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Deference of Jurisdiction by the National Labor Relations Board and the Arbitration Clause

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I. The Problem

In 1935, when the Wagner Act was passed, arbitration was not used extensively as a method of settling labor disputes. Most parties to labor disputes relied on the National Labor Relations Board (NLRB) or the courts as means of settlement, rather than binding themselves to the decision of an arbitrator.[1] Gradually, however, with the increased availability of more skilled arbitrators and the acute awareness of the costs of outside solution, arbitration has become a highly popular method of settling labor disputes. It is estimated that 94 percent of all collective bargaining agreements now provide for arbitration of grievances not settled by the parties themselves.[2] Much of this popularity has been due to its recognition as a successful alternative to litigation,[3] and to its judicial sanction by the Supreme Court as "a major factor in achieving industrial peace."[4] Recently, in *Boys Markets Inc. v. Retail Clerks*,[5] the Supreme Court reiterated its approval of the arbitration process by suggesting that arbitration has become "the central institution in the administration of collective bargaining contracts."[6]

Despite the popular acceptance of the arbitration process as a settlement device, disputing parties may still be confronted with the problem of which forum—arbitration, the NLRB, or the courts—should resolve a particular labor dispute arising out of a collective bargaining agreement containing an arbitration clause. This forum problem occurs when the labor dispute involves conduct allegedly constituting a breach of that collective bargaining agreement as well as an unfair labor practice.[7] Arbitration can resolve the dispute pursuant to the provisions of

1. *See* Address by NLRB Chairman Edward B. Miller, Conference of Western States Employer Association Executives, Aug. 27, 1971, *reported in full* in 78 Labor Rel. Rep. 28, 31 (1971).

2. 2 BNA, Collective Bargaining—Negotiations and Contracts 51:6 (1970); U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1425-1, Major Collective Bargaining Agreements 1 (1964).

3. Generally, arbitration is said to be faster and less expensive. *See* McCulloch, *Arbitration and/or the NLRB*, 18 Arb. J. (n.s. 3.4 (1963).

4. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960). This case is one of three Supreme Court cases known as the *Steelworkers Trilogy*, which stand as a statement of the Court that final adjustment by methods agreed to by the parties is the desirable method for settlement of grievance disputes regarding the application or interpretation of a collective bargaining agreement.

5. 398 U.S. 235 (1970).

6. *Id.* at 252.

7. A clear example of this might be the collective bargaining contract explicitly forbidding

the contract, but sections 8 and 10(a) of the Taft-Hartley Act[8] empower the NLRB to prevent unfair labor practices, and section 301(a) of the same Act[9] authorizes district courts of the United States to assert jurisdiction over suits involving a breach of the collective bargaining contract.[10]

Initially, the Supreme Court's decision in *Garner v. Teamsters Union*[11] had been the basis for precluding an arbitrator or a court from adjudicating a breach of the collective bargaining agreement in which the conduct constituting the breach was also an unfair labor practice; the Board had exclusive jurisdiction over such a matter.[12] Following *Garner*, the Court held, in *San Diego Building Trades Council v. Garmon*,[13] that the jurisdiction of state and federal courts is preempted by that of the Board with respect to conduct that is *arguably* protected by section 7 or prohibited by section 8 of the Act. Consequently, this holding was used to support the argument that if the conduct allegedly constituting a breach of the collective bargaining agreement was also arguably subject to sections 7 or 8 of the Act, the Board had exclusive jurisdiction to review such conduct.[14] Subsequently, however, the Supreme Court refuted this argument and permitted the lower federal courts to exercise jurisdiction over conduct arguably subject to sections 7 or 8 of the Act "where Congress has affirmatively indicated that such power should exist . . . ."[15] This affirmative indication has been found

unfair labor practices. For example, many agreements prohibit an employer from discriminating against an employee for engaging in union activities. An employer so discriminating would not only be breaching the collective bargaining agreement but also would be violating § 8(a)(3) of the National Labor Relations Act.

8. "The Board is empowered as hereinafter provided, to prevent any person from engaging in any unfair practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." National Labor Relations Act § 10(a), 29 U.S.C. § 160(a) (1970).

9. "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Labor-Management Relations Act (Taft-Hartley Act) § 301(a), 29 U.S.C. § 185(a) (1970).

10. Employees, although excluded in the language of § 301(a), have been included as a result of Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

11. 346 U.S. 485 (1953).

12. Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 COLUM. L. REV. 52-53 (1957).

13. 359 U.S. 236 (1959).

14. *See* McCulloch, *supra* note 3.

15. Amalgamated Ass'n of Streetcar Employees v. Lockridge, 403 U.S. 274, 297 (1971); Smith v. Evening News, 371 U.S. 195 (1962).

in section 301 so that federal court jurisdiction over breaches of collective bargaining contracts is not destroyed merely because the breach also is *arguably* an unfair labor practice.[16] In other words, in regard to this preemption question, section 301 suits are exempt from the *Garmon* rule.[17] Therefore, the Board and the courts retain concurrent jurisdiction[18] over conduct that allegedly constitutes both an unfair labor practice and a breach of the collective bargaining agreement.[19]

The parties' solution to this problem of concurrent jurisdiction often depends on the remedy sought, for the available remedies in each form are substantially dissimilar. In a section 301 action, the court could remedy a breach of contract with either damages,[20] specific performance,[21] or injunctive relief in certain instances.[22] On the other hand, the NLRB is given broad discretion to form an appropriate remedy that is adapted to the particular situation[23] and that will "effectuate the

16. *See* Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964).

17. Amalgamated Ass'n of Streetcar Employees v. Lockridge, 403 U.S. 274, 298 (1971); Vaca v. Sipes, 386 U.S. 171, 184 (1967); Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 101 n.9 (1962). The *Garmon* principle will still have some impact on the case due to the fact that federal common law will be applied on the basis of Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

18. Thus in addition to any available remedy under the Act, there might also be a contractual remedy in federal court pursuant to section 301. *See* Smith v. Evening News Ass'n, 371 U.S. 195, 197 (1962); notes 20-28 *infra* and accompanying text.

19. *See* Vaca v. Sipes, 386 U.S. 171, 187-88 (1967); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 714-15 (7th Cir. 1969); NLRB v. George E. Light Boat Storage, Inc., 373 F.2d 762 (5th Cir. 1967); United Steelworkers v. American Int'l Aluminum Corp., 334 F.2d 147, 152 (5th Cir. 1964).

20. *E.g.*, Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962).

21. *E.g.*, United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). This remedy would include the requiring of arbitration if provided for in the collective bargaining agreement.

22. Section 301 effectuates an exception to the anti-injunction provisions of § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 4 (1970). Section 4 prevents any court of the United States from enjoining any person or persons participating in a labor dispute from engaging in certain activities, one of which is a refusal to perform work. In Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962), the Supreme Court barred the federal courts from enjoining strikes in violation of no-strike provisions of collective bargaining agreements, reasoning that § 301 was not intended to limit the anti-injunction provisions of Norris-LaGuardia. *Sinclair*, however, has recently been overruled by Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235 (1970), which held that a federal court may, pursuant to § 301, enjoin a strike conducted in violation of the collective bargaining agreement. In determining whether injunctive relief may be granted, the *Boys Markets* majority adopted as a rule the guiding principles suggested by the dissenting opinion in *Sinclair*: "A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act." 398 U.S. at 254.

23. *See* NLRB v. District 50, UMW, 355 U.S. 453 (1958); Lipman Motors, Inc. v. NLRB, 451 F.2d 823, 829 (2d Cir. 1971).

policies of [the National Labor Relations Act]."[24] Such remedies include orders to bargain,[25] orders to cease and desist,[26] orders to reinstate with or without back pay,[27] and temporary injunctive relief pursuant to sections 10(j) and 10(l) of the Act. Monetary relief as a sole remedy has not been granted as frequently by the Board as it has by the courts.[28]

In those instances in which a Board remedy would be desirable and an unfair labor practice charge is filed with the Board, the Board is then confronted with the problem of what effect it should give to the arbitration clause in the collective bargaining agreement.[29] As previously stated, section 10(a) of the National Labor Relations Act empowers the Board to prevent any unfair labor practice, with this power not being affected by any private agreement among the parties.[30] Despite this grant of exclusive jurisdiction, however, section 14(c)(1) of the Act[31] states that the Board, in its discretion, may decline to assert jurisdiction over any labor dispute involving any group of employers in one of two ways: (1) by rule of decision, or (2) by published rules adopted pursuant to the Administrative Procedure Act.[32] Although not as explicitly stated as in section 14(c)(1), the language of section 10(a) itself clearly suggests a congressional intention to allow discretionary deference by the Board,[33] and this has been continually recognized by the courts.[34]

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24. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1970). *See* Vaca v. Sipes, 386 U.S. 171, 195-96 (1967).

25. *See, e.g.*, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); Garment Workers' Local 57 v. NLRB, 374 F.2d 295 (D.C. Cir.), *cert. denied*, 386 U.S. 942 (1967), *enforcing and rev'g in part sub nom.* Garwin Corp., 153 N.L.R.B. 664 (1965).

26. *See, e.g.*, May Dep't Stores Co. v. NLRB, 326 U.S. 376 (1945).

27. *See, e.g.*, Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533 (1943).

28. "The award of monetary relief for an employer's failure to bargain is an unusual remedy which has been used very sparingly by the Board . . . ." Herald Co. v. NLRB, 444 F.2d 430, 436-37 (2d Cir. 1971).

29. The courts also are faced with this problem in actions to compel arbitration or to enforce an arbitration award.

30. *See* note 7 *supra*. *See also* NLRB v. Strong, 393 U.S. 357, 360 (1969); NLRB v. Acme Indus. Co., 385 U.S. 432, 437 (1967).

31. National Labor Relations Act § 14(c)(1), 29 U.S.C. § 164(c)(1) (1970).

32. "The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction . . . ." *Id.*

33. Whereas § 10(k) states that the Board is "empowered and directed" to hear a § 8(b)(4)(D) charge (subject to exceptions), § 10(a) merely states that the Board is "empowered" to prevent unfair labor practices. Not directing the Board to prevent all unfair labor practices is tantamount to giving it discretion over when to exercise its jurisdiction. *See* Dunau, *supra* note 12, at 61.

34. *E.g.*, Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 271 (1964); Smith v. Evening

Therefore, the question presented is: under what circumstances will the Board either hear a labor dispute involving an unfair labor practice or defer to arbitration? This note will analyze the discretion of the Board as promulgated by its rules of decision in order to identify the basic rationale that the Board uses in deciding this deference question.

II. Policy Considerations

Much of the significance of the deferral problem exists because of the differences between arbitration and NLRB proceedings. The basic advantage of arbitration is that the dispute is usually settled by an arbitrator whose skill, experience, and knowledge pertaining to the particular labor and trade customs involved has made him more capable than any other forum to arrive at an appropriate and just remedy. Moreover, use of private arbitration often serves to curtail undesired public attention toward the dispute. The widespread use of arbitrators, however, inevitably results in inconsistent decisions, which flies in the face of one of the major reasons for the establishment of the NLRB—uniformity of decisions. While the Board's primary approach is one of administrative *stare decisis*, arbitrators usually confine themselves to the special situation before them and are disinterested in what may have resulted in other disputes with similar factual situations. Moreover, the arbitrator's rationale is often directed toward finding a solution that will best fit within the intention of the parties to the collective bargaining agreement; the Board's rationale, however, must additionally include considerations of the rights of those not party to the agreement. In other words, the analysis of a particular problem by an arbitrator might be substantially different from that of the Board. Consequently, because the forum for settlement can be of great significance to the disputing parties, the Board's discretion will have a substantial impact on the eventual outcome of many disputes.

Two major conflicting labor policies influence the exercise of this discretion. First, the Act itself states that the national labor policy is that industrial peace can best be secured through the encouragement of collective bargaining[35] by which the settlement of issues between employers, employees, and their representatives is best achieved by mutually agreed-upon methods, including that of voluntary arbitration.[36]

News Ass'n, 371 U.S. 195 (1962); Sinclair Ref. Co. v. NLRB, 306 F.2d 569 (5th Cir. 1962); Timken Roller Bearing Co. v. NLRB, 161 F.2d 949 (6th Cir. 1947); Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1934 (1971).

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

36. Labor Management Relations Act (Taft-Hartley Act) §§ 201(a)-(b), 29

This policy favoring private settlement is most directly stated in section 203(d) of the Act: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."[37] Secondly, although the solution of a labor dispute by arbitration, as agreed to by the parties, may be the desirable method for settlement, section 10(a) makes it explicit that the Board's jurisdiction cannot be defeated by such a private agreement.[38] Congress recognized that the Board, regardless of any agreement among the parties, must be able to resolve any unfair labor practice dispute in order to effectuate the other policies of the Act. The Board is a quasi-judicial body existing, pursuant to section 10(a), to protect not only the interests of the parties to the agreement, but also the interests of those not necessarily reflected in the collective bargaining process—the public and the economically vulnerable. The arbitrator, on the other hand, represents a system of self-government established by those he serves, and under section 203(d), he functions to apply and interpret the existing collective bargaining agreement. Unlike the Board, he is not necessarily the protector of the interests of third parties.[39] The policy conflict confronting the Board in every deference question, therefore, is essentially between the statutory grant of exclusive jurisdiction by section 10(a) and the national labor policy—stated in sections 201(a), 201(b), and 203(d)—encouraging settlement by privately agreed-upon methods.

III. Resolution of the Conflicting Policies

A. Nature of Dispute Involved

In *Electrical Workers Local 259 v. Worthington Corp.*,[40] the First Circuit stated that one of the considerations used by the Board in the

U.S.C. §§ 171(a)-(b) (1970).

37. Labor Management Relations Act (Taft-Hartley Act) § 203(d), 29 U.S.C. § 173(d) (1970). For cases recognizing this as the national labor policy see Amalgamated Ass'n of Streetcar Employees v. Lockridge, 403 U.S. 274, 309-13 (1971) (White, J., & Burger, C.J., dissenting); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, 582 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566-68 (1960); NLRB v. Horn & Hardart Co., 439 F.2d 674, 678 (2d Cir. 1971); P.R. Mallory & Co. v. NLRB, 411 F.2d 948, 952 (7th Cir. 1969); Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1935 (1971); Dubo Mfg. Corp., 142 N.L.R.B. 431, 432 (1963), *enforced*, 353 F.2d 157 (6th Cir. 1965).

38. *See* note 9 *supra*.

39. *See* NLRB v. Horn & Hardart Co., 439 F.2d 674, 678 (2d Cir. 1971). *See also* McCulloch, *supra* note 3.

40. 236 F.2d 364 (1st Cir. 1956).

exercise of its discretion is the type of unfair labor practice charged.[41] Commentators have taken a similar position by suggesting that the exercise of deference of jurisdiction is often determined by whether the case involves a question of representation, discrimination, jurisdiction, or refusal to bargain.[42] One example of such an approach, expressed in Board Member Brown's concurring opinion in the recent *Collyer Insulated Wire* decision,[43] is that the deferral policy should be applied in discrimination and refusal to bargain cases, but perhaps not applied in representation cases.[44] Although such an approach may be sound in theory and although the nature of the charge involved may have some impact on the Board's deferral decision, an analysis of the cases reveals that, with the exception of jurisdictional disputes and refusal to bargain disputes arising out of a refusal to furnish information, an application of the nature-of-the-dispute approach will not only misconstrue the reasoning of the Board in many cases, but will lead to incorrect conclusions and increased confusion regarding the Board's deference rationale.

1. *Jurisdiction Cases.*—The language of section 10(k) of the Act excepts jurisdictional suits from the general language of section 10(a), which empowers the Board to prevent unfair labor practices. Pursuant to section 10(k), the Board is "empowered *and directed* to hear and determine the dispute out of which such unfair labor practice shall have arisen, *unless* . . . the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute."[45] Resolution of the deference question, therefore, depends on whether this statutory exception is applicable. When the parties have agreed to be bound by arbitration, the Board will defer.[46] If, however, the parties have not agreed on meth-

41. *Id.* at 368. The court cited as its authority the analysis in Note, *Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice*, 69 HARV. L. REV. 725, 731-36 (1956).

42. *See* Note, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191 (1968); McCulloch, *supra* note 3.

43. 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (1971). For a discussion of this recent decision see text accompanying notes 113-29 *infra*.

44. 77 L.R.R.M. at 1939-40 (Brown, Member, concuring). In his address before the FMCS-AAA Regional Conference on Labor Arbitration, NLRB General Counsel Peter G. Nash stated, contrary to Member Brown's opinion, that deferral in a discrimination case might not seem appropriate. LAB. REL. YEAR. 151, 154 (1971).

45. National Labor Relations Act § 10(k), 29 U.S.C. § 160(k) (1970) (emphasis added).

46. *E.g.*, NLRB v. Plasterers' Local 79, 404 U.S. 116, 123-25, 136 (1971) (Board must defer if parties submit to the Board satisfactory evidence that they have agreed on methods of voluntary settlement); Electrical Workers Local 728, 153 N.L.R.B. 873 (1965).

ods of voluntary settlement, the Board will exercise its jurisdiction and resolve the dispute.[47] Consequently, due to the language of section 10(k), the nature of the dispute does have a substantial effect on the Board's rationale on deference when the case involves a jurisdictional dispute.

2. *Representation Cases.*—Although some confusion exists on the distinction between a representation and a jurisdictional dispute,[48] the basic difference is that the former questions which union shall represent certain employees, whereas the latter questions which union may have its member employees do certain work.[49] Initially, it was held that the NLRB had exclusive jurisdiction to settle questions of representation.[50] Much of the basis for this holding was that section 9(b) of the Act grants to the Board the power to decide in each case what the appropriate unit for collective bargaining purposes shall be.[51] In *Raley's Supermarkets, Inc.*,[52] however, the Board deferred to the decision of an arbitrator despite the language in section 9(b), because arbitration had been provided for in the contract between the parties, the arbitration award had already been rendered, and the question at issue involved an interpretation of the contract.[53] Subsequent to *Raley's*, the Supreme Court approved Board deference in representation cases by holding, in *Carey v. Westinghouse*,[54] that such disputes are not within the sole jurisdiction of the Board and that, as in *Raley's* they may be deferred to arbitration.

Later decisions, however, have clearly indicated that the fact that a dispute involves a question of representation does not necessarily make deference appropriate. In *Hotel Employers Association of San*

47. *See, e.g.*, Electrical Workers Local 1505 v. Machinists Local 1836, 304 F.2d 365, 367 (1st Cir. 1962) ("jurisdictional disputes between unions are precisely its [the Board's province"—citing NLRB v. Broadcast Engrs. Local 1212, 364 U.S. 573 (1961)); Newspaper Deliverers' Union, 141 N.L.R.B. 578 (1963).

48. *See* Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 264-70 (1964).

49. In other words, representation involves unions disputing over control of people, and jurisdiction involves unions disputing over control of work.

50. "It has been universally held that the jurisdiction of the National Labor Relations Board to determine the unit appropriate for collective bargaining purposes and settle questions of representation is exclusive." International Chem. Workers v. Olin Mathieson Chem. Corp., 202 F. Supp. 363, 365 (S.D. Ill. 1962). *See also* Retail Clerks Local 1357 v. Food Fair Stores, Inc., 202 F. Supp. 322 (E.D. Pa. 1961).

51. "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ." National Labor Relations Act § 9(b), 29 U.S.C. § 159(b) (1970).

52. 143 N.L.R.B. 256 (1963) (dispute over representation of janitors and bottle sorters).

53. *Id.* at 258-59.

54. 375 U.S. 261 (1964).

Francisco,[55] the Board refused to defer because, unlike the dispute in *Raley*'s, the dispute over the representation of certain hotel clerks did not involve an issue of contract interpretation the resolution of which would also settle the representation question.[56] In *Dayton Typographic Service, Inc.*,[57] the Board refused to defer a dispute over union representation of an employee at a meeting, reasoning that the issue involved day-to-day dealings with the employees and could have had a broad impact on conditions in all the shops. In *NLRB v. Horn & Hardart Co.*,[58] the Second Circuit recently upheld the Board's refusal to defer to an arbitration award regarding the representation of certain restaurant cashiers, when it found that the question had not been fairly presented to the arbitrator. These more recent cases demonstrate that considerations other than the nature of the charge are determinative of whether the Board should defer in representation cases.

3. *Discrimination Cases*.—Similarly, the mere fact that a dispute involves discrimination, does not necessarily call for deference by the Board. It has been argued, in some cases successfully,[59] that submitting such a dispute to arbitration would either run the risk that the statutory policies will be ignored or misconstrued, or create a danger of bias against an employee by an arbitrator whose authority often derives from the contract between the union and employer.[60] The NLRB also has refused to defer when the specific issue of discrimination involved was not within the competence of the arbitrator and was primarily one requiring solution under the Act.[61] On the other hand, the Board has deferred to arbitration when the proceedings seemed fair to the grievants and consistent with the Act's policies,[62] thereby suggesting that an

55. 159 N.L.R.B. 143, 148 (1966). *See also* Pullman Industries, Inc., 159 N.L.R.B. 580 (1966).

56. *Accord*, Westinghouse Elec. Corp., 162 N.L.R.B. 768, 771 (1967).

57. 176 N.L.R.B. No. 48, 72 L.R.R.M. 1073 (1969).

58. 439 F.2d 674 (2d Cir. 1971).

59. Carpenters Local 180, 162 N.L.R.B. 950 (1967) (arbitration body possessed interests contrary to those of the grievant); Woodlawn Farm Dairy Co., 162 N.L.R.B. 48 (1966) (arbitration proceedings would not have protected interests of those discriminated against).

60. Note, *supra* note 42.

61. Eastern Illinois Gas & Sec. Co., 175 N.L.R.B. 639 (1969), *enforcement denied on other grounds*, 440 F.2d 656 (7th Cir. 1971) (discharge). *See also* McLean Trucking Co., 175 N.L.R.B. 440 (1969).

62. Howard Elec. Co., 166 N.L.R.B. 338 (1967); Schott's Bakery Inc., 164 N.L.R.B. 332 (1967); Modern Motor Express, Inc., 149 N.L.R.B. 1507 (1964). The Board deferred to the arbitrator's decision in these cases, since they satisfied standards established in Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955), and International Harvester Co., 138 N.L.R.B. 923 (1962), *enforced sub nom.*, Ramsey v. NLRB, 327 F.2d 784 (7th Cir. 1964). *See* notes 78-84 *infra*. *See also* Hribar Trucking Inc., 166 N.L.R.B. 745 (1967), *enforced as modified*, 406 F.2d 854 (7th Cir. 1969), for a case in which the arbitration did not satisfy such standards, and the Board did not defer.

arbitrator is competent to resolve justly a dispute involving discrimination. In other discrimination cases, the Board has refused to defer when arbitration had not yet occurred;[63] yet, in *Dubo Manufacturing Corp.*,[64] it did defer on the question of an allegedly discriminatory discharge despite the lack of an arbitration award. Consequently, much like cases involving representation questions, the only pattern that can be identified in cases involving charges of discrimination is that the deferral question depends more on the facts of the particular case than on the nature of the charge.

4. *Refusal-to-bargain cases.*—(a) *Refusal to furnish information.*—Both the Board's decision in *Hercules Motor Corp.*[65] and its decision in *Sinclair Refining Co.*[66] have been cited as authority for the proposition that deference is appropriate in unfair labor practice cases arising out of an employer's refusal to furnish relevant information.[67] In those two cases, the unions sought data[68] to aid in the processing of certain grievances. The Board deferred to arbitration in each case because the central issue—whether the union had the right to pursue a grievance over the subject of the dispute—could only be determined through an interpretation of the contracts. Subsequent cases, however, have retreated from the positions of *Hercules* and *Sinclair*, and it now appears that in cases involving a refusal to furnish information, the Board will not defer to arbitration. In *Acme Industrial Co.*,[69] the Supreme Court enforced a Board order requiring an employer to furnish information regarding the removal of plant machinery since it was relevant to the union's discharge of its statutory duties. The Board has since followed the Court's holding and refused to defer in such refusal to furnish information cases on the grounds that the right to the information is statutory, unaffected by any grievance-arbitration procedure.[70] This retreat from the earlier position of *Hercules* and *Sinclair* is most recently evidenced by *P.R. Mallory & Co. v. NLRB*,[71] in which the

63. Steves Sash & Door, Inc., 178 N.L.R.B. 154 (1969), *enforced*, 430 F.2d 1364 (5th Cir. 1970); Hoerner-Waldorf Paper Prods. Co., 163 N.L.R.B. 772 (1967).

64. 142 N.L.R.B. 431 (1963), *enforced*, 353 F.2d 157 (6th Cir. 1965) (the Board refused to defer the §§ 8(a)(5) and (a)(1) charges, but did defer the § 8(a)(3) charge).

65. 136 N.L.R.B. 1648 (1962).

66. 145 N.L.R.B. 732 (1963).

67. *E.g.*, Square D Co., 332 F.2d 360 (9th Cir. 1964).

68. In *Hercules*, the union sought time-study and job evaluation data, and in *Sinclair*, the union sought data pertaining to vacation allowances.

69. 385 U.S. 432 (1967).

70. Scandia Restaurants, Inc., 171 N.L.R.B. 326 (1968); Univis, Inc., 169 N.L.R.B. 37 (1968); Puerto Rico Tel. Co., 149 N.L.R.B. 950 (1964), *enforced as modified*, 359 F.2d 983 (1st Cir. 1966).

71. 411 F.2d 948 (7th Cir. 1969).

Seventh Circuit enforced a Board order directing an employer to furnish information concerning an incentive wage system despite the fact that some question of contract interpretation was inevitably involved.[72] The court stated that "the Board's self-limitation in *Hercules Motor Corp.* has been all but abandoned by the Board itself," and "the decision of the Fifth Circuit in *Sinclair Refining Co. v. NLRB* was specifically disapproved by *Acme.*"[73] Consequently, in refusal-to-bargain cases, when an employer is charged with refusing to furnish relevant information, the Board apparently will not defer to any available arbitration procedure.

(b) *Unilateral action.*—Although it has been argued that deference is appropriate when the case involves unilateral action constituting a refusal to bargain unfair labor practice,[74] there is no evidence that the Board has placed any particular significance on the nature of the charge when deciding whether to defer to arbitration. To the contrary, cases involving unilateral action present the clearest indication of how the Board looks beyond the nature of the charge and considers the particular factors involved in the cases to resolve the deference problem in a manner that will best effectuate the policies of the Act. With some factors favoring deference and others suggesting exercise of jurisdiction, the Board's rationale becomes an accommodation of the policy favoring private settlement with the policy of the Board having exclusive jurisdiction. It is an accommodation achieved by a consideration of many relevant factors, rather than a determination based on the nature of the unfair labor practice charge involved.[75] This approach, evident in the unilateral action cases, will now be examined as being, for the most part, the more accurate description of Board deference rationale.

B. Consideration of Case Factors

An analysis of the factors considered by the Board when deciding whether deferral is appropriate must begin by separating the cases into two distinct classes—those in which there already has been an arbitral award, and those in which an award has not been made.

1. *Arbitral Award Already Rendered.*—The arbitral award re-

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72. *Id.* at 954.

73. *Id.* at 956 (citations omitted).

74. *See* Speech by James G. Davis, Midwest Labor Law Conference, *reported in* 78 LAB. REL. REP. 176 (1971); Note, *supra* note 42. All unfair labor practices caused by management's unilateral action are not refusals to bargain, but the majority of such unilateral actions do fall into that category.

75. As Member Brown stated in his concurring opinion in Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410, 1421 (1964): "Each case stands on its own facts."

ceived early acceptance when, in the case of *Timken Roller Bearing Co.*,[76] the Board deferred to an arbitrator's decision, despite the fact that the Board could otherwise have found that an unfair labor practice had been committed. The Board was unwilling to allow the union a second hearing, after having lost its case initially at arbitration.[77] In *Spielberg Manufacturing Co.*,[78] the Board's approach was refined substantially and set forth in the well-recognized rule that the Board will defer to an arbitration award if: (1) the arbitration proceedings appear to have been fair and regular; (2) all parties had agreed to be bound by those proceedings; and (3) the arbitration decision is not clearly repugnant to the purposes and policies of the Act.[79] Later, the Board apparently modified the *Spielberg* rule in *International Harvester Co.*,[80] and stated that it would defer claims arising from the same facts as an arbitrated contract dispute unless the arbitration proceedings were "tainted by fraud, collusion, unfairness, or serious procedural irregularities or . . . the award was clearly repugnant to the purposes and policies of the Act."[81] The tests established by these two cases are essentially the same except that the latter does not require that all parties must have agreed to be bound by the arbitration proceedings. Apparently, under the *Spielberg* test, the Board would not defer to an arbitration award if the employer has refused to be bound by that arbitration proceeding; under the *International Harvester* test, however, the Board might still defer. Although the more recent rule of *International Harvester* has been accepted by the Supreme Court,[82] the Board apparently favors the use of the *Spielberg* test, for it has consistently continued to cite *Spielberg*, either as a concurrent test with that of *International Harvester*,[83] or as *the sole test* that the Board will apply.[84] Due to this recognition in recent

76. 70 N.L.R.B. 500 (1946).

77. "It would not comport with the sound exercise of our administrative discretion to permit the union to seek redress under the Act after having initiated arbitration proceedings which, at the union's request, resulted in a determination upon the merits." *Id.*

78. 112 N.L.R.B. 1080 (1955).

79. *Id.* at 1082.

80. 138 N.L.R.B. 923 (1962), *enforced sub. nom.* Ramsey v. NLRB, 327 F.2d 784 (7th Cir. 1964).

81. *Id.* at 927.

82. *See* Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 270-71 (1964).

83. *See, e.g.*, Cloverleaf Div. of Adams Diary Co., 147 N.L.R.B. 1410, 1420 (1964) (Member Brown's concurring opinion).

84. *See, e.g.*, Office and Professional Employees Local 425 v. NLRB, 419 F.2d 314, 319 (D.C. Cir. 1969); Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1935-36, 1939, 1942 (1971); Eastern Illinois Gas & Sec. Co., 175 N.L.R.B. 639, 641 (1969), *enforcement denied on other grounds*, 440 F.2d 656 (7th Cir. 1971) (dicta in Member Brown's dissenting opinion).

Board cases, the *Spielberg* test should not be considered as having been discarded in favor of that of *International Harvester*, and therefore, the requirement that all parties must have agreed to be bound by the arbitration proceedings has remained essential for Board deference to those proceedings.

2. *No Arbitral Award Rendered.*—"In those cases in which no award [has been] issued, the Board's guidelines have been less clear."[85] Much of this confusion is due to the many factors considered by the Board when deciding whether deferral is appropriate, and the varying significance associated with each factor in the different cases. Some of these factors, if present, make deferral seem appropriate, while others require the Board not to defer. In addition, there are other Board considerations that have been supportive of deference in some cases but have been refuted in other cases as not being influential on the Board's exercise of discretion. As a result, the Board has yet to arrive at any express guidelines on the deferral question, thereby leaving only an analysis of the cases as means of arriving at some indication of the Board's rationale.

A study of the cases reveals that the Board will not defer when any one of a number of factors is present. The Board will not defer if the dispute is a matter outside the competence of an arbitrator.[86] The Board also will exercise jurisdiction if neither party has sought arbitration or is willing to arbitrate.[87] Deference will be refused if the issue of the dispute has already been fully litigated before the Board[88] or pertains essentially to a statutory matter rather than contractual interpretation.[89] Lastly, the cases indicate that the Board will not defer if the arbitrating

85. Collyer Insulated Wire, 192 N.L.R.B. No. 150 (1971). Problems of this situation have been said by one Board member to be "much more difficult." Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410, 1422 (1964) (Member Brown's concurring opinion).

86. *See* Eastern Illinois Gas & Sec. Co., 175 N.L.R.B. 639 (1969), *enforcement denied on other grounds*, 440 F.2d 656 (7th Cir. 1971); McLean Trucking Co., 175 N.L.R.B. 440 (1969) (competency of arbitrator not needed).

87. *See* Zenith Radio Corp., 177 N.L.R.B. 366 (1969) (both parties felt that Board should decide the issue); Morrison-Knudsen Co., 173 N.L.R.B. 56 (1968); W.P. Ihrie & Sons, 165 N.L.R.B. 167 (1967); C & S Indus., Inc., 158 N.L.R.B. 454 (1966); Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410 (1964).

88. *See* Consolidated Freightways Corp., 181 N.L.R.B. 856 (1970); McLean Trucking Co., 175 N.L.R.B. 440 (1969); Union Drop Forge Div., 171 N.L.R.B. 600 (1968), *enforced as modified*, 412 F.2d 108 (7th Cir. 1969).

89. *See* Eastern Illinois Gas & Sec. Co., 175 N.L.R.B. 639 (1969), *enforcement denied on other grounds*, 440 F.2d 656 (7th Cir. 1971); Gravenslund Operating Co., 168 N.L.R.B. 513 (1967); W.P. Ihrie & Sons, 165 N.L.R.B. 167 (1967); C & S Indus., Inc., 158 N.L.R.B. 454 (1966); Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410, 1416 (1964).

body would possess interests clearly contrary to those of the grievant.[90]

Although the Board will not defer if any of the above situations exists, the nonexistence of those factors does not automatically make deference appropriate. For example, the Board will not necessarily defer if the subject matter of the dispute is within the arbitrator's competence, if the dispute has not been fully litigated before the Board, or if the question of the dispute is essentially one of contract interpretation. Actually, the cases do not indicate any one circumstance that, if present, would definitely cause the Board to defer. All that can be concluded is that there are certain factors which either (1) have an inconsistent effect on the Board's decision or (2) tend to suggest that deferral is the better course.

The positive or negative implication of some Board considerations is not evident from the cases. One example of the confusion involves the question whether the grievance-arbitration procedures must be exhausted before the Board should exercise jurisdiction. Initially, the failure to fully utilize these procedures often was used as a factor supporting deference.[91] Subsequent cases, however, suggest that such a failure is not sufficient reason for the Board to defer.[92] The impact of the employer's willingness to arbitrate on Board rationale is also not precisely indicated. In some cases, the employer's willingness to arbitrate has been given as one of the reasons for NLRB deference;[93] but, in other cases, the Board has refused to defer despite the willingness of the employer to go to arbitration.[94] Although this suggests that the willingness of the employer to arbitrate is not necessarily a factor favoring deference, the Board apparently has adopted the position that the employer's unwillingness to arbitrate is a factor against deference. When the employer has not been willing to go to arbitration, the Board has not deferred.[95]

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90. *See, e.g.*, Carpenters Local 180, 162 N.L.R.B. 950 (1967).

91. *See* Hercules Motor Corp., 136 N.L.R.B. 1648 (1962); Crown Zellerbach Corp., 95 N.L.R.B. 753 (1951); Consolidated Aircraft Corp., 47 N.L.R.B. 694, 706 (1943), *enforced as modified*, 141 F.2d 785 (9th Cir. 1944).

92. *See* Iron Workers Local 229, 183 N.L.R.B. No. 35, 74 L.R.R.M. 1317 (1970); Steves Sash & Door, Inc., 178 N.L.R.B. 154 (1969), *enforced*, 430 F.2d 1364 (5th Cir. 1970); Morrison-Knudsen Co., 173 N.L.R.B. 56 (1968); Cuneo Eastern Press, Inc., 168 N.L.R.B. 523 (1967); Hoerner-Waldorf Paper Prods. Co., 163 N.L.R.B. 772 (1967); Hod Carriers Local 300, 159 N.L.R.B. 1128 (1966), *enforced*, 392 F.2d 581 (9th Cir. 1968).

93. *See* Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (1971); Joseph Schlitz Brewing Co., 175 N.L.R.B. 141 (1969); Flintkote Co., 149 N.L.R.B. 1561 (1964); Sinclair Ref. Co., 145 N.L.R.B. 732 (1963); Hercules Motor Corp., 136 N.L.R.B. 1648 (1962).

94. *See* Union Drop Forge Div., 171 N.L.R.B. 600 (1968), *enforced as modified*, 412 F.2d 108 (7th Cir. 1969); Producers Grain Corp., 169 N.L.R.B. 466 (1968).

95. *See* Office and Professional Employees Local 425 v. NLRB, 419 F.2d 314 (D.C. Cir.

The factors which favor deferral include a showing: (1) that the alleged wrongful act was committed in good faith and without any anti-union motive;[96] (2) that the parties to the dispute have had a long-established and successful bargaining relationship;[97] and (3) that the complaining party had sought arbitration initially but had changed its course in midstream by filing a charge with the Board.[98] Although these factors are not sufficiently significant by themselves to convince the Board that deferral is appropriate, their existence has been continually used in support of Board deference.

If one element of a case could be said to have the most substantial effect on the Board's decision of whether deferral is appropriate, it must be the extent to which the dispute involves the interpretation or application of the collective bargaining agreement. As stated earlier, section 203(d) of the Act specifically provides that disputes arising over the *application or interpretation* of collective bargaining agreements should be settled by methods agreed upon by the parties,[99] which would include arbitration. Accordingly, the function of the arbitrator rarely exceeds the application of interpretation of the contract provisions.[100] Thus, it has been argued that the arbitrator, not the NLRB, should settle disputes at the centers of which are conflicts over the application or interpretation of the contract. The Board has adopted this reasoning in certain cases as support for its decision to defer,[101] especially in cases in which the arbitrator's interpretation also will resolve the unfair labor

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1969); Puerto Rico Tel. Co., 149 N.L.R.B. 950 (1964), *enforced as modified*, 359 F.2d 983 (1st Cir. 1966). NLRB General Counsel Peter G. Nash has stated that "it seems correct to assume tha respondent's [employer's] willingness to resort to arbitration at the time he urges Board deferral is essential to the Collyer policy." Address by Peter G. Nash, FMCS-AAA Regional Conferences on Labor Arbitration, Oct. 15, 1971, *reported in* LAB. REL. YEAR. 151, 155 (1971).

96. *See* Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (1971); Joseph Schlitz Brewing Co., 175 N.L.R.B. 141 (1969); Vickers, Inc., 153 N.L.R.B. 561 (1965); Bemis Bros. Bag Co., 143 N.L.R.B. 1311 (1963).

97. *See* Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (1971); Joseph Schlitz Brewing Co., 175 N.L.R.B. 141 (1969); Bemis Bros. Bag Co., 143 N.L.R.B. 1311 (1963). *But see* Union Drop Forge Div., 171 N.L.R.B. 600 (1968), *enforced as modified*, 412 F.2d 108 (7th Cir. 1969).

98. *See* Bemis Bros. Bag Co., 143 N.L.R.B. 1311 (1963); Montgomery Ward & Co., 137 N.L.R.B. 418 (1962). *But see* Union Drop Forge Div., 171 N.L.R.B. 600 (1968), *enforced as modified*, 412 F.2d 108 (7th Cir. 1969).

99. *See* note 37 *supra* and accompanying text.

100. *See* Board Member Brown's concurring opinion in Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410, 1420 (1964).

101. *See* Square D Co. v. NLRB, 332 F.2d 360 (9th Cir. 1964); Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (1971); Joseph Schlitz Brewing Co., 175 N.L.R.B. 141 (1969); Vickers, Inc., 153 N.L.R.B. 561 (1965); Hercules Motor Corp., 136 N.L.R.B. 1648 (1962); McDonnell Aircraft Corp., 109 N.L.R.B. 930 (1954).

practice issue.[102] This preference for deferral, however, has not been uniformly applied by the Board in all cases involving contract interpretation. Both the courts and the Board have frequently held that the Board is not precluded from interpreting and applying contract provisions.[103] Those holdings recognize that in deciding whether an unfair labor practice has or has not been committed, the Board must perform an interpretive function. This is unavoidable, but it need not require the Board to defer. If it did, the Board's case load might be so drastically reduced that the Board's usefulness would be abolished. A separation of the issues—the contract question to the arbitrator and the statutory question to the Board—might be a reasonable solution to the deference problem, if it were not for the monstrous procedural difficulties involved. What has resulted is that the arbitrator's function and the Board's power to interpret and apply contractual provisions co-exist, leaving the possibility of forum shopping to be resolved by a predictable deference rationale that has not yet been established.[104]

The presence of a contract interpretation or application issue in a dispute has been a major factor in the two recent significant cases in which the Board has deferred to arbitration. In *Joseph Schlitz Brewing Co.*,[105] the respondent employer decided to halt its production line during employee breaks, which resulted in, among other things, elimination of the relief man job classification. The union filed an unfair labor practice charge with the Board, but the Board deferred to the arbitration procedures of the collective bargaining agreement. The Board ruled that in unilateral action cases, it should defer to an arbitration clause agreed to by the parties if three conditions are met: (1) the contract clearly provides for grievance and arbitration machinery; (2) the alleged wrongful conduct is not designed to undermine the union, and is based on a substantial claim of contractual privilege; and (3) it appears that the arbitral interpretation will resolve both the contract issue and the unfair labor practice issue in a manner compatible with the policies of the

102. *See* Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (1971); Joseph Schlitz Brewing Co., 175 N.L.R.B. 141 (1969); Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410 (1964). *See also* Wollett, *The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Jurisdiction?* 10 LAB. L.J. 477 (1959).

103. *See* NLRB v. Acme Indus., Co., 385 U.S. 432 (1967); NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967); Cello-Foil Prod., Inc., 178 N.L.R.B. 676 (1969); K & H Specialities Co., 163 N.L.R.B. 644 (1967), *enforced*, 407 F.2d 820 (6th Cir. 1969); Long Lake Lumber Co., 160 N.L.R.B. 1475 (1966); C & S Indus., Inc., 158 N.L.R.B. 454 (1966).

104. The possibility of forum shopping exists since the Board will usually not apply the same rules of interpretation as will the arbitrator.

105. 175 N.L.R.B. 141 (1969).

Act.[106] The Board determined that these conditions were satisfied because the parties had a long, established, and successful bargaining relationship, the dispute involved substantive contract interpretation, each party was asserting its claim in good faith, the grievance-arbitration procedure was clearly defined, and the employer was willing to arbitrate.[107] This rationale, which is in essence a compilation of the positive deferral factors,[108] was then combined by the Board[109] with the position that deferral is appropriate if contract interpretation is at the center of the dispute.[110] Based on the subsequent decision of *Progress Bulletin Publishing Co.*,[111] it is clear that the Board deferred in *Schlitz* essentially because of the presence of the interpretation issue. In *Progress Bulletin*, the Board refused to defer to arbitration a dispute over the unilateral termination of a Christmas bonus. Although several positive deferral factors similar to those in *Schlitz* were present, the Board determined that since the contract was silent on the bonus, no issue of contract interpretation existed. The Board failed to adopt the *Schlitz* rule, rejecting it as only applicable to disputes "patently a matter of contract interpretation."[112]

The effect of the contract interpretation issue also was the determining factor in the Board's recent *Collyer Insulated Wire* case.[113] In a 3-2 decision, the Board deferred to arbitration a dispute over an employer's unilateral changes in wages and job duties. Citing *Schlitz* as its primary support, the majority decided that deferral to arbitration was appropriate because the dispute arose entirely from the contract and therefore should be resolved in the manner that the contract prescribed. The majority added that these disputes are better resolved by arbitrators, who possess better skills and have more experience in such matters than has the Board, and that deferral in such cases will encour-

106. *Id.* at 142.

107. *Id.*

108. *See* notes 91 & 92 *supra* (pertaining to conduct being in good faith and the existence of a long and established bargaining history).

109. Member Jenkins, in his dissent in *Collyer Wire*, states that in *Schlitz* only the question of dismissal received a majority, and that actually a majority of the Board was against deferral. Nonetheless, the case was cited in *Collyer Wire* by the majority as support for its deference position.

110. *See* notes 101 & 102 *supra*.

111. 182 N.L.R.B. 904 (1970), *enforced as modified*, 443 F.2d 1369 (9th Cir. 1971).

112. 182 N.L.R.B. at 904 n.3. Member Brown dissented, urging that deference was appropriate, on the basis of *Schlitz*, since there were other factors present in *Progress Bulletin* similar to those in *Schlitz*. The majority, however, seemed to say: "No question of contract interpretation, no deference!"

113. 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (1971).

age the practice of collective bargaining. The vigorous dissents argued that the effect of the decision was to enforce compulsory arbitration[114] and that the decision constituted a complete reversal of Board precedent.[115] Although the majority opinion in *Collyer* may not have the far reaching effect asserted by the minority, the decision should have a significant impact on satisfying the necessity for more refined guidelines regarding the Board's deference rationale.

III. THE AFTERMATH OF COLLYER WIRE

As a result of *Collyer Wire*, the Board's deference rationale begins with the question whether the dispute centers around the terms and meaning of certain contract provisions. The competence of the arbitrator is confined to his function of interpreting and applying collective bargaining agreements. Consequently, if the dispute does not involve contract interpretation or application, the dispute is not within the competence or the function of the arbitrator; therefore the Board will not defer, even if other favorable circumstances exist.[116]

If, on the other hand, the dispute does involve contract interpretation or application, *Collyer Wire* suggests that the Board may defer when the surrounding circumstances are favorable. The decision to defer in *Collyer Wire* substantially depended on the fact that the terms and meaning of the contract lay at the *center* of the dispute. Thus, the contract issue will be a significant primary consideration in future Board cases, with deferral less likely as the issue becomes more peripheral. In addition, *Collyer Wire* indicates that even though contract interpretation may be central to a dispute, the Board will continue to consider the surrounding circumstances in reaching its decision. For example, the Board will analyze the general relationship of the parties. A successful and established bargaining history will be favorable; a poor bargaining record, however, probably would cause deference to be refused. The Board also will consider whether the employer's unilateral changes were

114. Member Fanning argued that (1) since the charging party had not filed any grievances and the time to do so had passed, and (2) since all arbitration provisions give parties the right to arbitrate, but not the duty to arbitrate, the effect of the Board's deferral is essentially compulsory arbitration.

115. Member Jenkins cited numerous cases in which the Board had refused to defer "unilateral change of contract" disputes, despite the availability of arbitration. Although these cases, cited throughout this note, do suggest that the Board usually has refused to defer in such cases, it is not precisely correct to say that the Board had not deferred in such cases in the past. *See* Note, *supra* note 42.

116. *See* Progress Bulletin Pub. Co., 182 N.L.R.B. No. 135, 74 L.R.R.M. 1237 (1970), *enforced as modified*, 443 F.2d 1369 (9th Cir. 1971).

made in good faith and not to undermine the union. This suggests that deferral will be denied when the alleged wrongful conduct involves an unlawful motive, such as in section 8(a)(3) discrimination cases.

The major impact of *Collyer Wire*, however, depends on whether the Board will continue to consider the willingness of the parties to arbitrate a determining factor. Answering the dissent's charge that the effect of *Collyer Wire* meant compulsory arbitration, the majority stated that its decision was not "compelling" the parties to arbitrate, but merely holding them to their agreement to settle disputes by arbitration. They had agreed to arbitration, and the Board should not allow them to "sidestep" the agreement by retaining jurisdiction.[117] Consequently, the language does suggest that the Board might defer to arbitration in the future even if neither party wishes to go to arbitration. NLRB Chairman Edward B. Miller, one of the *Collyer Wire* majority, has stated that he favors the concept of voluntarism in dispute settlement.[118] The question arises of how voluntary the *Collyer Wire* order is when it could be interpreted to compel parties to utilize their voluntary methods when neither of them has voluntarily chosen to do so.[119] Such a concept of voluntarism might encourage parties to eliminate arbitration provisions from their collective bargaining agreements, because they would be contracting away access to the Board and leaving themselves with the increasing costs of arbitration.[120] Thus, *Collyer Wire* should not be implemented by the Board to the extent of ordering essentially compulsory arbitration for both parties. The Board should adhere to its more justifiable rule that it will not send the parties to arbitration when neither of them wants to go.[121]

The more puzzling question of *Collyer Wire* is whether the Board will continue to refuse deference when the employer is unwilling to arbitrate.[122] Some language of the opinion suggests that the Board would not continue to do so; the Board implies that the employer should be bound to his agreement to arbitrate if the other party seeks to enforce that agreement.[123] On the other hand, the majority's emphasis of the

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117. 77 L.R.R.M. at 1937.

118. Address by NLRB Chairman Edward B. Miller, Conference of Western States Employer Association Executives, Aug. 27, 1971, *reported in* 78 LAB. REL. REP. 28 (1971).

119. 77 L.R.R.M. at 1949.

120. Costs were set at $539.88 per day in 1970, and in 1971, one large corporation estimated arbitration costs at $1,800 per day for the company and $1,900 per day for the union. Kilberg, *The FMCS and Arbitration: Problems and Prospects*, 94 MONTHLY LAB. REV. 40, 41 (April 1971).

121. *See* note 87 *supra* and accompanying text.

122. *See* note 95 *supra* and accompanying text.

123. *See* 77 L.R.R.M. at 1937.

fact that the employer was willing to arbitrate suggests that his willingness remains essential for deference.[124] This latter interpretation is the one accepted by NLRB General Counsel Peter G. Nash.[125] When an arbitration award has been rendered, however, if it is not necessary that the employer, or even the other party to the dispute, be willing to arbitrate for the Board to find deferral appropriate, then *Collyer Wire* might conflict with the Board's *Spielberg* rationale which requires that both parties must have agreed to be bound before the Board will defer.[126] If the parties are held to have bound themselves when they agreed to the contract, then *Spielberg* is satisfied. *Collyer Wire* would deviate from the *Spielberg* test, however, if the parties' willingness to be bound by the proceedings is determined independently from the fact that the parties had previously signed an agreement. This would not constitute a reversal of Board precedent, though, because the accepted test of *International Harvester*[127] would, in essence, still be satisfied.

The *Collyer Wire* minority has overstated the probable significance of the case. Instead of effectuating compulsory arbitration or a reversal of Board precedent, the decision will stand for the principle that when the existing dispute arises out of the terms and meaning of the collective bargaining contract, the Board will defer when the surrounding circumstances make arbitration appropriate. It is possible, however, that the fears of the minority will be realized if the Board proceeds to order arbitration when both parties, or merely the employer, do not wish to arbitrate. *Collyer Wire* would then become known as a landmark decision in labor law constituting a major change in the Board's rationale on deference.

The only other change of equal significance would be any adoption of rules pursuant to the Administrative Procedure Act that could establish guidelines for Board discretion.[128] As early as *Timken Roller Bearing*,[129] the Board recognized that the defending party should not suffer the costs of defending the same charge in one forum after winning in the other. The *Spielberg* doctrine and the entire deference policy exist to alleviate dual litigation. Perhaps the complaining party should be able to choose the forum in which to proceed with his case, but with the requirement that the other forum will be closed to him forever. This,

124. *Id.* at 1936.
125. *See* note 95 *supra*.
126. *See* notes 78-84 *supra* and accompanying text.
127. *See* notes 80 & 81 *supra* and accompanying text.
128. *See* notes 31 & 32 *supra* and accompanying text.
129. *See* note 76 *supra*.

no doubt, would relieve much of the deference problem. Until such rules are adopted, however, the Board's rules of decision delimit the NLRB deference policy, of which *Collyer Wire* is the latest word. It is a word that is, for the most part, consistent with Board rationale, but perhaps forward-reaching in its result.[130]

ALAN COMSTOCK ROSSER

130. A recent case which relied heavily upon the *Collyer* decision was Southwestern Bell Tel. Co. v. CWA, 80 L.R.R.M. 2513 (1972). Here, the District Court for the Southern District of Texas held that an injunction would be issued against a union despite the union's claim that the strike was called to protest the alleged unfair labor practice of the employer. In relying on *Collyer*, the court stated that the NLRB was unlikely to take this case because the contract involved contained an arbitration clause. If the court did not assume jurisdiction, the public would be faced with "a strike which is arguably within the exclusive jurisdiction of the Board and beyond the remedial reach of the courts." *Id.* at 2517. The court concluded by holding that the inclusion of no-strike and arbitration clauses in a contract raises a presumption that unfair labor practice disputes are arbitrable unless otherwise specified.