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Deferral to Arbitration: Accommodation of Competing Statutory Policies

Mark A. Shank
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I. THE SUPREME COURT'S POLICY FAVORING ARBITRATION

The national policy favoring the use of negotiated grievance resolution procedures stands as one of the strongest principles in labor law. Its basis remains simple: management and labor agree to negotiate on procedures for the resolution of employee-employer differences. The effect is salutary, fostering industrial peace by encouraging ongoing dispute resolution processes between the parties.

An understanding of the role of collective bargaining begins with Textile Workers Union v. Lincoln Mills. In Lincoln Mills, a § 301 action to compel arbitration, the Supreme Court created a federal common law of collective bargaining to be fashioned "from the policy of our national labor laws." Rejecting the common-law notion that executory agreements to arbitrate were unenforceable, the Court ordered arbitration. The decision opened a new arena for con-

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Conflict resolution, foreshadowing the routine use of arbitration as an alternative to strikes, or court actions, in the resolution of labor disputes.

Shortly after *Lincoln Mills* the Supreme Court answered previously unresolved questions regarding the Court's deferral to arbitration. Three cases decided together known as the *Steelworkers Trilogy*, supra note 7, directed the courts to ignore the merits of an arbitral award, even if the court disagreed with the result. The court's task was to assess whether the award drew its "essence from" the collective bargaining agreement. If so, the award would be upheld. The Court established a presumption of arbitrability of labor disputes, requiring that all doubts concerning the application of arbitration clauses to particular grievances be resolved in favor of arbitration. As a result, the Court expressed its strong preference for arbitration, characterizing arbitrators as "indispensable agencies in a continuous collective bargaining process."10

Against this backdrop, the evolution of judicial deferral to arbitration will be examined. An analysis of this development requires the accommodation of two competing policies. The Supreme Court's strong preference for arbitration must be balanced against the view expressed by Congress that the power of the National Labor Relations Board (hereinafter the Board) "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise."11 This accommodation involves two discrete, yet overlapping areas: (1) whether to prospectively defer an alleged unfair labor practice to arbitration,12 and (2) when it is appropriate for a court to defer to a final arbitration award.13

Accepted standards under which the Board will defer to a final arbitration award will be examined first. The Board in *Spielberg Manufacturing Co.*, supra note 14, set out the following three-pronged test to determine the appropriateness of deferring to an award: (1) the arbi-

12. See infra text accompanying notes 119-86.
13. See infra text accompanying notes 54-99.
Deferral to Arbitration proceedings must have been fair and regular; (2) all parties must have previously agreed to be bound by the arbitration decision; and (3) the decision of the arbitrator cannot be repugnant to the policies and the purposes of the Act. The Board later added a fourth prong which has proved difficult to apply: the deferred unfair labor practice must have been thoroughly considered by the arbitrator.

In effect, the Board abandoned this fourth prong in *Electronic Reproduction Services Corp.* A few years later, however, *Electronic Reproduction* was overruled in *Suburban Motor Freight Inc.* The view expressed in *Suburban Motor Freight Inc.* was upheld in the Board’s 1982 decision in *Propoco, Inc.* However, two years later, in *Olin Corp.*, the Board modified the holdings in both *Suburban Motor Freight* and *Propoco*. In *Olin*, the Board held that the arbitrator had adequately considered the unfair labor practice issue where: (1) the contractual issue was “factually parallel” to the unfair labor practice issue, and (2) the arbitrator was presented with facts relevant to resolving the unfair labor practice issue.

The Board’s decision in *Olin*, however, provided little guidance as to what it meant by the requirement that the issues must be “factually parallel.” Moreover, the Board failed to provide a workable standard by which to judge whether an arbitration award was repugnant to the Act. This article will examine these two issues which continue to trouble attorneys who practice in the post-*Olin* world.

Additionally, the controversial issue of when prospective deferral to arbitration is appropriate will be reviewed. One controversial aspect of the decision to defer is the question of whether it is suitable to defer to alleged violations of an individual employee’s section rights. Initially, the Board, in *Collyer Insulated Wire*, decided to defer only section 8(a)(5) violations. Later, the Board abruptly re-

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21. Id. at 574, 115 L.R.R.M. at 1058.
22. Id.
23. Id. at 576, 115 L.R.R.M. at 1060.
25. Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1982) provides that it is an unfair labor practice for an employer to “refuse to bargain collectively with the representatives of his employees.”
vised its position, adopting and then abandoning a blanket policy of deferring unfair labor practice charges involving section 7 rights.\textsuperscript{26} In \textit{United Technologies},\textsuperscript{27} in a decision issued the same day as \textit{Olin}, the Board re-adopted a blanket approach. The Board announced it would defer not only to section 8(a)(5) charges, but also to those charges involving section 7 violations.

### II. Early Board Treatment of Deferral

Cases preceding \textit{Collyer}\textsuperscript{28} provided no consistent guidelines for deferral. Yet, early on, some cases recognized that in situations of concurrent jurisdiction, the Board could influence an existing collective bargaining relationship positively by deferring to arbitration. Although changing Board composition caused vacillation, these decisions established modern deferral principles.

In \textit{Consolidated Aircraft Corp.},\textsuperscript{29} the Board declined to exercise jurisdiction where an employer allegedly violated section 8(a)(5) by engaging in prohibited unilateral acts during the term of a collective bargaining agreement.\textsuperscript{30} The employer ultimately negotiated the complaint with the union and the parties resolved their dispute. Neither party sought arbitration of the alleged violations. Rather than electing to actively police labor agreements, the Board opted to encourage parties to resolve their disputes through collective bargaining and settlement.\textsuperscript{31}

Eleven years later, in two separate decisions, the Board indicated a willingness to defer in contractual disputes. In \textit{McDonnell Aircraft Corp.},\textsuperscript{32} the Board dismissed a complaint because the employer was willing to resolve the issue through the grievance procedure. In \textit{United Telephone Co.},\textsuperscript{33} the Board deferred in disputes which arose out of contractual interpretations.\textsuperscript{34} There, the Board

\textsuperscript{26} See infra text accompanying notes 146-86.
\textsuperscript{28} 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971).
\textsuperscript{29} 47 N.L.R.B. 694, 12 L.R.R.M. 44 (1943).
\textsuperscript{30} \textit{Id.} at 711, 12 L.R.R.M. at 44.
\textsuperscript{31} \textit{Id.} at 706, 710-11, 12 L.R.R.M. at 45. The Board also held that the acts of the employer interfered with employee rights since the Union was entitled to notification and consultation. This portion clouds an otherwise clear opinion. The soundness of the Board's decision in \textit{Consolidated Aircraft} has been called into question. See Schatzki, \textit{NLRB Resolution of Collective Bargaining Disputes Under Section 8(a)(5)}, 50 Tex. L. Rev. 225, 234 (1972).
\textsuperscript{33} \textit{Id.} at 935, 34 L.R.R.M. at 1473-74. The company was charged with a unilateral change in working conditions in violation of § 8(a)(5) of the Act.
\textsuperscript{34} 112 N.L.R.B. 779, 36 L.R.R.M. 1097 (1955).
\textsuperscript{35} \textit{Id.} at 780, 36 L.R.R.M. at 1098. These are frequently characterized as "pure" con-
emphasized that it does not provide "the proper forum for parties seeking to remedy an alleged breach of contract."\textsuperscript{36}

Additionally, the Board issued \textit{Joseph Schlitz Brewing Co.},\textsuperscript{37} a decision analogous to \textit{Collyer}.\textsuperscript{38} In \textit{Schlitz}, the employer, without negotiation, closed a production line during coffee breaks instead of allowing relief workers to operate it. The union alleged that the action violated section 8(a)(5) since the company refused to bargain about the closing.

Finding that "arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act,"\textsuperscript{39} the Board left the dispute to the parties' grievance-arbitration procedure. This principle remains central to the continued controversy in the area of deferral to arbitration.\textsuperscript{40}

\section*{III. Signals From the Supreme Court: Setting the Stage for Deferral}

Paralleling the Board's activity, the Supreme Court authored several decisions laying a foundation for deferral.\textsuperscript{41} The Court recognized the Board's exclusive unfair labor practice jurisdiction and noted its own lack of expertise in interpreting labor contracts. The Court indicated that where concurrent jurisdiction existed, the Board possessed discretionary authority to choose whether or not to exercise its power.\textsuperscript{42}

It was not until 1964 that the Court allowed jurisdictional disputes to be resolved through arbitration.\textsuperscript{43} It recognized concurrent jurisdiction of the Board and the arbitrator, while upholding the Board's discretion to defer. However, because the Board possessed primary authority, it could overturn any arbitral award with which it disagreed.\textsuperscript{44}
In two later decisions the Court allowed significant Board intrusion into contract disputes. In *NLRB v. C&C Plywood Corp.*, the Court upheld a Board finding that a unilateral increase in incentive pay violated section 8(a)(5) of the Act. The decision authorized the Board to decide contract issues when necessary in order to resolve unfair labor practice charges. On the same day in *NLRB v. Acme Industrial Co.*, the Court enforced a Board order requiring an employer to furnish information. There, the order neither interfered with the arbitration nor substituted the Board's judgment for that of the arbitrator. Thus, the Board's section 104 mandate permitted more intrusion into arbitration by the Board than by the courts.

In *NLRB v. Strong*, the Court endorsed expediency as a basis for deferral decisions. It enforced a Board order requiring the employer to make contractual payments to a fringe benefit fund. Since only the Board could determine whether the employer was bound by the contract, it could also decide the fringe benefits issue. Consequently, the Court rejected the prospect of piecemeal adjudication in two different forums.

Although it did not allow the Board to administer and enforce collective bargaining agreements, the Court did allow it considerable discretion where contract interpretation and unfair labor practice issues overlapped. In effect, the Board received a mandate to shape its own deferral destiny.

IV. SPIELBERG: THE FORERUNNER TO COLLYER
THE LEGITIMIZATION OF DEFFERAL

During its infant years, the Board generally refused to defer to

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49. Id. at 438.
52. Id. at 360-61.
arbitration awards, relying upon its exclusive power to remedy unfair labor practices.\textsuperscript{54} For example, even when an arbitrator reinstated discriminatorily discharged employees, the Board independently determined whether the Act was violated.\textsuperscript{55} Still, deferral occurred, though infrequently,\textsuperscript{56} long before it was legitimized as a firm policy of the Board by the decision in \textit{Spielberg}.\textsuperscript{57} As discussed in the following section, until the Board's decision in \textit{Suburban Motor Freight},\textsuperscript{58} this policy was consistently reaffirmed by the Board and the courts. Following \textit{Suburban Motor Freight}, \textit{Spielberg}'s history has been marked by inconsistent application of the doctrine.\textsuperscript{59}

\section*{A. The Spielberg Decision}

The \textit{Spielberg} decision developed standards to test the propriety of a final arbitration award.\textsuperscript{60} In \textit{Spielberg}, the Board formulated a three-pronged test for proper deferral to an arbitral award: 1) the proceedings must be fair and regular; 2) all parties must have previously agreed to be bound by the arbitration decision; 3) the decision of the arbitration panel cannot be clearly repugnant to the policies of the Act.\textsuperscript{61} Later, a fourth requirement—that the unfair labor practice must have been presented to, and considered by, the arbitrator—was added.\textsuperscript{62} This fourth requirement has become the most troublesome, as a result of the Board's reluctance to consistently apply the rule.

\textit{Spielberg} has experienced general approval, except by those who believe that an expanded deferral policy is an abdication by the

\begin{itemize}
\item \textsuperscript{54} See \textit{The Developing Labor Law} 489 (C. Morris ed. 1974).
\item \textsuperscript{55} \textit{In re} Rieke Metal Products Corp., 40 N.L.R.B. 867, 10 L.R.R.M. 82 (1942).
\item \textsuperscript{57} Spielberg Mfg. Co., 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).
\item \textsuperscript{58} 247 N.L.R.B. 146, 103 L.R.R.M. 1113 (1980). See \textit{infra} text accompanying notes 79-87.
\item \textsuperscript{59} See \textit{infra} text accompanying notes 65-118.
\item \textsuperscript{60} This may be compared to \textit{Collyer} which contemplated the use of contractual dispute resolution procedures prior to Board review. The Board retains jurisdiction to insure that the dispute is resolved with reasonable promptness. Once a decision is reached, then it must meet the requirements of \textit{Spielberg}. \textit{Spielberg} does not require Board agreement as to the ultimate result, only that the decision was reached in a manner consistent with the Act. See \textit{infra} text accompanying notes 287-311.
\item \textsuperscript{61} Spielberg Mfg. Co., 112 N.L.R.B. at 1082, 36 L.R.R.M. at 1153.
\end{itemize}
Board of its statutory authority. The Supreme Court appears to have given it overt and consistent acceptance. Generally, discord arises only when decisions expand the Spielberg doctrine beyond the confines of the original decision.

**B. The Expansion of Spielberg**

The Spielberg Doctrine experienced a steady, twenty-year expansion. In *International Harvester Co.*, the Board emphasized that the Act was primarily designed to promote industrial peace and stability by encouraging collective bargaining. This objective could be obtained by using arbitration as a substitute for industrial strife. Unless an arbitration award is deemed “palpably wrong,” the Board should withhold its authority to decide an unfair labor practice charge arising from arbitrable contract claims. The arbitrator’s award became the sole remedy, though subject to Spielberg review. After *International Harvester*, the Board continued its strong approval of Spielberg and appeared loath to intervene once the arbitrator had rendered his decision.

Following Spielberg, the fourth Spielberg requirement received the most attention, culminating in *Electronic Reproduction Service Corp.* Prior to that case, the Board, in such cases as *Airco Industrial Gases*, had consistently refused to defer unless the unfair labor practice issue had been both presented to and considered by the arbitrator. In *Electronic Reproduction*, the Board revised its earlier holdings and placed much less emphasis on this requirement. It stated that deferral should occur in discipline and discharge cases under Spielberg:

> except when unusual circumstances are shown which demonstrate that there were bona fide reasons, other than a mere desire on the

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66. Id. at 926, 51 L.R.R.M. at 1156 (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960)).

67. Int’l Harvester Co. Id. at 929, 51 L.R.R.M. at 1158.

68. For example, in Local 1522, Int’l Bhd. of Elec. Workers, 180 N.L.R.B. 131, 73 L.R.R.M. 1091 (1969), the Board indicated that new information not previously presented to the arbitral tribunal was insufficient to vacate an arbitral award.


70. 195 N.L.R.B. 676, 79 L.R.R.M. 467 (1972) *See infra* note 85.
part of one party to try the same set of facts before two forums, which caused the failure to introduce such evidence at the arbitration proceeding.\footnote{Electronic Reproduction Serv. Corp., 213 N.L.R.B. at 762, 87 L.R.R.M. at 1216.}

The Board noted that the usual practice in arbitration cases had been to submit to the arbitrator the central issue of the merits of the discipline or discharge. These would parallel any section 8(a)(3) issues presented.\footnote{Id.} Unless he specifically declined to hear, or was prohibited from hearing the evidence, or unless the evidence was specifically excluded, the arbitrator would be presumed to have considered the section 8(a)(3) issues.\footnote{Id. See infra notes 287-93 and accompanying text.} The effect, as predicted by the \textit{Electronic Reproduction} dissenters\footnote{Electronic Reproduction Serv. Corp., 213 N.L.R.B. at 765, 768, 87 L.R.R.M. at 1219, 1222 (Members Fanning & Jenkins, concurring in part and dissenting in part).} was that the Board would not vacate an award if the unfair labor practice issue was, or could have been, decided by the arbitrator.

The Board followed with \textit{Kansas City Star Co.},\footnote{236 N.L.R.B. 866, 98 L.R.R.M. 1320 (1978).} where it reinforced the principle expressed in \textit{Spielberg}, and deferred to arbitral awards that met the expanded \textit{Spielberg} standards.\footnote{J.S. Irving, \textit{New Directions—Recent Trends and Developments in NLRB Cases}, INST. ON LAB. L.’SW. LEGAL FOUND, LAB. L. DEV. ANN. PROC., 25, 29 (1981).} Thereafter, the Board in \textit{Atlantic Steel Co.}\footnote{245 N.L.R.B. 814, 102 L.R.R.M. 1247 (1979).} retreated from its position and required arbitral consideration of all the evidence relevant to the unfair labor practice issue.\footnote{Id. at 815, 102 L.R.R.M. at 1248.}

\section*{C. Suburban Motor Freight and Its Aftermath}

The expansion of \textit{Spielberg} halted with \textit{Suburban Motor Freight, Inc.}\footnote{247 N.L.R.B. 146, 103 L.R.R.M. 1113 (1980).} There, the company-respondent reprimanded and discharged the employee twice. In separate decisions, arbitrators reinstated him with reduced punishment. The complaint alleged that the respondent disciplined the employee for discriminatory, anti-union reasons in violation of sections 8(a)(1) and (3) of the Act. The unfair labor practice issue was not raised in either of the arbitration proceedings.

Although the Administrative Law Judge ("A.L.J.") found the relevant facts indistinguishable from those in \textit{Electronic Reproduction}...
tion, he refused to defer, arguing that Electronic Reproduction should be abandoned. The Board agreed and overruled Electronic Reproduction.

Electronic Reproduction placed a premium upon encouraging contractual dispute settlement and preventing multiple litigation of the same facts. The Suburban Motor Freight Board found this "economically praiseworthy," but maintained that it impermissibly derogated the exercise of employees' section 7 rights. Changing its primary emphasis to protection of individual employee rights, the Board would no longer force employees to arbitrate their private contractual rights along with their public statutory rights, or risk waiving the latter.

As the Board stated:

In specific terms, we will no longer honor the results of an arbitration proceeding under Spielberg unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator. In accord with the rule formerly stated in Airco Industrial Gases, we will give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue of discrimination in determining the propriety of an employer's disciplinary actions. In like accord with the corollary rule stated in Yourga Trucking, we shall impose on the party seeking Board deferral to an arbitration award the burden to prove that the issue of discrimination was litigated before the arbitrator.

The Board thus returned to the standard of review previously set out in Airco Industrial Gases. Airco required that unless the unfair labor practice issue was both presented to and considered by the arbitrator, there would be no deferral. The arbitrator must actually consider the unfair labor practice along with the grievance and rule on both for deferral to be appropriate.

80. Id. at 152, 103 L.R.R.M. at 1114.
80.1. Id. at 146, 103 L.R.R.M. at 1114.
81. Id.
82. Id.
83. Id.
84. Id. at 146-47, 103 L.R.R.M. at 1114.
86. This development is unfortunate, according to ex-Member Penello, since it involves the Board in trivial issues or ones the parties have already resolved in a fair and equitable
The practical effect of Suburban Motor Freight was to enable a party to submit a grievance to arbitration under the contract without raising the unfair labor practice issue. If dissatisfied with the result, he could bring a separate unfair labor practice proceeding. Such multiple litigation severely undermined the strong national policy favoring dispute resolution by private parties without government intervention and promoted wasteful duplicate litigation of identical issues of fact.

Two cases, Bay Shipbuilding and Chemical Leaman Tank Lines, temporarily suggested a possible return to Atlantic Steel and a move away from the restrictive Suburban Motor Freight requirements. In each case the Board deferred, although the arbitrator did not expressly address the unfair labor practice issue. The Board found that the arbitrators' fact findings implicitly resolved the statutory issues. It appeared that these cases might signal a return to less exacting Spielberg review.

A subsequent decision proved this conclusion to be unfounded and added to the confusion in this area. In Propoco, despite strong dissents by Chairman Van de Water and Member Hunter, the Board majority refused to defer, although the arbitrator specifically found that the grievant's discharge was unrelated to exercise of his section 7 rights. According to the majority, there appeared to be little or no evidence presented to the arbitrator concerning this issue; therefore the Board refused to defer.

Although claiming adherence to Suburban Motor Freight, Propoco stated that a grievant may choose to exclude arbitral consideration of an alleged violation of the Act. According to Propoco, the grievant could "elect" to have the same issues of fact litigated in two different forums. The deferral process could not require him to "forfeit the right to a Board disposition."

In Suburban Motor Freight, the Board indicated it would not force the grievant to raise both the contractual and statutory issues
in arbitration. The Board refused to impose a rule that if both issues were not raised, the grievant risked waiving the statutory issues.\textsuperscript{94} The Board declined to adopt the view that the responsibility to raise both issues rested solely in the hands of the employee. Rather, \textit{Suburban Motor Freight} seemed only to require that the statutory issue be "presented to and considered by the arbitrator"\textsuperscript{95} no matter who initiated presentation of the issue.

\textit{Propoco} rejected dissenting Member Hunter's view that \textit{Suburban Motor Freight}'s requirements are satisfied "whenever the contractual and unfair labor practice issues are factually parallel and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue."\textsuperscript{96} \textit{Propoco} seemed to signal strict and limited adherence to \textit{Suburban Motor Freight}'s principles, unnecessary interference into the stable collective bargaining relationship and near \textit{de novo} review of arbitral awards.\textsuperscript{97}

In \textit{Roadway Express, Inc.},\textsuperscript{98} the Board added to the inconsistency by holding \textit{Spielberg} inapplicable to cases settled prior to arbitration. Consequently, it appeared that the Board would relitigate any issues settled short of arbitration. This approach appeared especially indefensible, considering the Board's stated purpose of fostering amicable resolution of industrial disputes. \textit{Roadway Express} encouraged the opposite—to avoid relitigation by the Board, the parties must arbitrate a dispute they might otherwise settle.

With these decisions, the Board reversed a consistent twenty-year development of \textit{Spielberg} and replaced it with confusion that undermined the purposes and policies underlying deferral. This tended to frustrate statutory industrial self-regulation by requiring unnecessary Board intrusion into the arbitral forum.\textsuperscript{99}

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  \item \textsuperscript{94} Suburban Motor Freight, 247 N.L.R.B. at 146, 103 L.R.R.M. at 114.
  \item \textsuperscript{95} \textit{Id.} at 146-47, 103 L.R.R.M. at 1114. \textit{See supra} note 84 and accompanying text.
  \item \textsuperscript{96} Propoco, 263 N.L.R.B. at 138, 110 L.R.R.M. at 1499.
  \item \textsuperscript{97} Furthering this view was Babcock & Wilcox Co., 263 N.L.R.B. 405, 111 L.R.R.M. 1064 (1982). In \textit{Babcock & Wilcox}, the majority refused to defer to the arbitrator's award, even though the arbitrator found no evidence of discharge for Union activities. Babcock & Wilcox, 263 N.L.R.B. at 405, 111 L.R.R.M. at 1065. Chairperson Van de Water, relying on his \textit{Propoco} dissent, urged deferral, since "[o]ver-zealous dissection of [arbitration] opinions by the NLRB, as well as by the courts, can defer the writing of full opinions, and it should not be assumed that an arbitrator has snubbed the Act any more than that he has exceeded his authority." Babcock & Wilcox, 263 N.L.R.B. at 406, 111 L.R.R.M. at 1066 (citing Douglas Aircraft Co. v. NLRB, 609 F.2d 352, 355 (9th Cir. 1979)).
  \item \textsuperscript{99} \textit{See Irving, supra} note 76 and accompanying text.
\end{itemize}
Recent changes in Board membership have, however, initiated what appears to be a more rational and consistent policy, as evidenced by the recent decision in *Olin Corp.*100 In *Olin*, a union president was discharged for failure to prevent a work stoppage which violated the contractual no strike clause. This clause placed an affirmative duty upon union officials not to cause or to permit union members to engage in a strike. Subsequently, a grievance was filed and arbitrated. The arbitrator denied the grievance, finding that the union president “at least partially caused or participated in” the work stoppage.101 Consequently, the president’s conduct breached the contract’s no strike clause. The arbitrator further found that the union president’s union activities played no part in his discharge.102

An A.L.J. decided, however, not to defer to the award, because the unfair labor practice had not been considered “in any serious way.”103

The Board reversed the decision of the A.L.J. and set out a new standard by which to determine the appropriateness of deferring to an arbitration award. The Board focused on the controversial fourth prong (whether the unfair labor practice was presented to and considered by the arbitrator)104 and noted, in principle, that it would not defer to an arbitration award that did not consider the unfair labor practice. The Board then held:

We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is ‘clearly repugnant’ to the Act.105

The Board then went on to discuss the third prong of *Spielberg*:

And, with regard to the inquiry into the ‘clearly repugnant’ standard, we would not require an arbitrator’s award to be totally consistent with Board precedent. Unless the award is ‘palpably wrong,’ i.e., unless the arbitrator’s decision is not susceptible to an interpre-

102. *Id.*
103. *Id.*
104. See supra note 62 and accompanying text.
In short, the Board, in Olin, overruled Propoco, noting that it would no longer engage in de novo review of an arbitrator's award. The Board further overruled Suburban Motor Freight holding that it would now require the party seeking to have the Board ignore an arbitration award to bear the burden of proof. Such a party must affirmatively demonstrate that the arbitration did not comport with the standards set out in Olin. The Board did not, however, provide any guidance concerning the circumstances under which it would consider the contractual and the unfair labor practice issues to be factually parallel. Moreover, the Board's decision in Olin was additionally deficient in failing to articulate a clear-cut and workable repugnancy standard.

A Memorandum composed by Acting General Counsel Wilford W. Johansen and issued to the Board's regional offices provides some guidance on the first issue. The Johansen Memo examines the newly formulated fourth prong by applying it to the facts of Olin. In Olin, the unfair labor practice charge alleged that the employer discharged the union president because of his union position and activities. The contractual issue in Olin involved a violation by the union president of a no-strike clause. The arbitrator found that the president contravened his obligations under this clause and that his union activities played no part in the discharge. Consequently, the contractual issue considered by the arbitrator was factually parallel to that raised by the unfair labor practice charge. Moreover, the arbitrator was "presented generally" with the facts necessary to resolve the unfair labor practice.

The Johansen Memo provides further guidance for the Regions in a more typical section 8(a)(3) discharge. It examines a fact situation where a discharged employee or his union files a grievance. The grievance contends that the employee was discharged for his union activities. Such a discharge is in violation of a collective bargaining agreement clause which forbids such unlawful actions. Under these circumstances, "the contractual issue is, [as in Olin] factually parallel to the unfair labor practice issue."

106. Id.
107. Id. at 575, 115 L.R.R.M. at 1058.
109. Id.
110. Id.
The identical conclusion results in the following scenario: An employee is discharged. Subsequently, the union files a grievance alleging that the discharge was in violation of a contract clause requiring discipline to be imposed only for just cause. The grievant contends *inter alia*, that the discharge was not for just cause because it was imposed in retaliation for his union activities. In such instances, the Johansen Memo considers the contractual issue to be factually parallel to the unfair labor practice issue. Once again, the Johansen Memo notes that an arbitrator presented generally with the facts relevant to resolving the unfair labor practice issue is presumed to have adequately considered the unfair labor practice issue.\(^{111}\)

Johansen continued by pointing out that if the grievant merely contended that the employee was innocent of any misconduct or that such misconduct did not warrant the discipline imposed, then the contractual provision would not be injected into the arbitral proceedings. Accordingly, the issues would not be factually parallel. Deferral to this award would not be appropriate.\(^{112}\)

The Johansen Memo further discusses deferral in the context of section 8(a)(5). There, according to Johansen's analysis, the contractual issue is factually parallel to a section 8(a)(5) unfair labor practice issue when the union files an unfair labor practice charge alleging that certain conduct constitutes a midterm modification of the contract in violation of sections 8(a)(5) and 8(d) of the Act. The union files a grievance alleging that such conduct breaches a provision of the contract. In such an instance, the contractual issue is factually parallel to the unfair labor practice issue.\(^{113}\)

By contrast, if the grievance alleges a breach of contract and the unfair labor practice alleges a *unilateral change*, then the Johansen Memo instructs the Region to consider carefully whether the issues are "factually parallel."\(^{114}\) In this situation, the issue raised by the grievance is whether the employee's conduct breached a specific provision of the collective bargaining agreement.\(^{115}\) In contrast, the unfair labor practice charge questions whether a unilateral change was made with respect to a mandatory subject of bargaining.\(^{116}\) Johansen observed that such issues are not "factually parallel."

Member Zimmerman, the sole dissenter in *Olin*, succinctly

\(^{111}\) Id.

\(^{112}\) Id.

\(^{113}\) Id.

\(^{114}\) Id. (emphasis in original)

\(^{115}\) Id.

\(^{116}\) Id.
characterized the import of the majority's holding:

[The Board now] will presume that an arbitrator has considered both contract and unfair labor practice issues unless the General Counsel can prove that there is no factual parallel between the issues. The more broadly the Board construes the notion of factual parallelism, the more difficult the General Counsel's task becomes.\(^{117}\)

Despite Olin's attempt at clarity it still does not provide adequate guidance where an award is deemed repugnant to the Act.\(^{118}\)

V. THE Collyer Decision: A Further Expansion of Deferral

_Spielberg_ dealt with the issue of deferral to a final arbitration award. In _Collyer Insulated Wire_\(^{119}\) the Board expanded the deferral concept to require parties to utilize the arbitration process _prior_ to seeking Board review.

In contrast to _Spielberg_, the Board in _Collyer_ suspended its activities until the grievance arbitration machinery had decided the issues. Further, it retained jurisdiction over the case:

> ... solely for the purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this decision, 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.\(^{120}\)

In _Collyer_ the employer and the union unsuccessfully attempted to negotiate wage differences for skilled maintenance employees. Thereafter, the employer instituted a unilateral wage increase for some of the employees.\(^{121}\) The union filed section 8(a)(5) (refusal to bargain) charges against the employer. Both the employer and the union relied upon contractual language to support their respective positions.\(^{122}\)

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\(^{118}\) See infra text accompanying notes 294-331.


\(^{120}\) Id. at 843, 77 L.R.R.M. at 1938 (footnote omitted).

\(^{121}\) Id. at 838, 77 L.R.R.M. at 1932.

\(^{122}\) Id. at 837, 77 L.R.R.M. at 1932.
The Board agreed with the employer's contention that the dispute was essentially one over the meaning of terms within the contract. It dismissed the complaint, stating that the disputed issues should be resolved under the grievance procedure set up by the parties.\textsuperscript{123}

The plurality (Members Miller and Kennedy) acknowledged that the Board retains paramount and primary authority to adjudicate disputes of this nature. Nonetheless, it also found that the Board possesses discretionary authority to defer to arbitration, especially in view of the strong national policy favoring arbitration.\textsuperscript{124} Consequently, the Board retains discretionary authority to withhold its own processes. This restraint is not relinquishment, but rather an actual deferral of jurisdiction, since the ultimate decision of the arbitrator will still be subject to review by the Board under \textit{Spielberg} standards.\textsuperscript{125}

As justification for withholding its processes, the Board in \textit{Collyer} found that its discretionary authority to defer was never questioned by the courts of appeals\textsuperscript{126} or by the Supreme Court.\textsuperscript{127} Indeed, the Supreme Court\textsuperscript{128} enthusiastically approved \textit{International Harvester Co.},\textsuperscript{129} favoring considerable discretion where deferral would serve the Act.\textsuperscript{130} Moreover, the Board itself previously had a long history of hospitable acceptance of deferral.\textsuperscript{131}

\begin{itemize}
\item \textsuperscript{123} \textit{Id.} at 843, 77 L.R.R.M. at 1938.
\item \textsuperscript{124} \textit{Id.} at 840, 77 L.R.R.M. at 1935.
\item \textsuperscript{125} \textit{Id.} at 843, 77 L.R.R.M. at 1937.
\item \textsuperscript{126} \textit{Id.} at 840 n. 2, 77 L.R.R.M. at 1934 n. 2. The opinion asserts that at least two cases, Sinclair Refining Company v. NLRB, 306 F.2d 569 (5th Cir. 1962), and Timken Roller Bearing Co. v. NLRB, 161 F.2d 949 (6th Cir. 1947), indicate that the Board may be \textit{required} to defer to arbitration. \textit{Collyer Insulated Wire}, 192 N.L.R.B. at 840 n.2, 77 L.R.R.M. at 1934 n.2.
\item \textsuperscript{127} \textit{Id.} at 840, 77 L.R.R.M. at 1934.
\item \textsuperscript{128} Carey v. Westinghouse, 375 U.S. 261, 271 (1964). \textit{See supra} note 53 and accompanying text.
\item \textsuperscript{129} 138 N.L.R.B. 923, 49 L.R.R.M. 1753 (1962), \textit{aff'd} sub nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), \textit{cert. denied}, 377 U.S. 1003, \textit{reh'g denied}, 379 U.S. 874 (1964). \textit{See supra} note 65 and accompanying text. "In enforcing the Board's decision [in \textit{International Harvester}] the Seventh Circuit stated at p. 787, 'Thus, the Supreme Court has held that the Board has discretion to defer to the decision of an Arbitrator.'" \textit{Collyer}, 192 N.L.R.B. at 840 n. 4, 77 L.R.R.M. at 1984 n. 2.
\item \textsuperscript{130} \textit{Collyer}, 192 N.L.R.B. at 840, 77 L.R.R.M. at 1034. Smith v. \textit{Evening News Ass'n}, 373 U.S. 195 (1963), indicates the Supreme Court's approval of "informed use" of its discretion to defer.
\item \textsuperscript{131} \textit{Collyer} at 841, 77 L.R.R.M. at 1935 (citing Timken Roller Bearing Co., 70 N.L.R.B. 500, 18 L.R.R.M. 1370 (1946) and \textit{Spielberg} as examples where deferral occurred, although not prior to issuance of an award).
\end{itemize}
The Board also pointed to In re Consolidated Aircraft Co.\textsuperscript{132} as a case where the Board had forced the charging party to utilize the contractual grievance resolution procedures, although it acknowledged that the Board has since applied the doctrine inconsistently.\textsuperscript{133}

The opinion considered Jos. Schlitz Brewing Co.,\textsuperscript{134} arguing that the circumstances of Collyer, like those in Schlitz, "weigh(ed) heavily in favor of deferral."\textsuperscript{135} In Collyer and in Schlitz the parties had enjoyed a long and productive bargaining relationship. There were no claims of employer enmity and the employer was willing to utilize arbitration under an arbitration clause broad enough to cover the dispute. These factors weighed heavily in favor of allowing the parties to resolve their own disputes without Board interference.

The majority in Collyer consisted of a Miller-Kennedy plurality opinion and Member Brown's concurrence. Brown, long a deferral adherent, opined that the Board should only defer in a rights dispute. According to Brown, a rights dispute occurs where the disputed issue is encompassed by the agreement and has been previously bargained for by the parties. Conversely, a dispute not addressed by the language of the agreement would not qualify as a rights dispute and would not be subject to deferral.\textsuperscript{136} Member Brown's argument bears only historical significance, since subsequent discussions generally have not used his analysis.

In separate dissenting opinions, Members Fanning and Jenkins each assailed the new deferral policy. They argued that Collyer forced the charging party to arbitrate or suffer dismissal of the charge. Consequently, a permissive arbitration clause became a compulsory one.\textsuperscript{137} Only Congress, and not the Board, could authorize such a surrender of employees' statutory rights.\textsuperscript{138} Accordingly, arbitral awards disposing only of the individual case, rather than settling a principle, are limited in the breadth and adequacy of the remedy available to the grievant, and do not speak to or affect unfair labor practice conduct.\textsuperscript{139} Arbitration was costly, and there was no reason

\textsuperscript{133} Collyer, 192 N.L.R.B. at 841, 77 L.R.R.M. at 1936.
\textsuperscript{135} Collyer, 192 N.L.R.B. at 842, 77 L.R.R.M. at 1936.
\textsuperscript{136} 192 N.L.R.B. at 845, 77 L.R.R.M. at 1939. Brown's approach is quite similar to that of Chairman Murphy in General American Transportation and Roy Robinson Chevrolet. See infra note 172 and accompanying text.
\textsuperscript{137} Id. at 847, 77 L.R.R.M. at 1941 (Member Fanning, dissenting).
\textsuperscript{138} Id. at 847, 77 L.R.R.M. at 1941-42.
\textsuperscript{139} Id. at 855, 77 L.R.R.M. at 1949 (Member Jenkins, dissenting).
to believe arbitrators to be any more qualified than the Board to interpret contracts.\textsuperscript{140} Despite its meticulous use of precedent to support its arguments, the gravamen of the Miller-Kennedy opinion is based upon policy: arbitrators are better suited than the Board to resolve disputes during the term of a collective bargaining agreement, due to their special skill and experience in deciding collective bargaining relationship issues.\textsuperscript{141} This position is not supported by any empirical evidence. Rather, it is derived from the Trilogy's strong language favoring arbitration. Unlike that of the Board, the arbitrators' sole domain is interpretation of collective bargaining agreements.\textsuperscript{142} Practical considerations favor the withholding of the Board's processes when the parties have contractually agreed to resolve the dispute without Board intervention. Further, deferral allows the Board more time to carry out its other functions.

A. After Collyer: Further Deferral for Statutory and Contractual Wrongs

Shortly after Collyer, Member Brown's tenure on the Board ended. Since he formed part of the Collyer majority, the new member's views became crucial to its fate. Although the Board suspended further decisions on the issue due to the deadlock, General Counsel Nash did issue a Memorandum to the Regional Offices\textsuperscript{143} interpreting Collyer. Further, Member Penello embraced the Miller-Kennedy view\textsuperscript{144} of Collyer. As a result, the Board applied the doctrine in a consistent manner, developing a policy of deferral similar in many respects to judicial deferral to arbitral awards following the Steelworkers Trilogy.\textsuperscript{145}

In National Radio Co.,\textsuperscript{146} the Board significantly and innovatively applied Collyer to a section 8(a)(3) case for the first time. In National Radio the Union charged that the employer had unilaterally instituted a rule requiring representatives to report to their supervisors upon leaving their work area. According to the union, the rule violated a contractual provision allowing certain employees free

\begin{itemize}
  \item \textsuperscript{140} Id. at 854-55, 77 L.R.R.M. at 1948-49.
  \item \textsuperscript{142} Id. at 169 n. 134.
  \item \textsuperscript{143} Nash, \textit{Arbitration Deferral Policy Under Collyer}, G. C. Memo (Feb. 1972), reprinted in Lab. L. Rep. (CCH) § 9002 [hereinafter cited as Nash Memo].
  \item \textsuperscript{144} See supra text accompanying notes 124-25.
  \item \textsuperscript{145} See Steelworkers Trilogy, supra note 1; Zimmer, supra note 141, at 177-78.
  \item \textsuperscript{146} 198 N.L.R.B. 527, 80 L.R.R.M. 1718 (1972).
\end{itemize}
movement to handle grievances. After a series of confrontations over the rule, a Union steward was fired. The Union filed a grievance and section 8(a)(3) and 8(a)(5) unfair labor practice charges, alleging, \textit{inter alia}, anti-union animus.\textsuperscript{147}

The case progressed in two different forums. When the Regional Director refused to stay the unfair labor practice hearing, the arbitrator recessed the hearing pending the Board decision.

The A.L.J. concluded that no relevant contractual provisions were in dispute. Still, the Board deferred the case to arbitration. It acknowledged, but rejected, the General Counsel's attempts to distinguish \textit{National Radio} from \textit{Collyer}, on the basis of the presence of anti-union animus. The majority did agree that \textit{National Radio} differed from \textit{Collyer} in that the central issues were statutory, rather than contractual in nature. Nonetheless, the Board concluded that jurisdiction was "improvidently asserted prior to issuance of the Arbitrator's Award."\textsuperscript{148} The fundamental consideration was the same as in \textit{Collyer}—the "asserted wrong [was] remediable in both a statutory and a contractual forum."\textsuperscript{149}

In an attempt to persuade the Board not to defer, the charging party argued that the arbitrator's ruling might be unobjectionable under the contract, but still unenforceable under section 8(a)(3). The Board found the crucial determinant to be "the reasonableness of the assumption that the arbitration procedure will resolve this dispute in a manner consistent with the standards of \textit{Spielberg}."\textsuperscript{150}

Significantly, the issue most often resolved by arbitrators was (and is) that of just cause for the imposition of discipline.\textsuperscript{151} As a result, the Board assumed adherence to \textit{Spielberg} by the arbitrator, knowing that it could overturn the award under its continuing jurisdiction, if necessary.

In addition, the Board focused upon the necessity of promoting the national policy favoring arbitration and the concomitant expansion of \textit{Collyer}. The Board also noted that the relationship of the contracting parties would be enhanced by allowing them to settle disputes without government intervention, especially since the inter-

\begin{enumerate}
\item[147.] \textit{Id.} at 530, 80 L.R.R.M. at 1721-22.
\item[148.] \textit{Id.} at 530, 80 L.R.R.M. at 1721.
\item[149.] \textit{Id.} at 531, 80 L.R.R.M. at 1722.
\item[150.] \textit{Id.} at 531, 80 L.R.R.M. at 1723.
\item[151.] Statistics released by the American Arbitration Association indicate that discharge and discipline cases still are the ones most frequently arbitrated. Of 1,188 cases from 1981 analyzed, 315 were discharge cases and 157 were discipline cases. Disputes over wages, with 132 in this category, were the next most frequent. See 151 \textit{DAILY LAB. REP.} (BNA), at A-2 (Aug. 5, 1982).
\end{enumerate}
vention of the Board could "sometimes be an unsettling force."\textsuperscript{152} Finally, the Board found the parties' long-established stable and productive bargaining relationship persuasive. It hinted that a different result might occur in cases where a history of animus or a pattern of subversion of section 7 rights existed.\textsuperscript{153}

\textit{National Radio} marks the first application of \textit{Collyer} to a section 8(a)(3) case. Its analysis was unique, emphasizing accommodation of the two forums (the Board and arbitration) in contrast to its reliance upon "arbiter expertise" in \textit{Collyer}. Although the Board majority used \textit{National Radio} as a vehicle for expanding the deferral concept, the decision probably went further than necessary. The Board could rightly have held that just cause cases are pure contract questions normally left to arbitrators.

Dissenters Fanning and Jenkins offered a far different analysis. They argued that the only true issue was whether the employee was fired for union activity in violation of section 8(a)(3). They viewed the majority's action not as merely deferral, but abdication. They believed the decision impermissibly allowed a private tribunal to determine statutory rights. According to the dissenter, the decision permitted questions of statutory interpretation to be decided in a private forum, although the employee had already implicitly rejected such a forum by asking the Board to decide the case.\textsuperscript{154}

\textit{National Radio} allowed arbitrators to decide disputes with increased statutory significance. This decision recognized and enhanced arbitration's fundamental role in a large and ever-increasing number of collective bargaining relationships.\textsuperscript{155} Since the Board considered the arbitral and Board forums to be equally competent, it chose to accommodate the two. Mindful of the Board's ever-increasing caseload, it routed cases to arbitration.

The "equal competence" reasoning fails to withstand careful scrutiny. It seems unlikely that an arbitrator, whose normal function is to decide contractual issues, will be equally competent to apply Board law. More than likely his emphasis will be on contractual rather than statutory construction. As a result, statutory rights may take a back seat to contractual rights in the arbitral forum.

This argument may appear to be at odds with the view that increased deferral is essential to resolve efficiently a large number of

\textsuperscript{152} National Radio Co., 198 N.L.R.B. at 532, 80 L.R.R.M. at 1723.
\textsuperscript{153} Id. at 532 n. 16, 80 L.R.R.M. at 1724 n. 16 (citing United Aircraft Corp., 188 N.L.R.B. 633, 76 L.R.R.M. 1405 (1971)).
\textsuperscript{154} Id. at 532-33, 80 L.R.R.M. at 1724.
\textsuperscript{155} See Zimmer, supra note 141, at 177.
labor disputes. The "equal competence" argument, however, is an
unnecessary attempt to justify theoretically a policy decision that the
Board must defer for reasons of expediency. Arbitration and the
Board are two distinct methods of dispute settlement. Deferral
should not be rejected simply because the arbitral decision and the
method of achieving that result do not parallel the Board's. Rather,
the arbitrator should only be required to reach a result based upon
the evidence and not repugnant to the basic policies and purposes of
the Act.

Attempts to resolve the same dispute in the two different forums
inevitably result in wasted time and money and Board interference
with arbitration. National Radio offers a prime example. By pro-
ceeding simultaneously with the Board hearing and arbitration, the
parties incurred the expense and effort of two separate de novo hear-
ings concerning one factual occurrence.

The parties chose a private forum for resolving their differences.
The dual exigencies of decreased federal spending and a backlog of
Board cases require that the parties be compelled to utilize their
chosen forum. The competing policies of expediency and absolute
protection of statutory rights must be balanced in favor of the for-
mer. Consequently, if the arbitrator is likely to resolve the dispute in
a just manner, the dispute should be deferred.

In Appalachian Power Co., a decision rendered on the same
day as National Radio, the Board used a less innovative Collyer
analysis to defer to a section 8(a)(3) case. The dispute centered upon
a contractual provision granting leaves of absence to Union repre-
sentatives to conduct Union business. The Company cancelled the
leaves of representatives who used the time to organize a sister
company.

The Board found the dispute to be essentially a contractual one
because the right to a leave of absence derived only from the con-
tract. Since the contract required arbitration, the Board granted
the request for Collyer deferral. According to the Board, Appalachian
Power required meshing of contractual and statutory issues. If a con-
tractual breach occurred, the company most probably committed an
unfair labor practice. Since the evidence presented on the contrac-
tual and statutory issues was essentially the same, the arbitrator's
award would resolve both. The Board carefully emphasized, how-
ever, that lack of employer hostility toward the collective bargainin

156. See infra note 179.
relationship remained a necessary prerequisite to deferral.\textsuperscript{168}

\textit{National Radio} significantly expanded the \textit{Collyer} doctrine and stands as a significant point in its evolution. Subsequent to the decision, the major focus in deciding whether to defer was upon the contractual grievance resolution procedure itself. Absent some technical requirement which would restrict deferral, the character of the dispute was not important. The determining factor was whether the Board concluded that arbitration was likely to resolve the question in a just manner.\textsuperscript{169} The Board eventually applied \textit{Collyer} in cases involving alleged violations of sections 8(a)(1),(3),(5) and 8(b)(1)(A), (1)(B), (2) and (3). In the majority of cases where the Board refused deferral, it did so because the basic criteria set out in \textit{Collyer} were not met.\textsuperscript{160}

A Revised Memorandum prepared by General Counsel Nash\textsuperscript{161} reflected the change of emphasis by the Board. As the Revised Memo explained, deferral might occur even when the contract was not at the heart of the dispute. The Board placed primary emphasis on whether or not the dispute would be resolved in a manner consistent with \textit{Spielberg}. Less emphasis was placed upon the language of the contract and more upon the grievance resolution machinery.\textsuperscript{162} Despite the change in emphasis, the Board still would not defer where the contractual language affecting the disputes would not comport with the standards the Board utilized in deciding the unfair labor practice issues.\textsuperscript{168}

Under the Revised Memo, evidence of employer enmity toward employee or union rights under the Act would block deferral. This hardly seems surprising, considering the emphasis \textit{Spielberg}, \textit{Collyer} and their progeny placed upon supporting an already stable collective bargaining relationship. For example, a single anti-union unfair labor practice by the employer normally was not sufficient to make deferral inappropriate. The Board looked to see if continuing history

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\item \textsuperscript{158.} \textit{Id.} at 578-79, 80 L.R.R.M. at 1733-34.
\item \textsuperscript{160.} \textit{The Developing Labor Law,} 274-75 (A. Bioff, L. Cohen & K. Hanslowe eds. Supp. 1976).
\item \textsuperscript{161.} Nash, \textit{Arbitration Deferral Policy Under Collyer-Revised Guidelines, G.C. Memo} (May 10, 1973) [hereinafter cited as \textit{Revised Memo}].
\item \textsuperscript{162.} \textit{Id.} at 10-11.
\item \textsuperscript{163.} \textit{Id.} at 13 (citing National Radio Co., 198 N.L.R.B. 527, 80 L.R.R.M. 1718 (1972)). Nash states that where the contract conflicts with statutory law, it is not reasonable to assume that the arbitral decision will depart from the contract.
\end{itemize}
\end{small}
of hostility to collective bargaining rights existed. To this end the Board often looked to the character and frequency of unfair labor practice complaints. Only if the employer’s previous actions reflected “a deliberate disregard or rejection of statutory obligations,” would deferral be deemed inappropriate.\textsuperscript{164}

Under the Revised Memo, deferral would not occur unless the respondent was willing to submit all aspects of the dispute to arbitration. Accordingly, the Revised Memo required a respondent to state a willingness to arbitrate and to forego any procedural defenses (i.e. limitations or expiration of the contract). The respondent could contest the arbitrability of the underlying dispute so long as he was willing to submit the dispute to arbitration if the matter was found to be arbitrable. The willingness to arbitrate would not be presumed; the respondent would be required to agree to arbitration upon inquiry by the Region.\textsuperscript{165}

Deferral would not occur if the respondent asserted a bad faith justification for its actions. Bad faith would exist where the justification was frivolous and the respondent did not actually rely upon the stated justification in taking the action. Failure to assert a contract claim in arbitration would not be sufficient to preclude deferral.\textsuperscript{166}

The Board also examined the nature of the grievance-arbitration procedures prior to making its deferral determination. The parties’ contract needed to provide for final and binding arbitration of the underlying dispute. In other words, the award had to be enforceable\textsuperscript{167} and the arbitration provisions in the contract had to arguably encompass the dispute in question. Deferral would not be precluded if there existed a substantial question as to arbitrability. Arbitrators determine arbitrability.\textsuperscript{168} Further, the charging party had to be able to unilaterally invoke arbitration.

Finally, the arbitration process needed to be quick and fair. Relevant inquiries on this subject included whether, 1) for “pragmatic” reasons, the arbitral procedures failed to allow a quick and fair means of resolving the disputes, 2) whether or not a substantial backlog of cases existed, 3) the cost of arbitration, and 4) any relative disparity of financial positions between the parties.\textsuperscript{169}

\textsuperscript{164}. Revised Memo, \textit{supra} note 161, at 14-15.
\textsuperscript{165}. \textit{Id.} at 15-17.
\textsuperscript{166}. \textit{Id.} at 19.
\textsuperscript{167}. \textit{Id.} at 31-32.
\textsuperscript{168}. \textit{Id.} at 30-31. A contract providing for exhaustion of remedies prior to arbitration would suffice; one which required the other party’s assent prior to invoking the arbitral procedures would not.
\textsuperscript{169}. \textit{Id.} at 32.
B. General American Transportation: An Abrupt Retrenchment

Until 1977 when Board Chairman Miller (part of the original Collyer majority) left the Board in favor of Chairman Murphy, the treatment of Collyer remained fairly stable.

In General American Transportation Corp.,\textsuperscript{170} the Board refused to defer with facts similar to those in National Radio. Members Fanning and Jenkins (authoring the plurality opinion) were joined by Chairman Murphy and formed the majority. Members Penello and Walther (the two remaining from the original Collyer majority) dissented.

The plurality relied upon their dissents in Collyer and subsequent cases and on their longstanding opposition to Collyer in general. In addition, they argued that Collyer had failed, because of its indiscriminate application.\textsuperscript{171}

These views were not new. The concurrence of Chairman Murphy\textsuperscript{172} provided a new viewpoint representing the state of law as it pertained to Collyer, hers being the "swing" vote.

Chairman Murphy concluded that the issues addressed by General American Transportation—whether the employee was discharged because of protected concerted activity in violation of sections 8(a)(3) and (1) of the Act—were not suitable for deferral under Collyer. She would not, however, go as far as Fanning and Jenkins and state that the Board lacked statutory authority to defer any unfair labor practice allegation to arbitration.

According to Murphy, the Board should defer only in two situations: where the dispute is essentially over contract interpretation and where there is no alleged interference with individual employees’ basic rights under Section 7 of the Act. Section 8(a)(5) and 8(b)(3) cases fall “squarely within this category,”\textsuperscript{173} since the issue is whether the conduct is permitted under the contract. In contrast, in section 8(a)(3), (a)(1), (b)(1)(A) and (b)(2) cases, the “determinative issue”\textsuperscript{174} is whether Section 7 rights are violated.

Chairman Murphy focused upon section 1 of the Act\textsuperscript{175} and its stated purpose of protecting workers’ exercise of full freedom of as-

\textsuperscript{170} 228 N.L.R.B. 808, 94 L.R.R.M. 1483 (1977).
\textsuperscript{171} Id. at 810, 94 L.R.R.M. at 1486. The dissent again placed emphasis on the likelihood that deferrals would foster arbitration, arguing that employee statutory rights would be protected by Spielberg review. Id.
\textsuperscript{172} Id. at 810-13, 94 L.R.R.M. at 1486-89.
\textsuperscript{173} Id. at 810, 94 L.R.R.M. at 1486.
\textsuperscript{174} Id. at 811, 94 L.R.R.M. at 1486.
\textsuperscript{175} 29 U.S.C. § 151 (1976).
She would refuse to defer where violations of section 7 rights existed since these rights could not lawfully be ignored by the employer, the union or both. Where collective bargaining had already occurred, and where the issues involved contract interpretation, Murphy would defer. Thus, she equated freedom of association with protection of statutory rights.

*General American Transportation* appeared to be a victory for the employee, since the charge needed only to allege that the employee's section 7 rights were violated to avoid deferral. Of course, this difference could have a distinct effect on the ultimate outcome. As a general rule Board decisions tend to favor the employee more than do arbitral awards.

*General American Transportation* took an unfortunate backward step. The language of the Act, as well as Supreme Court and Board pronouncements, show great willingness to foster arbitration; this points toward increased deferral. The Board's power to defer is discretionary. It is not required to defer, but may do so in an attempt to further the Act's policies. Given present-day economic realities, a rational accommodation of the competing policies of the Act—most notably those of protecting employee section 7 rights and of fostering arbitration—would support increased deferral.

Functioning grievance resolution procedures should be allowed to resolve disputes between the parties whenever possible. The em-

177. *Id.* at 812-13, 94 L.R.R.M. at 1487-88.
179. The increased backlog of cases before the Board points to the efficiency of a deferral policy. Statistics presented to the House Manpower and Housing Subcommittee of the Committee on Government Operations, at hearings on May 9, 1984, described the Board's current case backlog. Chairman Dotson reported that 1,459 cases were pending as of May 1, 1984, while the "historically acceptable" level is only 400 to 500. 638 LAB. L. REP. (CCH) at 3 (May 18, 1984).

Other statistics released by the Government Accounting Office show that this is not just a recent phenomenon. The time to process cases scheduled for ALJ hearings has steadily increased over recent years, and is attributable to increases in the time between issuance of the formal complaint and the ALJ's decision setting forth findings and recommendations. Further, the NLRB's processes have suffered from a burgeoning caseload and a government-wide ceiling on ALJ positions.

The median time required to process an unfair labor practice case from filing of the charge through Board decision stage increased from 327 to 484 days between 1973 and 1980, a 48 percent increase in processing time. The average backlog for each ALJ increased from 5.4 to 19.8 cases between fiscal years 1974 and 1979, and to 29.4 by fiscal year 1981. Board Chairman John H. Fanning noted an estimated record intake of 63,000 cases for 1982 and observed that "sooner or later, the tide of cases is going to swamp us." L. Modjeska, *In Defense of the NLRB*, 33 MERCER L. REV. 851, 862 (citing 106 LAB. REL. REP. (BNA) at 125 (1981)).
phasis should return from the type of dispute (e.g., section 8(a)(5) or 8(a)(3)) to inquiry into whether the arbitral forum could effectively decide the issues. The parties are accustomed to choosing an arbitrator to resolve their disputes, and the selection of an arbitrator by the parties is preferable to the imposition of an A.L.J., chosen without their participation in the process.\textsuperscript{180} Arbitrators generally enjoy a reputation for making just decisions. Why should we assume that the decision will be any less just because contract interpretation spills over into statutory issues?

The decision in \textit{Roy Robinson, Inc.},\textsuperscript{181} issued on the same day as \textit{General American Transportation}, applied Murphy’s \textit{General American Transportation} doctrine and deferral occurred. In \textit{Roy Robinson}, the complaint alleged that the respondent had violated Sections 8(a)(1) and (5) of the Act by refusing to bargain about closing its body shop and discharging certain employees. The contract provided that the “[e]mployer shall have the exclusive right to hire, suspend and discharge his employees.”\textsuperscript{182} Respondent argued that it had the authority to take unilateral action under the agreement. The A.L.J. refused to defer; the majority disagreed, and dismissed the complaint.\textsuperscript{183}

Once again Members Penello and Walther formed the plurality, Members Jenkins and Fanning formed the dissent, and Chairman Murphy, in concurrence, provided the “swing” vote. Murphy believed that the issues were ones requiring contract interpretation which should be deferred under \textit{Collyer}. Since the decision to eliminate the body shop was based upon economic, rather than anti-union considerations, only an interpretation of rights and duties under the contract was necessary. The dispute was particularly suited to arbitration even though the facts in issue could have given rise to charges under sections 8(a)(3) and 8(b)(5) of the Act.\textsuperscript{184}

Following the \textit{General American Transportation} and \textit{Roy Robinson} decisions, General Counsel John S. Irving issued a Memorandum to the Regional Offices regarding handling of \textit{Collyer} issues in light of these two decisions.\textsuperscript{185} The Irving Memo clearly indicated

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\textsuperscript{182} Id. at 831, 94 L.R.R.M. 1474.
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Irving, \textit{Regional Office Handling of Collyer Issues in Light Of The Board’s Decision In General American Transportation}, G.C. Memo 79-36 (May 4, 1979) [hereinafter cited as \textit{Irving Memo}].
\end{flushleft}
that Chairman Murphy's approach would govern the day-to-day application of Collyer at the Regions. As a result, Murphy's analysis became the operative law despite the fact that she was the only one of the five Board members to espouse her view.

Under the Irving Memo, section 8(a)(5) and 8(b)(3) charges would be deferred, provided that they met the traditional Collyer tests. Section 8(a)(3), 8(a)(1), 8(b)(1)(A) and 8(b)(2) charges would not. The Irving Memo also provided for handling of charges which involved both categories. Generally, it instructed the Region to issue a complaint on all issues if the facts under each category of charge were the same, or "inextricably intertwined." If the facts in each were not so closely related, the Board should defer on the 8(a)(5) or 8(b)(3) portions of the case and issue a complaint on the remainder. 186

VI. DUBO: AN ALTERNATIVE TO COLLYER VOLUNTARY DEFERRAL

The Board's policy in Dubo Manufacturing Corp. 187 probably softened the impact of its retrenchment in General American Transportation. In Dubo, the Board announced that it would allow voluntary deferral of cases that, in effect, did not meet Murphy's guidelines. 188 Murphy specifically agreed that although the Board would not compel the parties to arbitrate when there was a section 7 rights violation charge, voluntary arbitration would be allowed. 189

In 1979, General Counsel Irving issued another Memorandum further interpreting the Board's Dubo policy. Irving correctly focused upon the voluntary nature of Dubo deferral. Under the Dubo Memo, the charging party must be given the opportunity to choose between the Board's processes and arbitration. If the charging party chooses the latter, then Dubo applies. Even if the individual wishes to pursue the grievance, deferral will not occur if the Union refuses to prosecute it. 190

The Dubo Memo evidently was in response to confusion created

186. Id. at 4.
188. Id. at 432-33, 53 L.R.R.M. at 1070.
190. Irving, Procedures for Applications of the Dubo Policy to Pending Charges, G.C. Memo 79-36 (May 14, 1979) [hereinafter cited as Dubo Memo].
191. It appears that the Board will also defer where the Union, rather than the Grievant, pursues the grievance. The Grievant is put in a "no-lose" situation. If the Union loses, the Board will not defer, since it was the Grievant who pursued Arbitration. See, Lubbers, Deferral of Charges Under Dubo Manufacturing Company, G.C. Memo 81-39 (July 17, 1981).
Deferral to Arbitration

by Youngstown Sheet and Tube Company.\textsuperscript{192} The A.L.J. found\textsuperscript{193} that General American Transportation had not altered Dubo, but found Youngstown to be factually distinguishable.\textsuperscript{194} Although the grievant pursued his case within the grievance process, "the matter [had] not been submitted to arbitration, and there [was] no particular reason to believe that it could be."\textsuperscript{195} Moreover, the A.L.J. found the filing of the charge to be strong evidence that the grievant had chosen the Board as the forum for resolution of the dispute. Consequently, he found no voluntary choice of the arbitral (as opposed to Board) process by the grievant. Therefore, Dubo did not apply.\textsuperscript{196}

Youngstown may be compared with National Rejectors Industries.\textsuperscript{197} In National Rejectors the union president was discharged and two officers were suspended. The union filed grievances with respect to these actions, but refused to continue the grievance resolution process when the company insisted on skipping the second step of the procedure.\textsuperscript{198} Subsequently, the union brought section 8(a)(3) charges against the company concerning the dismissal and suspensions. Thereafter, the company unilaterally promulgated new work rules for the employees. The rules were put into effect after the union refused to negotiate about them without their discharged president. However, the union informed the company that it would not comply with the new rules and consequently 138 employees were suspended for their failure to do so. The union filed grievances with respect to each suspension. The company suspended enforcement of the new rules when production seriously declined, and requested immediate arbitration of the grievances. The union refused and the company sought relief in the district court. The court ordered the union to submit the grievances to arbitration.\textsuperscript{198.1}

With regard to the charges filed with the Board, the A.L.J. granted a motion of the General Counsel to dismiss the section

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\textsuperscript{193} Opinion adopted by the Board as modified. Youngstown, 235 N.L.R.B. at 572, 98 L.R.R.M. at 1347.
\textsuperscript{194} Id. at 575, 98 L.R.R.M. at 1347.
\textsuperscript{195} Id.
\textsuperscript{196} The distinguishing fact in Youngstown was that no arbitration had taken or would take place.
\textsuperscript{197} 234 N.L.R.B. 251, 97 L.R.R.M. 1142 (1978).
\textsuperscript{198} Id. at 251, 97 L.R.R.M. at 1143. The company requested that further proceedings be conducted at a higher level in the grievance procedure because the three disciplined employees were members of the grievance committee which would have met with management at Step 2.
\textsuperscript{198.1} National Rejectors Indus., 95 L.R.R.M. 2145 (W.D. Ark. 1977).
8(a)(3) charges "in view of the parties' intention to arbitrate." The Board (members Fanning and Jenkins) refused deferral, emphasizing that, as in General American Transportation, there would be "nothing voluntary" about the arbitration. Although the charging party initially sought arbitration, it had steadfastly opposed it under the respondent's modified terms. In fact, the charging party's willingness to arbitrate was based entirely upon the order of a federal district court.

National Rejectors exemplifies the relationship between Collyer and Dubo. Deferral is based upon the concept that the parties have voluntarily agreed to settle their disputes privately, without government interference. Under both Collyer and Dubo, deferral will not occur absent the willingness of the parties to submit their dispute to arbitration (expressed in the collective bargaining agreement). Under Collyer, however, the Board compels the charging party to arbitrate; in Dubo it inquires whether he wishes to do so.

Although not actually addressed in the opinion, National Rejectors implicitly emphasized a fundamental prerequisite: deferral is only appropriate where the collective bargaining and grievance resolution processes are functioning properly. In National Rejectors such was not the case. The collective bargaining relationship had clearly broken down; federal district court intervention was required to compel arbitration. In this situation deferral is inappropriate, since, due to the ineffectiveness of and opposition of the parties to the grievance-resolution process, it ceases to function as a viable procedure. At this point deferral becomes "abdication," as argued by Collyer critics.

In contrast, when the relationship is healthy, deferral is not abdication, but simply a legitimate accommodation of competing statutory policies.

A. Administrative Procedures Effecting Deferral

Since the Region makes the initial determination whether or not to allow Collyer deferral, an understanding of Region procedures is essential to a total comprehension of the Collyer process. These procedures emanate from policy memoranda issued by the General


200. 234 N.L.R.B. at 251, 97 L.R.R.M. at 1143.

201. 234 N.L.R.B. at 252, 97 L.R.R.M. at 1143. Indeed, Collyer and its progeny place great emphasis upon the prerequisite that the parties must be enjoying a stable collective bargaining relationship. See supra text accompanying notes 101-135.

Counsel's office, which instruct Board attorneys as to proper steps in resolving a deferral question.

The Region makes a preliminary determination whether an arguable violation of the Act has occurred. If the evidence appears arguable the deferral issue is addressed immediately.\textsuperscript{203} The Region investigates crucial deferral facts to see if circumstances exist which would block deferral.\textsuperscript{204}

If the Region concludes that \textit{Collyer} deferral is unwarranted, it will still inquire as to whether grievance procedures leading to binding arbitration are being actively pursued. If they are, \textit{Dubo} deferral is appropriate. The respondent is then asked if it will arbitrate the issue, and is informed of the consequences should it refuse. If the respondent responds affirmatively, the Region issues the formal deferral letter. If the respondent does not, the Region completes its investigation and determines the merits of the charge.\textsuperscript{205} After determining the merits of the charge, the region makes two determinations: (1) whether deferral is warranted, and (2) absent deferral, whether a complaint should be issued. Once deferral is indicated, the respondent's willingness to arbitrate is ascertained. If the respondent assents, the formal deferral letter is sent out. Should the respondent fail to express its willingness to arbitrate, then it receives formal notice that a complaint will issue unless it agrees in writing to arbitrate within seven days.\textsuperscript{206} If the respondent agrees to arbitrate, the Region issues the formal deferral letter. If not, a complaint issues, unless the charge is settled.\textsuperscript{207}

The pre-investigation deferral process saves Region time in the cases in which the respondent agrees to arbitrate. The need for a full investigation into and final determination of the merits of the charge is eliminated. Obviously, this requires the respondent's cooperation: it must agree to arbitrate and must also agree to waive any contractual time limitations defense it might have.

Once the Region decides to defer, it monitors the status of a
deferral action every 90 days,\textsuperscript{208} or on motion by a party to the case. Once the arbitrator issues his award, the Region will normally dismiss the deferral charge unless the charging party requests Spielberg review. The Region then reviews the award under the Spielberg standards and subsequently either dismisses the charge or issues a complaint.

Should the Region determine that deferral is not appropriate, and issue a complaint, the respondent may raise the Collyer issue at the unfair labor practice hearing. The Region will not normally object to evidence on Collyer issues unless the respondent's answer fails to raise Collyer as an affirmative defense. The Region should, "where necessary, support Respondent's right to submit evidence relevant" to the deferral issue.\textsuperscript{209} It will also present all evidence relevant to the deferral issue and articulate the grounds upon which it rejected deferral. Should the respondent fail to properly raise the Collyer defense, the Region will oppose any evidence on the issue.\textsuperscript{210}

B. Supreme Court Reaction to Collyer

Collyer received generally favorable comment from the Supreme Court. In William E. Arnold Co. v. Carpenters District Council,\textsuperscript{211} the Supreme Court, in dicta, approved Collyer:

"We believe it to be consistent with the fundamental objectives of Federal law to require the parties . . . to honor their contractual obligations rather than, by casting [their] dispute in statutory terms, to ignore their agreed-upon procedures." [quoting Collyer Insulated Wire, 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971)] The Board's position harmonizes with Congress' articulated concern that, "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . . § 203(d) of the LMRA, 29 U.S.C. § 173(d)."

Members Kennedy and Penello have described the Arnold decision as a specific endorsement of Collyer.\textsuperscript{213} Member Jenkins disagrees, arguing that the Supreme Court's rejection of deferral of Ti-
tle VII rights to arbitration in Gardner-Denver precludes deferral. His contentions do not withstand careful analysis.

Policies underlying Title VII differ greatly from those of the Act. Under the Act, the Supreme Court has elevated arbitration to a favored position, articulating again and again the congressional policy encouraging its use to settle labor disputes. Moreover, Title VII provides no statutory authority parallel to the Taft-Hartley Amendments to the Act which explicitly favor voluntary self-regulation of labor-management relations. Although section 10(a) of the Act grants exclusive jurisdiction to the Board to adjudicate unfair labor practices, the Board is not required to exercise its jurisdiction, especially where the collective bargaining agreement offers a mutually-chosen alternative forum. When these dissimilarities between Title VII and the Act are carefully considered, Gardner-Denver does not preclude deferral by the Board.

C. General American Transportation and Roy Robinson: The Aftermath

After the General American Transportation and Roy Robinson decisions, it soon became clear that Chairman Murphy's concurrence would provide the blueprint for the Board's deferral policy. General Counsel Irving's Memorandum, issued shortly after these decisions, affirmed this fact. This state of affairs has continued without significant change. That this is so is especially curious since she was the only Board member to actually espouse this view, while the four other members disagreed with her. Despite her departure from the Board, the General American Transportation and Roy Robinson decisions remain, more than five years after their issuance, as the definitive Collyer cases. These decisions did not state how the Board should treat deferral where the case contained both deferrable issues (section 8(a)(5) or section 8(b)(3)) and nondeferrable unfair labor practice issues (all other alleged violations of section 8).

219. Section 10(a) of the National Labor Relations Act, 29 U.S.C. § 160(a).
220. See Comment, Collyer Insulated Wire: The NLRB Further Opens the Gate Toward Total Industrial Self-Regulation, 13 SANTA CLARA L. REV. 236, 243 (1972).
221. Irving Memo, supra note 185.
In *Northeast Oklahoma City Manufacturing Co.*\(^{222}\) the employer was charged with violating section 8(a)(5) of the Act by failing to pay a contractual bonus in a timely manner. In addition, the union filed section 8(a)(1) and (3) charges based upon the discharge of 12 employees who struck over the late bonuses. Although the Administrative Law Judge deferred the case, the Board reversed. It rejected the A.L.J.'s finding that the fundamental issue was whether a material breach of the contract had occurred and that the dispute was primarily contractual in nature. The Board found the contractual violations "inextricably related" to violations of employee section 7 rights and refused to defer.\(^{223}\)

Chairman Murphy stated shortly after *General American Transportation* and *Suburban Motor Freight* that she would not automatically refuse to defer simply because an unfair labor practice complaint contained allegations of interference with section 7 rights. According to Murphy, the unfair labor practice charge must be substantive and not merely "derivative" or added to avoid deferral.\(^{224}\) Although the A.L.J.'s decision seemed to be an effort to comport with her wishes, the Board refused to defer. Since *General American Transportation*, close cases tend to be resolved in favor of nondefer-ral, a treatment which seems contrary to the spirit and the letter of her opinions.

*Native Textiles*\(^{225}\) seemed to confirm this trend. In that case, an employee was discharged for altering production records to increase her pay. When the employee continued to act as she had previously done in her capacity as a union area representative, an employer refused to meet with her. According to the employer, the contract stated that only employees could hold that position. Since she was discharged, she no longer qualified as an employee. The employee filed charges that the employer's refusal to bargain charges violated section 8(a)(5). The Board found the right of an employee to designate and be represented by those of his or her own choosing basic to section 7 rights and refused to defer. According to the Board, the issue was not just a matter of contract interpretation, but one of in-


\(^{223}\) Id. See also National Rejectors Indus., 234 N.L.R.B. 251, 97 L.R.R.M. 1142 (1978); Meilman Food Indus., 234 N.L.R.B. 698, 97 L.R.R.M. 1372 (1978). *Irving Memo, supra* note 185, at 4. There, General Counsel Irving instructs the Regions to defer to § 8(a)(5) charges not "inextricably intertwined" with § 8(a)(1) or (3) acts. He instructs a similar course of action with charges that allege § 8(b)(3) allegations and § 8(b)(2) or 8(b)(1)(A) allegations.


terference with basic statutory rights of employees.

In Procter & Gamble, the Board rejected deferral even though there were contractual issues involved. There, the Board believed that deferral would merely fragmentize the issues, since interpretation of the collective bargaining agreement would not fully resolve the basic problem. Similarly, the Board refused to defer in Caterpillar Tractor Co., where the employer was charged with a unilateral change in the company transfer request system, and also with terminating employees because of their union status. In Struthers Wells Corp., the Board deemed deferral necessary since the contract was "clear on its face," and no contractual interpretation was necessary.

Consistent with the Murphy approach, these cases indicated that, absent unusual circumstances, deferral would occur in pure section 8(a)(5) and section 8(b)(3) cases, but in no others. The case of Vesuvius Crucible evidences some of the problems with a mechanical application of the Murphy analysis. In Vesuvius Crucible the complaint alleged that the Respondent violated Sections 8(a)(3) and 8(a)(1) of the Act by denying accrued vacation benefits to striking employees. The majority (consisting of Members Fanning and Jenkins) refused to defer due to the nature of the allegations.

Member Penello dissented, arguing that resolution of the matter turned upon contractual interpretation, and would best be decided by arbitration. Penello correctly noted that whether or not accrued vacation benefits are available is a matter of contract interpretation. The parties' chosen method of grievance resolution—arbitration—would be the proper forum for resolution of this dispute.

The Third Circuit evidently agreed. The Court noted that the employee vacation benefits were eventually recovered through the collective bargaining process. Therefore, the deferral issue was moot, the dispute having been resolved through arbitration. The Court also

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230. Id. at 1171, 102 L.R.R.M. at 1485.
232. Id. at 1284, 105 L.R.R.M. at 1594.
held that absent proof of anti-union motivation or conduct inherently destructive of employee rights, nondiscriminatory refusal to pay vacation benefits to all employees was based on a good faith interpretation of the collective bargaining agreement. In such an instance, the denial is not a violation of the Act. \(^{234}\)

Shortly after President Reagan assumed office, changes in composition of the Board made prediction of Collyer's course difficult. President Reagan's appointees now comprise a majority of the Board. \(^{235}\)

This new Board has reflected the President's conservative policies and in *United Technologies*, \(^{236}\) decided to resurrect and infuse Collyer with renewed life. \(^{237}\) In *United Technologies*, the Board noted with approval Collyer and its extension in *National Radio*, while decrying *General American Transportation* as "emasculat[ing] the Board's deferral policy." \(^{238}\) In short, the Board in *United Technologies* embraced Collyer and *National Radio* and explicitly overruled *General American Transportation*. The Board reasoned that the parties to a collective bargaining agreement have voluntarily decided to create a grievance/arbitration machinery. Consequently, it is inappropriate for the Board processes to intrude upon that machinery prior to an "honest attempt" \(^{239}\) by the parties to resolve their dispute. Permitting the parties to resort to Board processes effectively permits the parties to circumvent their collective bargaining agreement. \(^{240}\)

The Board further criticized the rationale underlying *General American Transportation* and held:

[D]eferral is not akin to abdication. It is merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed. The Board's processes may always be invoked if the arbitral result is inconsistent with the standards of *Spielberg*. \(^{241}\)

As General Counsel Lubbers stated in his Memorandum, \(^{242}\) the

\(^{234}\) *Id.* at 168.

\(^{235}\) President Reagan's Appointees were Chairman Dotson, and members Dennis and Hunter.


\(^{237}\) *Id.*

\(^{238}\) *Id.* at 559, 115 L.R.R.M. at 1051.

\(^{239}\) *Id.*

\(^{240}\) *Id.*

\(^{241}\) *Id.* at 560, 115 L.R.R.M. at 1052 (footnote omitted).

\(^{242}\) Lubbers, *Guideline Memorandum Concerning United Technologies Corporation, GC Memo 84-5* (March 6, 1984) [hereinafter cited as *Lubbers Memo*].
Board’s decision in United Technologies extended its deferral doctrine to cases involving sections 8(a)(1), 8(a)(3), 8(a)(5), 8(b)(1)(A), 8(b)(2) and 8(b)(3). Although United Technologies extended the scope of deferral, several principles of existing deferral law apparently remain unchanged.\(^{244}\) First, an unfair labor practice case is only deferrable if the grievance/arbitration provisions of the agreement “clearly encompass” the dispute.\(^{246}\) Thus, in determining the appropriateness of deferral, the contract must be examined to determine whether a provision of the contract governs the dispute. Second, Board law remains unchanged inasmuch as the respondent seeking deferral must be willing to arbitrate the dispute and waive any timeliness problems with the grievance/arbitration clause.\(^{246}\)

Third, the Board, in United Technologies, adhered to existing Board law by noting that deferral is “inappropriate when respondent’s conduct constitutes a rejection of the principles of collective bargaining.”\(^{247}\) For example, deferral is inappropriate in those cases in which the respondent has repudiated the collective bargaining agreement, or in which the respondent’s conduct is consciously designed to interfere with utilization of the grievance arbitration machinery.\(^{248}\)

An issue left unresolved by the Board’s decision in United Technologies is the extent to which the Board will consider a respondent’s past history of unfair labor practice violations in determining the appropriateness of deferral. The Lubbers Memo noted that the key question will be whether respondent’s history of violations so undermines the parties’ grievance and arbitration machinery that the machinery cannot be relied upon to function properly to resolve a dispute fairly.\(^{249}\)

Another troublesome question raised by the Lubbers Memo involves the application of United Technologies where an individual employee, not a union, files the charge. The Lubbers Memo notes that if a charge is filed by an individual, and the case is otherwise deferrable, then the Region should defer the case. If the union declines to take the grievance through the grievance procedure or to submit it to arbitration, the Region must determine whether the union’s refusal violates its duty of fair representation. Moreover, the

\(^{243}\) Id. at 1. In addition, it continued to defer to those involving § 8(b)(1)(B).

\(^{244}\) See supra text accompanying notes 203-10.

\(^{245}\) Lubbers Memo, supra note 242, at 2.

\(^{246}\) Id.

\(^{247}\) Id.

\(^{248}\) Id. at 3.

\(^{249}\) Id. at 3-4.
Region must determine whether the refusal by the union is motivated solely by the union's desire to avoid deferral. If neither is the case, then the charge is deferrable. 250

VII. DEFERRAL: SOME OBSERVATIONS & RECOMMENDATIONS

A. Observations

1. Necessity of Increased Deferral

The Board's decisions in Olin and United Technologies are both wise and practical. The government should continue to place greater emphasis upon encouraging parties to resolve labor disputes through their private, agreed-upon methods, and not resort to federal government intervention through the Board. 251

There exist a plethora of legal arguments regarding the relative merits of increased or decreased deferral to arbitration. There is no need to restate them, since one thing is certain: the law does not require one conclusion. As previously discussed, 252 Congress enacted two competing statutory sections with respect to deferral. Section 10(a), 253 articulating the Board's jurisdiction to preside over unfair labor practice issues, states: "This power shall not be affected by any other means of adjudication or prevention that has been or may be established by agreement, law or otherwise. . . ." 254 Section 203(d), 255 reflecting a competing view, states: "Final adjustment by a method agreed upon by the parties is declared to be the desired method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." 256

Accommodation of the two provisions is essential. The result of that accommodation depends upon the relative importance placed upon protection of the individual grievant's section 7 rights. At the same time, stability in labor relations brought about by increased utilization of a process founded upon these same section 7 rights is important. 257 Will the Board continue to view its ultimate purpose as

250. Id. at 4-5.
251. This section draws heavily upon Irving, Arbitration and the National Labor Relations Board, 35 ARB. J. 5-9 (1980).
252. See supra text accompanying note 11.
254. Id.
256. Id.
maximizing employee’s section 7 rights, or will it focus upon protecting commerce by encouraging resolution through collective bargaining?

Harsh realities mandate an accommodation in favor of the latter, and warrant the Board’s decisions in Olin and in United Technologies. The Board’s expanding caseload,258 coupled with reductions in the federal budget, make it imperative that the Board avail itself of every opportunity to manage its affairs efficiently. Moreover, the consensus of current political philosophy seems to favor reduced government intervention into matters which can be resolved privately, including private labor disputes.268

The original Collyer majority, as recognized in United Technologies, stood for the principle that many disputes involving statutory issues should not automatically be decided by the Board’s overloaded processes. Some matters, however, are not susceptible to private resolution. They are laden with violations of statutory unfair labor practice,260 and it would not be proper to submit them to arbitration. Where the action of one of the disputants “strikes at the heart and foundation”261 of the collective bargaining relationship, deferral should not occur. By contrast, where there are working collective bargaining relationships, the parties should be encouraged whenever possible to utilize their own private dispute resolution methods to resolve their own problems.

In such cases, resort to arbitration will adequately resolve the disputes and restrict governmental involvement in a functioning labor relationship. The evidence normally will be thoroughly presented before a neutral arbitrator chosen by the parties, whose very existence stems from the agreement. Just as we presume that the arbitrator will remain true to the contract, we must presume that he will not disregard the basic principles and policies of the Act.262 In the rare instances when he does, Spielberg review remains available.

Limited Board resources, due to the contracting federal budget, require the Board to ration its limited revenues. Increased deferral would free scarce agency resources in favor of those areas requiring closer Board scrutiny, such as supervision of organization activities.

258. Id. at 99; See also supra note 155 and accompanying text. (For additional comments regarding the Board’s caseload, see J. Penello, The NLRB’s Misplaced Priorities, 30 LAB. L.J. 3-9 (1979)).

259. See Sands, supra note 257, at 99.


261. Id.


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The policies of the Board would be better served by supervising budding collective bargaining relationships, than by resolving minor disputes in already flourishing collective bargaining relationships, especially when there is an adequate alternative forum for resolution of the issues.263

2. The Settlement Value of Deferral

Others argue that since the Board must spend time supervising deferral, no conservation of agency resources occurs. Although some preliminary examination must occur, a great amount of time will be saved if the cases are deferred (and, in most instances, never reviewed by the Board) without going beyond the investigatory stage. Moreover, if the parties know that certain unfair labor practice charges will ultimately be deferred, many may never be filed. Of course, this effect is nearly impossible to measure, but at least one former General Counsel believes it to be significant.264

3. Continued Vitality of Dubo

As stated earlier, the availability of Dubo deferral lessened the impact of General American Transportation. Cases containing other then section 8(a)(5) allegations would be deferred, provided the charging party agreed.265

As recognized in the Lubbers Memo, United Technologies did not discuss Dubo.266 Because it did not, Lubbers concluded that Dubo retains its vitality where the parties voluntarily use the grievance/arbitration machinery.267 Dubo may be distinguished from Collyer, since in the former, no compulsion exists—the parties voluntarily forego use of the Board’s processes. This voluntary resort to bargained-for dispute resolution procedures should be encouraged.

4. Deferral as a Pro-Management Policy

Since its decision in 1971, Collyer has gradually come to connote pro-management and anti-union predisposition.268 United Technologies may be interpreted in the same manner. This view is not well-founded. The Board has a merit rating of approximately thirty-

263. The Board’s failure to defer in discipline cases appears especially troubling, since typically more than 60% of the Board’s caseload involves discipline because of union or concerted activity. See 45 NLRB ANN. REP. 243 (1980).

264. See Irving, supra note 251, at 7.


266. See Lubbers Memo, supra note 242.

267. Id.

268. See Sands, supra note 257, at 98.
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five percent,²⁶⁹ that is, for every ten charges filed, only three and one-half reach the complaint stage. The rest are dismissed and the individual’s rights never reach adjudication. By contrast, if the Board Collyerizes these cases, they will be tried before an arbitrator, and subjected to Spielberg review. So, Collyerization provides added benefit to union members, and added protection to their individual rights. This seems especially significant, since many Collyer opponents base their objections primarily upon concerns for individual rights.

Although conventional wisdom holds that Board decisions favor the worker more often than do arbitral decisions, unions should consider the advantages offered by Collyerization. Once a complaint is issued, several months pass before the A.L.J. renders his decision, with subsequent Board decisions often taking more than a year. Routinely, arbitral awards are issued long before an A.L.J. would even hear the case, especially in discharge and discipline cases.²⁷⁰

The relative merits of Board versus arbitral review may provide little solace to an employee who, although wrongfully discharged, must wait one and one-half years or longer for vindication by the Board. Often this long period so disrupts his life that the eventual Board decision in his favor provides a truly hollow victory.

B. Recommendations

The Olin and United Technologies decisions reflect the current Administration’s stated attitudes against government intrusion into private affairs. These decisions will be evaluated, and recommendations for the further development of deferral are offered in the following sections.

1. The Necessity of Increased Stability in the Deferral Area.

It seems that the only thing certain in the deferral area has been change. Shifting Board membership has caused both Collyer and Spielberg to undergo almost continual metamorphoses. The fluctuation is explained by the sharp philosophical differences among Board members in an area where decisions are based more upon policy than clear statutory mandate. This serves to undermine many of the benefits that should result from a homogenous deferral policy. The uncertainty in the area itself remains a persuasive argument in opposition to Collyer deferral. Shifting Board membership and the

²⁶⁹. See Modjeska, supra note 179, at 858.
²⁷⁰. See supra note 179 and accompanying text.
constant expansion and contraction of Board deferral policies sharply diminish litigation result predictability. Criteria for deferral should be clearly defined, so that employers, unions and employees know what to expect, and so that the Regional Offices may handle unfair labor practice complaints consistently.

Continued skirmishes concerning Collyer and Spielberg unnecessarilly increase multi-forum litigation before arbitrators and the Board, and in the courts. Such distended litigation is inefficient. It requires that unnecessary time be spent by company personnel, unions, arbitrators and officials in various forums. Much can be gained by allowing flexible applications of legal principles to the myriad of situations that do arise. To date, however, deferral seems to have been far too flexible and too erratic.

A major objective of deferral is reduction of litigation time and expense. The thrust of any deferral policy should be toward formulating rules to this end. At this juncture, the inability of the Board to establish, with some degree of permanence, basic ground rules upon which parties can order their affairs severely undermines the value of deferral. The Olin and United Technologies decisions may signal a movement toward stability.

2. United Technologies Correctly Returned to the Rule of National Radio

In United Technologies, the Board correctly reverted to the rule of National Radio, thus restricting General American Transportation. General American Transportation and subsequent decisions offered too narrow a view on the efficacy of Collyer. When concurrent jurisdiction exists between the Board and arbitration, the type of dispute (e.g. section 8(a)(3), section 8(a)(5)) should not be nearly so important as arbitration's ability to decide the issue in a just manner.

Deferral should not be refused simply because the complaint is couched in terms of a section 8(a)(3) allegation. This result is far too mechanical. It unnecessarily intrudes into stable collective bargaining relationships and does little to encourage the parties to re-

solve their own differences. The Board should take a pragmatic approach and ask the basic question: "Is the dispute susceptible to resolution in the arbitral forum?" If so, deferral should occur. *Vesuvius Crucible* provides one example of how this mechanical approach unnecessarily precluded deferral. Under *General American Transportation*, these also would not have been deferred.

Discharge and discipline cases also illustrate the simplistic nature of the Murphy approach. Deferral to arbitration in these cases as *United Technologies* again sanctions, will effectively encourage industrial self-regulation. Arbitrators routinely decide these cases employing the familiar "just cause" standard. Under *General American Transportation*, the Board would not defer.

Refusal to defer presupposes that an arbitrator who finds anti-union motivation for the discharge or discipline may still find the activity supportable under the contract. The assumption is not valid. Under universal arbitral law, anti-union motivation is not just cause for discharge or discipline. Arbitrators should be allowed to decide these cases, even where concurrent statutory issues exist. Deferral yields the desired benefit: agreed-upon dispute resolution which is not repugnant to the Act.

Discharge and discipline cases also exemplify the efficiency of deferral. In these cases, there may be a number of issues involved, including the existence of anti-union motivation, together with pure contractual issues. Where the contract issues are resolved in one forum (arbitration) and the statutory issues in another (unfair labor practice proceedings), identical facts are presented and litigated in each forum at significant added time and expense to the parties (who must appear in both forums) and to the government. In contrast, deferral results in litigation and resolution of all the issues in arbitration, with only minimal Board participation.

The *National Radio* approach, as reaffirmed in *United Technologies*, returns the emphasis to an examination of the arbitral mechanism. When concurrent jurisdiction exists and it appears that the arbitrator can decide the issue, the Board should allow him to do so. The Board retains the ultimate authority to review and disregard the

276. 228 N.L.R.B. at 831, 94 L.R.R.M. at 1474.
decision, if it is repugnant to the Act.\textsuperscript{279} In such a case, the parties have used the agreed upon dispute resolution procedure, fostering collective bargaining and promoting stable labor relations. The unsettling influence of government intervention is reduced.

3. Special Problems in Refusal to Bargain Cases.

Section 8(a)(5) refusal to bargain cases (which are currently subject to deferral under both *Collyer* and *Spielberg*), also present an opportunity to lessen pressure upon the Board’s processes through use of deferral. In discharge and discipline cases, the “just cause” arbitral standard implicitly embraces section 8(a)(5).\textsuperscript{280} In the section 8(a)(5) cases, the contractual and statutory issues may not be so directly parallel.

The situation might occur where Board law differs, or appears to differ, from the collective bargaining agreement. In that instance, the arbitrator, whose authority derives from, and therefore is limited by, the contract, must adhere to its terms.\textsuperscript{281} He should first attempt to harmonize Board law and the contract. In the rare instances where he is unable to do so, the contract must control.

Another problem in section 8(a)(5) cases relates to the source of the arbitrator’s authority. Generally, the grievance will raise both statutory and contractual issues. The arbitrator should be encouraged to decide both, and deferral should occur, providing it passes *Spielberg* scrutiny. If the contract is silent, where does the arbitrator derive his authority to apply the Act? Normally, the arbitrator can find at least some contractual basis for his decision, and then move forward and address the statutory issue.\textsuperscript{282} If the arbitrator has no authority, or declines to rule on the statutory issue, the Board should look to the award and the factual determinations made. If the award implicitly resolves the statutory question—and is

\textsuperscript{279} See infra text accompanying notes 294-332.

\textsuperscript{280} See supra text accompanying notes 275-76.

\textsuperscript{281} See, e.g., George Koch Sons, Inc., 199 N.L.R.B. 166, 81 L.R.R.M. 1195 (1972) (indicates that where the law and conflict are not in agreement, the Board presumes that the arbitrator will follow the contract. In these instances, *Collyer* deferral will not occur, since it is presumed that the award will not be consistent with *Spielberg*.) \textit{Id.} at 168, 81 L.R.R.M. at 1198.

\textsuperscript{282} See Liberal Market, Inc., 264 N.L.R.B. 807, 111 L.R.R.M. 1326, 1327 (1982). The arbitrator presumably also addressing contractual issues, found (citing Board precedent) that no duty to bargain existed with respect to the decision to close a portion of the company operations. The Board deferred, finding that the award could not be deemed “unreasonable” or “as having substantially violated published Board policy.” \textit{Id.} at 817, 111 L.R.R.M. at 1327-28.
Deferral to Arbitration

not repugnant—it should be upheld.\textsuperscript{283} If it does not, but the arbitrator makes factual findings which bear upon the unfair labor practice issue, then these should control. This allows the Board to use the determinations made in arbitration, and prevents multiple litigation of the same factual issues to the greatest degree possible.


The Board's decision in \textit{Olin} correctly overruled \textit{Propoco} and \textit{Suburban Motor Freight}. As previously discussed,\textsuperscript{284} although the arbitrator in \textit{Propoco} expressly found that the grievant-charging party was "not discharged because of union activity or any other conduct protected by the Act," the Board refused to defer.\textsuperscript{285} Non-deferral occurred because the statutory issues were not fully litigated before the arbitrator.

\textit{Olin}, as foreshadowed by the dissents of Chairman Van de Water and Member Hunter in \textit{Propoco}, provided a sound deferral policy by requiring a return to broader deferral standards rather than to the restrictive standards followed in \textit{Propoco}.\textsuperscript{286}

Following the Board's partial return to \textit{Electronic Reproduction}\textsuperscript{287} it will now presume that the arbitrator adequately determined all related claims unless "unusual circumstances are shown which demonstrate that there were bona fide reasons . . . which caused the failure to introduce such evidence at the arbitration proceeding."\textsuperscript{288} This presumption should not only apply to evidence that was actually presented in the unfair labor practice claim, but also to other evidence which the parties had an opportunity to present, but did not. In \textit{Olin}, the Board noted, however, that where the grievant had the opportunity to present an issue to an arbitrator, but did not, deferral would not occur.\textsuperscript{289}

An estoppel policy, similar to that first articulated in \textit{Electronic Reproduction}, which would require parties to plead and prove their

\begin{itemize}
  \item \textsuperscript{283} This is the approach adopted by the Board in \textit{Electronic Reproduction}, to which \textit{Olin} partially returned. \textit{See infra} text accompanying notes 284-93.
  \item \textsuperscript{284} \textit{See supra} text accompanying notes 91-97.
  \item \textsuperscript{286} \textit{Id.} at 146, 110 L.R.R.M. at 1503.
  \item \textsuperscript{287} The Board's decision in \textit{Olin} did not mark a complete return to \textit{Electronic Reproduction}. Although it placed the burden on the General Counsel to prove the award unworthy of deferral, it did not "resurrect" that part of the case which would have required only the "opportunity" to present the unfair labor practice issue to the arbitrator to warrant deferral. \textit{Olin Corp.}, 268 N.L.R.B. 573, 575, 115 L.R.R.M. 1056, 1059 n. 10 (1984).
  \item \textsuperscript{288} \textit{Id.}
  \item \textsuperscript{289} 268 N.L.R.B. at 574, 115 L.R.R.M. at 1057.
\end{itemize}
unfair labor practice contentions in the initial arbitration proceed- ings has much to recommend it. Evidence not presented to the arbitrator would then be excluded from consideration by the Board. The policy would prohibit "two bites at the apple," and the concomitant waste of time and money caused by dual litigation.

This approach also precludes the present Board intervention into disputes previously litigated and resolved in the arbitral forum. It would restrict multiple litigation of the same facts and prevents parties from disregarding their previous agreement to submit all their disputes to arbitration.

Further, arbitrators should be required to resolve factual issues and apply Board precedent exactly as would the Board. Such a rigid approach requires unacceptable Board intrusion into arbitration, and transforms arbitrators into "de facto administrative law judges," under severe Board scrutiny. These standards appear far too restrictive to be of value, and to be consistent with the statutory policy favoring collective bargaining by encouraging arbitration. Instead, it should be presumed that arbitrators consider all of the facts and render a decision consistent with the Act, disposing of all the issues, unless it clearly appears otherwise.

VIII. TOWARD A STABLE AND WORKABLE REPUGNANCY STANDARD

A. The Eroding Repugnancy Standard.

In Spielberg, the Board indicated that deferral would not occur where the result was clearly repugnant to the purposes and policies of the Act. The Board stated that it would defer absent clear repugnancy, even if it would have decided the case differently. Thus, the Board could not give de novo review to an issue previously resolved by arbitration since little progress toward peaceful resolution of industrial disputes would result.

291. Id. at 761, 87 L.R.R.M. at 1215 (1974). Propoco seemed to encourage multi-forum litigation by indicating that the decision to raise statutory issues before the arbitrator is solely that of the grievant. See supra note 93 and accompanying text.
293. Id.
Early decisions, relying on Spielberg, adhered to these guidelines, and the Board overturned only those arbitral awards which were clearly in derogation of the Act's basic policies (such as the discharge of one employee for filing a charge with the Board\textsuperscript{296}) or where the award perpetrated a clearly discriminatory employer activity.\textsuperscript{297} As the years progressed, however, the Board created numerous exceptions justifying refusal to accept arbitral awards. For example, the Board refused to defer to arbitral awards where the remedy did not comport with the Board's normal backpay award procedures.\textsuperscript{298}

Gradually, the Board gravitated toward \textit{de novo} review (ostensibly under the repugnancy standard). The Board appeared unwilling to defer when the award did not coincide with the shifting tides of Board precedent,\textsuperscript{299} or where it simply did not agree with the result.\textsuperscript{300} The Board even questioned an arbitrator's findings of fact.\textsuperscript{301}

Subsequent decisions indicated that the Board (Members Fanning, Jenkins and Zimmerman) would continue close scrutiny of arbitral awards under Spielberg. In Babcock \& Wilcox,\textsuperscript{302} the Board refused to defer, concluding that the arbitrator did not resolve the unfair labor practice issue despite his finding that there was "no evidence of discharge because of the Grievant's Union activities."\textsuperscript{303} Chairman Van de Water's dissent argued against such a restrictive review. He stated:

This reason for not deferring is clearly contrary to Douglas Aircraft Company v. N.L.R.B., [sic] 609 F.2d 352, 355, 108 L.R.R.M. 2811 (9th Cir. 1979), denying enforcement of the Board's decision not to defer, 234 NLRB [sic] 578, 97 L.R.R.M. 1242 (1978), wherein the court stated, "Overzealous dissection of [arbitration] opinions by the NLRB, as well as by the courts, can deter the writing of full opinions, and it should not be assumed that an arbitrator has snubbed the Act any more than that he has exceeded his authority."\textsuperscript{304}

\textsuperscript{297} Hribar Trucking, Inc., 166 N.L.R.B. 745, 65 L.R.R.M. 1555 (1967).
\textsuperscript{301} Illinois Bell Telephone Co., 221 N.L.R.B. 989, 91 L.R.R.M. 116 (1975).
\textsuperscript{302} 263 N.L.R.B. 405, 111 L.R.R.M. 1064 (1982).
\textsuperscript{303} \textit{Id.} at 405, 111 L.R.R.M. at 1065.
\textsuperscript{304} \textit{Id.} at 406, 111 L.R.R.M. at 1066.
In their dissents, Member Hunter and Chairman Van de Water continued to espouse better-reasoned applications of Spielberg review principles. In *U.S. Steel Corp.*, the Board refused to defer because the award "contraven[ed] unfair labor practice principles of the Act," because "the arbitrator's mode of analysis [was] unacceptable" and because the award [did] not comport with our unfair labor practice decisions." Van de Water argued that the majority applied an improper deferral standard. Since the arbitrator had at least "a reasonable basis" for his decision and since his award was susceptible to a "permissible interpretation," it should be upheld.

In *Consolidation Coal Co.*, the Board refused to defer where an arbitrator's decision punished union officers, but not rank and file participants, for violation of a no-strike clause. Member Hunter argued that deferral was appropriate, "in light of [the] decisional history." He reasoned that since both the Board and the Circuits have continued to vacillate in their treatment of the issue of harsher discipline to union officers in violation of a no-strike clause, the award could not be characterized as clearly repugnant to the Act. Member Hunter showed evident approval for *Inland Steel Co.*, which held that the award must be contrary to "a clear and consistent line of Board and judicial precedent" to fail the repugnancy test.

B. Pet, Inc.: Movement Toward A More Rational Policy?

A recent decision, *Pet, Inc.*, appears to resolve the Board's policy of close scrutiny under Spielberg. In *Pet*, the Board deferred to an arbitral award where the Employer was charged with violating Sections 8(a)(5) and 8(a)(3) of the Act by discharging em-

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306. Id. at 82, 111 L.R.R.M. at 1205.
307. Id. See also Inland Steel Co., 264 N.L.R.B. 84, 86, 111 L.R.R.M. 1222, 1224 (1982) (Chairman Van de Water and Member Hunter, dissenting).
308. 263 N.L.R.B. 1306, 111 L.R.R.M. 1205 (1982), (Member Zimmerman, concurring, and Chairman Van de Water and Member Hunter, dissenting).
309. Id. at 1317, 111 L.R.R.M. at 1216-17. See infra notes 329-30 and accompanying text.
311. Id. at 1091, 111 L.R.R.M. at 1194.
313. Actually, it may have indicated only a change in Member Zimmerman's approach. In *Pet*, Members Fanning and Jenkins dissented, leaving Zimmerman's as the swing vote. This time he aligned himself with Chairman Van de Water and Member Hunter, whose approaches, like those of Fanning and Jenkins, have remained constant. Perhaps Zimmerman's realignment was based more upon the resolution of the conflict and impasse issues rather than upon approval of the deferral standards set out in *Pet*. See supra notes 302-10 and accompanying text.
ployees who struck to protest implementation of work rules.

The arbitrator found no conflict between the contract and the new work rules. However, he found that although Pet engaged in good-faith bargaining during negotiations and had made certain concessions, once impasse was reached, Pet was free to implement the new work rules. The strike had not been caused by Pet’s unfair labor practices, therefore, the company was justified in discharging employees who violated the no-strike clause of the contract.

The Board deferred, since the arbitrator’s decision concerning the absence of conflict was “a reasonable and arguable one which [did] not appear to be clearly at odds with Board precedent or otherwise repugnant to the Act.” In addition, an arguable basis existed for the arbitrator’s decision concerning the impasse. Therefore, deferral was appropriate. According to Pet, the fact that the Board might have decided the case differently is not grounds for non-deferral, since the Board’s function is not to decide whether the arbitrator made the correct decision, but rather whether the decision is repugnant to the Act. This approach was affirmed in Olin, where the Board stated that to be repugnant an award must not be susceptible to an interpretation consistent with the Act.

C. Formulation of the Standard.

The Board should reverse its pre-Pet and pre-Olin tendency toward de novo review under the repugnancy standard. Rather, the Board should refuse to defer only where awards appear improper under the standards set out by the original Spielberg decision. Any other result derogates the policies underlying deferral. As Chairman Van de Water stated in Propoco: “We think it clear that submission to grievance and arbitration proceedings of disputes which might involve unfair labor practices would be substantially discouraged if the disputants thought the Board would give de novo consideration to the issue which the arbitrator might resolve.”

Thus, the Board should continue the approach of Olin and Pet and require more than mere Board disagreement with an arbitrator’s factual or legal findings before overturning the decision. Such a stan-

315. Id. at 1289, 111 L.R.R.M. at 1497.
316. Id.
317. Id. at 1290, 111 L.R.R.M. at 1497.
318. Id. at 1290, 111 L.R.R.M. at 1497-98.
dard requires that a decision be overturned only when it is repugnant to the purposes and policies of the Act. As first recognized in Olin, an award can only be overturned if it is "palpably wrong." Unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, the Board should defer.

The term "clearly repugnant" in the Spielberg context should, as suggested by Chairman Van de Water "be restrictively defined and broadly applied." As when the Courts examine an arbitral award, the Board should presume the award to be valid. If the arbitrator has a reasonable basis for his decision, or if an arbitral award may be subject to two interpretations, one of which is consistent with the fundamental principles and policies of the Act, the award should be considered not clearly repugnant. Ample judicial authority and the original Spielberg opinion support this interpretation.

Except in rare instances where the arbitrator's remedy perpetuates a violation of the Act, the Board should refuse to inquire into the remedy fashioned by the arbitrator. The Board should not intrude into otherwise acceptable awards simply because the back pay or other aspects of the award do not mirror the remedy normally granted by the Board. Outside of the deferral context, arbitrators using their own discretion fashion awards based upon their interpretation of the issues, and generally accepted industrial common law. The parties contract for and routinely use a forum applying these principles. The Board should not disrupt this arrangement.

Additionally, the Board must remain cognizant of settled arbitral law. In only the rarest and most compelling circumstances should it overturn an award which comports with longstanding arbitral principles. This is necessary to preserve continuity and stability in the forum which deferral seeks to encourage—arbitration. The rewards derived from upholding arbitration by supporting generally accepted arbitral principles "outweigh a need for uniformity of result

325. E.g., NLRB v. Pincus Bros., Inc., 620 F.2d 367 (3d Cir. 1980); Douglas Aircraft Co. v. NLRB, 609 F.2d 352 (9th Cir. 1979); Associated Press v. NLRB, 492 F.2d 662 (D.C. Cir. 1974).
326. 112 N.L.R.B. at 1082, 36 L.R.R.M. at 1153.
or a correct resolution of the dispute in every case. The parties are not injured by [deferral] because it is the parties themselves who have selected and agreed to be bound by the arbitration process.\textsuperscript{328}

In Consolidation Coal Co.,\textsuperscript{329} Member Hunter correctly pointed out the Board's failure to adhere to this principle. As Hunter explained, "arbitrators have recognized almost without exception that stewards and usually other union officials have a higher duty to abide by and enforce a no-strike obligation than rank-and-file employees.\textsuperscript{330} Although the Board is not bound by arbitral precedent, its rejection of industrial common law absent a compelling justification "is neither good sense nor good law."\textsuperscript{331}

In sum, to be repugnant, an award must be palpably wrong. The award must be directly contrary: (1) to a consistent line of Board decisions, (2) to settled judicial pronouncements,\textsuperscript{333} (3) to a fundamental policy of the Act.

IX. ADDITIONAL RECOMMENDATIONS

A. Use of Presumptions.

Certain other procedural innovations will assist the Board in applying its deferral policy more rationally. To achieve this result, the Board should establish certain presumptions to aid it in applying Spielberg standards. Discharge and discipline cases provide an excellent example of how this might be accomplished.

The Board should establish a rebuttable presumption that an arbitrator's award has considered all reasons for the discharge, including those involving unfair labor practice issues. Doing so would implement Chairman Van de Water's and the Ninth Circuit's admonition that "it should not be assumed that an arbitrator has snubbed

\textsuperscript{328} Pincus Bros., 620 F.2d at 374.
\textsuperscript{329} 263 N.L.R.B. 1306, 111 L.R.R.M. 1205 (1982).
\textsuperscript{330} Id. at 1320-21, 111 L.R.R.M. at 1220 (citations omitted).
\textsuperscript{331} Id. Subsequent to Consolidation Coal, the United States Supreme Court, in Metropolitan Edison Co., 460 U.S. 693 (1983), held that an employer may not impose more severe sanctions on Union officials than rank-and-file employees for participating in an unlawful strike where the Union officials do not take a leadership role in the strike. This Supreme Court decision on point represents the type of "compelling justification" which would require rejection of arbitral precedent. Still, Member Hunter's premise that absent clear and direct contrary precedent the Board should not reject the common law of a forum chosen by parties remains correct.

\textsuperscript{332} Although arbitrators should be encouraged to harmonize their decisions with exterior law, if the two are irreconcilable, absent unusual circumstances, the contract should control. See Sovern, When Should Arbitrators Follow Federal Law?, 25 Nat'l Acad. of Arb. 29, 30-38 (1970).
the Act any more than that he has exceeded his authority.” 333

Such a presumption would place the obligation upon the charging party to raise all issues before the arbitrator. Also, the presumption thwarts the common strategy under existing law, of intentionally withholding the unfair labor practice charge from arbitration. Further, if the charging party is dissatisfied with the arbitral award, he may have the same evidence heard before the Board.

The suggested presumption would present arbitrators with a challenge requiring the parties’ assistance. Arbitrators cannot render awards which will satisfy Spielberg unless the parties raise and litigate the common contractual and statutory issues. The charging party and his union bear the burden here, since failure to raise the issue at arbitration could preclude its adjudication by the Board. 334 Without the parties’ cooperation the issues will not be adjudicated, since arbitrators should not address the statutory issues on their own motion. 335

B. Modification of the Deferral Letter

In Collyerized cases, the Board should explain to the parties their responsibilities to raise the issues before the arbitrator. Consequently, its Collyer deferral letter should clearly and carefully explain to both sides that all issues must be presented to the arbitrator.

The deferral letter should also require, as a preliminary matter, that the parties inquire of prospective arbitrators whether they will consent to arbitrate a case which includes both contractual and unfair labor practice issues. It should further require as a condition precedent to deferral that the arbitrator agree to resolution of all (including statutory) issues prior to acceptance of the case. 336 This prevents an arbitrator from impeding the Collyer process by refusing to decide the statutory issues put before him. 337


334. See supra text accompanying notes 287-93. Others may argue that this approach may leave an employee inadequately represented by his Union at the grievance hearing with his only recourse being that of a duty of fair representation suit. To prevail, he must prove more than mere negligence on the part of the Union. See, e.g., Vaca v. Sipes, 386 U.S. 171 (1967). In that event, the employee-charging party seeking to avoid deferral would assert that the arbitral proceedings were not fair and regular.

335. See Sands, supra note 257, at 117.

336. The parties should also select an Arbitrator who is competent to resolve the issues presented. In addition, perhaps Arbitrators should seek training to insure their competence. See Zack, Arbitration Training: A Matter of Institutional Survival, 34 Lab. L.J. 488 (1983).

337. For an example of an arbitral award addressing both contractual and statutory issues, see Keebler Co., 75 Lab. Arb. (BNA) 975 (1980).

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X. CONCLUSION

Deferral's history of inconsistency parallels the changing composition of the Board. The recent restructuring of the Board membership presents the opportunity for it to articulate a clear and workable policy which accommodates both the Board's statutory mandates and practical realities. The Board should set the basic ground rules under which arbitration may take place. The Board should not emphasize the type of dispute and the specific statutory section under which it falls or the concurrence of both contractual and statutory issues which preclude settlement by arbitration alone. Rather, the Board should formulate a less mechanical and more pragmatic approach to deferral.

The first question to be asked is whether the dispute can be resolved in an arbitral forum. Second, is the resolution clearly "not repugnant" to the act? Third, is the resolution consistent with Spielberg? Arbitral awards should be presumed valid, shifting the burden upon the charging party to contest the efficacy and legitimacy of the settlement. Properly utilized, deferral can assume a role of increasing prominence in the Board's activities, and will enhance its ability to promote the ongoing dispute resolution processes important to industrial self-regulation.