CHAPTER 4

THE NLRB AND ARBITRATION: SOME IMPRESSIONS OF THE PRACTICAL EFFECT OF THE BOARD'S *COLLYER* POLICY UPON ARBITRATORS AND ARBITRATION

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I. Introduction

Throughout the history of the National Labor Relations Board, there has been a hospitable acceptance of the arbitration process as a practical method of resolving disputes between labor and management. This acceptance reflects the national policy defined in Section 203 (d) of the National Labor Relations Act: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

That acceptance, in terms of Board inaction upon an otherwise meritorious charge of a violation of Section 8 of the NLRA, has been attended by a debate over when and under what circumstances the Board should eschew its own authority and responsibility to resolve unfair labor practices and defer to the privately negotiated arbitration process for the settlement of labor-management disputes. The Board's decision in *Collyer Insulated Wire Co.*[1] and subsequent cases[2] have defined the "when" and some

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[1] 192 NLRB 837, 77 LRRM 1931 (1971).

[2] See generally *Arbitration Deferral Policy Under Collyer—Revised Guidelines*, memorandum of NLRB General Counsel dated May 10, 1973 (hereinafter referred to as *Collyer—Revised Guidelines*), 83 LRR 41. The Board's *Collyer* doctrine has received court approval in *Nabisco, Inc.* v. *NLRB*, 479 F.2d 770, 83 LRRM 2612 (2d Cir. 1973); *Associated Press* v. *NLRB*, 492 F.2d 662, 85 LRRM 2440 (D.C.Cir. 1974); *IBEW Local 2188 v. NLRB* (Western Electric Co.) 494 F.2d 1087, 85 LRRM 2576 (D.C.Cir. 1974); and *Provision House Workers Union Local 274* v. *NLRB* (Urban Patman, Inc.), 493 F.2d 1249, 85 LRRM 2863 (9th Cir. 1974). Both the Board's *Collyer* and *Spielberg* doctrines may, however, be affected to an extent as yet unclear by a unanimous decision of the Supreme Court rejecting deferral to an arbitration award in a suit under Title VII of the Civil Rights Act of 1964. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974).

of the "circumstances under which," and it is these definitions and their practical effect upon arbitration and arbitrators that will be examined here.

II. Brief History

A brief review of history may be helpful.

In 1955, the Board decided *Spielberg Manufacturing Co.*,[3] which set standards necessary for Board deferral to an issued arbitrator's award. In that case the arbitration proceeding had been completed and an arbitrator's award entered before the Board considered the unfair labor practice case. The Board declined to pass upon the merits of the case, but, instead, dismissed the complaint because (1) all parties had agreed to be bound by the results of the arbitration, (2) the proceedings before the arbitrator had been fair and regular, and (3) the conclusions of the arbitration were not clearly repugnant to the purposes and policies of the Act. Subsequently, the Board made it clear that deferral was to be limited to those cases where the arbitrator considered and ruled upon the unfair labor practice issues.[4]

Thirty Board volumes later came the *Dubo* [5] case. There the Board held that because the parties were already subject to a court order directing arbitration of their dispute via their contractual grievance and arbitration procedure, it would defer action in the alleged unfair labor practice until the contract procedures had run their course. After the contract procedures had run their course, the Board, in a subsequent decision,[6] reviewed the arbitration proceeding and rejected the arbitration award on the ground it was inadequate as a basis for Board deferral. The "*Dubo* doctrine" established no new standards for ultimate deferral but did render temporary deferral appropriate because the parties were moving toward an arbitral resolution of their dispute.

Then, starting in August 1971, came *Collyer* and its progeny. The *Collyer* doctrine, stripped of its exceptions and qualifications, simply holds that even though no arbitration award has is-

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[3] 112 NLRB 1080, 36 LRRM 1152 (1955).
[4] See, *e.g.*, *Raytheon Co.*, 140 NLRB 883, 52 LRRM 1129 (1963); *Airco Industrial Gases*, 195 NLRB No. 120, 79 LRRM 1467 (1972).
[5] *Dubo Mfg. Corp.*, 142 NLRB 431, 53 LRRM 1070 (1963).
[6] *Dubo Mfg. Corp.*, 148 NLRB 1114, 57 LRRM 1111 (1964).

sued and even though the parties are not proceeding to resolve their dispute pursuant to the grievance arbitration procedure of their collective bargaining agreement, the Board will temporarily defer consideration of an unfair labor practice case where there is in existence an agreed-upon grievance arbitration procedure to which the parties have bound themselves, the use of which by the parties is reasonably likely to resolve the unfair labor practice issue in a manner consistent with the Board's *Spielberg* standards. Following the use of this procedure by the parties, again the Board, as in *Dubo,* will review the arbitrator's award against those *Spielberg* standards. As with *Dubo* and *Spielberg,* if the standards are met, the case will be dismissed; if they are not, the Board will decide the unfair labor practice case without regard to the arbitrator's decision or award.

Thus, the Board in its *Collyer* doctrine has decided "when" it will defer (even before resort to contractual procedures), but has established no new review standards and maintains those of *Spielberg:* (1) All parties agree to be bound. (2) The proceedings were fair and regular. (3) The arbitrator considered and decided the unfair labor practice issue. (4) The arbitrator's decision is not repugnant to the purposes and policies of the National Labor Relations Act.

III. Impact of *Collyer* on Arbitration

A. The Use of Arbitration

Accordingly, in assessing the impact of *Collyer* upon arbitration, one should, I believe, review the impact of *Spielberg* which set the still-existing standards. In so doing, I believe we can project at least one nonimpact area.

Based on the experience since *Spielberg,* which has shown a tremendous rise in the use of arbitration and arbitrators in resolving labor-management disputes, I cannot envision that *Collyer* will significantly reduce the extensive use of arbitration. I see a number of reasons for this prediction:

First, it didn't happen after *Spielberg,* which set the Board policy of deferral.

Second, *Collyer* doesn't affect enough otherwise arbitrable issues to motivate parties to scrap arbitration. Thus, for *Collyer* to

apply, the dispute between the parties must constitute an unfair labor practice as well as a dispute reconcilable under the contractual arbitration procedure. Thousands of the latter exist for each of the former, thus motivating only the shortsighted to bow out of arbitration for fear of Board deferral.

Third, resort by parties to a collective bargaining relationship to their agreed-upon private dispute settlement procedure is more conducive than is public litigation to establishing and maintaining a workable collective bargaining relationship. Perhaps the most important reason for this is that private arbitration, as compared to litigation before the NLRB, is less likely to develop hardened public positions on issues, for the parties are not involved in public charges, a public investigation, a public hearing, and a public decision of the government.

Fourth, with the Board's deferral policy now operating more systematically since *Collyer,* more cases will be arbitrated, rather than being deferred by the parties to the Board's process. In fact, during the past few months the regional offices of the Board have maintained in *Collyer* deferral status more than 300 cases at any one point in time. Thus, I submit that arbitrators in the labor-management sphere may well be as busy, if not busier, than ever.

However, there is one distinction between *Spielberg* and *Collyer* that may well have a practical impact upon the arbitration process: that is, the timing of the Board's deferral. Under *Spielberg,* the parties and the arbitrator never knew for sure whether the case they were arbitrating would ever be before the Board, nor had they any indication of whether or not the Board might find merit to a charge based upon the same facts. Under *Collyer,* the matter has been presented clearly, and at least the General Counsel's office has found some merit to the charge pending before it in a deferred status. It is the practical impact of this timing in the deferral process that we will discuss further.

B. The Effect of General Counsel or Board Deferral Action Itself Upon the Arbitrator

Clearly, an arbitrator should make up his own mind as to whether or not the arguments of the parties presented to him have merit. The issue has been raised, however, as to what effect Board or General Counsel deferral of a case should have, or does in fact have, upon the arbitrator. Thus, when the Board orders a

Collyer deferral, it has before it a case in which the General Counsel's office has found merit. Further, in the early days of *Collyer,* the General Counsel's office would defer cases administratively only after finding that the charge meritoriously alleged a violation of the Act.[7] Because the General Counsel's policy was public knowledge and because he wins close to 80 percent of his complaint cases, a legitimate suggestion was made that arbitrators ought to be, and indeed were, influenced by a Board or General Counsel decision to defer "merit" cases.

I suggest, however, that arbitrators should not be so influenced in terms of the result they reach, and that it has not been the intent of the Board to have its action represent a prejudgment of the upcoming arbitration. Quite the contrary. The *Collyer—Revised Guidelines* of the General Counsel recognized this problem and sought to ameliorate it by providing for deferral prior to a "merit" finding in the unfair labor practice case under investigation.[8]

Furthermore, whether or not there is a statutory violation often depends upon the arbitrator's interpretation of the collective bargaining agreement, so that the arbitrator's independent judgment may render unmeritorious altogether a charge earlier thought to be meritorious. Such was the Board's view of the *Collyer* case itself.

Finally, the arbitrator disserves the parties when he allows another's judgment to dictate his result, for it is the arbitrator before whom the parties have agreed to place their disputes, not the NLRB.

C. The Defense of Untimeliness

Under *Collyer* and subsequent decisions, the respondent in the unfair labor practice case before the Board must agree to arbitrate the dispute that is the subject of the case before the Board will defer or "Collyerize" it, even when that willingness requires that the respondent waive any claim or defense that the contractual time limits for submission of the dispute to the arbitrator have expired. Failure to so waive will result in no Board deferral and a Board decision on the underlying unfair labor

[7] See *Arbitration Deferral Policy Under Collyer,* memorandum of NLRB General Counsel dated Feb. 28, 1972, released Mar. 10, 1972 (summarized at 79 LRR 239).
[8] 83 LRR 41, notes 17 and 61 and accompanying text.

practice.[9] Therefore, if the defense of untimeliness is asserted at the commencement of an arbitration proceeding and not promptly rejected by the arbitrator, the charging party may well persuade the Board to hear and decide his case without regard to the ongoing arbitration. Arbitrators and parties should be sensitive to this and seek prompt resolution of such an issue.

D. Information Issues

As we all know since the *Acme Industrial Co.*[10] case, employers and unions have been obligated to furnish to the other side relevant information that is necessary to the processing of a grievance to arbitration. With the Board's policy in *Collyer,* which fosters and indeed requires the use of arbitration in place of the statutory processes of the Board, it would seem reasonable to assume that the Board will support even more vigorously the parties' right to relevant and necessary information.[11] Thus, the Board has recently held that unless the parties have waived the right to such information in their contract, the Board would decide complaint cases under Section 8 (a) (5) of the Act (and presumably under 8 (b) (3)) dealing with the obligation to furnish information.[12] In essence, then, the Board, in support of the arbitration process and consistent with its *Collyer* doctrine, acts as a discovery mechanism in arbitration cases.

However, this discovery process remains as slow and cumbersome as is the Board's process in any unfair labor practice case. It still requires an average of over 300 days to process a case from charge to Board order and approximately another year for court enforcement of that Board order. Unless the information sought is essential, therefore, the process may be of little practical use to those who seek submission of their cases to arbitration in less than two years from the event giving rise to the dispute. If, however, the underlying dispute is also an unfair labor practice which would otherwise be "Collyerable," and if the party seeking

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[9] See *Collyer—Revised Guidelines,* 83 LRR 41, at note 67 and accompanying text. See also *Detroit Edison Co.,* 206 NLRB No. 116, 84 LRRM 1385 (1973).

[10] *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 64 LRRM 2069 (1967).

[11] See generally *Collyer—Revised Guidelines,* 83 LRR 41, notes 21-26 and accompanying text.

[12] *American Standard, Inc.,* 203 NLRB No. 169, 83 LRRM 1245 (1973); *United Aircraft Corp.,* 204 NLRB No. 133, 83 LRRM 1411 (1973). And see *Collyer Deferral in Disputes over the Refusal to Furnish Information for Grievance Processing or Contract Administration,* memorandum of NLRB General Counsel dated Dec. 18, 1973, 1973 DLR 12, A-2.

information is denied access thereto in violation of the "duty to bargain," [13] the General Counsel's policy is clear that both cases will be consolidated and tried before the Board, with no deferral of the underlying dispute.[14] Our limited experience with this procedure indicates that where respondents before us would prefer arbitration rather than Board review of the underlying case, the information is normally provided upon our administrative determination that the refusal to provide is complaint-worthy.

The consequence of this discussion is that, at least in the limited area last described, the parties may well be able to come to the arbitration better prepared than may have been true in the past. However, an even more significant impact upon arbitration and its process may flow from the *Collyer* doctrine in the "duty to furnish information" area.

Assume, for instance, a case in which a request for the production of relevant and necessary information is denied by the requested party and the arbitrator is called upon to rule upon that denial. This may occur, for example, in either (1) a situation where the underlying dispute is not an unfair labor practice and the parties don't pursue Board litigation to resolve the issue, or (2) where the Board has deferred the information issue because the contract contains clauses bearing upon whether the parties have waived the right to such information. Does *Collyer* and, more importantly, does *Spielberg* place any special decision-making burden upon the arbitrator? I believe that they do.

The *Spielberg* standards require, as you recall, that the arbitration proceeding be "fair and regular" and that the holding not be "repugnant to the purposes and policies of the Act." Assume, taking first, a case in which the underlying dispute being arbitrated is also an unfair labor practice. If the arbitrator declines to require the production of information that the Board would require produced under the statutory duty to bargain (8 (a) (5) or 8 (b) (3)) or requires its production but does not afford the recipient party reasonable time to evaluate the information so that he can make effective use of it in the arbitration, then I believe

[13] Such a violation of Sections 8 (a) (5) or 8 (b) (3) contemplates, of course, that there has been no waiver of the right to the information in the agreement of the parties.

[14] See *Collyer—Revised Guidelines*, 83 LRR 41, at note 25 and accompanying text.

the Board would be warranted in denying deferral to the ultimate arbitration award on the ground that the proceeding had not been "fair and regular." [15] In another instance—that in which the underlying dispute may not involve unfair labor practice issues—although that underlying dispute may not be considered by the Board because it does not constitute an unfair labor practice, the Board, in reviewing under its *Spielberg* glasses the case where the arbitrator disallowed either the information or a reasonable time for evaluation and use, might well consider the arbitrator's decision on the information issue to be repugnant to the purposes and policies of the Act (at least in those cases where it considered the information vital to the charging party's presentation of its arbitration case), and it might fashion an award requiring the respondent to furnish the information and resubmit the case to another arbitration proceeding.[16]

Such results may be compelled by the national policy and, indeed, the Board's *Collyer* policy of deferrence to the arbitration process for the settlement of labor-management disputes. Further, if dual and wasteful litigation is to be avoided, arbitrators must, I submit, decide these issues with care and with due regard for the Board law on the duty to furnish relevant and necessary information in support of the arbitration process.

E. The Need for Prompt Consideration and Decision

The Board in *Collyer,* as part of its rationale for deferral, described arbitration as a "*quick* and fair means" for resolving disputes.[17] Board members [18] have made comments that could

[15] See *Collyer—Revised Guidelines,* 83 LRR 41, at note 23.

[16] Admittedly, this remedy would require more of the respondent than merely a performance of the act, the omission of which was found to violate the Act. But some support for such a remedy may be found, by way of analogy, in the Board's remedial treatment of a union's unlawful refusal to process an employee's grievance. A remedy merely requiring the union to attempt to process the grievance is rendered meaningless if the employer is no longer willing to accept and process the grievance. To provide for this contingency, the Board has provided that where processing of the grievance is no longer possible, even though for reasons outside the union's control, the union shall instead reimburse the employee for any losses he may have sustained as a result of the union's failure to process his grievance. *Automotive Plating Corp.,* 183 NLRB No. 131, 74 LRRM 1396 (1970).

[17] See *Collyer—Revised Guidelines,* 83 LRR 41 at note 54 and accompanying text.

[18] See NLRB Chairman Edward B. Miller, "Little Collyer Grows Up," speech before the Industrial Relations Research Association, Sept. 12, 1972, Oakland, Calif. (NLRB Release No. 1255); "A Case Story," address before Conference of Western States Employer Association Executives, Aug. 27, 1971, Pebble Beach, Calif.; "Deferral to Arbitration—Temperance or Abstinence," remarks before the Georgia Bar Association, May 4, 1973, Atlanta, Ga.

be construed to mean that a failure of the process to resolve the dispute quickly may warrant a reassertion of Board jurisdiction over the dispute and a Board decision even though the "Collyered" case may be before the arbitrator. Again, in order to avoid duplicative litigation, parties and arbitrators should be sensitive to the need to present, consider, and decide their cases expeditiously, which, of course, is nothing more than a restatement of the philosophy that should guide them in any event in the interest of building and maintaining effective labor-management relations.[19]

F. The Requirement That the Arbitrator Consider and Decide the Unfair Labor Practice Issue

Admittedly, there is some division of opinion among arbitrators between those who consider themselves confined to the "four corners of the agreement" and the submission of the dispute to them and those who consider themselves justified—or compelled—to consider relevant public labor policy and law which may be literally extraneous to the provisions of the agreement and submission.[20] The *Collyer* doctrine, as it has evolved, may have a real impact upon this division either because of the actions of the parties or because arbitrators who see their roles as final dispute resolvers, rather than merely decision recommenders prior to Board adjudication of the same claim, will act with public law in mind.

Let me be more specific, again in the context of *Collyer* where the parties and the arbitrator are aware, at the time of their participation in the arbitration process, that the same case is pending before the Board and stands to be reviewed under the *Spielberg* standards. As discussed earlier, the *Collyer* policy explicitly preserves the right of either party to the Board case to secure further Board review of the matter upon a showing that the arbitration award does not meet the *Spielberg* standards. Further, as we have noted, the *Spielberg* standards include the requirement that the

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[19] See "Code of Professional Responsibility for Labor Arbitrators," Preliminary Committee Draft, II. A. 11, 84 LRR 245, at 253 (Nov. 1, 1973).

[20] See Sovern, "When Should Arbitrators Follow Federal Law?" in *Arbitration and the Expanding Role of Neutrals*, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), a discussion of which is reported in *Labor Relations Yearbook—1970* (Washington: BNA Books, 1971), 150 at 151-152. But compare *Alexander* v. *Gardner-Denver*, 7 FEP Cases 81, at 87, 89 (1974).

arbitrator consider and decide the unfair labor practice issue before the Board.

The first issue is: Should an arbitrator do so, regardless of the position of the parties before him? Of course, each arbitrator must make his own judgment which, I suspect, will have to include a practical evaluation of whether or not his award, in the circumstances of the case and the positions of the parties, will be acceptable enough to the parties that further Board review will be sought by neither. However, as a matter of personal opinion only, and despite the Supreme Court's indications to the contrary in *Alexander* v. *Gardner-Denver*,[21] I believe that arbitrators have greater warrant for deciding statutory issues now, primarily because it is now known to all that the same matter is before the Board, unlike the circumstances which prevailed post-*Spielberg* and pre-*Collyer*.

The second issue is whether the parties will be more likely to submit the statutory issues to the arbitrator, compelling him to decide them whether or not he subscribes to the "four corners of the agreement" school of thought. Recent Board cases would seem to indicate that careful parties to a deferred Board case will be so inclined. Earlier in the *Collyer* decision, the Board had predicated its deferral to arbitration in part on the respondent's willingness to arbitrate. The Board also made clear its view that, because of the availability of arbitration procedures for resolution of the dispute, the Board should not rule on or remedy the alleged violation. In this context, the Board's order clearly implies its intended course if it is shown that an earlier deferred dispute has not been "submitted promptly to arbitration"; to wit, if the respondent's unwillingness to arbitrate is responsible for this state of affairs, the Board will reassert its jurisdiction and resolve the dispute; if the charging party is at fault in failing to make reasonable efforts to carry the dispute to arbitration, the Board will relinquish its limited jurisdiction and dismiss the complaint in its entirety. The Board has thus not attempted to promote a federal policy favoring arbitration by attempting to compel the parties to embark on arbitration, as does a court in the enforcement of arbitration agreements. Rather, the Board, while leaving each party perfectly free to refuse arbitration, en-

[21] *Supra* note 2.

forces its policy by indirection, that is, by making the willingness or unwillingness of the parties to arbitrate the determinant of its own willingness to rule on or dismiss the complaint. The Board has encouraged, rather than compelled, the respondent's willingness to arbitrate by making arbitration an alternative to formal Board proceedings. The charging party is similarly encouraged to invoke arbitration by the Board's refusal to provide an alternative forum and by guaranteeing to the charging party the Board's assertion of jurisdiction if the respondent ultimately obstructs arbitration or the arbitration award fails to meet *Spielberg* standards.

The *Spielberg* policy reflects a similar policy of effectuation. In the usual *Spielberg* case, the failure of an award to meet *Spielberg* standards occasions the Board's intervention and resolution of the dispute. The Board contemplates a similar assertion of jurisdiction in cases in which arbitration follows Board deferral under the *Collyer* policy, but the award fails to meet the *Spielberg* standards. The Board indicated as much in the *Collyer* case by retaining jurisdiction for the purpose of effectuating the *Spielberg* policy; the Board plainly contemplated that upon issuance of an award, and timely motion, it would ascertain whether the award meets the *Spielberg* standards.

However, the basic premise of the *Collyer* policy would seem to suggest an important difference in the Board's reaction to a deficient arbitration award which follows *Collyer* deferral. In the usual *Spielberg* case, upon finding that the award does not meet the *Spielberg* standards, the Board proceeds to a resolution of the unfair labor practice issues. But in a "Collyered" case, the Board may well predicate its subsequent reassertion of jurisdiction on the charging party's having made reasonable efforts to invoke the arbitration machinery of the contract for resolution of the dispute consistent with *Spielberg*. If the deficiency of the resulting award is attributable to the charging party—that is, if the moving party who carried the burden of securing arbitral resolution of the dispute failed to make reasonable efforts to ensure that the award meets the *Spielberg* standards—it may well be that the Board will find that the charging party has not met fully the conditions the Board has made prerequisite to its reassertion of jurisdiction. These considerations lead to the conclusion that in the application of the *Spielberg* standards in the "Collyered" case,

the Board will turn its decision whether to reassert its jurisdiction not only on whether the *Spielberg* standards are met, but on whether the failure of the award to measure up is attributable to the charging party.

This conclusion is reflected in the Board's recent decision in *National Radio Co.*,[22] denying the charging union's motion for further consideration in a case the Board had earlier deferred for arbitration.[23] The complaint in that case alleged, *inter alia,* that respondent violated Section 8 (a) (5) "by unilaterally imposing a condition that union representatives record and report their movements in the plant while processing grievances on compensated time" and Section 8 (a) (3) by disciplining and then discharging an employee for his refusal to comply with this condition. The Board deferred under the *Collyer* policy, issuing its usual order. After the arbitration award issued, the charging union moved the Board for further consideration, contending that the *Spielberg* standards had not been met because "the arbitrator did not pass on the contract issue raised by the 8 (a) (5) allegation of the complaint relating to the propriety of the initial promulgation of the reporting rule. . . ."

It is difficult to ascertain whether the Board found that the arbitrator ruled on the 8 (a) (5) issue of the alleged unilateral promulgation of the rule. But more important to the present analysis are the following observations of the Board:

> "Moreover, as the arbitrator noted, the Charging Party initially did not ask him to resolve the issue of the propriety of the manner in which the rule had been promulgated in the arbitration and subsequently did not avail itself of the unopposed opportunity to expand the scope of the arbitration procedure to include that issue. Finally, at no time prior to the issuance of the award did the Board receive a timely motion from the Charging Party that any issue as to the propriety of the rule or the nature of its promulgation had not been resolved by amicable settlement in the grievance procedure or had not been submitted for arbitration."

In the accompanying footnote the Board observed *inter alia,* that:

> "It would not further the Federal policy of 'encouraging practices fundamental to the friendly adjustment of industrial disputes' to

[22] 205 NLRB No. 112, 84 LRRM 1105 (1973).
[23] *National Radio Co.,* 198 NLRB No. 1, 80 LRRM 1718 (1972).

step in and reassert jurisdiction at this late date because the Charging Party failed to have the arbitrator resolve an issue which it now claims is determinative."

The foregoing warrants at least a general observation as to the position in which the Board may be placing the parties in a case deferred under the *Collyer* policy. In such a case, if the charging party hopes to avoid dismissal of its charge "in its entirety" and to preserve the possibility of favorable Board action in the event the award should fail the *Spielberg* test, the charging party not only must attempt to invoke the arbitration procedures, but must make every effort to ensure that it is not its own delinquencies that lead to the inadequacies of the award. A respondent that hopes to avoid the Board's assertion of jurisdiction not only must similarly cooperate for a reasonable time in the charging party's efforts to invoke arbitration, but must try to ensure that the ultimate award is not deficient for any reason other than those that may be attributed to the charging party.

Based upon this analysis, I submit that prudent arbitration advocates will present the statutory issues in a "Collyered" case which they might well have left unsubmitted in the past and that arbitrators accordingly will either be required, or more clearly privileged, to expand their decision references beyond the corners of the collective bargaining agreement.

The third pertinent issue is what impact this requirement will have upon the process of arbitration; that is, will verbatim transcripts, extensive legal briefs, and detailed written decisions become more prevalent, thus complicating, extending, and making more expensive the arbitration process? Again, the impact of Board deferral prior to arbitration makes this question even more valid today than it was in the past when *Spielberg* review was only a remote possibility.

The most candid answer I can give to the question is "probably," but as far as the Board is concerned, it doesn't need to happen. Both the Board and the General Counsel's office have been called upon to give *Spielberg* review to arbitration cases where there have been no transcripts, no briefs, and no articulated rationale for the arbitrator's award. We are able to accomplish that, legitimately I believe, by eliciting statements from the parties as to what evidence and arguments were presented to the arbitrator,

obtaining documents submitted at the proceeding, and then assuming that the arbitrator considered and made his decision based upon that which was before him.[24]

There is a caveat to arbitrators in this area of inquiry. Where a conflict exists between the parties as to what was presented or considered, it is possible that the arbitrator may be called by the parties or by the General Counsel to give statements and/or testify in a matter before the Board.[25] Such a possibility may influence some arbitrators to articulate more fully their written decision.

G. *The Issue of the Award's Repugnancy to the Purposes and Policies of the Act*

Perhaps the most difficult requirement of *Spielberg* for the arbitrator, again magnified by prearbitration *Collyer* deferral, is that his award may not be repugnant to the purposes and policies of the National Labor Relations Act.

In general terms, this requirement does not mean that the Board must necessarily agree with the arbitrator's final decision. Thus, he may make fact findings with which the Board might well disagree, but which disagreement will not prompt independent Board consideration of the merits of the case. However, the requirement generally does compel an arbitrator to apply correctly Board law upon the facts found, and failure to do so will result in no Board deferral.

Perhaps some examples will best put this requirement in perspective.

In the recent case of *Radio Television Technical School, Inc.*,[26] the Board refused to defer to an arbitration award in which the arbitrator held that a Christmas bonus arrangement

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[24] *Gulf States Asphalt Co.*, 200 NLRB No. 100, 82 LRRM 1008 (1972); *McLean Trucking Co.* 202 NLRB No. 102, 82 LRRM 1652 (1973); *Terminal Transport Co.*, 185 NLRB 672, 75 LRRM 1130 (1970). However, the Board clearly prefers that arbitrators plainly state the issues they are deciding. *Gulf States Asphalt Co., supra.* See also *Yourga Trucking, Inc.*, 197 NLRB No. 130, 80 LRRM 1498 (1972), where the procedure of proof was discussed by the Board at p. 3 of the slip opinion.

[25] In such cases the arbitrator should, I submit, consider his actions in light of the "Code of Professional Responsibility for Labor Arbitrators," 84 LRR 245, at note 19, and II. A. 3, at 248-249, and II. D. 4, at 258, and other applicable codes or canons.

[26] 199 NLRB No. 85, 81 LRRM 1296 (1972).

which the employer had continued for years was not "wages" and could therefore be unilaterally terminated at will by the employer. The Board considered the merits of this case and found a violation of the Act because the arbitrator had "ignored a long line of Board and Court precedent" which clearly established that, as a matter of law, a Christmas bonus system such as that found by the arbitrator to have existed did constitute wages which could not be unilaterally terminated by the employer.

In a recent case presented to the General Counsel, complaint was authorized despite an arbitrator's award that was found to be repugnant to the Act. In that case, the employer, many years before, had unilaterally instituted a wage-incentive plan that was never incorporated into any of its collective bargaining agreements with the incumbent union. When the employer unilaterally abolished the plan in 1972, the union protested and the employer defended its action on the ground that the union had waived its right to bargain on the subject and that, in any event, the plan was not a mandatory bargaining subject. The parties thereafter brought the dispute before an arbitrator, and the union filed a refusal-to-bargain charge. The regional director deferred further proceedings on the charge pending outcome of the arbitration.

The arbitrator issued an award finding that the plan was a bargainable subject and that the union had not waived its right to bargain with respect to the plan, but further found that the employer could terminate the plan unilaterally, under a very broad and unspecific contractual management-rights clause. We found the ultimate conclusion to be so inconsistent with the legal consequences of his finding that the employer had not met his bargaining obligation, as to render the award repugnant to the Act. Thus, on one hand the arbitrator found a bargaining obligation, but on the other hand found that the employer did not violate 8 (a) (5) when it terminated the incentive plan without bargaining. Thus, the arbitrator's conclusion that a bargaining obligation was still in existence was inconsistent with his finding that the parties had agreed in the management-rights clause that the employer would have the right to take unilateral action with reference to the incentive plan.

In order for the arbitrator's decision to have been internally consistent, he would have to have found that the broad manage-

ment-rights-clause language was intended merely as a waiver of the union's right to bargain over only the termination of the existing plan, but was also intended to preserve the union's right to bargain generally about wage-incentive plans. Although it might be argued that the arbitrator found just that, he did not say so, and, further, to have so interpreted broad management-rights language (without reference to bargaining discussions or history on the subject) to preclude a broad waiver but support a very limited and specific waiver falling within the broader category not found, rendered his decision internally inconsistent and counter to the Act. Accordingly, complaint was authorized.[27]

Finally, by way of example, we recently issued a complaint upon a finding that an arbitrator's award was repugnant to the Act, based ultimately upon an inadequate remedy. The case involved the discharge of a number of striking employees, who allegedly had struck in violation of a no-strike clause. That clause could have been interpreted to sanction a strike during the contract term until the company met the condition precedent of notifying the union of the strike, which would then render the strike thereafter in breach of the contract and would privilege company discharge of the strikers.[28] The discharge cases were arbitrated, and the arbitrator found that the company had not given notice of the strike to the union prior to discharging the striking employees. However, the arbitrator found that the company would otherwise have had cause to discipline the employees under a provision allowing discipline for "just cause," the arbitrator apparently determining that strike activity during a collective bargaining agreement (even though not in violation of the "no strike" clause) constituted just cause for discipline. The arbitrator then went on to find that discharge was too harsh a penalty and instead ordered reinstatement of the strikers after a one year's suspension without pay.

Our analysis of the case and the award indicated that the arbitrator had allowed a one year's suspension of employees who had engaged in a protected strike, a result repugnant to basic Board law. The fact that the employees were all reinstated was not sufficient to remedy the violation, in our judgment. Accordingly, we

[27] See *Report of Case-Handling Developments at NLRB*, 84 LRR 270, at 270.
[28] See *Wagoner Transportation Co.*, 177 NLRB 452, 73 LRRM 1179 (1969).

issued a complaint seeking the one year's back pay, which we deemed necessary to meet the requirements of the Act.[29]

In summary, these three examples indicate a need for arbitrators to apply Board law accurately; to guard against inconsistent conclusions in their decisions, one of which conclusions would render their award contrary to Board law; and to view carefully their remedies to ensure that employee rights under the Act are protected by the arbitrator's award.

The practical consequences of this "nonrepugnancy" *Spielberg* requirement in a "Collyered" case may well be to propel arbitrators into detailed consideration of Board law and precedent. It may well be that parties, in these relatively few "Collyered" arbitrations, will find themselves, more than ever before, seeking arbitrators known to be schooled in the intricacies of the National Labor Relations Act. Further, it is reasonable to assume that the parties may be more inclined to submit detailed briefs covering Board law, or that arbitrators will request such assistance from the parties.

It is submitted, however, that in almost all cases, and particularly in the standard employee discipline or discharge cases which continue to comprise the bulk of Board and arbitration cases, a formalized and legalistic consideration of these basically factual disputes will not be required. Thus, although the rare and complex case may involve detailed legal analysis, one would hope that the parties will exercise good judgment in holding those to a bare minimum.

IV. Conclusion

It has not been the purpose of this discussion to urge legalistic formality in the arbitration process. Quite the contrary. I believe that it would be unfortunate if the Board's *Collyer* policy were to add additional impetus to the present trend toward formality. Realistically, *Collyer* may have some impact in that direction. However, as detailed herein, it need not, even in the relatively few "Collyered" cases, if parties understand the Board's standards

[29] Since the complaint was authorized in this case, the Board has indicated that an arbitration award may be repugnant to the Act if it does not provide for the reimbursement of lost wages which the Board would have awarded in the same circumstances. *Ohio Ferro-Alloy Corp.*, 209 NLRB No. 77, 85 LRRM 1466 (1974), note 2.

of *Spielberg* review and the process of that review function. I hope that this analysis may have been of some aid in that understanding.

Comment—

JAMES E. BARDEN*

What does it mean to be "Collyerized"?

By now most of you have an idea what that means in the technical or textbook sense. Today, General Counsel Nash has outlined for you some of the practical effects of "Collyerization" as he views them from his vantage point with the NLRB. I want to respond briefly in three areas regarding the effects of the *Collyer* [1] decision on the arbitration process, and more specifically on the arbitrator's job from the viewpoint of a lawyer representing one of the parties to a labor dispute—the employer-company.

Will "Collyerization" Speed Along the Trend Toward Formality in Arbitration Proceedings?

Probably so—at least in those cases that are deferred by the NLRB.

Advocates of arbitration traditionally pay homage to the informal nature of the process as though it were the prime result to be achieved in an arbitration proceeding. The informal nature of the proceedings has, for the most part, served us well. In too many instances, however, informality has been used as an excuse for an unprepared approach to the hearing or a carelessly conducted fact-finding effort. Thus, informality is not necessarily a good thing in and of itself, and it certainly can become a disadvantage is misused.

Indeed, it is the very characteristic of informality that, in my opinion, helped persuade the Supreme Court not to defer to arbitration in the recently decided *Gardner-Denver* case.[2] Speaking for a unanimous Supreme Court in refusing to defer to arbitration, Mr. Justice Powell stated:

> "Indeed it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for

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1 *Collyer Insulated Wire Co.*, 192 NLRB No. 150 (1971).

2 *Alexander* v. *Gardner-Denver Co.*, 42 LW 4214 (Feb. 19, 1974).

dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts."[3]

The *Collyer* deferral policy cannot help but make arbitration a more formal and complex procedure—at least in those cases that have been so deferred. This factor was acknowledged by the Court in the *Gardner-Denver* case when it stated, ". . . a standard which adequately insured effectuation of Title VII rights in the arbitral forum would tend to make arbitration a procedurally complex, expensive and time-consuming process."[4]

However, I do not view increasing formality of the proceedings with great alarm. In the first place, some formality or form to the proceedings is a desirable thing if it means (1) more careful attention to the fairness and regularity of the proceedings, (2) more judicious and careful results, and (3) more cognizance of the law and its impact. Furthermore, if the proceedings were somewhat formalized, will not the Board in later reviewing the arbitrator's decision under the *Spielberg*[5] criteria have more confidence in the proceedings and the rationale of the result?

The real challenge to your skill as arbitrators and to ours as participants is to strike the balance, making the arbitration process meet the *Collyer* deferral standards without allowing it to become overly complex and inflexibly formalized. It would be ironic if the *Collyer* deferral policy, which was intended to highlight the primacy of arbitration, became the burden that reduced arbitration to a point of formalized ineffectiveness.

Does a *Collyer* Deferral Create Any Presumptions in the Arbitration Forum?

One of the early troubling aspects of the deferral policy was the fact that only after the General Counsel's office had fully investigated and determined that the charging party's complaint had merit did it even discuss the possibility of deferral to arbitration.[6] Aware of the investigative experience and expertise possessed by

[3] *Id.* at 4220.
[4] *Id.* at 4221.
[5] *Spielberg Manufacturing Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955).
[6] *Arbitration Deferral Policy Under Collyer*, memorandum of NLRB General Counsel dated Feb. 28, 1972; 79 LRRM 239 (1972).

the NLRB General Counsel's offices, arbitrators may have had a tendency—despite their best intentions to the contrary—to give some weight to the General Counsel's findings. Recognizing the possibility of a presumption of merit in the case as a result of the deferral, the General Counsel revised the administrative guidelines to provide for deferral earlier in the processing of a charge, so that now a deferral can be made after only a preliminary determination that the charge and the evidence submitted by the charging party establish an "arguable violation of the Act." [7] In other words, all that is necessary now is that the charge is determined not to be frivolous or clearly lacking in merit before it may be deferred.

As Mr. Nash has pointed out, under the amended guidelines there should be no presumption as to the merits of a party's claim simply because it has been preliminarily investigated by the General Counsel's office and deferred to arbitration.

But what about a presumption of arbitrability of a dispute that has been "Collyerized"? The first impulse is to answer that certainly the dispute is arbitrable or the parties would not have been willing to agree to deferral and the General Counsel's office would not have deferred it.

Not all disputes between an employer and an employee's representative are subject to the arbitration process, although persuading an arbitrator to find that a dispute is nonarbitrable is an extremely difficult task. The courts say that where the claim is, on its face, *arguably arbitrable* under the parties' collective bargaining agreement, it should be for an arbitrator to determine whether the grievance is, *in fact,* subject to arbitration.[8] The Board, in several decisions, has recognized this principle and has "Collyerized" cases where there existed a dispute between the parties over arbitrability.[9] The guidelines of the General Counsel

[7] *Arbitration Deferral Policy Under Collyer—Revised Guidelines,* memorandum of NLRB General Counsel dated May 10, 1973; 83 LRRM 41 (1973).

[8] *United Steelworkers of America* v. *American Manufacturing Co.,* 363 U.S. 564, 46 LRRM 2414 (1960); *Lodge No. 12, Dist. No. 37, IAM* v. *Cameron Iron Works, Inc.,* 292 F.2d 112, 48 LRRM 2516 (5th Cir. 1961); *Communications Workers of America* v. *Southwestern Bell Telephone Co.,* 415 F.2d 35, 71 LRRM 3025 (5th Cir. 1969).

[9] *Norfolk Portsmouth Wholesale Beer Distributors Assn.,* 196 NLRB No. 165, 80 LRRM 1235 (1972); *Urban N. Patman, Inc.,* 197 NLRB No. 150, 80 LRRM 1481 (1972); *Southwestern Bell Telephone Co.,* 198 NLRB No. 6, 80 LRRM 1711 (1972); *Western Electric, Inc.,* 199 NLRB No. 49, 81 LRRM 1615 (1972).

also provide for deferral in certain cases where there is a dispute over arbitrability.[10] Quoting from such guidelines: "Deferral will *not* be precluded by the fact that a substantial question is raised as to the arbitrability of the dispute, arbitrability being 'properly determinable by an arbitrator.' " (Emphasis supplied.)

Thus, it must be recognized that just as no presumption on the merits of a dispute should be inferred from a deferral, so should no presumption as to arbitrability necessarily be drawn from the fact of a *Collyer* deferral.

Does "Collyerization" Enlarge the Arbitrator's Jurisdiction?

One of the most vexatious debates in arbitration today seems to be the scope of the arbitrator's responsibility in deciding disputes. Does he stay within the four corners of the contract, or does he range afield in an attempt to solve whatever ails the union-company collective bargaining relationship? *Collyer* only adds more fuel to the fire of this debate.

In his remarks, Mr. Nash invited arbitrators to go beyond the four corners of the contract, to consider and decide the statutory unfair labor practice issues, and to fashion remedies ensuring employees' rights under the Act. In effect, in addition to your duties as arbitrators, you are invited, in those cases that have been "Collyerized," to become NLRB administrative law judges.

Furthermore, the company and union are invited to submit detailed briefs covering Board law in "Collyerized" cases and to seek arbitrators schooled in the intricacies of the National Labor Relations Act. To this portion of Mr. Nash's remarks I must respectfully dissent.

In the first place, the Supreme Court has told us that while an arbitrator may look for guidance from many sources, his award is "legitimate only so long as it draws its essence from the collective bargaining agreement."[11] Second, while the Board can legiti-

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[10] *Supra* note 7. It should be noted, however, that before such cases involving a dispute over arbitrability are deferred, the NLRB and the General Counsel's office require that the parties be willing to submit the issue of arbitrability to the arbitrator and, if found to be arbitrable, be willing to submit the dispute on the merits to the arbitrator for resolution.

[11] *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

mately defer resolution of an essentially contractual dispute to arbitration, as it has done by its *Collyer* doctrine, it cannot as such delegate its statutorily assigned duty to determine if a violation of the statute has occurred. In fact, in the *Collyer* opinion, the Board took note that Congress had granted to *it* the *exclusive* jurisdiction to prevent unfair labor practices.[12]

The NLRB, in its *Collyer* decision, emphasized the contractual origin of the dispute in such terms as "the dispute between these parties is the very stuff of labor contract arbitration," and "we believe it to be consistent with the fundamental objectives of federal law to require the parties here to honor their *contractual* obligations rather than, by casting this dispute in *statutory* terms, to ignore their agreed-upon procedures." [13] (Emphasis supplied.) At least in my reading of the *Collyer* case and its progeny, I can find nothing that requires or even invites the arbitrator to assume the role of determining a statutory unfair labor practice case.

Since the review of an arbitrator's award following a *Collyer* deferral will be judged on the basis of the criteria in the *Spielberg* case decided in 1955, and since arbitrators have decided cases for some 15 years before *Collyer* without having to decide the statutory unfair labor practice issue, and since those cases have satisfied the Board's criteria, I do not believe that *Collyer* was intended to require a determination of the statutory issues as such in addition to resolving the contractual dispute. As a matter of fact, in the *Collyer* opinion the Board cited an earlier decision where it deferred to an arbitrator's decision in the employer's favor despite the fact that the Board would have found an unfair labor practice had been committed.[14]

Furthermore, the whole concept of arbitration is that the jurisdiction of the arbitrator is that which the parties have agreed to give him. Some contracts have very broad arbitration jurisdiction provisions; others are specifically limited. In the *Joseph Schlitz* case, which was decided before *Collyer,* the Board in deferring to arbitration stated that the case should be "left for resolution within the framework of the agreed upon settlement procedures."[15] That case was cited with approval in *Collyer.* It would

[12] *Supra* note 1.
[13] *Supra* note 1.
[14] *Timken Roller Bearing Co.,* 70 NLRB 500, 18 LRRM 1370 (1946).
[15] *Jos. Schlitz Brewing Co.,* 175 NLRB No. 23, 70 LRRM 1472 (1969).

seem to follow, then, that the policy of deferral announced in *Collyer* and followed in subsequent cases has not had the effect of expanding the arbitrator's jurisdiction as set forth in any particular collective bargaining agreement.

Very often the arbitrator selected by the parties is not a lawyer or is "not trained in the law." He or she is certainly not necessarily schooled in the intricacies of the National Labor Relations Act. Along the same line, many of the cases in arbitration are presented not by lawyers but by union business agents and personnel managers who certainly are not in a position to submit detailed briefs on the statutory issues. To impose the burden of deciding statutory unfair labor practice issues on the arbitration process would effectively eliminate a great number of the present participants in the arbitration process—a result surely not intended by the Board which must have been fully aware of these factors both when it decided the *Spielberg* case in 1955 and in 1971 when it decided *Collyer.*

By my remarks I do not want to leave the impression that I think arbitrators are to wear blinders when they decide cases or that they should make their determinations without regard to what the law requires. To the contrary, every collective bargaining contract is subject to the requirements of the law, and arbitrators, in deciding contractual disputes, must be fully cognizant of what the law requires in order to avoid a result that is in conflict with the law. An arbitration award that would place one of the parties in the position of violating the law in order to comply with the award should be set aside by the courts. Likewise, an arbitrator in deciding a contractual dispute that has been "Collyerized" should be aware of and consider the statutory requirements in order that his decision will not be repugnant to the purposes of the Act and will meet the *Spielberg* criteria. But that is a much different situation than requiring the parties and the arbitrator to litigate in the arbitration forum statutory unfair labor practice issues—especially if the parties are not in agreement to submit the statutory issues.

While *Collyer* may have broadened your responsibility as arbitrators, it has not enlarged your jurisdiction. That remains as set forth in the collective bargaining agreement.

Conclusion

I welcome the *Collyer* doctrine as a sound and practical policy of a mature governmental agency. The willingness to allow the governed to work out their problems within their own procedures is becoming all too rare a philosophy of government these days.

The fact that the Supreme Court historically has expressed confidence in the arbitral process—at least until its recent opinion in *Alexander* v. *Gardner-Denver* [16]—attests to your abilities and integrity as resolvers of contractual disputes. The fact that the NLRB has now, through its *Collyer* deferral policy, joined the ranks is further evidence that the confidence and responsibility placed on you by the parties to collective bargaining agreements is for the most part being faithfully discharged. As long as arbitrators remain loyal to that charge—to resolve those disputes that the parties in their collective bargaining agreements have agreed that you should decide—confidence in the arbitration process will continue to grow, and parties in dispute will be willing to submit a greater number of issues to the arbitration process for resolution.

What does it mean to be "Collyerized"? I believe it means that the parties to arbitration should continue to pursue the courses that historically have served so well and have led to the present situation of the Board's expression of confidence in the arbitration process which is embodied in its *Collyer* decision.

Comment—

C. PAUL BARKER*

Let me begin by saying that I think arbitrators have now reached their proper place in the sun. Arbitrators are no longer the bastards at the family reunion. They are an important part of the administrative machinery and an important factor in the formulation and judicial setting of national labor policy. This has been true since the *Steelworkers* trilogy cases.[1] It has been made

[16] *Supra* note 2.

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[1] *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960).

more so by the recent Supreme Court decision in *Boys Markets* [2] where the trigger that determines whether or not a federal court will entertain injunction proceedings against a strike is the question of the petitioner's willingness to submit it to an arbitrator. And finally, by the Labor Board's deferral position in *Spielberg* [3] and *Collyer.*[4] This, in turn, implies important responsibility for the arbitrators. I do not agree, however, with the Supreme Court's characterization in their opinion in *Alexander* v. *Gardner-Denver,* [5] the case referred to by Mr. Barden, that arbitration is informal, simple, and inexpensive. I think sometimes maybe they do live in an ivory tower. The Court, in this comment, is out of touch with reality. Good arbitrators are expensive, they study their cases carefully and make good findings, and most of the opinions are well reasoned. And this comment applies to those who usually decide against me as well.

The importance of this new doctrine of deferral to arbitration in unfair labor practice cases has come of age with approval of the circuit courts. Three circuits have endorsed the principle of the National Labor Relations Board's deferring in advance to arbitration processes. The 10th Circuit, in 1967, had approved of the Board's deferring to arbitration awards where the arbitration had actually taken place.[6] Now the Second Circuit, through Judge Hays, who once was the secretary of the Labor Law Section of the American Bar for two years before he went on the bench, in *Nabisco, Inc.* v. *NLRB,*[7] decided in June 1973, expressly approved of the deferral doctrine of the NLRB even though the arbitration had not yet taken place; that is, deferral to the arbitration procedure. In January of this year, the Board in the *Coors* [8] case, with which I understand you are familiar, deferred to arbitration in a racial discrimination case under rather unique circumstances. As you will recall, the arbitrator, with a member of the Colorado commission present, had decided that the man had not been discriminated against and that discrimination was covered in the arbitration clause of the contract. The commission

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[2] *Boys Markets, Inc.* v. *Retail Clerks Local 770,* 398 U.S. 235, 74 LRRM 2257 (1970).
[3] *Spielberg Mfg. Co.,* 112 NLRB 1080, 36 LRRM 1152 (1955).
[4] *Collyer Insulated Wire,* 192 NLRB 837, 77 LRRM 1931 (1971).
[5] *Alexander* v. *Gardner-Denver,* 7 FEP Cases 81, 39 L.Ed.2d 147 (1974).
[6] *NLRB* v. *Auburn Rubber Co.,* 384 F.2d 1, 66 LRRM 2129 (10th Cir. 1967).
[7] 479 F.2d 770, 83 LRRM 2612 (2d. Cir. 1973).
[8] 85 LRRM 1127 (1974).

subsequently, on additional evidence, made a finding that race was a motivating factor in his discharge. The state courts refused to defer to the arbitration, but nevertheless reversed the commission.[9]

The D. C. Circuit has now approved such deferral in *Associated Press* v. *NLRB*,[10] a decision written by Judge Skelly Wright, where the Board held up its decision, after the issuance of the complaint, to defer to arbitration. This was on a charge by an employer growing out of the union's efforts to compel the Associated Press, following a strike, to continue the check-off of the dues under the old contract. (By the way, Skelly Wright was a schoolmate of mine, a couple of years ahead of me. It was a small law school, and I often wonder what they taught him that they didn't teach me because he has a fine judicial mind and an excellent intellect, although we had roughly the same staff of professors and instructors and the same dean.)

This case strikes me as important because there the arbitrator decided that the check-offs, although provided for in the collective bargaining agreement, were individual contracts between the individual and the employer, that presumably the union had an interest in them, and that they reactivated when the contract was renewed and the collective bargaining agreement came into effect again. So the court, in effect, approved the dual interpretation—interpretation of the private check-off agreement as well as the interpretation of the collective bargaining agreement—and the Board's approval of the arbitrator's remedy and interpretation of NLRB law and policy. Further, the court approved of the Board's second deferral in the case and its decision to refer back to the parties that portion of the dispute that had not yet been decided.

That case was decided on February 20 and was followed by another decision out of the D. C. Circuit on February 28 in which the court again approved of deferral in a slightly different set of circumstances—in a different panel, of course. But importantly, this case, *IBEW Local 2188* v. *NLRB*,[11] points out that deferral is proper except in those cases where the expense of the litigation may deprive the individual of his statutory rights. If the arbitra-

[9] 5 FEP Cases 256 (1974).
[10] 85 LRRM 2440 (1974).
[11] 85 LRRM 2576 (D.C.Cir. 1974).

tion becomes so burdensome that he cannot exercise his rights, then the Board has no right to defer, or if the pattern developing by the arbitrators in the deferral cases is not uniform, even though following Board law, the Board might not necessarily have the right to defer. This principle, while a dicta in the particular case, seems to be important.

We will just briefly discuss *Gardner-Denver.*[12] I don't know what *Gardner-Denver* means except an awful lot of trouble. It holds that after you arbitrate and do everything possible to resolve, you can still be sued. There is some unrealistic language in *Gardner-Denver,* I think—particularly in that portion where it talks about the therapeutic value to the employer and employee that would result from the arbitration: [13] "An employer thus has an incentive to make available the conciliatory and therapeutic process of arbitration which may satisfy an employee's perceived need to resort to the judicial forum, thus saving the employer the expense and aggravation associated with a lawsuit. For similar reasons, the employee also has a strong incentive to arbitrate grievances, and arbitrations may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum." The Court has never been in one of those cases, because if the grievant loses, he's going to sue you anyway whether he loses in the arbitration or before the Board. A man is interested in his job or grievance, not moral victory, and no employer wants to put out cash to satisfy his esthetic obligations. I think that the Board should defer even in racial cases, although I understand it is considering a policy of not deferring in order to relieve the burden of the Equal Employment Opportunity Commission. It should continue to defer until we have more definitive law from the Supreme Court.

For instance, what is the effect as evidence of an arbitrator's decision in a racial discrimination case? Can the court consider this as *prima facie* evidence and put the burden on the plaintiff if the arbitrator found no discrimination? If they take a case through to a final decision and find no racial discrimination, then I think they have a duty to litigate the question of the effect of this decision by a statutory agency on the right to sue. What effect does it have in the district court when the individual files his private

[12] *Supra* note 5.
[13] *Id.* at 162.

lawsuit, despite the statutory agency's decision? Will it be given weight as evidence? Will it act as collateral estoppel or as *res judicata,* as some courts have held in secondary-boycott cases? [14]

Frankly, I think we're at a loss as to what to do in that type of case, but the importance of care in the arbitration of those cases is emphasized. First, I would be certain that the individual as well as the union files a charge, so that the individual is a participant as well. The court has indicated that under certain circumstances, while he cannot waive his statutory rights under the Civil Rights Act, he can settle. Query: Suppose after the arbitration is complete but before decision, he voluntarily agrees to be bound by the arbitrator's decision. Would this preclude further suit in district court? There remain many unanswered questions.

In conclusion, let me say that we originally objected to this deferral policy, and we still do not find the policy completely adequate because of the inadequacy of the sources available to unions and employees in prehearing investigations. It's all right to say the company has to furnish lots of information or the necessary information in records and from witnesses, but the Board agent has the real advantage of being better able to investigate. The agents have the prestige—the Government—and people will talk to them honestly and give them statements and affidavits they will not give to opposing counsel. They still have a definite advantage in the preparation of the cases. If the Board is to continue this deferral policy, then I suggest that it should make available to the moving parties the files on the investigation of the unfair labor practice case before the arbitration.

Again, arbitration is frequently expensive, especially if a company is deliberately dragging out the procedure or arbitrating everything. Small unions cannot afford it. In view of the D. C. circuit's decision in the *IBEW* case, I think the individual should file the charge and plead the pauper's oath. If the arbitration begins to get too expensive, he can go back to the Board with an argument that he cannot afford the arbitration. This may solve some of the individual rights questions involved.

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[14] *Cf. Painters District Council 38* v. *Edgewood Contracting Co.,* 416 F.2d 1081, 72 LRRM 2523 (5th Cir. 1969); *H. L. Robertson & Assoc., Inc.* v. *Plumbers Local 519,* 429 F.2d 520, 74 LRRM 2872 (5th Cir. 1970); *International Wire* v. *IBEW Local 38,* 475 F.2d 1078, 82 LRRM 3065 (6th Cir. 1973); *Texaco* v. *Operative Plasterers & Cement Masons Local 685,* 472 F.2d 594, 82 LRRM 2384 (5th Cir. 1973).

Comment—

EDWIN R. TEPLE*

I was particularly happy to find Mr. Nash commenting upon the responsibility of the parties themselves, in connection with the unfair labor practice aspect of a grievance before an arbitrator. The arbitrator is at serious disadvantage if an adequate factual presentation on this aspect of the case is not made. It seems to me eminently fair that the charging party should not be permitted to take advantage of its own failure to raise the issue and present the necessary facts for a proper determination of the unfair practice aspect. The Board's conclusion in the recent *National Radio Company* [1] case, to which Mr. Nash referred, should have a healthy effect.

As disputes under collective agreements become more complex and the parties grow more sophisticated, there seems to be a tendency to forget the basic purpose of the grievance and arbitration procedure, that is, to achieve the resolution of the dispute, whatever it may be, at the earliest possible time within their own collective bargaining relationship. I feel that the Board's deferral policy is designed to support this objective. But it still will not be achieved without the full cooperation of the parties themselves.

If the parties are faced with action that could be an unfair labor practice as well as a violation of the collective agreement, a careful presentation of the facts and arguments which bear upon both aspects of the case may well dispose of the entire problem. Citations to relevant Board and court decisions may become necessary so that the arbitrator will at least be aware of the Board's position or the law with reference to the application of the contract in this context. Determination of the law of the shop, including the intended effect of uncertain contract terms, requires all available light. Given this kind of help, I believe that experienced arbitrators will be able to decide the case properly. From my own research and acquaintance with both labor arbitrators and members of the judiciary, the arbitrators compare very well

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[1] 205 NLRB No. 112, 84 LRRM 1105 (1973).

in the field in which they work, and others seem to agree.[2] I have considerable confidence, generally speaking, in both their integrity and competence. And, after all, the parties retain the right to choose their arbitrator. If the parties do their part and the arbitrator still should "miss the boat," the charging party will then have an opportunity to obtain a review of the award by the NLRB under the *Collyer* rule and the tests set out in *Spielberg*.[3]

For the arbitrator's part, perhaps we will need to be more careful in our written opinions to make it clear that we have considered the facts that bear upon any unfair practice aspect of the matter. Gerald Brown, a former Board member and a long-time proponent of the *Collyer* rule, has indicated that the most difficult problem the Board encountered in applying the *Spielberg* doctrine involved a determination of whether the arbitrator had considered the unfair labor practice issue in making his decision under the contract. Where the record before the Board included direct evidence that the arbitrator had considered the statutory issue in a discharge situation, for instance, the award was adopted even though the Board might have reached a different result.[4] But the usual case, Brown indicated, was one in which the Board had difficulty understanding just what the arbitrator had considered, and he suggested that it would prove salutary for the arbitrator somehow to indicate that issues of interest to the Board had been canvassed in his deliberations.[5]

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[2] Finley, "Labor Arbitration: The Quest for Industrial Justice," 18 *West. Res. L. Rev.* 1091, 1100 (1967); Dunau, 35 *Amer. Scholar* No. 4, at 774-776 (1966), referred to in Meltzer, "Ruminations About Ideology, Law, and Labor Arbitration," in *The Arbitrator, the NLRB, and the Courts*, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), at 2. On this point, of course, the opinion of Justice William O. Douglas in *Warrior & Gulf* is well known. It is no accident, I believe, that some of the very best literature on labor subjects pertaining to the interpretation and application of collective agreements (including views that are often critical) is to be found in the Proceedings of the National Academy of Arbitrators.

[3] The result is to give the charging party a chance for appeal. There has been a persistent view among some of the lawyers engaged in arbitration work that an appeal procedure should be provided within the arbitration framework. See Finley, *supra* note 1, at 1118; Jones and Smith, "Management and Labor Appraisals and Criticisms of the Arbitration Process," 62 *Mich. L. Rev.* 1115, 1124-1127 (1964). Although this might tend to weaken some of the most important advantages of arbitration in the average grievance, the idea may warrant serious consideration in important test cases or where the issue is complex and involves outside legal aspects, as in a *Collyer*-type case.

[4] *Oscherwitz*, 130 NLRB 1078, 47 LRRM 1415 (1961).

[5] Brown, "National Labor Policy, the NLRB, and Arbitration," in *Developments in American and Foreign Arbitration*, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968), at 85-87.

I don't think this is asking too much. There is no need, it seems to me, to disclaim consideration of the statutory aspects. One purpose of writing opinions is to outline as clearly as possible the factual basis upon which the arbitrator's determination is made. Discriminatory treatment as a result of union activity, which may become the basis for an unfair practice charge, is also quite relevant in determining whether the action of management is proper and for just cause. Ben Aaron has suggested that arbitrators might consider using some type of boilerplate (standard language) for this purpose,[6] but it may be sufficient simply to indicate that the facts that bear upon the unfair practice aspect have been fully considered in reaching the arbitrator's conclusion under the collective agreement.

To the extent that Board and court decisions become pertinent in connection with the unfair practice aspect of contract issues, I believe such law can and should be considered. The Supreme Court, in its recent *Gardner-Denver* decision,[7] said that the specialized competence of arbitrators pertained primarily to the law of the shop, not the law of the land, and that arbitrators had no general authority to invoke public laws that conflict with the bargain between the parties. But this statement has reference to the law generally and the Civil Rights Act in particular, not the national labor policy and aspects of the LMRA that pertain to the interpretation or application of labor agreements. In the same opinion, Mr. Justice Powell stated that the arbitrator's authority to resolve questions of contractual rights remained, regardless of whether they were similar to or duplicated statutory rights, and in a footnote he said that the Court did not mean to suggest that arbitrators do not possess a high degree of competence with respect to the vital role in implementing the federal policy favoring arbitration of labor disputes. Barely a month earlier, moreover, Mr. Justice Powell also wrote the opinion for the Court when it ruled that the expertise of the labor arbitrators applied as much to safety issues as to other disputes arising in connection with the collective agreement, and upheld a district court order directing

[6] Aaron, "Judicial and Administrative Deference to Arbitration, Labor Law Developments 1972," in *18th Annual Institute of The Southwestern Legal Foundation*, 175, 181.

[7] 7 FEP Cases 81 (1974).

the United Mine Workers to end a strike over a safety issue and to submit the dispute to arbitration.[8]

As Mr. Nash has pointed out, the extension of the *Spielberg* doctrine in *Collyer* is likely to have an effect upon the arbitration process in situations where the Board's policy applies, but this has been an extremely small segment of the cases that reach arbitration and the overall effect is likely to be minimal. In those cases where an unfair practice issue is intertwined with the contract issue, greater care in preparation and slightly more formality in the proceeding may save the expense and time involved in further review before the NLRB. If the parties are really interested in getting the problem settled with finality and dispatch under their own procedure, the price which this involves may not be too great.

Even in cases involving alleged discrimination based on race, religion, or sex, more attention to presenting the facts that bear upon the discriminatory aspect, and a little more care on the arbitrator's part to indicate that he has considered this aspect in reaching his determination on the issue of just cause under the collective agreement, may also serve a useful purpose, since the Supreme Court indicated in *Gardner-Denver* that the arbitrator's award might be made part of the record before the federal district court and was entitled to consideration.[9] Careful findings based upon a full presentation of the pertinent facts by the parties may carry considerable weight in any trials that follow under the Civil Rights Act.

In any event, I believe the Board's expanded deferral policy is sound and may help, rather than harm, the labor arbitration process. I recognize some risks in connection with cases involving individual rights which may diverge from collective interests, but

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[8] *Gateway Coal Co.* v. *Mine Workers,* 414 U.S. 368, 85 LRRM 2049 (1974). Justice Douglas, in his dissent, thought the employees' rights under the Federal Safety Act should have been given precedence in this instance.

[9] For some unexplained reason, the arbitrator in the *Gardner-Denver* case made no reference to the claim of discrimination in connection with his determination that just cause had been shown for the employer's action. The issue of discrimination was not mentioned in the original grievance report, but was raised during a subsequent step of the grievance procedure and reference to the charge was made during the arbitration hearing. In one of my own cases, I heard subsequently that a charge of discrimination had been filed with the EEOC by the grievant; but when I checked my file I could find no reference to alleged discrimination anywhere in the record, including the grievant's own testimony. I think there is a lesson to be learned from situations like this.

the Board and the General Counsel seem to be alert to this, and I believe the Board will accept cases where it is apparent that some individual right needs protection. Failure to accord fair representation falls within the Landrum-Griffin Act.

Comment—

HERBERT L. SHERMAN, JR.*

The decision in *Collyer*[1] and its progeny, under which the NLRB defers to arbitration, have spawned a running debate. There have been numerous articles published in law reviews which debate the merits of the *Collyer* doctrine.[2] For example, Professors Schatzki and Zimmer support the *Collyer* doctrine, while Professor Getman believes that it represents a case of misplaced modesty by the NLRB and Professor Atleson argues against automatic deferral to arbitration.

However, it should be noted that the Court of Appeals for the District of Columbia,[3] and the First and Second Circuit Courts of Appeal [4] have approved the *Collyer* doctrine.

In these comments I shall identify 10 arguments that have been advanced against *Collyer,* and I shall state why I believe that they are not persuasive, or at least why they do not outweigh the arguments in favor of the doctrine of deferral.

1. Some argue that the effect of *Collyer* is a direction by the NLRB to the parties to arbitrate a grievance that is no longer arbitrable, since the time limits for the filing and processing of grievances have already expired by the time that the Board renders its decision to defer to arbitration. But a party seeking to have a case deferred to arbitration can be expected to waive a possible defense of the untimely filing of the grievance. Moreover, waiver of such a defense is not at all uncommon in labor ar-

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[1] *Collyer Insulated Wire,* 192 NLRB 837, 77 LRRM 1931 (1971).

[2] *E.g.,* Schatzki, "NLRB Resolution of Contract Dispute Under Section 8 (a) (5)," 50 *Texas L. Rev.* 225 (1972); Zimmer, "Wired for *Collyer*: Rationalizing NLRB and Arbitration Jurisdiction," 48 *Ind. L.J.* 141 (1972); Atleson, "Disciplinary Discharges, Arbitration and NLRB Deference," 20 *Buf. L. Rev.* 355 (1971); Getman, "*Collyer Insulated Wire*: A Case of Misplaced Modesty," 49 *Ind. L.J.* 57 (1973).

[3] *Associated Press* v. *NLRB,* 85 LRRM 2440 (1974); *IBEW Local 2188* v. *NLRB,* 85 LRRM 2576 (1974).

[4] *Enterprise Publishing Co.* v. *NLRB,* 85 LRRM 2746 (1974); *Nabisco, Inc.* v. *NLRB,* 83 LRRM 2612 (1973).

bitration. And, as noted by Peter Nash, the respondent in the case before the Board may be required to waive such a defense in order to obtain a Board deferral.

2. A second argument against *Collyer* is that it verges on compulsory arbitration. But compulsory arbitration is a term that is normally used to refer to arbitration compelled by statute, and not to a legal proceeding that results in a ruling that a party is compelled to abide by a voluntary agreement to arbitrate. Under U. S. Supreme Court decisions, parties have been compelled, by court orders of specific performance, to abide by voluntary agreements to arbitrate,[5] but such rulings do not result in compulsory arbitration as that term is normally used in labor relations. And in *Drake Bakeries*,[6] where a company sued a union for damages for an alleged breach of a no-strike clause in a collective bargaining agreement, the U. S. Supreme Court ruled that the union's motion for a stay, pending arbitration, should be granted where the contract provided that either party could invoke the grievance procedure and that either party could seek arbitration. The grievance and arbitration provisions were not viewed as providing an optional forum for management to seek a remedy. The decision in *Collyer* is consistent when it held that the grievance and arbitration provisions of the agreement did not simply provide an optional forum for the union to seek a remedy.

3. A third argument is that the *Collyer* doctrine may discourage use of the arbitral process because parties may eliminate arbitration and no-strike provisions from their agreements. But this argument calls to mind the forebodings expressed by some when the U. S. Supreme Court handed down the *Steelworkers* trilogy in 1960. Nevertheless, the trilogy did not cause the elimination of any signficant number of provisions for arbitration, and I agree with Peter Nash that *Collyer* will not result in the elimination of any really significant number of provisions for arbitration.

4. A fourth argument is that *Collyer* is contrary to Section 10 (a) of the NLRA, which provides that the Board's power to

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[5] *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957); *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960).

[6] *Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers*, 370 U.S. 254, 50 LRRM 2440 (1962).

prevent any person from engaging in an unfair labor practice "... shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Of course, the Board has the power to refrain from deferring to arbitration. But the real question is whether, as a matter of wise policy, it should defer to arbitration. If *Collyer* is contrary to Section 10 (a) of the NLRA, then it would seem that the *Spielberg* doctrine,[7] under which the Board has deferred to arbitration awards under certain conditions ever since 1955, is contrary to Section 10 (a) of the NLRA. But it has been held that the *Spielberg* doctrine is not contrary to Section 10 (a).

5. A fifth argument is that since the arbitrator decides contractual questions and the Board decides statutory questions, an arbitrator may render a decision under the contract that is inconsistent with statutory rights. For example, where a contract is silent, or speaks only obliquely, on a given subject matter, an arbitrator might hold that unilateral action on this matter is permissible under the contract, while the Board would hold that further negotiation is required in the absence of a clear and unmistakable waiver by the union. It is true that this possibility exists. But the same problem exists under the *Spielberg* doctrine. And arbitrators often find that the mere existence of the contract, read as a whole and in the light of past practices, imposes implied restrictions on the company. Such an approach is consistent with the trilogy and may well result in a decision that is not contrary to statutory law. In any event, under *Collyer* the Board retains jurisdiction over the case so that it can reach a different result in the relatively rare case where the arbitration award is repugnant to the NLRA. But under *Collyer,* the Board in the meantime has taken action consistent with federal policy set forth in Section 203 (d) of the Taft-Hartley Act, which states in part as follows: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

6. A sixth argument is that legitimate interests of employees may not be protected because a financially weak union may be "arbitrated to death" and may lack the necessary funds to process

[7] *Spielberg Mfg. Co.,* 112 NLRB 1080, 1082, 36 LRRM 1152 (1955).

cases to arbitration. But in 1973 Peter Nash, the General Counsel of the NLRB, met this problem by taking the position that deferral to arbitration under *Collyer* was not appropriate where the financial inability of the union to proceed to arbitration was an obstacle to a quick and fair resolution of the dispute.[8] Even though (a) the statutory issues raised by the charge were otherwise appropriate for deferral, (b) monthly union membership dues were only $1.00 per member, (c) a recent resolution to raise the membership dues to $4.00 per month had been rejected by a membership vote, and (d) during the preceding year the union had spent more than $3,500 on an arbitration case in some unexplained manner, the General Counsel concluded that deferral was not appropriate. Thus, at least as far as the General Counsel is concerned, the weak financial condition of the union will not present an obstacle to the protection of rights of employees despite the *Collyer* doctrine. Incidentally, the General Counsel has also taken the position that charges of violation of Section 8(a)(4) of the NLRA (involving alleged discrimination against an employee because he had filed prior charges with the Board) should not be deferred to arbitration under *Collyer*.[9]

7. A seventh argument is that the *Collyer* doctrine may cause an undue delay in resolving the dispute. Nevertheless, I submit that, on the average, a case falling under *Collyer* is resolved faster through arbitration than through the processes of the Board. There are not, to my knowledge, unchallengeable figures to prove this point, in part because most arbitration awards are never published. But at least my experience in the past 22 years leads me to believe that issues that would fall under *Collyer* have been settled faster through arbitration.

8. An eighth argument against deferral to arbitration, made by a dissenting opinion in *Collyer*, is that arbitration expense is heavy, averaging over $500 per day in 1970, even excluding attorneys' fees and the cost of stenographers, witnesses, and hearing room rental. My only response to this argument is that I have grave difficulty in believing that in 1970 arbitration expense averaged over $500 *per day* after deduction of the items I have mentioned. It appears that this argument is based on an inaccurate premise.

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[8] See *Quarterly Report of General Counsel for Third Quarter of 1973*, at 3.
[9] *Id.* at 1.

9. A ninth argument is that since arbitration can be invoked only by the union and not by individual employees, the rights of aggrieved individuals may be sacrificed under the *Collyer* doctrine. But the General Counsel's guidelines to regional directors for the application of *Collyer,* dated May 10, 1973, seem to protect the individual by providing that charges filed by an individual will be deferred to arbitration only if (a) the interests of such employee are in substantial harmony with the interests of one of the parties to the collective bargaining agreement and this party is willing to invoke the arbitration procedures and advocate the employee's position before the arbitrator, and (b) the employee does not, on his own initiative, expressly object to arbitration of the dispute.

10. A 10th argument is that cases such as *Collyer* are such an insignificant part of the workload of the Board that *Collyer* will reduce only a small amount of the workload of the Board. But it must be remembered, as noted in the statistics cited by Peter Nash, that the regional offices of the Board can also benefit from the *Collyer* doctrine in that their workloads may be reduced.

Nevertheless, despite these observations, I note that the recent U. S. Supreme Court decision in *Alexander* v. *Gardner-Denver Co.*,[10] dealing with the effect of an arbitration award on a subsequent court proceeding under Title VII of the Civil Rights Act, does contain some language that could be viewed as raising some doubts about the *Collyer* and *Spielberg* doctrines. However, it should be noted that there are important differences between the question of the relationship of arbitration and the Civil Rights Act and the question of the relationship of arbitration and the NLRA. The purposes and procedures of the two statutes are quite different.

In *Gardner-Denver,* the Supreme Court refused to adopt a rule that lower courts must defer to arbitration awards in cases involving Title VII of the Civil Rights Act. But it did hold that the arbitration award "may be admitted as evidence and accorded such weight as the [district] court deems appropriate." In footnote 21, the Supreme Court set forth various factors for a district court to consider in determining how much weight, if any, the

[10] 415 U.S. 36, 7 FEP Cases 81 (1974).

court should give to the arbitration award.[11] Perhaps the NLRB will feel that it is desirable to restate its *Spielberg* doctrine to take such factors into account. Even so, results similar to those reached under the present *Spielberg* doctrine could be reached under a revised *Spielberg* doctrine.

Discussion—

CHAIRMAN ROLF VALTIN: I don't think I'll give the panel members a chance to comment on each other's papers because I want to give the audience at least some chance to raise questions or to make comments.

MR. WILLIAM MURPHY: My question is addressed to Mr. Nash, and what I would like to do is to invite comparison between *Collyer,* which was an 8 (a) (5) application, and cases under 8 (a) (1) and 8 (a) (3). I'll approach it this way: The 8 (a) (5) in *Collyer* was based on a unilateral employer change in terms and conditions of employment where the defense was that the change was authorized by the contract. This, of course, is grist for the arbitrator's mill—even the arbitrator without legal training—and, furthermore, for the Board to defer to arbitration in that case involved no dilution of its primary statutory authority. If we move to 8 (a) (1) and 8 (a) (3) cases, a violation may rest on a specific finding of anti-union motivation or may turn on much more subtle and difficult questions of unwarranted employer interference with employee rights protected by Section 7. There, an arbitrator's competence with a contractual standard of just cause gives him no background for dealing with the problem, and the arbitrator without legal training lacks the competence to deal with the statutory issues. In addition, it might be thought that for the Board to defer in those situations does represent a withdrawal

[11] *Id.,* footnote 21, which reads as follows: "We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum."

from its primary statutory purpose. Would you care to comment on these possible distinctions, and do you believe that your guidelines adequately deal with them?

MR. NASH: Yes, I would like to comment, and yes, I believe the guidelines do deal with them. I think maybe I would initially disagree with your premise. I can envision an 8 (a) (5) unilateral change case which involves much tougher local problems than does a judgment as to whether an individual has been discharged for a good cause, which turns on whether the individual has been discharged because of his or her union activity. So I believe that the discharge case, the 8 (a) (1) or 8 (a) (3) discrimination case, is the kind of stuff that is grist for the arbitrator's mill.

Second, from a legal point of view, I read *Collyer* as nothing more than *Spielberg* a few months earlier, and *Spielberg* has been around since 1955. The deferral doctrine as we know it today started with *Spielberg*. There you had an arbitrator's decision. We then moved to *Dubo*. In that case there wasn't any arbitration decision, but the parties were moving to arbitration. The Board deferred and looked at the award later under its *Spielberg* standards. *Collyer* was the next step—no arbitration award, no procedure being used at that time, but an existing procedure. The Board deferred and then retained jurisdiction to look at the ultimate award under its "*Spielberg* glasses." So I see the *Collyer* doctrine as really nothing more than an extension of *Spielberg* which, you will recall, was an 8 (a) (3) case, not 8 (a) (5). Thus my comment would be that it's perfectly appropriate for deferral in that area and that the law substantiates that conclusion.

MR. DAVID E. FELLER: I haven't felt obliged to rise to disagree with almost everybody who has spoken on a subject since the Academy meeting in 1959 in Detroit, when the speakers were uniformly deprecating the *Lincoln Mills* decision.

This has been one of the most significant discussions at the Academy for some years, and arbitrators ought to be listening here, ought to understand precisely what Peter Nash has so very carefully and explicitly stated, a position that I think probably reflects the Labor Board's current position. I think that it is outrageous.

What we have now, as Mr. Nash has so carefully explained, is compulsory arbitration before grievance arbitrators of questions

of interpretation and application of the National Labor Relations Act of the appropriate remedies for the violation of that Act. It is compulsory arbitration, not voluntary, because most parties voluntarily agree to arbitrate only questions of interpretation and application of the collective bargaining agreement. The whole series of cases that everyone on the panel has referred to in the Supreme Court were based upon the assumption that the arbitrator is chosen to decide just those questions. But the result of the Board's current view, as described by Mr. Nash, is that arbitrators whom the parties have regularly designated to decide those questions must now, at least at the option of the respondent, although not the charging party, also decide questions of interpretation and application of the NLRA. The option is in the respondent because, as I understand what Mr. Nash said, if a claim is made that there has been a violation of the Act and the Board then defers to the arbitrator, but the respondent refuses to stipulate that the arbitrator can decide the NLRA questions, then the Board will take the case and decide them. But if the charging party, the grievant, refuses to stipulate that the arbitrator shall decide questions of interpretation and application of the NLRA, then the Board will say: "Too bad. You haven't complied with our *Collyer* policy and we will therefore dismiss the complaint." So, what the Board is saying to charging parties is that if they agree to arbitration of questions of interpretation and application of the collective agreement, then they must give up their right to have questions under the Act decided by the Board.

(Incidentally, I think, contrary to what I believe Herb Sherman said, that this position is highly dubious under *Gardner-Denver*. Although that was a Title VII case, the Court not only adopted, but specifically cited, the Meltzer view, with which I concur, as to the limited function of a grievance arbitrator with respect to questions of external law.)

If the Board's view is to prevail, I believe that the arbitration fraternity has got to give serious consideration to what it means, particularly to those of you who are not lawyers or who haven't practiced NLRA law for a long time. The first thing you ought to do is to have BNA set up a stand here and sell copies of *The Developing Labor Law*, the best text available as to the meaning of the Act. You've all got to be Board lawyers now, and at least a great many arbitrators who I think are very fine arbitrators—one

of whom I'm looking at right now—are not lawyers and, as far as I know, have never professed any expertise with respect to the NLRA. We will have to correct that situation. Perhaps we ought to change the admission standards for the Academy and require applicants to pass an examination as to the proper interpretation and application of the Act before they are admitted to membership.

Apart from the effect on arbitrators, I think that the Board is saying some very distressing things to the parties. What the Board is saying to them is that they cannot do what they have traditionally done—that is, to give final and binding authority to arbitrators to decide what collective bargaining agreements mean because arbitrators are supposedly expert on such matters and on what goes on in a plant. They are now not allowed to do that—at least the charging parties are not allowed to do that—without also vesting authority in the arbitrator to decide NLRA questions, if I read Mr. Nash correctly.

This whole development reminds me of the *Guss* case. You will remember that an earlier Board—one dominated by an administration of similar political character to the present one—attempted to transfer jurisdiction over a great many cases, not to arbitrators, but to the states. That attempt terminated with the *Guss* case, when the Supreme Court told them that they couldn't do it. My own guess would be that, in a proper case, the Supreme Court will similarly refuse to permit the Board to simply hand over jurisdiction to arbitrators, not over questions of fact underlying a contractual question, or over contractual questions, but over questions of the proper interpretation and application of the NLRA. The Board's present effort to do that is very distressing. I think it will do great damage to the arbitration process, and I hope that I am right that the courts will ultimately not permit it to happen.

I should like to add a little footnote. The Court decided the *Magnavox* case just recently. It said there that a collective agreement could not waive the statutory right of employees to distribute union literature or solicit on union questions on nonworking time. Now suppose that as an arbitrator you had a case in which the collective agreement specifically said that no employee shall solicit on plant property at any time. Suppose that an employee deliberately violated that rule and filed a grievance when he was

disciplined for the violation. I think that most members of this Academy would sustain the discipline on the ground that the contract was clear, the union agreed to it, and the employee had no right to violate it deliberately. What I think the Labor Board is saying is that if you do that, you're repugnant. And I don't think arbitrators like to be told that they are repugnant when they are doing the job the parties have asked them to do.

MR. NASH: Thank you very much for the recognition, not only in saying that this is a most significant discussion before this group, but also in mentioning the *Magnavox* case that I argued in the Supreme Court. I appreciate the recognition.

I think that if the grievance and arbitration provisions in the collective bargaining agreement state that matters of contract interpretation are to be arbitrated, it is not true that unfair labor practices which do not involve interpretation of the collective bargaining agreement will necessarily be deferred by the Board. Not only has the Board so stated in its decisions, but two sets of published guidelines by the General Counsel's office indicate that one of the criteria necessary for deferral under *Collyer* is that the dispute in fact be a dispute of the type that the parties have agreed to arbitrate. It must be cognizable under the provision of the collective bargaining agreement that relates to grievance handling and arbitration, and I think that fact, at least as I interpret your remarks, indicates that perhaps they are based on a faulty premise.

As to your speculation (or your hope) that the courts will not buy the *Collyer* doctrine, I suspect it must be based on the *Gardner-Denver* decision because all the courts of appeals that have considered the case have bought the doctrine. I would submit that the *Gardner-Denver* decision does not, in my view, indicate that the Board deferral doctrine under *Collyer* is in any jeopardy. As a matter of fact, I think the *Gardner-Denver* decision was based primarily upon an exhaustive examination of the legislative history of Title VII of the Civil Rights Act, which indicated that Congress intended that multiple forums be available for individual discriminatees and for parties under Title VII. However, the National Labor Relations Act, in Section 203 (d), does indicate a preference in terms of national labor policy for the resolution of disputes under the agreed-upon mechanisms in the

collective bargaining agreement, a significant distinction in legislative intent and history.

Second, I think if you look at the scheme of the act under Title VII and the scheme of the act of the National Labor Relations statute, there are significant distinctions. Under Title VII of the Civil Rights Act, it is anticipated and contemplated that private rights will, in fact, be enforced by private actions of the discriminated against parties. Whereas, without getting into a lot of detail on this, the NLRA, in fact, is a statute enforced by a public prosecutor for the basic purpose of protecting the institution of free collective bargaining.

In addition, as I read *Gardner-Denver,* the basic arguments made to the court as to why there ought to be deferral in a Title VII case to an arbitration decision raised issues of "waiver" and "election of remedy," neither of which is applicable in the *Collyer* area. In this latter area, the Board is merely deferring its review cases.

Finally, to characterize the question of *Collyer* deferral as "compulsory arbitration" and to suggest that there is an indication of political persuasion of the present Board which brought about *Collyer* is as outrageous a comment on the integrity of present Board members as it is of ex-member Brown who was "the father of *Collyer.*"

MR. WINN NEWMAN: One of the things usually overlooked in this kind of discussion on *Collyer*—the point Dave was making about the difference of issues before an arbitrator and before the Board—is clearly presented in *National Radio.* In that case the arbitrator decided the issue before him on the "obey now and grieve later" doctrine. He refused to decide the case on the basis that a unilateral rule had been imposed by the employer and that a trial examiner had previously found such unilateral imposition to be a violation of Section 8 (a) (5) of the Act.

Now, the arbitrator in *National Radio* happened to be an arbitrator who has been writing since 1949 that Section 8 (a) (5) should be stripped from the Act—that it does not belong in the Act. That arbitrator is Archibald Cox, and that is the type of thinking to which the Board is prepared to defer in this kind of case.

Clearly, if the only issue in the case were the old arbitration doctrine of obey now and grieve later, this case was lost before it began: The employee did not obey now and grieve later. He violated a unilaterally imposed rule. Under NLRB doctrine, however, if the rule were illegal or illegally promulgated, the discharge of the employee would have been reversed.

As far as cost is concerned, I think the attitude reflected here is typical of the attitude generally reflected by arbitrators—that unions can afford to arbitrate cases. There is a lack of recognition of the fact that unions may have to choose two of 20 cases they can afford to arbitrate. I don't really think that the General Counsel of the NLRB is prepared to get a financial report from each local union as to whether or not it can afford to arbitrate a particular case. Unions with 100 members have an extremely hard time arbitrating cases. They cannot do it because of cost. Every time they go to arbitration, they must consider cost. Moreover, the Board's *Collyer* policy would require a much more formalized decision from the arbitrator. The trend will be for more formalized decisions because arbitrators are going to be afraid of being reversed. Thus, the result will be more lengthy decisions rather than expedited ones.

One further point Dave made is about the general lack of knowledge arbitrators may have with respect to the NLRA. We heard an arbitrator here say that it is the burden of the parties to present the NLRA issue to the arbitrator. However, it would not be the burden of the parties to present the general legal principles with respect to an obey-now-and-grieve-later issue. Those principles the arbitrator would understand.

Do you really want to impose a burden on a union going to arbitration that it must have a lawyer in order to present to the arbitrator "new" legal principles concerning the NLRA so that the arbitrator will understand the issue? What this burden would mean, in effect, is that if there is an NLRA issue in the arbitration, a union will have to be represented by a lawyer. No one can reasonably argue that that is not going to increase costs in the situation.

Last, I would like to comment on the typical arbitrator's approach of letting evidence in for what it is worth: The application of that doctrine would be extremely dangerous when dealing

with the NLRA, which the arbitrator may not understand. On top of that, for what is it worth, educating the arbitrator would encumber the hearing and add a burden to time as well as cost.

In sum, the option given an employer by the *Collyer* doctrine has to be viewed as one additional important tool which the Board has provided clearly and simply, as I see it, for the benefit of the employers.

MR. CLYDE SUMMERS: It would be supererogation for me to try to add to what Dave Feller has said, but I want to underline certain aspects. At the outset, I reject completely any suggestion that *Collyer* had its origins in the present political complexion of the Board. On the contrary, I believe that *Collyer* was simply the product of the Board's failure to think through the consequences and implications of what it was doing.

First, it is disingenuous to say that this is not mandatory arbitration of unfair labor practices—we will take out the red-flag word "compulsory." It is mandatory arbitration in the following sense, if I understand what the Board is saying: If the parties agree to submit discharge cases to arbitration, they must agree to have all 8(a)(3) cases submitted to arbitration. If the parties agree to submit management-rights clauses to arbitration, then they must agree to submit 8(a)(5) cases to arbitration. The essence is that you cannot have arbitration of typical contract issues without being compelled to accept arbitration of statutory issues. If you give an arbitrator power to interpret and apply the contract, you must automatically give him power to interpret and apply the National Labor Relations Act. The Board's deferral rules simply add up to that. Whether you call it compulsory arbitration, mandatory arbitration, or dealer's choice, that is what it means.

Second, let us look at what it means with relation to the competency of arbitrators. One aspect I can testify to from personal experience. Two weeks ago I was asked by both the lawyer of the union and the lawyer for management to be an expert witness in an arbitration to inform an arbitrator as to the meaning of the NLRA. The reason I was asked was because the regional director of the Board refused on the grounds that it would be improper for him to testify as to the meaning of the Act. If the Board continues to follow *Collyer,* perhaps I can supplement my salary by

being an expert witness. Certainly, there are many arbitrators, highly competent arbitrators, who will badly need one. Indeed, counsel for both the union and the employer will also need an expert where they are not lawyers but are business agents or personnel managers, as is often the case. Imagine, a question of statutory violation being presented by two nonlawyers to a nonlawyer for decision, with a law professor as an expert. It should give everyone, even the law professor, pause.

Now, let us look at the question of competency in the more basic legal sense of what tribunal is legally competent to make a particular decision. Here, it seems to me that *Gardner-Denver* goes further than has been suggested by either Mr. Nash or Mr. Sherman. In the *Garmon* decision 15 years ago, the Supreme Court made articulate that the Board had special procedures, special fact-finding and hearing devices, and special competence. It is appointed for the special purpose of making certain statutory decisions. For that reason, the Board could not, either by cession of jurisdiction or refusal to act, allow either a state court or a federal court to make decisions that belong in the Board. The principle of primary jurisdiction required those decisions to be made by the Board. Under *Garmon,* the Board could not cede or defer to any other agency; the Board is vested by Congress with primary competence. Under *Collyer,* the Board seeks to have the statutory issues decided by an arbitrator who may know no law, advocated by advocates who are not lawyers and who have none of the investigative facilities of the NLRB. The Board would have the public rights it is charged with protecting adjudicated in such a private proceeding.

In *Gardner-Denver,* the Court held that where Congress had placed adjudication of statutory rights in the federal courts, the courts could not defer to, nor be bound by, the arbitrator's decision. Statutory rights are to be adjudicated by the statutorily designated tribunals. This is the obverse of the *Steelworkers* trilogy. There the Supreme Court held that the courts should defer to arbitration because contractual rights are to be adjudicated by the contractually designated tribunals.

Now a final comment which may seem unkind but is not meant so: I agree that the *Collyer* doctrine will not lead the parties to abandon arbitration, even though they know that their statutory rights will be decided by the arbitrator. Unqualified as

the arbitrator may be to decide these legal issues, the parties know that he will have primary concern for their mutual interests, and he will have some sense of his mandate and his function. The Board portrays itself as lacking of both of these, forcing on at least one of the parties arbitration of issues that were not agreed should be arbitrated, and abdicating its responsibility to decide issues given it to decide. The parties may well conclude that with a Board which will adopt and carry through the doctrine we have heard here today, it really is better to be before the arbitrators.

MR. EDGAR A. JONES, JR.: I step away from the mainstream of contention briefly because I didn't think we should close the meeting without at least highlighting Mr. Nash's remark about subpoenaing arbitrators to testify concerning the grounds of their decision. I'm somewhat titillated by way of expectation of that role, and I pose to Mr. Nash, in simple and hopefully unadorned brief terms, the following query:

Suppose that I, having had a case under *Collyer* deferral, go ahead and state whatever I state in the opinion and walk away from it. As I drive home from the hearing, I reflect upon the role of federal district judges and state trial judges in the lines of cases in the federal and state courts concerning insulation of the trial judiciary from scrutiny concerning the bases of their decisions. Now I arrive home and find myself the recipient of a subpoena to testify concerning the grounds of my decision, and I respond to those who issued the subpoena by saying, "I really think that's a very improper area for you to probe into, and I do not intend to respond." What, then, would be the position of the General Counsel?

MR. NASH: First of all, the basic reason that I mentioned this is not because the General Counsel's office intends to subpoena arbitrators, but rather because in a recent case in which I decided to issue complaint, counsel for the respondent threatened such a subpoena. In such a case, the position of the General Counsel would have to be an institutional one. Thus, if a party has subpoenaed you as a witness, and that subpoena has not been quashed by an administrative law judge or the Board, the General Counsel is required to proceed in district court to enforce the subpoena. Presumably, the issue of whether it is or is not proper for the arbitrator to so testify or whether his testimony

would be relevant to the proceeding would be considered well in advance of such a court proceeding by your motion to quash that subpoena made before the administrative law judge or the Board.

MS. IDA KLAUS: I'm a former solicitor of the NLRB—many years ago. And first, I'd like to say that I'm very pleased to see that the battle we fought many years ago for a more cooperative relationship between the Board and General Counsel has been won and the General Counsel does cooperate with the Board in the way in which I think the statute intended. That's just introductory.

I'd like to know what the Board, as a public agency endowed with the exclusive authority to administer a public policy, believes are the advantages to it of the doctrine that you have been talking about.

MR. NASH: I can't answer that question in terms of what's in the minds of Board members or what they have discussed at their agendas. I'm not privy to that. It has been suggested in some areas that the Board sees this as an advantage to itself because it will cut down its caseload, but I don't think that's an advantage. I don't think there are that many cases that will end up "undecided" by the Board because of *Collyer*.

As I read the Board's decisions, they are not based upon what it perceives to be the advantage to the Board. Rather, I believe the *Collyer* doctrine is based upon what the Board perceives as most consistent with developing and maintaining meaningful collective bargaining relationships. The Board stated clearly in *Collyer* that it believes that collective bargaining is best supported when the parties abide by their agreement to arbitrate. That is the articulated rationale of the Board and the honest judgment of the three Board members who make up its majority in support of the *Collyer* doctrine.