CHAPTER 8

COURTS, ARBITRATORS, AND THE NLRB: THE NATURE OF THE DEFERRAL BEAST

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The overlapping concerns of arbitrators, the NLRB, and the courts on NLRA-related matters are old issues now—much debated, much written about, much discussed in journals and published proceedings of meetings, including some lively dialogue at past Academy sessions.[1]

As is well known, the combination of the NLRB's *Collyer*[2] and *Spielberg*[3] decisions were the debate-precipitators in 1971 and 1955, respectively, and with the exception of the external-law issue, perhaps no arbitration issues have drawn more print than these two cases—which raises the question: Is there anything more to be said about how overlapping NLRB-arbitral-judicial issues are being and should be handled by the Board, the courts, and arbitrators?

Ted Jones has reduced speculation on that question to zero by coming up with the general topic of comparative thought-processes of arbitrators, judges, and agency members in resolving common questions of fact, a fascinating topic, filled with intriguing questions concerning the methodology of decision-

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[1] *See* McCulloch, *Arbitration and/or the NLRB,* in Proceedings of the Sixteenth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1963), 175; Ordman, *The Arbitrator and the NLRB,* in Proceedings of the Twentieth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1967), 47; Nash, *The NLRB and Arbitration: Some Impressions of the Practical Effect of the Board's Collyer Policy upon Arbitrators and Arbitration,* in Proceedings of the Twenty-Seventh Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1974), 106. Joining issue over the *Collyer* controversy are the following: Isaacson and Zifchak, *Agency Deferral to Private Arbitration of Employment Disputes,* 73 Col. L.Rev. 1383 (1973); Getman, *Collyer Insulated Wire: A Case of Misplaced Modesty,* 49 Ind. L.J. 57 (1973); Schatzki, *A Response to Professor Getman, id.,* at 76; Zimmer, *A Little Bit More on Collyer Insulated Wire, id.,* at 80; Getman, *Can Collyer and Gardner-Denver Co-Exist? A Postscript,* 49 Ind. L.J. 285 (1974).

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

[3] *Spielberg Manufacturing Co.,* 112 NLRB 1080, 36 LRRM 1152 (1955).

making at the incipient cerebral level. The topic has strong *Collyer-Spielberg* overtones, as would any topic on areas of common NLRB-arbitral jurisdiction.

I will not cover the ground Howard Block has gone over in his invocation of the names Llewellyn, Frank, Hutchison, and other students of the judicial thought-process. My rather peripheral use of the decision-making-methodology topic suggests that while *Collyer* and *Spielberg* are old and familiar cases, new progeny of *Collyer* and *Spielberg* show up all the time to give us fresh insights into the thinking of NLRB members on their applicability. *Suburban Motor Freight, Inc.*,[4] decided January 8, 1980, is perhaps the Board's latest *Collyer-Spielberg* variant. There the Board determined that it will no longer defer to an arbitrator's decision in a discipline case if the unfair practice issue before the Board was both presented to and considered by the arbitrator.

Without commenting on the merits of the Board's conclusion in *Suburban Motor Freight, Inc.*, the case represents one of many Board decisions in which the current case "A" overrules an earlier case "B" and returns to the status quo ante of case "C."[5] The case is also a split decision, two to one, with a dissent. *Spielberg* was unanimous, but almost every major Board case applying *Collyer* or *Spielberg* is a split decision.[6] The history is familiar and, without recounting it, we know that *Collyer* survives now by the slenderest of threads. Board members have come and gone, and each change in membership threatens *Collyer's* survivability, so narrow is the majority in its favor.[7] This is a classic example of how differing and fundamental viewpoints on the role of arbitration and the Board in respect to how questions

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[4]247 NLRB No. 2, 103 LRRM 1113 (1980).

[5]Case "A" is *Suburban Motor Freight, Inc., ibid;* case "B" is *Electronic Reproduction Service Corp.*, 213 NLRB 758, 87 LRRM 1211 (1974); case "C" is *Airco Industrial Gases-Pacific*, 195 NLRB 676, 79 LRRM 1497 (1972).

[6]*E.g., Southwestern Bell Telephone Co.*, 212 NLRB 396, 87 LRRM 1446 (1974); *National Radio*, 198 NLRB 527, 80 LRRM 1718 (1972); *Joseph T. Ryerson & Sons, Inc.*, 199 NLRB 461, 81 LRRM 1261 (1972); *United Aircraft Corp.*, 204 NLRB 879, 83 LRRM 1411 (1973); *McClean Trucking Co.*, 202 NLRB 710 (1973); *General American Transportation Corp.*, 228 NLRB 810, 94 LRRM 1483 (1977); *Roy Robinson Chevrolet*, 228 NLRB 828, 94 LRRM 1474 (1977), all of which are prearbitration deferral cases. Some split opinions applying *Spielberg* are those cited in note 5, *supra.* In addition, see *International Harvester Co.*, 138 NLRB 923, 51 LRRM 1155 (1962), *aff'd sub nom. Ramsey* v. *NLRB*, 327 F.2d 784, 55 LRRM 2441 (7th Cir. 1974), *cert. den.*, 377 U.S. 1003, 56 LRRM 2544 (1964).

[7]On October 25, 1977, John C. Truesdale was appointed to the NLRB seat left vacant when Peter D. Walther, a *Collyer* proponent, resigned. At this writing, Member Truesdale's views on *Collyer* have not been publicly made known. His vote in favor of not deferring in prearbitration disputes would overrule *Collyer.*

of forum—where cases should be heard and tried—should be decided.

What kinds of cases spawn these shifting and uncertain majorities? And what are the characteristics of the *Collyer-Spielberg* issues that make them so amenable to widely differing viewpoints at the Board level? Do the opponents of NLRB deferral perhaps mistrust arbitrators and the arbitration process?[8] Or, do deferral opponents take the more neutral-principled view that Congress simply never intended that the Board should decline to hear a class of cases within its jurisdiction, even on the assumption that arbitration might be a better forum for resolving the question[9]—better for the parties (though both parties might not agree) and better for the Board and its ability to cope with a constantly rising caseload?

I offer the notion that among the many reasons raised in opposition to *Collyer* (and less so to *Spielberg*) we might add the view that the Board's indecision, its shifting majorities, its constant creation and re-creation of exceptions to the general rule are also reasons for abandoning *Collyer*'s rule of prearbitration deferral.

As applied to *Collyer-Spielberg* deferral, the NLRB's shifting majorities and variations on the theme rather distort the element of litigation-result predictability that is so valuable an inducer of litigation-avoiding settlements. The *Collyer-Spielberg* doctrine may be creating more litigation time than it avoids for NLRB personnel, arbitrators, and judges. And by "litigation time," I mean the sum total of man-hours spent by parties in deciding whether to litigate, preparing to litigate, litigating, or, in the case of courts, arbitrators, and NLRB personnel, attempting to resolve or decide disputes.

I am not suggesting repeal of all general rules of law that are subject to exceptions. We often gain from a flexible application of exceptions to an otherwise rigidly applied rule, even at the expense of some uncertainty of application. But deferral policies do not fit that mold. Weighing the advantages and disadvantages of a flexible deferral policy against the advantages and

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[8]See the discussion of Chairman Murphy's opinions in *Roy Robinson Chevrolet* and *General American Transportation Co.*, notes 26–40 *infra*, and accompanying text.

[9]That view is part of the rationale of dissenting Members Fanning and Jenkins in *Collyer* and its progeny. *See, e.g.*, 192 NLRB at 853.

disadvantages of an inflexible policy of nondeferral, I believe the net advantage lies with a policy of nondeferral. The advantage of reducing litigation time should be a paramount concern in the face of deferral policies with advantages that are mainly illusory and seriously diluted by the inability of the NLRB to agree upon the basic ground rules.

What is it about the nature of the deferral issue that so often prompts new Board members to bring differing points of view to the Board, and that prompts some old NLRB members to shift their views, all to the detriment of litigation-result-predictability and reduced litigation time for parties, arbitrators, courts, and NLRB personnel? Posing the matter in terms of the allocation of scarce and finite decision-making time, the questions on the merits of whether employee Doe was discharged because of union activity, or whether XYZ Corporation illegally refused to bargain with ABC union, or a union's picketing was illegal under the NLRA, are to me more important questions than the issues of whether and under what circumstances the NLRB should defer to arbitration.

Implicit in *Collyer* itself is the premise that the NLRB saves time by invoking the *Collyer* principle, that some cases which would reach the Board without a deferral policy will never reach the Board because a swift and expert arbitrator will provide a complete and final remedy for a grievant.[10] But does *Collyer* save time, as the NLRB suggests, or cost time? Relevant in attempting to resolve that issue are subsidiary questions concerning the nature of the common jurisdiction cases subject to deferral policies and the manner in which they are resolved by arbitration, NLRB, and judicial processes.

In the beginning, *Collyer* was applied to any matter of common concern to arbitrators and the NLRB. Discipline because of union or concerted activity, a class of cases comprising 70 percent of the NLRB's caseload,[11] concurrently fell within the jurisdiction of an arbitrator interpreting a "just cause" clause in an agreement; certain forms of refusal-to-bargain allegations also fell within the arbitrator's as well as the NLRB's province if, for

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[10]In *General American Transportation Corp., supra* note 6, at 819, Members Walther and Penello generalize that arbitration is faster than the Board's processes. Their use of statistical data in support of that view is criticized by this author at note 35 *infra*.

[11]40 NLRB Ann. Rep. 215 (1975).

example, a refusal-to-bargain charge happened arguably to involve a contract term. There were other areas of arbitral-NLRB jurisdictional overlap,[12] but these latter two types of cases dominated the lot.

Before *Collyer,* and before the NLRB began to think about deferral, a party filing an NLRB charge had only to consider whether the charge had arguable merit in alleging a violation of the NLRA. Immediately following the *Collyer* case and for six years thereafter, a party thinking of filing an unfair practice charge in an NLRB regional office had to consider the following: (a) whether the unfair practice charge had arguable merit as an alleged NLRA violation; (b) whether the subject of the unfair practice charge was arguably a subject covered by the grievance-arbitration clause of a governing collective bargaining agreement; (c) whether the NLRB would eventually perceive the subject of the unfair practice charge as a subject also covered by the grievance arbitration clause of a governing collective bargaining agreement and defer on *Collyer* grounds; and, if so, (d) whether those persons who in fact control the decision to seek arbitration might be persuaded to pursue the grievance to arbitration; and, if so, (e) whether, on reaching the arbitration level of the grievance arbitration process, the arbitrator would decide that the dispute was arbitrable and decide it on the merits.[13]

Now, with cases like *Roy Robinson Chevrolet*[14] and *General American Transportation Corp.*[15] on the books, new thinking, and a new exception to *Spielberg,* a potential charging party before the NLRB must consider not only how old law should be applied, but also the meaning of new deferral law and what possible changes still newer deferral law might make in the future.

NLRB *Collyer* proponents assume that arbitration is invariably

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[12]A sampling of cases presenting other than Section 8(a)(3) and Section 8(a)(5) *Collyer* questions for resolution by the NLRB include: *Sheet Metal Workers' International Association, Local 17* (George Koch Sons, Inc.), 199 NLRB 166, 81 LRRM 1195 (1972) (Section 8(b)(1)(B), fine for violating union rules); *Associated Press,* 199 NLRB 1110, 81 LRRM 1535 (1972) (Section 8(a)(2), dues deductions after checkoff authorizations revoked); *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers* (Bigge Drayage Co.), 197 NLRB 281, 80 LRRM 1382 (1972) (Section 8(e), "hot cargo" clause issue).

[13]In *Collyer* itself, the contractual time within which to seek arbitration had expired by the time the NLRB made its decision. See 192 NLRB at 847, 77 LRRM at 1941 (Member Fanning dissenting). *Collyer* proponents discount this as a problem by noting that the party seeking deferral, usually the respondent employer, must agree to waive arbitrability defenses as a condition of deferral. *See* Nash, *supra* note 1, at 138.

[14]*Supra* note 6.

[15]*Supra* note 6.

the swift route.[16] They tend to see the extreme time lag in NLRB dispositions and to compare that with the more expeditious grievance handling. But why should that comparison be made? Why not consider the other extreme of a quick disposition by the NLRB at the regional level, by settlement, withdrawal, or dismissal, as compared with the long-delayed arbitration case, of which there are many?[17] The NLRB's implicit assumption that grievance arbitration is always faster than the NLRB process is not really valid. Indeed, when the Board is criticized for delay in case-handling, its time-honored response is a reference to the small percentage of NLRB filings that reach the Board members[18] and the short time in which most remaining cases are closed through settlements, dismissals, and withdrawals following investigation, and without a hearing.[19]

The *Collyer* Board's easy assumptions concerning the voluntary nature of arbitration are also somewhat skewed, in that they avoid the internal economic and political realities of grievance arbitration, the problems flowing from a union's unwillingness

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[16] *Supra* note 10.

[17] Almost all annual reports of the Federal Mediation and Conciliation Service show that the costs of arbitration have increased annually. According to FMCS data, arbitrators' fees now average $830.54 per case, up from $511.06 in 1969. Fed. Med. & Conc. Serv. Ann. Rep. (1978), 40. During the year 1978, the average time between the filing of a grievance and a request for an FMCS list of arbitrators was 191.1 days. The time from the hearing date until the date of the arbitrator's award averaged 32.4 days, down considerably from an average of 52.2 days in 1977. Thus, the total time from the grievance to completion of the arbitration averaged 223.5 days in 1978, which was down from a high of 268.3 total days in 1977. The figures provided by FMCS do not include the time from the date the list of arbitrators is requested until the arbitration is held. This would include the time it takes the FMCS to compile the list and forward it to the parties, the time required by the parties to select an arbitrator, and the time required by the parties and the arbitrator to arrive at a mutually agreeable date for the hearing. I would conservatively place that time at an average of about 60 days. Adding that figure to the FMCS totals noted above, the total average time from grievance filing to an award was in the vicinity of 283.5 days in 1978 and 328.3 days in 1977. *Ibid.* The data on costs excludes transcript costs, attorney fees, and other arbitration expenses. FMCS reports that parties used transcripts in 24.1 percent of FMCS arbitrated cases in 1978. *Id.*, at 43.

[18] According to annual reports of the NLRB, about 5 percent of unfair-practice filings reach the Board members as contested cases. In 1978, 25 percent of the 37,192 unfair-practice charges were closed by settlement or adjustment in advance of a hearing before an administrative law judge, 33 percent by withdrawal before complaint, and 37 percent by administrative dismissal. 43 NLRB Ann. Rep. 9 (1978).

[19] The Board completes its investigation of unfair-practice charges in a median time of 47 days in investigated cases culminating in the issuance of complaints. *Id.*, at 11. The Board's annual reports do not show the median or average time required by regional offices to dispose of all cases not resulting in a hearing before an administrative law judge. The median time for disposing of all such cases is probably roughly in the vicinity of 47 days. That time, of course, compares more than favorably with the average of 283.5 days required to grieve, complete arbitration proceedings, and receive an award in 1978. *Supra* note 17.

or inability (for economic reasons, for example) to pursue a grievance to arbitration; they overlook the numerous means available to an employer to delay or resist arbitration.[20]

Given the wide-ranging variables that can influence the decision to arbitrate and the often difficult objective considerations that might influence a choice of NLRB over grievance arbitration and vice versa, that tactical choice should be left to the party who owns the charge.

I would argue that when presented with a legal choice between the NLRB and arbitration, a charging party is prompted to prefer one forum over the other, not so much in anticipation of a favorable result in one forum, but by a perception that a result would be more swiftly and efficiently achieved in one forum than in the other. The equities might fall in favor of the NLRB in some instances and in favor of grievance arbitration in others. But the question, it seems to me, of when the time and efficiency equities might favor one forum over the other is not nearly as important as the question of who should resolve that question, the charging party or the NLRB.

That the choice of an NLRB or arbitration forum is best left to the charging party in all instances of concurrent NLRB-arbitral jurisdiction is more easily perceived when the common jurisdiction of the NLRB and arbitration processes is viewed as part of an interlocking labor-management relations dispute-resolution scheme in which the interests of a charging party in the most effective and expeditious resolution of a dispute are at least as great as, if not greater than, the interests of the NLRB in managing its caseload. For even assuming for the sake of argument that *Collyer* proponents are correct in their assumption that *Collyer* reduces the NLRB's caseload, the NLRB caseload reduction would generally be at the expense of increased litigation time for a charging party somewhere in the dispute-resolution system.[21]

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[20]At the Academy's Twenty-Seventh Annual Meeting, speaker Winn Newman suggested that "unions may have to choose two of twenty cases they can afford to arbitrate." In Proceedings of the Twenty-Seventh Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1974), at 149.

[21]If the NLRB itself is splitting two-two-one and three-two in *Collyer/Spielberg* cases, many charging parties can be forgiven for making the incorrect choice of forum. In the extreme case, charging party can file originally with the NLRB, receive an NLRB decision to defer (N1), pursue arbitration to completion and receive an adverse decision from the arbitrator (A), file with the NLRB under *Spielberg*, and receive a favorable decision on grounds of "repugnancy" (N2). Obviously, (N1) + (A) + (N2) would consume more time than (N1) as a decision on the merits. *Collyer* proponents would respond that "Charging party should have known the Board's deferral policies and

Charging parties are surely in a better position than the NLRB to weigh the pros and cons of the NLRB forum versus the arbitration forum: they understand where the tactical advantages lie; they understand the economic and political realities of the grievance-arbitration process, its subtleties, and unwritten rules. The NLRB, in contrast, is far removed from prearbitration grievance maneuvering.

I think my notion that, in choosing an NLRB-arbitration common-jurisdiction forum, a party is seeking an advantage of time and efficiency, tends to be borne out by the nature of the common-jurisdiction cases. In that limited class of cases, there are not enough measurable differences between the arbitration and the NLRB forums to forecast a greater likelihood of final-outcome success in one forum. An attempt to do so would be a speculative shot in the dark. Intuitively, charging parties are so aware and thus seek what the NLRB denies them in those instances: a choice of what they perceive as an advantage of time and efficiency.

We can test some of this by examining the nature of the cases that are subject to the NLRB's deferral rule. We can view that in the context of our conference theme. What are the common jurisdiction cases? How are they being decided by arbitrators? How by the NLRB?

We know that for a period of about six years following *Collyer*, the NLRB deferred in virtually all NLRB-arbitration concurrent jurisdiction cases and that with *Roy Robinson Chevrolet*[22] and *General American Transportation Corp.*[23] the Board limited its deferral policy to unilateral-change allegations. Also, *Robinson* and *General American* marvelously reveal NLRB members' perceptions of how arbitrators decide cases. I think those two cases tend to illustrate that the NLRB is far removed from the nuts and bolts of grievance arbitration and that the Board's erroneous view of arbitration as a swift, voluntary process that NLRB charging parties should always use when it is available—despite the NLRB's jurisdiction over the subject matter—is really a convenient rationalization in support of the Board's enormous

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pursued arbitration as an original forum rather than the NLRB." But that forces a potential charging party to arbitrate or attempt to arbitrate any reasonably close deferral case rather than chance the inordinate delay of (N1) + (A) + (N2). Thus, the degree to which *Collyer* compels arbitration is increased by virtue of a charging party's having to err on the side of arbitration, even in those instances when (N1) alone would consume less time and require far less in the way of expenditure of money than (A).

[22] *Supra* note 6.

[23] *Supra* note 6.

and understandable desire to reduce its mounting caseload.

Roy Robinson and *General American* were companion cases decided by the NLRB on the same day. Three opinions were filed in each case: one by Members Fanning and Jenkins, arguing against all prearbitration deferral;[24] one by Members Penello and Walther, in favor of deferral in all "disputes covered by a collective bargaining agreement and subject to arbitration. . . ."[25] Chairman Murphy cast her vote in favor of deferring in certain refusal-to-bargain cases and not deferring in discipline cases.[26] Thus, the opinions boiled down to a two-two-one split, with Chairman Murphy picking up the votes of Members Fanning and Jenkins, to the extent that they would not defer in discipline cases (since they would not defer in any case), and the votes of Members Penello and Walther, to the extent that they would defer in refusal-to-bargain-type cases (since they would defer in all NLRB-arbitration concurrent jurisdiction cases). In sum, two sets of Board members agreed partially with Chairman Murphy's result; no member agreed with her reasoning in support of limited deferral.

Chairman Murphy's opinion states, among other things:

> "[I]n cases alleging violations of Section 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2), although arguably also involving a contract violation, the determinative issue is not whether the conduct is permitted by the contract, but whether the conduct was unlawfully motivated or whether it otherwise interfered with, restrained, or coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act. In these situations, an arbitrator's resolution of the contract issue will not dispose of the unfair labor practice allegation. Nor is the arbitration process suited for resolving employee complaints of discrimination under Section 7."[27]

I read in that statement the presupposition that an arbitrator interpreting a just-cause clause in a collective bargaining agreement might not find a contract violation, even though the arbitrator determined that the motivation for the discharge or other discipline was union or concerted activities. I think that is not a valid supposition.[28]

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[24]228 NLRB at 818, 832 (1977).
[25]228 NLRB at 813, 828 (1977).
[26]228 NLRB at 810, 831 (1977).
[27]*Id.*, at 811, 94 LRRM at 1486–1487.
[28]The view that Section 8(a)(3) allegations require an expertise not generally possessed by arbitrators has been expressed at a prior meeting of the Academy. At the 1974 meeting, Professor William Murphy, in posing a question for General Counsel Nash of

Arbitrators are certainly aware that a host of reasons found to have motivated discipline might constitute a breach of a just-cause clause. That NLRB members may find a violation of the NLRA in discipline cases only when discipline was motivated by union or concerted activities surely does not mean that, conversely, an arbitrator is precluded from finding or is unqualified to find such discipline to be without just cause. I believe I am correct in my view that virtually every arbitrator who found union activity or concerted activities to be the motivation behind discipline would sustain a challenging grievance. Indeed, arbitrators are prone to find just-cause violations for any reason that appears to be arbitrary and without a foundation in fundamental fairness. That would include any discharge or discipline that had no satisfactory explanation. That is so much a part of the fabric of grievance arbitration that an arbitrator who had never heard of the NLRA or read an NLRB decision would undoubtedly find discipline action based on union or concerted activities to be without just cause.

Arbitration practice places upon the company in a discipline case both the burden of proof and the burden of going forward with the evidence.[29] In contrast, the burden of proof and of going forward with the evidence is upon the General Counsel of the NLRB in all unfair practice cases. General Counsel could not win an unfair practice case without putting on some evidence. In arbitrated discipline cases, a company could not win without putting on some evidence. We, of course, seldom hear of cases in which a party with the burden of proof presents no evidence. But there are many instances in which the party with the burden of proof puts on insufficient evidence to sustain the burden. The hypothetical zero-evidence cases are useful means of illustrating the consequences of allocating the burden

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the NLRB, said: "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 language." In Proceedings of the Twenty-Seventh Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1974), at 143.

[29]*See* Elkouri and Elkouri, How Arbitration Works. 3d ed. (Washington: BNA, 1973), at 621 and cases cited at note 56 therein: "Discharge is recognized to be the extreme industrial penalty since the employee's job, his seniority and other contractual benefits, and his reputation are at stake. Because of the seriousness of this penalty, the burden generally is held to be on the employer to prove guilt of wrongdoing, and probably always so where the agreement requires 'just cause' for discharge."

of proof and the burden of going forward with the evidence.

Further, it is unnecessary in an arbitration proceeding (as it is necessary before the NLRB in all unfair practice cases) to establish some legally required specific motivation for discipline. This means that the NLRB could find all sorts of arbitrary reasons for disciplinary action, but if union or concerted activities were not among them, the Board would have to find no violation of the NLRA. If an arbitrator in that instance found that no union activity motivated the discharge, but also found no rational reasons in support of the discharge, the arbitrator would surely sustain the grievance. On those facts, however, the NLRB would have to dismiss the unfair practice charge.[30]

Chairman Murphy's conclusion that "the arbitration process is not suited for resolving employee complaints of discrimination under Section 7"[31] assumes that the inherent arbitrariness of a discharge because of union or concerted activities has some mysterious quality that is known only to the NLRB, when in fact the arbitrary feature of discipline on account of union activity or concerted activities is but one type of arbitrariness among the hundreds of types of arbitary behavior that are considered by arbitrators when allegations are made under just-cause clauses.

We might also view this from the perspective of remedy. On matters of remedy, arbitrators operate with far more flexibility than do NLRB personnel. Arbitrators commonly—too commonly for many employer representatives—convert disciplinary discharges to suspensions or otherwise reduce discipline penalties, all depending upon the equities perceived by the arbitrator. In contrast, in an NLRB proceeding, evidence either supports or does not support, for example, a Section 8(a)(3) allegation.

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[30]In *American Shipbuilding Co.* v. *NLRB,* 380 U.S. 300, 311, 58 LRRM 2672 (1965), the Supreme Court noted: "It has long been established that a finding of violation under Section 8(a)(3) will normally turn on the employer's motivation. See National Labor Relations Board v. Brown, 380 U.S. 278 . . . Radio Officers' Union v. National Labor Relations Board, 347 U.S. 17 . . . National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1. . . ."

[31]228 NLRB at 811. The view that arbitrators lack expertise in deciding union or concerted-activities discipline cases appears to be based also on the erroneous notion that most Section 8(a)(3) discharge cases, for example, present sophisticated issues of law, when in fact those cases invariably raise disputed questions of fact and no question of law. In short, they are cases which a charging party will win if the facts alleged in the complaint are established at the hearing. Sophisticated questions of law of the kind that are found in law school casebooks on labor law, those that reach the United States Supreme Court, and some of those in the federal circuit courts represent a miniscule minority of NLRB discipline cases.

All of the essential elements of a violation may not be satisfied, including employer knowledge of union activity and discrimination on account of union activity.[32] Given the nature of the allegation, the NLRB has little leeway to reduce a discharge to a lesser penalty. There are, in short, no measurable degrees of union- or concerted-activities-based discrimination. Like pregnancy, it is either all there or it is not there at all. Thus, an NLRB discharge case that falls barely short of satisfying all of the elements of proof required to sustain a Section 8(a)(3) violation would result in a dismissal of the complaint unless some other section of the NLRA were found to have been independently violated. The same facts heard by an arbitrator might well result in a reduction of the discharge to some lesser discipline, not only because the employer's reasons for the discharge were found to be partially lacking in proof, but also for the possible reason that the arbitrator regarded the discharge penalty as being too severe under the circumstances.

In all of these respects it is true that, strictly speaking, an arbitrator would not be resolving statutory unfair practice allegations. But Chairman Murphy was almost certainly wrong when she wrote in *Roy Robinson* that in union or concerted-activities discrimination matters "an arbitrator's resolution of the contract issue will not dispose of the unfair practice allegation." If an arbitrator were sufficiently unwise to dismiss a grievance in the face of disciplinary action amounting to an NLRA violation, an NLRB remedy might be available under the postarbitration *Spielberg* policy. I believe, though, that the possibilities of an arbitrator's making that kind of incorrect decision are not greater than the possibilities of the NLRB's reaching the wrong result in discipline cases—as it surely sometimes must.

On matters other than the allocation of proof and going forward with the evidence, the general methodology of deciding an NLRB and an arbitration union-activity discipline case scarcely differs, as measured by the kinds of evidence that would be introduced and how an NLRB administrative law judge or arbitrator would react to the evidence. For example, it would weigh heavily against the employer in both the NLRB and the arbitration forums if the employer's reasons for discipline—excessive tardiness, lack of productivity, etc.—were found to be not sustained by the evidence. The finder of fact in both the NLRB and

[32] *Supra* note 30.

arbitration forums would in that instance tend to infer that the affirmative defense was merely a pretext and that union activity actually motivated the employer's decision to discipline. That is on the assumption, of course, that the facts were such that the arbitrator found it necessary to find that union or concerted activities motivated the discipline.

In another portion of her opinion in *General American,* Chairman Murphy further revealed her thinking (and perhaps the thinking of other NLRB members) on how the arbitration process is viewed from the offices of NLRB members. Her opinion states: "In [cases alleging refusal-to-bargain violations] the dispute is principally between the contracting parties—the employer and the union—while in [discipline] cases the dispute is between the employee on the one hand and the employer and/or the union on the other."[33] At least implicit here, I gather, is the notion that, as a dispute between contracting parties, the refusal-to-bargain case is more properly the province of those who interpret contracts—arbitrators, and that a dispute between an "individual" and the employer raises individual rights questions which are more properly the province of the NLRB. I find both the premise and the conclusion quite imprecise.

Before the NLRB, the union is most often the charging party in cases alleging discipline because of union activity;[34] the union is the charging party in just about all arbitrated cases and is certainly a party in all arbitrated cases arising under collective bargaining agreements in the private sector. In discipline cases invoking NLRA principles, the grievant's interest in the outcome, while personal and terribly important to the grievant, can hardly be characterized as being less important than the union's interest in sustaining a charge alleging some form of retribution for helping organize the union. The union's survival as a possible exclusive bargaining representative is often at stake in cases alleging union-activity discrimination during an initial or early stage of a union's organizing campaign. The union is a real party in interest in those cases, as well as the nominal charging party.

Somewhat ironically, Chairman Murphy's observations concerning the alignment of parties in discipline cases would have

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[33]94 LRRM at 1486.

[34]During the 1978 fiscal year, the NLRB received a total of 27,056 unfair-practice charges against employers, of which 15,016, or 55.5 percent, were filed by unions. 43 NLRB Ann. Rep. 239 (Table 1A) (1978). The figures provided in Table 1A are not broken down by type of unfair-practice charge filed by individuals, unions, and employers.

had more to commend it as applied to discipline cases not involving union activity. There the union's interest in winning a grievance would generally be comparatively less than its interest in winning a case in which the union's survival as exclusive representative might be at stake. But those are not the NLRB-arbitration concurrent-jurisdiction cases. Thus, Chairman Murphy's view of NLRA discipline cases as being between the employee and the employer is more amenable to criticism when applied to a class of cases—union-activity cases—in which the weakness of that reasoning is most apparent.

Lest I sound unduly critical of one member of the NLRB, I should emphasize that I appreciate Chairman Murphy's effort to limit prearbitration deferral. Discounting the split opinions in *Robinson* and *General American,* and the likelihood of their fragile majorities being upset, we now have at least one important class of cases—at this writing—in which a charging party need not be concerned that its own tactical judgments concerning time and efficiency in achieving a final result will be upset by the NLRB. My disagreement is with the reasoning in support of the decision to limit deferral, as well as the result of not ending all prearbitration deferral. And, as I see it, the flaws in the reasoning used in support of the decision not to defer in discipline cases is inextricably linked to Chairman Murphy's arguments in support of her decision to continue deferring in certain types of refusal-to-bargain cases. All the reasoning in support of deferring in discipline cases is simply conversely applied to support her conclusion in favor of deferring in refusal-to-bargain cases. But let us see what those cases might be. And here we can focus not on one Board member, but on the three who made up the majority in favor of deferral, Members Penello and Walther, with Chairman Murphy.

What kinds of refusal-to-bargain cases are these? How are they decided by arbitrators? How by the NLRB? Are there material differences between the NLRB and arbitration approaches to them that justify their forced resort to arbitration, even though the NLRB has jurisdiction? Is there something about them, other than the manner in which arbitrators might decide them, that justifies their continued deferral to arbitration in advance of arbitration?

These cases arise under Section 8(a)(5) of the NLRA.[35] But

[35]29 U.S.C. §158(a)(5) (1978). Refusal-to-bargain cases could also arise under Section 8(b)(3) of the NLRA, 29 U.S.C. §158(b)(3) (1978), which makes it an unfair practice for

we should classify them more closely, since the deferral policies would have no application at all in many kinds of refusal-to-bargain cases. Section 8(a)(5) of the NLRA may be violated by a party who engages in surface (make-believe) bargaining,[36] or by an employer's unilateral change of working conditions that are within the scope of bargaining, in two situations: (a) during negotiations and in advance of an agreement,[37] and (b) after an agreement has been reached and in arguable derogation of the agreement.[38] Ordinarily, deferral would have no application in surface bargaining cases since they involve conduct allegedly

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a labor organization to refuse to bargain in good faith. Section 8(b)(3) charges, though, are a distinct minority of 5 percent of the total cases filed annually with the NLRB. By comparison, Section 8(a)(5) allegations of refusal to bargain are 19.7 percent of the total number of charges filed annually, or four times the number of Section 8(b)(3) charges. *See* 43 NLRB Ann. Rep. 241 (Table 2) (1978). The Board's report does not show further breakdown of refusal-to-bargain charges by type, but unilateral-change cases of the kind that might fall within the concurrent jurisdiction of arbitrators are undoubtedly a still smaller percentage of the Board's total refusal-to-bargain workload.

Statistics cited by Board Members Walther and Penello, in favor of deferral, appear to have the paradoxical effect of patently refuting the conclusions they would reach in favor of the utility of prearbitration deferral. Dissenting in *General American Transportation Corp.*, they said: "In an unpublished Board study of the effect of Collyer over a 2 ½ year period . . . a total of 1,632 cases had been deferred by the Board's Regional Offices under Collyer. Arbitrators' decisions issued in 473 of these cases. Of these 473 decisions, the Regions scrutinized 159 at the request of the charging parties in light of the Spielberg standards. On 33 occasions, the Regions revoked the Collyer deferrals either because the respondents refused to proceed to arbitration or the arbitration awards were deficient under the Spielberg standards. In 24 of these 33 instances, issuance of a complaint was made unnecessary by the respondents' signing of a settlement agreement. Further, of the 1632 deferred cases, 437 were settled through the contract grievance procedure without the need of a proceeding to arbitration." 94 LRRM at 1494.

To obtain the benefit of 427 settlements through the grievance procedure and without arbitration, the Board had to spend prearbitration *Collyer* time plus postarbitration *Spielberg* time in 159 out of 437 arbitrated decisions, or 33.6 percent of the total. Without *Collyer*, in all of those 159 instances, the time spent on the merits of the charge at the postarbitration *Spielberg* stage would have been spent much earlier (at what was the prearbitration *Collyer* stage), and the dual proceedings before the Board *(Collyer* plus *Spielberg)* could have been a single proceeding on the merits. It is unclear how many of the 33 revoked *Collyer* deferrals were revoked because of refusals to arbitrate, but of that number, whatever it was, there were three levels of consideration by the Board's regional offices: level 1, the decision to defer; level 2, the decision to revoke deferral; and level 3, the decision on the merits. Absent *Collyer*, those levels would have been reduced to one, a decision on the merits. In the 24 instances when issuance of a complaint was made unnecessary by the respondent's settlement of a complaint, that would have been true in a single level 1 proceeding on the merits, in the absence of *Collyer*. It is abundantly clear, I think, that *Collyer* encumbers both the Board and the parties before the Board with additional Board-created work, and that the net effect of *Collyer* is a loss in Board and party time and resources.

[36] *See generally NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 401–403 (1952).

[37] *See, e.g., NLRB* v. *Katz*, 369 U.S. 736, 50 LRRM 2177 (1962).

[38] *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 64 LRRM 2065 (1967), and *Collyer* itself, among others, *supra* note 2. An arbitrator might, of course, find that a subject not expressly included in an existing agreement became an implied part of the agreement by way of past practice. I would regard that as a unilateral-change case based on a contract derogation allegation.

taking place during negotiations for an agreement. Likewise, of the two types of unilateral-change cases, deferral would have no application to those cases in which the unilateral change was not alleged to have been in breach of an agreement because no agreement existed, or an agreement existed but was not alleged to have been breached by the alleged unilateral change. It is the contract-term unilateral-change case that appears at this writing to be the sole surviving class of cases for NLRB prearbitration deferral. *Collyer* itself was such a case.

Collyer became a dispute before the NLRB when, during the term of a collective bargaining agreement, the company unilaterally increased wage rates and also changed from two to one the number of employees who worked on a worm gear. The agreement arguably precluded the company from taking either the wage-change or the manpower-change action. In deferring, the Board, among other things, said: "In our view, disputes such as these can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by application by this Board of a particular provision of the [NLRA]."[39] Too expert to be avoided in unilateral-change cases; not expert enough to be substituted for the NLRB in discipline cases. That appears to summarize the Board's judgment of arbitrators when *Collyer, Robinson,* and *General American* are read together.

One need not make the case that the NLRB is more skilled than arbitrators in deciding unilateral-change cases, no more so than it was necessary to make the case that arbitrators are more skilled than the NLRB in deciding discipline cases. I think it is sufficient to attempt to demonstrate that in the nature of the unilateral-change cases, the NLRB is no less competent than arbitrators to decide unilateral-change cases involving arguable contract violations. We can test this thesis by attempting to determine what arbitrators and the NLRB do when they decide these cases.

When the Board has before it an allegation of unilateral change that is manifested by a contract breach, the Board must (1) find a unilateral change; (2) determine whether the subject of the change is a mandatory subject of bargaining; and, if so, (3) determine whether the change breached the agreement. The

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[39] 192 NLRB at 839.

underlying theory of an NLRA violation in these cases is that a contract, having been mutually arrived at, ought to be changed only through negotiations leading to a mutual agreement to amend. A unilateral change of contract terms is quite the antithesis of a mutually agreed upon contract amendment, and the NLRA protects the bargaining relationship by requiring a threshold attempt to negotiate proposed changes in contract terms.[40] When the NLRB interprets an agreement in such cases, it is only making the determination that "the union did not agree to give up these statutory safeguards."[41] No hiatus separates the contract violation and a finding of refusal-to-bargain in unilateral-change cases. Thus, the essence of the statutory violation is the breach of the agreement. The *Collyer* Board more or less concluded that the essential nature of the unilateral-change case as a contract-breach case is what makes those cases so amenable to the "special skill and experience" of arbitrators. What the opinion fails to answer is the question of why the Board lacks skill and experience in deciding such cases as refusal-to-bargain cases, so labeled.

The only basis for concluding that arbitrators have a special expertise and competence in these cases is that the NLRB decides relatively few unilateral-change cases involving possible contract violations.[42] Arbitrators, on the other hand, always interpret agreements in labor-case grievances. Apart from that obvious inconsistency with the Board's judgment that arbitrators are sufficiently expert to decide contract discipline cases, other factors stand overlooked by the Board in its determination that arbitration is the expert forum for unilateral-change cases.

Overlooked is the Board's experience with other types of refusal-to-bargain cases. Surface-bargaining cases,[43] unilateral-change cases not involving arguable breaches of contract,[44]

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[40]If that is not the underlying theory of a unilateral-change-of-contract-terms violation of Section 8(a)(5), it is difficult to perceive why such allegations should be regarded as violations of the NLRA rather than purely the breach of an agreement requiring interpretation of the agreement, and hence beyond the NLRB's jurisdiction. That view seems to have been rejected by the U.S. Supreme Court in *NLRB* v. *C & C Plywood, id. C & C Plywood* acknowledges that the NLRB lacks jurisdiction generally to interpret collective bargaining agreements, but holds that the Board may do so to the limited extent of determining in a unilateral-change case whether the union waived its statutory protection against unlawful refusals to bargain. *See generally*, Schatzki, *NLRB Resolution of Contract Disputes Under Section 8(a)(5)*, 50 Texas L. Rev. 225, 246–265 (1972).

[41]*Supra* note 38.

[42]*Supra* note 35.

[43]*Supra* note 36.

[44]*Supra* note 37.

pure mandatory-subject-of-bargaining cases,[45] all raise issues that bring the Board into intimate contact with the collective bargaining process. The Board is familiar with the jargon, the nomenclature of the process leading to an agreement; it has a sense of the dynamics of bargaining-table disputes and, thus, through this unique dimension, a familiarity with the meaning of the contract terms that derive from that process. The Board is at least as generally competent as arbitrators to determine whether a merit-wage increase contradicts the terms of an agreement, whether a subcontracting clause permits or precludes a company from unilaterally contracting out work. From a remedy perspective, the unfair practice and arbitration routes lead to scarcely different results. An arbitrator, on finding a contract breach, would fashion a remedy accordingly. It would be ordered in a wage-change case, for example, that proper wages be paid, per the agreement. The NLRB remedy would not differ materially. There would be an order to refrain from taking unilateral action, and, like the administrative law judge in *Collyer*, the Board would require that the employer reinstate the wage scales set out in the agreement during the period of negotiations.

Given the complete standoff when degrees of NLRB-arbitrator expertise are compared in respect to unilateral-change issues, surely a charging party in such cases, and not the NLRB, should be permitted to determine which forum best suits the needs of the charging party and, incidentally, the system of industrial dispute resolution.

What remains is the question of whether something other than the manner in which arbitrators and the Board decide the class of cases so far discussed, supports the Board's policy of prearbitration deferral. *Collyer* states: "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."[46]

This statement of the Board, perhaps more than anything else said in *Collyer* or its successors, demonstrates the Board's unfamiliarity with the realities of grievance arbitration. The Board is apparently not only unaware of the complex range of factors

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[45] *See, e.g., Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 57 LRRM 2609 (1964).
[46] 192 NLRB at 843.

that must be considered by a union in determining whether a case should be taken to arbitration, but is also apparently unaware that arbitration clauses call for arbitration upon demand and not whenever a dispute arises. Dissenting Member Fanning was surely not overstating the case when he characterized *Collyer* as a case that "verges on the practice of compulsory arbitration."[47]

For a decade now I have told labor law students that "compulsory arbitration" means arbitration on the insistence of the government. Indeed, the Board's response to the Fanning dissent highlights the *Collyer* majority's misconceived distinction between compulsory and voluntary arbitration:

> "We are not compelling any party to agree to arbitrate disputes arising during a contract term, but are merely giving full effect to their own *voluntary agreements to submit all such disputes to arbitration,* rather than permitting such agreements to be side-stepped and permitting the substitutions of our processes, a forum not contemplated by their own agreement." [Emphasis added.][48]

Until *Collyer,* no one was aware that an agreement to arbitrate on demand could not be "side-stepped" for any reason short of a breach of the duty of fair representation. And no decision has so far held that seeking a Board remedy rather than an arbitration remedy is per se a breach of the duty of fair representation.

In some—but not complete—fairness to the *Collyer* majority, it should be noted that there are two different levels of arbitration at which the terms "compulsory" and "voluntary" might become an issue. One is at the level of creation of the agreement to arbitrate. The other is at the level of implementation of the arbitration clause. Successful governmental insistence upon an arbitration clause, even though both parties or one party might not want one, would be compulsory arbitration of one kind. It is at that level that the *Collyer* majority finds no governmental or other compulsion to enter into an agreement to arbitrate. But government could refrain from insisting upon agreements to arbitrate and then insist that all agreements to arbitrate *upon demand* be read as requiring arbitration of all contract-term disputes. I think that would be governmental compulsion of a different order, but compulsion no less than governmental insistence that all agreements contain arbitration clauses. Indeed,

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[47] *Id.,* at 847.
[48] *Id.,* at 842.

governmental insistence that a contract clause requiring arbitration on demand be read as requiring arbitration when the government insists upon it in a particular case is quite arguably a higher degree of compulsion than governmental insistence that a contract contain a grievance arbitration clause. At the compelled-arbitration-clause level, a union would remain free to arbitrate when it thought arbitration was in its best interests (short of a fair-representation breach). At the compelled-arbitration-implementation level, the union must arbitrate, though it may not think its best interests would be served by arbitration.

It is the insistence that a party arbitrate (even though it has chosen not to demand arbitration) that the Board has substituted for agreements to arbitrate upon demand. The nature of that form of compulsory arbitration is illuminated when considered in the context of my earlier remarks concerning the ability of charging parties to seek the tactical advantage of time and efficiency when resolving a choice between the NLRB and arbitration. The national policy of favoring arbitration—which the *Collyer* Board has distorted to mean a national policy in favor of arbitrating all disputes involving contract terms—was never intended to do more than make arbitration available as a voluntarily chosen means of dispute resolution.

To conclude, I have omitted from this discussion an analysis of the case law used by *Collyer* proponents in support of their view that the appellate courts support deferral,[49] and the appellate cases of *Collyer* opponents, as cited for the proposition that deferral is not authorized by law.[50] I have done so because of my belief that the deferral issue is not one of legal compulsion. I believe courts will continue to approve deferral if that is what the Board continues to do; I also believe that courts would permit the Board not to defer. In short, a Board decision either way would be regarded as a legitimate exercise of the Board's discretion. All I have said here relates to the Board's legal discretion, which I think has so far been improperly exercised in favor of prearbitration deferral.

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[49]*See generally* the federal circuit court and the U.S. Supreme Court decisions cited by the decision-writers in *Roy Robinson Chevrolet* and *General American Transportation Corp.*, *supra* note 6.

[50]*Ibid.*