Interest Arbitration and the NLRB: A Case for the Self-Terminating Interest Arbitration Clause

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Interest Arbitration and the NLRB: 
A Case for the Self-Terminating 
Interest Arbitration Clause

To avoid disruption caused by strikes and lockouts, unions and managements may agree to arbitrate disputes that arise in negotiation of collective bargaining agreements.1 Despite a historical reluctance to arbitrate these "interest" disputes,2 support for this type of arbitration seems to be growing.3 Pressed to minimize production costs by


The parties may agree beforehand to engage in arbitration of disputes that arise in negotiation of their collective bargaining agreement, or they may agree on an ad hoc basis when the disputes actually arise. Stevens, The Analytics of Voluntary Arbitration: Contract Disputes, 7 Indus. Rel. 68, 69-70 (1967).

2. Arbitration of disputes that arise in negotiation of collective bargaining agreements is referred to in the literature as "interest," "contract," "quasi-legislative," or "termination" arbitration. The usage "interest" arbitration will be employed here. Interest arbitration may best be understood in terms of the distinction between disputes of "interest" and disputes of "right":

[Intergroup conflicts] may originate in complaints about an alleged violation of agreed standards by members of the opposite group, in differences regarding the meaning or interpretation of those standards, [or] in the application of those standards to concrete cases . . . . This kind of dispute may be called . . . a "conflict of rights." . . . Alternatively the conflict may be concerned with the variation of existing or the laying down of new standards, i.e. it may be a "conflict of interests" . . . .

[The] distinction [is] between the protection of existing norms and the making of new ones . . . .

Kahn-Freund, Intergroup Conflicts and their Settlement, 5 Brit. J. Soc. 193, 205 (1954). Interest arbitration is designed to treat disputes of interest, while grievance arbitration is designed to treat disputes of right.

3. In the early part of this century interest arbitration was more common than grievance arbitration, which involves disputes over conflicting interpretations of the collective bargaining agreement. Grievance arbitration did not grow in importance until the 1930s, when written collective bargaining agreements became more common. See R. Fleming, The Labor Arbitration Process 12-14 (1965); Stieber, Voluntary Arbitration of Contract Terms, in Arbitration and the Expanding Role of Neutrals, PROCEEDINGS OF THE TWENTY-THIRD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 71, 71-77 (G. Somers & B. Dennis eds. 1970).

Support for interest arbitration declined after World War II. First, the postwar tendency toward longer contract periods reduced the opportunities for contract disputes and hence for interest arbitration. Second, the replacement of reopening clauses on wages with automatic adjustments such as cost-of-living escalators also reduced the need

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a competitive economic climate\(^4\) and perhaps encouraged by the use of interest arbitration in the public sector,\(^5\) some parties have chosen to adopt interest arbitration clauses in their collective bargaining agree-

for arbitration of wage disputes. Third, contract issues became increasingly complex. Pension plans, for example, unlike an issue such as wages, involve long-term cost commitments that parties are reluctant to have arbitrators make on their behalf. Finally, both unions and management, through devices such as strike funds and strike insurance, have taken steps to protect themselves against the impact of strikes. Stieber, supra at 77-83. See also R. Fleming, supra at 19-21.

Also contributing to the decline of interest arbitration may have been its lack of adjudicatory standards. Parties fear that the arbitrator will merely “split the difference” between their last offers, thus discouraging any serious attempt at reaching a prearbitral settlement. Unlike grievance arbitration, no contract guides the arbitrator’s decision. See 2 Amendments to the National Labor Relations Act: Hearings Before the House Comm. on Education and Labor, 90th Cong., 1st Sess. 225 (1947) (statement of Dr. Harold Metz, Brookings Institution) (absence of adjudicatory standards argues against compulsory interest arbitration). See also Hines, Mandatory Contract Arbitration—Is It a Viable Process?, 25 INDUS. & LAB. REL. REV. 533, 544 (1972) (public sector interest arbitration experience in Canada indicates that absence of consistently employed standards is major fault of system). But, see Handsaker, Arbitration and Contract Disputes, in CHALLENGES TO ARBITRATION, PROCEEDINGS OF THE THIRTEENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 78, 84-90 (J. McKelvey ed. 1960) (suggesting ways to improve interest arbitration to meet parties’ criticisms and arguing that despite deficiencies interest arbitration often better alternative than strikes or lockouts).

The result of these trends is that, in 1966, fewer than two percent of major collective bargaining agreements had clauses providing for interest arbitration of new contract terms, while 94% had grievance arbitration clauses. U.S. BUREAU OF LABOR STATISTICS, DEP’T OF LABOR, MAJOR COLLECTIVE BARGAINING AGREEMENTS ARBITRATION PROCEDURES 6-7, 96-97 (Bull. No. 1425-6, 1966). A recent survey, however, found that 41.5% of management respondents and 63.8% of union respondents were willing to consider interest arbitration, and that 31% of management respondents and 37% of union respondents were willing to consider specifically interest arbitration by prior agreement. Stieber, supra at 95-97. Both management and union respondents expressed reservations about the range of issues that should be arbitrated. Id. at 102, 106.


The use of interest arbitration in the public sector is in part the product of legislation. See McAvoy, Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector, 72 COLUM. L. REV. 1192, 1192-1205 (1972) (describing statutory enactments requiring public sector interest arbitration at state and local levels). Certain peculiar features of the public sector may preclude any simple extrapolation to the private sector of the experience with interest arbitration in disputes between the government and public employees. First, the longstanding national policy of encouraging collective bargaining and of permitting strikes and lockouts in the private sector stands in contrast to attitudes toward labor relations in the public sector, where there has been public and governmental antipathy toward collective bargaining and the use of concerted force by public employees. Interest arbitration may thus be a more favored response to bargaining impasse in the public sector than in the private sector. See generally H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES 29-32, 43-45, 49-51, 59-65 (1971) (arguing against full utilization of private sector bargaining practices in public sector). Second, the bargaining process in the public sector, unlike that in the private sector, is integrally involved with political decisionmaking. Management negotiators in the public sector often do not know what resources are going to be
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ments. Such clauses provide for arbitration of disputed issues arising in negotiation of the succeeding agreement.

Recent decisions of the National Labor Relations Board (NLRB) threaten to impede the movement toward interest arbitration. The Board's decisions, by declaring the interest arbitration clause a non-mandatory subject of bargaining, have made it an unfair labor prac-

available to the governmental unit. The strike sanction levied in response to proposals put forward by these negotiators incurs the risk of not influencing (and possibly alienating) those political decisionmakers who actually control the governmental unit's appropriations. For this additional reason, interest arbitration may have a more favored role as a substitute for strikes in the public than in the private sector. See Summers, Public Sector Bargaining: Problems of Governmental Decisionmaking, 44 U. Cin. L. Rev. 669, 670 (1975) (greater concern in public sector than in private sector with decision-making process leading to employer's bargaining position); Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L.J. 1156, 1156 (1974) ("[I]n private employment collective bargaining is a process of private decisionmaking shaped primarily by market forces, while in public employment it is a process of governmental decisionmaking shaped ultimately by political forces.")


In Aikens v. Abel, 373 F. Supp. 423 (W.D. Pa. 1974), union members challenged the ENA on the grounds that union leadership failed to obtain membership approval of the interest arbitration clause prior to its adoption. The court held that the union leadership was not legally required to obtain membership approval of the ENA. It also held that the leadership of the union did not act improperly in bargaining away the right to strike in the succeeding negotiating period.


8. Sections 8(a)(5), 8(b)(3), and 8(d) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 158(a)(5), (b)(3), (d) (1970), establish the duty of employers and unions to bargain in good faith over "wages, hours, and other terms and conditions of employment," NLRA § 8(d), 29 U.S.C. § 158(d) (1970). The courts refer to subjects that fall within this definition and therefore within the duty to bargain as "mandatory" subjects of bargaining. The standards used to determine the mandatory or nonmandatory status of bargaining subjects are discussed at pp. 720-23 infra.

The mandatory-nonmandatory distinction has been criticized for allowing the courts and the NLRB rather than the parties to define the scope of collective bargaining. See, e.g., H. Wellington, Labor and the Legal Process 63-90 (1968). But cf. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 219 n.2 (1964) (Stewart, J., concurring) (suggesting it is too late to dispense with distinction regardless of its alleged shortcomings because "too much law has been built" on it).
tice for one party to bargain to impasse over the clause, *i.e.*, to make its inclusion a condition for entering into the collective bargaining agreement despite the other party's objection.9

At stake in this controversy is the parties' freedom to contract10—to determine through the bargaining process whether to include an interest arbitration clause in their agreement. Moreover, the non-mandatory status of the interest arbitration clause will hinder implementation of this effective means for the maintenance of labor peace; yet maintaining labor peace is one of the fundamental goals of national labor policy.11 The practical consequences of the Board's decisions may be far-reaching. Where a union or a management is unwilling to absorb the economic and political costs of strikes or lockouts, it cannot use its full bargaining strength in an attempt to include an interest arbitration clause in the agreement. For example, an industry may be subject to consumer stockpiling of goods as a hedge against the possibility of a strike, with the consequent "roller-coaster" effect on industry production and employment.12 A concerned union or management cannot insist to impasse that the strike possibility be postponed through adoption of an interest arbitration clause. The erosion of freedom of contract, the failure to promote labor peace, and the more tangible industrial consequences flowing from the NLRB's rulings argue for a thorough reconsideration of the Board's position.

This Note contends that the reasoning behind the NLRB's rulings is misconceived: a properly circumscribed interest arbitration clause satisfies traditional requirements for mandatory subject status. The Note argues further that under certain circumstances the NLRB should permit interest arbitrators to make the initial determination regarding the mandatory or nonmandatory status of disputed bargaining issues.


10. For a discussion of governmental encroachments upon freedom of contract in collective bargaining, see H. Wellington, *supra* note 8, at 49-125.

11. See, *e.g.*, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964) ("One of the primary purposes of the [NLRA] is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation."); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960) ("A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.")

12. See p. 723 & note 32 *infra*. 718

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I. The Interest Arbitration Clause as a Mandatory Subject of Bargaining

The NLRB has ruled on three occasions that the interest arbitration clause is a nonmandatory subject of bargaining. Its opinion in Columbus Printing Pressmen & Assistants' Union No. 252 is the most complete statement of its position. The parties in Columbus Printing Pressmen had included an interest arbitration clause in their agreements for over two decades. In 1970, however, management resisted union efforts to include such a clause. The disputed issue was referred to arbitration as provided by the existing interest arbitration clause, and the arbitrator declared the disputed provision part of the new agreement. In 1973 management again resisted, but this time complained to the NLRB that the union had committed an unfair labor practice by arguing to impasse on a nonmandatory subject of bargaining. The NLRB upheld management's claim.

Three objections to the interest arbitration clause underlay the Board's position. First, the clause was held not to fall within the statutory description of mandatory bargaining subjects. Second, the Board believed that the interest arbitration clause interfered with the parties' statutory right to use economic force in collective bargaining. Third, the clause, according to a concurring Member of the


In Columbus Printing Pressmen the Board adopted the opinion of the administrative law judge holding the interest arbitration clause a nonmandatory subject of bargaining. The administrative law judge relied upon the opinion of another administrative law judge in Mechanical Contractors Ass'n, 202 N.L.R.B. 1, 5-16 (1973). There, the majority of the Board did not adopt the judge's opinion because they felt the disputed practice did not constitute interest arbitration. Id. at 2; 82 L.R.R.M. at 1439. See 22 WAYNE L. REV. 965, 965-67 (1976).
15. 219 N.L.R.B. at 279-81, 89 L.R.R.M. at 1556-58.
16. There is a brief reference to this objection in the plurality opinion, id. at 280-81, 89 L.R.R.M. at 1557-58, and a more explicit reference in Chairman Murphy's dissent:

The principal ground for finding a violation appears to be that because the quid pro quo for the interest arbitration clause is the waiver of the employees' right to bring economic pressure against the Employer by strike action, and, because public policy frowns upon any undue interference with the right to strike, necessarily the interest arbitration clause itself is against public policy.

Id. at 273, 89 L.R.R.M. at 1561. On this point the plurality opinion relied upon the similar reasoning of the administrative law judge in Mechanical Contractors Ass'n, 202 N.L.R.B. 1, 14-15 (1973).
Board, threatened to substitute perpetual arbitral rule for the process of collective bargaining, since neither party could unilaterally withdraw from the agreement to arbitrate interest disputes. The final two objections suggest that even if an interest arbitration clause fell within the statutory description of mandatory subjects, it still could not be considered mandatory because it offends a national labor policy that strongly supports the concept of collective bargaining.

A. The Interest Arbitration Clause as a Condition of Employment: A Statutory Interpretation

Mandatory subjects of bargaining are those within the National Labor Relations Act's (NLRA) description, "wages, hours, and other terms and conditions of employment." In Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co., the Supreme Court held that this language "includes only issues that settle an aspect of the relationship between the employer and employees." The NLRB concluded in Columbus Printing Pressmen that the interest arbitration clause is a nonmandatory subject of bargaining because it applies to disputes over terms to be included in an agreement subsequent to the one in which it exists; thus it is not a condition of employment during the period of the existing agreement. To cast the NLRB holding in terms of an embellishment of the Supreme Court's standard, the plurality opinion in Columbus Printing Pressmen mentions this objection, but apparently does not rely upon it. In concurrence, however, Member Fanning adopts by reference his dissent in Mechanical Contractors Ass'n, 202 N.L.R.B. 1, 3-5, 82 L.R.R.M. 1438, 1441-42 (1973), in which he raised the issue. To cast the NLRB holding in terms of an embellishment of the Supreme Court's standard, the
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Board found that the clause does not settle an aspect of the employment relationship during the term of the agreement in which it exists.

An examination of the NLRA reveals no basis for the Board's limitation. Section 8(d) defines collective bargaining as, inter alia,

the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder.\textsuperscript{22}

This language merely prescribes the duty to bargain in good faith on subjects relating to the employment relationship. It does not restrict that duty to subjects affecting the relationship during the contract period. Further, to read this language as imposing such a limitation would be to divorce the statutory conception of collective bargaining from industrial practice. The Board's view posits that rigid barriers separate contract periods. Collective bargaining, however, is an ongoing process,\textsuperscript{23} despite the contractual concepts and terminology imposed on it by the federal labor laws.\textsuperscript{24} The expiration and adoption of collective bargaining agreements merely provide the parties with periodic opportunities to redefine their relationship and should not

\textsuperscript{22} 29 U.S.C. § 158(d) (1970).
\textsuperscript{23} See Nolde Bros., Inc. v. Local 358, Bakery & Confectionery Workers Union, 45 U.S.L.W. 4251 (U.S. Mar. 7, 1977) (obligation to arbitrate disputes extends beyond termination of contract containing grievance arbitration provision, even where issues in dispute arise subsequent to termination); NLRB v. Laney & Duke Storage Warehouse Co., 369 F.2d 859, 866 (5th Cir. 1966) (duty to bargain is continuing, so union may legitimately bargain over wages and conditions of employment which affect employees hired in future); J.L. Case Co. v. NLRB, 253 F.2d 149, 153 (7th Cir. 1958) (collective bargaining is continuing process, so that union's right to data from management not limited to pending wage negotiations).
\textsuperscript{24} In addition to their failure to take into account the dynamic nature of collective bargaining, contractual concepts and terminology may be inadequate in other respects as well. Professor Chamberlain, for example, argued that a difficulty "in the field of industrial relations lies in the fact that we have sought to apply to collective bargaining and its resulting collective agreement the same doctrine which pertains to individual contract." Chamberlain, Collective Bargaining and the Concept of Contract, 48 Colum. L. Rev. 829, 834 (1948).

We are reproducing in our thinking an error of earlier years, by treating the collective association of workers as a single person, just as we have treated the corporation as a legal person. As persons they could be subsumed under the doctrine of individual contract—but only by ignoring their most basic characteristic, their collective nature.

be viewed as barriers, legal or otherwise, beyond which the parties cannot look in determining the course of that relationship. For example, terms of employment such as pensions and profit-sharing retirement plans extend beyond the contract period. Indeed, such provisions have been designated mandatory subjects, even though they do not normally produce material benefits for employees during the life of the agreement in which the terms exist.

Thus the interest arbitration clause should be considered a mandatory subject of bargaining if it settles an aspect of the employment relationship, without regard to whether that aspect falls within the tenure of the existing agreement. That the clause does settle an aspect of the employment relationship seems clear. It stipulates the parties' course of action if, during a subsequent period of negotiation, they are unable to agree on one or more bargaining issues. In this respect it is similar to the grievance arbitration clause, which is a mandatory subject of bargaining. In finding the grievance arbitration clause mandatory, courts apparently have been influenced by the "federal policy of promoting industrial peace through a combination of no-strike clauses and effective arbitration provisions." This policy also militates in favor of the interest arbitration clause. Under both clauses the parties agree to arbitrate future disputes and to relinquish the rights to strike and to lockout for a future period. The only distinct-


26. In her dissent in Columbus Printing Pressmen, Chairman Murphy commented that mandatory subjects of bargaining such as pensions are similar to the interest arbitration clause, since they do not have an immediately measurable impact upon the welfare of bargaining unit employees. 219 N.L.R.B. at 275, 89 L.R.R.M. at 1564.


29. See Taylor, Effectuating the Labor Contract Through Arbitration, in The Profession of Labor Arbitration, Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators 20, 20 (J. McKelvey ed. 1957) (defining grievance arbitration clause as "an agreement to arbitrate future disputes, since the rights to strike and to lock out are relinquished for a future period").
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tion is that the grievance arbitration clause provides for resolution of disputes concerning interpretation of terms in the agreement in which it exists, while the interest arbitration clause applies to disputes concerning negotiation of terms in the succeeding agreement.\textsuperscript{30}

Even if the Board were correct in holding that a mandatory subject of bargaining must settle an aspect of the employment relationship while the existing agreement is in force, the interest arbitration clause could still qualify. An employer’s business may be seriously affected by consumer stockpiling of goods in anticipation of a strike. Such stockpiling can lead to periods of intense work and overtime employment preceding expiration of a collective bargaining agreement, and to employee layoffs subsequent to adoption of a new agreement. An interest arbitration clause, by establishing the prospect of a production schedule uninterrupted by strikes and lockouts, prevents consumer stockpiling and the consequent fluctuation in employment levels. Thus the interest arbitration clause settles an aspect of the employment relationship while the existing agreement is in force. In the steel industry, adoption of an interest arbitration clause\textsuperscript{31} is credited with ending the consumer practice of stockpiling steel during the year in which the collective bargaining agreement was due to expire.\textsuperscript{32}

\textsuperscript{30} Indeed, one view of grievance arbitration discounts even this distinction. This view has it that grievances often arise over issues not covered by the agreement, perhaps because the agreement represents an inconclusive meeting of minds. N. CHAMBERLAIN \\& J. KUHN, COLLECTIVE BARGAINING 112 (2d ed. 1965); Katz, Minimizing Disputes Through the Adjustment of Grievances, 12 L. \\& CONTEMP. PROB. 249, 259 (1947). Nevertheless, these grievances are arbitrated. Grievance arbitration from this vantage point is an extension of collective bargaining and is quite similar to interest arbitration. The classic statement of this view is found in Taylor, supra note 29, at 21, where the author argues that grievance arbitration at times is tantamount to “agreement-making.” But see Braden, The Function of the Arbitrator in Labor-Management Disputes, 4 ARB. J. 35 (new series 1949).

\textsuperscript{31} See note 6 supra.

\textsuperscript{32} See An Experiment in Problem-Solving 6-7 (Pamphlet No. PR-226, United Steelworkers of America, undated):

There can be no question that the intended goals of [the interest arbitration agreement] were, in fact, reached. Since the steel consumers saw no chance of a halt in steel operations, there was no need for them to stockpile. Without the stockpiling and subsequent sell-off, there were no sharp gyrations in employment, either before the settlement date, or for many months thereafter . . . . The employment stability that was sought during the negotiating period was, in fact, achieved.

Prior to adoption of the interest arbitration agreement in the steel industry, stockpiling was accomplished in part through purchases of foreign steel. For instance, as a supplement to domestic production American consumers imported 18 million tons of foreign steel in the negotiating year 1968. By 1970 imports had dropped to 13.4 million tons. But in 1971, the next negotiating year, imports rose to an alltime high of 18.3 million tons. Id. at 8.

The stockpiling had led to an increase in orders for steel before the expiration of an existing agreement and to a decrease in orders after the negotiation of a new agreement. Employment levels in the steel industry consequently fluctuated both before and after the adoption of new agreements. For example, in the three months following adoption of agreements in 1965 and 1968, production-worker employment in the basic steel in-
B. Interest Arbitration and the Role of Economic Force

Both Congress\(^3\) and the courts\(^4\) have sought to protect the right of unions and managements to use economic force during collective bargaining. In *NLRB v. Insurance Agents International Union*,\(^5\) the Supreme Court stated that "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."\(^6\) Yet, by agreeing to arbitrate disputes arising during negotiation of a subsequent agreement, the parties seemingly relinquish their right to resort to these economic weapons.

It has long been accepted that parties may agree to a no-strike clause, which waives the right to use economic force during the contract term.\(^7\) Indeed, courts have held such a no-strike clause to be a manda-

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tory subject of bargaining. But the NLRB apparently believes that an interest arbitration clause, waiving the right to use economic force during a future negotiating period, is distinguishable from the conventional no-strike clause. For if the interest arbitration clause is held a mandatory subject of bargaining, a party might reluctantly agree to adopt the clause in order to avoid a strike or lockout during the current negotiating period. With the conventional no-strike clause already a mandatory subject, a reluctant party might find it necessary to agree to forgo economic force both during and after the term of an agreement.

The NLRB has misconceived the relationship between interest arbitration and economic force. Interest arbitration merely coexists with, rather than supplants, economic force in collective bargaining. The basis of this coexistence is the distinction between actual and threatened use of economic force. If effective bargaining required actual use of economic force during negotiation of an agreement, the NLRB’s position would be well-founded, for interest arbitration is an alternative to strikes and lockouts. But effective bargaining in fact requires only that the parties be able credibly to threaten the use of force.

The threat of force is sufficient because the collective bargaining relationship is not coterminous with the agreement that temporarily embodies it. Rather, the parties are likely to view themselves as permanently ensconced within their bargaining relationship. Threatened future use of economic force thus may have an influence on current negotiations that approximates actual use. The present use of economic force is inevitably a more immediate and therefore a more imposing prospect. But a party threatening to use economic force in a future negotiating period may compensate by varying the magnitude of the threat as the occasion demands.

38. See, e.g., Allis-Chalmers Mfg. Co. v. NLRB, 213 F.2d 374 (7th Cir. 1954). In Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962), the Supreme Court went even further in support of no-strike provisions and found a no-strike clause implicit in an agreement, even though the parties had not included one. The agreement did contain a grievance arbitration provision.
39. In Aikens v. Abel, 373 F. Supp. 425 (W.D. Pa. 1974), the court, faced with a challenge by union members to the interest arbitration clause in the steel industry, held that the right to use economic force during a subsequent negotiating period could be waived by mutual agreement.
41. This distinction is drawn by Stevens, supra note 1, at 75.
42. See pp. 721-22 & notes 23-26 supra.
43. For example, where an interest arbitration clause exists, employer intransigence on a particular bargaining issue might cause a union to threaten a strike at the termination of the succeeding agreement when it is no longer bound by the clause. The union may
Nonetheless, it might be argued that only a severe escalation of the threat could compensate for the inability to use force currently. The argument would emphasize that parties are principally motivated by the possibility of short-term advantage and are not intimidated by threatened use of economic force at some point in the future. Yet this position overlooks crucial restraints on the bargaining process. Since a bargaining relationship is normally ongoing, professional negotiators are generally hesitant to press bargaining advantages that may prove ephemeral. They recognize that to do so could create expectations in the minds of their constituents that such advantages will be maintained and perhaps improved upon in the future. Further, the opposing party may be more recalcitrant in future negotiations because of past concessions. Subsequent agreements might therefore be more difficult to negotiate. The parties’ sensitivity to long-term considerations is grounded in "the common need to preserve the continuity of the bargaining relationship." With both parties seeking to preserve this continuity, the impact of the threatened future use of force is substantially enhanced.

C. Overcoming the Problem of Perpetual Arbitral Rule: The Self-Terminating Interest Arbitration Clause

When an interest arbitration clause exists in the expiring collective bargaining agreement and a dispute arises over whether to include a

escalate by threatening to strike a larger portion of the employer's operation for a longer period of time. The union could also threaten obstructive tactics in the resolution of disputes arising during the contract period. A similar range of options is open to management. In short, the panoply of threats one party can invoke against another in the context of collective bargaining is not limited to the simple decision to strike or to lockout.

45. Id. at 14.
46. Id. at 13-16. Stevens, supra note 1, at 75-76, adopts a similar argument:

To explore the implications of extended no-strike agreements, consider a series of negotiations—N1, N2, and N3. The parties' standard procedure has been to negotiate a no-strike agreement only during the term of each of the substantive agreements. What about negotiating, along with the substantive terms during N1, an agreement which precludes resort to strike during N2? . . . [T]he N2 no-strike agreement itself becomes a bargaining lever for use during N1. Also, under the extended cease-fire, although a strike during N2 is precluded, the N2 negotiations are not themselves free of strike pressure. This is the case because of the implications for N3 of the N2 settlement. For example, if the company takes advantage of the no-strike agreement to drive a hard bargain during N2, this will leave further distance to move in order to avoid a strike during N3.

The potential impact of the threatened future use of economic force is illustrated by current practice in collective bargaining. If, during the term of an agreement, one party threatens to take advantage of another, the latter, assuming legal action is inappropriate, will likely respond by threatening use of economic force at the expiration of the agreement. That threat may constrain the party against whom the threat is made, even though the immediate use of economic force is out of the question.
similar clause in the succeeding agreement, an arbitrator empowered by the existing clause to decide the issue can override the objection of one of the parties and renew the clause. In this situation, the clause becomes a less voluntary form of dispute resolution, in the sense that its presence can no longer be attributed directly to good faith bargaining. Indeed, the arbitrator may retain the clause because he interprets the efforts to remove it as adverse commentary on his performance. Moreover, the chance that the clause may be perpetuated through successive arbitration awards substantially dilutes the threat of future use of economic force.

An interest arbitration clause could thus ensnare the parties in a compulsory system of dispute resolution and negate the factor of economic force in the collective bargaining equation. Both results do violence to the statutory conception of collective bargaining. To hold the clause a mandatory subject of bargaining would allow one party to use economic force in insisting upon a course that could lead to these results. Such a holding would be inconsistent with the legislative and judicial mandate to protect the collective bargaining process.

Adoption of a “self-terminating” interest arbitration clause, one which excluded from arbitration the issue of incorporating a new interest arbitration clause in the succeeding agreement, would avoid this problem. A self-terminating clause would be a more voluntary form of dispute settlement, since its inclusion would be directly attributable to a new bargain every negotiating period. Further, it preserves for the parties a viable threat of economic force, since implementation of the threat is postponed by only one contract period subsequent to the time of the clause’s operation. Indeed, since one issue—whether to include the clause in the next agreement—is exempt from arbitration, the parties could conceivably use economic force in

48. See Stieber, supra note 3, at 94.
49. See p. 721 & notes 33-36 supra.
50. The Supreme Court has in the past had occasion to restrict collective bargaining on subjects that threaten the collective bargaining process. See NLRB v. Magnavox Co., 415 U.S. 322, 324-26 (1974) (union cannot bargain away employees’ right to choose bargaining representative by agreeing to ban on union organizational activity); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 350 (1958) (“ballot” clause calling for prestrike secret vote of employees not mandatory subject because it modifies collective bargaining system provided for in statute by weakening independence of union).
51. See ENA, supra note 6, § H (1977) (“This agreement shall . . . terminate August 1, 1977, except to the extent that its continuation beyond that date is deemed necessary by the parties to achieve the objectives of this Agreement.”) The parties’ interest arbitration agreement effective during the 1974 negotiations had a similar provision. See id. (1974).
52. While the lengths of contract periods vary, they are usually two or three years. See Stieber, supra note 3, at 79-80.
the period of negotiation governed by the interest arbitration clause to support their positions on the interest arbitration issue. The self-terminating clause therefore ought to be classified a mandatory subject of bargaining.

II. NLRB Deference to Interest Arbitration

The jurisdiction of the interest arbitrator and the NLRB may overlap where one party claims that the disputed issue involves an unfair labor practice—namely, arguing to impasse on a nonmandatory subject of bargaining. It is settled that nothing in the arbitration agreement between the parties may supplant the NLRB's jurisdiction over unfair labor practices. Yet, one question raised by Columbus Printing Pressmen is whether the NLRB should permit interest arbitrators to make the initial determination regarding the mandatory or nonmandatory status of the disputed issue, while retaining the right to review the arbitrator's decision.

An interest arbitration clause could be designed to bring disputed issues to arbitration prior to impasse and thus block the NLRB's entry into the dispute. Such a clause might stipulate a negotiating period that terminates before expiration of the existing contract and provide that issues unresolved in that period should be referred to arbitration. If, however, the standard for invoking arbitration is simply the parties' failure to resolve the issue through negotiations, NLRB involvement could be predicated upon a complaint that one party has argued to impasse over a nonmandatory subject. In Columbus Printing Pressmen, for instance, management complained to the NLRB that the union had negotiated to impasse on the new interest arbitration clause, which management believed to be a nonmandatory subject. The union responded that, having argued to impasse, the parties were bound by contract to refer the disputed issue to the interest arbitrator.

By the union's reasoning, the original determination of whether the disputed issue was a mandatory subject could have been made by the interest arbitrator rather than the NLRB. Since the disputed issue was not referred to arbitration by mutual consent, the arbitrator, prior to making his substantive award, would have had to establish his jurisdiction under the contract. First, he would have had to determine

53. While it is thus true that the presence of a self-terminating interest arbitration clause would not preclude strikes and lockouts, it is unlikely that the parties would choose to strike or to lockout over inclusion of the new clause in the next agreement if all other issues are settled.

whether the dispute, in the words of the interest arbitration clause in *Columbus Printing Pressmen*, "[could] be settled by negotiations."\(^{55}\)

Second, he would have had to determine whether the issue before him was mandatory. Only if he found it mandatory could he properly have assumed jurisdiction, because no party can legally bargain a nonmandatory subject to impasse.\(^{56}\) As the NLRB indicated in *Columbus Printing Pressmen*, it will not hesitate to interfere with the arbitrator's jurisdiction under the contract in cases involving an alleged unfair labor practice.

The NLRB in *Columbus Printing Pressmen* refused to permit the arbitrator to make the initial determination because the Board considered the mandatory subject issue one of statutory rather than contractual interpretation.\(^{57}\) Arbitrators can decide only disputes that involve contractual questions.\(^{58}\) The Board failed to perceive, however, that one of the contractual questions may be whether a contractual question exists: if the disputed issue involves an unfair labor practice, it is properly within the Board's jurisdiction and no further contractual issues are involved. The determination of whether a disputed issue is mandatory or nonmandatory may be contractual in this sense. Therefore, where the status of a proposed subject of bargaining is unclear, the Board should defer to the interest arbitrator who, as a prelude to deciding the interest dispute, must determine whether the disputed issue is mandatory, permissibly argued to impasse, and thus properly referred to arbitration under the contract. The Board would, of course, retain the right to review the arbitrator's statutory interpretation.

An occasion for NLRB deference to interest arbitration was passed over in *Columbus Printing Pressmen*. The Board's analysis simply ignored the contractual component of the dispute, which would have justified granting the initial determination to the interest arbitrator. Precedent for this deference to interest arbitration is found in the

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55. *Columbus Printing Pressmen & Assistants' Union No. 252*, 219 N.L.R.B. 268, 279 (1975) (quoting interest arbitration clause that controlled disputed negotiating issues between employer and union in that case).

56. An arbitrator might settle the dispute between the parties without establishing that the issue is a mandatory subject of bargaining. In this event the NLRB, upon further consideration of the complaint subsequent to the arbitrator's award, would have to determine whether the subject was indeed mandatory, properly argued to impasse, and within the arbitrator's jurisdiction. Thus an arbitrator who is not attentive to the mandatory or nonmandatory status of the issue upon which he grants an award risks having his judgment overturned by the NLRB on review.

57. 219 N.L.R.B. at 270, 89 L.R.R.M. at 1556.

58. *See* Alexander v. Gardner-Denver Co., 415 U.S. 34, 53-54 (1974) (arbitrator has authority to resolve only questions of contractual rights, regardless of whether contractual rights are similar to or duplicative of statutory rights).
The NLRB's willingness to defer to grievance arbitration when a complaint alleges violations both of the contract and of the statute.\textsuperscript{50} Under this doctrine the NLRB can postpone consideration of the unfair labor practice complaint until after the arbitrator's award. At that time the Board can determine whether the award conforms to the requirements of the NLRA.\textsuperscript{60} The doctrine relies upon the arbitrators' expertise to decide issues of contractual interpretation that overlap statutory issues. That same arbitral expertise can profitably be applied to the complex question whether a bargaining subject "settle[s] an aspect of the [parties'] relationship."\textsuperscript{61}

Reserving the right to review statutory judgments of interest arbitrators would permit the Board to overrule arbitral decisions when appropriate. Yet the burden of decisionmaking and factfinding would fall upon private arbitrators, thereby conserving the resources of the

\textsuperscript{50} See Collyer Insulated Wire, A Gulf & Western Sys. Co., 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971). Collyer builds upon the Board's doctrine of postaward deference under which the Board, when handling a complaint for the first time after an award has already been granted, reviews the arbitrator's award in light of certain standards. See Spielberg Mfg. Co., 112 N.L.R.B. 1089, 36 L.R.R.M. 1152 (1955). A detailed examination of the NLRB's deference to grievance arbitration doctrine can be found in Murphy & Sterlacci, A Review of the National Labor Relations Board's Deferral Policy, 42 Fordham L. Rev. 291 (1973). The NLRB's deference policy has been the subject of widespread debate. Compare, e.g., Getman, Collyer Insulated Wire: A Case of Misplaced Modesty, 49 Ind. L.J. 57 (1973) and Getman, Can Collyer and Gardner-Denver Co-Exist?, id. at 285 with, e.g., Schatzki, A Response to Professor Getman, id. at 76 and Zimmer, A Little Bit More on Collyer Insulated Wire, id. at 80.

The NLRB recently has decided that its willingness to defer to grievance arbitration extends only to alleged unfair labor practices involving unlawful failures to bargain, Roy Robinson, Inc., 228 N.L.R.B. No. 103, 94 L.R.R.M. 1474 (1977), and not to alleged unfair labor practices involving unlawful interference with workers' organizational rights, General Am. Transp. Corp., 228 N.L.R.B. No. 102, 94 L.R.R.M. 1483 (1977). See Wall St. J., Mar. 21, 1977, at 2, col. 3. Since deference to interest arbitration can only arise in situations in which there is an alleged failure to bargain in good faith, the arguments advanced here are not affected by the NLRB's recent limitation of the Collyer doctrine.

\textsuperscript{60} Concomitant with the NLRB's jurisdiction over unfair labor practices granted by NLRA § 10(a), 29 U.S.C. § 160(a) (1970), is the authority to overrule arbitral decisions that reach an incorrect conclusion on the unfair labor practice aspect of the case. See Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 272 (1964).

Under the doctrine of preaward deference to grievance arbitration, see note 59 supra, the NLRB will act further upon a complaint if it is established that

(a) the dispute has not, with reasonable promptness after the issuance of [the decision to defer], either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.


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Since such a course also would respect the parties' designated method of dispute resolution and thus honor their freedom to contract, it is preferable to a prearbitration determination by the NLRB.

III. Four Paradigm Cases

It is appropriate to review the arguments concerning negotiation and operation of the interest arbitration clause. Where the clause requires that a subject be argued to impasse before arbitration, a party can attempt to avoid arbitration by asking the NLRB to declare a disputed bargaining subject nonmandatory. Such a determination would bar the other party from arguing to impasse on the particular subject and from referring that subject to interest arbitration. But that other party may seek to have the interest arbitrator rather than the NLRB make the original determination whether the subject is mandatory or nonmandatory. These moves by the parties can arise in a number of factual circumstances. Four paradigm cases will be presented to indicate how the arguments of this Note might apply in these different situations.

Paradigm Case A: There is an interest arbitration clause (not necessarily self-terminating) in the expiring agreement, and one party insists to impasse upon an issue other than inclusion of an interest arbitration clause in the succeeding agreement. If the issue is mandatory, it can be arbitrated. If it is nonmandatory, the party insisting to impasse has committed an unfair labor practice. If it is unclear whether the issue is mandatory or nonmandatory, the NLRB ought to defer to interest arbitration but retain the right to review the arbitrator's award.

Paradigm Case B: There is no interest arbitration clause in the expiring agreement, but one party insists to impasse that such a clause should be included in the succeeding agreement. If the disputed interest arbitration clause is self-terminating, it should be regarded as a mandatory subject of bargaining. The parties can decide, using economic force if necessary, whether to include the clause in the next agreement. If the clause is not self-terminating, it should be regarded as nonmandatory, since it cannot overcome the problem of perpetual arbitral rule. The party insisting to impasse has committed an unfair labor practice.

Paradigm Case C: There is an interest arbitration clause (not self-terminating) in the expiring agreement, and one party insists to impasse that another interest arbitration clause should be included in the succeeding agreement. If the clause in dispute is self-terminating,
the issue can be arbitrated. If it is not self-terminating and thus is nonmandatory, the party arguing to impasse has committed an unfair labor practice.

 Paradigm Case D: There is a self-terminating interest arbitration clause in the expiring agreement, and one party insists to impasse that another interest arbitration clause should be included in the succeeding agreement. If the clause in dispute is self-terminating, it can be argued to impasse. But since the existing clause is also self-terminating, arbitration of the disputed issue is precluded, except by mutual agreement on an ad hoc basis. The parties must then decide, using economic force if necessary, whether to retain the clause. If the clause in dispute is not self-terminating, the party insisting to impasse on the issue commits an unfair labor practice.

62. Arbitrating the issue admittedly permits the existing, nonterminating clause to control the decision to include the new clause. But consistency in treatment of the disputed self-terminating clause as a mandatory subject of bargaining demands that it be allowed to go to impasse and hence on to arbitration. The parties may still threaten future use of economic force in their negotiations.

63. See Stevens, supra note 1, at 69-70.