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A REVIEW OF THE NATIONAL LABOR RELATIONS BOARD'S DEFERRAL POLICY

MICHAEL A. MURPHY AND MICHAEL A. STERLACCI*

I. INTRODUCTION

IN 1971, the National Labor Relations Board handed down its now well-publicized decision in *Collyer Insulated Wire*.¹ Essentially, the Board announced a policy decision of deferring section 8(a)(5)² cases to the arbitral process where arbitration was provided for in a collective bargaining agreement. The concept of deferral itself was certainly not novel, having been invoked as far back as 1943 in *Consolidated Aircraft Corp.*³ Pre-*Collyer*, the application of such a principle had been at best inconsistent; the apparent intent of *Collyer*, however, was to formulate a consistent and firm policy of deferral.

Some critics have called this policy a product of the Nixon Board. Although it is true that incoming Member Penello was the catalyst for crystallizing *Collyer*, by turning what had been a two-two stalemate in the hiatus between his appointment and the departure of Board Member Brown into a three-two majority in favor of *Collyer*, it was the concurring opinion of Member Brown, long an advocate of deferral,⁴ which ushered in the tide of change. Furthermore, many legal scholars had predicted and called for the precise *Collyer* approach long before "baby *Collyer*" was born.⁵

Whether *Collyer* might best be categorized as a revolution or an evolution is debatable. An attempt will be made to trace the meanderings of the law in this area prior to *Collyer* and it will be left to the reader to decide whether its advent was precipitous or gradual. Perhaps it was a combination of both.

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1. 192 N.L.R.B. 837 (1971), noted in 41 Fordham L. Rev. 175 (1972).

2. Of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1970). See note 61 infra.

3. 47 N.L.R.B. 694, 706-07 (1943), enforced in pertinent part, 141 F.2d 785 (9th Cir. 1944).

4. See, e.g., *Univis, Inc.*, 169 N.L.R.B. 37 (1968) (Member Brown, dissenting); *Unit Drop Forge*, 171 N.L.R.B. 600, 604 (1968) (Members Brown and Zagoria, dissenting). See also Member Brown's concurring opinion in *Collyer*, 192 N.L.R.B. at 843-46.

5. See, e.g., *Samoff, Arbitration, Not NLRB Intervention*, 18 Lab. L.J. 602 (1967).

We will also see how baby *Collyer* "grew up," as the Board put it.⁶ An analysis of *Collyer* itself would indicate clearly that the new policy would encompass nothing more than the section 8(a)(5) area; but once the door was opened, that section was not to be the only one affected. Sections 8(a)(3)⁷ and 8(a)(1)⁸ also have now been included within the scope of *Collyer*. This has brought forth a visceral reaction on the part of *Collyer* critics who contend that the floodgates have been opened. Adherents of the decision applaud the extension of *Collyer* as a solidification of a sound deferral policy in accord with the principles of Occam's Razor that entities—in this case labor proceedings—are not to be multiplied without necessity.

An examination will also be made of the *Collyer*-type cases recently decided, and of those pending on the appellate level in the federal courts. Each of these several cases has its own distinct factual nuances, but, generally, the Board appears to be very pleased with its new approach for a variety of reasons, not the least of which is the lightening of its ever-burgeoning caseload. Unions, for the most part, seem to be aligned squarely against such a Board deferral policy, for a multitude of reasons which will become clearer upon examination of the motivating factors of the various parties. Perhaps we will find that even management, which for the most part has aligned itself with the Board, has on occasion opposed the deferral policy.⁹

What the ultimate outcome will be is, of course, purely conjectural and is likely to be resolved only by the Supreme Court. Judging from the notoriety which the decision already has received, it seems almost a certainty that one or more of the *Collyer*-type cases will be selected for Supreme Court review. Nonetheless, it is appropriate at this time to attempt an evaluation of the *Collyer* doctrine, its faults and attributes, as well as its likelihood of remaining a permanent fixture in the law.

II. PRE-COLLYER BACKGROUND

The year 1935 saw the passage of the National Labor Relations Act (NLRA), also called the Wagner Act.¹⁰ Section 7 of the Act¹¹ guarantees employees the right to organize free from undue influence or interference. Those practices which Congress wished to proscribe as interfering with an employee's section 7 rights are specifically enumerated as "unfair labor

6. Little *Collyer* Grows Up, remarks of NLRB Chairman Edward B. Miller before the Industrial Relations Research Association, Sept. 12, 1972.

7. 29 U.S.C. § 158(a)(3) (1970).

8. *Id.* § 158(a)(1).

9. E.g., *Nabisco, Inc. v. NLRB*, 198 N.L.R.B. No. 4 (July 31, 1972), enforced, 479 F.2d 770 (2d Cir. 1973).

10. 29 U.S.C. §§ 151-68 (1970).

11. *Id.* § 157.

practices” in section 8 of the Act.¹² In section 10, Congress addressed itself to the prevention of such unfair labor practices. The language in section 10(a) which was later to become a focal point of much dispute, reads in part:

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . [listed in section 8] 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 . . .¹³

This then was the state of the law in 1935. Employees had the right to organize and could not be interfered with in any of the ways enumerated in section 8. The Board’s power as the body authorized to prevent such abuses was clear and unequivocal.

The Act itself was silent on the Board’s right to defer exercise of its own powers to the arbitration process. However, it has been noted that when the original bill was drafted, Senator Wagner proposed that section 10(b) contain language 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 . . .¹⁴

This language was later deleted, however, and was not part of the final enactment. Therefore, at least by inference, it appears that there was some congressional opposition to deferral.

Then, in the 1943 *Consolidated Aircraft*¹⁵ decision, the Board chose for the first time to defer rather than to exercise its authority. No furor appears to have resulted over this decision;¹⁶ enforcement was granted without comment by the appellate court.¹⁷

In 1947, the National Labor Relations Act underwent what have come to be known as the Taft-Hartley amendments, also referred to as the Labor Management Relations Act (LMRA).¹⁸ Section 301¹⁹ therein provided for court enforcement of any contractual agreement between an employer and a labor union. Section 203(d) provided in part:

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.²⁰

12. Id. § 158.

13. Id. § 160(a).

14. S. 1958, 74th Cong., 1st Sess., 79 Cong. Rec. 2369 (1935). See also Brief for the NLRB at 18 n.17, *IBEW v. NLRB*, Nos. 72-1944 & 72-1995 (D.C. Cir., filed Oct. 20, 1972).

15. 47 N.L.R.B. 694 (1943), enforced in pertinent part, 141 F.2d 785 (9th Cir. 1944).

16. For a more detailed discussion see 6 *Suffolk U.L. Rev.* 720, 725 (1972).

17. 141 F.2d at 788.

18. 29 U.S.C. §§ 141-44, 151-68, 171-87 (1970).

19. Id. § 185.

20. Id. § 173(d).

It has been argued that this language overrides section 10(a) of the Act and indicates a congressional intent to encourage arbitration.²¹ One must also consider that section 14(c)²² of the amended Wagner Act does authorize the Board to decline to assert jurisdiction if it does not feel that the ramifications of such deferral would have a substantial effect on commerce.

Whatever the potential inconsistencies in the 1947 Act, there emerged in 1955 the *Spielberg* doctrine²³ which has remained firmly entrenched in labor law for almost twenty years. Under *Spielberg*, the Board will defer to the arbitration process when an arbitrator has *already* passed judgment on a labor dispute if (1) the proceedings are fair and regular; (2) all parties agree to be bound; and (3) the decision is not repugnant to the purposes and policies of the Act.²⁴ As the *Spielberg* deferral policy became more sharply delineated, the Board indicated that in addition to the criteria set forth above, it would not defer unless it found that the unfair labor practice issue had been presented to and passed on by the arbitrator.²⁵

The Board's position in *Spielberg* was clearly affirmed in *International Harvester Co.*²⁶ There, the Board had stated that "it is . . . 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."²⁷ The Supreme Court added its imprimatur in *Carey v. Westinghouse Electric Corp.*,²⁸ quoting with approval the following language from *International Harvester*:

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 grievance and disputes arising thereunder, "as a substitute for industrial strife," contribute significantly to the attainment of this statutory objective.²⁹

Meanwhile, there had been considerable development in the law as

21. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 452-56 (1957). See also text accompanying notes 75-78 *infra*.

22. 29 U.S.C. § 164(c) (1970) (added by Act of Sept. 14, 1959, Pub. L. No. 86-257, § 701(a), 73 Stat. 541).

23. From *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

24. *Id.* at 1082.

25. See, e.g., *Raytheon Co.*, 140 N.L.R.B. 883 (1963), *rev'd on other grounds*, 326 F.2d 471 (1st Cir. 1964); *Monsanto Chem. Co.*, 130 N.L.R.B. 1097 (1961).

26. 138 N.L.R.B. 923 (1962), *enforced sub nom. Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964).

27. *Id.* at 925-26.

28. 375 U.S. 261 (1964).

29. *Id.* at 271 (quoting from *International Harvester*, 138 N.L.R.B. at 926).

regards the scope of section 301 of the Act. In *Textile Workers Union v. Lincoln Mills*,³⁰ the Supreme Court approved the enforcement of an agreement to arbitrate. The Court indicated that such agreements were a "quid pro quo"³¹ for the no-strike clause and "that federal courts should enforce these agreements" since they offered the best avenue for achieving industrial peace.³²

Added impetus was given to the arbitral process in a series of three cases commonly referred to as the *Steelworkers Trilogy*.³³ In these cases, the Supreme Court announced what amounted to a hands-off policy concerning the review of an arbitrator's decision by the courts under section 301. Basically, courts were not to substitute their judgment for that of the arbitrator. Even though a court might view the arbitrator's decision as an erroneous interpretation of the law or the facts, if the arbitrator's decision was drawn from the essence of the contract it was not to be disturbed.³⁴ The judicial inquiry should confine itself to deciding whether or not the arbitrator had jurisdiction; that is, whether the subject matter was arguably arbitrable.

Thus, between *Spielberg* in 1955 and *Carey* in 1964, the courts had gone a long way toward indicating a predisposition favoring arbitration. Some other hazy areas regarding the arbitration process and the inter-relationship between the courts and the Board also had been resolved. In *San Diego Building Trades Council v. Garmon*,³⁵ a doctrine of federal pre-emption was enunciated. State and federal courts must defer to the NLRB in matters arguably subject to sections 7 and 8 of the Act.³⁶ It was thought that perhaps this would deprive an individual of a section 301 action until the Board had decided to what extent an unfair labor practice might exist. However, in *Smith v. Evening News Association*,³⁷

30. 353 U.S. 448 (1957).

31. *Id.* at 455.

32. *Id.*

33. The Steelworkers Trilogy consisted of *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The cases will hereinafter be referred to collectively as Steelworkers Trilogy.

For a development of the Court's policy not to encroach on the arbitral process see Zimmer, *Wired for Collyer: Rationalizing NLRB and Arbitration Jurisdiction*, 48 *Ind. L.J.* 141, 143 et seq. (1973).

34. See 363 U.S. at 598.

35. 359 U.S. 236, 245 (1959).

36. Cf. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 101-04 (1962), wherein it was decided that state courts have concurrent jurisdiction with federal courts to enforce a section 301 suit, although federal case law would of course govern.

37. 371 U.S. 195 (1962).

it was established conclusively that a suit under section 301 might be maintained even if it involved questions of unfair labor practice.

With the *Spielberg* doctrine firmly entrenched and the courts showing a decided favoritism for the arbitration process, the next logical step was an extension of the *Spielberg* policy of deference to the ultimate policy, finally adopted in *Collyer*, of outright deferral. Proponents of *Collyer* can cite numerous cases from the early sixties to suggest that this is exactly what transpired. For example, there were *Hercules Motor Corp.*³⁸ in 1962, *Dubo Manufacturing Corp.*³⁹ in 1963, and *Modern Motor Express, Inc.*⁴⁰ in 1964, all of which endorsed a policy of deferral. At the same time, there were instances of the Board being rebuked by the courts when it failed to defer. In the Fifth Circuit case of *Sinclair Refining Co. v. NLRB*⁴¹ and in the Ninth Circuit case of *Square D Co. v. NLRB*,⁴² the courts refused to enforce Board orders regarding discovery in the context of alleged section 8(a)(5) violations since the problem was under consideration by an arbitrator. In other words, the appellate courts felt that discovery should be compellable only if an arbitrator decided that the subject matter of the dispute was arbitrable. Until such a determination was made, the Board was not to interject itself into contractual determinations.

It might be assumed that there followed a proliferation of deferral cases. However, one exhaustive study of the Board's deferral policy indicates that a non-deferral policy continued to prevail.⁴³ In fact, between 1960 and 1964 (the latter being the year in which *Carey* was decided), the Board's average rate of deferral amounted to only a little over twenty-three percent.⁴⁴ Thus, the Board's deferral policy was at best an inconsistent one applied on an ad hoc basis.⁴⁵ Further analysis reveals that even ad hoc deferrals took a sharp decline after 1964, amounting to less than twelve percent in the years 1965 through 1967.⁴⁶

Further impetus for a non-deferral policy came from the Supreme

38. 136 N.L.R.B. 1648, 1651 (1962).

39. 142 N.L.R.B. 431 (1963); see also 17 St. Louis U.L.J. 411, 414 (1973).

40. 149 N.L.R.B. 1507 (1964).

41. 306 F.2d 569 (5th Cir. 1962).

42. 332 F.2d 360 (9th Cir. 1964).

43. Comment, The NLRB and Deference to Arbitration, 77 Yale L.J. 1191, 1219-21 (1968).

44. *Id.* at 1219 (1968).

45. Compare *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) (question of employer refusal to issue wage data need not be deferred) with *Insulation & Specialties, Inc.*, 144 N.L.R.B. 1540 (1963) (Board deferring to arbitrator in bargaining unit dispute).

46. Comment, *supra* note 43, at 1220.

Court cases of *NLRB v. C & C Plywood*⁴⁷ and *NLRB v. Acme Industrial Co.*,⁴⁸ which together suggested that it was proper for the Board to intervene in contractual disputes, notwithstanding contract provisions for their handling. *C & C Plywood* had some similarities to the decision in *Smith v. Evening News Association*.⁴⁹ In *Smith*, the Supreme Court indicated that section 301 rights need not be held in abeyance because of possible unfair labor practice implications. In *C & C Plywood*, the Court decided that the Board need not defer to the courts in an unfair labor practice situation even when there were contractual implications, especially in the absence of any arbitration provision. In *Acme Industrial*, the Court, reversing earlier appellate precedent, allowed intervention by the Board to direct the production of possibly relevant data before the arbitrator had decided if the case was arbitrable. In both instances, the Court was affirming a NLRB policy of interjecting itself into the contractual arena.⁵⁰

The Board apparently took this as a cue to continue phasing out any inclination to defer.⁵¹ For example, in *Unit Drop Forge*,⁵² the Board noted jurisdiction even though arbitration was available, on the theory that action was necessary because of an unduly long delay. One author indicates that, with the exception of *Joseph Schlitz Brewing Co.*,⁵³ deferral had virtually become extinct between 1968 and 1970.⁵⁴ What, then, brought about the results in *Collyer* which, based on the overwhelming statistical data available, was in reality a radical departure from what the Board had been doing between 1960 and 1970?

Aside from the obvious change in the political composition of the Board, the Supreme Court's about-face in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*⁵⁵ (in which it directly overruled a prior decision of only eight years' standing),⁵⁶ was undoubtedly a compelling factor heralding a new era of deference to the arbitration process. The courts always had had the authority to enjoin strike violence, but until *Boys*

47. 385 U.S. 421 (1967).

48. 385 U.S. 432 (1967).

49. 371 U.S. 195 (1962).

50. See Zimmer, *supra* note 33, at 156-60 for a discussion of NLRB interjection into the area of contractual interpretation.

51. Cf. *Eastern Ill. Gas & Sec. Co.*, 175 N.L.R.B. 639 (1969); *Producers Grain Corp.*, 169 N.L.R.B. 466 (1968).

52. 171 N.L.R.B. 600 (1968).

53. 175 N.L.R.B. 141 (1969). See note 157 *infra* for a discussion of the case.

54. See Comment, *NLRB and Private Arbitration: Should Collyer Be Extended to Employee Discipline Cases?*, 13 B.C. Ind. & Com. L. Rev. 1460, 1463 (1972).

55. 398 U.S. 235 (1970).

56. *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962).

Markets the anti-injunction provisions of the Norris-La Guardia Act⁵⁷ had been thought to preclude interference with peaceful picketing. However, the Court was eager to create a national policy favoring the speedy resolution of contractual differences over resort to economic warfare in the form of a strike. Thus, the Court held that under section 301, a peaceful strike can be enjoined where the contract contains no-strike and arbitration clauses and a request to invoke available grievance procedures has been met with refusal.⁵⁸ The courts have been liberal in their enforcement of the *Boys Markets* doctrine, to the point of implying a no-strike clause where the contract did not expressly provide for it.⁵⁹

Clearly, this decision had an impact on the Board. The mandate for deference to available grievance procedures first enunciated in *Carey* was emphatically reiterated. If the courts, already overburdened, can see no useful function in needless duplication of effort, the NLRB doubtless is prompted by a similar consideration. It is not happenstance that in *Collyer* we find *Boys Markets* cited prominently.⁶⁰ After an erratic history of deferral, the NLRB had decided to defer uniformly, and thus promulgated the *Collyer* doctrine. We now turn to an examination of that decision.

III. *Collyer*

In *Collyer*, the union filed an unfair labor practice charge with the Board, alleging that the employer had violated sections 8(a)(5)⁶¹ and 8(a)(1)⁶² of the National Labor Relations Act by making assertedly unilateral changes in wages and working conditions.⁶³ The employer

57. 29 U.S.C. §§ 101-15 (1970).

58. 398 U.S. at 254.

59. E.g., *Stein Printing Co. v. Atlanta Typographical Union No. 48*, 329 F. Supp. 754, 758 (N.D. Ga. 1971).

60. 192 N.L.R.B. at 843.

61. Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees" concerning wages, hours, and other terms and conditions of employment. 29 U.S.C. § 158(a)(5) (1970).

62. Section 8(a)(1) of the Act declares it to be an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the right to self-organization, to form, join or assist labor organization, to bargain collectively and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. 29 U.S.C. § 158(a)(1) (1970). "Accordingly, it has been held that violations of sub-sections (2), (3), (4) and (5) are also violations of Section 8(a)(1)." A. Cox and D. Bok, *Cases and Materials on Labor Law* 143-44 (1969).

63. The employer instituted an upward adjustment of wage rates for maintenance employees, directed that the weekly maintenance of certain equipment be performed by one machinist, rather than the usual team of two, and instituted a new incentive wage rate for extruder operators. 192 N.L.R.B. at 837-38.

claimed that he was empowered to make the changes under both the existing collective bargaining agreement and the course of dealing under that contract.⁶⁴ Accordingly, the employer contended that the controversy should be settled through the grievance-arbitration machinery provided in the agreement as the exclusive forum for the adjustment of contractual disputes.

Board Members Miller and Kennedy agreed with the employer's contention since it was "essentially a dispute over the terms and meaning of the contract between the Union and the [employer]."⁶⁵ The evidence supported the Board's finding that "this dispute in its entirety [arose] from the contract between the parties, and from the parties' relationship under the contract . . ."⁶⁶ The breadth of the arbitration provision⁶⁷ demonstrated to the Board's satisfaction that "the parties intended to make the grievance and arbitration machinery the exclusive forum for resolving contract disputes."⁶⁸ The Board felt that this machinery "made available a quick and fair means for the resolution of this dispute including . . . a fully effective remedy for any breach of contract which occurred,"⁶⁹ and that the Board's "obligation to advance the purposes of the Act [could be] best discharged by the dismissal of this complaint."⁷⁰

"Recognizing the suitability of the special skill and experience of arbitrators to resolve disputes such as this, the Board then discussed its authority to defer to the arbitral process . . ."⁷¹ It noted that its authority to do so had never been questioned by the courts, finding support in

64. "The contract provide[d] for a job evaluation plan and for the adjustment of rates, subject to the grievance procedure, during the term of the contract. Throughout the bargaining relationship, [the employer] ha[d] routinely made adjustments in incentive rates to accommodate new or changed production methods." *Id.* at 837.

65. *Id.* The following analysis borrows from that of NLRB General Counsel Peter G. Nash, in his address entitled, *First Questions from Collyer*, before the FMCS-AAA Regional Conference on Labor Arbitration, in Buffalo, N.Y., Oct. 15, 1971, in *BNA Lab. Rel. Y.B.—1971*, at 151, 152-53 [hereinafter cited as *Nash Address*].

66. 192 N.L.R.B. at 839.

67. The arbitration provision provided in part: "All questions, disputes or controversies under this Agreement shall be settled and determined solely and exclusively by the conciliation and arbitration procedures provided in this Agreement. . . . A grievance is defined as any controversy between an employee and his supervisor or any controversy between the Union and the Respondent involving 'the interpretation, application or violation of any provision of this agreement or supplement thereto.' The arbitration clause, article V, provides that 'any grievance' may be submitted to an impartial arbitrator for decision and that the decision of the arbitrator 'shall be final and binding upon the parties' if not contrary to law." *Id.* The scope of the arbitration provision is broad enough to allow either party to initiate a grievance proceeding.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Nash Address*, *supra* note 65, at 152.

the *Carey Court's* quotation⁷² of a Board statement made in *International Harvester Co.*:

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.⁷³

In addition, the Board noted that this judicial recognition of the discretion afforded the Board was consistent with the earlier case of *Smith v. Evening News Association*, where the Supreme Court similarly had observed that "the Board has, on prior occasions, declined to exercise its jurisdiction to deal with unfair labor practices in circumstances where, in its judgment, federal labor policy would best be served by leaving the parties to other processes of law."⁷⁴

Turning to the legislative background, the Board noted the congressional policy in favor of the voluntary settlement of labor disputes through the arbitral process. This policy finds specific expression in section 203(d) of the Labor Management Relations Act, in which Congress declared:

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.⁷⁵

Furthermore, the Board relied⁷⁶ on the Supreme Court's affirmation of that national policy in the *Steelworkers Trilogy*, which denotes the arbitral forum as the primary arena for settlement of disputes arising under section 301 of the LMRA.

While admitting that neither section 203 nor section 301 applies specifically to the Board, the majority contended that

"[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."⁷⁷

72. 375 U.S. at 271.

73. *International Harvester Co.*, 138 N.L.R.B. at 925-26 (footnotes omitted).

74. 192 N.L.R.B. at 840 (quoting *Smith v. Evening News Ass'n*, 371 U.S. 195, 198 n.6 (1962)).

75. 29 U.S.C. § 173(d) (1970).

76. 192 N.L.R.B. at 840.

77. *Id.* n.7 (quoting *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942)).

The Board buttressed its position by citing the legislative history of the Taft-Hartley amendment which, in its view, indicated that Congress intended that mere breaches of collective-bargaining contracts should not constitute unfair labor practices.⁷⁸

The Board referred to the contractual origin of the dispute in many ways,⁷⁹ noting that "[t]he contract and its meaning in present circumstances lie at the center of this dispute."⁸⁰ But the contractual element was identified more explicitly when the Board explained that the question of deferral arises "only when a set of facts may present not only an alleged violation of the Act but also an alleged breach of the collective-bargaining agreement subject to arbitration."⁸¹ In enumerating the factors favoring deferral, the Board said that in the *Collyer* dispute, which was "one eminently well suited to resolution by arbitration,"⁸² "the Act and its policies become involved only if it is determined that the agreement between the parties, examined in the light of its negotiating history and the practices of the parties thereunder, did not sanction Respondent's right to make the disputed changes . . . under the contractually prescribed procedure."⁸³

"In sum, the Board seems to have been referring to a dispute in which issues of substantive contract interpretation would have to be resolved against the respondent as a prerequisite to finding that the disputed conduct violated the Act."⁸⁴

The Board discussed its history of "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."⁸⁵ Continuing with this historical review,

78. At the time of the passage of the amendments, Congress rejected a proposal that the Board be given the power to remedy breaches in collective bargaining agreements. See H.R. Conf. Rep. No. 510, 80th Cong., 2d Sess. 42 (1947). Congress apparently had anticipated that the Board would "develop by rules and regulations a policy of entertaining under these provisions only such cases . . . as cannot be settled by resort to the machinery established by the contract itself, voluntary arbitration . . ." S. Rep. No. 105, 80th Cong., 1st Sess. 23 (1947). See also *Vaca v. Sipes*, 386 U.S. 171, 187 (1967): "[T]o remedy injuries arising out of a breach of contract [is] a task which Congress has not assigned [the Board] . . ."

79. See text accompanying notes 65-66 *supra*.

80. 192 N.L.R.B. at 842.

81. *Id.* at 841.

82. *Id.* at 842.

83. *Id.*

84. General Counsel's Memorandum, Arbitration Deferral Policy Under *Collyer*, Feb. 28, 1972, at 4 n.4.

85. 192 N.L.R.B. at 841; Nash Address, *supra* note 65, at 152.

the Board distinguished two lines of cases—those in which there was an arbitral award and those in which no such award was made.

In the former class of cases, the Board asserted that it “has long given hospitable acceptance to the arbitral process.”⁸⁶ “In those cases in which no award had issued,”⁸⁷ the Board noted that its guidelines have been less clear. “At times the Board has dealt with the unfair labor practice, and at other times it has left the parties to their contract remedies.”⁸⁸ Thus, “[t]he Board has continued to apply the doctrine enunciated in *Consolidated Aircraft*, although not consistently.”⁸⁹

The Board concluded its historical review by summarizing and quoting extensively from the “strikingly similar”⁹⁰ *Schlitz* case,⁹¹ noting that “[t]he circumstances of [*Collyer*], no less than those in *Schlitz*, weigh heavily in favor of deferral.”⁹² In discussing these “circumstances,” the Board first noted that the parties had a long and productive bargaining relationship in which they “mutually and voluntarily resolved the conflicts which inhere in collective bargaining.”⁹³ Second, “no claim is made of enmity by [employer] to employees’ exercise of protected rights,”⁹⁴ the “‘situation [is] wholly devoid of unlawful conduct or aggravated circumstances of any kind,’”⁹⁵ and the employer’s action “‘is not designed to undermine the Union.’”⁹⁶ Third, the employer “credibly asserted its willingness to resort to arbitration,”⁹⁷ and “‘urged the Union to [arbitrate] their dispute.’”⁹⁸ Fourth, “the contract between [the employer] and the Union unquestionably obligates each party to submit to arbitration any dispute arising under the contract and binds both parties to the result thereof,”⁹⁹ and the contract arbitration provisions are “unquestionably broad enough to embrace this dispute.”¹⁰⁰ Fifth, “[t]he

86. 192 N.L.R.B. at 841, citing *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955), and *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946), enforcement denied, 161 F.2d 949 (6th Cir. 1947).

87. 192 N.L.R.B. at 841, citing *Consolidated Aircraft Corp.*, 47 N.L.R.B. 694 (1943), enforced in pertinent part, 141 F.2d 785 (9th Cir. 1944).

88. 192 N.L.R.B. at 841.

89. *Id.* See also Part II *supra*.

90. 192 N.L.R.B. at 841.

91. *Jos. Schlitz Brewing Co.*, 175 N.L.R.B. 141 (1969).

92. 192 N.L.R.B. at 842; *Nash Address*, *supra* note 65, at 152. The following analysis is that of *id.* at 152-53.

93. 192 N.L.R.B. at 842.

94. *Id.*

95. *Id.* (quoting *Jos. Schlitz Brewing Co.*, 175 N.L.R.B. at 142).

96. *Id.* at 841 (quoting *Jos. Schlitz Brewing Co.*, 175 N.L.R.B. at 142).

97. *Id.* at 842.

98. *Id.* (quoting *Jos. Schlitz Brewing Co.*, 175 N.L.R.B. at 142).

99. *Id.*

100. *Id.*

contract and its meaning . . . lie at the center of this dispute"¹⁰¹ which involves "substantive contract interpretation almost classical in its form."¹⁰² The disputed action "is not patently erroneous but rather is based on a substantial claim of contractual privilege,"¹⁰³ and each party is "asserting a reasonable claim in good faith."¹⁰⁴ Sixth, "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,"¹⁰⁵ the Act becoming involved only if the contract "did not sanction [employer's] right to make the disputed changes."¹⁰⁶ Finally, the question of contract sanction for employer's action is a "threshold determination . . . [which] is clearly within the expertise of a mutually agreed-upon arbitrator."¹⁰⁷

The Board also pointed out the compatibility of its deferral for arbitration to be conducted in the future and its review, under its *Spielberg* policy, of arbitration awards already rendered.¹⁰⁸

Finally, the Board rejected the contention of Member Fanning that its decision instituted a form of "compulsory arbitration."¹⁰⁹ This rejection was grounded on the assertion that the Board was merely giving effect to "voluntary agreements to submit all such disputes to arbitration, rather than permitting . . . the substitution of our processes, a forum not contemplated by [the parties'] own agreement."¹¹⁰ However, the majority opinion avoided addressing the problem of whether the expiration of the time limitation of the contract governing the filing for grievance-arbitration proceedings bears any relationship to the requirement that the respondent be willing to arbitrate the dispute.¹¹¹ On the other hand, dissenting Member Fanning clearly stated that "[t]he time limits for the resolution of grievances with respect to these unilateral changes have passed . . ."¹¹² It was based upon this fact, ignored by the majority, that Member Fanning reasoned that, by compelling the arbitration of a grievance no longer contractually arbitrable, the majority disposition of

101. *Id.*

102. *Id.* (quoting *Jos. Schlitz Brewing Co.*, 175 N.L.R.B. at 142).

103. *Id.* at 841 (quoting *Jos. Schlitz Brewing Co.*, 175 N.L.R.B. at 142).

104. *Id.* at 842 (quoting *Jos. Schlitz Brewing Co.*, 175 N.L.R.B. at 142).

105. *Id.* at 841-42 (quoting *Jos. Schlitz Brewing Co.*, 175 N.L.R.B. at 142).

106. *Id.* at 842.

107. *Id.*

108. *Id.* at 842-43; Nash Address, *supra* note 65, at 153.

109. 192 N.L.R.B. at 842. Member Fanning's dissent is treated at notes 125-46 *infra* and accompanying text.

110. 192 N.L.R.B. at 842.

111. General Counsel's Memorandum, Arbitration Deferral Policy Under Collyer, Feb. 28, 1972, at 6 n.11.

112. 192 N.L.R.B. at 847 (Member Fanning, dissenting).

the case "verges on the practice of compulsory arbitration."¹¹³ It thus appears that the majority of the Board considered the question of time limits on the filing of grievances to be irrelevant to its decision. Apparently, it was enough for the Board's purposes that the employer was willing to arbitrate despite any time limitations contained in the contract. By negative implication, had the *Collyer* employer attempted to stand on its contract right to refuse arbitration on the grounds of untimeliness, the Board probably would have proceeded to render a decision on the merits of the alleged unfair labor practice.¹¹⁴ "Were the Board's decision so viewed, it would suggest that contractual time limitations on the initiation of arbitration proceedings may be ignored; if a charge is timely filed under the 6-month limitation of Section 10(b) of the Act, then the party which seeks deferral for arbitration must waive any arbitration time limitations which the contract may contain."¹¹⁵

As a final note, the Board reserved jurisdiction pending arbitration of the dispute, to guarantee that "there will be no sacrifice of statutory rights if the parties' own processes fail to function in a manner consistent with the dictates of our law."¹¹⁶

As already noted, the Board quoted that portion of the *Schlitz* opinion which suggested that an appropriate case for deferral to an arbitration clause is one in which employer action is "not patently erroneous but rather is based on a substantial claim of contractual privilege"¹¹⁷ and in which "each party [is] asserting a reasonable claim in good faith."¹¹⁸ The Board thus seemed to contemplate a contract claim which was neither so compelling as to preclude any conflicting construction or so unconvincing as to suggest bad faith on the part of its proponent. But there remains a gap here:

[A] contract may be silent with respect to the subject matter of a controversy, or may seem on its face to preclude change; or the acting party may have depended upon a general reserved rights clause to justify his initiative. In such a case, although an arbitrator is not without authority and expertise to effectuate the intent of the con-

113. *Id.*

114. Nash Address, *supra* note 65, at 155.

115. *Id.*

116. 192 N.L.R.B. at 843. More specifically, "[i]n order to eliminate the risk of prejudice to any party," the majority announced that it would: "[R]etain jurisdiction over this dispute solely 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." *Id.* (footnote omitted).

117. *Id.* at 841.

118. *Id.* at 842.

tracting parties, the increased possibility that new, unbargained-for rights are at stake will probably decrease the likelihood of deferral by the Board.¹¹⁹

Or, as pointed out by the concurring opinion in *Collyer*:

[A]rbitration properly serves the function of resolving differences about agreements previously reached, and [is not] a means for the "acquisition of future rights"; . . . arbitration [is not] a substitute for collective bargaining.¹²⁰

Member Brown, thus, would apparently require the Board to assure itself that the dispute was "arguably arbitrable" before deferring to arbitration. In his view,

[t]he Board should not defer where the dispute is not covered by the contract and, therefore, involves the acquisition of new rights. I would reach a different result where the contract is ambiguous. In such a case a party may be exercising an accrued right, and the party's action might be justified by the ultimate interpretation of the contract. Thus, I would defer where a good-faith dispute over the interpretation or application of a contract exists . . .¹²¹

Concentrating further on Member Brown's concurring opinion, it will be noted that one of the most significant elements of his analysis was the expansive approach he suggested for future application of the *Collyer* doctrine:

The deferral policy should be applied to disputes covered by the collective-bargaining agreement and subject to arbitration whether the disputes involve alleged violations of Section 8(a)(5), (3), or (1) or whether brought by the employer, the union, or an employee.¹²²

The principal opinion of the Board made no reference, even indirectly, to section 8(a)(3) violations. Thus, the majority failed either to endorse or to reject Member Brown's express suggestion. However, even he expressed some reservations about the application of the Board's deferral policy in certain areas. In his opinion, "deferral would serve only a limited purpose in representation cases" because "[r]epresentation proceedings generally involve the very questions of whether there will be a collective-bargaining arrangement and, if so, to what extent."¹²³ Similarly, he would be inclined not to defer "where there has been a repudiation of the collective-bargaining process."¹²⁴

The *Collyer* majority opinion also engendered some strong dissents. Member Fanning perceived the majority opinion as "a novel decision with

119. 41 Fordham L. Rev. 175, 185 (1972).

120. 192 N.L.R.B. at 845 (Member Brown, concurring); 41 Fordham L. Rev. at 185.

121. 192 N.L.R.B. at 845 (Member Brown, concurring) (footnotes omitted).

122. *Id.*

123. *Id.*

124. *Id.*

far-reaching implications."¹²⁵ While acknowledging the contractual right of the union or any of its members to institute grievance procedures, he cogently discerned that "[n]o such grievances have been filed in this case and there is no indication that the charging party or its members voluntarily desire[d] to do so."¹²⁶ In analyzing the actual agreement of the parties, he found, contrary to the majority, that "the arbitration provision does not make it clear that the parties intended ' . . . arbitration . . . [to be] the exclusive forum for resolving contract disputes,'"¹²⁷ but rather that "the grievance procedure is 'subject to the rights of individual employees as provided for in the Labor-Management Act of 1947.'"¹²⁸ He raised the additional question, unanswered by the majority, as to whether the parties were contemplating the loss of statutory rights when they agreed to an arbitration clause with broad language, despite the absence in the contract of any waiver clause.

In furtherance of his pronouncement that the majority opinion "verges on the practice of compulsory arbitration,"¹²⁹ he drew attention to the fact that "[n]either Congress nor the courts have attempted to coerce the parties in collective bargaining to resolve their grievances through arbitration."¹³⁰ He conceded that "[c]ollective-bargaining agreements . . . give aggrieved parties the *right* to file grievances and to present their disputes to an arbitrator," but averred that "[t]he element of compulsion has been deliberately omitted."¹³¹ Consequently, he predicted the majority decision will "discourage rather than [sic] encourage the arbitral process."¹³²

To substantiate his position, Member Fanning relied on the decisions in *Teamsters Local 357 v. NLRB*,¹³³ and *H.K. Porter Co. v. NLRB*,¹³⁴ and drew from the Supreme Court's opinion in the latter, where the Court said:

[A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.¹³⁵

125. *Id.* at 846 (Member Fanning, dissenting).

126. *Id.*

127. *Id.* at 846-47 (Member Fanning, dissenting).

128. *Id.* at 847.

129. *Id.*

130. *Id.*

131. *Id.* (emphasis in original).

132. *Id.*

133. 365 U.S. 667 (1961), cited in Collyer, 192 N.L.R.B. at 847 (Member Fanning, dissenting).

134. 397 U.S. 99 (1970), cited in Collyer, 192 N.L.R.B. at 847 (Member Fanning, dissenting).

135. 397 U.S. at 108.

He concluded this argument by stressing, in the traditional fashion, that Congress is the appropriate body to establish a new policy in this area, and he emphasized this point by stating that:

In Sections 8(b)(4)(D) and 10(k) Congress specifically provided that a "voluntary method" for the adjudication of jurisdictional disputes was preferable to Board intervention. No such preference has been indicated by Congress or the Supreme Court for alleged violations of Section 8(a).¹³⁶

Turning to the majority's recognition of the special skill and experience qualifying arbitrators to decide disputes arising under the bargaining relationship, Member Fanning contrarily concluded that "the Board, with the help of its staff and Trial Examiner, has more expertise and is more competent to judge such a dispute in a manner to effectuate the policies of the Act."¹³⁷ Moreover, relying on the Supreme Court's decisions in *NLRB v. Acme Industrial Co.*¹³⁸ and *Carey v. Westinghouse Electric Corp.*,¹³⁹ and the Board's authority under section 10(a) of the Act, he asserted that the Board stands in a different position vis-à-vis the arbitration process than do the courts. It has superior authority to relieve unfair labor practice violations, unlike the courts which are bound by the contract.¹⁴⁰

Reflecting on the *Consolidated Aircraft Corp.*¹⁴¹ and *Joseph Schlitz Brewing Co.*¹⁴² cases, relied on by the majority as authority for deferring to the arbitral process before arbitration has occurred, he emphasized that the former case is "28 years old and its over-broad rationale . . . has remained buried in the Board's history until resurrected in [*Collyer*],"¹⁴³ and that the latter case "was merely a question of contract interpretation and the 'situation was wholly devoid of unlawful conduct or aggravated circumstances of any kind.'"¹⁴⁴ Thus the impact of the majority's decision may go beyond even compulsory arbitration since the decision means that in the future the Board "will strip the parties of statutory rights merely on the *availability* of [arbitration]."¹⁴⁵

136. 192 N.L.R.B. at 847 (Member Fanning, dissenting).

137. *Id.* at 848.

138. 385 U.S. 432, 436-37 (1967), cited in *Collyer*, 192 N.L.R.B. at 848 (Member Fanning, dissenting).

139. 375 U.S. 261, 272 (1964), cited in *Collyer*, 192 N.L.R.B. at 848 (Member Fanning, dissenting).

140. See 192 N.L.R.B. at 848 (Member Fanning, dissenting).

141. 47 N.L.R.B. 694 (1943), enforced in pertinent part, 141 F.2d 785 (9th Cir. 1944), cited in *Collyer*, 192 N.L.R.B. at 848 (Member Fanning, dissenting).

142. 175 N.L.R.B. 141 (1969), cited in *Collyer*, 192 N.L.R.B. at 848 (Member Fanning, dissenting).

143. 192 N.L.R.B. at 849 (Member Fanning, dissenting).

144. *Id.*

145. *Id.* (emphasis in original).

In concluding his dissent, Member Fanning attempted to elucidate the limitations inherent in the employment of arbitrators. He found it understandable that "an arbitrator, paid jointly by a union and an employer to adjudicate their private rights and obligations, may be unwilling to suggest that one of them is in violation of the National Labor Relations Act and to direct a remedy appropriate to such a finding."¹⁴⁶

Member Jenkins initiated his dissenting opinion with a strident castigation of the majority's decision which he characterized as "a complete reversal of Board precedent."¹⁴⁷ He substantiated this contention by citing, in a footnote, a litany of cases which demonstrably indicate that "[i]n the period 1960-70, the Board has often decided the merits in 'unilateral change of contract' cases, despite the availability of arbitration . . ."¹⁴⁸

He further proclaimed that the Supreme Court's holding in *Motor Coach Employees v. Lockridge*¹⁴⁹ was controlling precedent. In that case the Supreme Court held that because "the preemption doctrine . . . is designed to avoid conflicting regulation of conduct by various tribunals which might have some authority over the subject matter, [the] Board had exclusive jurisdiction to decide the case, and the state court was without jurisdiction."¹⁵⁰ Accordingly, he continued:

Thus it is plain that the principal ground on which the majority rests its remission of this alleged violation of the Act to a different and private tribunal, namely, that an interpretation of the contract is or may be necessary in resolving the issue, is explicitly and conclusively rejected by *Lockridge*. . . .

If the Supreme Court is unwilling to give to state courts jurisdiction to decide suits which "arguably" involve an unfair labor practice under the Act and at the same time involve a contract interpretation issue, [the] Board can hardly relinquish its paramount jurisdiction to a private tribunal or to an arbitrator . . .¹⁵¹

To further support his averment that "the preemption rationale of *Lockridge* is *a fortiori* applicable to the [*Collyer*] case,"¹⁵² he turned to section 9(a) of the LMRA, which gives an employee the right to present his grievance to the Board, apart from any grievance-arbitration remedies available. Citing *NLRB v. Marine & Shipbuilding Workers*,¹⁵³ an 8(b) (1)(A) case, he discerned that "where unfair labor practices are alleged, 'other considerations of public policy come into play,' . . . [which make]

146. *Id.*

147. *Id.* at 850 (Member Jenkins, dissenting).

148. *Id.* n.32 and cases cited therein.

149. 403 U.S. 274 (1971), cited in *Collyer*, 192 N.L.R.B. at 850 (Member Jenkins, dissenting).

150. 192 N.L.R.B. at 850 (Member Jenkins, dissenting).

151. *Id.* at 851.

152. *Id.* at 852.

153. 391 U.S. 418 (1968), cited in *Collyer*, 192 N.L.R.B. at 852 (Member Jenkins, dissenting).

unimpeded access to the Board the only healthy alternative"¹⁵⁴ In light of this precedent, he deduced that the majority opinion is imposing a sort of "waiver" of a statutory right—the right of access to the Board—and that this imposition is contrary to "[t]he standard rule . . . enunciated in numerous decisions of the Supreme Court, . . . and . . . courts of [appeals] that the right to resort to the Board for relief against unfair labor practices cannot be foreclosed by private contract."¹⁵⁵ Moreover, he asserted that Congress, in maintaining unfettered access to the Board by means of section 14(c), had evinced an express interest in the Board's protection of statutory rights. The Supreme Court has shown an equal concern in *Vaca v. Sipes*.¹⁵⁶

Further, Member Jenkins asserted that the majority's reliance on the *Schlitz* case was misplaced. He denied that *Schlitz* stood for deferral to arbitration, stating that "on the issue of arbitration, the majority in *Schlitz* was opposed to deferral, and there was a majority only for the result of dismissal."¹⁵⁷

He also pointed out that arbitral procedures are becoming increasingly expensive and lengthy.¹⁵⁸ For example, he noted that officials of the Steelworkers Union have "expressed their dissatisfaction with the high cost, delays, and massive 'bogging-down' volume of arbitration, all of which led to its use as a weapon against the union. Management dissatisfaction with arbitration is likewise substantial."¹⁵⁹ Lastly, he asserted that arbitration neither provides "an adequate remedy for violations of the Act" nor effectively protects the public interest, and indeed "may sacrifice individual rights guaranteed by the Act because it is not available to aggrieved individuals."¹⁶⁰

154. 192 N.L.R.B. at 852 (Member Jenkins, dissenting).

155. *Id.* at 852-53 (quoting *Lodge 743, IAM v. United Aircraft Corp.*, 337 F.2d 5, 8 (2d Cir. 1964), cert. denied, 380 U.S. 908 (1965)).

156. 386 U.S. 171, 181-83 (1967).

157. 192 N.L.R.B. at 853 (Member Jenkins, dissenting). The dispute in *Schlitz* involved a change in the employees relief system, requiring all employees to break for lunch at the same time. The two-member majority ruled that the issue was properly a matter for arbitration since the "situation [was] wholly devoid of unlawful conduct or aggravated circumstances of any kind . . ." 175 N.L.R.B. at 142. Member Jenkins concurred on the grounds that the case should be dismissed on the merits. *Id.* (Member Jenkins, concurring). It is difficult to agree with Member Jenkins's recollection of the *Schlitz* decision if one examines the majority opinion in that case, which clearly seems to decide in favor of deferral.

158. 192 N.L.R.B. at 854.

159. *Id.* at 855 (footnotes omitted). Cf. Address by NLRB Chairman Edward B. Miller, Conference of Western States Employer Association Executives, Aug. 27, 1971, in 78 *Lab. Rel. Rep.* 28 (1971): "If we make clear to the parties that we are not going to rescue them from the imperfections of their own systems, we will encourage rather than discourage them in taking necessary action to improve the processes which they will not be obliged to follow without [the Board] serving as an easily available alternative." *Id.* at 32.

160. 192 N.L.R.B. at 855 (Member Jenkins, dissenting).

It is interesting to note that the *Collyer* case did not result in binding arbitration for the parties. Neither the union nor the company invoked the grievance-arbitration procedures in their contract. "Instead, with the termination of their then current contract, the disputes which gave rise to *Collyer* were cured by collective bargaining . . . for the new contract. The new agreement contains essentially the same provisions for grievance and arbitration."¹⁶¹

In sum, it is clear that the *Collyer* majority did consider its decision to be an important policy statement on the question of Board involvement in the area of contract administration; it declared that the decision

represents a developmental step in the Board's treatment of these problems and the controversy here arose at a time when the Board decisions may have led the parties to conclude that the Board approved dual litigation of this controversy before the Board and before an arbitrator.¹⁶²

IV. POST-*Collyer* BOARD DECISIONS

Before turning to some recent cases that have interpreted and extended *Collyer*, we should note that the Board itself has lent some assistance in interpreting that decision. The General Counsel of the Board, whose duty is to investigate and prosecute alleged violations of the Act,¹⁶³ has announced the general guidelines he intends to follow with "*Collyerable*" cases in order to implement the Board's new deferral policy.¹⁶⁴ The unofficial comments made by Board Chairman Miller¹⁶⁵ within a week of the *Collyer* decision offer perhaps the best indication of the policy implications of the case. Miller confirmed that "the decision makes clear that [deferral] will be [the Board's] policy in similar cases in the future,"¹⁶⁶ and characterized the case as a break from precedent and an affirmative change in Board policy.¹⁶⁷

The most noticeable feature of the *decisions* issued by the Board since *Collyer* is the seeming realization of the prophetic language uttered by Member Brown in *Collyer* when he proclaimed: "The deferral policy should be applied to disputes covered by the collective-bargaining agreement and subject to arbitration whether the disputes involve alleged violations of Section 8(a)(5), (3), or (1) or whether brought by the employer, the union, or an employee."¹⁶⁸ Post-*Collyer* decisions have sub-

161. 6 Suffolk U.L. Rev. 720, 733 (1972).

162. 192 N.L.R.B. at 843.

163. 29 U.S.C. § 153(d) (1970).

164. General Counsel's Memorandum, Arbitration Deferral Policy Under *Collyer*—Revised Guidelines, Jan. 31, 1973.

165. Miller Address, *supra* note 159.

166. *Id.* at 33.

167. *Id.* at 35.

168. 192 N.L.R.B. at 845 (Member Brown, concurring).

stantially extended and refined the original doctrine. Indeed, the *Collyer* policy has now been expanded by the Board to apply to charges alleging violations of sections 8(a)(1), 8(a)(2), 8(a)(3), 8(b)(1)(A), 8(b)(1)(B), 8(b)(2), and 8(b)(3), as well as 8(a)(5).¹⁶⁹ Besides this extension in scope, post-*Collyer* cases have modified or entirely abrogated some of the elements on which the *Collyer* Board had based its decision. We will discuss a number of these in turn.

One of the key points emphasized by the Board in *Collyer* was that the contract and its meaning were at the center of the dispute; that is, the question of deferral arose only because the facts presented "not only an alleged violation of the Act but also an alleged breach of the collective-bargaining agreement subject to arbitration."¹⁷⁰ In more recent cases, however, the Board has broadened the type of dispute which may be deferred for arbitration. In *National Radio Co.*,¹⁷¹ the Board deferred a complaint alleging violations of sections 8(a)(5) and 8(a)(3) of the Act. The Board noted that the employer's deferral contention did not "rest on any presumed primacy of an arbitrator to interpret an ambiguous or contested contract provision."¹⁷² Nevertheless the Board accepted the assumption, implicit in the employer's argument, that arbitration regarding the contractual provision limiting discipline to "just cause" would lead to a resolution of the dispute not "repugnant to the purposes and policies of the Act."¹⁷³ The Board found that the fundamental applicable considerations were the same as those in *Collyer*: in both cases, the "asserted wrong is remediable in both a statutory and a contractual forum."¹⁷⁴ According to the Board, "[t]he crucial determinant [was] . . . the reasonableness of the assumption that the arbitration procedure will resolve [the] dispute in a manner consistent with the standards of *Spielberg*."¹⁷⁵

Subsequently, in *Eastman Broadcasting Co.*,¹⁷⁶ a case involving an alleged 8(a)(5) violation, the Board restated the *Collyer* rule and declared it to be applicable where two basic conditions have been met:

169. General Counsel's Memorandum, Arbitration Deferral Policy Under *Collyer*—Revised Guidelines, May 10, 1973, at 10.

170. 192 N.L.R.B. at 841.

171. 198 N.L.R.B. No. 1 (July 31, 1972); see Note, The NLRB's Arbitration Deferral Policy Under *Collyer*: The Impact of *National Radio Co.*, 53 B.U.L. Rev. 711 (1973) for an in-depth analysis of the implications of the *National Radio* decision.

172. 198 N.L.R.B. No. 1, at 14-15.

173. *Id.* at 15 (footnote omitted).

174. *Id.*

175. *Id.* at 17.

176. 199 N.L.R.B. No. 58 (Sept. 29, 1972).

- (1) the 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.¹⁷⁷

Under this test, it appears that a dispute over the meaning or application of contested substantive terms of the contract is not a prerequisite to deferral under the *Collyer* policy. In the case of *Southwestern Bell Telephone Co.*,¹⁷⁸ for example, the trial examiner found that the employer had violated sections 8(a)(5) and 8(a)(1) of the Act. Rejecting the employer's argument that the dispute should be resolved by the grievance and arbitration provisions set up in the contract, he found that "the contract does not deal with these issues" and that under the terms of the contract "the dispute is not one which either party is bound to arbitrate."¹⁷⁹ On review the Board found merit in the employer's contention and held *Collyer* to be applicable.¹⁸⁰

In *Great Coastal Express, Inc.*,¹⁸¹ the Board ordered the deferral of a complaint alleging an 8(a)(5) violation where the matter in dispute was not specifically mentioned in the contract. There, the Board relied partially on the fact that the parties had in the past settled matters which, although not expressly covered by the contract, had been brought up under the "Maintenance of Standards" section of the agreement. Thus, it was appropriate to defer to allow an arbitrator to interpret that section to see if it covered the alleged unfair practice in the case.¹⁸² Similarly, in *Bethlehem Steel Corp.*,¹⁸³ the trial examiner found the parties' contract to be silent on subcontracting work.¹⁸⁴ In that case the employer justified his subcontracting by noting that historically he had contracted out similar work because the bargaining unit was not trained or qualified to do it.¹⁸⁵ Although the employer could not point to any contract provision bearing on the matter, the Board nevertheless deferred to arbitration under the grievance and arbitration provisions of the contract.¹⁸⁶

However, if the Board determines that the alleged conduct may violate the Act, it has refused to defer under the *Collyer* policy, notwithstanding

177. Id. at 12.

178. 198 N.L.R.B. No. 6 (July 31, 1972).

179. Id. at 5.

180. Id.

181. 196 N.L.R.B. No. 129 (May 2, 1972).

182. Id. at 4.

183. 197 N.L.R.B. No. 121 (June 21, 1972).

184. Id., Trial Examiner's Decision at 12.

185. Id. at 4.

186. 197 N.L.R.B. No. 121, at 2.

the contract provisions. In *Local 17, Sheet Metal Workers' International*,¹⁸⁷ the provisions of the contract appeared to allow the union to strike to protest a supervisor's working at less than the rates set for foremen by the contract. The Board concluded that since this kind of conduct violated section 8(b)(1)(B) notwithstanding the contract provisions, and since the arbitrator would decide only the question of contract privilege, the Board would be required to decide at least part of the dispute.¹⁸⁸ Therefore, the Board refused to defer, stating:

When an entire dispute can adequately be disposed of under the grievance and arbitration machinery, we are favorably inclined toward permitting the parties an opportunity to do so. One of our reasons for so doing is to avoid litigating the same issues in a multiplicity of forums. But here, since we must perforce determine a part of the dispute, there is far less compelling reason for not permitting the entire dispute to be resolved in a single proceeding.¹⁸⁹

Another consideration noted by the Board in *Collyer* was the duration and general quality of the disputants' bargaining relationship. The *Collyer* Board spoke of the parties' "'established and successful bargaining relationship'"¹⁹⁰ which had been "long and productive."¹⁹¹ Similarly, in *Appalachian Power Co.*,¹⁹² the Board dismissed an 8(a)(3) complaint contending that the trial examiner's finding of union hostility was overdrawn in light of the "[employer's] long history of bargaining with the Union."¹⁹³ This case apparently reaffirmed the Board's conviction, espoused in *Collyer*, that the duration of the parties' relationship should be considered in deciding whether to defer.¹⁹⁴

But in other decisions, the Board has indicated that the short duration of the bargaining relationship will not, of itself, preclude deferral of the complaint. In *Coppus Engineering Corp.*,¹⁹⁵ the union was certified in August 1969 and after twenty to twenty-five bargaining sessions, the parties executed a collective-bargaining agreement in December 1969.¹⁹⁶ The union filed an unfair labor practice complaint, alleging an 8(a)(5) violation, in May 1970. The Board dismissed the complaint, preferring

187. 199 N.L.R.B. No. 26 (Sept. 20, 1972).

188. *Id.* at 8. But cf. *Joseph T. Ryerson & Sons, Inc.*, 199 N.L.R.B. No. 44, at 1 n.1 (Oct. 2, 1972).

189. 199 N.L.R.B. No. 26, at 9.

190. 192 N.L.R.B. at 842 (citation admitted).

191. *Id.*

192. 198 N.L.R.B. No. 7 (July 31, 1972).

193. *Id.* at 10.

194. Likewise, in *National Radio Co.*, the Board deferred the dispute to arbitration, brushing aside current strike activity partially because of the parties' history of "a stable and productive bargaining relationship." 198 N.L.R.B. No. 1, at 20 (footnote omitted).

195. 195 N.L.R.B. 595 (1972).

196. *Id.*

instead to defer to the voluntary arbitration machinery provided for in the parties' collective-bargaining agreement.¹⁹⁷ Likewise, in *L.E.M., Inc.*,¹⁹⁸ the Board deferred a complaint alleging violations of sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act, although the disputes arose a short time after the parties had entered into their first collective-bargaining agreement.¹⁹⁹

The extent to which evidence of over-reaching or anti-union animus will influence the Board in future dismissals is debatable. In *Collyer* the Board noted that "no claim is made of enmity by [the employer] to employees' exercise of protected rights,"²⁰⁰ the "situation [is] wholly devoid of unlawful conduct or aggravated circumstances of any kind"²⁰¹ and the employer's action "is not designed to undermine the Union."²⁰² Later cases have been inconsistent on this point. For example, in *National Radio Co.*,²⁰³ a single, animus-motivated unfair labor practice was not enough to make deferral inappropriate. The *National Radio* Board did note that the allegation of animus "add[s] a dimension to this case which was not present in *Collyer*, where no claim was made that [the employer] acted from a desire or with an intent either to abridge Section 7 rights, or to penalize employees for their exercise of those rights."²⁰⁴ The Board nevertheless concluded that its jurisdiction over the controversy was asserted improvidently prior to the issuance of the arbitrator's award, and so deferred.²⁰⁵ On the other hand, in *Chase Manufacturing, Inc.*,²⁰⁶ the Board affirmed the trial examiner's findings of 8(a)(1) and 8(a)(5) violations and rejected the deferral procedure, stating:

197. Id. at 597.

198. 198 N.L.R.B. No. 99 (Aug. 4, 1972).

199. Id. at 7.

200. 192 N.L.R.B. at 842.

201. Id. (citation omitted).

202. Id. at 841 (citation omitted).

203. 198 N.L.R.B. No. 1 (July 31, 1972).

204. Id. at 11.

205. Similarly, in *Appalachian Power Co.*, 198 N.L.R.B. No. 7 (July 31, 1972), the Board refused to adopt the trial examiner's findings that the employer "entertained anti-union hostility and that such entered into the decision to cancel [the employee's] leave," thereby violating section 8(a)(3). Id. at 7-8. It concluded that, "viewed in the light of [employer's] long history of bargaining with the Union, [employer's activity] can hardly be characterized as displaying a deep-seated animus to its employees' union representation or disregard for its employees' statutory rights." Id. at 10-11. Apparently, the Board may evaluate allegations of enmity in future cases in light of the total bargaining history of the parties, including the duration and effectiveness of the bargaining relationship and character and frequency of unfair labor practices. See notes 190-99 supra and accompanying text for a discussion of the relevancy of the history of the parties' bargaining relationship to the question of deferral.

206. 200 N.L.R.B. No. 128 (Dec. 13, 1972).

the issue before us is not limited to the propriety of remedying a breach of contract, but rather one that concerns [employer's] complete rejection of the principles of collective bargaining, and the self-organizational rights of employees.²⁰⁷

In *United Aircraft Corp.*,²⁰⁸ the Board rejected a finding that the employer's history of unfair labor practices, including those in the case before it, demonstrated continuing enmity toward its employees' exercise of rights protected by the Act. The administrative law judge had concluded that deferral to arbitration was inappropriate and, indeed, precluded by the Board's doctrine in *Collyer*. In reversing the decision below, the Board majority continued to acknowledge the importance of exploring the nature of the relationship between the parties. However, the majority concluded, in a departure from the original *Collyer* doctrine, that

the nature and scope of the acts currently alleged to show such hostility, together with a measure of the current impact of any past such acts, must all be evaluated and then together be weighed against evidence as to the developing or maturing nature of the parties' collective-bargaining relationship and proven effectiveness (or lack thereof) of the available grievance and arbitration machinery. Upon a totality of those facts, it must then be determined whether the parties' agreed-upon grievance and arbitration machinery can reasonably be relied on to function properly and to resolve the current disputes fairly.²⁰⁹

Applying this standard, the Board was willing to overlook the administrative law judge's findings of a history of enmity. Relying heavily on the employer's recent compliance with two arbitrators' awards, the Board reaffirmed its policy enunciated in *National Radio Co.*, and concluded:

But if . . . there is now effective dispute-solving machinery available, and if the combination of past and presently alleged misconduct does not appear to be of such character as to render the use of that machinery unpromising or futile, then we ought not depart from our usual deferral policies.²¹⁰

United Aircraft implies that the Board's *Collyer* standard may have given way to a more flexible policy favoring private adjustments unless countervailing negative factors seriously threaten to undermine the successful use of the arbitral process. In adopting this relaxed deferral standard, the *United Aircraft* majority took the occasion to enunciate their underlying concern with the Board's ever-increasing caseload, by stating:

Being keenly aware of the limited resources of this Agency, we are 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 this Board of the innumerable individual disputes which are likely to arise in the

207. *Id.* at 2. See *North Shore Publishing Co.*, 206 N.L.R.B. No. 7 (Sept. 2, 1973); *Mountain State Constr. Co.*, 203 N.L.R.B. No. 167 (June 1, 1973).

208. 204 N.L.R.B. No. 133 (July 10, 1973).

209. *Id.* at 3.

210. *Id.*

day-to-day relationship When a labor organization seeks instead to have us resolve each such dispute, we think it proper to require it, before invoking our services, initially to invoke the available voluntary machinery.

. . . .
With the ever-increasing caseload, it is more important than ever that the Board be permitted to husband its limited resources and apply them where they have maximum impact in effectuating the Act.²¹¹

Members Fanning and Jenkins, in a vigorous dissent²¹² to *United Aircraft Corp.*, characterized the majority's disposition of the case as a demonstration that "[t]he justification used to support [the Board's] *Collyer* policy is simply meaningless rhetoric to be ignored when the facts do not fit the mold."²¹³

Certainly one of the other factors which influenced the Board's decision in *Collyer* was its finding that "the contract between [employer] and the Union unquestionably obligates each party to submit to arbitration any dispute arising under the contract and binds both parties to the result thereof."²¹⁴ In addition, the breadth of the arbitration provision satisfied the Board that "the parties intended to make the grievance and arbitration machinery the exclusive forum for resolving contract disputes."²¹⁵ In fashioning guidelines for subsequent application of the *Collyer* doctrine by the regional offices, the Board's General Counsel therefore provided:

[A]n unfair labor practice charge will not be deferred for arbitration under the *Collyer* policy unless the contract provides that the procedures culminating in binding arbitration shall be the exclusive means for settlement of the disputes underlying the charge.²¹⁶

Yet the evolution of the post-*Collyer* cases demonstrates a significant departure from the Board's strict approach to the question of "exclusive-ness" of the arbitral forum. It may well substantiate the perception of Board Member Fanning who, in his *Collyer* dissent, prognosticated:

The impact of the majority's decision may be said to go beyond compulsory arbitra-

211. *Id.* at 6-7 (quoting Local 76, Am. Fed'n of Musicians, 202 N.L.R.B. No. 80 (Mar. 21, 1973)).

212. *Id.* at 10.

213. *Id.* The same two Board members made a similar point in their dissent in *Columbus & Southern Ohio Elec. Co.*, 83 L.R.R.M. 1558 (1973): "Such unpredictability and lack of uniformity in deferring to arbitrators the decision on violations of the Act fails to guide or inform, and only confuses, those attempting to apply our decisions to their circumstances." 83 L.R.R.M. at 1561 (Members Fanning & Jenkins, dissenting).

214. 192 N.L.R.B. at 842.

215. *Id.* at 839. The arbitration clause provided that all disputes arising under the contract "shall be settled and determined solely and exclusively by the conciliation and arbitration procedures . . ." *Id.*

216. General Counsel's Memorandum, Arbitration Deferral Policy Under *Collyer*, Feb. 28, 1972, at 10.

tion. For it means that in the future the Board will not concern itself with the *fact* or the *regularity* of the arbitral process, but will strip the parties of statutory rights merely on the *availability* of such a procedure.²¹⁷

For example, in *Joseph T. Ryerson & Sons, Inc.*,²¹⁸ the Board stated that dismissal of the 8(a)(1) complaint was in order because “[t]his short and plain dispute emphasizes the fundamental soundness of our growing practice to abstain from action where grievance and arbitration procedures are available to resolve a dispute equally cognizable in *either* forum.”²¹⁹ Moreover, in setting out the “crucial determinant” and the “two basic conditions” for deferral in *National Radio Co.* and *Eastman Broadcasting Co.* respectively, the Board did not mention the exclusivity of the contract arbitration procedures as one of the criteria necessary for deferral. Rather, in *National Radio Co.*, the Board merely emphasized the “reasonableness of the assumption that the arbitration procedure will resolve [the] dispute,”²²⁰ and, in *Eastman Broadcasting Co.*, it called for deferral where “the disputed issues are . . . susceptible of resolution”²²¹ under the contract grievance machinery. If, however, the contract between the parties does not expressly provide for the resolution of disputes by arbitration, the Board as yet has not decided to defer the unfair labor practice charge.²²²

The development of the Board’s deferral policy in this area has been expressly acknowledged by the Board General Counsel in the new *Collyer* guidelines,²²³ wherein it is stated:

It seems clear . . . that the Board predicates deferral on the *availability* of grievance-arbitration procedures in otherwise suitable circumstances and not on any express or implied agreement of the parties to employ *only* those procedures in the settlement of their disputes.²²⁴

217. 192 N.L.R.B. at 849 (Member Fanning, dissenting).

218. 199 N.L.R.B. No. 44 (Oct. 2, 1972).

219. *Id.* at 2 (emphasis added).

220. 198 N.L.R.B. No. 1, at 17.

221. 199 N.L.R.B. No. 58, at 12.

222. See, e.g., *Machinists Dist. 10*, 200 N.L.R.B. No. 165 (Dec. 29, 1972), where the Board denied the union’s motion, predicated on *Collyer*, to dismiss the charge and to defer to the grievance provisions in the contract. The Board emphasized that the contract did not provide for arbitration and, therefore, it was unnecessary to decide whether *Collyer* was applicable. *Id.* at 4 n.4. Cf. *Tulsa-Wisconsin Funeral Homes, Inc.*, 195 N.L.R.B. No. 20 (Jan. 26, 1972), enforced, No. 72-1251 (10th Cir., July 12, 1973) where the Board refused to defer because the contract provided for arbitration only upon the mutual assent of the parties. “Here,” the Board said, “whenever the [employer] denies a grievance at the final step, the contract binds no one to any further procedure for peaceful resolution of the dispute.” *Id.* at 1 n.1.

223. General Counsel’s Memorandum, Arbitration Deferral Under *Collyer*—Revised Guidelines, May 10, 1973.

224. *Id.* at 27 n.37.

But once the Board determines that arbitration is *available* under the contract, it still remains necessary to decide whether the parties have contractually undertaken to arbitrate the kind of dispute which is the subject of the unfair labor practice charge; put another way, to warrant deferral, the subject matter of the dispute under consideration must be included in the issues which the contract makes arbitrable.²²⁵ This leads us to a consideration of how broadly post-*Collyer* cases have construed those parts of arbitration agreements which enumerate the proper subjects for arbitration. In *Collyer*, the Board merely stated without further analysis that the arbitration clause was "unquestionably broad enough to embrace [the] dispute."²²⁶ In subsequent cases, the Board has liberally interpreted what disputes may be arbitrable under the terms of a specific grievance contract.²²⁷

Further, the Board has continued to make it clear that the passage of the time limits for the filing of grievance proceedings, as occurred in *Collyer*,²²⁸ will not bar deferral. For example, in *Urban N. Patman, Inc.*,²²⁹ the trial examiner in finding an 8(a)(5) violation, concluded that the Board could not defer to arbitration because, *inter alia*, "the grievance provisions [require] that an employee must file a grievance in order for the dispute to proceed to arbitration, and no such grievance was filed in this case . . ."²³⁰ The Board reversed, finding that "the filing of a grievance is not a prerequisite to deferral for, in the lead case of *Collyer*, no such grievance had been filed."²³¹

A corollary consideration elicited by the Board in *Collyer* was that the

225. "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers Trilogy*, 363 U.S. 564, 582 (1960).

226. 192 N.L.R.B. at 842.

227. See, e.g., *Southwestern Bell Tel. Co.*, 198 N.L.R.B. No. 6 (July 31, 1972); *Wrought Washer Mfg. Co.*, 197 N.L.R.B. No. 14 (May 24, 1972); *Norfolk, Portsmouth Wholesale Beer Distribs. Ass'n*, 196 N.L.R.B. No. 165 (May 19, 1972); *Great Coastal Express, Inc.*, 196 N.L.R.B. No. 129 (May 2, 1972). But cf. *Joseph T. Ryerson & Sons, Inc.*, 199 N.L.R.B. No. 44 (Oct. 2, 1972), where the Board refused deferral of one portion of the complaint, in part because it did not "clearly appear that the incident complained of . . . could form the basis for a grievance cognizable under the contract" and "there [was] no showing that the arbitrator would have any authority, under the contract, to consider or remedy [the violation alleged]." *Id.* at 5.

228. In *Collyer*, Member Fanning's dissent noted that "the time limits [for filing grievances] have passed." 192 N.L.R.B. at 847 (Member Fanning, dissenting). See text accompanying notes 111-15 *supra*.

229. 197 N.L.R.B. No. 150 (June 30, 1972), appeal docketed sub nom. *Provision House Workers, Local 274 v. NLRB*, No. 72-2617 (9th Cir., Oct. 24, 1972).

230. *Id.* at 3.

231. *Id.*

employer "credibly asserted its willingness to resort to arbitration."²³² This same "willingness to have the dispute resolved in this manner" was likewise noted by the Board in *Coppus Engineering Corp.*²³³ Moreover, in *Collyer*, the Board provided a safeguard against procrastination or intransigence on the part of the respondent in submission to arbitration evidencing an unwillingness to arbitrate. In such situations the Board retains jurisdiction over the dispute for the purpose of entertaining a timely motion showing that "the dispute has not, with reasonable promptness . . . been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration . . ."²³⁴ Thus, the Board has a "club in the closet" which it will use to revoke deferral and to issue a decision on the merits in the event that a prompt submission is defeated by respondent's unwillingness to arbitrate.

In *Medical Manors, Inc.*,²³⁵ for example, the Board admonished the respondent that jurisdiction was being retained "against the contingency that respondent might engage in further foot-dragging in such manner that the disputes in issue are not promptly submitted to arbitration."²³⁶

A final criterion for deferral recognized by the Board in *Collyer* was the special skill and experience qualifying arbitrators to decide disputes arising under the bargaining relationship. The importance of this criterion has been demonstrated in post-*Collyer* cases, by the Board's deferral on issues that are primarily statutory.²³⁷

As noted at the outset of the discussion of the post-*Collyer* cases, Member Brown, in his concurring opinion, favored a more expansive deferral policy. Nevertheless, he expressed serious reservations about surrendering bargaining unit determinations to private parties and applying the *Collyer* principle to representation cases.²³⁸ The Board apparently has heeded this caveat thus far, holding that accretion issues are not suitable for deferral under *Collyer*. In *Combustion Engineering, Inc.*,²³⁹ the Board rejected the contention that employees of a newly established facility had been accreted to an existing bargaining unit and thus covered by the existing agreement. In doing so, the Board stated:

232. 192 N.L.R.B. at 842.

233. 195 N.L.R.B. 595, 602 (1972).

234. 192 N.L.R.B. at 843.

235. 199 N.L.R.B. No. 139 (Oct. 9, 1972).

236. *Id.* at 6 n.2.

237. See, e.g., *Associated Press*, 199 N.L.R.B. No. 168 (Oct. 27, 1972); *L.E.M., Inc.*, 198 N.L.R.B. No. 99 (Aug. 4, 1972); *National Radio Co.*, 198 N.L.R.B. No. 1 (July 31, 1972); *Bethlehem Steel Corp.*, 197 N.L.R.B. No. 121 (June 21, 1972); *Norfolk, Portsmouth Wholesale Beer Distribs. Ass'n*, 196 N.L.R.B. No. 165 (May 19, 1972).

238. 192 N.L.R.B. at 845.

239. 195 N.L.R.B. 909 (1972).

With respect to the award of the arbitrator, the question of whether the existing contract was intended, or can be construed, to cover those employees at [the new plant] who were hired after its effective date is a question for the arbitrator, but his conclusion on that issue does not govern or guide the Board in its disposition of the issue presented here. For . . . it is nevertheless the obligation of the Board to determine whether the employees at [the new plant] constituted an accretion to the existing unit.²⁴⁰

However, a more recent case may signal a change in the Board's attitude. In *Champlin Petroleum Co.*,²⁴¹ the Board affirmed the administrative trial judge's decision deferring alleged violations of sections 8(a)(3) and 8(a)(1) of the Labor Management Relations Act although the controversy involved the issue of "whether the warehouse employees may be considered an accretion to the bargaining unit."²⁴² Conceding that the Board's expressed reservation about relegating unit determinations to private parties posed a problem, the administrative law judge nevertheless had concluded:

The Board, however, has given no indication that it would not honor a unit determination arrived at by means of application or interpretation of the contract if such determination were consistent with Board law or policy.²⁴³

Whether the *Collyer* doctrine has advanced into the accretion area may be determined in the near future.

The preceding discussion which has highlighted some of the post-*Collyer* Board cases attempted to indicate the direction in which the Board is moving and the approach which it has taken on the fundamental issues emerging from *Collyer*. A review of the cases pending in various courts may further clarify the course that *Collyer* will follow.

V. POST-*Collyer* APPELLATE REVIEW

The first case to seek judicial review of the *Collyer* doctrine was *CWA v. NLRB*.²⁴⁴ In *CWA*, the union, believing that changes in the pay scale violated section 8(a)(5), filed an unfair labor practice charge with the Board and went on strike.²⁴⁵ Prior to the resolution of the charges by the Board, management sought,²⁴⁶ and on appeal was granted, a *Boys Mar-*

240. *Id.* See also *Machinists Dist. 10*, 200 N.L.R.B. No. 165 (Dec. 29, 1972).

241. 201 N.L.R.B. No. 9 (Jan. 8, 1973).

242. *Id.* at 14.

243. *Id.* at 15.

244. *Local 6222, CWA v. NLRB*, No. 72-1761 (D.C. Cir., Nov. 23, 1973) (*per curiam*). Although this was the first case to be argued, it was not the first in which a decision was rendered; see discussion *infra* at note 325 et seq.

245. Brief for Respondent at 2-9, *Local 6222, CWA v. NLRB*.

246. *Southwestern Bell Tel. Co. v. CWA*, 324 F. Supp. 830 (S.D. Tex.), *rev'd*, 454 F.2d 1333 (5th Cir. 1971).

lets injunction by the Fifth Circuit which directed the parties to arbitrate.²⁴⁷ Faced with this decision, the Board deferred to the arbitrator.²⁴⁸

Challenging the Board's deferral, the union noted the discrepancy between numerous instances in which the doctrine of deferral had been invoked²⁴⁹ and the *Collyer* majority's original modest assessment of the scope of the doctrine.²⁵⁰ Addressing itself to the original Wagner Act of 1935, the union then argued that the deletion of a deferral clause from section 10(b), as originally drafted, manifested clear congressional intent to reject any policy of Board deferral.²⁵¹ Reference also was made to section 14(c) of the Labor Management Relations Act which provides in pertinent part: "[t]hat the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."²⁵² The union further contended that because section 10(k) of the Act regarding jurisdictional disputes specifically contains deferral language, deferral in unfair labor practice cases is necessarily excluded.²⁵³

As precedent the union cited the recent case of *Motor Coach Employees v. Lockridge*,²⁵⁴ which upheld the policy of federal pre-emption in the field of labor law spelled out in *San Diego Building Trades Council v. Garmon*²⁵⁵ some twelve years earlier. If *Lockridge* had the effect of preempting the field of unfair labor practice violations, then the Board alone would be able to address itself to situations in which there was a plausible inference of an unfair labor practice. However, the union did not urge such a strong interpretation, but argued instead that *Lockridge* was merely indicative of a policy favoring the use of NLRB expertise in this area.

The union glossed over *H.K. Porter Co. v. NLRB*,²⁵⁶ which precludes the Board from rewriting a deficient collective bargaining agreement, and spent more time elaborating on *UAW v. NLRB*.²⁵⁷ The union urged that this latter case strongly supported the proposition that the NLRB can neither defer nor refuse to act.²⁵⁸ Turning then to what it labeled the

247. 454 F.2d at 1337.

248. Southwestern Bell Tel. Co., 198 N.L.R.B. No. 6, at 5-6 (Aug. 4, 1972).

249. Brief for Petitioner at 10-11, Local 6222, CWA v. NLRB.

250. 192 N.L.R.B. at 842-43.

251. Brief for Petitioner at 12, Local 6222, CWA v. NLRB.

252. 29 U.S.C. § 164(c)(1) (1970).

253. Brief for Petitioner at 15, Local 6222, CWA v. NLRB.

254. 403 U.S. 274 (1971).

255. 359 U.S. 236 (1959).

256. 397 U.S. 99 (1970).

257. 455 F.2d 1357 (D.C. Cir. 1971) (NLRB must set forth the reasons for its decisions). This case is referred to by the union in its brief as *NLRB v. Udylite Corp.*

258. Brief for Petitioner at 23, Local 6222, CWA v. NLRB.

"mystique of arbitration,"²⁵⁹ the union catalogued the evils inherent in arbitration²⁶⁰—including the thrusting of a complainant into the hands of incompetents whose sole qualification for sitting in judgment is their acceptability to the parties; the lack of enforcement power; the lack of stare decisis; and the preclusion of judicial review. In conclusion the union urged that *Collyer* was heralding a new era of confusion and disorder for those seeking some semblance of uniformity in the process of collective-bargaining enforcement.

In its response to the union's brief, the Board concentrated initially on rebutting the union's assertion that entrusting decisions to arbitrators is in derogation of its responsibility, amounting to turning loose on the public an unmanageable horde of ad hoc rule-makers. Quoting from *Collyer*²⁶¹ and the *Steelworkers Trilogy*,²⁶² the Board observed that the special skill of an arbitrator in resolving a contractual conflict is the most desirable means of performing the will of the parties. The Board then focused its attention on the language of the Labor Management Relations Act in support of its contention that it has the authority to defer.²⁶³ The thrust of the Board's argument was that, although the Board cannot be displaced by another body, the Taft-Hartley amendments (specifically sections 301 and 203(d)), and the language of section 14(c) encourage rather than preclude deferral.²⁶⁴ In support of this argument, the Board cited *Carey v. Westinghouse Electric Corp.*,²⁶⁵ in which the Supreme Court indirectly approved the well established *Spielberg* doctrine. As additional support, the Board enumerated various instances in which it had deferred over the years, including *Dubo Manufacturing Co.*²⁶⁶ Concluding with some policy arguments favoring deferral—it obviates the dangers resulting from a multiplicity of rulings, affords a welcome reduction in caseload, and promotes industrial peace²⁶⁷—the Board asked that *Collyer* be received with warm acceptance as a logical extension of the *Spielberg* doctrine.²⁶⁸

259. Id. at 27; 192 N.L.R.B. at 856 (Member Fanning dissenting).

260. Brief for Petitioner at 28-29, Local 6222, CWA v. NLRB.

261. See Brief for Respondent at 11-12, Local 6222, CWA v. NLRB. "[D]isputes 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 the Board of a particular provision of our statute." 192 N.L.R.B. at 839.

262. Brief for Respondent at 14-15, Local 6222, CWA v. NLRB.

263. Id. at 18-19.

264. See Brief for Respondent at 13-14, 18-19, Local 6222, CWA v. NLRB. Section 203(d) provides: "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." 29 U.S.C. § 173(d) (1970).

265. 375 U.S. 261, 271 (1964).

266. 142 N.L.R.B. 431 (1963).

267. Brief for NLRB at 33-35, Local 6222, CWA v. NLRB.

268. Id. at 36.

Despite the issues presented in the opposing briefs, the facts in *CWA* militated against a definitive judicial pronouncement on the *Collyer* doctrine. As noted above, in granting an injunction, the Court of Appeals for the Fifth Circuit had directed the parties to arbitrate.²⁶⁹ The arbitration proceedings were pending at the time the Board issued its deferral²⁷⁰ and were concluded prior to oral argument on the appeal from that deferral. In *Dubo Manufacturing Corp.*,²⁷¹ the Board deferred after arbitration had already begun. In *CWA* the arbitrator actually rendered a decision on July 3, 1973 while that case was still under consideration by the court. Thus the court in *CWA* also was obliged to consider *Smith v. Evening News Association*,²⁷² approving enforcement of an arbitrator's award in which potential unfair labor practice issues were resolved, as well as the long standing precedent of *Spielberg*. Clearly, the *Collyer* issues were blurred sufficiently to make any statement by the court of doubtful precedential value. It did not come as a complete surprise, therefore, that the court, upon the motion of the petitioner, remanded the case to the Board without rendering any decision.²⁷³ What is noteworthy is the court's comment that it was remanding the case "for further consideration under the jurisdiction which the Board has purported to retain."²⁷⁴ The court appears to be harboring some doubts about the jurisdictional aspects of *Collyer*, astutely avoided by the parties themselves.

Another *Collyer* case pending before the Court of Appeals for the District of Columbia is *Local 2188, IBEW v. NLRB*.²⁷⁵ Although similar to *CWA* in that it was triggered by the Board's deferral of issues involving alleged section 8(a)(5) violations,²⁷⁶ neither court orders nor arbitral proceedings have intervened in *IBEW* to cloud the *Collyer* issue.

Petitioner in *IBEW* argued that by favoring a policy of arbitration the Board misconstrued the congressional intent underlying the Labor Management Relations Act.²⁷⁷ Noting that language favoring arbitration did not appear in Title I of the Act where unfair labor practices were discussed, but only in Title II (section 203(d)), petitioner urged that this indicated a congressional intent to limit deferrals to the area of con-

269. See note 247 supra and accompanying text.

270. 198 N.L.R.B. No. 6, at 13-14.

271. 142 N.L.R.B. 431 (1963).

272. 371 U.S. 195 (1962).

273. *CWA v. NLRB*, No. 72-1761 (D.C. Cir., Nov. 23, 1973) (per curiam).

274. *Id.*

275. Nos. 72-1994, 72-1995 (D.C. Cir., filed Oct. 20, 1972) wherein the IBEW has consolidated two companion cases which, while different on the facts, confront the *Collyer* problem head on.

276. Brief for Petitioner at 1-16, *Local 2188, IBEW v. NLRB*.

277. *Id.* at 22.

tract enforcement (Titles II and III).²⁷⁸ The area of unfair labor practice, petitioner contended, has been pre-empted from arbitration by section 10(a) of the Act.²⁷⁹

Petitioner found support for this interpretation of congressional intent in a brief submitted by the Board in *NLRB v. C & C Plywood Corp.*²⁸⁰ There, the Board argued:

As the present case shows, contract defenses to unfair labor practice charges frequently may not be judged merely as abstract questions of contract law, disassociated from statutory considerations

The decision of such a question cannot properly be made without bringing to bear a full appreciation of the scope and tradition of the statutory right alleged to have been waived, matters as to which the Board has been entrusted with primary statutory responsibility.²⁸¹

Nor, petitioner argued, is such an interpretation inconsistent with *Boys Markets* where the Court noted that the "very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts or other self-help measures."²⁸² Emphasizing that the courts have limited the role of an arbitrator "to interpretation and application of the collective bargaining agreement; . . . [and not to dispensation of] his own brand of industrial justice,"²⁸³ petitioner contended that deferral in unfair labor practice situations was neither intended by Congress nor condoned by the courts.

Assuming *arguendo* the validity of *Collyer*, petitioner distinguished *IBEW* on the ground of "willingness to resort to arbitration."²⁸⁴ Noting that the parties in *IBEW* did not enter into an agreement specifically precluding Board review,²⁸⁵ petitioner argued that relegating the parties to arbitration was in effect a rewriting of the agreement, a practice proscribed by *H.K. Porter Co.*²⁸⁶ Even if the parties had entered into such an agreement, petitioner contended that it could not prevent the

278. *Id.* at 22-23.

279. *Id.* at 23.

280. 385 U.S. 421 (1967).

281. Brief for NLRB, *NLRB v. C & C Plywood Corp.*, quoted in Brief for Petitioner at 18, *Local 2188, IBEW v. NLRB*.

282. 398 U.S. 235, 249 (1970).

283. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

284. Brief for Petitioner at 54-55, *Local 2188, IBEW v. NLRB*. "We are not compelling any party to agree to arbitrate disputes arising during a contract term, but are merely giving full effect to their own voluntary agreements to submit all such disputes to arbitration, rather than permitting such agreements to be sidestepped and permitting the substitution of our process, a forum not contemplated by their own agreement." 192 N.L.R.B. at 842.

285. Brief for Petitioner at 29-30, *Local 2188, IBEW v. NLRB*.

286. 397 U.S. 99 (1970).

Board's assumption of jurisdiction, citing the interpretation of section 10(a) of the Labor Management Relations Act in *Lodge 743, IAM v. United Aircraft Corp.*²⁸⁷ As further support, petitioner quoted the NLRB's brief in *C & C Plywood Corp.*, where, reflecting on the language of an earlier case,²⁸⁸ the Board commented: "[t]he Court, however, did not suggest that the Board might—and it certainly did not intimate that it must decline jurisdiction merely because of the possibility of a co-existing arbitral or judicial remedy."²⁸⁹

Petitioner went on to suggest that: parties less financially sound will be loathe to indulge in the luxury of enforced arbitration;²⁹⁰ the system will break down if so rudely overburdened;²⁹¹ and arbitrators are hardly competent to wrestle with weighty statutory matters.²⁹² Petitioner continued that at least one court has noted greater perception at the Board level, afforded by a broad overview of the system.²⁹³ There was further criticism that arbitrators lack the statutory authority for enforcement vested in the Board.²⁹⁴ Furthermore, considerable time is lost when a case is shuttled between the Board and arbitrators rather than being processed expeditiously by the Board.²⁹⁵

In its reply to *IBEW*, the Board posited answers analogous to those presented in its *CWA* brief, but was more sophisticated and introspective in its approach to the subject matter. The first portion of its response was a recapitulation of the facts of the case²⁹⁶ which, as already indicated, involved a question of whether or not a unilateral change in working conditions actually occurred. These facts were not in dispute but there was little agreement as to the appropriate legal resolution of the conflict. The Board addressed itself to this with an introduction to the *Collyer* policy.²⁹⁷ The Board has concluded that it should defer whenever a dispute is well suited for arbitration, the company has asserted a willingness to arbitrate, and there exists a history of amicable collective-bargaining relations.²⁹⁸ It further averred that there has been a careful screening of cases to insure that the rights of the parties are safe-

287. 337 F.2d 5 (2d Cir. 1964), cert. denied, 380 U.S. 908 (1965).

288. *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964).

289. See Brief for Petitioner at 38, *Local 2188, IBEW v. NLRB*.

290. *Id.* at 33, 44.

291. *Id.* at 34 & n.16.

292. *Id.* at 42.

293. *Id.* at 43 (citing *United Aircraft Corp. v. NLRB*, 440 F.2d 85, 99 (2d Cir. 1971)).

294. *Id.* at 43-44.

295. *Id.* at 45-46.

296. Brief for NLRB at 1-3, *Local 2188, IBEW v. NLRB*.

297. *Id.* at 13-16.

298. *Id.* at 14-15.

guarded.²⁹⁹ Thus, its handling of potential unfair labor practice petitions has been discerning and discriminating as have its decisions under *Spielberg*.³⁰⁰

Respondent then set out to rebut petitioner's contention that a policy of deferral is beyond the scope of Board discretion, pointing out that although section 10(a) of the Act gives the Board authority to resolve unfair labor practice disputes, it does not compel the Board to act.

"[I]t is settled law that the extent to which the Board chooses to exercise [its] jurisdiction . . . is a matter of administrative policy within the Board's discretion." . . . [T]he Board has discretion to "decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act."³⁰¹

The Board also set forth the language of section 203(d) and noted that it, as well as section 301, was passed in 1947, twelve years after the Wagner Act, by which time there had emerged congressional preference for resolution of industrial strife by the arbitral process.³⁰² Furthermore, when these amendments were passed, Congress considered making the violation of an arbitration agreement an unfair labor practice.³⁰³ Although this provision was deleted from the final version of the bill, the commentary in the Senate Report³⁰⁴ is indicative of the results which Congress hoped to achieve by the Taft-Hartley Amendments:

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.³⁰⁵

The Board went on to point out the actions of the courts in the years since Taft-Hartley was enacted. They have, for example, given strong affirmation to the *Spielberg* doctrine,³⁰⁶ a *fait accompli* which the petitioner not only failed to challenge, but in fact accepted.³⁰⁷ Moreover,

299. *Id.* at 16 n.15 (citing, e.g., Pauley Paving Co., 200 N.L.R.B. No. 124 (Dec. 12, 1972); Local 17, Sheet Metal Workers, 199 N.L.R.B. No. 26 (Sept. 20, 1972); Kansas Meat Packers, 198 N.L.R.B. No. 2 (July 31, 1972); Tulsa-Whisenhunt Funeral Homes, Inc., 195 N.L.R.B. No. 20 (Jan. 26, 1972)).

300. See, e.g., Brief for NLRB at 32 n.32, Local 2188, IBEW v. NLRB (citing Local 425, Office Employees v. NLRB, 419 F.2d 314 (D.C. Cir. 1969)). "There is nothing before us to indicate abuses [in the Spielberg policy] at this regional level." Office Employees, *supra*, at 319.

301. Brief for NLRB at 17, Local 2188, IBEW v. NLRB (citations omitted).

302. *Id.* at 18. See also text accompanying notes 75-78 *supra*.

303. Brief for NLRB at 18-19, Local 2188, IBEW v. NLRB.

304. S. Rep. No. 105, 80th Cong., 1st Sess. (1947).

305. *Id.* at 23.

306. Brief for NLRB at 23, Local 2188, IBEW v. NLRB.

307. Brief for Petitioner at 37, Local 2188, IBEW v. NLRB.

the Board cited *NLRB v. Strong*,³⁰⁸ and *Charles Dowd Box Co. v. Courtney*,³⁰⁹ as support for the proposition that the Board is not authorized to replace the courts in the field of contract interpretation.³¹⁰ It referred to *NLRB v. C & C Plywood Corp.*³¹¹ as merely standing for the proposition that, in the absence of any arbitration provision, the Court would be inclined to approve of Board intervention. This is not to be taken as an anti-deferral policy and the Court in *C & C Plywood* referred to *Carey v. Westinghouse Electric Corp.*³¹² as support for its language:

[I]t is important first to point out that the collective bargaining agreement contained no arbitration clause. The contract did provide grievance procedures, but the end result of those procedures, if differences between the parties remained unresolved, was economic warfare, not "the therapy of arbitration."³¹³

Other important decisions—*Steelworkers Trilogy*, *Smith v. Evening News Association*, and *Boys Markets*—were interjected,³¹⁴ with one of the *Trilogy* quoted at length.³¹⁵ The thrust of respondent's argument appeared to be that in light of the Court's proclivity to support the use of the arbitral forum, there is no sound reason for refusing to extend the *Spielberg* doctrine to *Collyer*. Furthermore, although it is true that, pursuant to section 10(a) of the LMRA, the Board cannot be precluded from exercising its authority when an unfair labor practice may be involved, it is equally correct that the Board is free to exercise its discretion and refrain from acting when to do so will serve the fundamental aims of the Act.³¹⁶

The Board then added a new twist to its *Collyer* argument with an exhaustion of remedies theory.³¹⁷ To this end, the Board proffered:³¹⁸ (1) the Norris-La Guardia Act which provides for the denial of an injunction to a party who has failed to negotiate or arbitrate; (2) *Republic Steel Corp. v. Maddox*,³¹⁹ requiring union members to exhaust internal grievance procedures; and (3) the Labor-Management Reporting and Disclosure Act of 1959 encouraging courts to refrain³²⁰ from

308. 393 U.S. 357 (1969).

309. 368 U.S. 502 (1962).

310. Brief for NLRB at 20, Local 2188, IBEW v. NLRB.

311. 385 U.S. 421 (1967).

312. 375 U.S. 261 (1964).

313. 385 U.S. at 426 (footnote omitted).

314. Brief for NLRB at 21-24, Local 2188, IBEW v. NLRB.

315. *Id.* at 22.

316. *Id.* at 24.

317. *Id.*

318. *Id.* at 25-26.

319. 379 U.S. 650 (1965).

320. 29 U.S.C. § 411(a)(4) (1970).

intervention (though not binding them to do so) while attempts are made to resolve differences between an employee and his union on an internal basis. This is an interesting and persuasive argument assuming the existence of a remedy, but is inappropriate where the time limit for invoking such a remedy has expired. The majority of the Board in *Collyer* artfully avoided the time issue. Respondent also endeavored to defeat the chimerical horrors which petitioner had conjured up of incompetent arbitrators being accorded more responsibility than they can handle, thus allowing unfair labor practices to go uncorrected. The arbitrator is generally chosen because of his expertise in dealing with the daily wrangles arising at the grassroots level. He is familiar with the argot of the shop, the practices in the area, and the personnel involved. He can assess the situation with pragmatic insight rather than applying esoteric niceties of law in ignorance of the facts.³²¹ The NLRB dismissed as unrealistic any mercurial increases in the meting out of justice by resort to the Board since arbitration is, if anything, less time-consuming.³²² Lastly, there is no reason to envision either a decrease in arbitration³²³ or, in light of the success of *Spielberg*, a dilution of the remedies afforded the aggrieved.³²⁴

On June 20, 1973, the United States Court of Appeals for the Second Circuit issued the first appellate court decision on the *Collyer* doctrine in *Nabisco, Inc. v. NLRB*.³²⁵ While many of the issues involved were similar to those already fully discussed, this case was somewhat unique in that it was management which protested the broad sweep of *Collyer*, while the union was the party allegedly in violation of the contract. Moreover, section 8(b) was in issue rather than section 8(a). Specifically, the union was charged with violations of section 8(b)(3) for refusing to make cash collections for the company and sections 8(b)(1)(a) and 8(b)(2) for coercing workers who continued to do so.³²⁶

The petitioner, in its brief, did not take issue with *Spielberg* or the development of a deferral policy under that doctrine.³²⁷ In fact, it did not really criticize the Board for endorsing *Collyer*, but actually acquiesced in the propriety of deferral under ordinary circumstances,³²⁸ an attitude frequently expressed by management. However, the petitioner

321. Brief for NLRB at 22, *Local 2188, IBEW v. NLRB*.

322. *Id.* at 31 n.31.

323. *Id.*

324. *Id.* at 32.

325. 479 F.2d 770 (2d Cir. 1973).

326. *Id.* at 772.

327. Brief for Petitioner at 17-20, *Nabisco, Inc. v. NLRB*.

328. *Id.* at 20-22.

challenged the application of the doctrine in this particular instance as reaching well beyond the scope of *Collyer*.

The first point argued was that the time had passed for invoking available grievance procedures.³²⁹ Apparently management was less concerned with this procedural nicety than it was with the Board's disregard for the results it would trigger by deferral in this case.

Thus, the Board has asked the Company to file a grievance three years after the events giving rise to the dispute . . . and where, if the grievance deadlocks, the Union is not committed to arbitration but the Company is virtually assured of facing a strike.³³⁰

As the petitioner had explained earlier in its brief,³³¹ the grievance committee was composed of an equal number of union and company members. In order to go to arbitration it required a majority vote which meant a capitulation by either a union or company member, an unlikely result. Absent this rare concurrence of a majority, "either party [was] permitted all legal or economic recourse including strike or lockout action."³³² The contract was so designed because the Teamsters can bring greater leverage to bear by confronting an employer with loss of his trucking service than it can by always proceeding to arbitration. Given the Board's decision in this instance, the company felt faced with the choice of either surrendering to the union demands or facing a strike.

As the company pointed out, the Board refused to defer in *Tulsa-Whisenhunt Funeral Homes, Inc.*,³³³ where arbitration could have been thwarted by a refusal on the part of the general manager to proceed further, which would have resulted in economic warfare. It is difficult to perceive any significant difference in *Nabisco*: either party could prevent the implementation of arbitral proceedings; their bargaining history showed this to be a common practice.

A reading of the Board's brief makes it clear that the Board intended to push its theory of exhaustion of remedies to the limit. In other words, even though either party can thwart arbitration, as long as the possibility for internal resolution of the problem exists, the burden will be on the party seeking to invoke the aid of the Board to show that it has gone as far as it can go and has been rebuffed. Then the Board will consider the complaint. This is a marked deviation from the requirement, enunciated earlier in the development of *Collyer*, that mandatory arbitration be available.

329. Id. at 25.

330. Id.

331. Id. at 23-24.

332. Id. at 23.

333. 195 N.L.R.B. No. 20 (Jan. 26, 1972).

Considering the far-reaching implications of *Collyer*, the brevity of the Second Circuit's opinion in *Nabisco* was somewhat surprising—it took the court less than two pages to reach its conclusion. Following the lead of the petitioner's brief, the court never questioned the propriety of *Collyer* per se. Moreover, Judges Friendly, Hays and Jameson ignored, as had the *Collyer* majority, petitioner's reminder that the time limits for arbitration had expired. Thus, the court failed to confront a crucial issue—the extent to which the Board can compel a party to arbitrate, after the contractual time limits for doing so have run, without violating the prohibition against the rewriting of contracts.

What the *Nabisco* court did focus on was the question of deferral absent mandatory arbitration:³³⁴ Should the scope of *Collyer* be so confined?

We do not read the policy underlying the Act, as expressed in the legislative history, so narrowly. As the Senate Report stated . . . "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."³³⁵

For case law to support the proposition that the Board has a wide latitude in its discretion to defer, the court relied on *Carey v. Westinghouse Electric Corp.*³³⁶ and *Smith v. Evening News Association.*³³⁷ The result was a wholehearted endorsement of a broad and expanding policy of deferral where there exists the slightest possibility that arbitration may occur. The court seemed reluctant, however, to acknowledge that this case represented any marked departure from previous Board decisions. Thus, the case of *Tulsa-Whisenhunt Funeral Homes, Inc.* was relegated to a footnote as clearly distinguishable.³³⁸ To be sure, the cases may be distinguished on the facts. However, when both cases are viewed in light of the ultimate objective which the Board presumably hopes to achieve, namely arbitration, the court's logic appears to condone a distinction without a difference. In *Tulsa-Whisenhunt Funeral Homes, Inc.*, the arbitral process was available on an ad hoc basis after completion of the final step of the grievance procedure. Thus, although arbitration was not

334. 479 F.2d at 773.

335. *Id.* at 773 (quoting S. Rep. No. 105, 80th Cong., 1st Sess. 23 (1947); 1 Legislative History of the Labor Management Relations Act of 1947, at 429). It is interesting to note that this identical statutory argument was posited by the Board in its IBEW brief. See text accompanying notes 304-05 *supra*.

336. 375 U.S. 261, 271 (1964), in turn quoting approvingly from International Harvester Co., 138 N.L.R.B. 923, 925-26 (1962).

337. 371 U.S. 195, 198 n.6 (1962). These are the same cases relied on by the majority in *Collyer* itself. In fact the court quoted the same portions used by the Board.

338. 479 F.2d at 773 n.3.

specifically outlined within the framework of the contract, the parties could, if both agreed, proceed to arbitration after exhausting the grievance procedure. The Board, in refusing to defer in *Tulsa-Whisenhunt Funeral Homes, Inc.*, made no effort to discern how often the parties had in fact entered into such an arbitration arrangement.

In *Nabisco*, arbitration was specifically provided for in the collective-bargaining agreement. Nevertheless, it could be and usually was defeated. Neither the Board in granting nor the Court in approving deferral gave any weight to the unlikelihood that the arbitral process would be utilized. It makes little sense for the Board to defer where although the machinery of arbitration has been technically outlined in the contract, resort to arbitration is highly unlikely. Conversely, it would be sensible to refuse to defer where arbitration has not been technically provided for in the contract but the bargaining history of the parties indicates that resort to arbitration is a usual result. Surely, the logically consistent approach would be to defer in an appropriate *Tulsa*-type case as well.

While *Collyer* was being debated on the east coast it was not being entirely neglected on the west coast. In the Ninth Circuit case of *Local 274, Provision House Workers v. NLRB*,³³⁰ the union was disenchanted with what it termed a unilateral change in the wage and fringe benefits provisions.³⁴⁰ As in the other cases pending appellate review, the Board found that the issues involved were up for determination through the agreed-upon procedures of arbitration and declined to consider the matter under its *Collyer* doctrine.³⁴¹

The Board's brief concluded that deferral was proper and within the scope of its authority³⁴² for the same reasons advanced in its *IBEW* brief.³⁴³ It rejected the premise that *Templeton v. Dixie Color Printing Co.*³⁴⁴ was a mandate against deferral,³⁴⁵ as it had done in its brief in the *CWA* case.³⁴⁶ It went on to pronounce the favoritism which Congress was to display for the Taft-Hartley Amendments,³⁴⁷ liberally relying on

339. No. 72-2617 (9th Cir., filed Oct. 24, 1972), appealing *Urban N. Patman, Inc.*, 197 N.L.R.B. No. 150 (June 30, 1972).

340. Brief for NLRB at 2 et seq., *Local 274, Provision House Workers v. NLRB* (discussion of Board's finding of facts).

341. 197 N.L.R.B. No. 150, at 4.

342. Brief for NLRB at 13, *Local 274, Provision House Workers v. NLRB*.

343. Brief for NLRB at 17, *Local 2188, IBEW v. NLRB*.

344. 444 F.2d 1064 (5th Cir. 1971).

345. Brief for NLRB at 14 n.3, *Local 274, Provision House Workers v. NLRB*. In *Templeton*, the Board was reprimanded for abuse of discretion in arbitrarily applying its "blocking charge" policy. 444 F.2d at 1070.

346. Brief for NLRB at 24 n.12, *Local 6222, CWA v. NLRB*.

347. Brief for NLRB at 14-16, *Local 274, Provision House Workers v. NLRB*.

passages quoted in the *IBEW* brief.³⁴⁸ Of the more than sixty cases cited by the Board in its *Provision House* brief only perhaps five had not been cited previously, and were mere affirmations of previously advanced case law.

Another case pending in the United States Court of Appeals for the District of Columbia Circuit is *Associated Press v. NLRB*.³⁴⁹ While this case does involve the application of *Collyer*, the petitioner's brief³⁵⁰ is geared more toward challenging the Board's decision in the particular case than undermining the viability of *Collyer* itself. Succinctly stated, the facts involve a question as to when the cancellation of a check-off is proper. The question is whether employees have withdrawn their check-off if they resign during the hiatus between the old and new contract, absent a written withdrawal.

Petitioner, the employer, recognized a withdrawal of check-off provisions for some 102 employees during a hiatus between the termination of an old contract and the formation of a new one with the Wire Service Guild, Local 222.³⁵¹ Upon request by the union for arbitration, the petitioner sought to enjoin such a proceeding but was ordered to arbitrate by the district court.³⁵² The parties proceeded to arbitration without any challenge to the district court's order to arbitrate.³⁵³ The arbitrator decided against the petitioner on the question of dues check-off.³⁵⁴ Petitioner then sought relief from the Board, but was advised that insofar as the arbitrator had addressed issues presented, the *Spielberg* doctrine applied, and insofar as any matters sought for review which had not been passed upon by the arbitrator were concerned, the *Collyer* doctrine controlled.³⁵⁵

It would appear, therefore, because of the facts of the case and the manner in which the issues were postulated, that, like the CWA case, it will not present a clear-cut *Collyer* question. The part that was deferred under *Spielberg* clearly falls within the ambit of a long standing and

348. Brief for NLRB at 19, Local 2188, *IBEW v. NLRB*.

349. No. 73-1002 (D.C. Cir., filed Jan. 2, 1973), on appeal from 199 N.L.R.B. No. 168 (1972).

350. Brief for Petitioner, *Associated Press v. NLRB*, No. 73-1002 (D.C. Cir., filed Jan. 2, 1973).

351. *Id.* at 7.

352. *Associated Press v. Wire Serv. Guild*, 73 L.R.R.M. 2908 (S.D.N.Y. 1970).

353. "AP's argument that Judge Palmieri improvidently ordered arbitration of the dispute between the parties is clearly addressed to the improper forum. AP did not appeal Judge Palmieri's decision to the appropriate Federal court of appeals." 199 N.L.R.B. No. 168, at 12 n.9.

354. Brief for Petitioner at 11, *Associated Press v. NLRB*.

355. 199 N.L.R.B. No. 168, at 11-12.

well received deferral doctrine. If the Board is overturned on this point it will signify only that, under *Universal Camera Corp. v. NLRB*,³⁵⁶ the reviewing court did not find the evidence supporting the decision to be substantial when viewed in the light of the record in its entirety. A similar result would follow if the deferral based on *Collyer* were found to be unsound. This is especially so since the petitioner did not attack the viability of either *Spielberg* or *Collyer* in its appeal. The propriety of the doctrine is not before the court; any comment the court might address to that area would only be dicta. Also, it seems likely that other cases in which the *Collyer* issue is more clearly presented will be decided before *Associated Press*.

In the case of *Enterprise Publishing Co. v. NLRB*,³⁵⁷ management alleged that the union had violated sections 8(b)(1)(A) and 8(b)(2) of the Act.³⁵⁸ The union had sought the dismissal of three employees for alleged violations of the maintenance of membership clause, despite the fact that the employees had tendered their resignations to the union during the hiatus between the expiration of an old contract on April 23, 1970 and the signing of a new one on October 23, 1970.³⁵⁹ While the expanding focus of *Collyer* might have to be altered if petitioner prevails, this is another case in which the viability of the *Collyer* doctrine itself is conceded.³⁶⁰ Again, this is characteristically a management stance.

In *Enterprise* the alleged aberrations were threefold. First, the employees' own bargaining agent, the union, was seeking to have them discharged. Hence, resort to arbitration could not be "fair and regular" because they were not properly represented.³⁶¹ Second, statutory interpretation was involved and this was said to be beyond the competence of the arbitrator.³⁶² Last, arbitration was inappropriate since the Board has already heard the entire case on the merits.³⁶³

The last contention was denied by the Board in one brief paragraph of semantics.³⁶⁴ The Board asserted, despite two full days of hearings,

356. 340 U.S. 474 (1951).

357. No. 73-1154 (1st Cir., filed May 15, 1973), on appeal from 201 N.L.R.B. No. 118 (Feb. 12, 1973).

358. Brief for NLRB at 1, *Enterprise Publishing Co. v. NLRB*, No. 73-1154 (1st Cir., filed May 15, 1973).

359. *Id.* at 2-5 (discussion of Board's finding of facts).

360. Brief for Petitioner at 19, *Enterprise Publishing Co. v. NLRB*: "For this reason alone, this is not an appropriate case for the application of *Collyer* and it would do no violence to the *Collyer* doctrine to require the Board to decide this case on the merits."

361. *Id.* at 7.

362. *Id.* at 8.

363. *Id.*

364. Brief for NLRB at 10-11, *Enterprise Publishing Co. v. NLRB*.

that since it failed to render a decision, it didn't really hear the case on the merits. While this explanation is unsatisfactory, perhaps there was little else the Board could say. When this case arose in August 1971, *Collyer* was a novel concept.³⁶⁵ In the early stages of *Collyer's* development, exhaustive hearings before the Board were the order of the day. Since the evolution of *Collyer*, expedited procedures are being implemented by the Board with an eye towards eliminating Board review entirely in *Collyer*-type situations by encouraging the application of the *Collyer* doctrine at the regional level.³⁶⁶ Therefore, acceptance of the *Collyer* policy by petitioner presumes an acceptance of the more exhaustive review procedures that were necessary for the implementation of this policy. Since petitioner did not challenge *Collyer* itself, reversal on this ground is unlikely.

The assertion that statutory issues, unencumbered by contractual considerations, are clearly at stake and that resort to arbitration is inappropriate for their resolution presents a thornier issue and one which highlights the ever broadening scope of *Collyer*. In the 8(a)(5) context in which *Collyer* originated, the mixture of unfair labor practice and contract issues was such that one could hardly be resolved without the other. However, in the 8(b)(2) and 8(a)(3) areas, there often exists a much sharper dichotomy. One can more nearly isolate a statutory issue from attendant contract considerations. This is true in *Enterprise*.

The collective bargaining agreement had a maintenance of membership clause which provided, in essence, that an employee who was or became a member was obliged to maintain that membership during the life of the contract.³⁶⁷ It also had a clause which provided for negotiation of a new agreement with the proviso that the old contract remain in full force and effect during such negotiations.³⁶⁸ The union thus took the position that an employee could not successfully tender his resignation from membership during negotiations because the contract was still binding, there being no escape clause. The union urged that the recalcitrant employees, therefore, should be fired by the company for failing to maintain union membership. Petitioner filed an unfair labor practice charge with the Board asserting that such a lock-in of employees by contract language which fixed no termination date, since it could be renewed indefinitely, was per se unlawful.³⁶⁹ The Board's rationalization for deferral was that this was merely another case involving a contract deter-

365. *Id.*

366. See text accompanying notes 386-90 *infra*.

367. Brief for Petitioner at 3, *Enterprise Publishing Co. v. NLRB*.

368. *Id.*

369. *Id.* at 16-17.

mination since the effect that the negotiation clause (keeping the contract in full force and effect during negotiations) would have on the maintenance of membership clause (requiring good standing for the life of the agreement) was fundamentally a contract issue.³⁷⁰ Once more the Board engaged in semantics. By twisting words about, invariably one can find some semblance of a contract issue to which to resort. But here the petitioner was willing to concede the contract issue altogether. Assuming an arbitrator did find that by virtue of the negotiations clause the employees were locked into a continuous contract with no hiatus in which to resign, was that an unfair labor practice? It would be difficult to posit a more clearly isolated question of statutory interpretation. If the Board would abdicate to an arbitrator under these circumstances, it is difficult to envision when it would ever do anything but defer, no matter how specious the contract issue. The court may choose to avoid a detailed analysis of the 8(a)(3) and 8(b)(2) type question, a very controversial area of the *Collyer* doctrine, by either outright rejection or acceptance of *Collyer* under such circumstances. It would be a more difficult task for the court to attempt to lay down guidelines which are less elusive than the *Collyer* standards have been to date.

Further analysis of the Board's approach to this point is warranted. In fairness to the Board, it may have based deferral on the presumption that it is well settled law that a dues lock-in is an unfair labor practice.³⁷¹ If this were so, then the arbitrator's contract interpretation could be viewed as dispositive.³⁷² But the Board implied that this is by no means the settled law. The authors are unaware of any appellate court which has passed upon this question and are certain that the Supreme Court has not. It is doubtful that such a lock-in clause would be upheld in a right-to-work state in light of the Supreme Court's union³⁷³ and agency³⁷⁴ shop decisions allowing states to ban agreements requiring membership in a labor organization as a condition of employment. Courts in general have often found contract arrangements of excessive or inde-

370. Brief for NLRB at 11, *Enterprise Publishing Co. v. NLRB*.

371. *Id.* at 11-12 (citing *International Union, UAW*, 142 N.L.R.B. 296, 301 (1963)).

372. "Of course, should the extender clause be held to apply to the maintenance of membership clause, there would be no hiatus between contracts and, under established law, the employees would not be free to resign. . . . On the other hand, if the maintenance of membership clause should be held not to have been extended, a question would arise as to whether the employees had properly resigned. . . . Resolution of this issue presents questions of both fact and contract interpretation." *Id.* at 11-12 (citations omitted).

373. *AFL v. American Sash & Door Co.*, 335 U.S. 538 (1949); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949).

374. *Retail Clerks Local 1625 v. Schermerhorn*, 373 U.S. 746 (1963).

terminate length to be unduly oppressive.³⁷⁵ Even if it were settled law, the implications of the Board's refusal to rule on a statutory question are startling. It is doubtful that the parties to this agreement, by electing to incorporate an arbitration clause in the contract, intended to waive their right to Board review. Furthermore, the so-called settled law relied on by the Board for deferral is documented by the lone citation³⁷⁶ of a Board case over six years old.³⁷⁷ The Board apparently intends to defer anytime it has ever ruled on a question before. If such foisting of all statutory questions onto the shoulders of an arbitrator does not effectively preclude review, it certainly significantly impedes it. Arbitrators have been upheld even when they have decided wrongly on the law.³⁷⁸ How then can one petition the court to overturn an arbitrator's award when he is right on the law, the only law in the matter being a previous Board decision. Moreover, it would be difficult to argue to the Board that *Spielberg* should not be controlling because the arbitrator has applied Board law with which petitioner is unhappy. If *Collyer* is to be left substantially intact, perhaps some method should be made available for certifying for court review those legal questions which could be controlling. Otherwise, a petitioner not only must suffer the protracted delay of arbitration but also must overcome the unfair onus of the legal presumption which favors upholding the decision of an arbitrator.

Petitioner's remaining question also raises interesting implications. How will the real parties in interest—the employees who stand to be dismissed—be protected when the union is hostile to their cause? Undoubtedly the Board feels that it is not essential that the employees' interests be represented by the union since, by retaining jurisdiction, the Board can later determine if the employees were adequately protected. While this seems plausible, we do not know how the Board would respond to a number of other questions which, although alluded to by petitioner, were not fully elucidated. *Collyer* presupposes the existence of arbitration machinery of which the parties can avail themselves. Yet, in this instance, the employees have no such machinery available. They cannot initiate arbitration and their usual agent at such proceedings is hostile. Thus, they would not be bound by the result. That being the case, they would effectively get a second chance. If the union wins at arbitration and forces the company to fire its members, the employees could then resort to filing an unfair labor practice charge. This is the meaningless duplication of effort and multiplicity of suits which *Collyer*

375. Annot., 45 A.L.R.2d 77 (1956).

376. Brief for NLRB at 13-14, *Enterprise Publishing Co. v. NLRB*.

377. *Teamsters Local 959*, 167 N.L.R.B. 1042 (1967).

378. F. Elkouri & E. Elkouri, *How Arbitration Works* 27 (2d ed. 1960).

decried. On the other hand, if the Board attempts to impose the arbitrator's decision on the employees as binding, this would amount to a far more blatant instance of contract writing than the imposed waiver of time limits lamented by IBEW in its brief. The Board actually would have to create binding arbitration by its own ad hoc legislative fiat.

Petitioner's assertion presented the Board with two problems. First, it raised the possibility that an unfair labor practice charge could later be filed successfully by the employees if an adverse award were rendered, and secondly, in the absence of agreement by the employees not to be bound, it would in effect result in a rewriting of the contract by the Board. This latter proposition was not clearly articulated by the Board but it lurks prominently in the background. The Board did address the first problem and quoted *Humphrey v. Moore*,³⁷⁹ in which the Court stated: "[W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents"³⁸⁰ While this language is impressive, *Humphrey* was not an unfair labor practice case but a section 301 suit for breach of contract, and, earlier in its discussion, the Court, referring to this very same topic, stated: "[W]hether [or not] a violation of the duty of fair representation is an unfair labor practice . . . it is not necessary for us to resolve that difference here."³⁸¹

A case the brief writer for the Board failed to utilize was *International Harvester*.³⁸² In that case not only was the union hostile to the employees' interests but the employees were not even notified of the hearing, were not present, and were represented solely by management. Nonetheless, the Board affirmed the dismissal and that decision, which was challenged by the employees in an unfair labor practice suit, was upheld by the United States Court of Appeals for the Seventh Circuit. Thus, there is appellate court precedent which could preclude an unfair labor practice suit following an adverse arbitration award. The question of the duty of fair representation was not raised here. The area, therefore, is filled with far less certainty than the Board might have us believe. As to the question of contract rewriting which the Board does not address, the court in *International Harvester* clearly countenanced the binding of employees to an arbitration of which they were never advised. Of course, this result

379. 375 U.S. 335 (1964).

380. *Id.* at 349.

381. *Id.* at 344.

382. 138 N.L.R.B. 923 (1962), enforced sub nom. *Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.), cert. denied, 377 U.S. 1003 (1964). The Board cited this case in its brief as supporting deferral, but without commenting on the facts. Brief for NLRB at 7, *Enterprise Publishing Co. v. NLRB*.

preceded the decision in *H.K. Porter*,³⁸³ so one can only speculate as to whether the outcome would be the same today. However, the shape of *Collyer* will not be complete until these questions have been answered.

Finally, The Brockton Newspaper Guild, intervenor, raised for the first time, albeit in a footnote, the question which until now had lain dormant: is a *Collyer* order a final order within the meaning of the Act such that appellate review can properly be sought?³⁸⁴ Intervenor appears to have concluded perceptively that it may not be a final order.³⁸⁵ However, since intervenor is desirous of seeing *Collyer* prevail, these remarks were cautiously restricted to a footnote appraisal and it was urged that this issue not be held to be determinative. Since a court can always raise an issue of jurisdiction, even *sua sponte*, and since this matter has now been brought to the court's attention, this case may provide the first indication as to how the jurisdictional quandary posed by *Collyer* will be handled.

In *Letter Carriers, Local 2184 v. NLRB*,³⁸⁶ the union challenged the ultimate concept in *Collyerization*. There can be little doubt that Board philosophy, as embodied in *Collyer*, has been motivated greatly by the desire to reduce the Board's caseload to a manageable level.³⁸⁷ It was therefore logical and inevitable that the successful effectuation of this policy would call for the application of *Collyer* at the grassroots level, a development which would eventually relieve the Board almost entirely of its task. Precisely such an implementation of *Collyer* gave rise to the instant case. The union, which filed two separate 8(a)(5) charges, was advised by a regional director for the NLRB that since arbitration was available, he would defer on the basis of *Collyer*. After several months, having failed to resort to arbitration, the union again sought to invoke the assistance of the regional director. Another refusal by the regional director to issue an unfair labor practice charge was upheld by the Board's General Counsel. Petitioner sought to set aside that result.³⁸⁸

The case is the first to challenge the application of *Collyer* below the Board level, but as a result of the tack petitioner chose to take, a hearing on the merits will probably be delayed. It has long been held that the decision of the General Counsel not to issue an unfair labor practice

383. *H.K. Porter v. NLRB*, 397 U.S. 99 (1970).

384. Brief for Brockton Newspaper Guild as Intervenor at 6-7 n.1, *Enterprise Publishing Co. v. NLRB*.

385. *Id.* Intervenor also has noted that if it is considered a final order the Board may not have authority to administer arbitration since the filing of a petition pursuant to § 10(F) of the Act divests the Board of jurisdiction. *Id.*

386. No. 73-1921 (D.C. Cir., filed Sept. 13, 1973).

387. See text accompanying note 211 *supra*.

388. On appeal, the separate unfair labor practice charges were consolidated into one case.

complaint is not a final order subject to review. Appellate courts, therefore, are without jurisdiction to entertain such a suit.³⁸⁹ For this reason, petitioner seems likely to be the victim of a motion to dismiss. This, however, is not an adjudication on the merits. Petitioner could still attempt to challenge the Board at the district court level. In the case of *Leedom v. Kyne*,³⁹⁰ the Supreme Court carved out a narrow exception to the general rule precluding review by allowing a party to invoke the equitable jurisdiction of the district court. Such review is limited to those exceptional circumstances in which the Board can be said to have acted clearly beyond the scope of its authority. This presents a difficult burden of proof for the moving party, but it would at least afford the union the opportunity to present a clear-cut challenge to the legality of the Board's deferral policy under *Collyer*. Furthermore, regardless of the outcome, the case is important in that it indicates the direction in which the Board is heading.

Not all of the factors motivating the parties to litigate necessarily have risen to the surface. Some, although alluded to, have remained submerged beneath a flood of legalese. An examination of these factors should further an understanding of what the parties really believe to be at stake.

VI. UNDERLYING RATIONALE

Since the announcement of the NLRB's decision in the *Collyer* case, there has been a plethora of statements made by labor-management advocates and commentators regarding the parameters of the new doctrine: arguments urging its rescission or extension, and speculation about its future status in the judicial channels.³⁹¹ While there is no consensus as to the underlying motivation for the Board's policy of deferral to arbitra-

389. *Anthony v. NLRB*, 204 F.2d 832 (6th Cir. 1953); *Manhattan Constr. Co. v. NLRB*, 198 F.2d 320 (10th Cir. 1952); *Lincourt v. NLRB*, 170 F.2d 306 (1st Cir. 1948).

390. 358 U.S. 184 (1958). A suit in this type of situation is grounded on 28 U.S.C. § 1337 (1970) which provides that: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce" There are no time limits for filing under § 1337 so the petitioner, Letter Carriers, Local 2184, is not in danger of forfeiting his claim by having elected in the first instance to file in what appears to be an improper forum. See *The Developing Labor Law* 189 (C. Morris ed. 1971).

391. See, e.g., Anderson, *NLRB and Private Arbitration: Should Collyer Be Extended to Employee Discipline Cases?*, 13 B.C. Ind. & Com. L. Rev. 1460 (1972); Anderson, *Concurrent Jurisdiction—NLRB and Private Arbitration: A Pragmatic Analysis*, 12 B.C. Ind. & Com. L. Rev. 179 (1970); Samoff, *Arbitration, Not NLRB Intervention*, 18 Lab. L.J. 602 (1967); Note, *Some Post-Deferral Considerations Prompted by the NLRB's New Collyer Doctrine*, 13 Wm. & Mary L. Rev. 824 (1972) [hereinafter cited as *Post-Deferral Considerations*]; Comment, *The NLRB and Deference to Arbitration*, 77 Yale L.J. 1191 (1968); 41 *Fordham L. Rev.* 175 (1972); 6 *Suffolk U.L. Rev.* 720 (1972); 18 *Wayne L. Rev.* 1191 (1972).

tion enunciated in *Collyer*, there are significant considerations which apparently have set the combatants on a collision course in the judicial forum. An analysis of *Collyer* would be incomplete without an overview of these underlying motivations.

A. Arguments for Deferral

The Supreme Court decision in *Boys Markets*³⁹² signalled a judicial preference for deferral to arbitration in section 301 cases. In that case, the Court indicated that arbitration had become " 'the central institution in the administration of collective bargaining contracts.' "³⁹³ Now, under specified conditions, federal as well as state courts are allowed to enjoin a strike in breach of a no-strike clause, notwithstanding the anti-injunction provisions of the Norris-La Guardia Act.

Since the vast majority of companies have chosen to provide for collective-bargaining agreements with provisions for arbitration, it is obvious that the arbitral arena has been chosen by the parties as the most appropriate forum for resolution of contract disputes.³⁹⁴ This predilection, reaffirmed by the Supreme Court in *Boys Markets*, is consistent with *Textile Workers Union v. Lincoln Mills*,³⁹⁵ which stated that a no-strike clause is a *quid pro quo* for arbitration.

One of the more persuasive arguments supporting the Board's deferral policy in *Collyer* is the consequent reduction in the Board's caseload. While it has been suggested, perhaps tongue in cheek, that the Board's caseload at any given time has been the factor that determined whether the Board would assert its own jurisdiction or defer to arbitration,³⁹⁶ clearly this is a serious concern.³⁹⁷ There is evidence to demonstrate that the Board's caseload has doubled over the past ten years, with unfair labor practices accounting for more than fifty-eight percent³⁹⁸ of the total.

Indeed, a deferral policy may obviate the duplication of effort inherent in affording parties more than one available forum for settling their

392. *Boys Mkts., Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970).

393. *Id.* at 252 (quoting Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 *Yale L.J.* 1547, 1557 (1963)).

394. Ninety-four percent of all labor-management agreements have provisions for arbitration, Samoff, *supra* note 391, at 604; Comment, *The NLRB and Deference to Arbitration*, 77 *Yale L.J.* 1191 (1968).

395. 353 U.S. 448, 455 (1957); *The Developing Labor Law*, *supra* note 390, at 445. There, the Supreme Court expressed favor for the arbitral process and held that collective-bargaining agreements to arbitrate are binding and enforceable in the federal courts.

396. Samoff, *supra* note 391, at 606.

397. See text accompanying note 211 *supra*.

398. Anderson, *Concurrent Jurisdiction—NLRB and Private Arbitration: A Pragmatic Analysis*, 12 *B.C. Ind. & Com. L. Rev.* 179, 189 (1970).

disputes. The arbitrator in interpreting the contract may thereby resolve an unfair labor practice involving an alleged violation of conduct that is inextricably interwoven with the contract issue he is adjudicating.³⁹⁹ Moreover, in adopting the deferral policy enunciated in *Collyer*, the Board has not committed an illegal or unwarranted abdication of its authority. Neither has there been a diminution or trammeling of the employee's rights safeguarded by the NLRA, since the Board, in an approach similar to *Spielberg*,⁴⁰⁰ announced in *Collyer* its intention to continue policing arbitration awards by retaining jurisdiction⁴⁰¹ pending determination of the issue by the arbitrator.

Another policy consideration espoused for implementation of the *Collyer* deferral policy is the positive effect upon labor-management relations presumed to flow from internal settlement of disputes and the concomitant elimination of the disruptive impact upon the collective-bargaining process which results from Board intervention.⁴⁰² As a corollary, the Board may wish to encourage private settlement of labor disputes to diminish the potential for undermining the arbitral forum which is prevalent when an issue can be relitigated by the losing party in an arbitration proceeding. In certain circumstances, a party may be less inclined to arbitrate a dispute when the machinery of the Board is available.⁴⁰³ Moreover, the placement of the expense of settlement upon the parties causing the dispute rather than on the taxpayer is appealing.

Another justification for deference to arbitration is the arbitrator's purported expertise in deciding contract issues.⁴⁰⁴ This contention is

399. See *Hawkins v. NLRB*, 358 F.2d 281 (7th Cir. 1966), aff'g *Mitchell Transport, Inc.*, 152 N.L.R.B. 122 (1965) (denial of petition to set aside); *Raytheon Co. v. NLRB*, 326 F.2d 471 (1st Cir. 1964), rev'g 140 N.L.R.B. 883 (1963); *Dubo Mfg. Corp.*, 142 N.L.R.B. 431 (1963); *Precision Fittings, Inc.*, 141 N.L.R.B. 1034 (1963).

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

401. The Board "shall retain jurisdiction . . . 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." 192 N.L.R.B. at 843 (footnote omitted).

402. *Post-Deferral Considerations*, supra note 391.

403. The readiness of a union or employer to accept arbitration rather than Board proceedings often depends on the nature of the dispute. One author notes that "[a]lthough unions generally prefer no Board intervention in discharge cases, particularly those filed by individuals, where arbitration is available or held, they shift when employers' subcontract, alter working conditions, eliminate jobs or refuse to furnish information." Samoff, supra note 391, at 625. Employers are also inconsistent and will resist arbitration, fearing erosion of managerial rights through adverse awards. *Id.*

404. *Id.*

buttressed by the lack of public interest to be found in many contract disputes. There is also a correlative lack of necessity for imposing uniform standards where the contract may be resolved by interpretation of language which is germane to the special interests of the parties involved. Lastly, it should also be noted that the arbitrator is well suited to examine, analyze and weigh the significance of the subtle factors involved—especially political considerations—and can assess the intensity of the grievance by discerning the demeanor and attitudes of the parties.

B. *Arguments Against Arbitration*

The most trenchant arguments for overruling or severely limiting the *Collyer* doctrine are articulated by the union spokesmen.

Union desire for unfettered access to the Board is motivated in part by the knowledge that resolution of disputes charged as unfair labor practices will cost more if deferred to arbitration. The relatively cost-free process available with the Board's resolution of disputes contrasts strongly with the expense of protracted arbitration. The potential unavailability of the Board as a forum may be construed as a subtle yet effective form of economic coercion with unpalatable and unwarranted consequences, which may include the denial of a statutory right of access to the Board for adjudication of an asserted unfair labor practice. One of the problems posed by *Collyer* is that the Board, in considering unfair labor practice issues brought before it, is doing more than merely "encouraging" resort by the parties to available arbitration machinery, but rather is effectively "requiring" it. With respect to the costs of arbitration, the union advocates are confronted with the economic ramifications that the application of *Collyer* may produce.⁴⁰⁵ An arbitration provision may well be embraced by the union without the intent of resorting to it in each and every instance since to do so might well cause the financial ruin of a small union. Surely, no union which entered into a contract prior to the advent of *Collyer* imagined that by virtue of such an arbitration clause it was effectively precluding itself in most instances from invoking the immediate aid of the Board. Thus, although the public may be sheltered from the ruinous results of open economic warfare which the courts have sought to avoid, many small unions may still be brought to their knees behind closed doors in a different but equally deadly form of economic combat.

In discussing the possible effects attributable to the high cost of arbitration, one respected scholar pointed out to the National Academy of Arbitrators that "[s]mall unions or financially weak firms may be

405. See, e.g., 6 Suffolk U.L. Rev. 720, 732 (1972).

"arbitrated to death" and thus legitimate interests of individual workers or managers may be bargained away because of lack of funds to process cases. That this is happening, frequently by design of the financially stronger party, is evident from many sources in our profession."⁴⁰⁶

Another fear concerns the scope of *Collyer's* application beyond the area of 8(a)(5) violations. Soon after the Board's decision in *Collyer*, the Board's General Counsel issued a memorandum⁴⁰⁷ which stated:

The *Collyer* policy of deferral for arbitration will be applied only to disputes involving alleged refusals to bargain violative of Section 8(a)(5) of the Act and not to charges alleging violations of other sections of the Act.⁴⁰⁸

Since that memorandum, the Board has issued numerous decisions in which it has applied and substantially extended its initial policy.⁴⁰⁹ Moreover, less than one year after the announcement of the initial guidelines, the General Counsel issued revised guidelines⁴¹⁰ which announced that "[t]he *Collyer* policy has now been expanded by the Board to apply to charges alleging violations of Sections 8(a)(1), (2) and (3) and 8(b)(1) (A) and (B) and 8(b)(2) and (3), in addition to Section 8(a)(5)."⁴¹¹

The scope of review available in an arbitration proceeding raises an additional consideration. It has been argued that an arbitrator may not properly consider a labor dispute with the full panoply of safeguards available in a Board proceeding, and, indeed, is ostensibly precluded by section 10(a) from ruling on an unfair labor practice.⁴¹² The purported dilemma was succinctly stated by Arbitrator S. Cahn: an arbitrator may not interpret section 8—he "may only decide whether the Agreement as written has been breached, not whether the Agreement as written breaches or violates any law."⁴¹³

406. Remarks of Professor Irvin Sobel, in Nat'l Academy of Arbitrators, *Arbitration and Public Policy*, 96, 98-99 (1961) (cited in *Collyer*, 192 N.L.R.B. at 854-55 (Member Jenkins, dissenting)).

407. General Counsel's Memorandum, *supra* note 84.

408. *Id.* at 2. The justification for this statement was that: "The complaint in the *Collyer* case alleged the violation of Section 8(a)(5) and the principal opinion of the Board made no reference, even by indirection, to the applicability of its deferral policy to 8(a)(3) violations. Thus, the principal opinion failed either to endorse or reject Member Brown's express contention that the Board's arbitration deferral policy should be applied to Section 8(a)(3) and 8(a)(1) violations as well as 8(a)(5) violations." *Id.* at n.1.

409. See General Counsel's Memorandum, *Arbitration Deferral Policy Under Collyer—Revised Guidelines*, Jan. 31, 1973, especially cases cited at 1 nn.1-3.

410. *Id.*

411. *Id.* at 2.

412. *Post-Deferral Considerations*, *supra* note 391, at 826; cf. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962), where the Supreme Court upheld the authority of the courts under section 301(a) of the Act to compel arbitration or affirm an arbitral award even though the activity complained of may also constitute an unfair practice.

413. *Rowland Tompkins & Son*, 35 Lab. Arb. 154, 156 (1960).

In addition to the alleged statutory proscription, there arise questions as to the competency of arbitrators to interpret the statutory language, the time element involved in arbitrating an issue, and the limited discretion and remedies available to an arbitrator. For example, if an employee is fired for his union activity, there may well be an action for discrimination under section 8(a)(3), but an arbitrator in a hearing need only rule on the issue of just cause. Also, the procedural laxity in arbitration hearings—which allows evidence such as hearsay, past performance record, and fruits of an illegal search—dissipates the more stringent due process safeguards afforded in a Board proceeding. Moreover, the arbitrator cannot issue a cease and desist order or post notice or provide other types of remedies. Unlike the Board's processes, arbitration can be invoked only by the union and not by an individual. Thus, as pointed out in Member Jenkins's dissent in *Collyer*, the arbitrator's decision cannot remedy present statutory violations or control future conduct; "it cannot effectively protect the public interest by providing adequate remedies for violations, and it may sacrifice individual rights guaranteed by the Act because it is not available to aggrieved individuals."⁴¹⁴

It has been suggested that a further attenuation of the Board's powers by a "placid acceptance of arbitration as an alternative, rather than subordinate, forum,"⁴¹⁵ may involve an abdication of a major portion of the Board's statutory responsibility resulting in a denial of an employee's guaranteed statutory rights. For example, on the local levels, leaders fear rigged arbitration.⁴¹⁶ The vociferous employee may find himself jobless when the collusive interests of the union and the company unite to deter an airing of a legitimate 8(a)(3) complaint. A corollary fear voiced by the union is characterized by Member Fanning's dissent in *Collyer* as "compulsory arbitration."⁴¹⁷ Although the majority opinion in *Collyer* rejected this contention, the recent extension of the doctrine beyond 8(a)(5) violations⁴¹⁸ may justify union concern that arbitration should be only an option in a contract, and not a waiver of statutory rights.

Another compelling consideration is the limited review available if the arbitral process is employed. Furthermore, once the choice has been made to insert an arbitration clause in the collective bargaining agreement, there appears to be little likelihood that the process will not be employed.

414. 192 N.L.R.B. at 855.

415. Christensen, *Labor Arbitration and Judicial Oversight*, 19 *Stan. L. Rev.* 671, 683 (1967).

416. Comment, *The NLRB and Deference to Arbitration*, 77 *Yale L.J.* 1191, 1207 (1968).

417. 192 N.L.R.B. at 847.

418. General Counsel's Memorandum, *Arbitration Deferral Policy Under Collyer*—Revised Guidelines, Jan. 31, 1973, at 2.

A party that seeks to enforce a contract in court pursuant to a section 301 suit will be precluded from the judicial forum if the contract provides for the settling of disputes by resorting to available arbitration machinery. In fact, as a result of the Supreme Court's decision in *Boys Markets*,⁴¹⁹ the union's most potent weapon—the strike—can be enjoined by the court and arbitration compelled if the arbitral process is provided for by contract.

At the same time, *Collyer* precludes the union from seeking immediate redress from the Board when arbitration is deemed to be the appropriate forum, thereby foreclosing the Board process as a primary arena for settling disputes involving alleged violations of the Act. Once the arbitrator renders his decision, from a pragmatic and legal standpoint, review is extremely limited.

To pursue judicial review of an arbitrator's decision, the moving party must be prepared to overcome the limited review criteria set forth by the Supreme Court in the *Steelworker's Trilogy*:

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. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.⁴²⁰

On the other hand, the Board's review of an arbitrator's award may provide an equally formidable obstacle in light of the Board's propensity to rely on *Spielberg*—let the decision stand unless the results are repugnant to the Act. Based on the criteria set forth in *Collyer*⁴²¹ concerning Board retention of jurisdiction and the Board's policy of deference to the arbitrator's award consistently applied in *Spielberg* situations, there is reason to believe that Board review under *Collyer* circumstances likewise will be limited.⁴²² The net result, then, whether Board or judicial

419. *Boys Mkts., Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970).

420. *Steelworkers Trilogy*, 363 U.S. at 567-68 (footnote omitted).

421. 192 N.L.R.B. at 843.

422. Nash Address, *supra* note 65. The General Counsel sounded an ominous note with the following passage: "Whether, once *Collyer* becomes settled law, the Board will continue to hold cases for a retrospective review is yet an open question, particularly in light of the Board's heavy reliance on *Consolidated Aircraft Corp.*, which involved an outright dismissal of an 8(a)(5) complaint." *Id.* at 157 (footnote omitted).

review of an arbitrator's decision is sought, may be an illusory choice for the complainant concerned with the scope of review available beyond the arbitral forum.

Finally, there is some dissatisfaction with the arbitral forum. Many parties have serious doubts about the caliber of arbitrators and the quality of their awards. There is concern about the possibility of an unwarranted rewriting of the contract by an arbitrator, the potential for collusive practices and indifference to the public interest,⁴²³ and the alleged self-serving proclivity of an arbitrator to attempt to assuage both sides in order to secure future employment. Lastly, it should be noted that while an arbitrator's award is persuasive in influencing a colleague's decision, such an accommodation is analogous to the doctrine of comity and does not have the binding effect of *stare decisis* resulting from a judicial decision.

This is the history of *Collyer* to date but since what is past is prologue let us now turn our thoughts toward the future of *Collyer*.

VII. *Collyer—Desideratum* OR *Maranatha*

In 1898 a Milwaukee paper reported Clarence Darrow's statements in the woodworkers' conspiracy case in the following headline and story:

Chicago attorney says present case is an incident of great social problem agitating the world.⁴²⁴

A strike in the sash, door and blind industry in Oshkosh, Wisconsin was the spark that led to the filing of charges against Thomas I. Kidd, general secretary, Amalgamated Woodworkers' International Union, and George Zentner and Michael Troiber, both of Oshkosh, who acted as picket captains during the fourteen-week strike. The three defendants were accused of "criminal conspiracy" to injure the business of the Paine Lumber Company. . . .

Darrow himself maintained that the fundamental question posed by the Kidd case was "whether when a body of men desiring to benefit their conditions, and the condition of their fellow-men, shall strike . . . these men can be put to jail."⁴²⁵

A Philadelphia paper reported a 1903 labor incident:

DARROW'S CLOSING ADDRESS INCLUDED A VEHEMENT APPEAL FOR UNION CAUSE AND A BITTER CONDEMNATION OF THE OPERATORS FOR CRUELTY AND BLINDNESS.⁴²⁶ An estimated 10,000 anthracite coal miners walked off the job in 1900 under the leadership of John Mitchell, president of the United Mine Workers of America. Within a week, 100,000 miners were on strike.

The average annual wage of the miner was then about \$250, according to Mitchell.

Among the union's wage demands was a 20 per cent increase for day laborers who were receiving less than \$1.50 [per diem] . . .⁴²⁷

423. Samoff, *supra* note 391, at 611.

424. Milwaukee Sentinel, Nov. 1, 1898, at 1.

425. A. Weinberg, *Attorney For the Damned* 267-68 (1957).

426. Philadelphia North American, Feb. 15, 1903, at 1.

427. A. Weinberg, *supra* note 425, at 327.

As a result, an agreement was negotiated but two years later when the union asked for an eight-hour day, a twenty percent increase and recognition of the union, the company balked and a massive coal strike began in May 1902. Later that same year, after a long impasse, President Roosevelt initiated a series of conferences which led to the appointment of a seven-man federal mediation panel. In March of 1903 the Arbitration Commission reached its conclusions. A ten percent raise and an eight-hour day were put into effect. While the union was not formally recognized, anti-union discrimination was outlawed and future disputes between the miners and the operators were to be handled by a Board of Conciliation. "It was generally conceded that labor gained greatly by this arbitration" ⁴²⁸

The point of this digression into the history of the labor movement is not to point out that arbitration had been thought a useful and proven tool long before Taft-Hartley; but rather it is to show the social atmosphere out of which the Wagner Act evolved. Many of the men responsible for that legislative enactment in 1935 had lived through the turmoil of the early days of the labor movement. In the very recent past men had been prosecuted as criminals for attempting to organize labor movements. Therefore, when the Wagner Act was passed it was with a feeling of paternalism toward unions and with a conviction that the right of these men to be represented must be protected. Consequently, one wonders if the deletion of language from proposed amendment 10(b) of the Act which would have provided that the "[b]oard 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," ⁴²⁹ was really anti-deferral or pro-union. The labor movement was still in its infancy, so that in a showdown at the bargaining table, management unquestionably had the most clout. Had the door been left open to encourage the thrusting of arbitration agreements on the still financially shaky unions, it is probable that many of them would have gone under. Since Congress was disposed to foster and protect the labor movement, it seems plausible that the deletion of section 10(b) was as much a preventive measure to safeguard unionism as it was a mandate to the Board not to defer.

Twelve years later the Taft-Hartley Act amended the Wagner Act. It had become apparent to the legislators that the unions, after developing bargaining experience, were in a position to sit down at the conference table with big business as an equal. It was at this juncture that the much

428. *Id.* at 409 (remark of Clarence Darrow).

429. Brief for Petitioner at 12, *Local 6222, CWA v. NLRB* (citation omitted).

discussed sections of the Act, 203(d) and 301, were enacted.⁴³⁰ As foes of *Collyer* have fairly pointed out, these sections were not a part of Title I; therefore it may be improper to infer that their adoption was a legislative sanction for Board deferral in unfair labor practice cases.⁴³¹ While the argument is persuasive, it is not compelling since the Board's rejoinder illustrates that there was much floor discussion indicative of precisely such a sentiment.⁴³² Furthermore, in 1947 a proviso was added to section 10(a) empowering the Board to cede its authority to state or territorial agencies if it so desired. While it does not appear that this has ever occurred, it does tend to undercut the argument that the Board is the sole depository of all legislative fiat regarding unfair labor practices. There is at least a hint that the Board was free to delegate its authority.

It should also be noted that in the original Wagner Act, section 7 was formulated specifically to protect the employees in their "concerted activities for the purpose of collective bargaining or other mutual aid or protection."⁴³³ Section 8 went on to set forth that "[i]t shall be an unfair labor practice for an employer . . . to interfere . . . to dominate . . . to encourage or discourage membership . . . [or] to refuse to bargain collectively"⁴³⁴ This was quite obviously directed at employer interference with the rights of the workers. No mention is made of union interference with the workers. However, in 1947 the pendulum had begun to swing in the other direction. To the above quoted language of section 7 was added the phrase "and shall also have the right to refrain from any or all of such activities"⁴³⁵ Congress was now concerned with overzealous proselytizing on the part of the union. As a compliment to section 8(a) of the Act, a new section, 8(b), was added to proscribe certain types of union conduct.⁴³⁶ The language of this section is analogous to section 8(a) of the Act which in 1935 had been directed at employers. Clearly, the unions had begun to wield a power not apparent in 1935 because Congress felt impelled to draw in the reins on their activities. It was in this framework—an entirely different setting from that which existed earlier—that it was thought suitable to pass legislation designed to foster resort to arbitration as a means for settling

430. See text accompanying notes 75-78 *supra*.

431. See text accompanying note 278 *supra*.

432. S. Rep. No. 105, 80th Cong., 1st Sess. 23 (1947); see text accompanying notes 304-05 *supra*.

433. 29 U.S.C. § 157 (1970).

434. *Id.* § 158(a).

435. *Id.* § 157.

436. *Id.* § 158(b).

economic differences. This union growth was still evident 12 years later at the passage of the Landrum-Griffin Act, also known as the Labor Management Reporting and Disclosure Act of 1959,⁴³⁷ which further zeroed in on union activity. Thus, in a period covering almost a quarter of a century, labor had sprung from its infancy and had developed into what Congress felt was an overreaching adult. Whereas in 1935 the lawmakers were seeking to protect the employees from the evils of management, by 1959 it was union activity that was being circumscribed.

On balance, strong legislative arguments can be made for both sides with perhaps the anti-*Collyer* advocates holding a slight edge from a strictly literal reading of the statutory language; on the other hand, scales tip slightly the other way when the legislation is viewed against its historical backdrop. However, legislation cannot be viewed in a vacuum. The passage of time, changes in customs and mores, judicial interpretation, the political climate, and a host of other factors all play their part in shaping and reshaping the scope and application of nearly every congressional enactment. It was not thought at the time of its passage that the Civil Rights Act of 1866,⁴³⁸ which on its face promises to all citizens without regard to race "the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property," would be employed as a tool for outlawing discrimination in housing over one hundred years later.⁴³⁹ This use of the Act mildly shocked Justices Harlan and White,⁴⁴⁰ and probably even surprised then Acting Attorney General Ramsey Clark who argued persuasively to the Court that "[t]he fact that the statute lay partially dormant for many years cannot be held to diminish its force today."⁴⁴¹ What Congress did or did not say or did or did not mean in 1935 or 1947 does not at all guarantee how an act will be viewed by the judiciary twenty-five years later.

Since the advent of Taft-Hartley we have had a wholehearted acceptance of *Spielberg* on all levels. None of the opponents of *Collyer* have chosen to take issue with its validity. As previously mentioned, it has even been endorsed by the Supreme Court,⁴⁴² as a sound approach to disposing of situations in which multiple litigation would otherwise

437. *Id.* §§ 401-531.

438. 42 U.S.C. § 1982 (1970).

439. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

440. *Id.* at 449-80 (Harlan & White, JJ., dissenting).

441. *Id.* at 437. The Court blandly accepted this adverbial assertion which, to say the least, was an understatement.

442. In *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964), the Court approved the deferral doctrine although it did not mention *Spielberg* by name.

be inevitable. In attacking *Collyer* none of its assailants has successfully come to grips with the cornerstone upon which it is founded, namely, *Spielberg*. The time and cost factors, the incompetence of arbitrators, the procedural laxities and a variety of other objections⁴⁴³ already have been subjected successfully to the test of *Spielberg*.⁴⁴⁴

In addition to the Board's *Spielberg* doctrine, there has been an abundance of enthusiasm shown by the judiciary for arbitration. Beginning with the *Steeworkers Trilogy*⁴⁴⁵ and culminating with *Boys Markets*,⁴⁴⁶ the courts have unhesitatingly chosen to give free play to the arbitral process. While the petitioner in *IBEW* makes excellent use of the Board's own argument in *C & C Plywood*⁴⁴⁷ to indicate a predilection not to defer, the Supreme Court's thoughts on the matter, as echoed in the words of Justice Potter Stewart, that non-deferral there was approved mainly because there was no arbitration clause, have a far greater impact than the words of the brief writer for the Board.⁴⁴⁸ It is also significant that in the intervening years since Taft-Hartley, as *Spielberg* grew in stature and the courts showed an ever increasing preference for encouraging arbitration, there was no congressional action to alter this trend. The remarks of Judge Wyzanski in *CWA* are interesting in this context. As petitioner sought to persuade the court that *Collyer* represented an abdication of statutory authority and a serious departure from the intent of the Labor Management Relations Act, Judge Wyzanski probed counsel for some authority to support the proposition that the Board could not in its discretion defer. While petitioner scanned his notes for authorities, the judge offered the comment⁴⁴⁹ that he would be highly surprised if any such case existed, since such a position represented the antithesis of his understanding of this particular piece of legislation which he had helped to draft. The court further proffered that, to its knowledge, there had never been a successful mandamus action against the Board under section 10(f) when it had chosen in its discretion to defer.

There is case law supporting deferral,⁴⁵⁰ however, and counsel's lone citation of *UAW v. NLRB*⁴⁵¹ was explained by the three judges as a case in which the Board had already asserted jurisdiction but had failed to

443. See Section VI B *supra*.

444. This point has been addressed by the Board in at least one of its briefs. Brief for Respondent beginning at 31, Local 6222, *CWA v. NLRB*.

445. Note 33 *supra*.

446. 398 U.S. 235 (1970).

447. See, e.g., text accompanying note 290 *supra*.

448. See also Brief for Respondent at 20, Local 6222, *CWA v. NLRB*.

449. Remarks of Judge Wyzanski in open court (D.C. Cir. Apr. 6, 1973).

450. See *NLRB v. Carroll-Naslund Disposal, Inc.*, 359 F.2d 779 (9th Cir. 1966) (*per curiam*).

451. 455 F.2d 1357 (D.C. Cir. 1971).

make sufficient findings of fact to support its decision. Thus, it does not stand for the proposition that the court had ordered the Board to assert jurisdiction initially.

The best policy argument for those who would prefer to see the speedy demise of *Collyer* might seem to lie in an attack on its untrammelled proliferation.⁴⁵² While the decision itself supposedly was applicable only to section 8(a)(5) situations, it has been rapidly extended into other areas,⁴⁵³ perhaps somewhat haphazardly. There would be sound basis for much of this expansion were it not for *Spielberg*. But *Spielberg* itself was in the 8(a)(3) area and a review of its application would indicate that in reality *Collyer* adds little if anything to *Spielberg*, except to apply the principle prospectively instead of after the fact.

A far more persuasive rationale for setting aside *Collyer* would be not in the area of policy argument but in a full analysis of the legal implications of its waiver and exhaustion of remedies theories. In *Collyer* we are assured that:

[w]e are not compelling any party to agree to arbitrate disputes arising during a contract term, but are merely giving full effect to their own voluntary agreements to submit all such disputes to arbitration⁴⁵⁴

This viewpoint is reflected in the briefs of the Board.⁴⁵⁵ In its own decision in *Beacon Piece Dyeing & Finishing Co.*,⁴⁵⁶ the Board emphatically stated that:

although the Board has . . . held repeatedly that statutory rights may be "waived" by collective bargaining, it has also said that such a waiver "will not readily be inferred" and there must be "a clear and unmistakable showing" that the waiver occurred.⁴⁵⁷

The *IBEW* brief cited case law for this identical proposition.⁴⁵⁸ In *Collyer*, and the line of cases which follow, not only are the parties not waiving their right to go to the Board, but in fact are crying to be heard. The Board attempts to extricate itself from this quandary by urging that in light of its retention of jurisdiction this is not a waiver but merely a postponement of remedy. The Board's answer to this question is uncertain if, as suggested by the Board's General Counsel, the Board resorts to

452. See Brief for Petitioner at 10-11, Local 6222, CWA v. NLRB.

453. See Section IV supra.

454. 192 N.L.R.B. at 842.

455. See, e.g., Brief for Respondent beginning at 24, Local 6222, CWA v. NLRB.

456. 121 N.L.R.B. 953 (1958).

457. *Id.* at 956, citing International News Serv. Div., 113 N.L.R.B. 1067 (1955) and cases cited therein.

458. Rockwell-Standard Corp., 166 N.L.R.B. 124, 132 (1967), enforced, 410 F.2d 953 (6th

outright dismissal as it did in *Consolidated Aircraft*,⁴⁵⁹ a case heavily relied upon by the *Collyer* majority.⁴⁶⁰

An equally difficult issue (which the Board has attempted to avoid by postulating its exhaustion of remedies theory) is by what authority it can force unwilling parties to the arbitral forum. It has long been a principle of arbitration that "[i]f the agreement does contain clear time limits for filing and prosecuting grievances, failure to observe them generally will result in a dismissal of the grievance if the failure is protested."⁴⁶¹ It is nothing more than an exercise of circuitous reasoning to suggest that the parties can exhaust remedies from which they have already been precluded by the time limits of their own contract. If the Board presumes to waive these time limits by what authority does it do so? Is this not a rewriting of the contract in direct violation of *H.K. Porter Co. v. NLRB*?⁴⁶² Petitioners have forcefully urged this argument.⁴⁶³ The Board in its exhaustion of remedies theory offers a less than satisfactory answer and in fact never really confronts the issue. As Member Jenkins noted in his dissent in *Collyer*:

[I]f the [individual] becomes exhausted, instead of the remedies, the issues of public policy are never reached and an airing of the grievance never had⁴⁶⁴

Of the framers of *Collyer*, Board Member Brown appears to have shown the most prescience as to what the true scope of the doctrine should or would be.⁴⁶⁵ While the Board has been finding more disputes arguably arbitrable and thus deferrable than Member Brown might have expected, it was his feeling that the ambit of *Collyer* should include 8(a) (1) and 8(a) (3) as well as 8(a) (5) violations.⁴⁶⁶ As has been indicated, the cases which followed *Collyer* have long since exceeded even his objectives.⁴⁶⁷ This should not have been an entirely unexpected result and was alluded to in the commentary which followed *Collyer*.⁴⁶⁸ To begin with, it has been held since the earliest days of the Board that: "[A] violation by an employer of any of the four subdivisions of Section 8, other than

Cir. 1969) (cited in Brief for Petitioner at 51-52, *Local 2188, IBEW v. NLRB*).

459. 47 N.L.R.B. 694 (1943).

460. Nash Address, *supra* note 65, at 157.

461. F. Elkouri & E. Elkouri, *How Arbitration Works* 105 (rev. ed. 1960) (footnote omitted). See also cases cited at *id.* n.93.

462. 397 U.S. 99 (1970).

463. See, e.g., Brief for Petitioner at 31-32, *Local 2188, IBEW v. NLRB*.

464. 192 N.L.R.B. at 852 (quoting *NLRB v. Marine & Shipbuilding Workers*, 391 U.S. 418, 425 (1968)).

465. 192 N.L.R.B. at 844-45 (concurring opinion).

466. *Id.* at 845; see note 122 *supra* and accompanying text.

467. See Section IV *supra*.

468. Nash Address, *supra* note 65, at 154.

subdivision one, is also a violation of subdivision one."⁴⁶⁹ In fact, NLRB form 501 (2-67)—used for the filing of unfair labor practices against employers—section (h) states: "The above-named employer has engaged in . . . unfair labor practices within the meaning of section 8(a), subsections (1) and _____" Therefore, although not so expressed by the majority, it was evident at the outset that section 8(a)(5) was merely the tip of the iceberg. Furthermore, the strong reliance⁴⁷⁰ on *Spielberg*, of which *Collyer* is a logical extension, should have been indicative of the broader application that *Collyer* would ultimately receive. Indeed, the General Counsel for the Board discerned such implications.⁴⁷¹

Aside from the thorny problem of compelling the parties to do something for which the contract did not provide when time limits had run, thereby, at least indirectly, rewriting the contract,⁴⁷² there are other deficiencies in the reasoning of the majority. For example, *Consolidated Aircraft Corp.*,⁴⁷³ one of the two cases relied on heavily by the majority, had been buried in the Board archives until unearthed in *Collyer*. The other case, *Joseph Schlitz Brewing Co.*,⁴⁷⁴ was really not a strong deferral case because there was no unfair labor practice involved.⁴⁷⁵ Also, as has been noted in the foregoing discussion, deferral cases between 1960 and 1970 were fewer and fewer so as to have become virtually non-existent when *Collyer* was decided.⁴⁷⁶ Moreover, *Carey v. Westinghouse Electric Corp.*,⁴⁷⁷ hailed as championing deferral, also contains language that "notwithstanding the availability of arbitration, the 'superior authority of the Board may be invoked at any time' . . ."⁴⁷⁸ It is most interesting that after the Supreme Court had finished its pronouncements in *Carey*, the Board went ahead and decided the case anyway, reversing the arbitrator.⁴⁷⁹

However, as we have seen in *Jones v. Alfred H. Mayer Co.*,⁴⁸⁰ if the Supreme Court is bent on arriving at a certain decision, a mere interval of twenty-five years will not stand in the way; nor will one hundred years,

469. The Developing Labor Law, supra note 390, at 66 (footnote omitted). See also note 62 supra.

470. 192 N.L.R.B. at 841.

471. Nash Address, supra note 65, at 154.

472. 192 N.L.R.B. at 846-47, 849 (Member Fanning, dissenting). See also text at note 256 supra.

473. 47 N.L.R.B. 694 (1943), modified and enforced, 141 F.2d 785 (9th Cir. 1944).

474. 175 N.L.R.B. 141 (1969).

475. 192 N.L.R.B. at 849 (Member Fanning, dissenting).

476. See text accompanying notes 43-46 supra.

477. 375 U.S. 261 (1964).

478. 192 N.L.R.B. at 848 (citing *Carey v. Westinghouse Elec. Corp.*, 375 U.S. at 272).

479. *Westinghouse Elec. Corp.*, 162 N.L.R.B. 768, 775 (1967).

480. 392 U.S. 409 (1968).

for that matter. Furthermore, while *Schlitz* is not a strong case, the Board did defer, and, although the history of deferral is inconsistent, such a history undeniably exists. One may say that the Board's later action in *Carey* highlights the need for accessibility to the Board. Proponents of *Collyer* can argue to the contrary that this demonstrates that deferral does not deprive the petitioning party of all recourse to the Board, but rather that the Board stands ready to rectify a result clearly repugnant to the Act. The policy arguments vocally espoused by Member Jenkins that

[i]ndeed, responsible officials of the Steelworkers Union, whose espousal and support of arbitration led to the Trilogy, have publicly expressed their dissatisfaction with the high costs, delays, and massive "bogging-down" volume of arbitration, all of which led to its use as a weapon against the union⁴⁸¹

lose much of their impact in light of the recent collective bargaining agreement negotiated by the United Steelworkers which commits them to binding arbitration for the next four years.⁴⁸² The specter of *Collyer* quite obviously did not deter the negotiation of this arrangement. Also the invocation of *Lockridge* by Member Jenkins as ringing the death knell for *Collyer* has done little to impede its growth. Apparently, he was the only member to perceive such implications. In the only appellate brief to rely on *Lockridge*,⁴⁸³ the CWA acknowledged that it was perhaps nothing more than a reiteration of *Garmon*,⁴⁸⁴ and the Supreme Court itself pointed out that *Lockridge*⁴⁸⁵ was not a section 301 suit.

Our cases also clearly establish that individual union members may sue their employers under § 301 for breach of a promise embedded in the collective-bargaining agreement that was intended to confer a benefit upon the individual. Plainly, however, this is not such a lawsuit.⁴⁸⁶

One peripheral area of some concern, not touched upon particularly in *Collyer*, is the problem of fixed or rigged arbitrations.⁴⁸⁷ There is no doubt that this occurs, but its prevalence is difficult to ascertain. Naturally those who decry *Collyer* can point to instances where the arbitral process has been grossly abused. A glaring example of such abuse is *Star Expansion*

481. 192 N.L.R.B. at 855 (Member Jenkins, dissenting) (footnote omitted).

482. U.S. News & World Report, May 14, 1973, at 97.

483. Brief for Petitioner at 18-19, Local 6222, CWA v. NLRB. See also text accompanying notes 254-55 supra.

484. Brief for Petitioner at 19, Local 6222, CWA v. NLRB.

485. 403 U.S. 274 (1971).

486. Id. at 298-99 (citation omitted).

487. P. Hays, Labor Arbitration 62-66 (1966); Meltzer, Book Review, 34 U. Chi. L. Rev. 211 (1966); Seitz, Book Review, 19 Stan. L. Rev. 698 (1967); Stockman, Book Review, 19 Stan. L. Rev. 707 (1967); Vladeck, Book Review, 41 N.Y.U.L. Rev. 1021 (1966).

*Industries Corp.*⁴⁸⁸ In that case an employee had led a successful campaign for the decertification of the IBEW. At his discharge hearing, which was governed by the old contract, he was represented before a hostile employer by an IBEW attorney who previously had attacked his decertification activities. The arbitrator, also selected by IBEW, arrived at the expected result—discharge for just cause. However, hard cases make bad law and it would be as rash to discard the entire deferral system because of isolated abuses as it would be to outlaw automobiles because of a small number of reckless drivers. The Board has shown no hesitancy in refusing to defer under *Collyer* in section 8(a)(3) and other areas where it felt intervention was required or abuse was possible.⁴⁸⁹ There is, then, no evidence that the Board is acting any less diligently in its *Collyer* review than it has in its *Spielberg* review, which received the approval of the appeals court in *Local 425, Office and Professional Employees International v. NLRB*.⁴⁹⁰ Also, with the decision of the Supreme Court in *Vaca v. Sipes*,⁴⁹¹ an employee faced with a union that is dragging its heels can seek immediate court review on the grounds that the union has been derelict in its duty of fair representation, rather than being forced to exhaust his administrative remedies as would otherwise be the case.

One issue hardly touched upon in any of the litigation which has flowed from *Collyer* is the question of whether or not deferral under *Collyer* constitutes a final order of the Board which is then appealable. Except for the bald assertion by petitioner in the *CWA*⁴⁹² case that this does constitute a final order and a lone footnote by intervenor in *Enterprise Publishing Co.*⁴⁹³ intimating the contrary, the jurisdictional question has not been raised. The general rule is that

[t]he only final orders within the meaning of Sections 10(e) or (f) are those entered

488. 164 N.L.R.B. 563 (1967), enforced sub nom. *United Elec. Workers v. NLRB*, 409 F.2d 150 (D.C. Cir. 1969).

489. See, e.g., *Machinist's Lodge 68*, 205 N.L.R.B. No. 26 (Aug. 3, 1973) (8(b)(2)); *Jack Watkins, G.M.C.*, 203 N.L.R.B. No. 98 (May 16, 1973) (8(a)(3) and 8(b)(2)); *Local 1197, CWA*, 202 N.L.R.B. No. 45 (Mar. 6, 1973) (8(b)(1)(A)); *Asko, Inc.*, 202 N.L.R.B. No. 30 (Mar. 12, 1973) (8(a)(3)); *Anaconda Wire & Cable Co.*, 201 N.L.R.B. No. 125 (Feb. 13, 1973) (8(a)(1)); *Jacobs Transfer, Inc.*, 201 N.L.R.B. No. 34 (Jan. 11, 1973) (8(a)(3)).

490. 419 F.2d 314 (D.C. Cir. 1969).

491. 386 U.S. 171 (1967).

492. Brief for Petitioner at 8 n.13, *Local 6222, CWA v. NLRB*, in which without supportive citation petitioner stated "[t]here is one certainty, however—the dismissal of the Complaint in its entirety is a final Order."

493. Brief for Brockton Newspaper Guild as Intervenor at 6-7 n.1, *Enterprise Publishing Co. v. NLRB*.

by the Board in unfair labor practice cases, either dismissing a complaint in whole or in part or finding an unfair labor practice and directing a remedy.⁴⁹⁴

It is open to question whether, when the Board retains jurisdiction, it has issued a final order. The term "final order" connotes the idea that the Board has taken its last look at a case. If that were true, it would severely undercut the Board's position that they have not forced a party to waive his rights but merely deferred the application of a remedy if needed. On the other hand, if the Board is correct, then such deferrals are at least arguably non-final and therefore not appealable. Oddly enough, the Board has not even confronted the petitioners on this point. Perhaps it is simply a matter of strategy. By not raising any objection on jurisdictional grounds, the Board has expedited appeal of these cases. Thus, the *Collyer* question should reach the Supreme Court speedily. Should the Court then uphold *Collyer*, it will be interesting to see if the Board invokes a jurisdictional defense to preclude the appeal of variations which may arise as offshoots of *Collyer*. This would throw the parties back into the arbitral arena where many potentially appealable issues might be resolved, thus further lightening the burden of the Board. Obviously, petitioners have not raised the jurisdictional issue since to do so successfully would preclude the review they are seeking.

There are still other areas for conjecture such as how far the outstretched arms of "baby *Collyer*" will reach. For example, will it extend into the representation area? At least one case has shown implications of the extension of *Collyer* into accretion questions.⁴⁹⁵ Thus far the Board appears not to have deferred in the 10(k) area.⁴⁹⁶ Strong criticism has been leveled at any attempt to defer in the aforementioned areas, especially 10(k), since the arbitrator has binding authority over only two of the three parties.⁴⁹⁷

Further, in its approach to certain questions, the Board seems to realize that, in order effectively to encourage the use of arbitration, it must itself be willing to undertake certain tasks. For example, if an arbitrator declined to arbitrate a case on the grounds that the time limits for arbitration had passed, or a party had refused to arbitrate after deferral under

494. The Developing Labor Law, *supra* note 390, at 874 (citing Local 542, Int'l Union of Operating Eng'rs v. NLRB, 328 F.2d 850 (3d Cir.), cert. denied, 379 U.S. 826 (1964)).

495. Champlin Pet. Co., 201 N.L.R.B. No. 9 (Jan. 8, 1973).

496. See, e.g., Local 354, IBEW, 200 N.L.R.B. No. 92 (Nov. 29, 1972). See also Local 1, Bricklayers Union, 195 N.L.R.B. No. 2 (Jan. 27, 1972), enforced, 475 F.2d 1316 (D.C. Cir. 1973), where the Board not only showed no hesitancy in accepting jurisdiction but dismissed out of hand petitioner's demand that the Board await the recommendations of the trial examiner.

497. Comment, *supra* note 43, beginning at 1195.

Collyer by raising time limits as a defense, the Board will, and should, hear the grievance.⁴⁹⁸ The May 1973 guidelines also tend to indicate that the Board will continue to exercise its authority to afford the opposing parties a wide latitude of discovery before arbitration;⁴⁹⁹ such a policy was specifically approved by the Supreme Court in *NLRB v. Acme Industrial Co.*,⁵⁰⁰ to facilitate production of relevant information prior to arbitration. Certainly, it is logical that if the Board is going to encourage the use of arbitration in resolving economic difficulties, it should encourage the furnishing of relevant information so that the parties can be prepared to confront the issues knowledgeably.

Perhaps unions will attempt to circumvent *Collyer* by negotiating a clause in their contracts specifically preserving arbitration rights but precluding the use of arbitration during the pendency of an unfair labor practice charge. If the United Steelworkers contract is to be a guideline, such clauses are unlikely. However, there is another potential avenue for skirting *Collyer*. According to the May 1973 guidelines, deferral will occur if an individual does not explicitly indicate his refusal to be bound.

As the General Counsel himself notes, this criterion, which conforms to the *Spielberg* "acquiescence standard," arguably "would provide parties to bargaining agreements a convenient means of avoiding deferral," since the party to a contract wishing to avoid arbitration in a dispute involving unlawful coercion or discrimination against individual employees would, instead of filing the charge itself, "arrange for an individual discriminatee to file the charge and communicate to the regional office his opposition to the resolution of his claim under the contract arbitration procedures."⁵⁰¹

This guideline was undoubtedly devised to guard against an employee's being ensnared in a fixed arbitration proceeding. The Board may now find itself confronted with fixed non-arbitration arrangements. One suspects the Board will take a long, hard look at such cases to assure itself that the union-company collusion against the employee is real, not simply manufactured as a device by which to avoid *Collyer*.

If *Collyer* is disavowed by the courts, all of this theorizing becomes

498. See discussion in *Collyer Deferral Policy*, 82 Lab. Rel. Rep. (News & Background) 315 (Apr. 16, 1973); text accompanying note 52 *supra*.

499. NLRB General Counsel's Revised Guidelines for Processing *Collyer* Arbitration Deferral Cases, 83 Lab. Rel. Rep. (Analysis) 6-7 (May 14, 1973) [hereinafter cited as General Counsel's Guidelines]; Revised Guidelines Issued by the General Counsel of the National Labor Relations Board for Use of Board Regional Offices in Cases Involving Deferral to Arbitration, 83 Lab. Rel. Rep. (News & Background) 41, 47-49 (May 14, 1973); see, e.g., *American Standard, Inc.*, 203 N.L.R.B. No. 169 (June 4, 1973).

500. 385 U.S. 432 (1967).

501. General Counsel's Guidelines 8.

moot. Whether in resolving this problem the courts will view *Collyer* as a flexible approach or a doctrinaire device remains to be seen. But, at the core of the controversy, two principles of the law must clash head on and the courts must determine which shall yield.

The most significant consideration thus far advanced for disavowing *Collyer* is the recurring principle that men are free to arrange their affairs as best suits them and that neither the courts nor the Board have been established to rearrange such affairs. This concept and its recent espousal in *H.K. Porter Co. v. NLRB*⁵⁰² must be confronted by the courts in considering the questions posed. In waiving the time limits of innumerable contracts, as the Board in a policy decision has chosen to do, is the Board not in fact rewriting the contract for the parties? It is patently absurd to suggest that, in forcing the parties to arbitrate after the time limits have run, the terms of the agreement have not been altered. Even if the NLRB keeps its promise to afford a later remedy, any delay in that remedy would mitigate its effectiveness.

In counterpoise to *H.K. Porter* is an equally venerable principle of law, that logic must sometimes give way to pragmatic exigencies. When reason and result are at odds, what shall be the denouement? Perhaps the answer was best articulated by Justice Holmes when he opined that "[t]he life of the law has not been logic: it has been experience."⁵⁰³ *Spielberg*, of which *Collyer* is a logical extension, epitomizes this approach. It has proven itself a useful tool for the Board to lighten its ever-burgeoning caseload, which, although played down, is conceded by the Board to be a strong motivating factor.⁵⁰⁴ It has been employed for many years without any evidence of undue abuse.

In balancing these two competing considerations, one is ineluctably drawn to the conclusion that, in this instance, pragmatic considerations will prevail over philosophical ones and, in the end, the technically sound legal rationale that this is a rewriting of contracts, will give way to the more mundane and simplistic appraisal that *Collyer* works.

Furthermore, the courts are not unsympathetic to the caseload of the Board and have in fact been using a *Collyer*-like approach themselves for years. Ever since *Textile Workers v. Lincoln Mills*⁵⁰⁵ the courts have

502. 397 U.S. 99 (1970).

503. O.W. Holmes, *The Common Law* 1 (1909).

504. General Counsel's Memorandum, *Arbitration Deferral Policy Under Collyer—Revised Guidelines*, May 10, 1973, at 17 n.17 (citing *National Radio Co.*, 198 N.L.R.B. No. 1 (Aug. 4, 1972), wherein the Board said "considerations arising from the increasing case load before this five-man Board . . . should not be gainsaid . . ."). See also text accompanying note 211 *supra*.

505. 353 U.S. 448 (1957).

been sending the parties back to the arbitral forum to settle their differences. While apparently no case specifically has directed the parties to arbitrate after time limits have run, it is not impossible to conceive that the courts might label such an alteration of a contract as merely procedural rather than substantive,⁵⁰⁶ thus allowing *Collyer* to proceed intact. *Spielberg* itself, which *Collyer* follows, has been specifically endorsed by the courts.⁵⁰⁷

What more propitious moment to submit this particular issue to the Supreme Court than at a time when the Court is itself manifesting a decided discontent with its own caseload? There is talk of creating a new appellate court devoted to determining which cases will eventually be considered by the Supreme Court.⁵⁰⁸ Also, it should be noted that *Collyer* and *Boys Markets* have been decided at the height of a Republican administration. It may be more than coincidence that *Spielberg* was a product of the Eisenhower era. If ever the time were ripe politically, pragmatically and judicially for an affirmation of *Collyer*, that time is now. It is, therefore, submitted that *Collyer* is here to stay.

Although this new approach seems destined to remain with us, what is far more speculative is the shape and form into which it will evolve. With each daily change in the complexion of *Collyer* bringing new panegyrics immediately countered by a wave of polemics, the words of the General Counsel shortly after the enunciation of *Collyer* offer as probative a prognostication of its future as any available:

I have no clear answers to many of the issues raised [concerning *Collyer*] . . . I feel myself in much the same position as the farmer who took his young son to the city for the first time. The boy asked his father, "Pa, what are all those little clocks for on the posts at the edge of the sidewalk?" The father replied that he didn't rightly know. When the boy asked what the lights on the tall poles on the street corners flashing red and yellow and green were for, Pa didn't know that either. Standing in front of an elevator in an office building, the boy asked, "Pa, why do those people get into

506. E.g., *International Harvester Co.*, 138 N.L.R.B. 923 (1962), where the Board, in binding employees to an arbitration proceeding of which they had no notice and in which they did not take part, cited approvingly language from *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949), noting that "[a]fter all is said and done, 'procedural regularity [is] not . . . an end in itself, but [is] . . . a means of defending substantive interests.'" 138 N.L.R.B. at 928. The court in upholding the Board's decision had no trouble with the Board's characterization of what it had accomplished as being merely procedural. *Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.). It would seem but a short step to achieve the same rationalization with *Collyer*.

507. See, e.g., *Rios v. Reynolds Metals Co.*, 467 F.2d 54, 58 (5th Cir. 1972) (Title VII case).

508. See Comment, *The National Court of Appeals: Composition, Constitutionality, and Desirability*, 41 *Fordham L. Rev.* 863 (1973).

that little room and the door shuts by itself and when it opens the people are gone?" The father couldn't rightly say—maybe it was a magic room for making people disappear. Finally the boy asked, "Pa, do you mind me asking you all these questions?" Unhesitatingly Pa assured him, "Why of course not, son. If you don't ask questions, how you ever gonna learn."

It is with perhaps the same assurance that I have dealt with the questions raised by the Collyer case. And it is with the same confidence that I will try to field any of your questions or comments.⁵⁰⁹

509. Nash Address, *supra* note 65, at 158.