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Collyer Insulated Wire[1] has been one of the most significant decisions by the National Labor Relations Board (Board) in recent years. That case established the principle that the policies of the National Labor Relations Act (NLRA or Act)[2] could best be effectuated if the Board deferred resolution of disputes based primarily on the meaning and application of a collective-bargaining agreement to the grievance-arbitration provisions of the parties' agreement. While the underpinnings of *Collyer* are traceable to well-established NLRB and judicial precedents, the decision is nonetheless an important new "developmental step"[3] that has precipitated far-reaching changes in the Board's approach to processing and deciding unfair labor practice cases. In succeeding decisions, the Board has expanded its application of *Collyer*, while refining the criteria necessary for deferral. This article will review and analyze the development of those policies into what is now called the "*Collyer* doctrine."

I. The Holding in *Collyer*

The complaint in *Collyer* alleged that the employer had violated section 8(a)(5) of the Act[4] during the term of its collective-bargaining agreement by unilaterally (1) increasing the wage rates for certain skilled maintenance employees; (2) directing that worm

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The views expressed in this article are those of the authors and are not necessarily the views of the National Labor Relations Board.

1. Collyer Insulated Wire, 192 N.L.R.B. 837 (1971).
2. 29 U.S.C. §§ 151-68 (1970).
3. 192 N.L.R.B. at 843.
4. Section 8(a)(5), 29 U.S.C. § 158(a)(5) (1970), makes it "an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

gear removal and cleaning be performed by a single maintenance machinist rather than by two; and (3) changing wage rates for extruder operators.[5] During negotiations, the union had rejected management's proposal that maintenance employees receive wage raises in addition to those being negotiated for the production and maintenance unit generally. As a result, the contract contained no provision for such raises. After the contract was executed, the employer continued to inform the union of its desire to raise the maintenance employees' rates; ultimately it gave the union five days' notice of its plan to adjust their wages. When the union protested and asked for a reevaluation of all jobs in the plant, the employer agreed to consider a plant-wide evaluation, contingent upon the union's agreement to the increase for skilled tradesmen.[6]

The Board's Trial Examiner found that the increase went into effect over the union's objections.[7] While finding that the employer unlawfully made unilateral changes in the maintenance employees' wages and in the worm gear operation, the Trial Examiner found that the change in computing incentive rates for extruder operations had been discussed at two meetings and was sanctioned by the contract and practice under it.[8] The Board majority, however, agreed with the employer's contention that the dispute was "essentially . . . over the terms and meaning of the contract between the Union and the Respondent," and held that the "dispute should have been resolved pursuant to the [grievance-arbitration provisions of the] contract . . . ."[9]

In the Board's view, the circumstances of the case weighed heavily in favor of deferral to the parties' grievance-arbitration procedures for resolution of the dispute.

> [T]his dispute arises within the confines of a long and productive collective-bargaining relationship. The parties before us have, for 35 years, mutually and voluntarily resolved the conflicts which inhere in collective bargaining. . . . [N]o claim is made of enmity by Respondent to employees' exercise of protected rights. Respondent here has credibly asserted its willingness to resort to arbitration under a clause providing for arbitration in a very broad range of disputes and unquestionably broad enough to embrace this dispute.
>
> Finally . . . the dispute is one eminently well suited to resolution by

5. 192 N.L.R.B. at 837-38.

6. *Id.*

7. *Id.* at 839, 866. Effective August 19, 1972, the title of "Trial Examiner" was changed to "Administrative Law Judge." As hereinafter used in this article, the abbreviations "TXD" and "JD" shall stand for Trial Examiner's decision and Administrative Law Judge's decision, respectively.

8. *Id.* at 839, 865-66.

9. *Id.* at 837 (opinion of Chairman Miller and Memher Kennedy).

> arbitration. The contract and its meaning in present circumstances lie at the center of this dispute.[10]

The Board dismissed the complaint. Recognizing, however, that it could not prejudge "the regularity or statutory acceptability of the result in an arbitration proceeding which has not occurred,"[11] the Board retained jurisdiction over the matter

> for the purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.[12]

The *Collyer* majority, including Member Gerald A. Brown, concurring, based their disposition upon statutory and decisional precedents that will be examined hereinafter to facilitate understanding of the arbitration deferral doctrine that has emanated from *Collyer*. That examination will be followed by an analysis of the Board's current requirements for deferral and the extent to which the factors that influenced deferral in *Collyer* have remained viable considerations in the Board's formulation and application of that doctrine.

II. The Authority for Prospective Arbitration Deferral

The Board has explicated *Collyer* in subsequent cases, which constitute the principal focus of this article, and the General Counsel is already on record as "unreservedly" supporting the Board's prospective deferral policies.[13] Since, however, the *Collyer* doctrine remains somewhat controversial[14]—despite its application for over

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10. *Id.* at 842.

11. *Id.*

12. *Id.* at 843. In *Collyer* and its progeny the Board has indicated that any such review of arbitral awards will be governed by the principles established in Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955). *See* National Radio Co., 198 N.L.R.B. No. 1, at 15 (July 31, 1972), *motion for further consideration denied*, 205 N.L.R.B. No. 112, at 2-3 (Sept. 11, 1973); 192 N.L.R.B. at 841-43.

13. *See, e.g., First Questions from Collyer*, Address by Peter Nash before the FMCS-AAA Regional Conference on Labor Arbitration, Buffalo, N.Y., Oct. 15, 1971, *reported in* BNA 1971 Lab. Rel. Yearbook 151. NLRB Chairman Edward B. Miller, moreover, has defended the majority's position on several occasions. *See, e.g., Little Collyer Grows Up*, Address before the Industrial Relations Research Association, Oakland, Calif., Sept. 12, 1972, N.L.R.B. Release No. 1255; *A Case Story*, Address before Conference of Western States Employer Association Executives, Pebble Beach, Calif., Aug. 27, 1971, *reported in* 78 Lab. Rel. Rep. 28 (1971).

14. *See, e.g., Deferral to Arbitration; Rights of Strikers*, 84 Lab. Rel. Rep. 72, 73-74 (1973) (remarks of Francis F. Sulley and Robert E. Fitzgerald at F.B.A. Convention, Chicago,

two years—a reiteration of the legal and pragmatic principles supporting it may be warranted. In essence, *Collyer* was bottomed on (1) the Board's discretion to reserve jurisdiction in disputes involving arguable breaches of contract; (2) the "hospitable acceptance"[15] accorded arbitration by the NLRB and the courts; and (3) practical considerations. Although there is some overlap in these bases, they will be discussed separately to the extent that it is possible to do so.

A. The Basis for the Board's Discretion

Finding that the "dispute in its entirety [arose] from the contract between the parties, and from the parties' relationship under the contract,"[16] the *Collyer* majority recognized that the decision whether to defer to the parties' agreed-upon contractual remedy "compels an accommodation between, on the one hand, the statutory policy favoring the fullest use of collective bargaining and the arbitral process and, on the other, the statutory policy reflected by Congress' grant to the Board of exclusive jurisdiction to prevent unfair labor practices."[17] Those statutory policies are expressed in sections 10(a)[18] of the NLRA and 203(d)[19] of the Labor-Management Relations Act (LMRA).

Sept. 12-15, 1973); *ABA Panel Views on Boys Market, Collyer Rulings*, 83 LAB. REL. REP. 355, 356-57 (1973) (remarks of Patrick C. O'Donoghue, Evan J. Spelfogel, and Thomas G.S. Christensen at A.B.A. Convention, Washington, D.C., Aug. 7, 1973).

As demonstrated in the later cases in which the Board deferred to arbitration, Member John A. Penello, appointed in 1971 to replace Member Gerald Brown, generally has joined with Chairman Miller and Member Ralph E. Kennedy to vote for deferral, and Members John H. Fanning and Howard Jenkins, Jr., regularly have dissented, as they did in *Collyer*. *See, e.g.*, Columbus & S. Ohio Elec. Co., 205 N.L.R.B. No. 33 (Aug. 1, 1973); United Aircraft Corp., 204 N.L.R.B. No. 133 (July 10, 1973); Houston Mailers Union No. 36 (Houston Chronicle Publishing Co.), 199 N.L.R.B. No. 69 (Oct. 18, 1972); Joseph T. Ryerson & Sons, Inc., 199 N.L.R.B. No. 44 (Oct. 2, 1972); Appalachian Power Co., 198 N.L.R.B. No. 7 (July 31, 1972); Bethlehem Steel Corp., 197 N.L.R.B. No. 121 (June 21, 1972). *But cf.* Jemco, Inc., 203 N.L.R.B. No. 32 (Apr. 30, 1973) (Kennedy, Member, dissenting); Radio Television Technical School, Inc., 199 N.L.R.B. No. 85 (Oct. 10, 1972), *enforced*, 488 F.2d 457 (3d Cir. 1973).

15. International Harvester Co., 138 N.L.R.B. 923, 927 (1962), *aff'd sub nom.* Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964).

16. 192 N.L.R.B. at 839.

17. *Id.* at 841.

18. 29 U.S.C. § 160(a) (1970). The relevant portion of that section is set forth in the succeeding paragraph of the text.

19. Labor-Management Relations Act (Taft-Hartley Act) § 203(d), 29 U.S.C. § 173(d) (1970), provides:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Although the NLRB is empowered to resolve unfair labor practice issues arising out of contractual disputes, the Act does not require it to exercise that power in every case. Section 10(a) of the Act provides that the Board's authority to decide such matters "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." But neither the legislative history of section 10(a)[20] nor the case law interpreting it[21] suggests that the Board may not defer to means of adjustment established by agreement.[22]

Even before enactment of section 203(d)[23] as part of the LMRA, the Board occasionally refrained from deciding unfair labor practice cases that essentially involved alleged contract breaches. Thus, in *Consolidated Aircraft Corp.*,[24] the Board dismissed such charges and asserted:

> [I]t will not effectuate the statutory policy of 'encouraging the practice and procedures of collective bargaining' for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting

20. *See* H.R. REP. No. 510 on H.R. 3020, 80th Cong., 1st Sess., 53, I LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, 556 (1947) [hereinafter cited as LEG. HIST. LMRA]. To be sure, Congress rejected a proposal by Senator Wagner that the original Act contain a clause expressly providing that the Board "may in its discretion, defer its exercise of jurisdiction over any such unfair labor practice in any case where there is another means of prevention provided for by agreement . . . ." S. 1958, § 10(b), 74th Cong., 1st Sess., I LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1301 (1935) [hereinafter cited as LEG. HIST.]; *Debates on S. 1958 in Senate*, 79 CONG. REC. 7651, I LEG. HIST. 2351 (1935). Whatever inferences may be drawn from that omission, the legislative history of the Taft-Hartley amendments, outlined below, demonstrates that by 1947 Congress had recognized the value of arbitration as a means of settling disputes. Accordingly, Congress, through the enactment of § 301 of the Labor-Management Relations Act (Taft-Hartley Act) 29 U.S.C. § 185 (1970), accorded the federal courts and arbitrators, rather than the Board, primary responsibility for applying and enforcing collective-bargaining agreements. *See also* Labor-Management Relations Act (Taft-Hartley Act) § 203(d), 29 U.S.C. § 173(d) (1970).

21. In a case in which the Board eschewed deference to an arbitral award and found that the employer violated the Act, the court of appeals that enforced the NLRB order asserted:

> Clearly, agreements between parties cannot restrict the jurisdiction of the Board. . . . Therefore, we believe the Board may exercise jurisdiction in any case of an unfair labor practice when in its discretion its interference is necessary to protect the public rights defined in the Act. The Board, then, had discretionary power to exercise its jurisdiction in the instant case.

NLRB v. Walt Disney Prod., 146 F.2d 44, 48 (9th Cir. 1944), *cert. denied*, 324 U.S. 877 (1945). *See also* NLRB v. General Motors Corp., 116 F.2d 306, 312 (7th Cir. 1940); Timken Roller Bearing Co., 70 N.L.R.B. 500, 501 (1946), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947).

22. 192 N.L.R.B. at 840.

23. Labor-Management Relations Act (Taft-Hartley Act) § 203(d), 29 U.S.C. § 173(d) (1970). For the text of this section see note 19 *supra*.

24. 47 N.L.R.B. 694 (1943), *enforced*, 141 F.2d 785 (9th Cir. 1944).

> to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through settlement procedures mutually agreed upon by them, and to remit the interpretation and administration of their contracts to the Board. We therefore do not deem it wise to exercise our jurisdiction in such a case, where the parties have not exhausted their rights and remedies under the contract as to which the dispute has arisen.[25]

Although the Board did not uniformly follow *Consolidated Aircraft*,[26] the majority in *Collyer*[27] properly regarded it as precedent for deferring to arbitration even before any party has invoked the grievance-arbitration machinery.

The addition of section 203(d) to the LMRA provided further statutory support for the Board's deference to arbitration for resolution of contractual disputes. The legislative history of this and other 1947 amendments demonstrates that Congress anticipated a Board policy of deferral in cases involving both a possible breach of contract and an arguable unfair labor practice. When the Senate Labor Committee reported out Senate bill 1126, which would have made it an unfair labor practice for employers or unions to "violate the terms of a collective bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration,"[28] it stated:

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25. *Id.* at 706 (quoting from § 1 of the Act, 29 U.S.C. § 151 (1970)). *See* Vickers, Inc., 153 N.L.R.B. 561 (1965); Flintkote Co., 149 N.L.R.B. 1561 (1964); Bemis Bros. Bag Co., 143 N.L.R.B. 1311, 1312 (1963); Montgomery Ward & Co., 137 N.L.R.B. 418, 423 (1962); United Tel. Co. of the West, 112 N.L.R.B. 779, 781 (1955); McDonnell Aircraft Corp., 109 N.L.R.B. 930, 934 (1954); Crown Zellerbach Corp., 95 N.L.R.B. 753 (1951); *cf.* Office & Professional Employees Local 425 v. NLRB, 419 F.2d 314, 319 (D.C. Cir. 1969); Dresser Indus. Valve & Instru. Div., 178 N.L.R.B. 317 n.1 (1969).

26. *See, e.g.*, Combined Paper Mills, Inc., 174 N.L.R.B. 483, 485-86 (1969); Wisconsin S. Gas Co., 173 N.L.R.B. 480 (1968); Unit Drop Forge Div., 171 N.L.R.B. 600, 602 (1968), *enforced*, 412 F.2d 108 (7th Cir. 1969); Gravenslund Operating Co., 168 N.L.R.B. 365 (1967); Adelson, Inc., 163 N.L.R.B. 513 (1967); Scam Instru. Corp., 163 N.L.R.B. 284, 289-90 (1967), *enforced*, 394 F.2d 884 (7th Cir.), *cert. denied*, 393 U.S. 980 (1968); American Fire Apparatus Co., 160 N.L.R.B. 1318, 1322-23 (1966), *enforced*, 380 F.2d 1005 (8th Cir. 1967); C & S Indus., Inc., 158 N.L.R.B. 454, 459-60 (1966); Crescent Bed Co., 157 N.L.R.B. 296, 298-99 (1966); Century Papers, Inc., 155 N.L.R.B. 358 (1965); Huttig Sash & Door Co., 154 N.L.R.B. 1567, 1569-70 (1965), *enforced*, 377 F.2d 964 (8th Cir. 1967); American Sign Co., 153 N.L.R.B. 537, 544 (1965); Smith Cabinet Mfg. Co., 147 N.L.R.B. 1506, 1508-09 (1964); LeRoy Mach. Co., 147 N.L.R.B. 1431 (1964); Adams Dairy Co., 147 N.L.R.B. 1410, 1414-16 (1964); *cf.* Puerto Rico Tel. Co., 149 N.L.R.B. 950, 965-68 (1964), *enforced as modified*, 359 F.2d 983 (1st Cir. 1966); Square D Co., 142 N.L.R.B. 332 (1963), *aff'd*, 332 F.2d 360 (9th Cir. 1964).

27. In *Consolidated Aircraft* and the cases cited at note 25 *supra*, the complaints were dismissed entirely. While it refrained from deciding the merits of the dispute and technically "dismissed" the complaint in *Collyer*, the Board, recognizing that it had taken a "developmental step," 192 N.L.R.B. at 843, retained jurisdiction for the limited purpose recited in the text accompanying note 12 *supra*.

28. S. Rep. No. 105, 80th Cong., 1st Sess. 1947, *reprinted in* I LEG. HIST. LMRA 99, 111 (1947).

> The committee wishes to make it clear that by this provision . . . it is not intended that the National Labor Relations Board shall undertake to adjudicate all disputes alleging breach of labor agreements. Any such course would be inimical to the development by the parties themselves of adequate grievance-handling and voluntary arbitration machinery. It is the purpose of this bill to encourage free-collective bargaining; it would not be conducive to that objective if the Board became the forum for trying day-to-day grievances or if in the guise of unfair labor practice cases it entertained damage actions arising out of breach of contract. Hence the committee anticipates that the Board will develop by rules and regulations a policy of entertaining under these provisions only such cases alleging violation of contract as cannot be settled by resort to the machinery established by the contract itself, voluntary arbitration, or if necessary, by litigation in court. Any other course would engulf the Board with a vast number of petty cases that could best be settled by other means. In short, the intention of the committee in this regard is that cases of contract violation be entertained on a highly selective basis, when it is demonstrated to the Board that alternative methods of settling the dispute have been exhausted or are not available.[29]

Significantly, the proposed amendments were deleted competely from the final version of the bill, with this explanation: "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual process of law and not to the NLRB."[30]

In denying the Board "plenary authority to administer and enforce collective bargaining agreements," Congress established arbitrators and the courts as "the principal sources of contract interpretation"[31] when it enacted section 301 as part of the LMRA.[32] While Congress in passing section 301 admittedly did not preclude the Board from interpreting contract clauses in the course of adjudicating alleged unfair labor practices,[33] it cannot be urged obversely

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29. *Id.* at 23, I LEG. HIST. LMRA at 429. The quoted comments were directed to that portion of the bill addressed to unions. A similar discussion occurred relative to the companion provision applying to employers. *Id.* at 20-21, I LEG. HIST. LMRA at 426-27.

30. H.R. Rep. No. 510, *supra* note 20, at 42, I LEG. HIST. LMRA at 546. *See also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 452 (1957).

31. NLRB v. Strong, 393 U.S. 357, 360-61 (1969). The Supreme Court has also noted that Congress, in enacting § 301, "decided to make collective bargaining agreements enforceable only in the courts." Cbarles Dowd Box Co. v. Courtney, 368 U.S. 502, 511 (1962).

32. In relevant part, § 301, 29 U.S.C. § 185 (1970), provides: "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties. . . ."

33. NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967). In *Collyer*, 192 N.L.R.B. at 841, the Board emphatically dismissed any suggestions that it was abdicating altogether its jurisdiction over unfair labor practices:

> The question whether the Board should withbold its process arises, of course, only when a set of facts may present not only an alleged violation of tbe Act but also an alleged breach of the collective-bargaining agreement subject to arbitration.

Cf. L.E.M., Inc., 198 N.L.R.B. No. 99, at 6-7 (Aug. 4, 1972), where the Board majority asserted:

that the Board is compelled to decide contractual disputes involving unfair labor practices, particularly where the contract provides specifically for binding arbitration.[34] In *NLRB v. C & C Plywood Corp.*,[35] where the Board's authority to interpret contracts was upheld, the Supreme Court noted that "the collective bargaining agreement contained no arbitration clause. The contract did provide grievance procedures," the Court continued, "but the end result of those procedures, if differences between the parties remained unresolved, was economic warfare, not 'the therapy of arbitration.' "[36] The Court went on to assert that the Board's action in not deferring "was in no way inconsistent with its previous recognition of arbitration as 'an instrument of national labor policy for composing contractual differences.' "[37]

That arbitration plays a prominent role in the national labor policy cannot be doubted. Following its holding in *Textile Workers Union v. Lincoln Mills*[38] that executory agreements to arbitrate are enforceable under section 301, the Supreme Court repeatedly has insisted that the parties adhere to their agreed upon grievance arbitration procedures.[39] Thus, in *United Steelworkers v. American Manufacturing Co.*,[40] the Court emphasized that the congressional policy expressed in section 203(d) "can be effectuated only if the

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Although we do not agree with the Respondent that the Board lacks jurisdiction to decide this controversy, we do believe that the dispute is based on the parties' interpretation of the contract, and would be best resolved through the grievance procedure provided for in the parties' contract.

See also National Radio, 198 N.L.R.B. No. 1, at 15-16 (July 31, 1972).

34. In Smith v. Evening News Ass'n, 371 U.S. 195, 197 (1962), the Court later acknowledged the concurrent jurisdiction of the NLRB and the courts and stated: "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but *it is not exclusive* and does not destroy the jurisdiction of the courts in suits under § 301" (emphasis added). *See also* NLRB v. Local 378, Iron Workers, 473 F.2d 816 (9th Cir. 1973); Lodge 1327, Machinists v. Fraser & Johnston Co., 454 F.2d 88, 90-91 (9th Cir. 1971); Office & Professional Employees Local 425 v. NLRB, 419 F.2d 314 (D.C. Cir. 1969); Unit Drop Forge Div. v. NLRB, 412 F.2d 108, 110-11 (7th Cir. 1969); NLRB v. Thor Power Tool Co., 351 F.2d 584, 587 (7th Cir. 1965); Lummus Co. v. NLRB, 339 F.2d 728, 732-33 (D.C. Cir. 1964).

35. 385 U.S. 421 (1967).

36. *Id.* at 426.

37. *Id.* (quoting from International Harvester Co., 138 N.L.R.B. at 926).

38. 353 U.S. 448 (1957). This decision has been said to go "a long way towards making arbitration the central institution in the administration of collective bargaining contracts." Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547, 1557 (1963) (quoted approvingly in Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235, 252 (1970)).

39. *See, e.g.*, Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235 (1970); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957).

40. 363 U.S. 564 (1960).

means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play."[41] Similarly, in *United Steelworkers v. Warrior & Gulf Navigation Co.*,[42] the Supreme Court gave effect to "the congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration" by holding that "the judicial inquiry under section 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made."[43] The following standard established by the Court for resolving those questions amounts to a veritable presumption of arbitrability:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[44]

More recently, the Supreme Court had occasion in *Boys Markets*[45] to reaffirm "the congressional policy to promote the peaceful settlement of labor disputes through arbitration." That case upheld the authority of the federal courts to enjoin strikes over arbitrable grievances, despite the anti-injunction provisions of the Norris-LaGuardia Act.[46] The Court's accommodation of the policies of Norris-LaGuardia and sections 203(d) and 301 of the LMRA was predicated upon "the importance that Congress has attached generally to the voluntary settlement of labor disputes without self-help and more particularly to arbitration as a means to this end."[47]

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41. *Id.* at 566. Recognizing the special value of arbitration and the ability of arbitrators to interpret contracts, the Court went on to observe that, in actions to compel arbitration, courts "have no business weighing the merits of the grievance." *Id.* at 568. In reversing the Court of Appeals, which regarded the disputed grievance as "a frivolous, patently baseless one, not subject to arbitration," *Id.* at 566, *quoting*, 264 F.2d 624, 628, the Supreme Court declared: "The processing of even frivolous claims may have therapeutic values . . . ." *Id.* at 568. *See also* Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MT. L. REV. 247, 261 (1958) (*cited in* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 n.6 (1960)).

42. 363 U.S. 574 (1960). This case is one of 3 Supreme Court cases collectively referred to as the *Steelworkers Trilogy*. The other cases comprising the trilogy are United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) and United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

43. *Id.* at 582.

44. *Id.* at 582-83. Since the *Steelworkers Trilogy* was founded upon judicial recognition of the efficacy of and necessity for arbitration, the Court's rationale for such a formula is discussed below in the context of the pragmatic bases of the *Collyer* doctrine.

45. Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235, 241 (1970). *See also* Gateway Coal Co. v. UMW, 94 S. Ct. 629, 636-637 (1974); Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 105 (1962).

46. 29 U.S.C. §§ 101-15 (1970).

47. 398 U.S. at 252. *See also* 398 U.S. at 241-43, 249, 253.

On February 19, 1974, the Supreme Court held that an employee's statutory right to trial

Although some of the aforementioned principles deal primarily with the relationship between the courts and arbitration rather than that between the Board and the arbitrator, they clearly manifest the respect accorded by the Supreme Court to the arbitral process. The Board has a decisive role to play in determining the success or failure of the national policy of encouraging peaceful settlement of industrial disputes through arbitration rather than through economic warfare. The Board's promotion of that policy[48] is particularly compatible with the design of the Act to encourage "practices fundamental to the friendly adjustment of industrial disputes" and "the practice and procedure of collective-bargaining."[49] For the *Collyer* doctrine not only furthers the "basic policy of national legislation to promote the arbitral process,"[50] but also, by requiring that signatories to contracts obey their own agreements to arbitrate disputes,[51] supports the principles of good-faith collective bargaining under the Act.[52] These policy considerations underlying *Collyer* have been summarized succinctly by former Board Member Gerald Brown:

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de novo under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (Supp. II, 1972), was not foreclosed by prior submission of his claim of racial discrimination to final and binding arbitration under the collective-bargaining agreement between his employer and bargaining representative. Alexander v. Gardner-Denver Co., 42 U.S.L.W. 4214 (U.S. Feb. 19, 1974). Distinguishing between review of an arbitrator's decision under the *Steelworkers Trilogy*, *supra* note 42, and the plaintiff's exercise of a "statutory right independent of the arbitration process," *id.* at 4219, the Court, in a unanimous opinion, declared that neither Title VII nor its legislative history suggests any congressional intent to bar the employee's cause of action, whether on the district court's election-of-remedies theory or hecause of any purported waiver by his bargaining representative. *Id.* at 4216-9. The Court also rejected the notion, advanced by the respondent employer, that "federal courts should defer to arbitral decisions on discrimination claims where: (i) the claim was before the arbitrator; (ii) the collective-bargaining agreement prohibited the form of discrimination charged in the suit under Title VII; and (iii) the arbitrator has authority to rule on the claim and to fashion a remedy." *Id.* at 4220. Because *Gardner-Denver* was handed down just before the galley proof of this article was transmitted to the printer, and since the statutory schemes of Title VII and the NLRA are substantially different, it is not possible at this time to determine whether this recent decision will have any impact upon the Board's policies under *Collyer*.

48. *See* Collyer Insulated Wire, 192 N.L.R.B. 837, 843 (1970).

49. National Labor Relations Act § 1, 29 U.S.C. § 151 (1970).

50. Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 105 (1962).

51. The Supreme Court asserted in United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 547 (1960), that "arbitration of labor disputes is part and parcel of the collective bargaining process itself." *Id.* at 578. In addition, the Court there recognized that an obvious therapeutic value inheres in the grievance process: "The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective-bargaining agreement." *Id.* at 581. *See also* Timken Roller Bearing Co. v. NLRB, 161 F.2d 949, 954 (6th Cir. 1947); Cox, *supra* note 41, at 261.

52. *See* National Labor Relations Act §§ 8(a)(5) & 8(b)(3), 29 U.S.C. §§ 158(a) & (b)(3) (1970). Section 8(a)(5) is set forth in note 4 *supra*. Section 8(b)(3) provides that it is "an unfair labor practice for a labor organization or its agents . . . to refuse to bargain

> The grievance-arbitration process is one of the most important tools of collective bargaining, and the *raison d'etre* of the National Labor Relations Act is to encourage collective bargaining . . . . Certainly great damage could be done to the entire system of grievance arbitration, and to the process of collective bargaining, if parties believed they could ignore an agreed-upon method of settling disputes. Since in most cases deferring to arbitration will encourage collective bargaining, the Board. in carrying out the Act's purpose, should see that full play is given to the arbitral process. (Footnotes omitted).[53]

B. Board Deferral to Arbitration and Acceptance Thereof

Cognizant of the congressional and judicial approval of arbitration as an effective means for resolving labor disputes, the Board for years has deferred to the arbitral process in several contexts. First, the Board developed, and consistently applied, a policy of deferring to outstanding arbitration decisions when the arbitral proceedings satisfied certain criteria. The standards for acceptance of arbitration awards initially were enunciated in *Spielberg Manufacturing Co.*[54] There the Board dismissed a complaint in deference to an existing arbitration award (as distinguished from an existing procedure, as in *Collyer*) since the arbitration proceedings that led to that award appeared to have been "fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel [was] not clearly repugnant to the purposes and policies of the Act."[55] In addition to these three conditions, the Board later emphasized the requirement, which had been met in *Spielberg*, that there be an identity between the unfair labor practice issues before it and the contractual questions decided by the arbitrator.[56]

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collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a)." In relevant part, § 8(d) defines the duty to "bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . . ." 29 U.S.C. § 158(d) (1970).

53. Collyer Insulated Wire, 192 N.L.R.B. 837, 844 (1970) (concurring opinion); *cf.* Communications Workers (Western Elec. Co.), 204 N.L.R.B. No. 94, at 6 (July 6, 1973); Chase Mfg., Inc., 200 N.L.R.B. No. 128, at 2 (Dec. 13, 1972), *enforced*, No. 73-1270 (7th Cir., Feb. 5, 1974) (unpublished order).

54. 112 N.L.R.B. 1080 (1955).

55. *Id.* at 1082. *See* Local 18, Operating Engineers (Frazier Davis Constr. Co.), 145 N.L.R.B. 1492 (1964); Raley's Supermarkets, 143 N.L.R.B. 256 (1963); Denver-Chicago Trucking Co., 132 N.L.R.B. 1416 (1961) (deferral to an award of a bipartite panel composed of employer and union representatives); I. Oscherwitz & Sons, 130 N.L.R.B. 1078, 1079 (1961); *cf.* Roadway Express, Inc., 145 N.L.R.B. 513, 514-15 (1963) (all members of bipartite panel "arrayed in common interest against the individual grievant"); Gateway Transportation Co., 137 N.L.R.B. 1763 (1962) (arbitral proceeding not fair and regular); Honolulu Star-Bulletin, Ltd., 123 N.L.R.B. 395, 408 (1959), *rev'd and remanded on other grounds*, 274 F.2d 567 (D.C. Cir. 1959), *modified*, 126 N.L.R.B. 1012 (1960).

56. *See* Yourga Trucking, Inc., 197 N.L.R.B. No. 130 (June 26, 1972); Airco Indus. Gases—Pacific, 195 N.L.R.B. 676 (1972); Raytheon Co., 140 N.L.R.B. 883, 884-86 (1963),

The courts not only have uniformly affirmed the Board's decisions deferring to arbitral awards, but also have commented favorably upon the *Spielberg* policy. In *Carey v. Westinghouse Electric Corp.*[57] the Supreme Court stated:

> 'There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held. However, it is equally well established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.
>
> 'The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of grievances and disputes arising thereunder "as a substitute for industrial strife," contribute significantly to the attainment of this statutory objective.'[58]

Prior to *Collyer*, the Board also deferred when the parties had begun, either voluntarily or pursuant to a district court order, to arbitrate the dispute. In *Dubo Manufacturing Corp.*,[59] for example, the employer allegedly discharged and refused to reinstate employees in violation of section 8(a)(3). The Board deferred action on these allegations, pending completion of arbitration directed by a district court in a section 301 action instituted by the union against the employer. Relying upon section 203(d) of the LMRA,[60] and noting *Spielberg*'s recognition of existing arbitration awards, the Board reasoned that "[i]t would certainly frustrate the intent expressed by Congress if the Board were now to permit the use of the Board's processes to enable the parties to avoid their contractual obligations

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enforcement denied on other grounds, 326 F.2d 471 (1st Cir. 1964); Monsanto Chem. Co., 130 N.L.R.B. 1097, 1099 (1961).

57. 375 U.S. 261 (1964).

58. *Id.* at 271 (quoting from International Harvester Co., 138 N.L.R.B. at 926). *See* NLRB v. Plasterers' Local 79, 404 U.S. 116, 136-37 (1971); Smith v. Evening News Ass'n, 371 U.S. 195, 197-98 (1962); Associated Press v. NLRB, Nos. 73-1002 & 73-1390, slip opinion, 8-10 (D.C. Cir., Feb. 20, 1974); Radio Television Technical School, Inc. v. NLRB, 488 F.2d 457 (3d Cir. 1973); John Klann Moving & Trucking Co. v. NLRB, 411 F.2d 261, 263 (6th Cir.), *cert. denied*, 396 U.S. 833 (1969); Illinois Ruan Transp. Corp. v. NLRB, 404 F.2d 274, 280 (8th Cir. 1968); NLRB v. Auburn Rubber Co., 384 F.2d 1, 3-4 (10th Cir. 1967); Ramsey v. NLRB, 327 F.2d 784 (1964); *cf.* NLRB v. Walt Disney Prod., 146 F.2d 44, 48 (9th Cir. 1944).

59. 142 N.L.R.B. 431 (1963). *See* Great Scott Supermarkets, Inc., 206 N.L.R.B. No. 111, at 7 (Oct. 16, 1973) (JD); Theodore P. Mansour, 199 N.L.R.B. No. 29, at 4-7 (Sept. 22, 1972) (TXD); NLRB General Counsel Administrative Ruling in Case No. SR-2615, 52 L.R.R.M. 1405 (1963); *Arbitration and the NLRB—A Second Look*, Speech by former NLRB General Counsel Arnold Ordman before the National Academy of Arbitrators, San Francisco, Mar. 3, 1967, *reported in* BNA 1967 LAB. REL. YEARBOOK 197, 202; *cf.* Flintkote Co., 149 N.L.R.B. 1561 (1961); United Tel. Co. of the West, 112 N.L.R.B. 779, 780-81 (1955); McDonnell Aircraft Corp., 109 N.L.R.B. 930, 933-35 (1954).

60. 29 U.S.C. § 173(d) (1970). The text of this section is set forth in note 19 *supra*.

as interpreted by the court."[61]

Another case that not only presaged *Collyer*, but also provided substantial support for the plurality opinions therein, was *Joseph Schlitz Brewing Co.*[62] Although *Schlitz* cited neither the *Spielberg-Dubo* nor *Consolidated* lines of cases, it brought them together in the Board's attempt to postulate a policy of refraining from deciding questions that depend upon contract interpretation. The complaint in *Schlitz* alleged that the employer had violated section 8(a)(5) by unilaterally abandoning its systems of relieving employees individually in favor of shutting down the entire production line. In dismissing the complaint, the Board set forth various factors that influenced it to defer to arbitration:

> [W]e believe that where, as here, the *contract clearly provides for grievance and arbitration machinery*, where the *unilateral action taken is not designed to undermine the Union and is not patently erroneous but rather is based on a substantial claim of contractual privilege*, and it appears that the *arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act*, then the Board should defer to the arbitration clause conceived by the parties. This particular case is indeed an appropriate one for just such deferral. The parties have an *unusually long established and successful bargaining relationship*; they have a *dispute involving substantive contract interpretation* almost classical in its form, each party asserting a *reasonable claim in good faith* in a situation *wholly devoid of unlawful conduct* or aggravated circumstances of any kind; they have a clearly defined grievance-arbitration procedure which Respondent has urged the Union to use for resolving their dispute; and, significantly, the Respondent, the party which in fact desires to abide by the terms of its contract, is the same party which, although it firmly believed in good faith in its right under the contract to take the action it did take, offered to discuss the entire matter with the Union prior to taking such action. Accordingly, under the principles above stated, and the persuasive facts in this case, we believe that the policy of promoting industrial peace and stability through collective bargaining obliges us to defer the parties to the grievance-arbitration procedures they themselves have voluntarily established.[63]

Until its rationale was adopted by the *Collyer* majority,[64] however,

61. 142 N.L.R.B. at 432. Following an arbitration decision on the dischargees' grievances, the Board later decided the § 8(a)(3) charges on their merits because no majority consensus on the arbitration panel supported its award. 148 N.L.R.B. 1114, 1116 (1964).

62. 175 N.L.R.B. 141 (1969).

63. *Id.* at 142 (emphasis added). Since the "swing" vote of Member Jenkins was based upon his finding of a contract waiver, the deferral doctrine quoted in the text was not supported by a Board majority.

64. No article on *Collyer* would be complete without the observation that former Board Member Gerald Brown had urged deference to prospective arbitration for years before he wrote his concurring opinion in *Collyer*. Therein he listed his separate opinions in cases dating from Raytheon Co., 140 N.L.R.B. 883 (1963), in which he propounded that idea. 192 N.L.R.B. at 844 n.19. He was joined by former Member Sam Zagoria in a dissent in Unit Drop Forge Div., 171 N.L.R.B. 600, 604 (1968).

the *Schlitz* decision, like *Consolidated Aircraft*,[65] was not invariably followed by the Board.[66]

As noted above, the Board has maintained policies of deferring when the parties are pursuing arbitration or an arbitral award has been rendered,[67] and for years the courts have approved these policies.[68] In *Office and Professional Employees Local 425 v. NLRB*,[69] for example, the United States Court of Appeals for the District of Columbia, affirming a Board determination not to defer, made these observations about the scope of the Board's discretion:

> It is not the province of the court to supervise the Board in terms of sound economy of administration, or to say whether we think it wise for an overworked Board to exercise jurisdiction to the extent indicated. It suffices for the purposes of this case and the contention before us to say that we have no basis for concluding that the Board is sailing without any rudder, or is charting a course too far out to sea [by deferring in some instances, but not others].[70]

Through its *Collyer* doctrine, the Board is acting in accord not only with statutory and decisional precedent that allow it to decline jurisdiction over such matters, but also with the emphatic congressional and judicial approval of settling labor disputes through arbitral processes. Long before *Collyer*, it was recognized that the same considerations upon which *Spielberg* was grounded come into play when the alleged unfair labor practice issue had not yet been submitted to arbitration. As one commentator has stated:

> There seems to be no difference in principle between *Spielberg*, where the offices of the NLRB were invoked after an arbitral award had been rendered, and the situation in which arbitration is available but is bypassed in favor of proceedings before the NLRB. The consideration of "voluntary settlement" is as much defeated by ignoring the contractual forum as by attempting to relitigate its award. The NLRB recognized this at an early date [in *Consolidated Aircraft*].[71]

Significantly, the courts of appeal are now also endorsing the Board's policy of deferring prospectively to arbitration.[72] With its

65. 47 N.L.R.B. 694 (1943), *enforced*, 141 F.2d 785 (9th Cir. 1944).

66. *See, e.g.*, DuQuoin Packing Co., 183 N.L.R.B. No. 108 (June 24, 1970); Navajo Freight Lines, Inc., 180 N.L.R.B. 516 (1969); Cello-Foil Prods., Inc., 178 N.L.R.B. 676 (1969); Dresser Indus. Valve, 178 N.L.R.B. 317 (1969); Zenith Radio Corp., 177 N.L.R.B. 366 (1969); Boston Edison Co., 176 N.L.R.B. 942 (1969).

67. Dubo Mfg. Corp., 142 N.L.R.B. 431 (1963); Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).

68. *See* Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964), and cases cited in note 58 *supra*.

69. 419 F.2d 314 (D.C. Cir. 1969).

70. *Id.* at 320.

71. Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 COLUM. L. REV. 52, 59-60 (1957). *See also* Samoff, *Arbitration, Not NLRB Intervention*, 18 LAB. L.J. 602 (1967).

72. *See* Nabisco, Inc. v. NLRB, 479 F.2d 770 (2d Cir. 1973), *enforcing* Teamsters Local

statement in *Nabisco*, the Second Circuit perhaps indicated the direction other courts may take:

> We cannot say that the Board has abused its discretion in the present case in reaching the conclusion that federal labor policy would be furthered by giving the grievance procedure a chance to work, while retaining jurisdiction to step in if it did not.[73]

C. *Pragmatic Bases for the Collyer Doctrine*

The *Collyer* majority noted that contractual "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 the application by this Board of a particular provision of a statute. The necessity for such special skill and expertise is apparent upon examination of the [complex] issues arising from Respondent's actions . . . ."[74] In *Warrior and Gulf*[75] the Supreme Court praised the utility of grievance arbitration and the singular competence of an arbitrator familiar with the parties' contract and bargaining history:

> A collective bargaining agreement is an effort to erect a system of industrial self-government. . . . [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

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70 (National Biscuit Co.), 198 N.L.R.B. No. 4 (July 31, 1972); Associated Press v. NLRB, Nos. 73-1002 & 73-1390 (D.C. Cir., Feb. 20, 1974), *denying review of* 199 N.L.R.B. No. 168 (Oct. 27, 1972); Provision House Workers Local 274 v. NLRB, No. 72-2617 (9tb Cir., Feb. 21, 1974) (mem.), *denying review of* Urban N. Patman, Inc., 197 N.L.R.B. No. 150 (June 30, 1972); *cf.* Food Fair Stores, Inc. v. NLRB, 85 L.R.R.M. 2274, 2278-79 n.9 (3d Cir. 1974); Radio Television Tecbnical School, Inc. v. NLRB, 488 F.2d 457, 461 (3d Cir. 1973); Southwestern Bell Tel. Co. v. Communications Workers Local 6222, 454 F.2d 1333, 1337 (5th Cir. 1972); International Bhd. of Machinists v. Fraser & Johnston Co., 454 F.2d 88, 91 (9th Cir. 1971).

73. 479 F.2d at 773.

74. 192 N.L.R.B. at 839. Finding tbat the dispute therein, as in *Schlitz*, was "one eminently well suited to resolution by arbitration," the Board stated:

> The contract and its meaning in present circumstances lie at the center of this dispute. In contrast, the Act and its policies become involved only if it is determined that the agreement between the parties, examined in the ligbt of its negotiating history and the practices of the parties tbereunder, did not sanction Respondent's right to make the disputed changes, subject to review if sought by the Union, under the contractually prescribed procedure. That thresbold determination is clearly witbin the expertise of a mutually agreed-upon arbitrator. In this regard we note especially that here, as in *Schlitz*, the dispute between tbese parties is the very stuff of labor contract arbitration.

Id. at 842.

75. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

> . . .
> . . .The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs.[76]

. For years the Board has trusted the ability of arbitrators to settle labor disputes arising under collective-bargaining agreements. Implicit in the Board's *Spielberg*[77] policy of deferring to arbitral decisions is its understanding that the arbitrator addressed himself to the relevant statutory issues,[78] for the Board will not defer to such an award unless the arbitrator has explored those issues and has made a judgment not repugnant to the purposes and policies of the Act.[79] The *Collyer* deferral doctrine resulted in large part from the Board's experience under *Spielberg*[80] that disputes which arguably involve unfair labor practices, as well as alleged breaches of contract, can be resolved fairly by arbitrators.[81] The success of the *Spielberg* policy is reflected in *Collyer*'s reaffirmation[82] of the standards[83] for accepting awards rendered after the parties have proceeded to arbitration, standards that protect the parties' statutory rights from unfair proceedings and arbitral decisions that are "clearly repugnant" to the Act.

Similarly significant is the extent to which employers and labor organizations actually utilize arbitration in settling their disputes. Not only do an overwhelming number of contracts contain grievance-arbitration provisions,[84] but also the use of arbitrators by

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76. *Id.* at 580-82. *See also* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960).

77. Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).

78. *See, e.g.*, Raytheon Co., 140 N.L.R.B. 883, 884 (1963); Monsanto Chem. Co., 130 N.L.R.B. 1097, 1099 (1961); *cf.* International Harvester Co., 138 N.L.R.B. 923, 928 (1962).

79. *See* John Klann Moving & Trucking Co. v. NLRB, 411 F.2d 261, 263 (6th Cir. 1969); Illinois Ruan Transp. Corp. v. NLRB, 404 F.2d 274, 280 (8th Cir. 1968).

80. Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1086 (1955); *cf.* Consolidated Aircraft Corp., 47 N.L.R.B. 694, 706-07 (1943).

81. *See, e.g.*, Radioear Corp., 199 N.L.R.B. No. 137, at 2-3 (Oct. 30, 1972) (citing Indianapolis Union Printers, 46 LAB. ARB. 1077 (1966), and Stepan Chem. Co., 45 LAB. ARB. 34 (1965)); Collyer Insulated Wire, 192 N.L.R.B. 837, 842 (1971) (citing Atlanta Newspaper, 43 LAB. ARB. 758 (1964), and American Welding, 45 LAB. ARB. 812 (1965)); *cf.* Dunau, *supra* note 71, at 64-81.

82. 192 N.L.R.B. at 842-43.

83. *See* text accompanying notes 54-56 *supra*.

84. In *Collyer* Member Brown pointed out that the Bureau of Labor Statistics reports

disputing unions and employers has been increasing significantly.[85] Moreover, arbitrators are deciding a wide variety of issues, including discharge and disciplinary actions that otherwise would be the subject of section 8(a)(3) charges.[86] It is, therefore, no extraordinary or novel procedure to which the Board is deferring in its *Collyer* decisions.

The fact that arbitration generally provides a faster resolution of disputes than does resolution by the Board lends additional support to the *Collyer* doctrine. In fiscal 1972, for example, an average of 241.5 days were required from the filing of a grievance to the issuance of an arbitration award through the Federal Mediation and Conciliation Service. This period included an average of 75.1 days for processing a dispute through the grievance steps preliminary to arbitration.[87] In the same fiscal year a median of 316 days elapsed from the filing of charges with the Board to the issuance of its decision and order.[88]

Rejecting the suggestion that *Collyer* is merely a device by the Board to lighten its burgeoning caseload, Chairman Miller has asserted instead that the deferral policy was intended to encourage the parties' use of their own forum for adjusting their problems.[89] It cannot be denied, however, that promotion of grievance arbitration as the primary means for resolving contractual disputes ultimately

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that 99% of 1,717 agreements analyzed in a continuing study contained grievance procedures and that 94% provided for arbitration. 192 N.L.R.B. at 844 n.20 (Brown, Member, concurring). It therefore is appropriate to observe that "contract grievance and arbitration procedures have become an integral part of virtually all collective-bargaining contracts in this country." National Radio Co., 198 N.L.R.B. No. 1, at 17 (July 31, 1972). *See also* Menard, *The National Labor Relations Board—No Longer a Threat to the Arbitral Process?* 23 LAB. L.J. 140, 143 n.23 (1972).

85. *See generally* Dunau, *supra* note 71; Note, *Discharge in the "Law" of Arbitration*, 20 VAND. L. REV. 81 (1966). *See also* National Radio Co., 198 N.L.R.B. No. 1 at 17 n.9 (July 31, 1972) (statistics cited).

86. *See generally* Note, *supra* note 85.

87. Power, *Improving Arbitration: Roles of Parties and Agencies*, 95 MON. LAB. REV. 15, 21, Table 4 (Nov. 1972); *cf.* Collyer Insulated Wire, 192 N.L.R.B. at 854 (Jenkins, Member, dissenting).

88. In this connection, it might be noted that while § 10(b) of the Act provides a six-month statute of limitations, most contracts require that grievances be initiated within days after the disputed action.

89. *ABA Panel Views on Boys Markets, Collyer Rulings*, 83 LAB. REL. REP. 355, 357 (AUG. 13, 1973). *But see* United Aircraft Corp., 204 N.L.R.B. No. 133, at 6 (July 10, 1973):

> Being keenly aware of the limited resources of this agency, the Board is not particularly desirous of inviting any labor organization, particularly one representing employees in so large a context as this, to bypass their own procedures and to seek adjudication by the Board of the innumerable individual disputes which are likely to arise in the day-to-day relationship between employees and their immediate supervisors. . . .

See also American Standard, Inc., 203 N.L.R.B. No. 169, at 5 (July 7, 1973); American Fed'n of Musicians Local 76 (John C. Wakely), 202 N.L.R.B. No. 80, at 3-7 (Mar. 21, 1973).

may reduce the growing burden upon the Board, the General Counsel, and the regional offices.[90]

In sum, the *Collyer* doctrine is founded upon firm legal ground and sound pragmatic bases. Both the law and industrial realities support the Board's efforts to encourage unions and employers to settle their differences through collective bargaining and grievance arbitration, rather than through economic warfare.

III. *Collyer* APPLIED

As previously shown, the Board's *Collyer* holding departed from earlier precedent only to the extent that it announced for the first time that, even in cases where an arbitral award has not issued or the parties were not engaged in the arbitral process, the Board would defer on a regular, rather than an *ad hoc*, basis if certain conditions were met.[91] The majority in *Collyer* pointed out five factors that particularly favored deferral:[92] (1) the dispute arose "within the confines of a long and productive collective-bargaining relationship;" (2) "no claim [was] made of enmity by Respondent to employees' exercise of protected rights;" (3) the respondent "credibly asserted its willingness to resort to arbitration;" (4) the contract contained a "clause providing for arbitration in a very broad range of disputes and unquestionably broad enough to embrace this dispute;" and (5) "the dispute [was] one eminently well suited to resolution by arbitration."[93] *Collyer* thus seemed to establish definite criteria for deferral;[94] however, the Board, by attributing greater weight to some factors than to others, has refined and extended its arbitration deferral policies. Additionally, the Board has deferred certain types of unfair labor practices, but not others.

Two sets of gnidelines[95] have been issued to indicate how the

90. *See* Menard, *supra* note 84, at 143, 152; Samoff, *Coping with the NLRB's Growing Caseload*, 22 LAB. L.J. 739, 743, 749-51 (1971).

91. The Board's pre-*Collyer* deferral policy was criticized for engendering uncertainty about whether the Board would or would not defer to the arbitral process in cases where there were no outstanding awards. *See* Office & Professional Employees Local 425 v. NLRB, 419 F.2d 314, 317-20 (D.C. Cir. 1969); Dunau, *supra* note 71, at 62-63; Menard, *supra* note 84; Note, *NLRB Unfair Labor Practice Jurisdiction & Arbitration—Effect of Deferring to Arbitration Prior to Issuance of Award*, 18 WAYNE L. REV. 1191, 1194 (1972).

92. 192 N.L.R.B. at 842. The majority developed these factors relying on similar factors stated in Joseph Schlitz Brewing Co., 175 N.L.R.B. 141 (1969).

93. *Cf.* Joseph Schlitz Brewing Co., 175 N.L.R.B. 141, 142 (1969).

94. *See, e.g., First Questions from Collyer*, Address by Peter G. Nash before FMCS-AAA Regional Conference on Labor Arbitration, Buffalo, N.Y., Oct. 15, 1971, *reported in* BNA 1971 LAB. REL. YEARBOOK 151, 153-56.

95. General Counsel Memorandum, "Arbitration Deferral Policy under *Collyer*," Feb. 28, 1972 [hereinafter cited as *1972 Guidelines*] *reported in* 4 CCH LAB. L. REP. ¶ 9002, at 15,011 (1972); General Counsel Memorandum, "Arbitration Deferral Policy under

Office of the General Counsel and the Board's regional offices will apply the Board's deferral policies.[96] These memoranda were intended primarily to inform the regional offices and the public when deferral would be warranted and what factors would be considered in reaching that determination. Hopefully, they will aid in understanding when a specific factual situation satisfies the requirements for deferring to the parties' grievance-arbitration procedures. Unlike the guidelines, however, this article will emphasize the reasons for the development of the Board's criteria for *Collyer* deferrals, rather than the application of those criteria to regional office case handling.

A. Contract Provisions Concerning the Resolution of Disputes

It is obvious, but elemental, that there must be a collective-bargaining agreement in existence to which the Board may contemplate deferral. Just as deferral would be inappropriate when there is a substantial question about the existence of a contract as a whole,[97] so the Board has declined to apply *Collyer* to situations where, for example, the alleged discriminatees are not covered by any collective-bargaining agreement. Thus, in *Pauley Paving Co.*[98] the Board refused to defer action on a section 8(a)(1) charge since neither the union nor the employer regarded the discharged employees as covered by the contract. Since the *Collyer* doctrine is predicated upon the "availability" of contractual arbitration procedures,[99] the requisite basis for deferral is also absent when there is substantial doubt about the existence of arbitration provisions at the time the dispute arose.[100]

Collyer—Revised Guidelines," May 10, 1973 [hereinafter cited as *1973 Revised Guidelines*] *reported in* 83 LAB. REL. REP. 41 (1973).

96. Some commentators, particularly at the 1973 American Bar Association convention, have claimed that the memoranda propounding the guidelines are unclear. *See ABA Panel Views on Boys Markets, Collyer Rulings, supra* note 14, at 357; *cf.* Davey, *Arbitration as a Substitute for Other Legal Remedies*, 23 LAB. L.J. 595, 597 n.5 (1972).

97. *See* Teamsters Local 85 (Tyler Bros. Drayage Co.), 206 N.L.R.B. No. 59, at 21-23 (Oct. 30, 1973); Communications Workers (Western Elec. Co.), 204 N.L.R.B. No. 94, at 6 n.2 (July 6, 1973) (J.D.); *1973 Revised Guidelines, supra* note 95, at 24, 83 LAB. REL. REP. at 49 (1973); *cf.* Seng Co., 205 N.L.R.B. No. 36 (Aug. 2, 1973) (collective-bargaining representative had been decertified).

98. 200 N.L.R.B. No. 124, at 3 (April 9, 1972), *petition for enforcement filed*, No. 73-1346 (4th Cir., Mar. 29, 1973); *cf.* Reapp Typographic Serv., Inc., 204 N.L.R.B. No. 122, at 2 n.2 (July 6, 1973); Associated Press, 199 N.L.R.B. No. 168 (Oct. 27, 1972), *petitions for review denied*, Nos. 73-1002 and 72-1390 (D.C. Cir., Feb. 20, 1974). *But see* Urban N. Patman, Inc., 197 N.L.R.B. No. 150 (June 30, 1972), *petition for review denied, sub nom.*, Provision House Workers Local 274 v. NLRB, No. 72-2617 (9th Cir., Feb. 21, 1974).

99. *See, e.g.*, Joseph T. Ryerson & Sons, 199 N.L.R.B. No. 44, at 6 (Oct. 2, 1972); Peerless Pressed Metal Corp., 198 N.L.R.B. No. 5, at 2 (July 31, 1972); Collyer Insulated Wire, 192 N.L.R.B. 837, 839 (1971); *cf.* Jemco, Inc., 203 N.L.R.B. No. 32 (Apr. 30, 1973).

100. *See* Packerland Packing Co., 203 N.L.R.B. No. 39, at 6 (April 25, 1973), *petition*

In addition, the contract must make binding arbitration available to the charging party for resolution of the dispute underlying the unfair labor practice charge and there can be no obstacles to a "quick and fair" arbitral resolution of the dispute. This generalization assumes the existence of numerous criteria established by the Board, each requiring individual exploration.

1. *Requirement of "Arbitration."*—The Board has refused to defer cases unless the applicable contract procedures provide for "arbitration."[101] The determination of what constitutes an arbitral procedure has depended upon the criteria developed by the Board in the *Spielberg*[102] area. Thus, prospective deferral has been made to joint labor-management grievance committees[103] when the interests of the participants are not "in apparent conflict with the interests" of the employees who have filed the charges.[104]

Although it first was thought that *Collyer* dictated that a grievance and arbitration procedure be the "exclusive" means for settling the parties' dispute,[105] later Board decisions have dispelled that notion. In postulating the "basic conditions" for deferral, the Board has declared that one criterion is whether "the disputed issues are, in fact, issues *susceptible* of resolution under the operation

for review filed, No. 73-1518 (7th Cir., June 13, 1973); Borden, Inc., 196 N.L.R.B. 1170 (1972); *cf.* Jemco, Inc., 203 N.L.R.B. No. 32, at 3 (Apr. 30, 1973). The Board has held that statutory obligations to process grievances, but not contractual duties to arbitrate, survive termination of collective-bargaining agreements. Hilton-Davis Chemical Co., 185 N.L.R.B. 241 (1970). As shown below, the questions of the "existence" of a contract and of arbitration procedures have appeared in the context of repudiations of collective-bargaining relationships and interference with the use of the grievance-arbitration provisions.

101. Machinists Dist. No. 10 (Ladish Co.), 200 N.L.R.B. No. 165, at 4 n.4 (Dec. 29, 1972); *cf.* Mechnical Contractors Ass'n, 202 N.L.R.B. No. 1, at 12 n.15 (March 1, 1973).

102. Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955). In such post-award cases, the Board held that the absence of a neutral member on a bipartite grievance-adjustment panel would not necessarily preclude deferral to the panel's decision. Modern Motor Express, Inc., 149 N.L.R.B. 1507, 1510-12 (1964); Denver-Chicago Trucking Co., 132 N.L.R.B. 1416, 1421 n.6 (1961). As previously mentioned, however, deferral has been considered inappropriate if all members of the bipartite panel are "arrayed in common interest against the individual grievant." Roadway Express, Inc., 145 N.L.R.B. 513, 514-15 (1963). *See also* Youngstown Cartage Co., 146 N.L.R.B. 305, 308 n.4 (1964).

103. *See* Tyee Constr. Co., 202 N.L.R.B. No. 34 (March 9, 1973); Teamsters Local 70 (National Biscuit Co.), 198 N.L.R.B. No. 4, at 8 (July 31, 1972), *enforced sub nom.* Nabisco, Inc. v. NLRB, 429 F.2d 770 (2d Cir. 1973); Great Coastal Express, Inc., 196 N.L.R.B. 871 (1972).

104. Kansas Meat Packers, 198 N.L.R.B. No. 2, at 3 (July 31, 1972); *cf.* National Football League Management Council, 203 N.L.R.B. No. 165, at 5 (May 30, 1973) (NFL Commissioner, the contractual arbitrator, not considered to be a "disinterested party"). *See also* Jacobs Transfer, Inc., 201 N.L.R.B. No. 34 (Jan. 11, 1973).

105. In *Collyer* the agreement provided that all contractual disputes "shall be settled and determined solely and exclusively by the conciliation and arbitration procedures . . . ." The Board found that the breadth of the provision demonstrated that "the parties intended to make the grievance and arbitration machinery the exclusive forum for resolving contract

of the grievance machinery . . . ."[106] Thus it is on the *availability* of grievance-arbitration machinery that the Board now predicates deferral.[107] To meet that test, the adjustment procedure must encompass the dispute and the charging party must have the right to invoke the procedure.[108]

2. *Encompassment of the Dispute by the Contractual Procedures.*—Though some of the post-*Collyer* cases have noted that the particular dispute was clearly arbitrable,[109] the Board requires for deferral merely that the grievance and arbitration provisions of the contract "arguably" encompass the dispute. In *Urban N. Patman, Inc.*,[110] for example, the agreement expressly excluded controversies over wages. Nevertheless, the Board held that the dispute was "arguably one of whether the contract covers the precooked food department employees, and not of wages" and that, in any event, an arbitrator properly could determine the arbitrability of such a dispute.[111] Thus, where disputes over the interpretation, application, or alleged breach of the contract are subject to arbitration, the Board readily will conclude that the agreement's settlement procedures encompass disputes over the enforcement, attempted enforcement, or alleged violations of any contract provision.[112] Moreover, the Board has narrowly construed grievance provisions that allegedly exclude certain subjects from arbitration or

disputes." 192 N.L.R.B. at 839. *See 1972 Guidelines, supra* note 95, at 10-12, 4 CCH LAB. L. REP. ¶ 9002, at 15,019; *cf.* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960) ("Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement.").

106. Eastman Broadcasting Co., 199 N.L.R.B. No. 58, at 12 (Sept. 29, 1972) (emphasis added). *See* National Radio Co., 198 N.L.R.B. No. 1, at 17 (July 31, 1972); *1973 Revised Guidelines, supra* note 95, at 27 n.37, 83 LAB. REL. REP. at 50 n.37; *cf.* note 44 *supra* and accompanying text.

107. *See* note 99 *supra.*

108. *See 1973 Revised Guidelines, supra* note 95, at 26 n.36, 83 LAB. REL. REP. at 50 n.36.

109. *See, e.g.*, Tyee Constr. Co., 202 N.L.R.B. No. 34, at 3, 5 (March 9, 1973); Joseph T. Ryerson & Sons, Inc., 199 N.L.R.B. No. 44, at 5 (Oct. 2, 1972). *See also 1973 Revised Guidelines, supra* note 95, at 28-30 n.42, 83 LAB. REL. REP. at 51.

110. 197 N.L.R.B. No. 150, at 3 (June 30, 1972).

111. Likewise, the Board bas ruled that if the charging party deems the respondent's action to be "outside" or unprotected by the contract, it should file a grievance. Southwestern Bell Tel. Co., 198 N.L.R.B. No. 6, at 5 (July 31, 1972), *remanded sub nom.* Communications Workers v. NLRB, No. 72-1761 (D.C. Cir., Nov. 23, 1973). In a related § 301 action filed by the respondent employer against the union, the court of appeals regarded the same dispute as "arguably arbitrable." Southwestern Bell Tel. Co. v. Communication Workers, 454 F.2d 1333, 1337 (5th Cir. 1972).

112. *See, e.g.*, Eastman Broadcasting Co., 199 N.L.R.B. No. 58, at 12 (Sept. 29, 1972); Southwestern Bell Tel. Co., 198 N.L.R.B. No. 6, at 3 (July 31, 1972); Peerless Pressed Metal Corp., 198 N.L.R.B. No. 5, at 2 (July 31, 1972); National Radio Co., 198 N.L.R.B. No. 1, at 17 (July 31, 1972); Urban N. Patman, Inc., 197 N.L.R.B. No. 150, at 2 (June 30, 1972); Wrought Washer Mfg. Co., 197 N.L.R.B. No. 14 (May 24, 1972).

limit the scope of the arbitrator's authority.[113]

That a contract may be silent with respect to disputed conduct has not precluded the Board from deferring to arbitration under its *Collyer* policy. In *Bethlehem Steel Corp.*,[114] for example, deferral was ordered notwithstanding the Trial Examiner's findings that the agreement was silent on the subject of subcontracting and that the employer, without reference to any contractual provision, had defended its unilateral subcontracting of unit work solely by claiming its inability to perform the work.[115] Where one party has negotiated unsuccessfully for the inclusion of a particular item, the Board also will consider issues involving that subject as encompassed within the grievance-arbitration provisions if the contract contains a broad "zipper" or "management prerogatives" clause.[116]

Furthermore, even if the arbitrability of a grievance is itself disputed, the Board will defer resolution of that question to the arbitrator, for "arbitrability . . . is properly determinable by an arbitrator."[117] As the Board has observed, it "has become the near

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113. *See, e.g.*, Western Elec. Co., 199 N.L.R.B. No. 49 (Sept. 29, 1972); Western Elec. Co., 199 N.L.R.B. No. 45, at 18-20 (Sept. 29, 1972) (TXD), *petition for review filed sub nom.* Electrical Workers Local 1974 v. NLRB, No. 72-1995 (D.C. Cir., Oct. 20, 1972). *But cf.* Communications Workers Local 1197 (Western Elec. Co.), 202 N.L.R.B. No. 45, at 9 (March 6, 1973) (JD); Joseph T. Ryerson & Sons, Inc., 199 N.L.R.B. No. 44, at 2 (Oct. 2, 1972).

In United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. at 584-85, the Supreme Court held:

> In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.

114. 197 N.L.R.B. No. 121 (June 26, 1972) (TXD).

115. *Id.* at 12. The Trial Examiner, citing Joseph Schlitz Brewing Co., 175 N.L.R.B. 141 (1969), and Tellepsen Petro-Chem Constructors, 190 N.L.R.B. 433 (1971), recommended dismissal. *But cf.* Reapp Typographic Serv., 204 N.L.R.B. No. 122, at 2 n.2 (July 6, 1973); American Standard, Inc., 203 N.L.R.B. No. 169, at 5 (July 7, 1973); Conval-Ohio Inc., 202 N.L.R.B. No. 16, at 3-4 (March 2, 1973) (TXD) (Trial Examiner recommended that *Collyer* not be applied because the deferral defense was not raised until respondent had submitted post-hearing brief and the contract was silent on subject of alleged unilateral change). *See also* Great Coastal Express, Inc., 196 N.L.R.B. 871 (1972) (held that an arbitrator could best decide whether the agreement's reference to "conditions of employment" included employee parking privileges unmentioned in contract).

116. United States Postal Serv., 207 N.L.R.B. No. 5 (Nov. 19, 1973); Radioear Corp., 199 N.L.R.B. No. 137, at 2-3 (Oct. 30, 1972); *cf.* Reapp Typographic Serv., 204 N.L.R.B. No. 122, at 7 (July 6, 1973) (JD); Collyer Insulated Wire, 192 N.L.R.B. 837, 837-38, 840 (1971) (regarding the failure of the employer to secure the union's agreement on increased wage rates for skilled maintenance employees).

117. Urban N. Patman, Inc., 197 N.L.R.B. No. 150, at 3 (June 30, 1972). *See* United Aircraft Corp., 204 N.L.R.B. No. 133, at 6 n.5 (July 10, 1973); *cf.* MacDonald Eng'r Co., 202 N.L.R.B. No. 113, at 3 (Mar. 26, 1973) (absence of specific deferral request obviated deferring on arbitrability issue).

However, in Southwestern Bell Tel. Co., 198 N.L.R.B. No. 6, at 5-6 (July 31, 1973), the Board, recognizing that the dispute but "argnably" arose from the collective-bargaining

universal practice under collective-bargaining agreements" to submit arbitrability issues to arbitrators.[118] While in actions to compel arbitration the courts possess authority to determine whether grievances are arguably arbitrable, it is the arbitrator's ultimate responsibility to ascertain whether a particular dispute is arbitrable under the contract.[119]

3. *Availability of Arbitration to Charging Party.*—Assuming the parties have agreed upon arbitral procedures that at least arguably encompass the particular dispute, the Board then inquires whether those procedures are available to the charging party. In this regard, the Board has declined to defer to arbitration where "only by *ad hoc* agreement of the parties" could arbitration be invoked after the employer's general manager denied a grievance.[120]

The cases also suggest that the Board will defer only if the charging party or someone acting in his best interests can activate the grievance-arbitration machinery. For example, the *Collyer* doctrine majority[121] in one case[122] adopted without comment an Administrative Law Judge's conclusion that deferral was inappropriate because of the "failure of the contract to contemplate a grievance

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agreement, retained jurisdiction for an added purpose—possible further consideration if the arbitrator found the dispute not arbitrable. *Cf.* Collyer Insulated Wire, 192 N.L.R.B. 837, 843 (1971).

118. Norfolk, Portsmouth Wholesale Beer Distribs. Ass'n, 196 N.L.R.B. 1150, 1151 (1972). *See also* J. Weingarten, Inc., 202 N.L.R.B. No. 69, at 10 (Mar. 16, 1973) (JD), *enforcement denied on other grounds*, 485 F.2d 1135 (5th Cir. 1973).

119. In John Wiley & Sons v. Livingston, 376 U.S. 543, 555 (1964), the Supreme Court stated:

> Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts. It is sufficient for present purposes that the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as nonarbitrable because it can he seen in advance that no award to the Union could receive judicial sanction.

See also Operating Eng'rs Local 150 v. Flair Builders, Inc., 406 U.S. 487, 491-92 (1972); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960) ("The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).

120. Tulsa-Whisenhunt Funeral Homes, Inc., 195 N.L.R.B. 106 n.1 (1972), *enforced*, 84 L.R.R.M. 2300 (10th Cir. July 12, 1973) (unpublished decision); *cf.* Gary-Hobart Water Corp., 200 N.L.R.B. No. 98, at 4 n.4 (Nov. 30, 1972); Western Elec. Inc., 199 N.L.R.B. No. 49, at 2 n.3 (Sept. 28, 1972) (rejecting contention that arbitration was not obligatory because clause provided that disputes "may be referred . . . to an arbitrator").

121. The majority consisted of Chairman Miller and Members Kennedy and Penello. *See* note 14 *supra*.

122. Communications Workers Local 1197 (Western Elec. Co.) 202 N.L.R.B. No. 45 (May. 6, 1973).

on behalf of the [charging] employees against their bargaining representative [the respondent]."[123] And in a later decision,[124] the Board declined to defer action on a section 8(b)(3) complaint in part because there was "a close question" whether the employer-charging party could file grievances.[125] When, however, the grievance procedure could be invoked by someone sharing common interests with the charging party, the Board has not shied away from deferring.[126]

Generally, then, the Board has regarded arbitration as "available" where, upon exhaustion of a grievance procedure invocable by the charging party, the charging party or employer and union representatives other than the immediate disputants could initiate arbitration proceedings.

4. *Binding Character of Arbitration Result.*—One of the prerequisites for deferral under *Spielberg* has been that "all parties [have] agreed to be bound" by the arbitral award.[127] In *International Harvester*, the Board observed:

> Experience has demonstrated that collective-bargaining agreements that provide for *final and binding* arbitration of grievance and disputes arising thereunder, 'as a substitute for industrial strife,' contribute significantly to the attainment of this statutory objective.[128]

Since the grievance-arbitration provisions involved in *Collyer* stated that the arbitrator's decision "shall be final and binding upon the

123. *Id.* at 9. The Judge's alternative basis for recommending against deferral—the express contractual prohibition against the arbitrator's alteration or modification of the agreement—would seem unsupported by the Board's contrary opinions. *See* note 113 *supra* and accompanying text.

124. Communications Workers (Western Elec. Co.), 204 N.L.R.B. No. 94 (July 6, 1973).

125. *Id.* at 7. The decision not to defer turned primarily on the Board's conclusion that the union had "in effect repudiated its obligation under [the] agreement altogether," thereby renouncing "the most basic of collective-bargaining principles." *Id.* at 6.

126. *See* Teamsters Local 70 (National Biscuit Co.), 198 N.L.R.B. No. 4, at 8 (July 31, 1972); L.E.M., Inc., 198 N.L.R.B. No. 99 (Aug. 8, 1972) (while charging union apparently could not file grievances involving alleged §§ 8(a)(3) & (5) conduct, the injured employees could); Urban N. Patman, Inc., 197 N.L.R.B. No. 150, at 3 (June 30, 1972); Norfolk, Portsmouth Wholesale Beer Distribs. Ass'n, 196 N.L.R.B. 1150 (1972); *cf.* Tyee Constr. Co., 202 N.L.R.B. No. 34 (Mar. 9, 1973). *See also* Seng Co., 205 N.L.R.B. No. 36, at 6 (Aug. 2, 1973); T.I.M.E.—DC, Inc., 203 N.L.R.B. No. 174, at 20 (June 4, 1973) (JD); Jack Watkins, G.M.C., 203 N.L.R.B. No. 98, at 6-7 (May 16, 1973) (JD); Kansas Meat Packers, 198 N.L.R.B. No. 2, at 5 (July 31, 1972) (no deferral "to an arbitral process authored, administered, and invoked entirely by parties hostile to the [charging employees'] interests").

127. 112 N.L.R.B. at 1082.

128. 138 N.L.R.B. 923, 926 (1962) (emphasis supplied), *quoting* United States Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. at 578; *see* Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 271 (1964).

parties,"[129] it was easy for the Board to conclude that the agreement "unquestionably obligates each party to submit to arbitration any dispute arising under the contract and binds both parties to the result thereof."[130] Nonetheless, the Board's decisions applying *Collyer* have made it clear that deferral depends in part upon a contractual obligation to abide by future arbitration awards or decisions. Accordingly, no deferral is made when the arbitration procedure in effect at the time of the alleged unfair labor practice does not bind the parties to accept its result.[131] Moreover, the Board has declined to defer to arbitration in a section 10(k)[132] proceeding partly because, unlike in *Collyer*, there was "no single arbitration provision that [was] binding on all of the parties."[133]

The rationale behind the Board's demand that the arbitral proceedings bind all the disputants is sound.[134] If for some reason the arbitration award does not contractually bind a party or is inherently incapable of settling the dispute, deferral will not further the purposes of the Act. It was upon this rationale that the Board in *Eastman Broadcasting* refined the "basic conditions" for deferral under *Collyer*:

> (1) [T]he disputed issues are, in fact, issues susceptible of resolution under the operation of the grievance machinery agreed to by the parties, and (2) there is no reason for us to believe that use of that machinery by the parties could not or would not resolve such issues in a manner compatible with the purposes of the Act.[135]

That the Board expects the grievance-arbitration proceedings to put the dispute "finally at rest in a manner sufficient to effectuate the policies of the Act"[136] is reflected in its application of the

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129. 192 N.L.R.B. at 839.

130. *Id.* at 842.

131. United States Postal Serv., 202 N.L.R.B. No. 119, at 9 (Apr. 2, 1973) (JD) (unresolved grivances could be "appealed" either to the employer's own Board of Appeals and Review or to advisory arbitration).

132. The Board is required to conduct hearings under § 10(k) of the Act, 29 U.S.C. § 160(k) (1970), in order to resolve work assignment disputes within the meaning of § 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D) (1970), when all parties to the dispute have not agreed to be bound by the results of a voluntary procedure for settling the dispute. *See* NLRB v. Plasterers' Local 79, 404 U.S. 116 (1971); NLRB v. Radio Eng'rs Local 1212, 364 U.S. 573 (1961).

133. Steelworkers Local 4454 (Continental Can Co.), 202 N.L.R.B. No. 78, at 8 (Mar. 23, 1973); *cf.* Hutchinson Printing Pressmen (Hutchinson Publishing Co.), 205 N.L.R.B. No. 93, at 6 n.5 (Aug. 16, 1973).

134. Deferral is appropriate when "it appears reasonably probable that arbitration will put the statutory infringement finally at rest in a manner sufficient to effectuate the policies of the Act." Appalachian Power Co., 198 N.L.R.B. No. 7, at 12 (July 31, 1972).

135. 199 N.L.R.B. No. 58, at 12 (Sept. 29, 1972).

136. Appalachian Power Co., 198 N.L.R.B. No. 7 (July 31, 1972). *See also* National

Spielberg criteria[137] to arbitral awards rendered after deferral under *Collyer*.[138]

B. Circumstances Relevant to Deferral Determinations

In determining whether deferral of an unfair labor practice charge to the grievance-arbitration provisions of the parties' contract is appropriate, the Board considers factors other than those bearing on the contract provisions dealing with the resolution of disputes. These considerations, which have been refined since their enunciation in *Collyer*, include obstacles to arbitral resolution of the dispute; the relationship of the unfair labor practice charges and the issues subject to arbitration; the respondent's "willingness" to arbitrate; the respondent's good faith in asserting that its conduct is privileged by the contract; the respondent's enmity, if any, toward employees' statutory rights; and the adequacy of representation afforded an individual employee in grievance-arbitration proceedings.

1. *Obstacles to Quick and Fair Arbitral Resolution*—In many cases, the Board has stated that deferral is appropriate because the grievance-arbitration procedure provides a "quick and fair means" for resolution of the dispute.[139] In his *Collyer* dissent, Member Howard Jenkins argued that the high cost of arbitration injures small unions and companies and that even industrial giants are dissatisfied with the sheer "bogging-down" volume of arbitration.[140] The Board has yet to decline deferral where there have been such obstacles to "quick and fair" arbitration. However, partially in answer to Member Jenkins, Chairman Miller has intimated that he personaly would urge exercise of the Board's jurisdiction

> [i]f, in the future we find coming before us with regularity instances in which the parties have not been able to make their own machinery work—if we find that grievance and arbitration procedures become ridden with unconscionable expense and delay—if we find that the parties abuse their own processes so as to reach results inconsistent with our Act—[or] if any or all of these developments or others which we cannot yet foresee demonstrate that freedom and voluntarism produce results at odds with our national policy . . . .[141]

Radio Co., 198 N.L.R.B. No. 1, at 17 (July 31, 1972).

137. *See* 112 N.L.R.B. at 1082.

138. National Radio Co., 205 N.L.R.B. No. 112 (Sept. 11, 1973), *denying motion for further consideration of* National Radio Co., 198 N.L.R.B. No. 1 (July 31, 1972).

139. *See, e.g.*, Tyee Constr. Co., 202 N.L.R.B. No. 34, at 5 (Mar. 9, 1973); Joseph T. Ryerson & Sons, 199 N.L.R.B. No. 44, at 2 (Oct. 2, 1972); National Radio Co., 198 N.L.R.B. No. 1, at 5 (July 31, 1972); Bethlehem Steel Corp., 197 N.L.R.B. No. 121, at 2 (June 21, 1972); *cf.* Seng Co., 205 N.L.R.B. No. 36 (Aug. 2, 1973).

140. 192 N.L.R.B. at 854-55.

141. *A Case Story*, Address before Conference of Western States Employer Executives,

Absent authoritative Board precedent indicating the extent to which delays, expenses, or backlogs in arbitration affect deferral, the regional offices have been directed to submit to the General Counsel for advice "cases in which a substantial claim is made that for pragmatic, rather than formal, contractual reasons, the arbitration procedures do not in fact afford the charging party what the Board has referred to as a 'quick and fair means' for resolving the dispute."[142] As of November 1, 1973, complaint had issued in only one otherwise deferrable case because the charging party, a labor organization, was financially unable to pursue its contractual remedies.[143]

2. *Probability That Arbitration Can Resolve Unfair Labor Practice Issues.*—Initially it appeared that the *Collyer* doctrine would apply when the skill of an arbitrator was needed to interpret ambiguous contract clauses.[144] In extending the *Collyer* doctrine, however, the Board has established the proposition that deferral depends neither upon a dispute over the meaning or application of substantive contract terms,[145] nor upon a party's claim that its dis-

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Pebble Beach, Calif., Aug. 27, 1971, *reported in* 78 LAB. REL. REP. 28, 34-35 (1971). However, Chairman Miller also asserted that the parties to the contract, rather than the Board, should reform any defects in their procedures. *Id.* at 34.

142. *1973 Revised Guidelines, supra* note 95, at 32, 83 LAB. REL. REP. at 53.

143. In this case, which was submitted to the Division of Advice, the employer was charged witb unlawfully suspending 3 stewards and issuing final warning letters to 30 other employees for their participation in a walkout, which the employer considered unprotected. The union was approximately $7,000 in debt and had previously expended some $3,500 in arbitration over a simple discbarge. Moreover, while about 5,000 of the approximately 7,000 employees in the bargaining unit were members of tbe union, their dues were only $1.00 per month, and the members had recently rejected tbe union's proposal to increase their dues. It was determined that the Regional Office should be authorized to issue a § 8(a)(3) complaint because of these circumstances and since there was no evidence that the union had maintained low dues to avoid arbitration. In addition, the amount of dues levied upon the members was viewed as an internal union matter—beyond the Board's purview in the circumstances. *Quarterly Report of the General Counsel*, NLRB Release No. 1230, Feb. 12, 1974, at 3-4, *reported in* 85 Lab. Rel. Rep. 119, 120 (1974).

Another complaint was authorized last year upon charges alleging that an employer had committed multiple violations of §§ 8(a)(1), (3), and (5). Deferral was deemed inappropriate, primarily hecause the employer was considered to have rejected the statutory principles of good-faith collective bargaining and of respecting the union's rights to file grievances. *See* Chase Mfg., Inc., 200 N.L.R.B. No. 128 (Dec. 13, 1972); *cf.* Joseph T. Ryerson & Sons, 199 N.L.R.B. No. 44 (Oct. 2, 1972). One of several secondary considerations weighing against deferral was the fact that the union could annually afford to arbitrate only 12 of the 69 grievances then pending arbitration.

144. *1972 Guidelines, supra* note 95, at 2-3, 4 CCH LAB. L. REP., ¶ 9002, at 15,015. *See also 1973 Revised Guidelines, supra* note 95, at 11 n.6, 83 LAB. REL. REP. at 43 n.6.

145. *See, e.g.*, National Heat & Power Corp., 201 N.L.R.B. No. 150, at 5 (Feb. 26, 1972); Great Coastal Express, Inc., 196 N.L.R.B. 871 (1972); text accompanying notes 111-19 *supra*. *But see* Oak Cliff-Golman Baking Co., 202 N.L.R.B. No. 72 (Mar. 21, 1973), *on reconsideration*, 207 N.L.R.B. No. 138 (Dec. 26, 1973).

puted conduct is privileged by the contract.[146] As the Board succinctly stated in *National Radio Co.*, "[t]he crucial determinant is, we believe, the reasonableness of the assumption that the arbitration procedure will resolve this dispute in a manner consistent with the standards of *Spielberg*."[147]

The relationship between the unfair labor practice issue and the contractual dispute is therefore defined in terms of the grievance-arbitration procedure's capacity to resolve the dispute. Although the Board readily has deferred when the questions in issue turn on the meaning or application of particular provisions of the collective-bargaining agreement,[148] the latest cases show that deferral does not depend upon even the involvement of any substantive clauses.[149] Moreover, the fact that no construction of the contract would privilege the respondent's conduct has not prevented the Board from deferring resolution of the matter.[150] It is fully consistent

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In National Radio Co., 198 N.L.R.B. No. 1, at 14-15 (July 31, 1972), the Board pointed out: "Respondent's contention that our authority is improvidently invoked does not rest on any presumed primacy of an arbitrator to interpret an ambiguous or contested contract provision."

146. Although the Board in *Schlitz* stressed that there was "a substantial claim of contract privilege", 175 N.L.R.B. at 142, the post-*Collyer* cases have probably eliminated any such factor as a requirement for deferral. *See, e.g.*, Peerless Pressed Metal Corp., 198 N.L.R.B. No. 5, at 3 (July 31, 1972) (Although the majority described the dispute as one involving a "good-faith disagreement between the parties concerning the interpretation of the contract," the dissent maintained that "there is no substantial claim of contractual privilege," *id.* at 11.); Wrought Washer Mfg. Co., 197 N.L.R.B. No. 14, at 17 (Mar. 24, 1972) (where deferral was not discouraged by the Trial Examiner's characterization of the respondent's contract interpretation as "patently erroneous") (TXD).

Several decisions have suggested, however, that deferral might not be warranted if the respondent asserts its justifications in bad faith or does not actually rely upon its asserted justifications. *See* Oak Cliff-Golman Baking Co., 202 N.L.R.B. No. 72, at 8 (Mar. 21, 1973) (TXD), *on reconsideration*, 207 N.L.R.B. No. 138 (Dec. 26, 1973); Peerless Pressed Metal Corp., 198 N.L.R.B. No. 5, at 3 n.1 (July 31, 1972).

147. Appalachian Power Co., 198 N.L.R.B. No. 7, at 17 (July 31, 1972). *See also* Eastman Broadcasting Co., 199 N.L.R.B. No. 58, at 12 (Sept. 29, 1972) quoted in text accompanying note 135 *supra*.

148. *See* note 112 *supra*. This also has been true when the parties' resolution of the dispute would "flesh out the bare-bones of their statutory obligations with specific ground rules appropriate to their particular circumstances." Houston Mailers Local 36 (Houston Chronicle Publishing Co.), 199 N.L.R.B. No. 69, at 4 (Oct. 18, 1972). *See also* Baltimore Typographical Local 12 (A.S. Abell Co.), 201 N.L.R.B. No. 5 (Jan. 9, 1973).

149. *See* text accompanying notes 110-19 *supra*.

150. *See* Tyee Constr. Co., 202 N.L.R.B. No. 34 (Mar. 9, 1973); Baltimore Typographical Local 12 (A.S. Abell Co.), 201 NL.R.B. No. 5 (Jan. 9, 1973); Houston Mailers Local 36 (Houston Chronicle Publishing Co.), 199 N.L.R.B. No. 69 (Oct. 18, 1972); Peerless Pressed Metal Corp., 198 N.L.R.B. No. 5 (July 31, 1972); Wrought Washer Mfg. Co., 197 N.L.R.B. No. 14 (Mar. 24, 1972); Great Coastal Express, Inc., 196 N.L.R.B. 871 (1972); *cf.* Lithographers Local 271 (U.S. Playing Card Co.), 204 N.L.R.B. No. 65 (June 22, 1973), *petition for enforcement filed*, No. 73-1922 (6th Cir., Sept. 13, 1973).

with the *Collyer* doctrine to avoid deciding the merits of such cases; for if the respondent has no support from the contract, bargaining history, or past practices, the probable result is simply that the charging party will prevail in the contract procedure.

When legal issues are resolvable under grievance-arbitration provisions, the Board usually declines to decide them, whether or not they require contract interpretation.[151] Deferral has been eschewed, however, when the pertinent contract provisions establish criteria for resolving the dispute that are inconsistent with those the Board would apply in determining the unfair labor practice issues. In *George Koch Sons, Inc.*,[152] for example, the Board held that the union had violated section 8(b)(1)(B) by, *inter alia*, striking to protest the employer's alleged failure to pay an individual the contract wage scale for foremen. The contract appeared to privilege the strike if the man were an "employee" under the Act, but did not exclude statutory "supervisors" from its coverage. Finding that an arbitrator, therefore, could not determine the individual's status, the Board decided that he was a "supervisor" under the Act, with the result that the work stoppage was unlawful. Hence, *Koch* reflects the Board's general policy to defer to prospective grievances when it reasonably can assume that "the arbitration procedure will resolve [the] dispute in a manner consistent with the standards of *Spielberg*."[153] As the Board has recognized in applying the *Spielberg* criteria, that assumption is absent when there is a conflict between the contract provisions and statutory principles, or when the unfair labor practice issue cannot be resolved by an arbitrator.[154]

When unfair labor practice charges present multiple issues, in-

151. *See* Newspaper Guild (Enterprise Publishing Co.), 201 N.L.R.B. No. 118 (Feb. 12, 1973), *petition for review filed*, No. 73-1154 (1st Cir., June 25, 1973) (violation for requesting discharge of employees for nonpayment of dues dependent on whether contract contained maintenance-of-membership clause); Associated Press, 199 N.L.R.B. No. 168, at 14-15 (Oct. 27, 1972) (timeliness of checkoff revocation turned on effect of contract hiatus); L.E.M., 198 N.L.R.B No. 99, at 6 (Aug. 8, 1973) (contractual validity of checkoff authorizations would resolve ultimate question in case). *But cf.* American Standard, Inc., 203 N.L.R.B. No. 169 (June 4, 1973).

152. 199 N.L.R.B. No. 26 (Sept. 20, 1972), *petition for enforcement filed*, No. 73-1025 (1st Cir., Feb. 14, 1973); *see* Communications Workers (Western Elec. Co.), 204 N.L.R.B. No. 94, at 7 (July 6, 1973) ("[T]here is not a sufficient identity between the issue which we are asked to decide with respect to the strike . . . for us to apply our *Collyer* policy to his matter."); B-E-C-K-Christenson-Raber-Kief & Associates, Inc., 195 N.L.R.B. 468 n.2 (Feb. 18, 1972).

153. National Radio Co., 198 N.L.R.B. No. 1, at 17 (July 31, 1972).

154. *See* Radio Television Technical School, Inc., 199 N.L.R.B. No. 85, at 2 (Oct. 10, 1972), *enforced*, 488 F.2d 457 (3d Cir. 1973); Airco Indus. Gases—Pacific, 195 N.L.R.B. 676 (1972), and cases cited at 677 nn.6-8.

cluding some that are not susceptible of resolution through arbitration, the Board will strive to identify and defer all questions that can be resolved finally through recourse to the contract procedure, while reserving for its own decision those that cannot be deferred.[155] If, however, the issues are not separable, the Board is disposed to defer action on all issues where the arbitration of one is likely to resolve a substantial question common to all disputed issues.[156] In *National Biscuit Co.*,[157] for instance, the Board deferred charges under sections 8(b)(1)(A) and 8(b)(3) based on the union's threat to fine, and actual fining of, member-drivers for defying a union rule prohibiting cash pick-ups that the union had promulgated unilaterally after failing to secure the employer's agreement to suspend that practice. Even though the union's threats and fining of uncooperative members were not arbitrable under the parties' contract, the Board deferred action on all charges pending arbitration of the question whether the parties' contract or established past practice required the drivers to make cash pick-ups. Since, in the Board's view, the validity of the union's conduct, both in promulgating the rule and in disciplining its members for violations, hinged on a correct interpretation of the parties' contract, the dispute underlying the charges was considered one that could be resolved best by an arbitrator.[158] On the other hand, the Board apparently will decide inseparable issues where the common question cannot be resolved through the parties' contract procedures.[159]

3. *Willingness to Arbitrate the Dispute.*—One of the circumstances supporting deferral in *Collyer* was the fact that the respondent employer had "credibly asserted its willingness to resort to arbitration . . . ."[160] The Board still considers it essential to deferral that the respondent be willing to submit all aspects of the under-

155. *See, e.g.*, J. Weingarten, Inc., 202 N.L.R.B. No. 69 (Mar. 16, 1973); Joseph T. Ryerson & Sons, 199 N.L.R.B. No. 44 (Oct. 2, 1972); L.E.M., 198 N.L.R.B. No. 99 (Aug. 8, 1973) (deferred issue whether employees were properly discharged, but determined their eligibility to vote in election); Coppus Eng'r Corp., 195 N.L.R.B. 595 (1972); *cf.* Atlantic Richfield Co., 199 N.L.R.B. No. 135 (Oct. 31, 1972) (*semble*); Associated Press, 199 N.L.R.B. No. 168 (Oct. 27, 1972) (part *Spielberg*, part *Collyer* disposition).

156. *Cf.* Gary-Hobart Water Corp., 200 N.L.R.B. No. 98, at 4 (Nov. 30, 1972); Eastman Broadcasting, 199 N.L.R.B. No. 58, at 12 (Sept. 29, 1972); George Koch Sons, Inc., 199 N.L.R.B. No. 26, at 9 (Sept. 20, 1972).

157. Teamsters Local 70 (National Biscuit Co.), 198 N.L.R.B. No. 4 (July 31, 1972).

158. *Id.* at 10 n.8.

159. *See, e.g.*, Communications Workers (Western Elec. Co.), 204 N.L.R.B. No. 94, at 10 n.4 (July 6, 1973); Gates Rubber, Inc., 199 N.L.R.B. No. 108, at 18 (Oct. 16, 1972) (TXD), *petition for enforcement filed*, No. 73-1098 (6th Cir., Jan. 30, 1973).

160. 192 N.L.R.B. at 842.

lying dispute to arbitration;[161] in fact, it refrained from even considering deferral in *Salt River Valley Water Users' Association* "because neither the Charging Party nor the Respondent desire[d] to utilize their agreed-upon contractual grievance arbitration procedure to resolve their dispute . . . ."[162] In this connection, the Board's regional offices have been instructed not to defer administratively any case unless the respondent affirmatively expresses its willingness to arbitrate.[163] Once the respondent complies with this requirement, the following circumstances are not deemed inconsistent with its expression of willingness:

> (1) The respondent did not previously propose arbitration of the dispute or contend that the charge should be deferred for arbitration; (2) the respondent previously refused a demand that the dispute be submitted to arbitration; and (3) the respondent intends to contest the arbitrability of the underlying dispute in the arbitral forum, if, upon determination that the matter is arbitrable, the respondent is willing to submit the merits of the dispute to arbitration.[164]

Further, the fact that the time limitation established by the contract for filing grievances has passed will not, by itself, preclude deferral if the respondent is willing to waive the limitation and permit final resolution of the dispute under the contractual procedure.[165]

On the other hand, a respondent may assert certain technical defenses that evidence its unwillingness to process the dispute through to arbitration. In *Detroit Edison Co.*,[166] for example, the charging party's bargaining representative had not processed his grievance over vacation pay to arbitration before the limits for invoking the arbitral procedure had expired. The Board declined to defer section 8(a)(1) and (3) charges based on the employer's alleged discriminatory denial of vacation pay because the employer, far from waiving the limitation, insisted that it would rely on untimeli-

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161. Detroit Edison Co., 206 N.L.R.B. No. 116, at 2-3 (Nov. 2, 1973). *See also* Seng Co., 205 N.L.R.B. No. 36, at 5 (Aug. 2, 1973); Columbus & S. Ohio Elec. Co., 205 N.L.R.B. No. 33, at 3 (Aug. 1, 1973); Coppus Eng'r. Corp., 195 N.L.R.B. 595, at 597 (1972).

162. 204 N.L.R.B. No. 26, at 1 n.1 (June 12, 1973). *See also* Jack Watkins, G.M.C., 203 N.L.R.B. No. 98, at 5 (May 16, 1973) (JD); Gates Rubber, Inc., 199 N.L.R.B. No. 108, at 18 (Oct. 16, 1972) (TXD).

163. *1973 Revised Guidelines* at 15-19, 83 LAB. REL. REP. at 45-46; *cf.* Medical Manors, Inc., 199 N.L.R.B. No. 139 (Oct. 19, 1973), *supplemented*, 206 N.L.R.B. No. 124 (Nov. 6, 1973).

164. *1973 Revised Guidelines* at 16, 83 LAB. REL. REP. at 46.

165. *See, e.g.*, L.E.M., Inc., 198 N.L.R.B. No. 99 (Aug. 8, 1973).

166. 206 N.L.R.B. No. 116 (Nov. 2, 1973). *See also* Fleet Carrier Corp., 201 N.L.R.B. No. 29 (Jan. 12, 1973) (where an alternative basis for the Administrative Law Judge's recommendation against deferral was the lapse of the time period for filing grievances through the failure of the union business agent to institute proceedings on the charging party's behalf).

ness as a defense to bar arbitration. Similarly, the respondent's unwillingness to proceed to arbitration will be conclusively presumed from its intention to assert, as a defense in the arbitral forum, that arbitration is barred by reason of the expiration of the contract in effect when the dispute underlying the unfair labor practice charge arose.[167] Moreover, assuming the respondent is willing to proceed to arbitration at the time the deferral decision is made, either by the Board or a regional office, it is clear that the respondent's asserted willingness to arbitrate the dispute must be manifest for a reasonable period of time after deferral. Otherwise, the decision to defer will be revoked, jurisdiction will be asserted, and the issues raised by the complaint will be adjudicated on the merits.[168]

A separate, but related, factor considered by the Board in weighing deferral has been the timing of any contention by the respondent that the matter should be deferred under *Collyer*. If neither party wants to resolve the dispute through their grievance-arbitration procedure, the Board will not reach the question of deferral.[169] Likewise, if the respondent never raises a *Collyer* defense, the unfair labor practice charges will be decided on their merits.[170]

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167. *See 1973 Revised Guidelines* at 15-19, 83 LAB. REL. REP. at 45-46.

168. In Medical Manors, Inc., 199 N.L.R.B. No. 139 (Oct. 19, 1973), the employer's "reluctance to proceed promptly to resolve disputes" in the grievance-arbitration procedure gave the Board pause in considering whether to defer, but it did defer, warning the employer against "foot-dragging" in accepting arbitration of the dispute. *Id.* at 5-6 n.2. After the respondent later had insisted "on its own contractually unfounded preconditions to arbitration," the Board reasserted jurisdiction over the complaint. 206 N.L.R.B. No. 124, at 3 (Nov. 6 1973).

The requirement that the respondent evidence its willingness to arbitrate applies equally when it is a regional office that has deferred charges administratively. Last year, for example, a union asked the General Counsel's Office of Appeals to reconsider its upholding of a Regional Director's deferral when the employer refused to proceed to arbitration. The employer maintained that the union, by appealing the Regional Director's deferral, had waived its right to arbitrate alleged unilateral changes in working conditions. Rejecting that contention, the Office of Appeals concluded that where charges have been deferred under the *Collyer* policy, the respondent must for a reasonable time thereafter be willing to resolve the dispute through the grievance-arbitration mechanism. Moreover, the union's appeal of the deferral determination was not deemed to justify the employer's unwillingness to arbitrate. Accordingly, the Regional Director was authorized to issue a § 8(a)(5) complaint unless the employer agreed to arbitration or the dispute was settled on its merits. This case convinced the General Counsel that administrative deferrals by the regional offices should be appealable. *Quarterly Report of the General Counsel*, NLRB Release No. 1280, Apr. 2, 1973, at 41-43, *reported in* 82 LAB. REL. REP. 308, 315-316 (1973).

169. Salt River Valley Water Users' Ass'n, 204 N.L.R.B. No. 26, at 1 n.1 (June 12, 1973).

170. *See* Food Fair Stores, Inc. v. NLRB, 85 L.R.R.M. 2274, 2278-79 (3d Cir. 1974); Nedco Constr. Corp., 206 N.L.R.B. No. 17, at 2 (Sept. 24, 1973); Local 70, Iron Workers (Padgett Welding, Inc.), 206 N.L.R.B. No. 20, at 1-2 n.2 (Sept. 21, 1973); Association of Motion Picture & Television Producers, Inc., 204 N.L.R.B. No. 134, at 4 (July 6, 1973);

In *Hunter Saw Division of Asko, Inc.*, Chairman Miller opined that "a respondent seeking to assert this defense has the burden of establishing it by pleading and proving facts sufficient to show the applicability of the principles established in the *Collyer* line of cases."[171] Apparently his view has prevailed among the *Collyer* doctrine majority, inasmuch as the Board now requires the charged party to plead a *Collyer*-type defense in its answer so that the deferral issue may be litigated before the Administrative Law Judge.[172] Accordingly, the General Counsel has advised the regional offices to oppose introduction of evidence by the respondent if it fails to present an affirmative *Collyer* defense in its answer to the complaint.[173]

This discussion of timing of deferral defenses has centered on cases in which that issue was not raised during the investigation either by the respondent or the General Counsel, or in which the General Counsel concluded administratively that deferral under the Board's *Collyer* policy was not warranted. It should be noted, however, that the regional offices have been instructed to investigate deferral issues whether or not they are raised formally by any party. Under presently existing procedures, the regions must first determine whether a charge sets forth an arguable violation of the Act and then whether the dispute underlying the charge is prima facie suitable for deferral.[174] If it concludes that deferral is warranted, the region will ascertain informally whether the respondent is willing to arbitrate the dispute. If the respondent indicates its willingness, the charge will be deferred pending arbitration;[175] otherwise, the region will proceed to a full investigation and final determination on the merits of the charge.

If the region concludes that complaint should issue, the respondent will be afforded an additional opportunity to express its will-

MacDonald Eng'r Co., 202 N.L.R.B. No. 113, at 2-3 (Mar. 26, 1973); Hunter Saw Div. of Asko, Inc., 202 N.L.R.B. No. 30, at 2 n.2 (Mar. 12, 1973); Gates Rubber, Inc., 199 N.L.R.B. No. 108, at 18 (Oct. 16, 1972) (TXD); *cf.* Montgomery Ward & Co., 195 N.L.R.B. 725 n.1 (Mar. 7, 1972).

171. 202 N.L.R.B. No. 30, at 2 n.2 (Mar. 12, 1973); *cf.* Yourga Trucking Inc., 197 N.L.R.B. No. 130, at 2 (June 26, 1972) (burden is on party requesting deference to arbitral award under *Spielberg*).

172. *See* Nugent Serv., Inc., 207 N.L.R.B. No. 14, at 7 (Nov. 9, 1973) (JD); Mountain State Constr. Co., Inc., 203 N.L.R.B. No. 167, at 2 (June 1, 1973) (*Collyer* defense first raised in post-hearing brief); Coliseum Hosp., Inc., 202 N.L.R.B. No. 149, at 1 n.2 (Apr. 5, 1973) (Administrative Law Judge recommended deferral even though neither party raised or litigated issue of deferral); Conval-Ohio, Inc., 202 N.L.R.B. No. 16, at 3-4 (Mar. 2, 1973) (TXD); cases cited in note 170 *supra*. *But see* Great Scott Supermarkets, Inc., 206 N.L.R.B. No. 111, at 14-16 (Oct. 16, 1973) (JD).

173. *1973 Revised Guidelines* at 48, 83 LAB. REL. REP. at 61.

174. *Id.* at 36-37, 83 LAB. REL. REP. at 55.

175. *Id.* at 17-19 n.17, 37 n.62, 41-43, 83 LAB. REL. REP. at 46-47 n.17, 55 n.62, 57-58.

ingness to arbitrate the dispute. In the event that the respondent fails to avail itself of that opportunity within seven days after notification of the region's investigative conclusions, an unfair labor practice complaint will issue and the region will urge that any future assertion of the deferral defense be barred by reason of the respondent's failure to make timely assertion of its willingness to arbitrate.[176] The purpose of this administrative instruction, which has not yet been considered by the Board, is to allow the *Collyer* policy to operate at the regional office level as well as at the Board decisional stage of unfair labor practice proceedings. The instruction emphasizes that the advantages of the deferral policy in minimizing delay and alleviating the Board's caseload "can be achieved only through administrative deferral of charges for arbitration early enough in the proceeding to avoid the expenditure of regional office time and resources required to determine fully the merits of a charge, and to prepare and present the case before an administrative law judge."[177]

4. *Enmity Towards Statutory Rights.*—Two of the five considerations that persuaded the Board to defer to arbitration in *Collyer* were the parties' "long and productive collective-bargaining relationship" and the absence of any "enmity by Respondent to employees' exercise of protected rights."[178] While the length of the collective-bargaining relationship has constituted an insignificant element in the formulation of the Board's *Collyer* deferral policy,[179] the *quality* of that relationship has remained an important determinant.

Although judging the quality of the bargaining history requires consideration of many factors,[180] the paramount component proba-

176. *Id.* at 42-43, 48, 83 LAB. REL. REP. at 58, 61.

177. *Id.* at 17 n.17, 83 LAB. REL. REP. at 46-47 n.17.

178. 192 N.L.R.B. at 842.

179. The Board has declined jurisdiction over alleged unfair labor practices occurring during initial collective-bargaining agreements. *See, e.g.*, Champlin Petroleum Co., 201 N.L.R.B. No. 9 (Jan. 8, 1973); National Heat & Power Corp., 201 N.L.R.B. No. 150 (Feb. 26, 1972); Coppus Eng'r Corp., 195 N.L.R.B. 595 (1972).

180. Such factors include prior unfair labor practice violations and settlements, § 301 suits, strikes, lockouts, arbitration experience, and compliance with arbitral awards, NLRB decisions, and court orders. *See, e.g.*, United Aircraft Corp., 204 N.L.R.B. No. 133, at 7 (July 10, 1973) ("positive evidence of maturation of the collective bargaining relationship," despite "litigious characteristics exhibited in the past," in view of recent arbitral resolution of similar disputes); T.I.M.E.—DC, Inc., 203 N.L.R.B. No. 174, at 20 (June 4, 1973) (JD) (refusal to comply with prior arbitral award); Tyee Constr. Co., 202 N.L.R.B. No. 34, at 6 (Mar. 9, 1973) (JD) ("stable and productive bargaining relationship," despite 2 wildcat strikes, and "absence of a history of union animus"); Local 702, Motion Picture Laboratory Technician, 197 N.L.R.B. No. 138, at 14-15 (June 26, 1972) (noncompliance with arbitration decisions).

bly is the evidence of mutual respect for statutory rights, particularly those protected by section 7 of the Act.[181] Significant displays of enmity towards such protected rights, whether they occurred in the past or are the subject of the instant unfair labor practice charges, may militate against deferral. While it is unlikely that isolated incidents evidencing antipathy to protected rights will render deferral inappropriate,[182] the Board generally rejects *Collyer* defenses when there has been a pattern of conduct hostile to employee rights or a repudiation of collective-bargaining principles. Thus, in *Western Electric Co.* the Board found that the union's "wholesale repudiation" of the agreement on the day it was ratified amounted to "a renunciation of the most basic of collective-bargaining principles"[183] and therefore declined to defer allegations that the union had violated section 8(b)(3) when, to force an employer to modify the newly agreed-upon contract, it struck without proper section 8(d) notices. In another case involving charges against an employer for committing numerous violations of sections 8(a)(1), (2), (3), and (5), the Board disagreed with the Administrative Law Judge's deferral recommendation on the ground that the respondent's alleged termination of the incumbent union's contract and execution of a "sweetheart" agreement with another labor organization constituted "a complete rejection of the principles of collective bargaining and the self-organizational rights of employees . . . ."[184]

In determining whether any employer enmity weighs against deferral, the Board looks to the *general* quality of labor-management relations over the duration of collective bargaining

181. National Labor Relations Act § 7, 29 U.S.C. § 157 (1970), provides:
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

182. *Cf.* Medical Manors, Inc., 199 N.L.R.B. No. 139 (Oct. 19, 1973); Todd Shipyards Corp., 203 N.L.R.B. No. 20 (Apr. 24, 1973); Great Coastal Express, 196 N.L.R.B. 871 (1972).

183. 204 N.L.R.B. No. 94, at 6 (July 6, 1973).

184. Mountain State Constr. Co., 203 N.L.R.B. No. 167, at 3 (June 1, 1973), *supplemented*, 207 N.L.R.B. No. 4 (Nov. 9, 1973); *accord* Chase Mfg. Inc., 200 N.L.R.B. No. 128 (Dec. 13, 1972); *cf.* United States Postal Serv., 202 N.L.R.B. No. 119, at 9 (Apr. 2, 1973) (JD); National Radio Co., 198 N.L.R.B. No. 1, at 20 (July 31, 1972); Quarterly Report of the General Counsel, NLRB Release No. 1263, at 20-21 (Dec. 18, 1972), *reported in* BNA 1972 LAB. REL. YEARBOOK 238, 246-47. *See also* United Aircraft Corp., 204 N.L.R.B. No. 133 (July 10, 1973).

between the parties. As shown below,[185] particular charges alleging *specific* instances of employer interference with grievance processing require separate consideration in the application of the *Collyer* doctrine, even though such conduct, if violative of the Act, may in and of itself reflect enmity towards protected rights.

5. *Charges Filed by Individuals.*—In developing the *Collyer* doctrine, the Board has recognized that special considerations come into play when unfair labor practice charges are filed by individuals, usually aggrieved employees, rather than employers or labor organizations. Just as it has refused under the *Spielberg* criteria to accept arbitral awards of bipartite panels that are "arrayed in common interest against the individual grievant,"[186] the Board likewise declines to defer to arbitration proceedings in which the allegedly injured employee would not be represented adequately. This exception to the *Collyer* policy was established in *Kansas Meat Packers*,[187] where two employees were discharged unlawfully for their vigorous pursuit of grievances over allegedly unsafe working conditions. The union business agent, who had been antagonistic toward the dischargees, not only failed to assist them in seeking reinstatement through the grievance procedures, but also had personally instigated their discharge. The Board held:

> In our opinion, it would not be consonant with statutory policy to defer to arbitration in this instance as the interests of the Charging Parties—the alleged discriminatees—are in apparent conflict with the interests of the Union and certain of its officials, as well as with the interests of Respondent.[188]

The *National Radio Co.*[189] case was distinguished on the ground that the Board's deferral of charges under sections 8(a)(1) and (3) in that case

> was predicated on [the] finding that the interests of the union and employee therein were 'in substantial harmony' and that there was, therefore, no ground for assuming that the employee's interests would be inadequately represented under contractual procedures. In the instant case, conversely, the interests of the union and employees involved are in substantial conflict and, as a result thereof, reasonable ground exists for assuming that the latter's interests may not be adequately represented in the arbitral process.[190]

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185. *See* text accompanying notes 222-32 *infra*.

186. Roadway Express, 145 N.L.R.B. 513, 514-15 (Dec. 18, 1963); *cf.* Jacobs Transfer, Inc., 201 N.L.R.B. No. 34 (Jan. 11, 1973). *See also* Youngstown Cartage Co., 146 N.L.R.B. 305, 308 n.4 (1964).

187. 198 N.L.R.B. No. 2 (July 31, 1972).

188. *Id.* at 3.

189. 198 N.L.R.B. No. 1 (Nov. 8, 1972).

190. *Id.* at 5 n.5; *see* National Radio Co., 198 N.L.R.B. No. 1, at 19 (July 31, 1972).

The Board has followed the principles of *Kansas Meat Packers* in cases alleging violations of sections 8(a)(1) and (3),[191] as well as in those alleging a union's contravention of section 8(b)(1)(A) or 8(b)(2),[192] by declining deferral where the positions of the aggrieved employee and his bargaining representative were expressly or inherently divergent. In *Seng Co.*,[193] a recent extension of the *Kansas Meat* principles, the Board adjudicated a complaint alleging that an employer had discriminatorily enforced a no-solicitation and no-distribution rule by reprimanding and discharging employees in violation of sections 8(a)(1) and (3). Although the employees' activities were directed at assisting their union, so that their position in grievance-arbitration proceedings would certainly be akin to the union's, the labor organization had been decertified as bargaining representative. The Board concluded that its "primary motivation in deferring to arbitration, namely, that of facilitating and fostering an *existing* collective-bargaining relationship, [could not] by definition be achieved."[194] Even if the decertified union could have proceeded to arbitration under *John Wiley v. Livingston*,[195] the Board was "not willing to assume, perhaps to the discriminatee's detriment, that a decertified union which has nothing to gain and economic resources to lose if it chooses to go to arbitration will pursue the grievances of these employees and thus obtain a 'quick and fair' resolution thereof . . . ."[196] Thus, while the other decisions in the *Kansas Meat* line of cases stressed the actual or apparent unwilling-

191. *See, e.g.*, Seatrain Terminals, Inc., 205 N.L.R.B. No. 129, at 14 (Aug. 27, 1973) (JD); Anaconda Wire & Cable Co., 201 N.L.R.B. No. 125 (Feb. 13, 1973); Fleet Carrier Corp., 201 N.L.R.B. No. 29 (Jan. 12, 1973); *cf.* Great Scott Supermarkets, Inc., 206 N.L.R.B. No. 111, at 16-27 (Oct. 16, 1973) (JD); Tyee Constr. Co., 202 N.L.R.B. No. 34 (Mar. 9, 1973) (wherein the Board majority implicitly rejected the dissenters' contention that the employee-charging parties would be inadequately represented in grievance proceedings and stressed that the alleged discrimatees could, under the contract, process their own grievances to arbitration without tbe union's involvement).

192. In the pre-*Kansas* case of Local 573, Laborers' Int'l (F.F. Mengel Constr. Co.), 196 N.L.R.B. 440 (1972) (TXD), jurisdiction was exercised over a § 8(b)(1)(A) & (2) complaint because the rights of the charging employees would be defeated if the employer, who was not party to the Board proceedings, could be forced to resort to arbitration, and because the employees' position, if they could invoke arbitration, "would have been adverse to that of the parties to the contract." *Id.* 442 n.7. *See also* Local 207, Laborers' Int'l, 206 N.L.R.B. No. 128 (Nov. 2, 1973); Jack Watkins, G.M.C., 203 N.L.R.B. No. 98, at 6-7 (May 16, 1973) (JD) (§§ 8(a)(1) & (3) and §§ 8(b)(1)(A) & (2)); *cf.* T.I.M.E.—DC, Inc., 203 N.L.R.B. No. 174, at 20 (June 4, 1973) (wherein the Law Judge deemed *Collyer* inapplicable to §§ 8(a)(1) & (3) and §§ 8(b)(1)(A) & (2) charges filed after the arbitration of the dispute).

193. 205 N.L.R.B. No. 36 (Aug. 2, 1973).

194. *Id.* at 6.

195. 376 U.S. 543 (1964).

196. 205 N.L.R.B. No. 36, at 6 (Aug. 2, 1973); *cf.* Packerland Packing Co., 203 N.L.R.B. No. 39 (Apr. 25, 1973); Pauley Paving Co., 200 N.L.R.B. No. 124 (Dec. 12, 1972).

ness of the bargaining representative to support the individual charging party through the grievance-arbitration procedure, *Seng* reflects the Board's understanding that some unions may simply be *unable*, from a practical standpoint, to do so.

In accordance with the above-described policies, the Board's regional offices will administratively defer charges filed by individual employees (or by someone, not party to an applicable contract, acting on their behalf) only if certain conditions are met.[197] First, the interests of the individual charging party must be in "substantial harmony"[198] with the interests of a party to the collective-bargaining agreement, providing that party is willing (and presumably able) to invoke the arbitration procedure and advocate the charging party's position before the arbitrator or arbitral panel. This requirement corresponds with the *Spielberg* standard dictating that the charging party be "adequately represented" in the arbitration proceedings as a condition of Board deferral to a final arbitration award.[199]

The second condition is that the individual charging party does not expressly object to, or refuse to be bound by, the award.[200] Although an employee may be bound by the acts of his bargaining representative,[201] except when the union violates its duty of fair representation,[202] the *Spielberg* standards have required that "all

197. *1973 Revised Guidelines*, at 32-36, 83 LAB. REL. REP. at 53-55.

198. National Radio Co., 198 N.L.R.B. No. 1, at 19 (July 31, 1972). *See also* Kansas Meat Packers, 198 N.L.R.B. No. 2, at 5 n.5 (July 31, 1972).

199. Electrical Workers Local 130 (Westinghouse Elec. Co.), 200 N.L.R.B. No. 115, at 11 (Dec. 5, 1972) (TXD); *accord*, McLean Trucking Co., 202 N.L.R.B. No. 102, at 6 (Mar. 23, 1973); Campbell Sixty Six Express, Inc., 200 N.L.R.B. No. 157, at 6 (Dec. 22, 1972) (TXD); Electrical Workers Local 1522, 180 N.L.R.B. 131, 132 (1969); Eazor Express, Inc., 172 N.L.R.B. 1705, 1709 n.7 (1968). *But see* Great Scott Supermarkets, Inc., 206 N.L.R.B. No. 111, at 12-14 (Oct. 16, 1973) (JD).

200. Under the *1973 Revised Guidelines* on arbitration deferral, at 34, 35 n.57, 38, 83 LAB. REL. REP. at 54 & n.57, 55, 56, the NLRB regions were not to solicit the position of the charging employee concerning his willingness to be bound by arbitration of the dispute. Experience under those instructions revealed, however, that employees acting without assistance of counsel or a union representative have been unaware that their rejection of arbitration could preclude deferral. To correct this disparate treatment, the regional offices were notified by a memorandum dated July 30, 1973, to advise an individual charging party, whether or not assisted by an informed representative, that his charge will not be administratively deferred to arbitration if he specifically objects to arbitration of his case and does not act inconsistently with that objection, such as by not filing, maintaining, or pursuing a grievance to resolve the dispute. However, the regional office must also advise the charging party that the Board may not defer his charge, in which event extensive time may be expended on two proceedings before his case ultimately is resolved by arbitration.

201. *See* Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); Humphrey v. Moore, 375 U.S. 335 (1964); Black-Clawson Co. v. Machinists Lodge 355, 313 F.2d 179 (2d Cir. 1962); Federal Tel. & Radio Co., 107 N.L.R.B. 649 (1953).

202. *See* Vaca v. Sipes, 386 U.S. 171 (1967); Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963); Metal Workers Local No. 1 (Hughes Tool

parties [agree] to be bound" by the arbitral proceeding.[203] The Board has not required as a prerequisite to deferring to arbitration awards that the aggrieved employee be a formal party to the arbitration proceeding. It is clear, however, that he must have "acquiesced or participated therein."[204] In *Jacobs Transfer*,[205] for example, the Trial Examiner refused to consider a bipartite committee's decision as comporting with the *Spielberg* standards, partially because the employee "did not voluntarily submit the issue to the Joint Committee, and did not agree to be bound by the award."[206] Since the Board under the *Collyer* deferral policy[207] considers whether a dispute will be resolved in conformity with the *Spielberg* standards, it seems that the charging party's express or implied acquiescence in the binding character of the arbitration result is required to defer an individually filed charge.

C. *Disputes over Special Subject Matters*

Following its deferral of a section 8(a)(5) complaint in *Collyer*, the Board extended its arbitration deferral policies to alleged violations of other sections of the Act.[208] Yet it has not deferred to arbitra-

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Co.), 147 N.L.R.B. 1573 (1964).

203. 112 N.L.R.B. at 1082; *see* Hershey Chocolate Corp., 129 N.L.R.B. 1052, 1053 (1960).

204. Electrical Workers Local 130 (Westinghouse Elec. Corp.), 200 N.L.R.B. No. 115, at 11 (Dec. 5, 1972) (TXD). *See also* cases cited in note 199 *supra*.

205. 201 N.L.R.B. No. 34 (Jan. 11, 1973) (TXD).

206. *Id.* at 29. The Board adopted the Trial Examiner's decision and recommendations without modifications, although Chairman Miller opposed acceptance of the arbitration award "solely on grounds that the Committee was arrayed in interest against the grievant." *Id.* at 1 n.2. *See* Electrical Workers Local 130, 200 N.L.R.B. No. 115, at 11 (Dec. 5, 1972) (TXD). In Steelworkers Local 4454 (Continental Can Co.), 202 N.L.R.B. No. 78, at 8 (Mar. 23, 1973), the Board rejected a *Collyer* deferral contention in the context of a § 10(k) proceeding and asserted:

> Here we have no single arbitration provision that is binding on all of the parties. . . . [I]mplicit within *Collyer* is the rationale that the Board will defer to arbitration proceedings only when, in effect, all parties involved are bound by the results of such arbitration.

But cf. McLean Trucking Co., 202 N.L.R.B. No. 102, at 7 n.5 (Mar. 23, 1973).

207. Eastman Broadcasting Co., 199 N.L.R.B. No. 58, at 12 (Sept. 29, 1972); Appalachian Power Co., 198 N.L.R.B. No. 7, at 12 (July 31, 1972); National Radio Co., 198 N.L.R.B. No. 1, at 17 (July 31, 1972), *motion for further consideration denied*, 205 N.L.R.B. No. 112 (Sept. 11, 1973); Collyer Insulated Wire, 192 N.L.R.B. 837, 843 (1971).

208. For cases representing the Board's first decisions to defer complaints alleging violations of § 8 of the Act see Newspaper Guild, 201 N.L.R.B. No. 118 (Feb. 12, 1973) (§§ 8(b)(1)(A) & (2)); Associated Press, 199 N.L.R.B. No. 168 (Oct. 27, 1972) (§ 8(a)(2)); Houston Mailers Union No. 36 (Houston Chronicle Publishing Co.), 199 N.L.R.B. No. 69 (Oct. 18, 1972) (§ 8(b)(1)(B)); Joseph T. Ryerson & Sons, Inc., 199 N.L.R.B. No. 44, at 2 (Oct. 2, 1972) (§ 8(a)(1)); Teamsters Local 70 (National Biscuit Co.), 198 N.L.R.B. No. 4

tion in cases involving sections 8(b)(4),[209] 8(b)(7), or 8(e).[210] Moreover, certain types of unfair labor practice disputes have been considered not properly deferrable to grievance-arbitration procedures, but appropriate for Board adjudication. These matters are summarily discussed below.

1. *Accretion Cases.*—Under the *Collyer* policy, the Board will probably decline to defer disputes over obligations to include new facilities or operations within an existing bargaining unit. The cases point in that direction. In *Combustion Engineering, Inc.*,[211] a post-*Collyer* case, the Board refused to accept an arbitrator's decision that certain new employees were covered by an existing contract. The Trial Examiner found that the employer violated sections 8(a)(1) and (3) by enforcing the contract's union-security clause with respect to those employees since they were not actually accreted to the pre-existing unit. Agreeing with that conclusion, the Board also approved the Trial Examiner's recommendation that deferral to the arbitral award would be inconsistent with the *Spielberg* standards. The Board noted that "though the arbitrator answered the question [whether the contract covered the employees] in the affirmative, it is nevertheless the obligation of the Board to determine whether the employees at [the newly established plant] constituted an accretion to the existing unit."[212]

(July 31, 1972) (§ 8(b)(3)); National Radio Co., 198 N.L.R.B. No. 1 (July 31, 1972) (§ 8(a)(3)).

209. *See* Carpenters Dist. Council, 202 N.L.R.B. No. 109 (Mar. 26, 1973) (§ 8(b)(4)(B); Steelworkers Local 4454 (Continental Can Co.), 202 N.L.R.B. No. 78 (Mar. 23, 1973) (§ 8(b)(4)(D)); Machinists Dist. 10 (Ladish Co.), 200 N.L.R.B. No. 165 (Dec. 29, 1972) (§ 8(b)(4)(D)); *cf.* Hutchinson Printing Pressmen (Hutchinson Publishing Co.), 205 N.L.R.B. No. 93 (Aug. 16, 1973) (§ 8(b)(4)(D)).

210. *Cf.* Boilermakers Local 92 (Bigge Drayage Co.), 197 N.L.R.B. No. 34, at 5 n.2 (June 6, 1972) (Miller, Chairman, concurring). In a recent § 8(e) case considered by the General Counsel, it was determined that administrative deferral would be inappropriate, particularly since the contract was allegedly unlawful.

Nor has the Board applied *Collyer* in any case alleging a violation of § 8(a)(4) of the Act, 29 U.S.C. § 158(a)(4) (1970), which makes it an unfair labor practice for an employer to "discriminate against an employee because he bas filed charges or given testimony" under the Act. Thus, regional offices were recently authorized not to defer such allegations in two cases submitted to the General Counsel for advice, since § 8(a)(4) violations involve "interference with the very statutory processes provided for correction of unfair labor practices." *Quarterly Report of the General Counsel*, NLRB Release No. 1320, Feb. 12, 1974, at 2, 3, *reported in* 85 Lab. Rel. Rep. 119, 120 (1974).

211. 195 N.L.R.B. 909 (1972).

212. *Id.*; *see* Pilot Freight Carriers, Inc., 208 N.L.R.B. No. 138, at 14 n.12 (Jan. 31, 1974); Westinghouse Elec. Corp., 206 N.L.R.B. No. 113, at 19-20, 30-31 (Oct. 31, 1973) (JD); *cf.* Standard Scientific, 195 N.L.R.B. 995 (1972) (wherein Board adopted Trial Examiner's conclusions that employer violated § 8(a)(2) by recognizing former representative of its closed plant at new plant where it enjoyed no majority status and that it would be inappropriate to defer to pending arbitration over enforcement of union-security provisions in expired contract as to new employees). *See also* Collyer Insulated Wire, 192 N.L.R.B. 837, 844-45

Moreover, in *Germantown Development Co.*[213] the Board rejected the union's contention that it should defer action on representation and unit clarification petitions, pending arbitral resolution of the issue whether employees working in a manufacturing plant operated by Germantown, a wholly owned subsidiary of Superior, were accreted to the multi-employer bargaining unit to which Superior's employees belonged. The union had filed a grievance alleging that Superior had violated the multi-employer contract by not applying its terms to the Germantown plant employees, whom the union maintained were accreted to the multi-employer unit covered by the agreement. The union's grievance was in process and an arbitrator had been selected before Superior and Germantown filed their petitions. Accordingly, the union's argument that the Board should defer consideration of the matter until the arbitrator ruled on the merits of the contract interpretation question before him raised a *Dubo*, rather than a *Collyer*, deferral issue. The Board's reasons for rejecting the union's argument would, nonetheless, appear applicable to the contention that the Board should defer in a similar context under *Collyer* where no grievances have been filed: The Board observed that it had "consistently held that, notwithstanding an arbitrator's findings on matters of contract interpretation related to accretion issues, it is the obligation of the Board to determine whether, absent the consent of the employees, the employees constitute an accretion to an existing bargaining unit."[214]

2. *Requests for Information.*—The Board has long held that section 8(a)(5) obligates an employer to honor requests by its employees' collective-bargaining agent for information that is relevant and necessary to the union's performance of its statutory duties. This general principle, which has met with Supreme Court approval,[215] applies both to information needed for collective bargain-

(1971) (concurring opinion of Member Brown, who expressed strong reservations about applying *Collyer* in representation area).

213. 207 N.L.R.B. No. 97 (Nov. 27, 1973).

214. *Id.* at 5. Champlin Petroleum Co., 201 N.L.R.B. No. 9 (Jan. 8, 1973), wherein the Board deferred §§ 8(a)(1) & (3) charges to the parties' grievance-arbitration procedures, is not to the contrary. Unlike *Combustion Engineering* and *Germantown*, however, *Champlin* involved no allegation that any employees should or should not have been accreted to an existing unit. Rather, the gravamen of the §§ 8(a)(1) & (3) complaint was that the employer had transferred several employees to less desirable jobs at the employer's warehouse because of their union activities—an issue that could be decided without reference to whether the warehouse to which the employees were assigned constituted an accretion to the existing unit. *Cf.* Urban N. Patman, Inc., 197 N.L.R.B. No. 150 (June 30, 1972).

215. *See* NLRB v. Acme Indus. Co., 385 U.S. 432 (1967); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152-53 (1956).

ing and to that necessary for administering the contract, such as for processing grievances for employees.[216]

Recognizing that the duty to furnish information flows from the Act, the Board generally has not deferred disputes concerning alleged breaches of that obligation.[217] In such circumstances, however, the Board emphasized that the parties' contract contained no provisions referring to union requests for information. Thus, in *American Standard, Inc.*, the Board held:

> It is now well settled that a collective bargaining representative is entitled to information which may be relevant to its task as bargaining agent, and this is not a matter for deferral to arbitration where, as here, the material is sought as a statutory, rather than a contract, right. It is clear in the case before us that there is no contract clause dealing specifically with the furnishing of information necessary and relevant to the processing of grievance or any other clause by which the Union waives its statutory right to such information.[218]

Applying the distinction between statutory and contractual rights to information, the Board in *United Aircraft*[219] deferred a dispute over the employer's production of certain records and data. The bargaining agreement required the company to provide certain materials at step 2 of a grievance proceeding, but was silent regarding any similar duty at step 1. In finding that the union's claim to the information during the first step presented a question of contract interpretation, the Board stated: "Whether or not this silence constitutes a waiver and whether or not the step 2 requirement mandates the production of the particular records and/or information which the union requested are matters best resolved by arbitration."[220]

The deferral of section 8(a)(5) charges based on the failure to supply relevant information raises one troublesome possibility, even in cases such as *United Aircraft*, where the parties have agreed to specific provisions governing the bargaining representative's right to

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216. *See* note 215 *supra*. *See also* Fafnir Bearing Co. v. NLRB, 362 F.2d 716, 721-22 (2d Cir. 1966); Timken Roller Bearing Co., 138 N.L.R.B. 15 (1962), *enforced*, 325 F.2d 746 (6th Cir. 1963), *cert. denied*, 376 U.S. 971 (1964).

217. *See* American Standard, Inc., 203 N.L.R.B. No. 169, at 3-4 (June 4, 1973); United-Carr Tennessee, 202 N.L.R.B. No. 112, at 4-7 (Mar. 23, 1973) (JD); *cf.* Fawcett Printing Corp., 201 N.L.R.B. No. 139 (Feb. 21, 1973). In C-B Buick, Inc., 206 N.L.R.B. No. 10 (Sept. 17, 1973), for example, the Board, without any mention of *Collyer*, found that an employer had violated § 8(a)(5), under NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956), by refusing to provide the union information during contract negotiations to substantiate its claimed inability to pay more than it offered to the union.

218. 203 N.L.R.B. No. 169, at 3-14 (June 4, 1973). *See also* United-Carr Tennessee, 202 N.L.R.B. No. 112, at 5 (Mar. 23, 1973) (JD).

219. 204 N.L.R.B. No. 133 (July 10, 1973).

220. *Id.* at 5-6.

obtain such information and their contract makes disputes arising under these provisions arbitrable. If information necessary to the processing of a particular grievance is not supplied upon request, the bargaining representative may be forced by the grievance-arbitration procedure's time limitations either to process the underlying grievance through to arbitration without relevant information or to abandon the grievance. This result could make meaningless the final disposition of the information issue, at least for purposes of the underlying dispute that gave rise to the request for information. To avoid this possibility, administrative deferral under *United Aircraft* will be conditioned on the respondent's commitment to resolve the information dispute through prompt settlement in grievance negotiations or submission to arbitration before, and without prejudice to, further processing of the underlying grievance to which the information pertains.[221]

3. *Frustration of Grievance Processing.*—The Board's decision in *Joseph T. Ryerson & Sons, Inc.*,[222] shows that deferral will not be available when the alleged unfair labor practice, if committed, impedes access to the grievance-arbitration procedures. The employer in *Ryerson* was charged with violating section 8(a)(1) by threatening a steward with reprisal for handling a grievance that the employer believed to be unmeritorious. Indicating several reasons why the dispute underlying the charge was not suitable for deferral, the Board stated that the incident could not clearly "form the basis for a grievance cognizable under the contract" and noted that there was "no showing that an arbitrator would have authority, under the contract, to consider or remedy company interference with the performance of grievance functions by a grievance committeeman."[223] Most importantly, the majority reasoned:

> [T]he violation with which this Respondent is charged, if committed, strikes at the foundation of that grievance and arbitration mechanism upon which we have relied in the formulation of our *Collyer* doctrine. If we are to foster the national policy favoring collective bargaining and arbitration as a primary arena for the resolution of industrial disputes, as we sought to do in *Collyer*, by declining to intervene in disputes best settled elsewhere, we must assure ourselves that those alternative procedures are not only "fair and regular" but that they are or were open, in fact, for use by the disputants. These considerations caution against our abstention on a claim that a respondent has sought by prohibited means, to inhibit or preclude access to the grievance procedures.[224]

221. *See* General Counsel Memorandum to Regional Offices, dated Dec. 18, 1973, *reported in* 85 Lab. Rel. Rep. 65 (1974).

222. 199 N.L.R.B. No. 44 (Oct. 2, 1972).

223. *Id.* at 5.

224. *Id.* at 5-6.

The Board recently reaffirmed *Ryerson* in *North Shore Publishing Co.*,[225] where an employee (Kabitze), purportedly discharged for poor work performance, actually was dismissed for filing a grievance complaining of a prior lay-off. After reciting the above-quoted language from *Ryerson*, the three-member Board panel (Chairman Miller and Members Fanning and Penello) found the complaint inappropriate for deferral under *Collyer* "[f]or the reasons set forth in *Ryerson*"[226] and in view of the following circumstances:

> In the instant case the complaint contains a specific allegation that Kabitze was discharged for invoking the very grievance procedure to which Respondent would have us defer. We cannot entrust such a complaint to a procedure the integrity of which is directly challenged by the allegations of the complaint itself.[227]

The Board then proceeded to hold that the employer had violated sections 8(a)(1) and (3) since "Kabitze's discharge was but an effectuation of the threatened reprisals, which would not, in fact, have occurred were it not for Kabitze's filing, his refusal to drop, and the Union's pressing of the grievance."[228] Thus *North Shore* should allay any suspicions that *Ryerson* was in disrepute with the Board or that it would not apply when the alleged interference with grievance processing constituted actual discipline that itself could be grievable under the contract.[229] Accordingly, it appears that disputes "in which respondent [is] attempting to foreclose or frustrate resort to the arbitration procedure"[230] remain unsuitable for deferral under *Collyer*.

In *Ryerson* and *North Shore* the Board first found that the charge on its face alleged interference with grievance processing and then determined the merits of that allegation.[231] Thus, if the re-

225. 206 N.L.R.B. No. 7 (Sept. 8, 1973).

226. *Id.* at 4. Member Fanning agreed with the disposition of the case, hut did "not subscribe to his colleagues' views regarding *Collyer*, and the policy of deferral enunciated in that and subsequent cases." *Id.* at n.7.

227. *Id.* at 4.

228. *Id.* at 5.

229. *Cf.* United Aircraft Corp., 204 N.L.R.B. No. 133 (July 10, 1973); Square D Co., 204 N.L.R.B. No. 14 (June 14, 1973). Medical Manors, Inc., 199 N.L.R.B. No. 139 (Oct. 19, 1972), may be distinguished on the grounds that the charged interference was against a contractual right of union representatives to visit the respondent's premises, allegedly in violation of §§ 8(a)(5) & (1).

230. *1973 Revised Guidelines*, at 24, 83 LAB. REL. REP. at 49.

In the second case mentioned in n.143 *supra*, the employer was considered to have frustrated its employees' access to the grievance machinery, but the overall conduct of repudiating collective-bargaining principles was regarded as bringing the matter more into the ambit of Chase Mfg., Inc., 200 N.L.R.B. No. 128 (Dec. 13, 1972). Reliance upon *Ryerson*, therefore, was only supportive of the determination to refrain from administrative deferral.

231. The Board dismissed this allegation in *Ryerson*, but found it meritorious under §§ 8(a)(1) & (3) in *North Shore*.

gional office finds that such an allegation presents an arguable violation, it would decline to defer the charges administratively and would determine whether complaint should issue thereon. When the Board is confronted with such a complaint, as it was in *Ryerson* and *North Shore*, it would, eschewing deferral, either find that the violation occurred as alleged or dismiss the charge for lack of sufficient evidence.[232] For the Board to insist upon a showing of more than an arguable violation as a condition of not deferring under *Ryerson* obviously would require a closer inquiry into the validity of the allegation—something contrary to the *Collyer* concept of considering deferral before, and separately from, a determination of the charge's merits.

4. *Disputes Over Unlawful Contract Provisions.*—The Board has yet to consider application of *Collyer* to disputes over the interpretation or implementation of contractual provisions that are unlawful on their face. It is doubtful, however, that the Board would be inclined to defer such matters.

Since the scope of the arbitrator's authority normally is restricted to the interpretation and enforcement of the contract,[233] he may not add to or modify the agreement. As the arbitrator derives his authority from the contract, he may not invalidate unlawful provisions absent authorization from the parties.[234] In these circumstances, the Board under *Spielberg* would likely disregard arbitral interpretation or enforcement of agreements that themselves are alleged to constitute unfair labor practices, either because the arbitrator's decision is repugnant to the Act,[235] or because the arbitrator did not adjudicate the same issue raised in the charges.[236]

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232. *Cf.* Square D Co., 204 N.L.R.B. No. 14, at 2 (June 14, 1972) (where "single, isolated" remarks pertaining to grievance processing were found not to rise "to the level of § 8(a)(1) violation" and, in any event, were too de minimis to warrant issuance of a remedial order); Todd Shipyards Corp., 203 N.L.R.B. No. 20, at 7-8 (Apr. 24, 1973) (JD) (where, in a similar circumstance, the Board adopted the Administrative Law Judge's recommendation to defer the issue whether under the contract the allegedly threatened steward could process grievances for employees in a different craft).

233. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

234. *Compare* Garment Workers' Union v. Ashland Industries, Inc., 85 L.R.R.M. 2319, 2320 (5th Cir. 1974) ("The arbitrator who derives his power solely from the contract cannot hold that charter to be legally ineffective.") *with* Anna's Queen, Inc. v. Dining Room Employees Local 1, 85 L.R.R.M. 2375, 2376-7 (S.D. N.Y. 1974) ("Claims of fraud in the inducement of the principal contract are for the arbitrator to decide where, as here, the arbitration clause is broad enough to encompass such claims."). For a discussion and review of the continuing controversy over whether public law should be included within an arbitrator's purview see Sovern, *When Should Arbitrators Follow Federal Law?* in ARBITRATION AND THE EXPANDING ROLE OF NEUTRALS 29 (Proceedings of the Twenty-Third Annual Meeting of the National Academy of Arbitrators, 1970).

235. *Cf.* Standard Scientific, 195 N.L.R.B. 995 (1972).

236. *Cf.* Airco Indus. Gases—Pacific, 195 N.L.R.B. 676 (1972).

For similar reasons, deference to prospective grievance-arbitration proceedings to enforce contractual provisions that are unlawful *per se* would not further the policies of the Act, unless it is demonstrated that the arbitrator has authority to apply NLRA principles and, if appropriate, to void the disputed term. Support for this proposition is found in *George Koch Sons, Inc.*,[237] where the Board resisted deferral because an arbitrator could have construed the contract to privilege acts by the respondent union that violated section 8(b)(1)(B). Moreover, in the only section 8(e)[238] case to present a *Collyer* issue, *Bigge Drayage*,[239] the Board accepted the Trial Examiner's recommendation not to defer a dispute over the unlawful enforcement of an ambiguous hot cargo agreement. Looking to extrinsic evidence, the Examiner found that the parties' bipartite grievance committee had issued a binding interpretation of the disputed clause, holding it applicable to an "off-site" location.[240] Although the Board majority did not comment on the Trial Examiner's rejection of the *Collyer* defense, Chairman Miller, concurring, gave this reason for opposing deferral:

> Although I agree with the Trial Examiner that we should not defer to such an award [of the joint panel], I reach that conclusion solely because that award is the conduct which gave rise to the violation alleged and found herein. As an interpretation of the agreement, the award was a part thereof. Far from resolving an unfair labor practice issue, the determination gave rise to the unfair labor practice. In these circumstances, the joint panel proceeding can in no sense be regarded as an alternative forum for resolving issues appropriate for Board determination.[241]

Chairman Miller's comments thus leave open the possibility that he would vote to defer in future section 8(e) cases if it is the

237. 199 N.L.R.B. No. 26, at 8-9 (Sept. 20, 1972). *See* text accompanying note 152 *supra*.

238. National Labor Relations Act § 8(e), 29 U.S.C. § 158(e) (1970) (prohibits so-called "hot cargo" agreements). In Carpenters Dist. Council (Astrodomain Corp.), 202 N.L.R.B. No. 109 (Mar. 26, 1973), the Administrative Law Judge found it unnecessary to defer the issue whether a company was a "primary" or a "secondary" employer, since the respondent's demands upon the company were not coercive within the meaning of § 8(b)(4)(ii). *Id.* at 7-8 (JD). The Board simply stated that since it agreed the complaint should be dismissed, no consideration of the *Collyer* question was required. *Id.* at 1 n.1.

239. 197 N.L.R.B. No. 34 (June 6, 1972).

240. *Id.* at 9, 15-16 (TXD). The construction industry provision to § 8(e) privileges "hot cargo" agreements that would otherwise contravene § 8(e) as long as they relate "to the contracting or subcontracting of work to be done *at the site* of the construction, alteration, painting, or repair of a building, structure, or other work" (emphasis supplied). *See* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 638-39 (1967); Teamsters Local 294 (Island Dock Lumber, Inc.), 145 N.L.R.B. 484, 490-92 (1963), *enforced*, 342 F.2d 18 (2d Cir. 1965); Ohio Valley Carpenters Dist. Council (Cardinal Indus., Inc.), 136 N.L.R.B. 977, 984-89 (1962).

241. Boilermakers Local 92 (Bigge Drayage Co.), 197 N.L.R.B. No. 34, at 5 n.2 (June 6, 1972) (Miller, Chairman, concurring); *cf.* Mechanical Contractors Ass'n, 202 N.L.R.B. No. 1, at 12 (Mar. 1, 1973) (TXD). *See also* Monsanto Chem. Co., 97 N.L.R.B. 517, 520 (1951).

hot cargo provision itself, rather than its interpretation, that "[gives] rise to the unfair labor practice."[242] On the other hand, neither *Bigge* nor any other case supports such an inference. Moreover, the Board has in the past secured preliminary injunctions against arbitration of allegedly illegal hot cargo clauses,[243] in circumstances where the violation of section 8(e) would turn on the questionable agreements themselves, rather than on their implementation.

5. *Disputes over Future Rights, Negotiability, and Unit Elimination.*—In *Collyer*, Member Brown expressed reservations about deferring disputes over the "acquisition of rights in the future"—that is, through negotiations—for he did not approve of arbitration as replacing the parties in collective bargaining.[244] The former Board Member set forth a significant condition for deferral:

> [T]he Board should assure itself that the requested deferral to arbitration encompasses matters which have been subjected to collective bargaining. The Board should not defer where the dispute is not covered by the contract, and therefore, involves the acquisition of new rights.[245]

Member Brown's philosophy seems to have been adopted by the *Collyer* doctrine majority. As previously mentioned, the Board has not deferred any case where there is substantial doubt concerning the existence of a collective-bargaining agreement at the time the alleged unfair labor practices arose;[246] where the dispute essentially involves recognition of a union;[247] or where the controversy is over repudiation of an entire contract.[248] In none of these cases were there conflicts over acquired rights that could be "covered by the contract."

The Board's reluctance to defer action on alleged unfair labor practices arising out of a party's attempted acquisition of new rights in collective bargaining was demonstrated in *Mechanical Contrac-*

242. Boilermakers Local 92 (Bigge Drayage Co.), 197 N.L.R.B. No. 34, at 5 n.2 (June 6, 1972) (Miller, Chairman, concurring).

243. *E.g.*, Retail Clerks Union v. Food Employers Council, Inc., 351 F.2d 525, 531-32 (9th Cir. 1965); McLeod v. AFTRA, N.Y. Council, 234 F. Supp. 832, 841-42 (S.D.N.Y. 1964), *aff'd mem.*, 351 F.2d 310 (2d Cir. 1965).

244. 192 N.L.R.B. at 845 (concurring opinion).

245. *Id.* See his quotation from Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 723 (1945), wherein the Court distinguished disputes over "acquisition of rights for the future" from grievances over "vested" rights. *Id.* at 844-45.

246. *See* text accompanying notes 97-100 *supra*.

247. *See* Mountain State Constr. Co., 203 N.L.R.B. No. 167 (June 1, 1973); Chase Mfg., Inc., 200 N.L.R.B. No. 128 (Dec. 13, 1972); *cf.* United States Postal Serv., 202 N.L.R.B. No. 119, at 9 (Apr. 2, 1973) (JD).

248. *See* Communication Workers (Western Elec. Co.), 204 N.L.R.B. No. 94 (July 6, 1973).

tors Association.[249] There the complaint charged an employer association with bargaining in bad faith due to its insistence upon a contractual provision that required it and the union to submit differences over economic matters to an Industrial Relations Council (IRC) for determination. Notwithstanding the inclusion of the IRC clause in previous agreements, the union wanted it deleted from the new contract. Refusing to accede to the union's demand, the association submitted to the IRC itself the question, *inter alia*, whether the IRC clause should be continued in the parties' agreement. Although the Board dismissed the case on its merits[250] without any discussion of *Collyer*, Member Fanning, dissenting, pointed out that the majority apparently agreed with the Administrative Law Judge that the case should not be deferred. Speculating about the rationale behind that silent affirmation, he noted that while the contract contained a grievance procedure, "the first step in that process is the submission of the grievance to the Council itself for what I presume my colleagues view as the negotiation of a settlement."[251]

It is unclear whether deferral would be appropriate where the employer has totally or substantially eliminated the bargaining unit. Yet the same considerations that led the Board to refuse deferral of disputes regarding the establishment of contract terms or the repudiation of an entire contract would require that disputes concerning the partial or total elimination of the unit be decided by the Board instead of an arbitrator. In particular, the rejection of collective bargaining inherent in such conduct would seem to weigh against deferral. Although the Board has not specifically addressed itself to this problem, it has decided cases involving alleged refusals to bargain over plant closings or removals since *Collyer* was handed down.[252]

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249. 202 N.L.R.B. No. 1 (March 1, 1973).

250. The IRC was found not to constitute an arbitration panel, but "an extension of the collective-bargaining process by a different set of negotiators." *Id.* at 5. By referring the dispute to the Council, the respondent was not conditioning agreement upon inclusion of the IRC clause; rather, it was referring that issue to the next level of bargaining. *Id.* at 8.

251. *Id.* at 12 n.15 (dissenting opinion).

The 1971 National Agreement between the U.S. Postal Service and 4 union signatories provided for local negotiations to implement that contract. Impasses arising in local bargaining were transmitted to regional impasse panels and thereafter, if disputes persisted, to a national impasse panel for resolution. Disputes over local issues could then be referred to arbitration. Hundreds of § 8(a)(5) charges arose from those local negotiations. Although some questions, such as the scope of the local negotiators' authority, were administratively deferred under *Collyer* and *Dubo*, deferral was made to the contractual grievance arbitration procedure, not to the impasse proceedings, which essentially culminated in interest arbitration.

252. *See, e.g.*, Summit Tooling Co., 195 N.L.R.B. 479 (1972), *enforced*, 83 L.R.R.M. 2044 (7th Cir. 1973) (wherein the court impliedly rejected employer's argument on appeal that the Board should have deferred under *Collyer*).

D. *Interrelationship of Collyer and Dubo Policies*

Analytically, the *Collyer* and *Dubo* policies are similar. Both depend upon the existence of final and binding arbitration as the terminal point of an agreed-upon grievance procedure; each generally applies when the dispute can be settled through an arbitral interpretation of a collective-bargaining agreement; and, after deferral under either policy, the Board will examine the arbitrator's decision to determine if the *Spielberg* tests are met. In addition, former General Counsel Arnold Ordman characterized the *Dubo* practice as one of deferring action on a charge when the "grievance-arbitration procedure is being actively pursued . . . if it appears that there is a substantial likelihood that the utilization of the procedure will set the dispute at rest."[253] A comparable test for the *Collyer* doctrine expressed in *Eastman Broadcasting* is that the disputed issues must be "susceptible of resolution under the operation of the grievance machinery."[254]

To be sure, *Dubo* operates when the parties are pursuing arbitration actively, while *Collyer* deferrals are predominantly prospective, operating before either party has invoked the grievance procedure. A more fundamental difference lies in the rationale underlying the two policies. Like *Spielberg, Dubo* was based essentially upon the Board's reluctance to allow the parties to use two forums simultaneously to resolve their dispute.[255] The *Collyer* doctrine not only incorporates this concern,[256] but goes further. Its philosophy is freedom of contract[257]—to encourage the disputants to utilize their agreed-upon procedures so long as the unfair labor practice issues are reasonably susceptible of resolution thereunder and the arbitral decision would not be repugnant to the policies of the Act. Unlike *Dubo*, under which deferral is based upon the parties' current utilization of existing grievance-arbitration procedures,

253. Ordman, *Arbitration and the NLRB—A Second Look*, Speech before the National Academy of Arbitrators, San Francisco, Mar. 3, 1967, reported in 1967 BNA LAB. REL. YEARBOOK 197, 202.

254. 199 N.L.R.B. No. 58, at 12 (Sept. 29, 1972).

255. Dubo Mfg. Corp., 142 N.L.R.B. 431, 432; cf. Timken Roller Bearing Co., 70 N.L.R.B. 500, 501 (1946). See also Theodore P. Mansour, 199 N.L.R.B. No. 29, at 4-7 (Sept. 22, 1972) (TXD).

256. As Chairman Miller asserted in his speech, *Little Collyer Grows Up, supra* note 13:

> If there is one thing which all of you who work in this field know, it is that if our system of free collective bargaining is to survive, it is vital that such [labor relations] disputes be settled promptly and without long and legalistic litigation.

257. *See* Atlantic Richfield Co., 199 N.L.R.B. No. 135, at 3 (Oct. 31, 1972).

Collyer calls for them to resort to those procedures. The lesson of *Collyer*, therefore, is that the parties can and should engage in good faith collective bargaining by adhering to their agreements, including those to arbitrate grievances encompassed by the contract's procedures.

As the Board has expanded its *Collyer* doctrine, it correspondingly has narrowed the applicability of *Dubo*. For instance, the Board has applied *Collyer*, rather than *Dubo*, not only when the parties are proceeding voluntarily to arbitration of their dispute,[258] but also when a court injunction orders the submission of a grievance to arbitration, as was the situation in *Dubo* itself.[259] Accordingly, it appears that the Board will examine deferral prospects under *Collyer* before considering a *Dubo* disposition. For this reason, regional offices now consider deferral under the *Collyer* doctrine prior to determining whether the *Dubo* policy is applicable.[260] Even if conditions for *Collyer* deferral are absent, the complaint may still be deferred administratively under *Dubo*.[261] Deferral may be warranted, for example, where the contract's grievance procedures do not encompass the dispute in question, but the parties have entered into an *ad hoc* agreement to arbitrate the particular dispute,[262] or where a pattern of employer enmity towards statutory rights precludes deferral under *Collyer*, but the union willingly processes the dispute to arbitration.[263]

IV. Impact of *Collyer* Upon NLRB Practice

The preceding discussion has dealt with the theoretical bases

258. *See* National Radio Co., 198 N.L.R.B. No. 1 (July 31, 1972), 205 N.L.R.B. No. 112 (Sept. 11, 1973) (Arbitration proceedings, which had been scheduled before the complaint was issued, were conducted before the Board hearing, but were continued by Arbitrator Archibald Cox, pending the Board's decision; after initially deferring under *Collyer*, the Board examined and accepted the arbitrator's decision as conforming to *Spielberg*); Coppus Eng'r Corp., 195 N.L.R.B. 595, 597 (1972) (grievance discussions pending at time of Board hearing). *But cf.* Titus-Will Ford Sales, Inc., 197 N.L.R.B. No. 4, at 2 (May 26, 1972) (wherein Board noted union had abandoned previously filed grievances and concluded *Collyer* applied).

259. Medical Manors, Inc., 199 N.L.R.B. No. 139, at 5 (Oct. 19, 1972); Southwestern Bell Tel. Co., 198 N.L.R.B. No. 6 (July 31, 1972). In Associated Press, 199 N.L.R.B. No. 168 (Oct. 27, 1972), the union obtained a federal court order compelling the employer to arbitrate the dispute, but withdrew one aspect of the dispute from arbitration. The Board, while recognizing the arbitrator's decision under *Spielberg*, deferred the withdrawn grievance under *Collyer*.

260. *Cf.* George Koch Sons, Inc., 199 N.L.R.B. No. 26 (Sept. 20, 1972) (wherein Board, citing only *Collyer*, found deferral inappropriate since arbitrator could not resolve the statutory question involved in pending grievance-arbitration proceedings).

261. *1973 Revised Guidelines*, at 38, 83 Lab. Rel. Rep. at 56 (1973). *See also 1972 Guidelines*, at 17, 4 CCH Lab. L. Rep., ¶ 9002, at 15,022.

262. *See* Tulsa-Whisenbunt Funeral Homes, Inc., 195 N.L.R.B. 106 n.1 (1972).

263. *But cf.* United Aircraft Corp., 188 N.L.R.B. 633 n.1 (1971) (wherein employer unsuccessfully pressed arbitration against union's objections).

of the *Collyer* decision and the development of the Board's deferral doctrine. But the *Collyer* policy is no mere abstraction; indeed, it has made a practical impact upon the Board's case handling procedures and perhaps upon private collective-bargaining relationships. This is not the place to speculate how, if at all, *Collyer* has influenced the negotiation of bargaining agreements.[264] It is not premature, however, to comment briefly on some of the more important changes in Board practice that have resulted from the *Collyer* decision.

A. Timing of Administrative Deferral

The Board's processes interact, sometimes abrasively, with private procedures for settling labor relations disputes. *Collyer* has relieved some of this friction by enabling parties in many cases to resolve their contractual differences through recourse to agreed-upon methods of adjustment. At least one commentator has suggested, however, that arbitral hearings may be prejudiced by a regional office's administrative determination that an unfair labor practice charge is meritorious and that complaint is warranted.[265] This admonition is valid to the extent that it relates to charges that are deferrable under the *Collyer* policy. Procedures have been developed, however, to minimize the danger that administrative handling of deferrable charges would adversely affect arbitration proceedings.[266]

Since the *Collyer* policy presupposes deferral of only arguably meritorious charges, plainly unmeritorious charges plainly are subject to dismissal.[267] To avoid an adverse impact on the arbitral

264. In their dissent in National Radio Co., 198 N.L.R.B. No. 1, at 28 (July 31, 1972), Members Fanning and Jenkins warned of contractual clauses that could subject unfair labor practice issues to deferral under *Collyer* and thereby deter the Board from deciding such issues:

> A further and necessary result [of the deferral policy] is that if the parties desire, they may contract themselves out of the Act to any extent they choose by listing in the contract the provisions of the Act they agree not to violate, and appending an arbitration clause to such listing.

See also Address by Patrick O'Donoghue, A.B.A. Convention, Washington, D.C., Aug. 7, 1973, *reported in* 83 LAB. REL. REP. 355, 356 (1973).

265. Address by Evan J. Spelfogel, A.B.A. Convention, Washington, D.C., Aug. 7, 1973, *reported in* 83 LAB. REL. REP. 355, 356 (1973).

266. *See 1973 Revised Guidelines*, at 37, 41, 47, 83 LAB. REL. REP. at 55, 57-60 (1973). Under the *1972 Guidelines*, at 17, 4 CCH LAB. L. REP. ¶ 9002, at 15,022 (1972), the regions would consider deferral only after the charges were fully investigated and issuance of a complaint was deemed warranted.

267. The Board has dismissed in their entirety complaints alleging what it deemed de minimis violations, without even considering whether the matters were otherwise deferrable.

hearing, however, the regional offices have been instructed to inquire only whether the charges are frivolous or clearly lacking in merit. Assuming the charge is not dismissed under this standard, the region will determine whether the charge may be deferred to the parties' grievance-arbitration machinery.[268] If the respondent expresses its willingness to arbitrate the dispute underlying the charge at this stage of the investigation, the matter will be deferred without further investigation or a final administrative determination that the charge is meritorious.[269] The region will proceed to determine whether complaint is warranted only if the respondent declines to express a willingness to arbitrate.[270] Accordingly, deferral at the earlier stage means merely that the charge is not patently unmeritorious, not that it has merit.

B. Post-Deferral Procedures

As discussed above,[271] the Board retains jurisdiction over deferred cases

> for the purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of [the] decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.[272]

See Square D Co., 204 N.L.R.B. No. 14, at 2 (June 14, 1973); American Fed'n of Musicians (John C. Wakely), 202 N.L.R.B. No. 80 (March 21, 1973); San-Tul Hotel Co., 198 N.L.R.B. No. 86 (July 27, 1972); *cf.* National Football League Management Council, 203 N.L.R.B. No. 165, at 7 n.5 (May 30, 1973), where the Board stated:

> Since we find that Respondent's course of conduct [as to bargaining over the use of artificial turf] did not reach the point of maturing into even a *prima facie* breach of either contractual or statutory duties, we need not and do not decide whether, had such a *prima facie* case been made out, we would have withheld our processes pending a resolution of the dispute under the contract's grievance and arbitration procedures.

268. *1973 Revised Guidelines*, at 36-37, 83 LAB. REL. REP. at 55 (1973); *see* text accompanying notes 174-77 *supra*.

269. *1973 Revised Guidelines*, at 18-19 n.17, 37 n.62, 41-42 n.68, 83 LAB. REL. REP. at 46-47 n.17, 55 n.62, 57 n.68 (1973).

270. *Id.* at 41-42, 53-54, 83 LAB. REL. REP. at 57-58, 64 (1973).

271. *See* text accompanying notes 11-12 *supra*.

272. National Radio Co., 198 N.L.R.B. No. 1, at 21 (July 31, 1972); Collyer Insulated Wire, 192 N.L.R.B. 837, 843 (1971). *See also* Great Scott Supermarkets, Inc., 206 N.L.R.B. No. 111, at 31 (Oct. 16, 1973) (wherein Board adopted without comment Administrative Law Judge's recommendation that jurisdiction should be reasserted if charging party could show also that "the decision of arbitrator is not wholly dispositive of the issue in [the] case."); Southwestern Bell Tel. Co., 198 N.L.R.B. No. 6, at 5-6 (July 31, 1972) (wherein Board held it would reconsider case upon additional showing that arbitrator found dispute not arbitrable).

The first of these two grounds on which the Board will entertain a motion for reconsideration was made clear in *Medical Manors, Inc.*, where the Board, in ordering deferral, first cautioned the respondent against "further foot-dragging in such manner that the disputes in issue are not promptly submitted to arbitration,"[273] and thereafter reasserted jurisdiction when the respondent delayed arbitration of the matter.[274] The Board's second decision in *National Radio Co.*[275] suggests how it will deal with motions urging the second ground for reconsideration—unfairness or irregularity in the arbitral procedures or repugnancy in the final arbitral result.

National Radio confirmed that the Board would indeed scrutinize arbitrator's awards in light of *Spielberg*. While no party contended that the arbitral proceeding was unfair or irregular, the charging party raised the *Spielberg* issue whether the award was repugnant to the Act by failing "to dispose of all the statutory issues raised by the complaint."[276] The union conceded at the outset that the arbitrator had considered and answered the question whether the employer's acts of disciplining and discharging the union's representative were based upon anti-union animus. It maintained, however, that the arbitrator had not passed on the section 8(a)(5) allegation that the employer unlawfully had promulgated a rule requiring union representatives to report their movements in the plant while processing grievances on compensated time. For his alleged refusal to obey this rule, the dischargee was fired. The Board majority responded to the union's contention by pointing out (1) that the arbitration proceeding did resolve the "basic underlying issue" and (2) that "the Charging Party initially did not ask [the arbitrator] to resolve the issue of the propriety of the manner in which the rule had been promulgated in the arbitration and subsequently did not avail itself of the unopposed opportunity to expand the scope of the arbitration procedures to include that issue."[277]

The Board's third reason for denying the union's motion in

273. 199 N.L.R.B. No. 139, at 5 (Oct. 19, 1972).

274. 206 N.L.R.B. No. 124 (Nov. 6, 1973). In cases where the charges are administratively deferred, the regions will revoke deferral and resume processing the charges if the respondent prevents or impedes the prompt resolution of the dispute through grievance-arbitration procedures. *1973 Revised Guidelines*, at 46-47, 83 LAB. REL. REP. at 60 (1973).

275. 205 N.L.R.B. No. 112 (Sept. 11, 1973).

276. *Id.* at 2. *See also* Airco Indus. Gases—Pacific, 195 N.L.R.B. 676 (1972).

277. 205 N.L.R.B. No. 112, at 3-4 (Sept. 11, 1973); *cf.* Associated Press, 199 N.L.R.B. No. 168, at 14 (Oct. 27, 1972) (wherein Board deferred under *Collyer* an issue withdrawn from arhitration by union).

National Radio supplied an additional facet to its post-deferral policies:

> [A]t no time prior to the issuance of the [arbitrator's] award did the Board receive a timely motion from the Charging Party that any issue as to the propriety of the rule or the nature of its promulgation had not been resolved by amicable settlement in the grievance procedure or had not been submitted to arbitration.[278]

The *National Radio* case, then, clarifies what the Board will consider a "timely motion." If a charging party has reason to believe that the arbitration proceedings to which the Board has deferred will not encompass a significant issue raised in the unfair labor practice complaint, it should apprise the Board of the fact as soon as it is discovered. Although the union in *National Radio* filed its motion for reconsideration only one month after the arbitrator's decision,[279] the motion was not timely in view of the purpose for which it was made. It might be noted that the General Counsel's administrative deferral guidelines provide for regional office inquiries into the status of deferred disputes at least every 90 days.[280] Moreover, the parties at any time may, with or without such inquiry, submit evidence in support of requests for dismissal, continued deferral, or issuance of complaint.[281]

C. Noncompliance With the Arbitral Award

The Board's post-award deferral policy was enunciated and developed in cases where the charging party's claim was first rejected in the arbitral forum.[282] In *Malrite of Wisconsin*,[283] on the other hand, the Board faced the question whether to issue a remedial order where the charging party had prevailed in arbitration, but the respondent had failed to comply with the arbitrator's decision. Agreeing with the Administrative Law Judge's conclusion that the award satisfied the *Spielberg* criteria, the Board nonetheless rejected his recommendation that an order issue against the respondent employer. The Board's rationale, in disclaiming responsibility for enforcing arbitration awards, was unequivocal:

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278. 205 N.L.R.B. No. 112, at 4 (Sept. 11, 1973) (footnote omitted). After deferring in Champlin Petroleum Co., 201 N.L.R.B. No. 9 (Jan. 8, 1973), the Board later granted the General Counsel's Motion to Approve Withdrawal Request and Close Case, since the parties had amicably settled their dispute. (Order dated October 2, 1973).

279. 205 N.L.R.B. No. 112, at 1-2 (Sept. 11, 1973).

280. *1973 Revised Guidelines*, at 45, 46, 55, 83 LAB. REL. REP. at 59, 60, 65 (1973).

281. *Id.*

282. *E.g.*, Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).

283. 198 N.L.R.B. No. 3 (July 18, 1972), *petition for review filed*, No. 72-1996 (D.C. Cir., Oct. 20, 1972).

> In its formulation of the *Spielberg* standards the Board did not contemplate its assumption of the functions of a tribunal for the determination of arbitration appeals and the enforcement of arbitration awards. If the Board's deference to arbitration is to be meaningful it must encompass the entire arbitration process, including the enforcement of arbitral awards. It appears that the desirable objective of encouraging the voluntary settlement of labor disputes through the arbitration process will best be served by requiring that parties to a dispute, after electing to resort to arbitration, proceed to the usual conclusion of that process—judicial enforcement—rather than permitting them to invoke the intervention of the Board.[284]

Although *Malrite* did not involve a dispute that the Board had previously deferred, its impact upon such cases is clear. Where an arbitration award that satisfies the *Spielberg* criteria is issued after deferral by the Board or by its regional offices, the deferred charges will be dismissed.[285]

V. Summary and Conclusions

The *Collyer* decision exemplifies the Board's "hospitable acceptance"[286] of arbitration as a means of adjusting disputes between parties to collective-bargaining agreements. The Board has long deferred resolution of contractual issues to arbitration, either when an arbitration is pending[287] or when an arbitrator has adjudicated a grievance that presents the same issues as the unfair labor practice charges.[288] *Collyer* was not the first Board decision to defer prospectively to a grievance-arbitration procedure that had not been invoked by the parties,[289] but the Board's previous recognition of the value of arbitration does not detract from the importance of the *Collyer* policy. For, as the *Collyer* majority recognized, the decision represented a "developmental step"[290] in the Board's treatment of

284. *Id.* at 4. An arbitration award was issued after the Board had deferred action in Southwestern Bell Tel. Co., 198 N.L.R.B. No. 6 (July 31, 1972), and after the charging party, the Communications Workers, had petitioned the Court of Appeals for the District of Columbia to review the NLRB order. Thereupon, the CWA moved the court to remand the record to the Board for a *Spielberg* review. On November 23, 1973, the court in a per curiam order dismissed the petition for review and remanded the matter to the Board for consideration of the arbitral award in light of the *Spielberg* standards. Communications Workers v. N.L.R.B., No. 72-1761 (D.C. Cir., Nov. 23, 1973).

285. *See 1973 Revised Guidelines*, at 47, 83 LAB. REL. REP. at 61 (1973).

286. International Harvester Co., 138 N.L.R.B. 923, 927 (1962).

287. *See* Dubo Mfg. Corp., 142 N.L.R.B. 431 (1963).

288. *See* Monsanto Chem. Co., 130 N.L.R.B. 1097, 1099 (1961); Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).

289. *See* Joseph Schlitz Brewing Co., 175 N.L.R.B. 141 (1969); Montgomery Ward & Co., 137 N.L.R.B. 418 (1962); United Tel. Co., 112 N.L.R.B. 779 (1955); McDonnell Aircraft Corp., 109 N.L.R.B. 930 (1954); Consolidated Aircraft Corp., 47 N.L.R.B. 694 (1943).

290. 192 N.L.R.B. at 843.

unfair labor practice cases whose resolution involves interpretation of the disputants' collective-bargaining agreement. There, for the first time, the Board promulgated specific criteria which, if met, would cause it to abstain from deciding certain kinds of cases in deference to the parties' grievance-arbitration procedures. Later cases refining the *Collyer* deferral doctrine have stressed the necessity of some of these criteria, while relegating others to secondary importance. Thus deferral is appropriate where the following prerequisites are satisfied:

1. A collective-bargaining agreement and its grievance-arbitration provisions must have been in existence when the dispute arose.[291]

2. That agreement must contain a grievance procedure culminating in binding arbitration.[292]

3. The grievance-arbitration procedure must be available to the charging party or someone willing and able to process a grievance compatibly with his interests.[293]

4. The grievance-arbitration procedure must arguably encompass the particular dispute that is the subject of the unfair labor practice charges.[294]

5. The respondent must be willing to accept arbitration by waiving whatever procedural defenses are at its disposal, other than the question of arbitrability.[295]

6. There should be no obstacles to a quick and fair arbitral resolution of the dispute.[296]

7. The parties' relationship should be free of substantial en-

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291. *See* Teamsters Local 85 (Tyler Bros. Drayage Co.), 206 N.L.R.B. No. 59, at 21-23 (Oct. 30, 1973) (JD); Communications Workers (Western Elec. Co.), 204 N.L.R.B. No. 94, at 6 n.2 (July 6, 1973); Pauley Paving Co., 200 N.L.R.B. No. 124 (Dec. 12, 1972); text accompanying notes 97-100 *supra*.

292. *See* Steelworkers Local 4454 (Continental Can Co.), 202 N.L.R.B. No. 78, at 8 (Mar. 23, 1973); Machinists Dist. 10 (Ladish Co.), 200 N.L.R.B. No. 165, at 4 n.4 (Dec. 29, 1972); text accompanying notes 101, 127-37 *supra*.

293. *See* Communications Workers (Western Elec. Co.), 204 N.L.R.B. No. 94, at 7 (July 6, 1973); L.E.M., Inc., 198 N.L.R.B. No. 99 (Aug. 4, 1972); Peerless Pressed Metal Corp., 198 N.L.R.B. No. 5, at 2 (July 31, 1972); text accompanying notes 120-26 *supra*.

294. *See* Urban N. Patman, Inc., 197 N.L.R.B. No. 150, at 3 (June 30, 1972); Bethlehem Steel Corp., 197 N.L.R.B. No. 121 (June 21, 1972); text accompanying notes 109-19 *supra*.

295. Detroit Edison Co., 206 N.L.R.B. No. 116, at 2-3 (Nov. 2, 1973). *See* Medical Manors, Inc., 206 N.L.R.B. No. 124 (Nov. 6, 1973); Salt River Valley Water Users' Ass'n, 204 N.L.R.B. No. 26, at n.1 (June 12, 1973); Coppus Eng'r Corp., 195 N.L.R.B. 595, 597 (1972); Collyer Insulated Wire, 192 N.L.R.B. 837, 842 (1971); text accompanying notes 160-77 *supra*; *cf.* Urban N. Patman, Inc., 197 N.L.R.B. No. 150 (June 30, 1972); Norfolk, Portsmouth Wholesale Beer Distrib., 196 N.L.R.B. No. 165 (May 19, 1972).

296. *See* text accompanying notes 139-41 *supra*.

mity towards the exercise of statutorily protected rights.[297]

8. The unfair labor practice with which the respondent is charged must not, if committed, "inhibit or preclude access to the grievance procedures."[298]

9. Where the charge is filed by an individual employee, he must be adequately represented in the grievance and arbitration proceedings.[299]

The post-*Collyer* cases also indicate that the Board's deferral policy does not require that the dispute call for special skills of an arbitrator;[300] that there be a "substantial claim of contractual privilege";[301] that a grievance-arbitration procedure be the "exclusive" means for settling disputes;[302] or that the parties have enjoyed a particularly long bargaining history.[303] On the other hand, the Board, in developing its arbitration deferral doctrine, has been disinclined to defer certain kinds of allegations, such as those involving unit determination problems;[304] failure to comply with statutory (as opposed to contractual) obligations to furnish information;[305] unlawful contract provisions;[306] or the acquisition of future contractual rights.[307]

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297. *See* Communications Workers (Western Elec. Co.), 204 N.L.R.B. No. 94 (July 6, 1973); Chase Mfg. Inc., 200 N.L.R.B. No. 128 (Dec. 13, 1972); text accompanying notes 178-84 *supra*; *cf.* United Aircraft Corp., 204 N.L.R.B. No. 133, at 7 (July 10, 1973).

298. North Shore Publishing Co., 206 N.L.R.B. No. 7, at 4 (Sept. 18, 1973); Joseph T. Ryerson & Sons, Inc., 199 N.L.R.B. No. 44, at 6 (Oct. 2, 1972).

299. National Radio Co., 198 N.L.R.B. No. 1, at 19 (July 31, 1972); Kansas Meat Packers, 198 N.L.R.B. No. 2, at 3, 5 n.5 (July 31, 1972). *See also* Seng Co., 205 N.L.R.B. No. 36 (Aug. 2, 1973); text accompanying notes 186-96 *supra*.

300. *See* National Heat & Power Corp., 201 N.L.R.B. No. 150, at 5 (Feb. 26, 1973); text accompanying notes 144-47 *supra*.

301. Joseph Schlitz Brewing Co., 175 N.L.R.B. 141, 142 (1969). *See* Tyee Constr. Co., 202 N.L.R.B. No. 34 (Mar. 9, 1973); Peerless Pressed Metal Corp., 198 N.L.R.B. No. 5, at 3 (July 31, 1972); Wrought Washer Mfg. Co., 197 N.L.R.B. No. 14 (May 24, 1972); text accompanying notes 110-16 *supra*.

302. *See* Eastman Broadcasting Co., 199 N.L.R.B. No. 58, at 12 (Sept. 29, 1972); text accompanying notes 105-08 *supra*.

303. *See* National Heat & Power Corp., 201 N.L.R.B. No. 150 (Feb. 26,1973); Champlin Petroleum Co., 201 N.L.R.B. No. 9, at 16 (Jan. 8, 1973) (TXD); text accompanying notes 178-80 *supra*.

304. *See* Combustion Eng'r, Inc., 195 N.L.R.B. 909 (1972); Standard Scientific, 195 N.L.R.B. 995 (1972); text accompanying notes 211-14 *supra*.

305. *Compare* American Standard, Inc., 203 N.L.R.B. No. 169 (June 4, 1973), *with* United Aircraft Corp., 204 N.L.R.B. No. 133, at 5-6 (July 10, 1973). *See also* text accompanying notes 215-21 *supra*.

306. *Cf.* Boilermakers Local 92 (Bigge Drayage Co.), 197 N.L.R.B. No. 34 (June 6, 1972). *See* text accompanying notes 233-43 *supra*.

307. *See* Mechanical Contractors Ass'n, 202 N.L.R.B. No. 1 (Mar. 1, 1973); Collyer Insulated Wire, 192 N.L.R.B. 837, 844-45 (1971) (Brown, Member, concurring); text accompanying notes 244-52 *supra*.

While the *Collyer* policy remains somewhat controversial despite its application for over two years, the Board's deferral philosophy seems to stand on firm legal and practical footing. The Board has the discretion under the NLRA to abstain from deciding cases where adjudication would not effectuate the policies of the Act,[308] and section 203(d) of the LMRA[309] declares that the parties' own agreed-upon procedures constitute the desirable method for adjusting contractual disputes. Support for the Board's deferral policies can be found in the Supreme Court's "hospitable acceptance" of arbitration as an informal means of dispute resolution,[310] as well as in those court decisions upholding the Board's application of its *Spielberg* criteria to arbitration awards.[311] It is significant, moreover, that the Board's *Collyer* policy was approved by the District of Columbia, Second, and Ninth Circuits in the only prospectively deferred cases, as of this writing, to be ruled upon by appellate courts.[312]

The rationale underlying the *Collyer* doctrine, as amplified by the Board, is simple and direct. As Chairman Miller has pointed out, the policy is intended to allow parties who have established an effective forum of their own for the resolution of disputes to resort to it for settling their own problems.[313] And by leaving the parties to their own devices, the Board promotes compliance with written agreements which, in turn, encourages good-faith collective bargaining. The parties' progress will be monitored at ninety-day intervals during the grievance-arbitration proceedings, and the final arbitral result will be viewed to ensure conformity with the time-honored *Spielberg* criteria. In this fashion the Board has sought to encourage private dispute settlement as a fundamental means of avoiding labor strife, while fulfilling its public responsibilities by retaining jurisdiction over the controversy to assure that the purposes of the Act are effectuated.

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308. *Cf.* National Labor Relations Act § 10(a), 29 U.S.C. § 160(a) (1970). *See* text accompanying notes 16-25 *supra*.

309. Labor-Management Relations Act (Taft-Hartley Act) § 203(d), 29 U.S.C. § 173(d) (1970).

310. *See* note 42 *supra*.

311. *See* NLRB v. Plasterers' Local 79, 404 U.S. 116, 136-37 (1971); Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 271 (1964); Smitb v. Evening News Ass'n, 371 U.S. 195, 198 n.6 (1962).

312. Nabisco, Inc. v. NLRB, 479 F.2d 770 (2d Cir. 1973), *enforcing sub nom.* Teamsters Local 70 (National Biscuit Co.), 198 N.L.R.B. No. 4 (July 31, 1972); Associated Press v. NLRB, Nos. 73-1002 & 73-1390 (D.C. Cir., Feb. 20, 1974), *denying review of* 199 N.L.R.B. No. 168 (Oct. 27, 1972); Provision House Workers Local 274 v. NLRB, No. 72-2617 (9tb Cir., Feb. 21, 1974), *denying review of* Urban N. Patman, Inc., 197 N.L.R.B. No. 150 (June 30, 1972). See also note 72 *supra*.

313. Remarks at A.B.A. Convention, Aug. 7, 1973, Wasbington, D.C., *reported in ABA Panel Views on Boys Markets, Collyer Rulings*, 83 BNA LAB. REL. REP. 355, 357 (1973).