Spielberg Reconsidered--Problems in Application and Content of the Deferral Doctrine

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SPIELBERG RECONSIDERED—PROBLEMS IN APPLICATION AND CONTENT OF THE DEFERRAL DOCTRINE

INTRODUCTION

Most collective bargaining agreements between union and employer provide for arbitration as the final step in the grievance procedure. Typically, an employee who believes that a dispute exists concerning the interpretation of his collective bargaining agreement will resort to this procedure for disposition of the contractual issue. Based on the perception that the arbitral process promotes "industrial peace and stability," the National Labor Relations Board (the Board) has a long-standing policy of declining to review arbitral awards that involve allegations of an unfair labor practice, as well as a contractual issue.

This policy was first articulated in Spielberg Manufacturing Co., in

2. R. Gorman, supra note 1, at 541.
3. Id. at 543. See generally W. Baer, supra note 1, at 22-61, 92-61, 92-158; P. Hays, Labor Arbitration: A Dissenting View 3-75 (1966); C. Updegraff & W. McCoy, Arbitration of Labor Disputes (1946).
6. Unfair labor practices are listed in § 8 of the Act. National Labor Relations Act, § 8, 29 U.S.C. § 158 (1976). Actions by an employer that constitute unfair labor practices are set forth in § 8(a) of the Act. Id. § 8(a), 29 U.S.C. § 158(a) (1976). Those for which a union may be charged are listed in § 8(b) of the Act. Id. § 8(b), 29 U.S.C. § 158(b) (1976). The deferral cases discussed in this Note invariably arise in the § 8(a) context. The primary role of the Board in unfair labor practice cases is adjudicative; it neither prosecutes nor investigates these cases. For a concise discussion of the Board’s role in both unfair labor practice and representation unit issues, see NLRB v. Pincus Bros.-Maxwell, 620 F.2d 367, 385-86 (3d Cir. 1980) (Gibbons, J., dissenting).
8. 112 N.L.R.B. 1080 (1955). In Spielberg, the employer refused to reinstate certain employees following a strike at the employer’s plant. Id. at 1081. He based
which the Board held that it would defer to arbitral awards provided three criteria were satisfied. First, the arbitral proceedings must have been fair and regular. Second, the parties must have agreed to be bound. Third, the award must not have been clearly repugnant to the National Labor Relations Act (the Act). Subsequently, a fourth

his refusal upon the arbitrator's decision that discharge of these employees was warranted. Id. The Trial Examiner for the Board found that the discharged employees had engaged in conduct protected under § 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1976). The Board did not disagree with the Trial Examiner's findings, expressing no opinion on the merits. Rather, it chose to "defer" to the award rendered by the arbitrator. Id. In the years immediately following, Spielberg met with little criticism. Commentators generally seemed to accept the doctrine without engaging in thorough analysis. See Beatty, Arbitration of Unfair Labor Practice Disputes, 14 Arb. J. 180 (1959); Mathews, Critical Issues in Arbitration Practice: Seniority and Discharge Cases, 32 Rocky Mt. L. Rev. 37 (1959); Note, The Effect Given to an Arbitration Award by the NLRB in an Unfair Labor Practice Hearing, 20 La. L. Rev. 767 (1960). But see Cummings, NLRB Jurisdiction and Labor Arbitration: "Uniformity" v. "Industrial Peace," 12 Lab. L.J. 425 (1961) (arguing that arbitrators should never hear disputes in which unfair labor practices are implicated). As the parameters of the doctrine were defined, however, strident critics emerged. See NLRB v. Pincus Bros.-Maxwell, 620 F.2d 367, 384-97 (3d Cir. 1980) (Gibbons, J., dissenting) (arguing that deferral is both statutorily forbidden and unsound policy); Banyard v. NLRB, 505 F.2d 342, 347 (D.C. Cir. 1974) (holding that Spielberg constitutes an impermissible abdication of the Board's statutory authority unless the arbitrator clearly decided the unfair labor practice issue and was competent to do so). The Ninth Circuit adopted the Banyard requirements in Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977). See generally Getman, Collyer Insulated Wire: A Case of Misplaced Modesty, 49 Ind. L.J. 57 (1973) (arguing that arbitrators are not as competent as the Board in resolving most unfair labor practice issues).

9. 112 N.L.R.B. at 1080, 1082. Despite the broad deferral language employed in Spielberg, subsequent cases have established that the Board considers deferral inappropriate in § 8(a)(4) cases that involve threats of discharge or discrimination against employees who avail themselves of the protection of the Act. Filmation Assocs., Inc., 227 N.L.R.B. 1721 (1977). The Board also has held that deferral is inappropriate in § 8(a)(2) cases in which an employer "dominate[s] or interfer[e] with the formation or administration of any labor organization." Servair, Inc., 236 N.L.R.B. 1278 (1978), enforcement denied, 607 F.2d 258 (9th Cir. 1979), withdrawn and remanded, 624 F.2d 92 (9th Cir. 1980). There has been dispute as to whether there is authority for deferral. Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d) (1976), provides that "[f]inal 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." Id. This section has consistently been relied upon to support the Board's ability to fashion deferral doctrines. See, e.g., William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12, 16-17 (1974); NLRB v. Pincus Bros.-Maxwell, 620 F.2d 367, 372-73, 378 (3d Cir. 1980) (Garth, J., concurring); Bloom v. NLRB, 603 F.2d 1015 (D.C. Cir. 1979); Local Union No. 2188, IBEW v. NLRB, 494 F.2d 1087 (D.C. Cir.), cert. denied, 419 U.S. 835 (1974); Nabisco, Inc. v. NLRB, 479 F.2d 770 (2d Cir. 1973); Collyer Insulated Wire, 192 N.L.R.B. 837 (1971); Dubo Mfg. Corp., 142 N.L.R.B. 431 (1963), enforced per curiam, 353 F.2d 157 (6th Cir. 1965); International Harvester Co., 138 N.L.R.B. 923 (1962), enforced sub nom.
criterion became evident. For deferral to be granted, the arbitrator must have considered the statutory, unfair labor practice claim, in

Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), cert. denied, 377 U.S. 1003 (1964). R

Reliance upon this section, however, is misplaced. Section 203(d) is one of the sections of the 1947 Taft-Hartley amendments that established the Federal Mediation and Conciliation Service. It has been observed that "[t]his section simply means that privately agreed upon settlement methods, including arbitration, are to be preferred over mediation by the Federal Mediation and Conciliation Service. The section does nothing to change the distribution of discretion and enforcement authority in [section]... 8... of the Act." NLRB v. Pincus Bros.-Maxwell, 620 F.2d at 390 n.9 (Gibbons, J., dissenting). Indeed, even the pro-deferral majority in Collyer Insulated Wire, 192 N.L.R.B. 837 (1971), recognized that § 203(d) does not apply "specifically to the Board." Id. at 840. Deferral advocates also have purported to find support from the Supreme Court’s enthusiastic endorsement of arbitration in the Steelworkers Trilogy cases: United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960) (even facially frivolous claims must be arbitrated, provided they are apparently governed by the collective bargaining agreement); United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 598 (1960) (mere ambiguity in arbitrator’s award is no reason to refuse to enforce an award, even when such ambiguity permits an inference that the arbitrator may have exceeded his or her authority); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960) (doubts as to whether a dispute is covered by the contract should be resolved in favor of coverage). Taken together, these cases indicate a strong preference for the use of arbitration to resolve disputes arising under collective bargaining agreements. These cases, however, were concerned with the relationship between the federal courts and arbitrators. The Supreme Court has subsequently noted that "[t]he relationship of the Board to the arbitration process is of a quite different order." NLRB v. Acme Indus. Co., 385 U.S. 432, 436 (1967). In addition, the Court has held that, when "the Board disagree[s] with the arbitrator, ... the Board’s ruling ... of course ... take[s] precedence." Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 272 (1964). It has also been argued that § 10(a) of the National Labor Relations Act, 29 U.S.C. § 160 (1976), precludes deferral. This section provides that the Board’s power to remedy unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Id. § 160(a). At least one Circuit Court Judge has stated that § 10(a), when coupled with two express provisions of the Act that grant deferral authority, militates against a general deferral policy. NLRB v. Pincus Bros.-Maxwell, 620 F.2d at 387-89 (Gibbons, J., dissenting). Although § 10(a) provides that the Board is not ousted from jurisdiction simply because other means of resolving the dispute are available, 29 U.S.C. § 160(a) (1976), it does not preclude the Board from deferring. Carey v. Westinghouse Elec. Corp., 375 U.S. at 271; International Harvester Co., 138 N.L.R.B. at 925-26. Thus, neither § 10(a) nor § 203(d) is dispositive. There nonetheless remains a tension between § 10(a) of the Act and the national policy favoring arbitration, as articulated in the Steelworkers Trilogy. Despite this tension, the Supreme Court has acknowledged the Board’s discretion in this area and has expressly approved the Spielberg doctrine. Carey v. Westinghouse Elec. Corp., 375 U.S. at 270-72; Smith v. Evening News Ass’n, 371 U.S. 195, 198 n.6 (1962) (dictum). One opponent of deferral has seized upon the fact that Carey concerned a jurisdictional dispute “as to which there are separate statutory provisions.” NLRB v. Pincus Bros.-Maxwell, 620 F.2d at 394-95 (Gibbons, J., dissenting). There is not the slightest indication in Carey, however, that the Supreme Court’s approval of Spielberg was so narrowly confined. Id. at 383 (Garth, J., concurring).

addition to the contractual issue. Because of this criterion, the employee may choose either to have the statutory issue presented to the arbitrator, in which case deferral may ensue, or to withhold evidence relevant to the unfair labor practice issue for presentation to the Board. Hence, the employee is able to obtain two forums for resolution of a single factual issue.

Although these criteria seem unambiguous, there have been two problems in the application of the deferral doctrine. First, there have been divergent interpretations of the "clearly repugnant" criterion by the Board and courts. In several cases, it has been recognized that adherence to this criterion requires a narrow examination of arbitral awards, and that deferral is mandated when the Board and the arbitrator merely disagree. In other cases, however, the strictures placed upon Board examination by the "clearly repugnant" criterion have been applied differently. Second, circuit courts have differed.


12. Suburban Motor Freight, Inc., 247 N.L.R.B. No. 2, 103 L.R.R.M. (BNA) 1113, 1114 (Jan. 8, 1980); see UPS, Inc., 252 N.L.R.B. No. 145, 105 L.R.R.M. (BNA) 1484, 1485 n.3 (Sept. 30, 1980) (Board stated that it "would not defer to an arbitration award where the litigants chose to reserve the unfair labor practice issue for a different forum").


as to the appropriate scope of review of Board deferral determinations.¹⁵

Part I of this Note contends that the "clearly repugnant" criterion mandates deferral when the arbitrator and the Board merely disagree, and that courts that have closely monitored decisions for compliance with Spielberg have properly reviewed Board refusals to defer.¹⁶ Part II of this Note proposes that the deferral doctrine be revised, however, because proper application may lead to the sacrifice of employee rights protected under the Act.

I. Proper Application of the Spielberg Doctrine

A. The Clearly Repugnant Criterion

In the wake of the Spielberg decision, the Board did not closely examine arbitral determinations. Consequently, a finding of "clear repugnancy" was unlikely.¹⁷ The rationale for this "hands off" approach to deferral was articulated in International Harvester Co.,¹⁸ in which the Board, relying upon Supreme Court decisions praising

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¹⁶. The Third Circuit holds that deferral is required when the award rendered by the arbitrator may arguably be considered consistent with Board policy. NLRB v. Pincus Bros.-Maxwell, 630 F.2d 367, 374 (3d Cir. 1980). The Ninth Circuit has expressly rejected this analysis. NLRB v. Max Factor and Co., 105 L.R.R.M. (BNA) 2765, 2769 n.7 (9th Cir. 1980), petition for cert. filed, 49 U.S.L.W. 3560 (U.S. Jan. 21, 1981) (No. 80-1246).


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arbitration, refused to examine the arbitrator's award closely despite the Trial Examiner's conclusion that the union had violated the Act. After indicating that the "clearly repugnant" criterion left the Board with little discretion to review arbitral awards, the Board held that the criterion precluded the substitution of the Board's judgment for that of the arbitrator.

The Board's subsequent course, however, has been difficult to follow. It has frequently scrutinized arbitral awards by closely examining the record prepared during arbitration. In many cases involving

20. 138 N.L.R.B. at 934-36.
21. Id. at 927-29.
22. Id. at 927. This case represents perhaps the Board's most forceful pro-arbitration decision. The arbitrator found violations of § 8(a)(1) and § 8(a)(3) by the company, and violations of § 8(b)(2) and § 8(b)(1)(A) by the union. Id. at 923. The Trial Examiner rejected Spielbergen deferral, finding that fundamental elements of fairness had not been satisfied. He stated that the employee "never agreed to be bound by [the] award, had no notice of the hearings in that proceeding, and did not participate therein." Id. at 935. The Trial Examiner also found that the Board had a duty to exercise its jurisdiction in this case and held that the award was contrary to the Act. Id. at 934-35. The Board, by a 3-2 vote, disagreed. Id. at 924-25. After discussing the merits of arbitration and coming close to holding that deferral might be required under the Act, id. at 926-27, the Board stated that "it plainly appears to us that the award is not palpably wrong. To require more of the Board would mean substituting the Board's judgment for that of the arbitrator, thereby defeating the purposes of the Act and the common goal of national labor policy of encouraging the final adjustment of disputes . . . ." Id. at 929. The Board's current Chairman, Fanning, dissented, arguing that the Trial Examiner had been correct. Id. at 930 (Fanning, Member, dissenting). A separate dissent was filed by Member Rodgers, who took issue with the Board's "palpably wrong" approach. He stated that "the majority does not say . . . the award . . . was . . . consonant with rights secured to employees under the National Labor Relations Act. The majority has avoided [this basic issue] and has chosen to 'honor' the award solely because that 'award is not palpably wrong.'" Id. at 929-30 (Rodgers, Member, dissenting). International Harvester best indicated how the Spielbergen criteria were to be applied. It has been argued, however, that International Harvester represents a departure from the Spielbergen principles. See Meltzer, Ruminations About Ideology, Law, and Labor Arbitration, in Proceedings of the Twentieth Annual Meeting—National Academy of Arbitrators 1, 17 n.39 (1967); Summers, Labor Arbitration: A Private Process with a Public Function, 34 Rev. Jur. U.P.R. 477, 493 (1965).

24. See, e.g., B & L Motor Freight, Inc., 252 N.L.R.B. No. 60, 105 L.R.R.M. (BNA) 1456 (Oct. 27, 1980) (arbitrator's conditioning reinstatement award on agreement not to engage in protected activity renders award repugnant to the Act); UPS, Inc., 252 N.L.R.B. No. 145, 105 L.R.R.M. (BNA) 1484 (Sept. 30, 1980) (merely stating in the written grievance that employee was discharged for union activities is not enough to satisfy requirement that arbitrator must have passed upon statutory issue); Motor Convoy, Inc., 252 N.L.R.B. No. 175, 105 L.R.R.M. (BNA) 1519 (Sept.
employee discipline, for example, the Board has concluded, contrary to the decision of the arbitrator, that the conduct was protected under section 7 of the Act.\textsuperscript{25} Such determinations have routinely

30, 1980) (discharge not deferred to when arbitration record failed to disclose whether information relating to the unfair labor practice was presented or decided upon); Hammermill Paper Co., 252 N.L.R.B. No. 172, 105 L.R.R.M. (BNA) 1409 (Sept. 30, 1980) (arbitrator's award insupportable when remedy omitted backpay); Albertsons, Inc., 252 N.L.R.B. No. 81, 105 L.R.R.M. (BNA) 1443 (Sept. 29, 1980) (discharge unlawful when predicated upon protected activity); Babcock & Wilcox Co., 249 N.L.R.B. No. 99, 104 L.R.R.M. (BNA) 1199 (May 23, 1980) (upholding discharge as clearly repugnant to Act when arbitrator's findings found to be without basis in fact); Colonial Stores, Inc., 248 N.L.R.B. 1187 (1980) (taking issue with arbitrator's determination that employee was engaged in self-help rather than protected activity); Sachs Elec. Co., 248 N.L.R.B. 669 (1980) (no deferral when issue resolved by arbitrator not factually parallel to statutory issue); General Warehouse Corp., 247 N.L.R.B. No. 142, 103 L.R.R.M. (BNA) 1294 (Feb. 14, 1980) (deferral to arbitrator's award upholding discharge inappropriate when there is no indication that arbitrator considered employee's protected activities); Suburban Motor Freight, Inc., 247 N.L.R.B. No. 2, 103 L.R.R.M. (BNA) 1113 (Jan. 8, 1980) (deferral only appropriate when arbitrator has resolved statutory issue); Triple A Mach. Shop, Inc., 245 N.L.R.B. No. 24, 102 L.R.R.M. (BNA) 1559 (Sept. 21, 1979) (deferral inappropriate when clarification provided by arbitrator, arguably written to secure deferral, failed to cure statutory repugnancy); Brown Co., 243 N.L.R.B. No. 100, 101 L.R.R.M. (BNA) 1608 (July 30, 1979) (award not sustained when arbitration panel composed of members antagonistic to employees' interests and when employer engaged in activities "inherently destructive" of employees' rights); Sea-Land Serv., Inc., 240 N.L.R.B. 1146 (1979) (no deferral when arbitrator erroneously separated the cause of the suspension from the protected conduct); Ad Art, Inc., 238 N.L.R.B. No. 159, 99 L.R.R.M. (BNA) 1626 (Sept. 29, 1978) (discharge not warranted for filing of grievances), enforced, [1980-81] 5 Lab. L. Rep. (CCH) (90 Lab. Cas.) \$ 12,467 (9th Cir. Dec. 9, 1980); Gould, Inc., 238 N.L.R.B. No. 88, 99 L.R.R.M. (BNA) 1705 (Sept. 29, 1978) (conversion of discharge into suspensions does not cure statutory repugnancy when employees were disciplined for engaging in informational picketing and sympathy strike), enforced, 89 Lab. Cas. (CCH) \$ 12,343 (10th Cir. 1980); Montgomery Ward & Co., 234 N.L.R.B. 588 (1978) (deferral inappropriate when duty to furnish information not resolved with reference to the Act); Owner's Maintenance Corp., 232 N.L.R.B. 100 (1977) (award upheld with respect to finding that discharges were not for just cause, but overturned as to finding that employees were discharged for other than union activities), enforced, 581 F.2d 44 (2d Cir. 1978).

been followed by a refusal to defer to arbitral decisions upholding
discipline or discharge as violative of the "clearly repugnant"
criterion. In a number of cases, however, the Board has adhered to
its original "hands off" interpretation of the criterion and has deferred
to the arbitrator's award.

This inconsistency is traceable to differences among the Board's
membership as to the proper application of the "clearly repugnant"
criterion. Pursuant to section 3(b) of the Act, the Board has fre-
quently delegated its authority in a given case to a panel composed of
three of its five members. Differences between members as to the
proper application of the "clearly repugnant" criterion have produced
divergent results that vary with the composition of the panel. A host
of cases indicates that the Board's current Chairman, Fanning, and
Member Jenkins, have been reluctant to defer, often finding arbitral
awards to be "clearly repugnant" to the Act. Engaging in a result-

Instead, after de novo review of the facts, have adopted that part of the award with
which they agree. Kansas City Star Co., 236 N.L.R.B. 866, 867 n.3 (1978). Section
7 of the National Labor Relations Act provides in pertinent part that "[e]mployees
shall have the right to self-organization, to form, join, or assist labor organizations, to
bargain collectively through representatives of their own choosing, and to engage in
other concerted activities for the purpose of collective bargaining or other mutual aid
or protection, and shall also have the right to refrain from any or all of such activi-

26. See note 25 supra. Once it is determined that an employee was engaging in
protected activities under the Act, discipline of that employee violates § 8(a)(1) of the
Act. Hence, an arbitrator's decision to uphold such discipline yields a result "clearly
repugnant" to the Act.

27. See, e.g., Cook Paint & Varnish Co., 246 N.L.R.B. No. 104, 102 L.R.R.M.
(BNA) 1680 (Nov. 30, 1979); United States Postal Serv., 241 N.L.R.B. No. 192, 101
L.R.R.M. (BNA) 1074 (May 3, 1979); United Mine Workers, Local 1269, 241
L.N.R.B. No. 16, 100 L.R.R.M. (BNA) 1496 (March 20, 1979); Kansas City Star Co.,
236 N.L.R.B. 866 (1978); Lorain, Div. of Koehring Co., 234 N.L.R.B. 1060 (1978);


29. Chairman Fanning has been a Board member since 1957, while Member
Jenkins was appointed to the Board in 1963.

30. In several cases, Chairman Fanning and Member Jenkins have concluded that
deferral was inappropriate, over the strong, sometimes strident, dissents of
Member Penello. See, e.g., Hammermill Paper Co., 252 N.L.R.B. No. 172, 105
L.R.R.M. (BNA) 1409 (Sept. 30, 1980); UPS, Inc., 252 N.L.R.B. No. 145, 105
L.R.R.M. (BNA) 1484 (Sept. 30, 1980); Albertsons, Inc., 252 N.L.R.B. No. 81, 105
99, 104 L.R.R.M. (BNA) 1199 (May 23, 1980); General Warehouse Corp., 247
N.L.R.B. No. 142, 103 L.R.R.M. (BNA) 1294 (Feb. 14, 1980); Triple A Mach. Shop
Inc., 245 N.L.R.B. No. 24, 102 L.R.R.M. (BNA) 1559 (Sept. 21, 1979); Ad Art, Inc.,
238 N.L.R.B. No. 159, 99 L.R.R.M. (BNA) 1626 (Sept. 29, 1979), enforced, [1980-
81] 5 Lab. L. Rep. (CCH) (90 Lab. Cas.) ¶ 12,467 (9th Cir. 1980). When only
Chairman Fanning or Member Jenkins has been a member of such a panel, the
result more often has been to defer. See, e.g., American Bakeries Co., 249 N.L.R.B.
No. 170, 104 L.R.R.M. (BNA) 1305 (June 13, 1980); Pacific Southwest Airlines, 242
oriented approach, they have been largely responsible for the tendency to restrict deferral to those cases in which they "happen to agree" with the result reached in arbitration. As a practical matter, when Chairman Fanning and Member Jenkins have represented the controlling voice in a deferral case, deferral generally has been granted only when the arbitrator has ruled in favor of the employee. When the employee has unsuccessfully arbitrated, Fanning and Jenkins have frequently declared the award "clearly repugnant." In contrast, Member Penello has been reluctant to find awards "clearly repugnant" to the Act, and has argued for deferral in cases in which the Board and the arbitrator have "merely disagreed."

31. Kansas City Star Co., 236 N.L.R.B. 866, 867 n.3 (1978). Member Penello has stridently criticized his colleagues for emasculating the doctrine. The criticism, at times, borders on outrage. See Texaco, Inc., 233 N.L.R.B. 375, 379 (1977) (Penello, Member, dissenting) (characterizing the case as post-arbitral and terming his colleagues' refusal to defer "incredible").


34. Member Penello was appointed to the Board in 1972 and continues to serve.

Similarly, the courts that have considered the issue have disagreed as to the proper definition of the "clearly repugnant" criterion. The Third Circuit most clearly expressed its position concerning the Board's obligation to defer to the arbitral process under the "clearly repugnant" criterion in NLRB v. Pincus Bros.-Maxwell. In this section 8(a)(1) case, the arbitrator had upheld the discharge of an employee. The Board refused to defer to the arbitrator's judgment, stating that the employee's conduct had not been sufficiently opprobrious to remove it from the protection of section 7. It held that the discharge thus violated section 8(a)(1) and that the arbitrator's decision was "clearly repugnant" to the Act. On appeal, the Third Circuit held that, when the decision of an arbitrator "may arguably be characterized as not inconsistent with Board policy," the Board may not refuse to defer. Because the court concluded that it was reasonable to characterize the employee's activities as arguably unprotected, it refused to enforce the Board's order. Therefore, if the

37. 620 F.2d 367 (3d Cir. 1980).
38. Id. at 371.
40. Id. at 1063.
41. 620 F.2d at 374 (footnote omitted).
42. Id. The court held the conduct "arguably unprotected" for several reasons. First, it held that, based upon the record compiled at arbitration, employee Richardson's statements were arguably deliberate falsehoods. Deliberate falsehoods are unprotected under the Act. Id. at 375-76 (citing Linn v. Plant Guard Workers, 383 U.S. 53, 61 (1966)). Second, based again upon the arbitrator's record, the conduct could also be deemed "unprotected disloyalty." Such conduct would justify the employee's discharge. Id. at 376 (citing NLRB v. Local Union No. 1229, IBEW (Jefferson Standard), 346 U.S. 464, 472 (1953)). Third, because the arbitrator concluded that the employee's activities were "intended to interfere with the Company's long-established collective bargaining relationship with the Union," it was deemed arguable that the conduct was unprotected. Id. at 376-77 (footnote omitted). Finally, the court held that the arbitral record raised the possibility that the employee's conduct was not concerted, and was, therefore, unprotected. In reaching this determination, the court relied upon precedent within the circuit. Id. at 377. The court emphasized that, although Spielberg had been satisfied, no opinion was being expressed as to how the case would be decided in "a trial de noco." Id. at 377.
43. Id. at 370. The Tenth Circuit has agreed with the holding in Pincus, but has thus far not found the Board to have acted improperly in refusing to defer. NLRB v. Gould, Inc., 105 L.R.R.M. (BNA) 2788 (10th Cir. 1980) (employee's conduct not even arguably unprotected); NLRB v. Northeast Okla. City Mfg. Co., 631 F.2d 669, 673-76 (10th Cir. 1980) (Board did not abuse discretion in refusing to defer to arbitral proceedings). In NLRB v. Auburn Rubber Co., 384 F.2d 1 (10th Cir. 1967), the court became the first to refuse to enforce a Board order when the Board had refused to defer under Spielberg, Id. at 3. The case, however, is inapposite because the unfair labor practice issue "was raised before the Board by an unaffected third party." NLRB v. Pincus Bros.-Maxwell, 620 F.2d at 397 (Gibbons, J., dissenting).
arbitrator’s award is neither in plain defiance of the Act nor wholly at odds with the interpretation given the Act by the Board and the courts, the award is not clearly repugnant and deferral will be mandated.\textsuperscript{44}

The Ninth Circuit, on the other hand, has demonstrated two approaches to deferral. In some cases, it has explicitly rejected the “arguably unprotected” analysis and has upheld Board decisions not to defer when the arbitrator’s award was only arguably inconsistent with Board policy.\textsuperscript{45} Another application of the “clearly repugnant” criterion was expressed in \textit{Douglas Aircraft Co. v. NLRB},\textsuperscript{46} in which the court refused to enforce the Board’s decision not to defer because the reasons for the arbitrator’s award were susceptible to two interpretations—one statutorily repugnant, and one permissible.\textsuperscript{47} In effect, the Ninth Circuit held that because the reasons for the award were unclear, the arbitrator’s decision was not “clearly repugnant” to the Act.\textsuperscript{48}

An analysis of \textit{Spielberg} and its progeny reveals that the interpretation given the “clearly repugnant” criterion by Member Penello and by the Third Circuit is correct. \textit{International Harvester},\textsuperscript{49} which represents the Board’s clearest expression of the deferral doctrine, mandates deferral in cases of mere disagreement, even when the award would have been at variance with the Board’s determination had the agency considered the case \textit{de novo}.\textsuperscript{50} Member Penello has recognized that refusal to defer may properly occur only when the arbitral award is “wholly at odds with Board law.”\textsuperscript{51} Similarly, the Third

\textsuperscript{44} 620 F.2d at 373-75.
\textsuperscript{46} 609 F.2d 352 (9th Cir. 1979).
\textsuperscript{47} Id. at 354. The court seized upon the “palpably wrong” language of \textit{International Harvester Co.}, 138 N.L.R.B. 923, 929 (1962), enforced sub nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), cert. denied, 377 U.S. 1003 (1964), in arriving at this determination. 609 F.2d at 354-55. The court also relied upon \textit{United Steelworkers v. Enterprise Wheel and Car Corp.}, 363 U.S. 593 (1960), for the proposition that a “mere ambiguity” in the arbitrator’s opinion does not justify refusal to defer. 609 F.2d at 598. The reliance was misplaced. Although the \textit{Steelworkers Trilogy} concerns the relationship between federal courts and arbitration, “[t]he relationship of the Board to the arbitration process is of a quite different order.” NLRB v. Acme Indus. Co., 385 U.S. 432, 436 (1967).
\textsuperscript{48} 609 F.2d at 354.
\textsuperscript{50} Id. at 929.
Circuit’s approach in *Pincus Brothers* follows the interpretation of the “clearly repugnant” criterion set forth in *International Harvester*. Although the Board has never explicitly articulated a “arguably inconsistent” test, such a standard is implicit in *International Harvester* and in those cases in which the Board has undertaken a merely cursory review of arbitral determinations. Deferral may only be refused if the award is not even arguably consistent with Board policy because only in such a case is the award “clearly repugnant to the Act.”

In contrast, the Ninth Circuit’s approaches are unpersuasive. First, rejection of the arguably inconsistent standard does not comport with *International Harvester*. Second, the Board has never indicated that deferral is mandated when an ambiguous award has been rendered by the arbitrator. Rather, in such a case, clarification of the award is necessary to enable the Board to determine whether the award is, in fact, “wholly at odds with Board law,” and therefore, “clearly repugnant” to the Act.

The approach taken by Chairman Fanning and Member Jenkins also fails to consider the Board’s interpretation of the “clearly repugnant” criterion and effectively substitutes an analysis under which the criterion is employed only when expedient. Although the Board


53. See note 17 *supra* and accompanying text.


55. See notes 49-51 *supra* and accompanying text.

56. See notes 29-35 *supra* and accompanying text.

57. Clarification renders the basis for the decision discernible. Thereafter, the Board can properly monitor the award for statutory repugnancy.

may alter the Spielberg doctrine, such a change must be expressly made.\textsuperscript{39} The Board, as any other administrative agency, is not empowered to depart from its own articulated standards on an arbitrary basis.\textsuperscript{60} Further, the approach of Chairman Fanning and Member Jenkins has the unacceptable effect of leaving litigants in a state of confusion because it is not possible to know whether Spielberg will be strictly employed, in which case the review is narrowly circumscribed,\textsuperscript{41} or whether the doctrine will effectively be ignored to enable the Board to reach the merits of the case.\textsuperscript{2} The result hinges on the composition of the panel, a factor that should not be relevant.

B. The Appropriate Standard of Review

Several approaches to the review of Board refusals to defer are evident. The Second,\textsuperscript{63} Seventh,\textsuperscript{64} and D.C.\textsuperscript{65} Circuits have given the Board a relatively free hand in applying the deferral doctrine. They

\begin{itemize}
\item 59. This duty to adhere to precedent absent explicit change is imposed upon administrative agencies. Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973); Secretary of Agriculture v. United States, 347 U.S. 645, 653-54 (1954); Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862, 872 (D.C. Cir. 1978); Greyhound Corp. v. ICC, 511 F.2d 414, 416 (D.C. Cir. 1977); International Union (UAW) v. NLRB, 495 F.2d 1329, 1341 (D.C. Cir. 1972); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), \textit{cert. denied}, 403 U.S. 923 (1971).
\item 60. In recognizing the injustice of such departures, courts have overturned agency determinations when unexplained departure from precedent has occurred. E.g., Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 805-06 (1973); Secretary of Agriculture v. United States, 347 U.S. 645, 653 (1954); Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862, 881-82 (D.C. Cir. 1978); Greyhound Corp. v. ICC, 551 F.2d 414, 417 (D.C. Cir. 1977); Teamsters Local 769 v. NLRB, 532 F.2d 1385, 1392 (D.C. Cir. 1976); International Union (UAW) v. NLRB, 459 F.2d 1329, 1341 (D.C. Cir. 1972); Mary Carter Paint Co. v. FTC, 333 F.2d 654, 657 (5th Cir. 1964), \textit{rev'd on other grounds}, 382 U.S. 46 (1965); Sangamon Valley Television Corp. v. United States, 269 F.2d 211, 224-25 (D.C. Cir. 1959); see \textit{Petition for Certiorari at 10-15, Max Factor and Co. v. NLRB, No. 80-1246 (U.S., filed Jan. 21, 1981). See generally W. Gellhorn, C. Byse, P. Strauss, Administrative Law 393-95 (7th ed. 1979); Byse, \textit{Requirement of Findings and Reasons in Formal Proceedings in Administrative Law}, 26 Am. J. Comp. L. 393 (1978 Supp.).
\item 61. See notes 17-23 \textit{supra} and accompanying text.
\item 62. See notes 24-27 \textit{supra} and accompanying text.
\item 63. NLRB v. Horn & Hardart Co., 439 F.2d 674 (2d Cir. 1971).
\item 64. St. Luke's Mem'l Hosp. v. NLRB, 623 F.2d 1173 (7th Cir. 1980); Dreis & Krump Mfg. Co. v. NLRB, 544 F.2d 320 (7th Cir. 1976).
\end{itemize}
have engaged in merely cursory examinations of decisions involving application of Spielberg.66 The D.C. Circuit, for example, has indicated that the Board is entitled to determine the extent to which it wishes to defer, absent a showing that no discernible pattern is being followed.67 Thus, in cases in which the Board and the arbitrator have disagreed, the Board’s decisions not to defer have been upheld.68 Conversely, the Third and Ninth Circuits have held the Board to a stricter standard of review. Although both circuits purportedly have applied an “abuse of discretion” standard,69 in practice, it has been one of legal error.70 Board decisions not to defer have been closely

66. The courts have used equivocal, unhelpful language. See, e.g., NLRB v. Horn & Hardart Co., 439 F.2d 674, 679 (2d Cir. 1971) ("The Board can change its mind or alter its standards for deference in some respects without necessarily engaging in conduct so blameworthy as to justify our calling it abuse of discretion."); Office and Professional Employees, Local 425 v. NLRB, 419 F.2d 314, 320 (D.C. Cir. 1969) (The Board’s order will be enforced absent a showing of “sailing without any rudder, or . . . charting a course too far out to sea.”). The Third Circuit formerly held that deferral was voluntary, Radio Television Tech. School, Inc. v. NLRB, 488 F.2d 457 (3d Cir. 1973), but no longer adheres to this position. NLRB v. Pincus Bros.-Maxwell, 620 F.2d 367 (3d. Cir. 1980). The First Circuit’s position is difficult to gauge. NLRB v. Davol, Inc., 597 F.2d 782 (1st Cir. 1979), arose in the pre-arbitral context, but there is strong language in the case that suggests that deferral, in the broad sense, is never mandated. Id. at 786 ("Where the issue is one of statutory construction and not of contractual interpretation, there is no need for deferral.").


70. NLRB v. Pincus Bros.-Maxwell, 620 F.2d 367, 380 (3d Cir. 1890) (Garth, J., concurring). Spielberg, by its very language, indicates that the Board will defer when the three criteria have been met. Whether an award is “clearly repugnant” to the Act is a question of law. Id. The Board thus discerns the legal basis for the arbitrator’s award and then decides whether that basis is “clearly repugnant” to the relevant labor law. Id. Because the Board is deciding a matter of law, “the appropriate standard of review must necessarily be that of legal error.” Id. Under this analysis, the reviewing court must decide whether the Board’s determination regarding statutory repugnancy is correct. If not, the Board’s order may not be enforced. Id. at 380-81.
monitored for compliance with the "clearly repugnant" criterion. These courts have stated that, absent a finding of such compliance, Board determinations that deferral is inappropriate should be reversed.\(^7\)

Underlying the analyses of the Second, Seventh, and D.C. Circuits may be the belief that the Board, as the body responsible for the interpretation and implementation of the Act, is best able to interpret and apply its own doctrines.\(^7\) Given the perception of administrative agencies as uniquely qualified to resolve issues within their jurisdiction,\(^7\) this argument has some plausibility. The Board, however, as any administrative agency, should be bound by its own strictures until it expressly overrules the case creating those strictures.\(^7\)

Having determined that national labor policy would best be served by deferring to arbitration in certain circumstances, the Board should not be permitted to ignore its own doctrine. The Third and Ninth Circuits have properly recognized that \textit{Spielberg} and its progeny have placed severe limitations upon the Board's discretion in the deferral context.\(^7\) In fact, the \textit{Spielberg} criteria divest the Board of


\(^{72}\) NLRB v. Horn & Hardart Co., 439 F.2d 674, 679 (2d Cir. 1971); Office and Professional Employees, Local 425 v. NLRB, 419 F.2d 314, 320 (D.C. Cir. 1969); \textit{cf.} \textit{Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade}, 412 U.S. 800, 809 (1973) (ICC may select method that, in its judgment, will best effectuate congressional intent); \textit{Secretary of Agriculture v. Central Roig Ref. Co.}, 338 U.S. 604, 611-12 (1950) (when statute provided certain factors for Secretary of Agriculture to consider in allocating sugar import quotas, it was not necessary that he apply those factors mechanically); \textit{International Detective Serv., Inc. v. ICC}, 613 F.2d 1067, 1076-77 (D.C. Cir. 1979) (statutory requirement that ICC consider five factors permits discretion as to weight to be accorded each).

\(^{73}\) There has been a perception that the complexity of society and the attendant need for administrative agencies imply a recognition that these agencies require a large degree of discretion in carrying out statutory mandates. The Fifth Circuit has observed that "[o]ur complex society now demands administrative agencies. The variety of problems dealt with make absolute consistency, perfect symmetry, impossible. And the law reflects its good sense by not exacting it." \textit{Mary Carter Paint Co. v. FTC}, 333 F.2d 654, 660 (5th Cir. 1964) (Brown, J., concurring), \textit{rev'd on other grounds}, 382 U.S. 46 (1965).


\(^{75}\) \textit{See note 71 supra} and accompanying text.
Significantly, these courts have not held that Spielberg could not be expressly disavowed. Rather, they have demanded only that the Board adhere to its own doctrine in the absence of an announced departure from precedent.

This approach comports with basic requirements of fairness. Litigants have a right to be apprised of the Board's disposition of a prospective deferral case. Current Board flux on this issue requires litigants to engage in educated guesswork. Proper adherence to the

76. NLRB v. Pincus Bros.-Maxwell, 620 F.2d 367, 381 (3d Cir. 1980) (Garth, J., concurring) ("The Spielberg doctrine . . . does not confer discretion on the Board. Rather, it requires the Board to determine whether each of the three parts of the Spielberg test is satisfied."); see NLRB v. Campbell Prod. Dept'., 623 F.2d 876, 881 (3d Cir. 1980) (NLRB must adhere to its own five-day objection rule in representation elections); K. Davis, Administrative Law Text §§ 4.03, 4.04 (1979) (banking agency's gradual narrowing of discretion favorably reviewed as comporting with general desirability of reduction of agency discretion); cf. Service v. Dulles, 354 U.S. 363, 380 (1957) (Secretary of State could, and did, create regulations that restricted his discretion); Accardi v. Shaughnessy, 347 U.S. 260, 265-67 (1954) (Attorney General's delegation of authority to Board of Immigration Appeals constituted a restriction on discretion that could not be sidestepped).

77. NLRB v. Pincus Bros.-Maxwell, 620 F.2d 367, 382 (3d Cir. 1980) (Garth, J., concurring) ("Since the Board has original discretion to select among various deference standards, it unquestionably has discretion to change . . . its own standard."); see Hawaiian Hauling Serv., Ltd., v. NLRB, 545 F.2d 674, 676 (9th Cir. 1976), cert. denied, 431 U.S. 965 (1977). Administrative agencies are generally empowered to disavow prior doctrines and holdings. Proper judicial review, however, is not possible absent a discernible basis for such disavowal. Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 805-06 (1973); International Union, UAW v. NLRB, 459 F.2d 1329, 1341 (D.C. Cir. 1972); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied., 403 U.S. 923 (1971); see Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862, 882 (D.C. Cir. 1978); Chisholm v. FCC, 538 F.2d 349, 364 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976). It is not generally required, however, that the agency furnish detailed reasons for its holding. O-J Trans. Co. v. United States, 536 F.2d 126, 129-30 (6th Cir.), cert. denied, 429 U.S. 960 (1976); see Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862, 882 (D.C. Cir. 1978); Chisholm v. FCC, 538 F.2d 349, 364 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976). It is not generally required, however, that the agency furnish detailed reasons for its holding.

78. See notes 69-71 supra and accompanying text.

79. The "law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, [and] another for Tuesday . . . ." Mary Carter Paint Co. v. FTC, 333 F.2d 654, 660 (5th Cir. 1964) (Brown, J., concurring), rev'd on other grounds, 382 U.S. 46 (1965); see Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167-69 (1962); Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862, 872 (D.C. Cir. 1978); Carnation Co. v. NLRB, 429 F.2d 1130, 1133 (9th Cir. 1970); NLRB v. WGOK, Inc., 384 F.2d 500, 503 (5th Cir. 1967); Burinskas v. NLRB, 357 F.2d 822, 827 (D.C. Cir. 1966).

80. See Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862, 872 (D.C. Cir. 1978). The court stated that the decision should not turn on "the composition of the NLRB panel which happens to hear the case." Id. (footnote omitted).

81. Such a result is unfair to litigants, see note 79 supra, and is at odds with the requirement of administrative law that an agency provide a reasoned basis for deci-
doctrine, however, leads to an unjust result because the deferral doctrine itself is flawed.

II. PROPOSAL FOR THE REVISION OF THE SPIELBERG DOCTRINE

A. The Deficiencies of the Spielberg Doctrine

The difficulties involved in application of the "clearly repugnant" criterion are compounded by a problem in the content of that criterion. When the criterion is strictly construed, the Board has rarely found arbitral decisions that are "clearly repugnant" to the Act. In close cases, there has been disagreement among Board members, and between the Board and reviewing courts, as to when employee conduct "crosses the line" from protected to unprotected activity. A host of factors must be weighed and considered. Yet, Spielberg mandates deferral when reasonable disagreement exists.

sion-making. "[I]f an agency glosses over or swerves from prior precedents without discussion it may cross the line from . . . tolerably terse to . . . intolerably mute." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) (footnote omitted), cert. denied, 403 U.S. 923 (1971). See also Secretary of Agriculture v. United States, 347 U.S. 645, 653 (1954); Greyhound Corp. v. ICC, 551 F.2d 414, 416 (D.C. Cir. 1977).

82. The contrast between the Third and Ninth Circuits regarding this criterion graphically illustrates the problems encountered by reviewing courts in attempting to decipher "clearly repugnant." See notes 37-48 supra.

83. See notes 17-23, 27 supra and accompanying text. Even assuming rigid adherence to the doctrine, however, there will be decisions by arbitrators that even Member Penello deems "clearly repugnant" to the Act. See, e.g., B & L Motor Freight, Inc., 253 N.L.R.B. No. 14, 105 L.R.R.M. (BNA) 1456 (Oct. 27, 1980); Retail Clerks, Local 324, 235 N.L.R.B. 711 (1978); Montgomery Ward & Co., 234 N.L.R.B. 588 (1978).

84. In other words, assuming agreement on the deferral issue, Board members may reasonably disagree at to whether the employee's conduct was protected under § 7 of the Act. In Colonial Stores, Inc., 248 N.L.R.B. 1187 (1980), for example, the majority held that the employee had engaged in concerted, protected activities under § 7, and thus refused to defer to the arbitrator's holding that the discharge had been proper. Id. at 1188. In dissent, Member Penello conceded that deferral was inappropriate, inasmuch as the arbitrator's rationale was "clearly repugnant" to the Act. Id. at 1190. He nonetheless concluded that the conduct had not constituted concerted, protected activity. Id. at 1191. See also Sea-Land Serv., Inc., 240 N.L.R.B. 1146 (1979).


86. Section 7 establishes the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1976). Because this language is imprecise, the most fruitful approach is to consult cases in which the Board has held that § 7 rights were infringed. See B. Feldacker, Labor Guide to Labor Law 98-102 (1980); M. Forkosch, A Treatise on Labor Law § 404 (2d ed. 1965).
The significance of this latter point becomes apparent when the respective roles of the Board and the arbitrator are considered. The arbitrator is best described as a contract reader. Although resort to external law may be inevitable, the arbitrator generally renders a decision through the process of parsing contractual language. Many arbitrators are quite skilled and experienced at this task. Moreover, to the extent that an arbitrator looks beyond the express language of the contract, the general purpose is to promote harmonious relations within the plant—to establish what has been referred to as a "common law of the shop." Resolution of statutory issues may occur incidentally and incorrectly.

The function of the Board is different. Operating pursuant to congressional authority, the Board is charged with the vindication of statutory guarantees embodied in the Act. These rights, however,
may not coincide with those provided for in a particular collective bargaining agreement. The "clearly repugnant" criterion, therefore, is undesirable because, when properly applied, it prevents the Board from fully protecting the litigants' statutory rights. Once it is determined that the award rendered by the arbitrator is not "clearly repugnant," and that the arbitrator has "passed on" the statutory issue—something the arbitrator may be ill-equipped to do—the inquiry must end. Terminating the review at this juncture allows the arbitrator to become responsible for the protection of statutory rights. The arbitrator, however, it not likely to be skilled in such
give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining. (quoting National Licorice Co. v. NLRB, 309 U.S. 350, 362 (1940)). Not only does the Board enjoy a congressional grant of power, see note 95 supra, but it has also been made statutorily accountable to Congress for the exercise of that power. See 29 U.S.C. § 153(c) (1976) (Board must report to the President and to Congress annually).

97. For example, the contractual interpretation of "discharge for just cause" may turn out to be quite different from the Board's conclusion as to whether the discharge was proper under the Act. Covington, supra note 90, at 117-22. In such a case, deferral may be equivalent to deprivation of statutory rights. Thus, the charging party will have been "deprived of rights guaranteed by public law as a result of an act of the agency charged with protecting those rights. This is clearly not to be countenanced." Id. at 118.

98. See notes 49-54 supra and accompanying text.


100. See notes 93-94 supra and accompanying text. A lack of confidence in the arbitrator's competence in non-contract related decisions prompted the court in Banyard v. NLRB, 503 F.2d 342 (D.C. Cir. 1974), to modify Spielberg to prevent deferral when the arbitrator had exceeded his competence. Id. at 347-49; see Covington, supra note 90, at 97.

101. In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Supreme Court held that statutory rights exist independently of private rights adjudicated by an arbitrator, and that the factual coincidence of the rights is not dispositive. Id. at 50. The Court also indicated that an arbitrator exceeds his authority when the award transcends the collective bargaining agreement. Id. at 53. Gardner-Denver arose in the context of a suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)-2000(e)-17 (1976). Commentators have argued that both the legislative history surrounding Title VII and the high priority given issues of discrimination make the statutory-contractual distinction inapplicable to the unfair labor practice-breach of contract controversy. Nash, Board Referral to Arbitration and Alexander v. Gardner-Denver: Some Preliminary Observations, 25 Lab. L.J. 259 (1974); Note, Alexander v. Gardner-Denver and Deferral to Labor Arbitration, 27 Hastings L.J. 403 (1975). The Supreme Court, however, expressly discussed the relationship between arbitrators and the Board in Gardner-Denver, stating that "consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude subsequent consideration of the claim by the National Labor Relations Board as an unfair labor practice charge." 415 U.S. at 50. This does not indicate that the Board may not, in the exercise of its discretion, defer to an arbitral award. The opinion does, however, indicate the Court's recognition of the divergence between contractual and statutory rights. It is noteworthy that at least
matters, nor has he been charged with the resolution of unfair labor practice disputes. To permit arbitral resolution of statutory issues is to sacrifice express statutory rights on the "altar of institutionalism."

The Board, therefore, must rationally expand its jurisdiction over arbitration awards that involve unfair labor practices to guarantee justice to all parties. The Board should not be constrained from examining all relevant evidence in making the determination. The following proposal, designed to revise the Spielberg doctrine, reflects these considerations.

B. A Suggested Approach

The Board should, consistent with its statutory role as the sole source of remedy for unfair labor practices, defer to an award resulting from a completed arbitral proceeding if it determines that the award has adequately protected the statutory rights of the party seeking the Board's assistance. Deferral should not be granted absent a written opinion in which the arbitrator fully addresses those

one Board member elaborated upon this distinction between contractual and statutory rights, and argued that Congress "did not intend to authorize the Board to subdelegate [the task of adjudicating unfair labor practice disputes] by recognizing any private arrangement or agreement of the parties, including arbitration." I. Oscherwitz & Sons, 130 N.L.R.B. 1078, 1083-84 (1961) (Kimball, Member, concurring in part, dissenting in part).

102. See notes 88-92 supra and accompanying text.

103. See 29 U.S.C. §§ 153(c), 160(e), (f) (1976).


105. For example, because transcripts are not always kept in arbitral proceedings, the existence of such a transcript in the hands of one of the parties may provide some indication as to what occurred. See United States Postal Serv., 241 N.L.R.B. No. 192, 101 L.R.R.M. (BNA) 1074, 1076 (May 3, 1979) (Fanning, Chairman, Jenkins, Member, dissenting). Professor Covington has stated that Board scrutiny of arbitral proceedings is desirable. Covington, supra note 90, at 127.

106. The Board should recognize that arbitrators are vindicating a separate set of rights, namely, those outlined in the collective bargaining agreement. See note 89 supra and accompanying text.

107. In contrast, the Board should not defer in those cases in which one party has preferred the processes of the Board over arbitration. Collyer Insulated Wire, 192 N.L.R.B. 837 (1971), is the source of this pre-arbitral deferral doctrine. The Collyer doctrine has been limited, however, by General Am. Transp. Corp., 228 N.L.R.B. 808 (1977), and its continuing vitality is in some doubt. NLRB v. Pincus Bros.-Maxwell, 620 F.2d 367, 393 (3d Cir. 1980) (Gibbons, J., dissenting).

108. See notes 95-104 supra and accompanying text.

109. A written opinion will save the Board the time and effort of attempting to discern the basis of the award. See Covington, supra note 90, at 125.
issues subject to the jurisdiction of the Board. In determining whether deferral is appropriate in a given case, the Board should consider the extent to which the dispute concerns the terms and meaning of the collective bargaining agreement, the extent to which the union’s interests during arbitration were harmonious with those of the employee, and the composition of the arbitral panel.

This proposal has the virtue of allowing a degree of discretion to remain with the Board. The rigid Spielberg checklist is replaced


111. Potential unfair labor practices that may be resolved by discerning the meaning of the contract are the best cases for deferral. If the arbitrator determines that the action taken by an employer did not violate the terms of the contract, the predicate for a § 8(a)(5) violation vanishes. NLRB v. Pincus Bros.-Maxwell, 620 F.2d 367, 391 (3d Cir. 1980) (Gibbons, J., dissenting). See also General American Transp. Corp., 228 N.L.R.B. 808, 810-11 (1977) (Murphy, Chairwoman, concurring). In addition, the Board may be more likely to defer in § 8(a)(5) cases than in a typical § 8(a)(3) case because the former, which involve the meaning of a contract, generally involve the kinds of situations with which arbitrators routinely deal. See Covington, supra note 90, at 108. For example, decisions concerning the meaning of a subcontracting clause have been deemed to be within the competence of arbitrators. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584-85 (1960).

112. This factor has been of dispositive significance in several recent Board cases. See UPS, Inc., 252 NLRB No. 145, 105 L.R.R.M. (BNA) 1484 (Sept. 30, 1980) (deferral inappropriate when union may have been in conflict with interests of employee); Brown Co., 243 NLRB No. 100, 101 L.R.R.M. (BNA) 1608 (July 30, 1979) (Spielberg deferral not granted when committee upholding work transfer consisted of members whose interests were in conflict with those of the charging party); Mason and Dixon Lines, Inc., 237 NLRB 6, 6 (1978) (Board approved Administrative Law Judge’s determination that union’s representation of employee had been perfunctory at best, and that, therefore, the Spielberg “fair and regular” criterion had not been met).

113. Member Jenkins has maintained that deferral is inappropriate absent a “neutral” member on the arbitral panel. Automobile Transp., Inc., 223 N.L.R.B. 217 (1976) (Jenkins, Member, dissenting in part); Terminal Transp. Co., 185 N.L.R.B. 672 (1970). This factor may be relevant when there is, for example, an arbitral panel adverse to an employee’s interests. See, e.g., Brown Co., 243 N.L.R.B. No. 100, 101 L.R.R.M. (BNA) 1608 (July 30, 1979). Consideration may also be given to the competence of the arbitrator here. See Covington, supra note 90, at 106-10.

114. It is instructive to compare the Spielberg doctrine with the Board’s deferral stance in the pre-arbitral context. Although the Board first announced a pre-arbitral deferral policy in Collyer Insulated Wire, 192 N.L.R.B. 837 (1971), it was not until a year later, in National Radio Co., 198 N.L.R.B. 527 (1972), overruled, General Am. Transp. Corp., 228 N.L.R.B. 908 (1977), that the Board announced the extension of the doctrine to § 8(a)(3) cases. In National Radio, a majority of the Board determined that the arbitral process would be deferred to, provided that the contract and its interpretation were central to the dispute, id. at 532, and that it could reasonably be anticipated that the dispute would be resolved in a manner not inconsistent with the Act. Id. at 531. This standard, which involves questions of fact, leaves the Board with a degree of discretion. Collyer and National Radio, taken together, indicate that
with a standard that focuses on the relevant circumstances." At the same time, the proposal recognizes that arbitrators can, and often do, settle contractual issues in a way that simultaneously satisfies the Board that the factually related unfair labor practice issue has been resolved in the arbitration proceedings. In addition, reviewing courts are notified that the Board has justifiably elected to retain a large amount of discretion in the deferral area. No longer may the

when the Board reserves a measure of discretion, reviewing courts will rarely overturn the agency's deferral determinations. NLRB v. Northeast Okla. City Mfg. Co., 631 F.2d 669, 673-79 (10th Cir. 1980); NLRB v. Safeway Stores, Inc., 622 F.2d 425, 428 (9th Cir. 1980), cert. denied, 49 U.S.L.W. 3617 (U.S. Feb. 23, 1981) (No. 80-814); Los Angeles Marine Hardware Co. v. NLRB, 602 F.2d 1302, 1309 (9th Cir. 1979); NLRB v. Davol, Inc., 597 F.2d 782, 787 (1st Cir. 1979); Lodges 700, 743, International Ass'n of Machinists Workers v. NLRB, 525 F.2d 237, 246 (2d Cir. 1975); Local Union No. 2188, IBEW v. NLRB, 494 F.2d 1087, 1091 (D.C. Cir.), cert. denied, 419 U.S. 835 (1974); Enterprise Publishing Co. v. NLRB, 493 F.2d 1024, 1027 (1st Cir. 1974).

115. The list is not intended to be exclusive and no factor need be dispositive. Rather, a distillation of the factors that have tended most frequently to influence Board decisions has been set forth. Professor Covington also proposes to amend Spielberg. Covington, supra note 90, at 133-34. His proposal, however, retains Spielberg's "checklist" type of approach. Id. He also suggests, however, that when the criteria he proposes have not been fully satisfied, the arbitral award and written opinion should be used as evidence in the subsequent unfair labor practice proceeding. Id. at 128-29. In contrast, use of the written opinion as evidence in the unfair labor practice proceeding is inappropriate under the present proposal. Deferral decisions are reached only after all relevant circumstances have been examined. Thus, once a decision has been made not to defer, there is simply nothing left to examine. Professor Davis has endorsed rules that, like the present proposal, allow for a measure of flexibility, stating that "[r]ules will not suffice. Rules must be supplemented with discretion. When discretion shrinks too much, affirmative action is needed to recreate it." K. Davis, supra note 76, § 1.07, at 23.

116. The arbitrator must have resolved the issues as the Board would have, based upon precedent and interpretation of the Act. One may argue that such a policy is not a deferral policy, but rather a policy under which the Board "adopts" a decision with which it agrees. See Atlantic Steel Co., 245 N.L.R.B. No. 107, 102 L.R.R.M. (BNA) 1247, 1250 (Sept. 28, 1979) (Penello, Member, concurring). Additionally, the proposed standard replaces a "clearly repugnant" standard with a "merely erroneous" test. See generally Sea-Land Serv., Inc., 240 N.L.R.B. 1146, 1151 (1979) (Penello, Member, dissenting). Purely as a definitional matter, however, the term "deferral" remains appropriate. "To defer" means "to submit or yield to another's wish or opinion." Webster's Seventh New Collegiate Dictionary 216 (1973). This deferral policy will not undermine the parties' confidence in the finality of arbitration for several reasons. First, current Board law is in such flux that parties have little idea as to whether an arbitrator's decision will be final. See notes 17-23 supra and accompanying text. Second, employees who lose in arbitration are not likely to seek a subsequent adjudication by the Board if the deferral policy is modified so as to make deferral less likely. Even before Spielberg had been announced, virtually all arbitration awards were followed. See Mathews, supra note 8, at 37. Finally, the Board should not abdicate its statutory responsibility merely on the basis of a speculative adverse effect on arbitration.

117. "Rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases. The justification for
circuit courts use the Board's own doctrine as an entering wedge to reach the merits of the case. The Board's order must be enforced, absent a showing that the large discretion retained has been abused, or that the Board has acted in contravention of the Act.

The changes submitted for consideration are extensive and would have a substantial impact. Accordingly, the Board should effect such changes through the mechanism of its rulemaking powers. The Board is generally endowed with discretion to choose between rulemaking and informal adjudication in a given situation. A change in Board policy as fundamental as that proposed here, however, is precisely the type of modification that should be undertaken only after the Board has examined all relevant factors pursuant to the statutory procedure. The importance of the issues involved demands no less.

Discretion is often the need for individualized justice.” K. Davis, supra note 76, § 107, at 22.


119. An obvious act of defiance would arise if the Board determined that it would remedy a breach of contract that did not constitute an unfair labor practice. The Board plainly lacks authority to do so, and, in such a case, reviewing courts would be required to refuse enforcement of the Board's order. See Kohls v. NLRB, 629 F.2d 173, 178-79 (D.C. Cir. 1980).


122. Petition for Certiorari at 16, Max Factor and Co. v. NLRB, No. 80-1246 (U.S., filed Jan. 21, 1981) (“Requiring a rulemaking proceeding here would . . . ensure that a change in policies as fundamental as this one would be based upon fully articulated reasoning and an accurate perception of practical realities, rather than upon the constantly changing political complexion of the Board itself.”). Additionally, such a procedure would afford all interested parties the opportunity to be heard prior to the effective date of any proposed policy. Pursuant to 5 U.S.C. § 553(b) (1976), agencies are required to publish notice of proposed rules in the Federal Register, unless “the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to public interest.” Id. § 553(b)(B). After notice has been given, “the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.” Id. § 553(c). To assure that interested parties will have sufficient time to react to a proposed rule, a time differential of 30 days is imposed between publication and the effective date of the rule. Id.; see 1 K. Davis, Administrative Law Treatise § 6.12 (1958).
Conclusion

The Board’s inconsistent application of Spielberg is unwarranted because of the unfairness to litigants and the departure from fundamental precepts of administrative law created by such inconsistency. Reviewing courts, therefore, should follow the Third Circuit’s lead and insist on adherence to the Spielberg principles. Recognition of the inherent deficiencies of these principles, however, is long overdue. Since 1955, a doctrine has been in effect that, under the guise of fostering arbitration, has resulted in the consideration of statutory rights by a party unqualified to resolve issues affecting those rights. Accordingly, Spielberg should be amended. The Board must accept ultimate responsibility for the protection of rights guaranteed by the National Labor Relations Act.

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