Volume 11
Number 1 *Fall 1976*

*pp.*133-147

Fall 1976

The Duty to Arbitrate—Contrasting Views of the Seventh Circuit and the NLRB (NLRB v. Keller-Crescent Co.)

THE DUTY TO ARBITRATE—CONTRASTING VIEWS OF THE SEVENTH CIRCUIT AND THE NLRB

*NLRB v. Keller-Crescent Co.**

INTRODUCTION

The recent case of *NLRB v. Keller-Crescent Co.*[1] illustrates a difference in standards between the Seventh Circuit and the National Labor Relations Board (NLRB) in determining when labor and management must arbitrate sympathy strike disputes. Such disputes arise when one union honors the picket lines of another union set up at the same location. Under a collective bargaining agreement containing a no-strike clause and specified arbitration procedures, the issue is whether there is a duty to arbitrate if the sympathy strike is a violation of the no-strike provision. Further complicating this question is whether failure to arbitrate will operate as a defense to unfair labor practice charges brought by the union when management disciplines employees in a sympathy strike. In *Keller-Crescent*, the Seventh Circuit and the NLRB disagreed as to when there was a duty to arbitrate such disputes.

Finding a duty to arbitrate would render the concerted activity of the employees unprotected because failure to arbitrate would be an affirmative defense to the unfair labor practice charge. Therefore any discipline against them by management would stand. Federal courts are more apt to find a duty to arbitrate than is the NLRB. In part this is due to the types of cases with which these jurisdictions have dealt—the federal courts must resolve contract disputes, while the NLRB must protect the rights of employees. When confronted with the question of whether a dispute is arbitrable the federal courts have been willing to presume arbitrability, while the Board demands affirmative proof of arbitrability. *Keller-Crescent* represents a situation in which the difference between the two jurisdictions over arbitrability yields opposing decisions in the same factual situation. This variance creates confusion as to when the rights of sympathy strikers will be protected and when they will not, as well as uncertainty in the interpretation of no-strike agreements.

---

* 538 F.2d 1291 (7th Cir. 1976).

1. 538 F.2d 1291 (7th Cir. 1976) [hereinafter cited as Keller-Crescent].

FACTS

The Keller-Cresent Company is a manufacturing firm in Evansville, Indiana. Different units of its employees are represented by the Evansville Typographical Union No. 35 (Local 35), by Local 117 of the Evansville Printing and Pressmen and Assistants Union (Pressmen), and by two other unions. During the summer of 1972, when negotiations between the Company and the Pressmen broke down, the Pressmen called a strike. Members of Local 35, refusing to cross the picket lines of the Pressmen, failed to report to work.

The collective bargaining agreement between Local 35 and the Company contained a sympathy strike provision (Section 12) and arbitration procedures, including a no-strike clause (Section 13).[2] During negotiations with the Pressmen and during the strike, the Company informed the twelve members of Local 35 that it regarded their refusal to cross the picket lines as a breach of Sections 12 and 13. After the strike, the members of Local 35 who honored the Pressmen's picket lines received a one-week disciplinary suspension.

The union filed unfair labor practice charges. An administrative law judge (ALJ) hearing the charges concluded that the Local 35 employees had breached the no-strike and arbitration provision of Section 13; therefore the discipline was upheld. According to the ALJ, Section 12, coupled with collateral evidence of contractual intent, reflected a desire on the part of the Company and Local 35 to ban all sympathy strikes except those sanctioned by the International Typographical Union.

---

2. Keller-Crescent Company and Local 35, Evansville Typographical Union had signed a collective bargaining agreement with the following provisions:

> Section 12—No employee covered by this contract shall be required to cross a picket line established because of a strike by, or lockout of, any other subordinate Union of the International Typographical Union, when such strike is authorized by, or such lockout is recognized by, the ITU.
> Section 13—A Joint Standing Committee of two representatives each of the Employer and the Union shall be selected. . . . To this committee shall be referred all disputes which may arise as to the application of and construction to be placed upon any provision of this agreement, or alledged violation thereof, which cannot be settled otherwise. Such joint committee shall meet within seven days after any question shall have been referred to it. . . . Should the Joint Standing Committee be unable to agree within ten days, then the membership of the same shall within five days select a fifth member. . . .
>
> There shall be no strikes or lockouts during the term of this agreement unless either party refuses to comply with the grievance procedure as outlined hereinabove.

Id. at 1293.

On appeal to the NLRB, a majority of the Board rejected the ALJ's finding that Section 12 and extrinsic evidence gave rise to an inference that Local 35 had waived its sympathy strike rights.[3] Since the dispute was precipitated by the strike of another union, it did not fall under the no-strike clause of Section 13. In the Board's opinion, there was no duty to arbitrate and the employees had not lost their protected status in honoring picket lines.[4]

The Company did not pay the lost wages of the employees as ordered by the NLRB; the case was thus referred to the Seventh Circuit for enforcement. The Seventh Circuit, however, refused to enforce the decision of the NLRB. The court held that because there was doubt as to the interpretation of the contract provisions, the case should have been decided by arbitration. Because the employees engaged in a sympathy strike before arbitrating its legality, the court held they had lost their protected status and the discipline against them was valid.

These various holdings in *Keller-Crescent* illustrate the respective positions of arbitration in the federal courts and the NLRB, as well as a difference as to when a duty to arbitrate will be found.

ARBITRATION AND THE FEDERAL COURTS

Arbitration has been given a prominent position in federal labor policy as a method of peaceful resolution of contract disputes.[5] To promote the use of the private grievance machinery, federal courts have adopted a presumption in favor of the arbitration of contract disputes.[6] This presumption of arbitrability imposes on the parties a duty to arbitrate any confusion over contract meaning before they engage in activity which might be a breach of the agreement. In *Keller-Crescent*, the Seventh Circuit held that the presumption created a duty to arbitrate the sympathy strike dispute. The failure

3. Keller-Crescent Co., 217 N.L.R.B. No. 100, 89 L.R.R.M. 1201 (1975) [hereinafter cited as Keller-Crescent (NLRB)].

4. *Id.* at 1208.

5. In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), Justice Douglas wrote:

> Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be obtained in that way.

Id. at 454.

6. *Id.* at 458.

of the Keller-Crescent Company and Local 35 to arbitrate meant that the sympathy strike was not protected activity and therefore the Company had the right to discipline the employees. Hence, the presumption of arbitrability outweighed protection of employee rights.

Presumption of Arbitrability

While the Seventh Circuit in *Keller-Crescent* considered the enforcement of an unfair labor practice charge, much of the precedent on which the court relied to find arbitrability arose in the context of contract violations. Federal courts are vested with the authority to resolve alleged contract violations under Section 301(a) of the Labor Management Relations Act.[7] Section 301 gives the courts power to compel specific performance of the arbitration agreements under collective bargaining contracts. The stated purpose for such power is to hold the parties to the agreements they privately enter.[8]

A presumption of arbitrability was first outlined in the well-known *Steelworkers* Trilogy,[9] a series of three cases in which the Supreme Court of the United States emphasized the importance of arbitrating contract disputes. To be consistent with the Congressional mandate in favor of arbitration, the Court argued that breach of contract cases would be confined to the question of whether the parties had agreed to arbitrate the grievance.[10] An order to arbitrate should be given unless it could be said with "positive assurance" that the arbitration clause did not cover the dispute: "Doubts should be resolved in favor of coverage."[11]

In the Trilogy, the Court emphasized that parties should be held

---

7. Labor Management Relations (Taft-Hartley) Act, § 301(a), 29 U.S.C. § 185(a) (1964):

> Suits for violation of contracts between an employer and labor organization representing employees in an industry affecting interstate commerce, as defined in this Act, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties.

8. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957).

9. United Steelworkers of America v. Enterprise Wheel & Car Co., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960).

10. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

11. *Id.* at 583.

to their agreements because they had voluntarily bargained for arbitration procedures and were free to draft these provisions as broadly or as narrowly as they pleased.[12] In addition, many disputes are complex and best resolved by an arbitrator familiar with the situation rather than the courts.[13] Thus, the presumption expanded the role of the arbitrator in ruling on the merits of a case and limited the courts to determining the arbitrability of a given dispute.[14]

The extent to which the Supreme Court is willing to go to find arbitrability is shown in *Gateway Coal Co. v. Mine Workers.*[15] In *Gateway,* the miners held a strike, protesting the company's retention of a foreman who had falsified air flow records in the mine. The Court held that the striking union could have arbitrated its grievance. Emphasizing the presumption of arbitrability, the Court noted that before the dispute would be held non-arbitrable, it must be said "with positive assurance" that the arbitration clause did not cover the dispute.[16] Although the parties in *Gateway* had not agreed to arbitrate this specific dispute, the Court held that the arbitration clause must be broadly construed to include the conflict over the unsafe conditions.[17]

In *Keller-Crescent,* the Seventh Circuit employed the presumption of arbitrability to find a duty to arbitrate.[18] Even though it was faced with an unfair labor practice charge, the court relied on federal cases based on contract violations to reach its conclusion. The court carefully considered cases dealing with whether injunctions could be used to end sympathy strikes where the parties had a

---

12. *Id.* at 580.

13. *Id.* at 582.

14. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 572 (1960).

15. 414 U.S. 368 (1974).

16. *Id.* at 378.

17. *Id.* at 383.

18. Where there is doubt as to the contract interpretation, arbitration should be invoked:

> In light of *Gateway,* the Board's conclusion that the conduct of Local 35 members did not fall within the no-strike ban of Section 13 implies that the Board can state with positive assurance that Section 13 was not susceptible to an interpretation covering the asserted dispute over the application of a construction to be placed upon Section 12. We do not think that the policy of the labor statutes to implement private resolution of disputes in the manner agreed upon . . . allows this court to reach so easily a conclusion that the dispute over the meaning of Section 13 was not an arbitrable issue.

Keller-Crescent at 1298.

no-strike clause and arbitration agreement. The purpose of examining the injunction question was to determine whether these cases changed the duty to arbitrate.

Injunctions and Arbitrability

Injunctions to enforce arbitration of no-strike agreements were sanctioned by the Supreme Court in *Boys Markets, Inc. v. Retail Clerks Local 770.*[19] The dispute in *Boys Markets* had arisen when union members engaged in a work stoppage despite a no-strike clause and an agreement that all disputes arising under the contract would be subject to arbitration. A federal district court issued an injunction to stop the strike and compel arbitration. The Supreme Court affirmed, arguing that the effectiveness of arbitration would be greatly diminished if injunctive relief were withheld for violations of a no-strike agreement.[20]

The central problem in *Boys Markets* was whether the injunction was barred by Section 4 of the Norris-LaGuardia Act,[21] which prohibits the use of injunctions in labor disputes. The Court noted that Section 4 had to be reconciled with Section 301 and the need to enforce collective bargaining agreements.[22] In this process, the conditions which existed at the time Section 4 was enacted must be considered; courts were regularly issuing injunctions against strikes and inhibiting the right of unions to engage in concerted activity. Because this was no longer the case, the *Boys Markets* Court concluded that the limited use of injunctions was permissible.[23] In this way the importance of arbitration was underscored by extending the use of injunctions to support it.

---

19. 398 U.S. 235 (1970).

20. *Id.* at 248-49.

21. The Section provides:

> No court of the United States shall have jurisdiction to issue any restraining order of temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from . . . [c]easing or refusing to perform any work or to remain in any relation of employment. . . .

Norris-LaGuardia Act § 4, 29 U.S.C. § 104 (1964).

22. Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 250 (1970).

23. The Court stated:

> We conclude, therefore, that the unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes, that the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy. . . .

Id. at 253.

The Supreme Court declined to extend the use of injunctions to forbid sympathy strikes in *Buffalo Forge v. United Steelworkers of America.*[24] *Buffalo Forge* settled a conflict among the circuits[25] over whether a sympathy strike could be enjoined because it was an arbitrable grievance. The Court found that the union did not engage in the strike because of any problem with its own contract, but only in support of a sister union. Because this was not a violation of the agreement not to strike over the contract provisions, no injunction should issue.[26] If there was any doubt as to whether a sympathy strike was included under the no-strike agreement, a court could order arbitration, but could not issue an injunction to end the strike.[27] Although the Court was unwilling to extend the remedy of injunction to sympathy strikes under no-strike agreements, the duty to arbitrate all conflicts over the meaning of a labor contract was not abridged.[28]

---

24. ___ U.S. ___, 96 S. Ct. 3141 (1976).

25. The Fifth Circuit argued that a sympathy strike was not an arbitrable grievance even where there was a no-strike clause in the contract. The court reasoned that a sympathy strike by a union was in support of a sister union and not a grievance which arose under the union's own contract. Hence, it could not be included in the arbitration clause and no injunction would be issued. Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372 (5th Cir. 1972). *See also* Buffalo Forge v. United Steelworkers of America, 517 F.2d 1207 (2d Cir. 1975), *aff'd*, ___ U.S. ___, 96 S.Ct. 3141 (1976); Plain Dealers Publishing Co. v. Cleveland Typographical Union 53, 520 F.2d 1207 (2d Cir. 1975); Parade Publications, Inc. v. Philadelphia Mailers Union, 459 F.2d 369 (3d Cir. 1972).

The Fourth Circuit adopted contrary reasoning, arguing that a sympathy strike, being a violation of a no-strike agreement, was arbitrable. Monongahela Power Co. v. Local 2332, IBEW, 484 F.2d 1209 (4th Cir. 1973). *See also* Valmac Indus. v. Food Handlers Local 425, 519 F.2d 263 (8th Cir. 1975); NAPA Pittsburg, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321 (3d Cir.), *cert. denied*, 419 U.S. 877 (1974); Pilot Freight Carriers v. Teamsters, 497 F.2d 311 (1st Cir.), *cert. denied*, 419 U.S. 1049 (1974).

The Seventh Circuit adopted what the Supreme Court characterized as an "intermediate position" in the conflict. Buffalo Forge v. United Steelworkers of America, ___ U.S. ___, 96 S. Ct. 3141, 3145 n.19 (1976).

26. Buffalo Forge v. United Steelworkers of America, ___ U.S. ___, 96 S. Ct. 3141, 3148 (1976).

27. The prime reason for refusing to issue an injunction was that the court would be compelled to rule on the merits:

> The court in such cases would be permitted, if the dispute was arbitrable, to hold hearing, make findings of fact, interpret applicable provisions of the contract and issue injunctions as to restore the *status quo ante* or to otherwise regulate the relationship of the parties pending exhaustion of the arbitral process. This would cut deeply into the policy of the Norris-LaGuardia Act and make the courts potential participants in a wide range of disputes.

Id. at 3148.

28. *Id.* at 3149.

The Seventh Circuit in *Keller-Crescent* emphasized that *Buffalo Forge* still upheld the importance of arbitration but only limited the injunctive relief available to the employer.[29] Accordingly, there may be a duty to arbitrate a sympathy strike and the failure to do so will render the strike illegal for purposes of an unfair labor practice charge. The injunction controversy did not affect the determination of arbitrability, but only altered the relief available.

Seventh Circuit Precedent

The presumption of arbitrability and the increased importance of arbitration in federal court decisions were important factors in the decision of the Seventh Circuit in *Keller-Crescent.* In the past, the Seventh Circuit had placed great emphasis on the specific wording of the contract. This test basing arbitrability on specific wording had produced seemingly inconsistent decisions.[30] In one instance, the court held that a restraining order to halt a sympathy strike was appropriate where the parties had agreed to arbitrate "any trouble of any kind arising in the mines" and had pledged not to strike over arbitrable grievances.[31] However, in another instance the court ruled that a sympathy strike was not arbitrable under an agreement to arbitrate "any and all disputes and controversies arising under or in connection with the terms of the provisions."[32] The common theme which the *Keller-Crescent* court saw in both cases was the emphasis on the contract wording to find arbitrability.[33]

---

29. The Seventh Circuit argued that *Buffalo Forge* strengthened the proposition that courts should not involve themselves in disputes which could be decided by the arbitrator. Therefore, as the issuance of an injunction against a sympathy strike would for all practical purposes decide the merits of the case, the *Buffalo Forge* decision represented an attempt to preserve the arbitrability of the dispute. Keller-Crescent at 1296.

30. The Seventh Circuit's positions were not viewed charitably by one commentator who classified them as "schizophrenic." Note, *The Applicability of Boys Markets Injunctions to Refusals to Cross Picket Lines,* 76 COLUM. L. REV. 113, 126 (1976).

31. Inland Steel Co. v. UMW Local 1545, 505 F.2d 293 (7th Cir. 1974). The dispute in *Inland Steel* involved a refusal of coal miners to cross picket lines of construction workers. The broad arbitration agreement and the no-strike clause were the bases of the court's decision.

32. Gary-Hobart Water Corp. v. N.L.R.B., 511 F.2d 284, 287 (7th Cir.), *cert. denied,* 423 U.S. 925 (1975), *enforcing* Gary-Hobart Water Corp., 210 N.L.R.B. No. 87, 86 L.R.R.M. 1210 (1974).

33. Keller-Crescent at 1299.

Another decision of the Seventh Circuit on sympathy strikes was *Hyster Co. v. Independent Towing Ass'n,* 519 F.2d 89 (7th Cir. 1975). The court compared the contract language in *Inland Steel* with that in *Gary-Hobart,* and decided that the provisions of the arbitration and no-strike clauses were closer to the latter. Therefore, injunctive relief was denied.

It was the blending of the presumption of arbitrability with the specific contract wording which was the basis of the Seventh Circuit's decision. The contract contained a no-strike and arbitration provision in Section 13, and a specification of which picket lines Local 35 could honor in Section 12.[34] At issue was whether Section 12 was an implied waiver of sympathy strike rights for all unions other than the International Typographical Union. The court declined to rule on this issue, choosing instead to fall back on the presumption of arbitrability. If there was any doubt as to how the contract was construed, and if it could not be said with positive assurance that arbitration would not cover the dispute, then there was a duty to arbitrate the waiver dispute.[35] The presumption of arbitrability, added to the specific contract wording, tipped the balance in favor of a duty to arbitrate.

The precedents cited by the *Keller-Crescent* court employed the presumption of arbitrability to assist enforcement of the collective bargaining agreement and emphasized the important part which arbitration played in federal labor policy.[36] Despite the recent Supreme Court ruling on injunctions of sympathy strikes, the presumption of arbitrability is not diminished. Therefore, the Seventh Circuit held that all doubts as to the interpretation of the *Keller-Crescent* contract were to be resolved in favor of arbitration. The denial of enforcement of the NLRB's decision in *Keller-Crescent* made it apparent that the Board had utilized a different standard for finding arbitrability.

ARBITRATION AND THE NLRB

The Seventh Circuit's refusal to enforce the NLRB's decision in *Keller-Crescent* highlights a different standard of arbitrability employed in these two jurisdictions. The NLRB, vested with the responsibility of hearing unfair labor practice cases and of protecting employee rights,[37] has been more reluctant than the federal courts to find a duty to arbitrate. In part, this NLRB reluctance has

---

34. *See* note 2 *supra.*

35. The court wrote:

> We conclude that any requirement that the court first determine that the union has unmistakably waived its sympathy strike rights before ascertaining the scope of a no-strike arbitration clause in an unfair labor practice context would undercut the presumption in favor of arbitrability established in the *Steelworkers* trilogy, confirmed in *Gateway* and favored in *Buffalo Forge.*

Keller-Crescent at 1300.

36. *Id.*

37. National Labor Relations Act, § 10(a), 29 U.S.C. § 160(a) (1964).

been because contract disputes are much more amenable to arbitration than are unfair labor practice cases, where the rights of individual employees are at stake.[38] The Board is willing to accept arbitration rulings on unfair labor practice charges if they meet certain standards. In recent years, this policy of deferral has been extended to include disputes for which arbitration procedures have been set up. In such a case, the NLRB will not make a decision but will defer the issue to arbitration. Nonetheless, the ruling of the NLRB in *Keller-Crescent* indicated that arbitrability was not to be presumed as in federal courts, but must be proven before arbitration could be utilized.

Keller-Crescent represented a rare situation in which the sympathy strike gave rise to two types of claims: one for breach of contract and another as an unfair labor practice charge. As a contract violation, the sympathy strike could be brought either before an arbitrator or to the federal court. In addition, the suspension of the employees could be heard by the NLRB as an unfair labor practice charge. In upholding the dual jurisdiction, the Supreme Court of the United States has ruled that arbitration should not be precluded simply because the conduct in question also falls within the jurisdiction of the NLRB;[39] neither should the Board be prevented from hearing a case because it would be required to interpret contract provisions.[40] In the event of a direct conflict the power of the NLRB to protect the public interest remains primary over the power of the arbitrator.[41]

Direct conflicts have in part been averted by the Board's greater willingness to defer to the final decision of the arbitrator.[42] This movement to give arbitration a larger role in resolving unfair labor practice charges has been similar to the expansion of arbitration in federal courts to resolve contract disputes. However, these developments have not moved at a parallel pace, for the NLRB is more reluctant to find arbitrability in a given case than the federal courts. The Seventh Circuit's refusal to enforce the NLRB decision

38. R. GORMAN, LABOR LAW at 729 (1976) [hereinafter cited as GORMAN]. For additional information as to remedies available to the employer during a sympathy strike, see Connolly and Connolly, *Employer's Rights Relative to Sympathy Strikes*, 14 DUQ. L. REV. 121 (1976).

39. Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964) (unfair labor practice charge can be heard by arbitrator).

40. NLRB v. Acme Indus. Co., 385 U.S. 482 (1967) (Board may hear an arbitrable contract dispute).

41. Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 266 (1964).

42. GORMAN, *supra* note 38, at 734.

in *Keller-Crescent* resulted from application of the federal court's standard for arbitrability which differed from the standard employed by the NLRB.

Deferral to Arbitration Award

A deferral to arbitration was at issue in *Keller-Crescent.* The Company argued before the NLRB that the arbitration procedures had been invoked and that the NLRB ought to defer to the arbitration award.[43] This policy of deferral to arbitration awards was first outlined by the NLRB in *Speilberg Manufacturing Co.*[44] For such deferral to occur, the Board declared that three factors had to be present: (1) the arbitration proceedings had to be fair and regular; (2) all parties must have agreed to be bound to the arbitrator's decision; and, (3) the decision of the arbitrator could not conflict with the Board's statutory mandate of protecting worker's rights.[46] Under those circumstances, the NLRB will recognize and give full weight to the award of the arbitrator.

In *Keller-Crescent* the Board refused to accept the Company's argument for a *Speilberg* deferral.[47] The Company contended that Local 35 had first requested the arbitration of the sympathy strike question, and that the company had indicated its willingness to

---

43. Keller-Crescent (NLRB) at 1203.

44. 112 N.L.R.B. 1080 (1955).

45. *Id.* at 1082.

46. *Id.* at 1080. For a recent affirmation of *Speilberg,* see *Jos. Schlitz Brewing Co.,* 175 N.L.R.B. 147 (1969).

47. Assuming the correctness of the Board's finding with regard to the Company's *Speilberg* argument, the Company might have also argued for a deferral to future arbitration. Where the parties have set up arbitration procedures, the Board will refuse to decide the case, but rather will defer to the use of the agreed procedures. In *Keller-Crescent* the Company did not argue for this type of deferral, although adequate precedent existed for the contention. The burden would have been on the Company to demonstrate the arbitrability of the dispute.

Deferral of unfair labor practices disputes to arbitration was extended to pending cases in *Collyer Insulated Wire Co.,* 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (1971). In *Collyer* the Board stated that the trend in federal courts of stressing the importance of arbitration and the desirability of requiring parties to honor their contractual obligations made it necessary for the Board to withhold jurisdiction. The unfair labor practice charge in *Collyer* had been brought under Section 8(a)5 of the National Labor Relations Act, 29 U.S.C. § 158(a)5 (1964), which prohibits unfair labor practices by the employer. In *National Radio Corp.,* 198 N.L.R.B. No. 1, 80 L.R.R.M. 1718 (1972), deferral was extended to cases arising under sancrosanct Section 8(a)3, 29 U.S.C. § 158(a)3 (1964), which forbids employer discrimination. However, an 8(a)3 case will not be deferred where it is unreasonable to expect full litigation in the arbitration process. *See also* Electronic Reproduction Corp., 213

arbitrate. However, Local 35 did not propose another member for the arbitration committee, the next step in the procedure. Therefore, when the time limit specified in the contract for such a step had expired, the arbitration machinery had made its award. This award, the Company argued, should be recognized by the NLRB. The Board, however, found insufficient evidentiary support for this argument.[48]

In refuting the Company's argument, the Board outlined the place of arbitration in the framework of the NLRB. The company had failed to provide sufficient proof of a *Speilberg* deferral; it had failed, in other words, to meet its burden of proof.[49] The principle reason for the NLRB decision was that in this instance, arbitrability provided an affirmative defense to the suspension of the sympathy strikers. Herein lay the chief difference between the NLRB and the federal courts. Arbitrability was presumed in the federal courts but the NLRB in *Keller-Crescent* contended that the company had the burden of proving arbitrability. This difference was the crux of the conflict between the two jurisdictions in *Keller-Crescent.*

IMPACT OF CONTRASTING VIEWS

The sympathy strike conflict in *Keller-Crescent* provides a graphic example of the impact of the contrasting views of the NLRB and the Seventh Circuit. The failure to agree on the standard for arbitrability has two effects. First, it is unclear when those engaged in a sympathy strike will be subject to discipline and when their right to honor picket lines will be protected. Second, the uncertainty as to when sympathy strike rights are deemed to be waived affects the drafting of labor contracts.

N.L.R.B. No. 110, 87 L.R.R.M. 1211 (1974); Kansas Meat Packers, 198 N.L.R.B. No. 2, 80 L.R.R.M. 1743 (1972); Appalachian Power Co., 198 N.L.R.B. No. 7, 80 L.R.R.M. 1731 (1972). For a discussion of Section 8(a)3 deferral, see Simon-Rose, *Deferral Under Collyer by NLRB of Section 8(a)3 Cases*, 27 LAB. L.J. 201 (1976).

48. The majority of the Board held:

> In our opinion this evidence fails to support Respondent's [Company's] contention and argument. Thus as heretofore noted, the record does not clearly disclose that the Union, as opposed to the Respondent, invoked the grievance machinery.

Keller-Crescent (NLRB) at 1203.

49. The Board summed up its standard:

> In relying on deferral pursuant to *Speilberg* as an affirmative defense, Respondent (Company) had the burden of pleading it, which it did not do, and proving facts sufficient to establish the applicability of the principles established in the *Speilberg* case.

Id. at 1204.

The ultimate question in *Keller-Crescent* was whether the employer could discipline employees for their part in the sympathy strike. Hence, the characterization of the sympathy strike as either protected or unprotected concerted activity was important. Resolution of the question directly depended on the determination of the duty to arbitrate. Inconsistency between the courts and the NLRB on that issue placed the employees in a precarious situation. They risked possible discipline by the employer for participating in the strike, and possible discipline by the union for crossing the picket lines.[50]

Drafting of waiver clauses governing sympathy strikes is also affected by the differing views of arbitrability. The immediate source of controversy between the Company and Local 35 in *Keller-Crescent* was whether Section 12 of the collective bargaining agreement prohibited sympathy strikes.[51] The Board held that because a waiver of sympathy strike rights must be "clear and unmistakable," Section 12 was not a waiver of the rights.[52] On the other hand, the Seventh Circuit held that there was sufficient doubt as to whether these rights had been impliedly waived by the specification of which lines could be honored; therefore the issue should have been brought to an arbitrator.

The Board's demand in *Keller-Crescent* for an express waiver indicated a general hostility to any limitations of employee rights to engage in sympathy strikes.[53] In *Gary-Hobart Water Corp. v.*

---

50. GORMAN, *supra* note 38, at 324.

51. *See* note 2 *supra.*

52. Keller-Crescent (NLRB) at 1207. In his dissent, Board member Penello wrote:

> In my opinion, this language expressly granted the employees the right to refuse to cross picket lines of a subordinate union of the ITU, inescapably implied that the ITU Local 35 members were prohibited from honoring any other picket lines. . . .
>
> In conclusion, in these circumstances it is clear that under Section 12 of the contract, ITU Local 35 waived the employees statutory rights to lend support to striking Pressmen by refusing to report to work. Since such activity by employees in violation of their collective bargaining agreement is not statutorily protected, Respondent lawfully took reprisal action against the charging parties.

Id. at 1210.

53. The NLRB has not always been consistent in the question of waiver, as illustrated in *Alliance Mfg. Co.*, 200 N.L.R.B. No. 112, 82 L.R.R.M. 1210 (1974). In *Alliance*, on the basis of contract provisions and extrinsic evidence, the Board held that a no-strike clause covered all work stoppages, even those which had to do with issues not subject to the arbitration procedures. Courts have not been consistent in

NLRB,[54] the Seventh Circuit enforced an NLRB decision that the Company had committed an unfair labor practice by suspending sympathy strikes. There the collective bargaining agreement contained a no-strike provision but made no mention of sympathy strike rights. The NLRB held that a waiver must be "clear and unmistakable" before it would be effective.[55] This test was affirmed by the Seventh Circuit in granting enforcement to the Board's decision.

In *Keller-Crescent*, the Seventh Circuit conditioned its view of the waiver issue on the presumption of arbitrability. The court argued it would make no sense to find arbitrability only where there was an unmistakable waiver of sympathy strike rights. To demand express language for a waiver would negate the presumption of arbitrability by taking away the disputed issue. In light of the presumption of arbitrability, it would be undesirable to preempt arbitration.[56] The Seventh Circuit maintained that the *Gary-Hobart* decision could be distinguished: in that case there was no sympathy strike clause to engender any doubt or controversy.[57] The result of the *Keller-Crescent* reasoning was that a "clear and unmistakable" waiver was not unconditionally necessary to warrant arbitration. Where there was sufficient doubt as to whether a given contract clause and series of negotiations constituted a waiver of the sympathy strike rights, the presumption of arbitrability mandated private resolution of the dispute.

At present there is a discrepancy between the Seventh Circuit and the NLRB as to the requirements of a sympathy strike waiver. As a result, there is confusion about the effect of a no-strike agreement because of the doubts as to which work stoppages will be

---

their requirements for waiver. *Compare* Montana-Dakota Utility Co. v. NLRB, 455 F.2d 1088 (8th Cir. 1972), *with* Kellogg Co. v. NLRB, 457 F.2d 510 (6th Cir. 1972), *and* Gen'l Tire & Rubber Co. v. NLRB, 451 F.2d 257 (1st Cir. 1971). In *Union News v. NLRB*, 393 F.2d 673 (D.C. Cir. 1968), it was held that in the absence of a specific clause preserving the right to engage in sympathy strikes, a broad no-strike clause precludes a sympathy strike.

54. 511 F.2d 284 (7th Cir.), *cert. denied*, 423 U.S. 925 (1975), *enforcing* Gary-Hobart Water Corp., 210 N.L.R.B. No. 87, 86 L.R.R.M. 1210 (1974).

55. Gary-Hobart (NLRB) at 1214.

56. The court held:

> On this record, it makes no sense to conclude that the court can find that a dispute is arbitrable only after finding in the present agreement an unmistakable waiver of the union's sympathy strike rights. *In the light of the federal policy favoring arbitration*, such a conclusion would preempt the role of the arbitral panel.

Keller-Crescent at 1300 (emphasis added).

57. *Id.* at 1299.

considered waived and which will not. To insure complete coverage by a no-strike agreement, negotiators would be required to enumerate in advance all potential disputes. This is clearly an impossible task and the need to do so represents a restriction on the coverage of a no-strike agreement. Where such a difference in standards of the Seventh Circuit and the NLRB exists, the draftsman must decide for which forum he is drafting a no-strike clause.

CONCLUSION

Keller-Crescent illustrates the different standards for arbitrability applied by the Seventh Circuit and the NLRB. Vested with the duty to enforce collective bargaining agreements, federal courts employ a presumption of arbitrability to facilitate private resolution of disputes. Arbitrability must be proved before the Board will find a duty to arbitrate, because arbitrability operates as an affirmative defense to an unfair labor practice charge. In *Keller-Crescent* the Seventh Circuit was willing to presume arbitrability, while the NLRB demanded that it be specifically proven. The different tests employed resulted in the NLRB finding that the Company had committed an unfair labor practice while the Seventh Circuit refused to enforce the Board decision.

Arbitration offers the best opportunity for parties to establish their respective rights before there is unnecessary harm to either side. To accomplish this, a duty to arbitrate should be construed broadly and arbitration should occur at the earliest possible time. The result will be greater stability in the respective positions of the parties and less confusion as to the rights of the individuals involved. The inconsistent positions of the Seventh Circuit and the NLRB as to the duty to arbitrate has the effect of injecting disorder into a situation which demands greater order.