

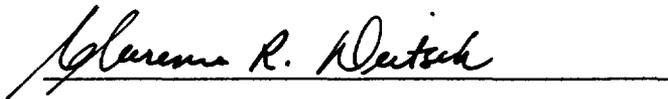
NLRB Policy on Deferral to Arbitration
Under the Collyer Doctrine

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Most governmental power has shifted from Congress to administrative agencies. . . . As regulation and administration have grown, liberty has been eroded and bureaucratic discretion has taken the place of the rule of law.*

NLRB Policy on Deferral to Arbitration
Under the Collyer Doctrine

Kim M. Baade

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The effectiveness of any piece of legislation lies in its interpretation and administration under current economic and political conditions. The purpose of this research was to analyze the National Labor Relations Board's practice of deferral to arbitration in unfair labor practice allegations involving the duty to bargain in good faith. At the base of this research was the hypothesis that the current practice of deferral encourages behavior detrimental to the collective bargaining process and is in direct contradiction with the intent of Congress to delegate the adjudication of all ULP's to the Board. A study of the number of unfair labor practice cases filed with the NLRB and arbitrators was conducted in an attempt to show that deferral is not an effective method of decreasing the caseload of the Board. This research was also intended to raise doubt about the equality of adjudication with a comparison between the two processes and support the contention that the average arbitrator is not qualified to resolve ULP issues.

These findings were accomplished through extensive research of past and present decisions of the National Labor Relations Board and the courts, labor statistics, and interpretations of the Collyer Doctrine as voiced by labor law authorities.

The research revealed an increase in ULP cases filed and only a small decrease in the percent of cases determined by the NLRB. Support was found that arbitrators may be lacking in the experience necessary for equal and fair treatment of these cases, and an analysis of various other factors lent credibility to the stated hypothesis.

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I. AN INTRODUCTION

In August of 1971, the National Labor Relations Board deviated from its past practice of adjudicating alleged unfair labor practice cases by electing to defer to the private grievance/arbitration process all Section 8(d) unfair labor practices, Section 8(a)5 and 8(b)3 violations, and various other illegal practices under Section 8 of Taft-Hartley. The case involved an employer who repeatedly attempted to persuade his union to include in the contract a negotiated skill factor for skilled labor grades. The union refused to negotiate for an "exclusive group" of employees and replied that re-evaluation of pay rates for skilled employees must be accompanied by a re-evaluation of all jobs. While consenting to this stipulation, the employer unilaterally established immediate incentive wage increases, disregarding the pay scale provided by the bargaining contract. In addition, the employer redesigned job duties in a fashion inconsistent with the negotiated contract (13).

Union response to these actions came in the form of an unfair labor practice charge alleging that the employer did not fulfill his bargaining obligations under the provisions of Taft-Hartley. The Trial Examiner who reviewed the case in the NLRB proceedings, found merit in the ULP charge. However, when the Collyer Company filed exceptions, the Board reasoned that the dispute arose out of the language of the contract. It asserted that the matter of a "skill factor" increase had been left open for further negotiation after the execution of the agreement, and the extent to which it remained open was the subject of the controversy. In the face of this "dual issue", the National Labor Relations

Board chose to ignore its obligation under Section 10(a) of the National Labor Relations Act of 1935 (the Wagner Act) to prevent any person from engaging in an unfair labor practice, and deferred the matter to arbitration with the justification that it would simultaneously determine the contractual issue and the unfair labor practice charge(13). The Board said:

The contract clearly provides for the grievance and arbitration machinery; where the unilateral action taken is not designed to undermine the union and is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a matter compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties.

It went on to say:

In our view, disputes such as these can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute (1, p. 387).

It wasn't until the General American Transportation Corp. case was determined in 1977 that the NLRB limited application of Collyer deferral by excluding unfair labor practices affecting individual rights under Section 7 of Taft-Hartley (2).

Despite this exclusion, the practice of deferral to arbitration in cases of "dual jurisdiction" (unfair labor practice charges stemming from violations of an employer's bargaining obligations) has been quite common since the Collyer decision in 1971. Its impact on the environment of contract negotiations is a subject of heated controversy among students of labor law. Is the National Labor Relations Board abandoning its statutory duty to prevent unfair labor practices and diluting its exclusive power in these matters, or is it legitimately exercising

its discretionary power? The purpose of this paper is to explore the possibilities of the Collyer decision and find support for my belief that the current nature of NLRB deferral to arbitration saddles the union with the burden of forcing employers to adhere to the collective bargaining agreement and encourages behavior which, prior to Collyer, would have been treated as an unfair labor practice and remedied by the NLRB.

II. THE LEGAL ENVIRONMENT

The congressional elections of November, 1934 produced a Democratic majority committed to the policies of the New Deal and the leadership of Franklin Roosevelt. On February 15, 1935, despite fierce managerial opposition, Senator Robert Wagner introduced his now famous labor bill. On June 27, 1935, the National Labor Relations Act (Wagner Act, as it was called) was given legislative approval and with it, approval of the collective bargaining process. With the statute's passage, the intent of which was to promote a better relationship between labor and management, Congress declared a national policy of

. . . encouraging the practice and procedure of collective bargaining and protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment in other mutual aid or protection (3).

As part of the Act, Congress created the National Labor Relations Board to ". . . make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this Act" (4). Certain employer practices were considered so injurious to the policies of the NLRA that they were called unfair labor practices and were prohibited by the legislation.

The favorable legal climate created by the Wagner Act, the discontent produced by Depression levels of unemployment between 1935 and 1941, and the labor shortages created by World War II combined to swell the ranks of organized labor and encourage union aggressiveness at the bargaining table. In an effort to curb organized labor's expanding economic and political power, Congress en-

acted the Labor Management Relations Act (Taft-Hartley Act) in 1947 despite the cries of union members denouncing Taft-Hartley as a "slave labor bill". This body of legislation explicitly recognized and protected the rights of all parties (labor organizations, employers, employees and the public). Again, Congress designated the NLRB as the administrative law agency responsible for the execution of Taft-Hartley policies; its membership, however, was expanded from three to five members. The statute also listed, for the first time, certain proscribed union practices--union unfair labor practices.

Section 8(5) of the Wagner Act states that it shall be an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees. . ." Experience under the Act quickly disproved the assumption that unions would deal in good faith at the bargaining table as a matter of practice. To emend the inequity, Section 8(b)3 of Taft-Hartley imposed upon management. Section 8(d) goes one step further to clarify the duty imposed by both sections.

. . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment. . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

In determining whether the parties to a contract have exhausted their responsibility to bargain in good faith, the states of mind of the parties are assessed and decisions are made on a case-by-case basis.

It is interesting to note that prior to Taft-Hartley, the National Labor Relations Board required that all grievances be adjusted with the representatives of a worker's labor union. Under the provisions of the legislation, employers may make adjustment of a grievance with the worker on an individual basis, provided he does not violate the terms of the collective bargaining agreement.

This encourages individual bargaining and provides a vehicle for weakening the practice of collective bargaining.

Though Congress probably did not intend for the power of the NLRB and the courts to determine the substance of collective bargaining contracts, in NLRB v. Wooster Division of Borg Warner Corp. (5), the U.S. Supreme Court upheld the Board's authority to broadly classify bargaining topics as either illegal, mandatory or voluntary in nature. Section 8(d) items fall into the second category, making it necessary to bargain them in good faith during the life of the contract under penalty of an unfair labor practice charge. Thus, the NLRB has the ability to limit the area of free collective bargaining by designating bargaining topics as voluntary items, thereby removing them from the good-faith bargaining mandate.

THE NATURE OF THE QUID PRO QUO AGREEMENT

Since collective bargaining is, in reality, the process of give and take, many union-management agreements contain a quid pro quo treatment of arbitration and no-strike clauses. In essence, management exchanges its unilateral decision-making authority (which is really an agreement to arbitrate) for a no-strike agreement from the union for the life of the contract. In the Shell Oil case of 1948 (6), the NLRB ruled that no-strike and, therefore, arbitration clauses are mandatory bargaining items.

The quid pro quo view is so well-entrenched that the U.S. Supreme Court has held that if a union has agreed to submit a particular dispute to binding arbitration, the union violates the collective bargaining agreement if it later strikes over the dispute--even in the absence of an explicit no-strike clause in the contract (7).

The repercussions of these decisions can be seen with the following example.

Suppose that an employer desires to implement certain changes in employment conditions to promote efficiency or reduce costs (items which fall in the mandatory

bargaining item category) and the matter is bargained to an impasse. Under the Fibreboard Doctrine (8), the Supreme Court held that an employer who bargains to the point where it appears that further bargaining would prove fruitless (i.e., has bargained to an impasse) has fulfilled its 8(d) obligations and can implement the change without violation of the Act. The union, who believes that the employer has violated the contract cannot strike because of its quid pro quo agreement. Its only choice is to seek redress through the grievance/arbitration procedure--during which time the employer continues the contractually questionable practices and reaps the fruits of the contractual changes.

III. THE COLLYER DOCTRINE

The NLRB is clearly responsible for administering the provisions of the National Labor Relations Act, including the prevention of unfair labor practices as defined in Section 8. When a party believes that an ULP has been committed, he may file a charge with the Board's General Counsel who investigates to determine its merit. If such probable cause is found, the General Counsel issues a complaint and the matter is resolved or brought before an administrative law judge who hears evidence of the violation. If any exceptions are filed to the judge's decision, the Board reviews the proceedings and will adopt or modify it. Further review is available upon application for enforcement of the Board's order or on petition for review sought in a Court of Appeals (9, p. 259).

Since the Collyer Insulated Wire case was decided in 1971, the Board has, on numerous occasions, delegated its responsibility to adjudicate all ULP's through the statutorily created mechanism. In these "deferred" cases, the determination whether or not the employer violated the bargaining agreement is made by a private arbitrator. Proponents of this practice argue that deferral to arbitration in cases involving 8(d) ULP charges is a fair and equitable alternative to the burdensome caseload of the NLRB. However, we shall see that this is not necessarily the case. Past practice (pre-Collyer) saw the parties to a dispute having the option to arbitrate the matter or file a complaint with the NLRB. Today (post-Collyer), the second option is eliminated when the case is deferred. In addition, private parties bear the cost of court enforcement of the arbitrator's award; whereas, in ULP proceedings, the costs are borne by the public. Finally, because both the probability of a guilty verdict and the severity of any sub-

sequent penalty is less in arbitral as opposed to Board proceedings, management is encouraged to make changes in employment conditions without first bargaining in good faith with the union.

In view of Collyer, one would expect the number of ULP charges to increase because the employer is less threatened by the arbitration process and is therefore tempted to bargain in "bad faith". Since the majority of these cases would be deferred, we would expect the increase to reveal itself in the number of arbitration cases filed. In the ten-year period between 1969 and 1979, the arbitration caseload rose a healthy 189 percent from 4,493 to 13,232 (10, p. 34)! Although political and economic conditions as well as the wider acceptance of the arbitration process may account for some of the increase (as well as other factors), Collyer deferral cannot be overlooked as an important causal factor.

Collyer advocates argue that the doctrine relieves the Board of some of its burdensome caseload. A look at the types of ULP charges in 1970 shows that 33 percent involved alleged Section 8(a)5 violations. By 1979, this percentage had fallen to 30.2 percent--definitely not the significant decline forecast by the proponents of Collyer (10, p. 268 and 11, p. 157). In summary, there is some evidence that Collyer may have caused an overall increase in the number of good-faith bargaining violations while doing little in the way of lessening the NLRB caseload!

THE COLLYER CASE

The Collyer decision was not a unanimous one.

In the majority were Miller, Kennedy and Brown, while Jenkins and Fanning constituted the minority. With unusual vigor, the minority criticized the majority on the grounds that, in their view, the Board abandoned its statutory duty to enforce the unfair labor practice provisions of Taft-Hartley (1, p. 387).

Jenkins and Fanning stated in their dissenting opinion that:

Congress has said that arbitration and the voluntary settlement of disputes are the preferred method of dealing with certain kinds of industrial unrest. Congress has also said that the power of the Board to dispose of unfair labor practices is not to be affected by any other method of adjustment. Whatever else these two statements mean, they do not mean that this Board can abdicate its authority wholesale (13).

Under the majority's opinion that deferral to arbitration is a legitimate exercise of the Board's power, not even the consideration of the nature and scope of an alleged unfair labor practice [as set forth in Consolidated Aircraft and Joseph Schlitz Brewing Company (14 & 15)] will warrant the Board's attention. In effect, then, Collyer deferral goes beyond voluntary arbitration. In his dissent, Fanning voiced his concern: ". . . 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" (13, p. 1943).

Though the Supreme Court has not yet addressed the issue, the federal circuit courts of appeal have upheld the deferral policy (16). These courts also believe that the Board's deferral to arbitration constitutes a legitimate exercise of their discretionary power despite Section 10(a) of Taft-Hartley which states: "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. . ." It would seem reasonably justified to believe that Congress intended that the Board's jurisdiction in this area be exclusive of all other methods devised to settle such disputes. Additionally, by denying the parties the option of Board proceedings, the NLRB is renouncing its express duty to adjudicate matters involving unfair labor practices.

CASES DEFERRED AND NOT DEFERRED UNDER COLLYER

The National Labor Relations Board decided, in Collyer, that it would no longer determine unfair labor practice charges under Section 8(d). In the case itself, the Board rescinded its exclusive jurisdiction to resolve a dispute arising over changed conditions of employment since they were covered by a provision of the labor agreement and past practice. Although the Board requires that these conditions be present before it will defer to arbitration, it is not an important limitation since:

Most unfair labor practices can be connected somehow to contract terms or existing practices, by Board construction of general clauses, by the necessary inquiry into existing practices, by 'waiver', or otherwise (1, p. 389).

Other prerequisites to deferral to arbitration include: (1) a dispute will not be deferred if the labor contract does not provide for the final and binding arbitration provision or if the employer refuses to agree with this alternative; (2) the Board will not defer if evidence reveals that the bargaining history between the involved parties has been marred by constant friction or where the employer has engaged in serious ULP's; (3) or the NLRB will not defer if the expenses of arbitration go beyond the financial resources of the union (17, p. 788-89). We shall see later that the last requirement has had only a minor impact on reducing union costs associated with enforcement of the Taft-Hartley good-faith bargaining requirements.

NLRB RETENTION OF JURISDICTION IN DEFERRAL CASES

The Board's policy of retaining jurisdiction over cases which have been deferred contains a major flaw. The policy was established at the time the Collyer decision was made. The Board concluded: "In order to eliminate the risk of prejudice to any party we shall retain jurisdiction over this dispute solely

for the purpose of entertaining an appropriate and timely motion for further consideration. . ." (18, p. 145). In the Supreme Court decision in Carey v. Westinghouse (19), the Court indicated that any decision the arbitrator reached which was contrary to the policies of the Board would be subject to reversal. What is "contrary to the policies of the Board" was clarified by the Spielberg standard (20), namely: (1) the arbitrator must conduct a fair hearing, (2) the employer must agree apriori to abide by the award, (3) the arbitrator must consider and resolve all ULP issues involved in the case, and (4) the arbitration decision must not be repugnant to the policies of the NLRB.

Peter Nash, a former General Counsel of the Board, pointed out that:

Perhaps the most difficult requirement of Spielberg for the arbitrator, again magnified by prearbitration Colllyer deferral, is that his award may not be repugnant to the purposes and policies of the National Labor Relations Act (1, p. 391).

Yet, if the NLRB so determines, this inconsistency may become grounds for revocation of deferral and Board re-adjudication of the issue. In one recent case, an arbitrator held that an employer could cease giving his employees a Christmas bonus though he had done so for the past twenty years (21). The NLRB disagreed and refused to honor the arbitration award on the basis that the decision was contrary to NLRB precedent. As this case illustrates, an award can be inconsistent with NLRB policy and practice without being "repugnant" yet become grounds for revocation. The term's meaning is determined by the NLRB on a case-by-case basis and, therefore, creates unequal application and enforcement of Section 8(d) of Taft-Hartley. If the Board had determined the issue instead of deferring, the parties would not have been given a second opportunity to win the same case. Further, two identical cases may be adjudicated differently by different arbitrators--neither decision in perfect accord with NLRB policy, but not sufficiently inconsistent or repugnant to Board policy for revocation of deferral. Such dispar-

ate arbitral treatment is but another example of the unequal application and enforcement of Section 8(d) of Taft-Hartley created by the Collyer Doctrine.

In his dissenting opinion of Collyer, Jenkins brought out the 1971 Supreme Court decision of Wilson Lockridge (22). Lockridge was discharged in accord with a valid union security clause because he was behind in union dues. The case was originally treated as an unfair labor practice until the court said Lockridge had made a claim sounding "squarely in contract" and the matter was deferred to arbitration. Lockridge denied the delinquency and was awarded damages in a state court. The Supreme Court, however, held that the Board had exclusive jurisdiction to decide the case even though the charge had become breach of contract and the issue was no longer statutory rights. Hence, the foundation [Section 203(d) of Taft-Hartley which says: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement" (39).] upon which the Collyer majority rested its reasoning for deferral is rejected. Here, the ULP was taken to the tribunal which neither of the affected parties desired simply because the contract contained an arbitration clause. As Jenkins so boldly stated, "Lockridge is conclusive authority that the Board lacks the power to take even the first step toward relinquishing or undermining its jurisdiction" (23, p. 729).

Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination and testimony under oath are often severely limited or unavailable" (9, p. 797).

Since Carter v. Carter Coal Co. (24), the NLRB has decided contractual issues where statutory rights are at stake. This power was reinforced in the Carey decision (19) where the Court held that in spite of arbitration: "The

superior authority of the Board may be invoked at any time," and also that the Board "may disagree with the arbiter." In which case, the "Board's ruling would, of course, take precedence." The Board's deferral policy appears to be inconsistent with the above-noted decisions.

THE ROLE OF THE ARBITRATOR

The arbitrator derives his authority from the language of the contract and the evidence presented at the time of the hearing. Since 1971 when the Collyer Doctrine was adopted, this individual has also been expected to apply material NLRB policies and practices in keeping with the Spielberg standards previously mentioned. Naturally, arbitrators differ widely in terms of experience, expertise and familiarity with NLRB policies. Milton Friedman noted these discrepancies in relation to an arbitrator's interpretation of the NLRA:

The frequency with which the courts overturn the Board . . . further highlights the danger of arbitrators applying the Act in preference to the contract. If the Board's application of the Act is held at times improper, it is safe to assume that [an] arbitrator's would fare even worse (18, p. 137).

Experience and expertise are not the only items that separate one arbitrator from another. Some feel that the requirements of the NLRA and other statutes must be considered by the arbitrator if they appear relevant to a dispute (25). Other arbitrators, however, take the opposite stance as reflected by the following statement: "I may not stray beyond the Agreement in order to determine whether or not any clause therein is illegal by virtue of that law" (26). How, then, can we assume that fair and equal treatment is being received in all cases if even the arbitrators are unclear how they are to proceed?

ARE THE ARBITRATORS QUALIFIED?

The Collyer decision was handed down on August 20, 1971.

At that time, the Membership Directory of the National Academy of Arbitrators, 1971-72 listed 381. For various reasons, a group of 302 can be considered as comprising the number of available arbitrators in that Association. Of these, only 106 had any legal training and of the 106, only 28 had experience on the NLRB staff. Seventy-eight were lawyers who had served on the War Labor Board or a similar agency (27, p. 819).

One could deceive himself and say that legal training and experience on the NLRB staff is not vital for determination of these unfair labor practice cases. A look at the statistics will show why this is not true.

Between May 1973 and December 1975, the Board deferred a total of 1,632 cases to arbitration. Of this number, arbitration awards were issued in 473 cases. In 159 of the arbitration cases, the losing party requested NLRB review of the arbitrator's decision. In slightly over 30 percent of these cases, the Board revoked deferral. . . generally because his decision was repugnant to the policies of the NLRB (1, p. 390).

These statistics lead one to believe that arbitrators may be very limited in the training necessary for this kind of role. By contrast, Board hearings are guided by administrative law judges who are very knowledgeable and skilled in the process and technique of trial procedure. Hence, one can reasonably conclude that, ". . . there is equally no doubt of the superiority of the Board's investigative processes and experience with statutory issues'" (17, p. 789).

It is widely recognized that the adjudication of ULP cases is an NLRB task while the adjudication of disputes involving contractual rights is the task of arbitrators. How, then, can we expect the latter to have the knowledge needed to fairly and even-handedly adjudicate cases which involve both types of issues? This question was addressed in the 1966 Alexander v. Gardner-Denver Co. decision (28) involving Title VII of the 1964 Civil Rights Act. Justice Powell wrote that arbitration was a "'comparatively inappropriate forum for the final resolution of disputes involving rights created by Title VII.'" Thus, as far as Powell and the majority of the Court are concerned, an arbitrator's award is not final and

binding but subject to judicial review where contractual disputes simultaneously involve statutory rights. This practice of court review, not to mention the previously described process of Board review, reveal a basic mistrust of an arbitrator's ability to satisfactorily resolve disputes transcending contract interpretation. This mistrust is shared by unions as Arthur Menard notes:

. . . an increasing tendency on the part of the unions to simultaneously file a demand for arbitration and a charge with the Board relating to the same subject matter and then to proceed with the Board hearing if a complaint issues but with arbitration if it does not mocks both processes and greatly weakens the authority of the National Labor Relations Board (29, p. 141).

Another problem worth noting is that of the economic survival of the arbitrator. Most of these men are older[one study identified the average age of arbitrators to be sixty (29, p. 42).] and their arbitration duties may determine their economic success or failure. As voiced in member Fanning's dissent of Collyer:

Understandably, 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 NLRA and to direct a remedy appropriate to such a finding. The function of a good arbitrator involves not only the resolution of a particular dispute, but the fostering of a harmonious relationship between the parties to collective bargaining (13).

In contrast, Board members are appointed and are not as vulnerable. President Roosevelt's Secretary of Labor, Frances Perkins, noted the pressures to which Board members are subject when he wrote:

It has always been hard to find just the right people willing to serve for they must be judicial in temperament and yet have plenty of firmness. It is a grueling job. Board members are constantly exposed to condemnation for following what they believe to be the meaning of the law (30, p. 25).

Is it even reasonable to assume that all arbitrators fit these qualifications?
Can we even assume that half of them do?

THE COST AND TIME SAVINGS OF ARBITRATION

An obvious consequence of deferral to arbitration is the increased demand for arbitrators--all of which should be qualified and knowledgeable of NLRB policies. The total number of unfair labor practice cases numbered 21,000 in 1970 or 59.6 percent of the total number of cases filed, and 41,000 or 75.1 percent of total cases filed in 1979--almost doubling in nine years (38)! In contrast, "the percentage of the civilian labor force that is unionized has declined from 33 percent in the early 1950's to 20 percent in 1982 (32, p. 311). In 1969, arbitrator appointments numbered approximately 4,500. By 1979, that figure had increased to 13,000 (10, p. 34). As the number of deferred cases increase, the greater the chance that larger numbers of unqualified arbitrators are entrusted with the protection of individual and public rights. Given these statistics, one might reasonably ask whether current Board policy unduly compromises statutory rights by placing responsibility for their protection in the hands of an increasingly burdened and unprepared group of individuals!

In fiscal 1979, the total average charge by an arbitrator, including fees and expenses, amounted to \$911.83. This figure has risen from \$511.06 in 1969 (31, p. 35). Not incorporated in that amount are costs attributed to attorneys' fees and other expenses incurred in the time spent preparing for a case, loss of work time for witnesses, etc. These costs can be burdensome to a union, especially those with limited financial resources. When faced with overpowering expenses, a union may not feel that it is financially able to take all violations of Taft-Hartley to arbitration; some will go uncontested. In contrast, where an employer or union charges violation of the statute, the NLRB does not require payment for the use of its services to the charging party.

In Boise Cascade (33), the Board decided it would not defer to arbitration such cases where the expenses would lie beyond the financial resources of the

union. Unfortunately, this effort to protect the union's resources does not prevent the gradual erosion of funds to the point where the union would have no money with which to arbitrate future cases. This problem was addressed in Vaca v. Sipes (34), when an employee filed suit against his union for its breach of duty to fairly represent him. The Court decided that a union is not required to follow all grievances filed to arbitration. Instead, the union has the right to make the determination of whether to arbitrate on the merits of each individual case. If a union was required to proceed to arbitration in every grievance case, the Court reasoned, the union could become financially unable to properly represent the interests of any member of the bargaining unit--not to mention taxing and overloading the private grievance/arbitration process.

The Vaca-Sipes decision did not solve the problem of management forcing grievances to the arbitration process in an attempt to deplete the union's resources, thereby denying employees an input in decision-making through grievance/arbitration. As noted, if the union is not satisfied with management's final decision concerning contract interpretation and, in Collyer cases, a Section 8(d) ULP charge, it will expend its resources to obtain an arbitrator's award--which may not turn out favorable. If the union, under the Vaca decision, fears exhausting its resources and decides against the arbitration process, management's actions go unchallenged; meritorious disputes are passed over. Hence, Collyer deferral gives management an incentive to violate both statutory and contractual provisions in an attempt to render the union impotent through exhaustion of its limited resources. If the union loses in arbitration, subsequent Board action is unlikely. If an award is rendered favorable to the union but the employer refuses to comply, enforcement must be obtained privately through a Section 301 court action and the union incurs additional expense.

The time savings argument for arbitration over NLRB adjudication is exaggerated in two respects. First, arbitral resolution of a dispute may be no speedier than a Board determination, especially since arbitrators are required to decide "dual jurisdiction" cases (statutory questions in which they have limited expertise as well as contractual issues) and adhere to Spielberg standards. Second, the Board must now spend time investigating questions irrelevant to the substantive claim but necessary for a decision on the propriety of deferral. When comparing the time taken for adjudication of unfair labor practice cases by arbitration and by Board proceedings, the differences are not significant, to say the least! "Time required from issuance of an unfair labor practice complaint to final NLRB determination of the issue currently varies from nine (9) months to one year" (35, p. 4-5). The average elapsed time per case for arbitration in 1979 was 230.5 days; approximately eight (8) months (31, p. 37). The latter figure underestimates arbitration time because it considers all types of cases and not just ULP's, which, on the average, take longer to determine because the arbitrator must be more careful of fact-finding and decision-making. In the words of one legal authority:

There are more uncertainties in arbitration compared with NLRB proceedings. . . .Some arbitrators are not qualified to apply NLRB and court law, and when this is so, the process of settlement of the issue is prolonged. . . .If the NLRB charges the arbitrator with not following the guidelines of Spielberg, the case then moves through the normal Board procedure. Under these circumstances, the time and money expended in the arbitration were wasted (1, p. 392).

IV. COLLYER IN FACT

Regardless of Board caseload and the attractiveness of arbitration as a way of reducing that caseload, there is a very heavy cost attached to a blind and placid acceptance of arbitration as an alternative to NLRB adjudication. One aspect of this cost involves the employer who, as previously discussed, knowingly becomes more aggressive at the bargaining table and engages in unscrupulous behavior simply because he knows the NLRB will defer to arbitration should his union protest. Thus, the Collyer doctrine provides temptation to employers to violate the union agreement on a greater number of occasions without fear. This increases the number of ULP's filed with the NLRB, defeating the original purpose of deferral!

Another cost element is the fact that Congress has unequivocally delegated to the NLRB the duty to remedy unfair labor practices and has stipulated that the duty should not be diluted by any other means of adjustment. It was given sweeping remedial power by Congress under Taft-Hartley 10(c)--much more extensive powers than those possessed by the arbitrator who is limited by the remedy the grievant requested when the grievance was filed or the one provided for by the bargaining contract. The Trial Examiner has a much greater wealth of experience and, therefore, greater probability of detecting statutory violations. In addition, it has long been accepted that the NLRB has the responsibility to decide questions of a contractual nature where a statutory right is at stake (36). In short, the deferral policy of the Board is inconsistent with the spirit and intent of the legislation which it was designed to safeguard and protect. Indeed, it provides the incentive and opportunity for unscrupulous employers to violate the Act and then benefit from

that violation.

Another point to consider in the question of deferral to arbitration involves the propriety of using outsiders to determine basic employment conditions when the parties to the labor agreement are reluctant to do so; labor and management seldom use arbitration to resolve disputes arising in the negotiation of new contract terms--interest arbitration. Employers and unions believe that they alone know their needs and therefore they, alone, should have full authority to negotiate its terms. Yet, Collyer places the determination of conditions of employment and the rights and obligations of management (i.e. basic contract terms) in the hands of an "outsider" (37).

Finally, the staff of the Board, itself, as well as a number of arbitrators do not understand and/or accept the application of deferral principles. If the individuals do not fully appreciate and/or accept their responsibilities in these cases, unequal application of the doctrine will occur. One author notes the reluctance on the part of the Board to defer matters:

Like, as not, they will not, if any way can be found to avoid it. . .the history of deferral as outlined in this article supports it, particularly the inhospitable reception that the Schlitz (15) decision was given by Trial Examiners (29, p. 150).

In view of the aforementioned costs, it would seem that a thorough reconsideration of the Board's policy of deferral to arbitration is in order.

V. A CONCLUSION

Is the National Labor Relations Board abandoning its statutory duty to prevent unfair labor practices by deferring them to arbitration? The NLRB was created by the Wagner Act in 1935 to "make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this Act" (4). In addition, Section 10(a) of Taft-Hartley states: ". . . this power shall not be affected by any other means of adjustment or prevention that has or may be established by agreement, law, or otherwise." In view of these two very clear provisions, the answer to our original question must be yes.

We could justify the Board's deferral if arbitration served as a fair and equal substitution for Board adjudication and reduced the caseload of the Board; this simply has not been the case. Regarding the first point, slightly over 10 percent of the cases deferred to arbitration between May 1973 and December 1975 were revoked by the Board--indicating that the Board, itself, was dissatisfied with the brand of justice meted out by the arbitral process. As regards NLRB caseload, there has occurred but a slight (i.e. 2.8 percent) decline in the percentage of total ULP cases involving or growing out of an employer's failure to bargain in good faith; the absolute number has actually increased. Hence, deferral cannot be justified on either of the grounds noted above.

The original argument addressed by this paper was the NLRB deferral to arbitration saddles the union with the burden of forcing employers to adhere to the provisions of collective bargaining agreement and, consequently, because arbitration is a poor substitute for Board adjudication, encourages "bad faith" behavior. Experience under the Wagner Act showed Congress that unions did not

automatically bargain in good faith without specific legislation to bind them to do so. Can we assume that the management side will act any better? The number of ULP's has steadily increased since Collyer and the Supreme Court acknowledged that there is a real possibility that a union's funds could be drained if it had to take every case to arbitration (33). Further, where a contract contains a grievance/arbitration process, quid pro quo precludes union recourse to the strike to combat unscrupulous behavior by the employer as long as the latter bargains an item to impasse. Finally, once an arbitration award has been issued, this does not guarantee employer compliance. If he does not comply with the award, the union must seek enforcement through the courts at its own expense. Hence, the weight of evidence concerning the benefits and costs of Collyer points in the direction of abolition.

A re-examination of this doctrine is long overdue. In lieu of such a re-examination, however, the Board "would be well advised to attend to the statutory business which Congress assigned it and leave the determination of arbitrability of a contractual dispute to the arbitrator, and review of the award to the courts" (23, p. 740)!

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