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Collyer Insulated Wire: A Case of Misplaced Modesty

Julius G. Getman
Indiana University School of Law

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In *Collyer Insulated Wire* the National Labor Relations Board announced a policy of systematic deferral to arbitration in cases which could be heard either by the Labor Board or by an arbitrator. Although the Board retains jurisdiction to vindicate statutory rights ignored or repudiated by the arbitrator, it will not hold a hearing until the case has been arbitrated.

Deferral deprives the complaining party (typically the union) of advantages which Labor Board adjudication offers. In cases where the Board accepts jurisdiction, it provides counsel and a hearing officer without cost if its investigation indicates that the charge is meritorious. By contrast, in arbitration these expenses are borne by the parties, and arbitrator's and counsel's fees may make regular use of the process prohibitively expensive for small unions. Moreover, small unions or employers may not have access to competent representatives.

The policy of deferral may also deprive the aggrieved party of the assurance that the tribunal which hears the case will be competent to address all of its issues and to render a final decision. For example, when unilateral employer action is being challenged, an arbitrator will typically be limited to deciding whether the conduct is permitted or prohibited by the contract. If the conduct is not governed by the contract, the arbitrator does not have jurisdiction to decide whether the failure to negotiate in advance of the action violated the duty to bargain under the *Fibreboard*

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† Professor of Law, Indiana University. Professor Getman was a former attorney with the National Labor Relations Board and is currently a member of the National Academy of Arbitrators. Alan Schwartz, Mary Hirschoff and Jerome Mintz made useful suggestions on earlier drafts. Leland Cross, Esq., a partner of Ice, Miller, Donadio & Ryan, called several useful cases to my attention.

1. 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (Aug. 20, 1971). The case involved unilateral changes in working conditions which the union and the general counsel concluded violated § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1970), under existing Board precedents because the changes were not first negotiated with the union. For discussion of this doctrine see Schatzki, *The Employer’s Unilateral Act—a Per Se Violation Sometimes*, 44 Tex. L. Rev. 470 (1966).

2. 192 N.L.R.B. at ——, 77 L.R.R.M. at 1938.


doctrine. Some arbitrators attempt to circumvent the problem by reading the duty to bargain into the contract, perhaps as part of the recognition clause. However, not only is it difficult to predict whether an arbitrator will do so, but there is also considerable sentiment among arbitrators and the practicing bar that arbitrators should not do so.

Reliance on arbitration has the additional drawback of increasing the individual employee's dependence upon the union's support for vindication of his or her rights. In arbitration the employee is largely at the mercy of

5. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); see Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951). If unilateral action is significant and in violation of the contract, it violates § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1970), because it constitutes a modification of the contract under § 8(d), 29 U.S.C. § 158(d) (1970), and the appropriate remedy would be to order the employer to undo the action. 379 U.S. at 215. If the Board finds that the action is not prohibited by the contract, it may, nonetheless, violate § 8(a)(5) because undertaken without prior negotiation. Where the allegation is of a minor infraction of the contract which would not amount to a modification, then the Board's ability to remedy is limited to ordering the employer to undo the action until it has been bargained about. In such cases it might make sense to defer to arbitration.

The situation is somewhat more complicated when a layoff is involved which might violate § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970) (employer discrimination to encourage or discourage union membership made an unfair labor practice), on the grounds that the discharge was for protected concerted activity. In such cases it is difficult to determine in advance by a blanket rule whether Board or arbitral jurisdiction would be desirable. If the case really centers around the alleged § 8(a)(3) violation, of course, the Board's jurisdiction would be preferable, partly because the concept of protected activity is a complicated one, as is the law dealing with what constitutes a legitimate response. See Getman, The Protection of Economic Pressure by § 7 of the N.L.R.A., 115 U. Pa. L. Rev. 1195 (1967). Many arbitrators are not likely to be familiar with the law in this regard. The § 8(a)(3) allegation may only be one aspect of the claim that good cause did not exist for a discharge, in which case the arbitrator would be in a better position to handle the dispute. On the relation between Board jurisdiction and arbitration in discipline cases see generally Atleson, Disciplinary Discharges, Arbitration and NLRB Deference, 20 Buff. L. Rev. 355 (1971) (arguing against automatic deferral) [hereinafter cited as Atleson].

6. A study commissioned by the American Arbitration Association indicated that 338 of 2,300 awards analyzed contained issues within the scope of the Board's jurisdiction. In only 54 cases were Board policies in some way acknowledged. See Waks, Arbitrator, Labor Board, or Both, Monthly Lab. Rev., Dec., 1968, at 1, 2.

7. See O'Connel, Should the Scope of Arbitration Be Restructured, in Proceedings of Eighteenth Annual Meeting, National Academy of Arbitrators 102, 120-28 (D. Jones ed. 1965) (cases cited therein). I have utilized the recognition clause in this way. See Ralph Rogers & Co., 48 Lab. Arb. 40 (1966). As a regular part of the Labor Law course at Indiana University, the distinguished labor lawyer Frederic D. Anderson, past Chairman of the Section of Labor Relations Law of the ABA, criticizes that part of my decision as a classic illustration of an arbitrator ignoring the task for which he was hired and claiming for himself a "general license to do good." The basic issue of the extent to which arbitrators may take their guidance from the law rather than from the agreement has been the subject of much diverse discussion at the annual meetings of the National Academy of Arbitrators. The prevailing view is that it is the arbitrator's duty to enforce the contract, not the law and that the law only be looked to when the contract is unclear. See Meltzer, Ruminations about Ideology, Law and Labor Arbitration, in The Arbitrator, The NLRB and the Court: Proceedings of the Twentieth Annual Meeting, National Academy of Arbitrators 1 (D. Jones ed. 1967).
the union which processes the grievance, chooses the arbitrator and presents the case. Because of the union's central role, there is a danger that arbitrators will overlook the rights of employees when they conflict in some way with the interests of both the employer and the union.\(^8\) By contrast, when a charge is filed which the Board will entertain, the Board itself controls the investigation and handling of the case thereby preventing the union from defeating the employee's claim. Thus, the doctrine of automatic deferral to arbitration has serious drawbacks. First, it increases the advantage of wealthy, well-counseled parties. Second, it increases the likelihood that a single case will be bifurcated and tried in different forums. Finally, the Collyer doctrine makes it less likely that an individual's claim will be vindicated if the union is either unwilling to or incapable of pursuing it vigorously.

The question is whether these disadvantages are offset by positive features of the doctrine. The Labor Board and commentators have suggested a variety of justifications for the policy of deferral. These should be probed in greater detail.

**Deferral Justifications**

*Arbitral Expertise*

In the *Collyer* case the opinion of Chairman Miller and Member Kennedy stated:

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. The necessity for such special skill and expertise is apparent. . . .\(^9\)

The conclusion in *Collyer* and subsequent cases that arbitrators possess special abilities is stated without explanation. A close examination of the elements of decisionmaking in cases where either the contract or the National Labor Relations Act\(^10\) might apply offers little reason to suppose that arbitrators are better qualified than the Board.\(^11\)

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11. The *Collyer* doctrine has primarily been applied in two types of cases: (1) cases in which the employer unilaterally changed working conditions by action which the union claims violated both the contract and § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970); and (2) cases involving discharge or discipline where at least one part of
(1) Factual Determinations

The cases often turn on factual determinations of such items as: past practice with respect to subcontracting; statements of the parties during or after negotiation; the actions of discharged employees; and the employer's motive in discharging employees. The Board's fact-finding processes are better than those typically available in arbitration. When an unfair labor practice charge is filed with the Board, a preliminary investigation is conducted by trained government personnel, non-meititious claims are dismissed and possibilities for settlement are discussed. If the case goes to a hearing, the issues are usually quite well drawn. The hearing is held before an administrative law judge where the government, the respondent and, in many cases, the aggrieved party are represented by attorneys. The parties know what they wish to bring forth, and the hearing may go on for several days if the matter is an important one. The hearing officer has powers of subpoena, and a trained court reporter makes a record of the hearing so that a complete transcript is available to the examiner when he makes his decision.

In arbitration, on the other hand, the parties are generally not represented by attorneys. The union is usually represented by a business agent who is apt to be busy with other matters and who often has only a cursory knowledge of the facts of the case. Companies are often represented by personnel directors. Thus, each party's case is likely to be handled by someone who is not skilled in developing facts through examination and cross-examination of witnesses. Moreover, quite frequently the issue in dispute has not been isolated, with the result that neither side is clear about what it wants to prove at the hearing, and it is seldom

the union's contention is that the discharge was in retaliation for protected activity in violation of § 8(a) (3), 29 U.S.C. § 158(a) (3) (1970). In unilateral action cases the employer typically claims that his action is authorized by the management rights clause of the contract, by the general concept of reserved rights and by reliance on past practice of the parties which shows that the contract was negotiated with general recognition of management's ability to take such action. The union claims that the contract language prohibits such activity or that the contract does not authorize management to take action. The union will deny that similar action was taken in the past without protest. Either side or both will contend that statements made during negotiations support their interpretation of the language in question. Discharge cases involve the questions of the facts surrounding the discharge and whether employee conduct constituted good cause for discharge which, in areas of overlap between the Board and arbitration, will involve whether the activity in question was protected by § 7 of the NLRA, 29 U.S.C. § 157 (1970).

possible to extend the hearing beyond a single day in order to ensure that all the pertinent testimony has been elicited. Often the arbitrator serves as his own court reporter. While ruling on questions of evidence and attempting to judge the credibility of the witness he must also take notes on the testimony. This combination of functions makes it more difficult to observe the witness’ demeanor closely. It also means that the record will be incomplete, omitting some aspects of the testimony and possibly distorting others.15

(2) Impact of Arbitration Decisions on Industrial Relations

In his famous opinion, United States Steelworkers of America v. Warrior & Gulf Navigation Co.,16 Justice Douglas stated that arbitrators are particularly well-suited to decide the meaning of collective bargaining agreements because of their special knowledge of industrial common law—the practice of industry and the shop.17 He also assumed that the labor arbitrator is usually chosen because of the parties’... trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment . . . such factors as the effect on productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished.18

Justice Douglas did not discuss the source of the arbitrator’s knowledge of these matters, and the truth of the matter is that even the most experienced ad hoc arbitrator is no more likely than the Board to be knowledgeable about these factors in a particular case. As the distinguished arbitrator Harold W. Davey has commented:

In most ad hoc situations, the impartial third man arrives

Ideally the movement of the grievance through the successive steps specified in the agreement is similar . . . to the movement of a law suit. . . . The issue initially submitted is stripped of irrelevancies and reduced to its barest essentials. . . . Alas, what an immeasurable distance there is between this Heaven of theoretical perfection and the Hell of actual practice! . . . [T]he neat little controversy that he anticipated with its well ordered facts and carefully delineated boundaries, all too often turns out to be a sprawling, shifting free-for-all, a jumble of conflicting claims, arguments and objectives.

Id.

17. Id. at 581-82.
18. Id.
at the scene of the hearing armed with only two salient facts—the names of the parties and perhaps the knowledge that the issue concerns discipline, seniority, overtime distribution, or what have you. In short, the ad hoc arbitrator starts completely cold at 10 a.m. on the day in question.\footnote{Experience in arbitrating is not likely to make the arbitrator particularly well informed about the other intangible factors mentioned by Justice Douglas, nor does it necessarily make an arbitrator able to understand the practical consequences of his interpretations.\footnote{The relationship of an ad hoc arbitrator with the parties terminates after the decision is issued. Only rarely does an arbitrator learn anything further about a case after rendering his opinion, and when he does, it is more likely to be the reaction of the parties than the consequences of the award. Since Justice Douglas' opinion, there has been considerable comment about the role of arbitrators. Representatives of the parties have made clear that they do not expect the arbitrator to take so broad a view of his function and articles by arbitrators have almost uniformly disclaimed either the ability to or the desirability of considering the factors referred to by Justice Douglas.}}

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(3) Consistency in Contractual Interpretation

The process of applying ambiguous language to specific labor situations is the regular business of the Board. It may or may not be the regular business of a particular arbitrator.\footnote{The relationship of an ad hoc arbitrator with the parties terminates after the decision is issued. Only rarely does an arbitrator learn anything further about a case after rendering his opinion, and when he does, it is more likely to be the reaction of the parties than the consequences of the award. Since Justice Douglas' opinion, there has been considerable comment about the role of arbitrators. Representatives of the parties have made clear that they do not expect the arbitrator to take so broad a view of his function and articles by arbitrators have almost uniformly disclaimed either the ability to or the desirability of considering the factors referred to by Justice Douglas.} Consequently, there is no reason to believe that an arbitrator can do this better than the Board.\footnote{The relationship of an ad hoc arbitrator with the parties terminates after the decision is issued. Only rarely does an arbitrator learn anything further about a case after rendering his opinion, and when he does, it is more likely to be the reaction of the parties than the consequences of the award. Since Justice Douglas' opinion, there has been considerable comment about the role of arbitrators. Representatives of the parties have made clear that they do not expect the arbitrator to take so broad a view of his function and articles by arbitrators have almost uniformly disclaimed either the ability to or the desirability of considering the factors referred to by Justice Douglas.}

20. This assumption is very similar to the assumption challenged in Getman & Goldberg, The Myth of Labor Board Expertise, 39 U. Chi. L. Rev. 681 (1972), that the Board through the process of deciding cases about campaign behavior in representation elections has acquired some special knowledge of voter behavior.
23. The Board has the benefit of a preliminary opinion of the administrative law judge and the ability of the members to confer with each other.
It is desirable that similar contractual provisions be interpreted similarly because knowledge of how a clause is likely to be interpreted is helpful in negotiating contracts and facilitating the informed settlement of disputes. It is easier for the Board to achieve a consistent pattern of interpretation than it is for individual arbitrators. Arbitration involves literally thousands of co-equal decisionmakers who generally do not have access to staffs or research assistants and who rarely try to achieve consistency with each other. The final authority of the Board on the other hand rests with its five members who have the resources available to be sure that in each case the decisions in similar cases have been considered.  

(4) Harmony with National Labor Policy and Application of the Law

It is obviously easier for the Board to interpret contracts in a manner consistent with national labor relations policy. The Board has greater familiarity with and access to its own rules than do arbitrators. The Board is able to determine, for example, whether alleged insubordinate behavior is protected by § 7 of the NLRA and whether a meeting held prior to a work change constitutes bargaining. The Board is much more likely to perceive when the contract conflicts with the law, and, as a public tribunal, it is in a position to affirm the law. In contrast, the position of arbitrators is more ambiguous. Most arbitrators believe themselves to be servants of the parties and institutionally incapable of ignoring the contract and following the law.

Thus, the policy of deferral cannot be supported by reference to the superior expertise of arbitators. If anything, it is the Board which is in a position to make a more careful and informed decision.

National Policy Favoring Arbitration

The opinion of Chairman Miller and Member Kennedy in Collyer

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24. The Board's effort to achieve internal consistency, while desirable, is not in itself adequate for the needs of the parties because the Board has failed to pay adequate attention to arbitral decisions. In order to develop a system of contract adjudication upon which the parties can rely, the Board should consider not only its own decisions but the decisions of arbitrators as well, something that the Board has not done in the past.


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

Id.
rested in part on "[t]he policy favoring voluntary settlement of labor
disputes through arbitral processes . . . ."26 The claim that Collyer
is justified by the national policy favoring arbitration, however, is ques-
tionable on two grounds. First, the national policy favoring arbitration
has been articulated in court opinions dealing with the availability of
arbitration and the enforceability of arbitration awards. The Supreme
Court has considered arbitration as a desirable substitute for industrial
strife and for judicial interpretation of agreements. While its opinions
praise arbitration, the Court has not considered whether arbitration is
preferable to Board adjudication in areas of overlapping jurisdiction, and
the Court has on occasion been equally complimentary about the Board's
expertise.27 Furthermore, the most relevant congressional statement of
policy indicates that Board jurisdiction is to continue despite any other
forms of settlement which might be available.28

Second, there is a possibility that the Collyer doctrine will discourage
the use of voluntary arbitration. There has been considerable criticism
of the arbitration process, particularly by unions, in the past few years.
The Collyer doctrine, by increasing the number of arbitrations (and
thereby the cost and the number of issues which arbitrators decide) might
lead unions and small employers to limit the reach of the arbitration clause
or else to find an alternative method of dispute settlement, as some unions
and employers are now doing.

 Arbitration is a Better Process for
the Resolution of Contract-Related Claims

Professor Schatzki in an influential article supported the Collyer
dialogue on the grounds that arbitration offers certain advantages as a
system of dispute settlement. He stated:

Generally speaking, arbitration is speedier than the full

27. Compare United Steelworkers of America v. Warrior & Gulf Navigation
Co., 363 U.S. 574 (1960) (one of the Court's famous arbitration trilogy of opinions
praising the arbitrator's knowledge of industrial relations) with NLRB v. Gissel
Packing Co., 395 U.S. 575 (1969) (discussing the Board's special knowledge of
industrial relations and its ability to draw inferences about the effect of employer
speech and action on employees on the basis of that expertise). It is true that in
Carey v. Westinghouse Elec. Co., 375 U.S. 261 (1964) the Court applied the policy
announced in the trilogy to a representation proceeding but there is no suggestion that
arbitration was to be preferred to Board adjudication.
28. § 10(a) of the NLRA provides:
The Board is empowered, as hereinafter provided, to prevent any person
from engaging in any unfair labor practice. . . . 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: . . . .
Board's processes; furthermore, the parties themselves control their cases, while before the Board one of the parties loses control to the General Counsel. The arbitrator, who may be expert in the industry or in the labor relations of the particular plant, is almost invariably closer to the context of the dispute than the Board or the trial examiner. The parties have selected the arbitrator and the arbitration process; this is the manner in which they indicated, prior to the particular disagreement, they preferred to resolve their disputes. My own observation tells me that arbitration is far less formal, less tense, and less exacerbating to the relationship of the parties, than a Board proceeding. In contrast, the Board proceeding is often quite bitter, deriving in part, I suspect, from the increased formality, the intervention of the General Counsel as a prosecutor, and the formal allegation by one party that the other is a lawbreaker in a sense more serious than mere breach of contract (which, after all, is a common and accepted practice in the business world). In addition, the arbitrator has access to more flexible remedies: he can "split the baby." Finally, if the arbitrator makes a bad decision, the parties can renegotiate immediately, or at their next bargaining sessions, for a new contract; often, little harm results from the arbitrator's bad award. I make this last point only to make clear that the need for Board intervention is not so great, even if the arbitrator errs. In essence, the whole process is a family affair. . . .

The conclusion that arbitration is speedier is not demonstrated. The statistics cited by Member Jenkins and accepted by Professor Schatzki do not compare the speed of Board decision and arbitration when the two are dealing with similar issues. As a result, there are no figures to tell whether Board cases dealing with unilateral employer action are decided more quickly than arbitration cases of the same type. Moreover, it would be surprising if the cases within the area of potential overlap were randomly distributed. It is possible that the cases which went to the Board were more complicated or important and would be more time consuming than those which went to arbitration.

30. Id. at 251.
31. Although Professor Schatzki points out that the disparity in the figures cited by Member Jenkins would be greater if one took account of the number of cases in which the trial examiner's decision was appealed to the Board, the time involved in arbitration would be greater if one took into account the number of arbitration cases
Even if arbitration is speedier, this is a consideration which the party seeking Board relief has rejected in choosing to pursue a Board remedy. If the aggrieved party (usually a union in these cases) is willing to forego the advantage of speed in order to obtain the benefits of a Board decision, why should it not be permitted to do so? Similarly, the argument that one of the parties loses control to the general counsel of the Board is not persuasive. It is the party who is seeking Board intervention which loses control. A union may decide that control over its case is less important than the economy and professional competence which the Board offers. Professor Schatzki's observation that "arbitration is far less formal, less tense, and less exacerbating to the relationship of the parties" than Board proceedings may be generally true, but that is only because a large percentage of Board cases arise out of union organizing campaigns or strikes which are by their very nature highly emotional, competitive situations, while almost by definition arbitration cases arise in the context of an established on-going relationship. It is also difficult to accept the assumption that company officials are so personally offended by the allegation that they modified a contract improperly under § 8(d) and therefore violated § 8(a)(5) that future relations between the parties are imperiled.

Moreover, the claim of more flexible remedies in arbitration proceedings is not supported by any empirical or theoretical explanation and is hardly self-evident. The NLRA gives the Board almost total flexibility in fashioning a remedy. Furthermore, since most cases coming under the Collyer doctrine involve a dispute about whether company action violated a contract, there is generally little room for flexibility if the answer is "yes" and little need for it if the answer is "no." The ability to renegotiate, as Professor Schatzki notes, applies to Board decisions as well as to arbitral ones although its value is conjectural unless the decision is one requiring bargaining (which can only be made by the Board). The winning party will not want to, and cannot be compelled

in which further action was taken by the Board, or cases in which the argument is made to the Board that the arbitrator's decision should not be referred to. See id. at 251 n.82.  
32. See id. at 251.  
33. Id. at 252.  
34. 29 U.S.C. § 158(d) (1970) (defining the duty to bargain collectively and providing procedures for contract modification).  
35. Id. § 158(a)(5) (employer refusal to bargain collectively made an unfair labor practice).  
36. The observation that the arbitrator "is almost invariably closer to the context of the dispute than the Board or the trial examiner," Schatzki, supra note 29, at 252, is either meaningless or a reaffirmation of arbitral expertise discussed above. See text accompanying notes 17-21 supra.  
38. See text accompanying note 29 supra.
to, negotiate before the agreement ends. And if the case involves major changes in plant operations, later negotiations to affect the decision may not be feasible. If lay-offs are involved, for instance, the affected party may have a new job by the time negotiations take place.

Professor Schatzki also supports the Collyer doctrine by referring to the voluntary nature of arbitration. He states:

The parties have selected the arbitrator and the arbitration process. This is the manner in which they have indicated prior to the particular disagreement they prefer to resolve their disputes.

He also cites Dean Shulman's oft-quoted statement that the arbitrator is not a public tribunal imposed upon the parties by superior authorities which the parties are obliged to accept. . . . It is rather part of a system of self-government created by and confined to the parties.

It is not clear, however, why the voluntary nature of arbitration should be used as a basis to force a recalcitrant party to arbitrate. Indeed, many of the benefits of voluntarism are lost by forcing a party to arbitrate when it prefers the Board. Nor can one infer from the inclusion of a broad arbitration clause, an intention by either party to remove cases from the Board's jurisdiction. For the most part, arbitration serves as a substitute for strikes and unlimited management discretion. The broad clause is a way of insuring that disputes about what management can do during the term of the agreement will be decided by a neutral person but does not indicate which neutral party should decide those cases in

39. Professor Schatzki recognizes this problem and is willing to have the Board intervene in contract disputes "only when a very substantial impact on employees is presented." Schatzki, supra note 29, at 261. This pragmatic concession is at variance with the rest of the article and could, of course, go a long way toward reducing what I believe to be the unfortunate aspects of Collyer. However, it appears from the article that Professor Schatzki would very severely limit the cases to be covered by this exception since he approves the Collyer decision itself and would have preferred a different result in NLRB v. C & C Plywood, 385 U.S. 421 (1967), where Board jurisdiction of a dispute about incentive pay was upheld. I recognize the wisdom of the Board's deferral to arbitration in cases which would not constitute a modification of § 8(d), 29 U.S.C. § 158(d) (1970), and in which the only feasible basis for Board jurisdiction would be unilateral action without prior negotiation under the Fibreboard doctrine. But this result can be achieved without the Collyer doctrine by intelligent application of the principle that only significant unilateral changes are covered by Fibreboard and by the Board's softening the clear waiver approach to unilateral action cases.

40. Schatzki, supra note 29, at 253. See also Johannesen & Smith, Collyer: Open Sesame to Deferral, 23 Lab. L.J. 723 (1972) [hereinafter cited as Johannesen & Smith].

41. Schatzki, supra note 29, at 253.
which Board and arbitrator jurisdiction overlap, particularly since the interrelation between Board and arbitration jurisdiction has for so long been so murky.

**Consistency, Individual Rights and Saving Board Resources**

Professor Zimmer, in his recent article in this Journal, supported the *Collyer* doctrine on several grounds: (1) the system of deferral has proceeded "consistently and rationally;" (2) "[t]he system of concurrent jurisdiction did not do a very sensitive job of handling employee claims against union and management," and (3) "the ever increasing crunch of expanding case load and limited resources restricts the number of cases the Board . . . can competently handle," and therefore the *Collyer* doctrine represents a more efficient allocation of resources than did the previous system of dual jurisdiction. Unfortunately, these arguments either do not support the conclusion reached or else they are not supported in the body of the article.

The contention that the *Collyer* doctrine has been applied rationally and consistently is not supported by the text of Professor Zimmer's article. The article points out that the Board's decisions to defer have, in fact, been inconsistent in cases involving representation questions and that the Board has used two different basic rationales to support the doctrine of deferral, one in *Collyer* and another in *National Radio Co.* The claim to consistency is also belied by the multiplication of subdoc-trines described in the article.

Although it may be true that the system of concurrent jurisdiction did not do a sensitive job of handling employee claims against union and management, greater reliance on arbitration is likely to exacerbate rather than improve the situation. Because the process is controlled by the parties and since the arbitrator is chosen by the parties, there is a danger that

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42. This is not to say that a recalcitrant party should never be forced to arbitrate on the basis of its earlier promise. Such compulsion may be necessary to make the original promise meaningful. However, in such circumstances it is misleading to describe the process as a voluntary one and the benefits which Dean Shulman associated with the voluntary nature of arbitration are lost, as he himself recognized. Indeed, Shulman said: "When the autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions . . . I suggest that the law stay out." Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955).


44. *Id.* at 196.

45. *Id.*

46. *Id. See also* Johannesen & Smith, *supra* note 40.


48. *Id.* at 176-77.
arbitrators will overlook the rights of employees when they conflict with the interests of both the employer and the union.\textsuperscript{50}

Professor Zimmer argues that individual rights are protected by the doctrine that the Board will not defer to arbitration where the position of the union and the individual employee's are not in substantial harmony.\textsuperscript{51} However, this argument is somewhat confusing because the Collyer doctrine even as modified by the substantial harmony rule cannot result in a net improvement over the previous system of dual jurisdiction which Professor Zimmer criticized. The threat to individual rights occurs when the union and the employer make common cause against the employee or when the union through lack of concern or ability fails to adequately pursue the claims of employees. The possibility that individual rights will be denied through breach of the duty of fair representation by unions is greater in arbitration than before the Board. In arbitration, as mentioned above, the employee is largely at the mercy of the union which processes the grievance, chooses the arbitrator and presents the case. By contrast, when a charge is filed which the Board will entertain, the Board itself controls the investigation and handling of the case and the union is not in a position to defeat the employee's claim. The substantial harmony rule is a way of ameliorating the more obvious cases in which the interests of the union and the employee differ by transferring such cases to the Board. Implicit in Professor Zimmer's praise for the doctrine is recognition of the fact that the greater the willingness of the Board to proceed on the basis of individual complaints the greater the likelihood that individual rights will be protected.

Despite the substantial harmony doctrine, individual employees are now required, because of Collyer, to place greater reliance on a system of adjudication controlled by the union. The substantial harmony doctrine is applied only where the conflict is apparent from the investigation of the case, either in the union's refusal to process or in opposing a grievance. It is unlikely to be applied where the union goes through the formal steps of representation but does not in fact support the grievance.\textsuperscript{52}

The argument that deferral helps to preserve the scarce resources of the Board is initially appealing. However, it is not at all clear that the

\textsuperscript{49} 198 N.L.R.B. No. 1, 80 L.R.R.M. 1718 (July 31, 1972).
\textsuperscript{50} See note 8 supra.
\textsuperscript{51} "The most encouraging part has been the sensitivity of the Board to the protection of statutory claims of employees in adopting its substantial harmony rule . . . " Zimmer, supra note 43, at 196.
Collyer doctrine will have the desired effect. It is possible that many cases in which the Board refuses to exercise jurisdiction will return to the Board on the grounds that the arbitrator's award was inconsistent with the national policy or else that the arbitrator did not consider a claim arising under the NLRA. The complicated nature of many of the Board's rules and the fact that most arbitrators are not experts in their application means that the question of consistency with Board rules will continue to be a troublesome one and that many of the claims of inconsistency will be upheld. Similarly, since many arbitrators do not regard it as proper to hear claims arising under the NLRA, it may be difficult to tell from the award itself whether statutory rights were in fact considered.

As was inevitable, the Collyer doctrine has led to the development of subordinate rules to determine when the Board will defer in cases involving different types of questions under the NLRA. For example, there seems to be some confusion about when the Board will defer in cases which involve representation issues. In these cases, the determination of whether the union's and the employee's interests are in substantial harmony creates the need for a special investigation which would be unnecessary if the Board simply asserted jurisdiction. Neither the boundaries of the substantial harmony rule nor its relation to the duty to fair representation have been worked out. Moreover, the substantial harmony test may lead to manipulation by unions in an effort to achieve Board adjudication by refusing to process grievances.

In addition, as Professor Zimmer points out, under the Collyer doctrine as currently interpreted, the Board does investigate the charge to determine the possibility of jurisdiction before deferral. In sum, the decision to defer may be preceded and followed by a complicated inquiry by the Board about what happened or whether to take jurisdiction. With these considerations in mind, it is not at all clear how significant a portion of the Board's case load will be affected by the doctrine.

Indeed, the Board's resources may ultimately be further burdened by untangling the inconsistencies between the Collyer doctrine and another of the Board's policies. Under current Board law, unilateral action by an employer violates § 8(a)(5) even where the collective

54. "The most significant question is what scope will be given the 'substantial harmony of interest' rule." Zimmer, supra note 43, at 190. Professor Atleson has pointed out that "deference policy requires an investigation into matters not strictly relevant to the merit of an unfair labor practice charge." Atleson, supra note 5, at 361.
bargaining agreement contains a so-called "zipper" clause stating that the parties waive the duty to bargain during the term of the agreement. Unilateral action is only permitted when the agreement expressly so states. This is the so-called "clear waiver rule."\(^5\) It serves to increase the Board's workload by increasing the number of possible unfair labor practices which an employer may commit during the course of an agreement and to reduce legitimately bargained for management discretion.

It has been pointed out that the Collyer doctrine and the clear waiver rule are basically inconsistent in terms of the weight that is given to the competing considerations of volunteerism and effectuation of statutory rights.\(^6\) The clear waiver rule assumes that employees do not mean to waive statutory rights even when they use language which on its face would suggest that they do, while the Collyer doctrine finds an implied waiver of these rights in the establishment of an alternative system of dispute resolution without any reference to Board jurisdiction. It is doubtful that the Collyer doctrine will, as has been claimed for it, significantly improve the problems caused by the Board's rigid application of the clear waiver rule. Arbitrators do not have a clear waiver rule. Where a contract contains both a zipper clause and a broad management rights clause, an arbitrator is likely to hold that management had the right to take the disputed unilateral action. The issue will then be raised whether the Board will accept an arbitrator's determination that an employer was authorized to take certain action in a case in which the Board were it to have ruled in the first instance, would have found a violation because there was not a clear or unmistakable waiver of the duty to bargain. If the Board does not accept arbitral decisions in conflict with its clear waiver doctrine, it is possible that a significant number of the cases will ultimately return to the Board to be tried de novo.\(^7\) In any case the inherent contradictions between the Collyer doctrine and the clear waiver rule are likely to provide another complication in an area already overloaded with technical rules. It would be easier for the Board simply to abandon its clear waiver rule.

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59. Thus, if an arbitrator were to rule that a contract authorizes the employer to abolish the Christmas bonus, the only way the Board could enforce its "clear waiver" rule would be to overrule the prior determination and hold that the contract does not permit the employer's action. Schatzki, *supra* note 29, at 255.
National Radio Co.: A Case Study

Many of the defects inherent in the Collyer doctrine are illustrated by the Board and arbitral decisions in the various National Radio cases. In its first decision in this matter the Board refused to hear a complaint that a company had violated § 8(a)(5) by unilaterally imposing a rule requiring that union representatives record and report their movements in the plant while processing grievances on compensated time and § 8(a)(3) by discharging a union representative for violating the rule. The Board in a long opinion announced the applicability of the Collyer doctrine to § 8(a)(3) cases. It assumed that the arbitrator would resolve both the § 8(a)(3) and § 8(a)(5) questions in a matter not "repugnant to the purposes and policies of the Act." Thereafter, an opinion was issued by arbitrator Archibald Cox which found that the discharge was not motivated by union animus and was legal. He found that even if the reporting clause was in violation of the contract, the discharged employee should have filed a grievance and not simply disobeyed. Professor Cox did not deal with the claim that the reporting clause was a violation of § 8(a)(5) because that was unilaterally established. However, he stated: "I should be surprised if this were even technically the law. Certainly, it is not important to any basic policy of the Act." Thereafter, the grievant sought further consideration from the Board. In another long opinion and over a strong dissent, the Board refused. The Board rejected the claim that the arbitration award was repugnant to the Act because the arbitrator did not consider the § 8(a)(5) allegation:

Moreover, as the arbitrator noted, the Charging Party initially did not ask him to resolve the issue of the propriety of the manner in which the rule had been promulgated in the arbitration and subsequently did not avail itself of the unopposed opportunity to expand the scope of the arbitration procedure to include that issue. Finally, at no time prior to the issuance of the award did the Board receive a timely motion from the Charging Party that any issue as to the propriety of the rule or the

62. Id. at —, 80 L.R.R.M. at 1718.
63. Id. at —, 80 L.R.R.M. at 1722.
64. 60 Lab. Arb. at 84.
65. Id. at 83.
66. Id. at 82.
nature of its promulgation had not been resolved by amicable settlement in the grievance procedure or had not been submitted to arbitration.  

Dissenting members Fanning and Jenkins asserted that the arbitrator was mistaken as to the law with respect to bargaining and accordingly, they concluded that the Board should not accept the award:

In this he seems quite plainly to be in error. Employers may not act unilaterally on mandatory subjects of bargaining unless the employees' collective-bargaining representative has clearly and unmistakably waived its right to be consulted. See N.L.R.B. v. C & C Plywood Corporation, 385 U.S. 421, 64 LRRM 2065; N.L.R.B. v. Katz, 369 U.S. 736, 50 LRRM 2177; N.L.R.B. v. Crompton-Highland Mills, Inc., 337 U.S. 217, 24 LRRM 2088. We do not say that the arbitrator failed to discharge his arbitration functions. Those functions are more limited, however, than those of the Board with respect to unfair labor practice issues generally and with respect to the issues involved in this case. The Board cannot properly refuse to apply the law as set forth in the statute as interpreted in these Supreme Court decisions.

Several aspects of the National Radio decision are worth noting. First, far from lightening the Board's caseload, the effect of applying the Collyer doctrine was to require two elaborate Board opinions discussing the relationship between Board adjudication and arbitration. Each contained a long dissenting opinion, and in neither was the merits of the grievant's statutory claim decided.

Second, in the arbitration proceeding the union did not effectively raise the statutory issue arising from the management's unilateral institution of the reporting rule. As a result, the arbitrator limited himself to a cursory analysis of this point which quite possibly misstated the law as to § 8(a)(5), and he did not consider the relationship between a possible § 8(a)(5) violation and the discharge. The fact that an arbitrator of the stature and learning of Professor Cox was unable to deal effectively with statutory issues surely demonstrates how poor a forum arbitration is for the vindication of statutory rights.

Third, after remitting the union to its contractual remedy with the

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67. 205 N.L.R.B. at ——, 84 L.R.R.M. at 1106.
68. Id. at ——, 84 L.R.R.M. at 1108.
70. See text accompanying note 68 supra.
assurance that the Board would retain jurisdiction to make certain that statutory rights were protected, the Board majority concluded that the arbitrator's decision was not "'repugnant to the policies and purposes of the Act'" without even considering the correctness of the arbitrator's interpretation of § 8(a)(5) or of the relationship between § 8(a)(5) and § 8(a)(3) in this context. Thus, the grievant was deprived of a hearing on the merits of his statutory claim because of the inability of the union to press it, a function which the union had sought to disclaim and which the Board required it to assume by its original decision deferring the proceeding to arbitration.

It is not difficult to understand the Board's reluctance to overturn an already issued award. In addition to the normal reluctance of one decision maker to reject the decision of another, the Board is undoubtedly concerned not to encourage parties to submit arbitration awards for reconsideration. Moreover, the Board's initial decision to defer is an expression of confidence in the ability of the arbitral process to deal with statutory issues. To reject the award thereafter would be an admission that the confidence was misplaced. Nevertheless, the abdication of the Board's own function, implicit in the acceptance of the award on these terms, seems unfair both to the union and to the grievant and poses a danger to the effectuation of statutory rights. The dissenting opinions indicate that these points are recognized by at least two Board members. It would therefore be surprising if the Board routinely followed this precedent. Future efforts to obtain reconsideration of decisions by less prominent arbitrators may be better received. Thus, application of the Collyer doctrine will present the Board with the unpleasant alternatives of either ignoring statutory rights or of encouraging parties to resubmit arbitration awards to the Board.

**Conclusion**

The Collyer doctrine denies employees claiming a violation of statutory rights access to the forum specifically created to effectuate those rights. They are remitted instead to arbitration which is costlier and which in some cases will not be able to deal with all of the issues raised.

Moreover, the benefits claimed for the Collyer doctrine are highly questionable. Arbitration has many defects and these are likely to be exacerbated in cases in which claims under the National Labor Relations Act are raised. Nor is it at all clear that the doctrine will simplify dispute resolution and help to preserve the resources of the Board. In many cases it might have just the opposite effect. Accordingly, it would

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71. 198 N.L.R.B. at ——, 80 L.R.R.M. at 1722.
be much more sensible for the Board Regional offices to determine in specific cases whether a party claiming violations of the NLRA should be restricted to his contractual remedy. Such a decision should not be made lightly but only when it appears that the arbitrator is more likely than the Board to be able to resolve the entire dispute.