CHAPTER 3

DISTINGUISHED SPEAKER: NLRB DEFERRAL TO ARBITRATION: STILL ALIVE AND KICKING

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It is a pleasure to be here and to address the Academy at this, its 53rd annual meeting. It was 54 years ago that I first came under the sway of Jean McKelvey, who was my teacher at the Cornell School of Industrial and Labor Relations beginning in 1946. I was one of Ms. McKelvey's boys, and proud of it. She became my mentor, and friend, through all the years that followed. I believe it was in 1970, the year she became the Academy's first woman president, that I attended an Academy meeting for the first time as her guest. In the intervening years, I often attended your open sessions, like so many others, as a guest of the Academy. I was at the Academy's 50th anniversary meeting in Chicago, where you honored Jean McKelvey as one of the founders of the Academy. I was grateful for the opportunity to see and hug her once again, as it turned out, for the last time. She was a wonderful person—brilliant, innovative, warm, and caring. I dedicate my remarks here today to her.

When I attended my first Academy meeting so many years ago, it was beyond the wildest stretch of my imagination that I would ever return someday as National Labor Relations Board (NLRB) Chairman. And it was still beyond that wildest stretch when I retired from the Board in 1996, and put a toe in the arbitration waters as a member of the American Arbitration Association (AAA), the Federal Mediation and Conciliation Service (FMCS), and the Oregon Employment Relations Board (ERB) labor panels. But, an early morning call from the White House nearly three years later,

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a last minute confirmation vote by the Senate the following year, and, presto, I appear before you today as Chairman of the NLRB. Alfred, Lord Tennyson, said, "A man is man and master of his fate."[1] But, as Shakespeare said, "Fortune brings in some boats that are not steer'd."[2] In my case, Shakespeare is the more apropos.

Of course, although this is my first life as Board Chairman, I have had several prior lives as a Board member. Indeed, I have been appointed to the Board so many times that I often feel like the Bill Murray character in the movie *Groundhog Day*, who keeps living the same day over and over again. Not only have I sometimes seen the same issue that I ruled on in one of my previous lives as a Board member, unfortunately I have also sometimes seen the same *case* that I ruled on, but that failed to issue before my term expired.

A good example is a case involving the Mississippi Power Company. *Mississippi Power*[3] was an old and difficult election case involving the supervisory status of dispatchers who coordinate switching sequences during emergency power outages. The Regional Director's decision in the case issued in September 1993, and I must have reviewed the Director's decision and voted in the case at least once or twice during my recess appointments to the Board in 1994 and 1995. And I can't tell you how happy I was that I wouldn't have to deal with that case anymore when I retired in early 1996.

Well, I'll never forget when I returned to the Board in December 1998—I got on the elevator and there was one of the Board's staff attorneys, who immediately turned to me and said, "Oh, John, we're so glad you're back. Now we can get *Mississippi Power* out!" My heart just sank. I could not believe that the case was still there.

We did finally get the case out in July 1999, along with many other extremely old cases that were pending when I returned. But I'll come back to more about that later.

In thinking over what I would talk to you about today, I remembered an old speech that I gave in 1978, during my very first term as a Board member. It happened to be my very first published speech as a Board member, and it was provocatively titled "Is *Spielberg* Dead?"[4] *Spielberg*,[5] of course, is the 1955 case that defined the Board's policy on review of arbitral awards in unfair labor

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[1]Tennyson, *The Marriage of Geraint* (l. 355), The Idylls of the King, 1859–1885.
[2]Shakespeare, Cymbeline, 4.3.46 (1609).
[3]*Mississippi Power Co.*, 328 NLRB No. 146, 161 LRRM 1241 (1999).
[4]John Truesdale, *Is* Spielberg *Dead?*, Address Before New York University's 31st National Conference on Labor, 1978 Daily Lab. Rep. (BNA) (June 15) No. 116:E-1.
[5]*Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955).

practice cases. Another case, *Collyer*,[6] later defined the Board's policy on deferring decisions in unfair labor practice cases until after the parties have been through the grievance arbitration procedure. Together, these cases are the foundation for the Board's pre-arbitral and post-arbitral deferral doctrine.[7] They represent the Board's attempt to reconcile its statutory duty to prevent unfair labor practices[8] with the federal labor policy favoring private dispute resolution.[9]

In 1978, in that first speech, my answer to the question was "no"; that *Spielberg* is not dead and remains a firmly entrenched doctrine. Now, 22 years later, and in what surely will be my last tour on the Board, it seems appropriate to revisit the subject of the Board's relationship to private dispute resolution systems.

Spielberg itself is still quite alive. I can state that with even greater conviction today than I did in 1978. At that time, there was considerable controversy within the Board itself about the deferral doctrine. In *Spielberg* situations, debate centered on what the Board should require to ensure that an arbitrator has adequately considered and decided an unfair labor practice issue while resolving a grievance. In *Collyer* situations, debate centered on whether deferral should be limited to cases alleging unilateral changes or other violations of section 8(a)(5) of the National Labor Relations Act (NLRA), or whether it also should include cases involving allegations of discrimination or threats in violation of sections 8(a)(1) and (3) and 8(b)(1)(A) and (2).

The pendulum of precedent on the deferral doctrine swung back and forth as Board membership changed.[10] However, it finally came to rest in 1984 with the issuance of *Olin Corp.*[11] and *United Technologies Corp.*[12]

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

[7]The Board also will hold an unfair labor practice case in abeyance where the parties have already voluntarily initiated the grievance arbitration process. *See Dubo Mfg. Corp.*, 142 NLRB 431, 53 LRRM 1070 (1963).

[8]29 U.S.C. §160(a).

[9]*See* 29 U.S.C. §173(d). *See also* the *Steelworkers Trilogy*: *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 46 LRRM 2416 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599, 46 LRRM 2423 (1960).

[10]For pre-arbitral deferral, *see National Radio Co.*, 198 NLRB 527, 80 LRRM 1718 (1972), *overruled by General Am. Transp.*, 228 NLRB 808, 94 LRRM 1483 (1977). For post-arbitral deferral, *see Electronic Reprod. Serv. Corp.*, 213 NLRB 758, 87 LRRM 1211 (1974), *overruled by Suburban Motor Freight*, 247 NLRB 146, 103 LRRM 1113 (1980).

[11]268 NLRB 573, 115 LRRM 1056 (1984), *overruling Suburban Motor Freight*, 247 NLRB 146, 103 LRRM 1113 (1980).

[12]268 NLRB 557, 115 LRRM 1049 (1984), *overruling General Am. Transp.*, 228 NLRB 808, 94 LRRM 1483 (1977).

Citing the strong national policy favoring voluntary arbitration, the Board majority in *Olin* adopted the more flexible approach taken in two earlier *Spielberg* deferral cases in which I participated in the late 1970s.[13] The majority held that it "would find that an arbitrator has adequately considered the unfair labor practice if: (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice."[14] The Board also reaffirmed the three other *Spielberg* requirements for deferring to an arbitrator's decision: (1) the arbitral proceedings were fair and regular, (2) all parties agreed to be bound by the result, and (3) the arbitrator's decision was not clearly repugnant to the Act. However, the Board clarified the repugnancy standard as meaning not "'palpably wrong,' i.e., . . . not susceptible to an interpretation consistent with the Act."[15] And the Board placed the burden on the party seeking to defeat deferral to prove that the *Spielberg/Olin* criteria had not been met.[16]

In the second case, *United Technologies*, the Board majority reaffirmed the *Collyer* criteria favoring pre-arbitral deferral. That is, the Board held that it will defer to the parties' grievance/arbitration machinery when: the dispute arises within the context of a long-standing bargaining relationship; there is no claim that the employer generally opposes the employees' exercise of protected rights; the bargaining agreement provides for arbitration in a broad range of disputes; the arbitration clause encompassed the dispute; the employer was willing to arbitrate; and the dispute was well suited to resolution in arbitration.[17] Most significantly, however, the Board held that it was appropriate to *Collyer*-ize unfair labor practice cases alleging discrimination and other conduct in violation of sections 8(a)(1) and (3) and 8(b)(1)(A) and (2).[18] Thus, again, the Board adopted a more flexible policy favoring deferral.

The Board completed its makeover of deferral doctrine a year later, in the 1985 *Alpha Beta* case.[19] The issue in that case was

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[13]*Kansas City Star Co.*, 236 NLRB 866, 98 LRRM 1320 (1978); *Atlantic Steel Co.*, 245 NLRB 814, 102 LRRM 1247 (1979).
[14]*Olin*, 268 NLRB at 574.
[15]*Id.*
[16]*Id.*
[17]*United Tech. Corp.*, 268 NLRB at 558.
[18]*Id.* at 559.
[19]*Alpha Beta Co.*, 273 NLRB 1546, 118 LRRM 1202 (1985), *enforced sub nom. Mahon v. NLRB*, 808 F.2d 1342, 124 LRRM 2762 (9th Cir. 1987).

whether to defer to a pre-arbitral settlement agreement as the basis for resolving an unfair labor practice case. The Board abandoned prior restrictive approaches to this issue, applied criteria similar to those in *Spielberg/Olin*, and deferred to the settlement.

The Board's revised deferral doctrine has survived, albeit tenuously at times,[20] over the past 15 years. This relatively long period of stable precedent has at least given the Board, practitioners, and the judiciary a real opportunity to appraise the doctrine and to suggest alternatives to it. There certainly have been critics.[21] The most familiar criticisms echo some of the arguments made in the dissenting opinions in *Olin* and *United Technologies*. They protest undue delegation to arbitrators of the authority to decide statutory issues. They also claim inadequate protection of individual employee statutory rights.

In the judicial realm, only one federal court of appeals, the Eleventh Circuit, has expressly rejected any aspect of the revised deferral doctrine.[22] All other courts of appeals that have ruled on the issue have approved, applied, or cited without comment the revised deferral doctrine in the circumstances presented.[23]

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[20] *See Mobil Oil Exploration & Producing, U.S., Inc.*, 325 NLRB 176, 179 n.14, 180–81, 156 LRRM 1273 (1997) (concurring opinion); *Tri-Pak Mach., Inc.*, 325 NLRB 671, 673 n.4, 158 LRRM 1049 (1998).

[21] *See, e.g.*, Berendt & Youngerman, *The Continuing Controversy Over Labor Board Deferral to Arbitration—An Alternative Approach*, 24 Stetson L. Rev. 175 (1994); Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 Chi.-Kent L. Rev. 571, 605–29 (1991); Northrup, *Distinguishing Arbitration and Private Settlement in NLRB Deferral Policy*, 44 U. Miami L. Rev. 341 (1989); Lynch, *Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again*, 44 U. Miami L. Rev. 237 (1989); Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 Ohio St. L.J. 23 (1985).

[22] *Taylor v. NLRB*, 786 F.2d 1516, 122 LRRM 2084 (11th Cir. 1986) (holding that *Olin* relinquished too much of the Board's responsibility under the Act and did not sufficiently protect employees' statutory rights to the extent it presumes, until proven otherwise, that the arbitration proceeding considered and decided the unfair labor practice issue).

[23] *See, e.g., Bakery, Confectionery & Tobacco Workers v. NLRB*, 730 F.2d 812, 815–16, 115 LRRM 3390 (D.C. Cir. 1984); *Hammontree v. NLRB*, 925 F.2d 1486, 136 LRRM 2478 (D.C. Cir. 1991) (*en banc*); *NLRB v. Aces Mechanical Corp.*, 837 F.2d 570, 127 LRRM 2513 (2d Cir. 1988); *Nevins v. NLRB*, 796 F.2d 14, 19 n.1, 122 LRRM 3147 (2d Cir. 1986); *NLRB v. Yellow Freight Sys., Inc.*, 930 F.2d 316, 321, 55 FEP Cases 998 (3d Cir. 1991); *Equitable Gas Co. v. NLRB*, 966 F.2d 861, 140 LRRM 2521 (4th Cir. 1992); *NLRB v. Ryder/P.I.E. Nationwide, Inc.*, 810 F.2d 502, 506, 124 LRRM 3024 (5th Cir. 1987); *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 115–16, 126 LRRM 2747 (6th Cir. 1987); *Doerfer Eng'g v. NLRB*, 79 F.3d 101, 151 LRRM 2809 (8th Cir. 1996); *NLRB v. Roswil, Inc.*, 55 F.3d 382, 149 LRRM 2332 (8th Cir. 1995); *Garcia v. NLRB*, 785 F.2d 807, 809–10, 121 LRRM 3349 (9th Cir. 1986); *Mahon v. NLRB*, 808 F.2d 1342, 1345, 124 LRRM 2762 (9th Cir. 1987); *NLRB v. U.S. Postal Serv.*, 906 F.2d 482, 488–90, 134 LRRM 2545 (10th Cir. 1990); *Harberson v. NLRB*, 810 F.2d 977, 984, 125 LRRM 2667 (10th Cir. 1987).

In a significant trio of cases,[24] the D.C. Circuit has expressed general approval of the Board's deferral doctrine, but has questioned its rational underpinnings. Most notable was the case of Marie Darr, a discharged union steward. An arbitrator found that Darr's employer had discharged her without just cause. He also found that Darr's union activity was "the primary motive" for discharging her. The arbitrator nevertheless awarded Darr only reinstatement, without back pay, a lesser remedy than she would have received for a discriminatory discharge under the Act. Still, the Board found that the award was not "clearly repugnant" under the *Spielberg/Olin* standard, and it deferred to the award.[25]

Darr challenged the Board's dismissal of her unfair labor practice case in the D.C. Circuit. On review, the court found the Board's justification for deferring inadequate. The court perceived "at least four separate theories supporting deferral" under the *Spielberg/Olin* doctrine: (1) collateral estoppel; (2) a quasi-appellate review concept; (3) the notion of deference to the determinative contract interpretation; and (4) the "theory that the parties have waived the statutory rights that the Board is empowered to enforce and instead rely on a different body of contract law."[26] The court stated that it was unable to discern the reasons for the Board's deferral to the arbitration award. It therefore remanded the case for the Board to clarify its reasoning for deferral.

On remand, however, the Board reversed itself, found that Darr's arbitral award was repugnant, and decided not to defer.[27] Consequently, despite the urging from the D.C. Circuit,[28] the Board did not make a full response to the broader deferral questions posed by the court's *Darr* opinion.

From the bench and in scholarly articles, Chief Judge Edwards of the D.C. Circuit has clearly expressed his preference for a waiver theory of deferral. The theory is, in his words, "a possible way out of everlasting confusion at the NLRB."[29] In his view, the Act permits

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[24]*Plumbers & Pipefitters Local Union No. 520 v. NLRB*, 955 F.2d 744, 139 LRRM 2457 (D.C. Cir. 1991); *Hammontree v. NLRB*, 925 F.2d 1486, 136 LRRM 2478 (D.C. Cir. 1991) (*en banc*); *Darr v. NLRB*, 801 F.2d 1404, 123 LRRM 2548, 123 LRRM 3051 (D.C. Cir. 1986).

[25]*Cone Mills Corp.*, 273 NLRB 1515, 118 LRRM 1197 (1985).

[26]*Darr v. NLRB*, 801 F.2d 1404, 1408, 123 LRRM 2551 (D.C. Cir. 1986).

[27]*Cone Mills Corp.*, 298 NLRB 661, 134 LRRM 1105 (1990).

[28]*Plumbers & Pipefitters Local Union No. 520 v. NLRB*, 955 F.2d 744, 755–56, 139 LRRM 2457 (D.C. Cir. 1991). *See also Utility Workers Union of Am., Local 246 v. NLRB*, 39 F.3d 1210, 147 LRRM 2860 (D.C. Cir. 1994).

[29]Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 Ohio St. L.J. 23 (1985); *Plumbers & Pipefitters Local Union No. 520 v. NLRB*, 955 F.2d 744, 751–52, 754–55, 139 LRRM 2457 (D.C. Cir. 1991).

a union bargaining representative to waive individual statutory rights in a collective bargaining agreement as long as it does not breach the duty of fair representation.[30] He reasons that when parties negotiate a contract with provisions for arbitration, "they have waived many of their statutory rights under the NLRA" and their "agreement, in essence, supplants the statute as the source of many employee rights in the context of collective bargaining."

With limited exception, the waiver theory would seem to lop off the "repugnancy" branch of the *Spielberg* tree. Under that theory, it would seem that, as long as it appears that the parties have agreed to substitute their dispute resolution system for the Board's on a particular employment issue, it would not matter if the resultant award contradicts statutory law. Of course, I must withhold my specific view on an open issue that may someday come before the Board.

Should the Board directly address this waiver theory, it likely will have to consider the kind of waiver language that would suffice to justify deferral. Moreover, that consideration will have to take into account the Supreme Court's holding in the 1998 *Wright* decision that any waiver in a collectively bargained arbitration provision of employees' rights to pursue statutory claims of employment discrimination in a judicial forum must be "clear and unmistakable."[31]

Turning from theory to practice, I note that one criticism of the revised deferral doctrine is that it would result in excessive and automatic deferral of unfair labor practice issues.[32] It is hard to say from a legal standpoint what number or percentage of deferrals would be "excessive." If the deferral theory is valid and the individual deferral decisions properly apply the theory, then the implications to be drawn from the number of cases deferred seem more practical than legal.

As a practical matter, from the Board's side, more deferrals to private dispute resolution facilitate casehandling and conserve resources. According to preliminary figures provided by the General Counsel's Division of Operations Management, over the past two fiscal years approximately 2,600 unfair labor practice cases have been deferred to the parties' grievance/arbitration process

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[30]Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 Ohio St. L.J. 23, 40 n.39 (1985).

[31]*Wright v. Universal Maritime Serv. Corp.*, 119 S. Ct. 391, 396, 159 LRRM 2769 (1998) (citing *Metropolitan Edison v. NLRB*, 460 U.S. 693, 112 LRRM 3265 (1983)).

[32]*See Olin*, 268 NLRB 573, 581, 115 LRRM 1056 (1984) (dissenting opinion).

under *Collyer*, or about 1,300 cases per year. It would be interesting to hear from the arbitration side of the fence about whether there is any perception that the revised deferral doctrines have overburdened contractual grievance arbitration systems.

Of course, the vast majority of deferral decisions are actually made by the General Counsel through the Regional Directors, rather than by the Board itself. The General Counsel's refusal to issue complaint, for deferral or any other reason, is essentially unreviewable by the Board or the courts.[33]

At least at the Board decisional level, experience under the revised deferral doctrine has demonstrated that deferral is not as broad or automatic as some critics had feared. There have been a number of cases in which the Board has declined to defer to an arbitration award or to the arbitral process. My own survey of Board cases from the past decade revealed 43 decisions with specific comment by the Board or an individual Board member about a contested deferral issue. Of these, the Board deferred in 19 cases[34] and denied deferral in 23 others.[35] In the remaining

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[33]The General Counsel does not regularly maintain detailed statistics on deferral decisions. An empirical study of casehandling activity in two of the Board's regional offices indicated a substantial jump in the percentage of deferrals in the immediate wake of *Olin*'s issuance. *See* Greenfield, *The NLRB's Deferral to Arbitration Before and After* Olin*: An Empirical Analysis*, 42 Indus. & Lab. Rel. Rev. 34 (1988). The jump is not surprising and, as I have suggested, not undesirable on its face. The author of the study contended that the statistics prove substantive fault in the Regional Offices' analysis of arbitration awards. On the basis of such a limited study, I am unwilling to draw any such broad conclusion.

[34]*Tri-Pak Mach., Inc.*, 325 NLRB 671, 158 LRRM 1049 (1998); *Mobil Oil Exploration & Producing*, 325 NLRB 176, 156 LRRM 1273 (1997); *McDonnell Douglas Corp.*, 324 NLRB 1202, 157 LRRM 1136 (1997); *Zurn Nepco*, 316 NLRB 811, 149 LRRM 1193 (1995); *Derr & Gruenewald Constr. Co.*, 315 NLRB 266, 147 LRRM 1153 (1994); *Public Serv. Co. of Okla.*, 319 NLRB 984, 151 LRRM 1089 (1995); *Southern Cal. Edison Co.*, 310 NLRB 1229, 143 LRRM 1073 (1993); *Textron, Inc.*, 310 NLRB 1209, 143 LRRM 1089 (1993); *August A. Busch & Co.*, 309 NLRB 714, 142 LRRM 1201 (1992); *Bethenergy Mines, Inc.*, 308 NLRB 1242, 141 LRRM 1145 (1992); *Hoover Co.*, 307 NLRB 524, 140 LRRM 1261 (1992); *United Parcel Serv. of Ohio*, 305 NLRB 433, 138 LRRM 1243 (1991); *Motor Convoy*, 303 NLRB 135, 137 LRRM 1169 (1991); *Bath Iron Works Corp.*, 302 NLRB 898, 137 LRRM 1124 (1991); *15th Avenue Iron Works, Inc.*, 301 NLRB 878, 137 LRRM 1042 (1991); *Catalytic, Inc.*, 301 NLRB 380, 137 LRRM 1113 (1991); *Teledyne Indus., Inc.*, 300 NLRB 780, 135 LRRM 1293 (1990); *U.S. Postal Serv.*, 300 NLRB 196, 135 LRRM 1209 (1990); *Inland Container Corp.*, 298 NLRB 715, 134 LRRM 1137 (1990).

[35]*Avery Dennison*, 330 NLRB 715, 163 LRRM 1033 (1999); *Nationsway Transp. Serv.*, 327 NLRB No. 184, 164 LRRM 1339 (1999); *Hallmor, Inc.*, 327 NLRB No. 61, 160 LRRM 1083 (1998); *U.S. Postal Serv.*, 324 NLRB 794, 156 LRRM 1229 (1997); *St. Mary's Med. Ctr.*, 322 NLRB 954, 154 LRRM 1099 (1997); *Roswill, Inc.*, 314 NLRB 9, 146 LRRM 1170 (1994); *Cirker's Moving & Storage Co.*, 313 NLRB 1318, 146 LRRM 1171 (1994); *R.T. Jones Lumber Co.*, 313 NLRB 726, 145 LRRM 1274 (1994); *McDonnell Douglas Corp.*, 312 NLRB 373, 144 LRRM 1137 (1993); *Advance Transp. Co.*, 310 NLRB 920, 144 LRRM 1250 (1993); *Int'l Screw Div. of Everlock Fastening Sys., Inc.*, 308 NLRB 1018, 141 LRRM 1207 (1992); *Stevens & Assocs. Constr. Co.*, 307 NLRB 1403, 141 LRRM 1253 (1992); *Columbian Chems. Co.*, 307 NLRB 592, 140 LRRM 1311 (1992); *Sillcocks/Miller Co.*, 306 NLRB 607, 140 LRRM 1039 (1992); *ABF Freight Sys., Inc.*, 304 NLRB 585, 139 LRRM 1125 (1991); *Equitable Gas Co.*, 303 NLRB 925,

case,[36] the Board deferred some issues and denied deferral on other issues.

In addition, both before and after the watershed 1984 precedent, there have been several situations in which the Board, as a policy matter, has consistently declined to defer to grievance arbitration. For example, the Board generally will not defer cases that allege that a party has failed to meet the statutory obligation to provide information relevant to the collective bargaining process in violation of section 8(a)(5) or 8(b)(3).[37]

This example presents an interesting practical conundrum. The Board itself has no prehearing discovery procedure. The traditional pattern in private labor arbitration has likewise provided for little or no prehearing discovery. Under well-established Board precedent, however, a party (most often an employer) must generally provide requested information that is relevant to the processing of a grievance.[38] So, in an unfortunate interplay, it is entirely conceivable that the Board may defer a substantive unfair labor practice issue for initial resolution in grievance and arbitration, only to have the contractual proceeding delayed while the parties come back to the Board to contest in a separate case the obligation to produce information requested for the grievance.[39]

927, 138 LRRM 1001 (1991); *U.S. Postal Serv.*, 302 NLRB 918, 137 LRRM 1352 (1991); *Wabeek Country Club*, 301 NLRB 694, 137 LRRM 1334 (1991); *Big Track Coal Co.*, 300 NLRB 951, 136 LRRM 1071 (1990); *Haddon Craftsmen, Inc.*, 300 NLRB 789, 136 LRRM 1190 (1990); *United Cable Television Corp.*, 299 NLRB 138, 135 LRRM 1033 (1990); *Barton Brands*, 298 NLRB 976, 135 LRRM 1022 (1990); *Cone Mills Corp.*, 298 NLRB 661, 144 LRRM 1215 (1990).

[36] *Clarkson Indus.*, 312 NLRB 349, 87 LRRM 1616 (1993).

[37] *See, e.g., U.S. Postal Serv.*, 302 NLRB 918, 137 LRRM 1352 (1991); *Worcester Polytechnic Inst.*, 213 NLRB 306, 309, 87 LRRM 1616 (1974). The Board also will not defer on cases involving statutory questions of representation, accretion, or appropriate unit. *See, e.g., St. Mary's Med. Ctr.*, 322 NLRB 954, 154 LRRM 1099 (1997); *Marion Power Shovel*, 230 NLRB 576, 95 LRRM 1339 (1997). It also will not defer contractual issues that are related to nondeferrable statutory questions, such as the lawfulness of an employer's withdrawal of recognition from the union. *See, e.g., Avery Dennison*, 330 NLRB 715, 163 LRRM 1033 (1999); *Sheet Metal Workers Local 17 (George Koch Sons)*, 199 NLRB 166, 168, 81 LRRM 1195 (1972). It also will not defer section 8(a)(4) allegations of discharge or discrimination against an employee who seeks access to the Board. *See, e.g., Equitable Gas Co.*, 303 NLRB 925, 927, 138 LRRM 1001 (1991), *enforced in relevant part*, 966 F.2d 861, 140 LRRM 2521 (4th Cir. 1992); *Filmation Assocs., Inc.*, 227 NLRB 1721, 94 LRRM 1470 (1977). And it will not defer in circumstances where the union representative's interests are at odds with the grievant's interests. *See, e.g., Regional Import & Export Trucking Co.*, 306 NLRB 740, 741, 139 LRRM 1377 (1992); *Kansas Meat Packers*, 198 NLRB 543, 80 LRRM 1743 (1972).

[38] *See, e.g., NLRB v. Acme Indus. Co.*, 385 U.S. 432, 64 LRRM 2069 (1967).

[39] *See* Furlong, *Fear and Loathing in Labor Arbitration: How Can There Possibly Be a Full and Fair Hearing Unless the Arbitrator Can Subpoena Evidence?*, 20 Willamette L. Rev. 535, 536–37 (1984).

Delay may result even if there is no unfair labor practice charge parallel to a grievance. Late last year, for instance, the Board decided a difficult information request issue in *Metropolitan Edison Co.*[40] The facts of that case dated back to the December 1992 discharge of an employee for stealing food from the plant cafeteria. The employee's union representative grieved the discharge and requested the names of two informants whose information led to surveillance and observation of the employee's theft. Expressing legitimate concerns about confidentiality and plant security, the employer refused to provide the names. The union then filed an unfair labor practice charge.

Ultimately, after balancing the competing interests of the employer's concern for confidentiality against the union's need for information, the Board decided that the company had unlawfully failed to bargain about how to accommodate the union's request. The Board did not require the company to actually turn over the informants' names. Rather, consistent with prior Board decisions involving union requests for confidential information, the Board directed the company to sit down and bargain with the union to see if there was an alternative way to satisfy the union's need.[41]

In the meantime, of course, years had passed. The high rate of Board member turnover and vacancies during that period, as well as the Agency's budget problems, were undoubtedly a significant cause of the delay in issuance of the Board's decision. Fortunately, the parties had long since settled the grievance. Had they not done so, the only options were for the union to proceed to arbitration without the requested information or for the parties to wait until the Board ruled.

The potential for adverse impact on arbitral proceedings illustrates one of the many reasons why the five-member Board must reduce delay in issuing decisions in cases. During my present term as Chairman, my colleagues and I have dedicated ourselves to this effort. Although the members are often at polar opposites in terms of their legal philosophy or interpretation of the Act, it is a "friendly polarization" that has not prevented us from working together in a collegial way to reduce the backlog of cases.

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[40]330 NLRB No. 21, 163 LRRM 1001 (1999).
[41]*Id.* at slip op. 3–4.

Our primary success so far has been in reducing the number of the very oldest unfair labor practice and election cases. These were cases that, like *Metropolitan Edison* and the *Mississippi Power* case I mentioned earlier, had been pending on appeal in Washington for several years or more when I returned as Chairman in December 1998. Again, there are certainly a variety of internal and external reasons why these cases got so old, but chief among them was clearly the high rate of Board member turnover and vacancies. Since March 1999, however, during a period of relative stability on the Board, we have issued decisions in more than 90 percent of the oldest cases that had been targeted.

But the goal also is to get out the newer cases faster, and to reduce the overall number of pending cases. To date, we have done very well in this regard with respect to pending election cases. We have reduced the total number of such cases before the Board by more than half. And we hope to make good progress on the unfair labor practice cases as well by the end of the fiscal year.

Nevertheless, even with reduced Board delay, the statutory scheme may inevitably lead to more delay in resolving a pre-arbitral information dispute than the parties might anticipate at the time the unfair labor practice charge is filed.[42] Fortunately, the parties work out most of these information disputes without any involvement by the Board.

Finally, as you all know, the hot topic of the past decade has been mandatory alternative dispute resolution in the nonunion work force. The Equal Employment Opportunity Commission (EEOC), which can act on its own initiative in this regard, has expressly opposed the notion that individuals may be forced to agree to mandatory arbitration of their statutory rights as a condition of employment.[43] The Board has remained on the sidelines, as it must do until a case is properly brought to it through the filing and litigation of an unfair labor practice charge.

It seemed that an opportunity to rule would arise after former General Counsel Feinstein issued complaints in four cases in

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[42] *See* Cooper, *Discovery in Labor Arbitration*, 72 Minn. L. Rev. 1281, 1294 (1988) (noting that the Agency's internal procedures usually require an investigation by the Regional Office and a hearing before an administrative law judge before the case is decided by the five-member Board, and the Board's order may be appealed to the courts of appeals).

[43] *EEOC Policy Statement on Alternative Dispute Resolution, No. 915.002*, 1995 Daily Lab. Rep. (BNA) (July 18), No. 137:E-13.

1994.[44] In *Bentley's Luggage*, for instance, the complaint alleged that the employer violated section 8(a)(4) of the Act by firing an employee who refused to sign an agreement requiring binding third-party arbitration of any legal action regarding employment or termination of employment. *Bentley's* and the other cases settled, however, and any unfair labor practice issues arising from mandatory arbitration in the nonunion setting remain open. I must therefore refrain from any specific comment about these issues.

So although the Board's deferral doctrine is still quite alive, there remain many deferral issues, both anticipated and unanticipated, that the Board will have to address in the future. A few of these may arise during the remainder of my time as Chairman, but most will, of course, come later. If and when the issues do arise, it is my hope and expectation that the Board will address those issues not only carefully, but expeditiously, ever mindful of the important role that private dispute resolution plays in effectuating our federal labor policy.

As I suggested earlier, a key element in the Board's ability to act expeditiously will depend on solving the problem of high Board member turnover and vacancies. A number of reasons have been suggested for this problem. Some cite the polarization of views and lack of consensus and cooperation in the labor-management community. Others cite the absence of any provision in the statute allowing a Board member to continue serving beyond his or her term until a replacement is nominated and confirmed. Such provisions are included in statutes covering various other agencies.

But whatever the reason, it is clear that constant turnover and extended vacancies have a severe impact on Board productivity. If there is one thing that would help the Board more than any other to permanently reduce the backlog of cases—and to tackle the tough issues that everyone wants to be decided in a timely manner—it would be for the labor-management community to work together to eliminate this problem; to make sure that the Board at all times is fully staffed with five members for full five-year terms. If that could be accomplished, history indicates that the rest should take care of itself; that the five-member Board will be able to harness its resources and expertise to decide the cases in a timely fashion—and, one hopes, with a little wisdom as well.

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[44] *Bentley's Luggage*, Case 12-CA-16658; *Bingham Toyota*, Case 31-CA-13604; *Great W. Bank*, Case 12-CA-16886; and *Raytheon, E-Systems Greenville Div.*, Case 16-CA-17970. For a discussion of the General Counsel's theory of violation in *Bentley's Luggage*, *see* 24 Advice Memorandum Rep. 212 (Aug. 21, 1995).