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A RESPONSE TO PROFESSOR GETMAN

GEORGE SCHATZKI†

Professor Getman makes a strong case in opposition to the *Collyer Insulated Wire*¹ decision. However, I think his position is based on arguments either not necessarily related to the *Collyer* case or entirely wide of what I believe to be the legitimate rationale behind the Board's determination.²

Professor Getman's attack rests on three primary propositions. First, he is concerned with saving costs for the impoverished charging party and making it possible, through government expense, for the charging party to litigate.³ Second, he argues that sometimes the arbitrator in *Collyer*-type cases cannot settle the entire case, and therefore the charging party will eventually litigate before the Board anyway.⁴ Finally, he points out that Board deferral in discrimination-for-concerted-activities cases would be unwise and unfair.⁵

With respect to the third proposition, I have never adopted the view that Board abstention should be extended to the discrimination cases. Quite to the contrary,⁶ I agree with Professor Getman that the interests of the individuals involved create a serious impediment for deferral. Moreover, unlike the so-called "unilateral-change" cases, the issue to be resolved by the Board does not necessitate any construction of a collective bargaining provision; all that is involved is an assessment of the facts and the law of § 8(a)(3)⁷ without regard to the collective bargaining contract.⁸ Thus, the dangers he sets out and the different role the Board

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1. 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (Aug. 20, 1971).

2. I do not purport in this brief piece to explore fully or set out all the arguments supporting *Collyer*. For a more complete discussion of *Collyer* see Schatzki, *NLRB Resolution of Contract Disputes Under Section 8(a)(5)*, 50 TEXAS L. REV. 225 (1972) [hereinafter cited as *NLRB Resolution*].

3. Getman, *Collyer Insulated Wire: A Case of Misplaced Modesty*, 49 IND. L.J. 57, (1973) [hereinafter cited as Getman].

4. *Id.*

5. *Id.* at 58.

6. See Schatzki, *Earliest Returns from the NLRB's New Deferral Policy in Collyer Insulated Wire*, in PROCEEDING OF NEW YORK UNIVERSITY TWENTY-FIFTH ANNUAL CONFERENCE ON LABOR 97 (1973) [hereinafter cited as Schatzki], where I not only took the position that the Board ought not to extend *Collyer* to cases involving individual rights, but that the Board ought to abandon its *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955), doctrine insofar as it involved discipline-or-discrimination-for-union activity cases. Schatzki, *supra* at 114-21.

7. 29 U.S.C. § 158(a)(3) (1970).

8. Implicit in the idea that cases involving discrimination or discipline allegedly for concerted activities do not involve questions of contract interpretation is the as-

must play in discrimination cases justifies the conclusion that the Board ought not to extend its *Collyer* holding to cases involving individual rights.

However, the separate interests of individuals to which Professor Getman alludes are hardly relevant to the question of whether the Board should defer in cases where the employer has allegedly engaged in unilateral changes in working conditions during the term of a collective bargaining contract. Professor Getman's other two points are more relevant to that question.

With respect to Professor Getman's concern that an arbitrator will sometimes be unable to resolve the entire case and subsequent (or concurrent) resort to the Board will be necessary, I ask first, how often will these cases occur? My judgment is that these cases will arise very rarely because an arbitrator will almost always find that the contract deals with the disputed issue in one way or another. Secondly, and perhaps more importantly, the parties ought not to be compelled to reopen the contract for further negotiations about a matter which does not "appear" to be covered by the contract. This is bad collective bargaining law. It encourages parties to hold back matters for the purpose of later negotiations. It unsettles the parties' expectations that the contract is the end of all that must be given up in order to buy peace. It assumes that if the contract does not obviously deal with the issue in some fashion, the parties did not negotiate about it and reach some understanding, even if it is an agreement to disagree.⁹

sumption that there are individual rights to concerted activity that cannot be waived by the collective bargaining agent. This raises a significant and complicated question. To the extent that the assumption is not true, I am prepared to join Professor Getman for the reasons he sets out, Getman, *supra* note 3, at 68, as well as the reasons set out in Atleson, *Disciplinary Discharges, Arbitration and NLRB Deference*, 20 *BUR. L. REV.* 355, 395-97 (1970), and in Schatzki, *supra* note 6, at 114-21, in the conclusion that the interests of the individuals are such that deference to arbitration is unwise and unjustified.

A further problem in my belief that individual rights cases should not be treated in the same fashion as the unilateral action cases is the occasional difficulty in determining in which of the two categories a given case should be placed for purposes of deferral or nondeferral. See, e.g., *National Radio Co.*, 198 *N.L.R.B. No. 1*, 80 *L.R.R.M.* 1718 (July 31, 1972). However, that difficulty does not appear to be so great as the difficulties in line-drawing or category-shaping created by Professor Getman's thesis that the Board should engage in

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.

Getman, *supra* note 3, at —.

9. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), cited by Professor Getman, did not involve an employer's unilateral act committed during the term of a collective contract. I have no doubt at all that § 8(d)'s mandate about "wages, hours, and other terms and conditions of employment," 29 U.S.C. § 158(d) (1970), should be read very broadly when the issue is: What should the parties bargain

Contracts are negotiated as packages. The notion that some matters can be held back and negotiated later is inconsistent with that concept and ought not to be imposed upon the parties unless they manifest such an intention.

If my assessment of the practices of arbitrators is accurate (*i.e.*, that arbitrators hardly ever say, "I can't find the answer in the contract."), then Professor Getman's concern about the parties having to go to the Board as well as the arbitrator cannot be significant. If my assessment of the law is correct, there will be no Board intervention in any event and, therefore, no concern for bifurcated proceedings.

Professor Getman's final concern, the worry about impecunious local unions or employers being unable to litigate, may be very real in some cases, I concede, but the Act¹⁰ was not enacted to wet-nurse feeble parties into maturity or protect them from the world if they never grow up. At the bottom of Professor Getman's concern for the poor union (as well as his fear of bifurcated hearings) is a rejection of the fundamental premise supporting *Collyer*: that the parties have agreed in advance to have arbitration as the institution to resolve their contract disputes.¹¹ They can tailor that agreement to fit their needs. That agreement is part of the total contract the parties reach, and that contract, a product of the parties' desires, of their comparative economic strength, and of their bargaining skill, is what the Act was passed to accomplish. The contract, for purposes of unilateral action cases, is a private law substituted for the relatively unstructured, unfocused and generalized law of the NLRA. The arbitration agreement is a promise to leave contract disputes to the arbitrator.

It is this concept that Professor Getman impliedly rejects. He rejects the objectives of collective bargaining with it. He is saying that the contract should be ignored where it proves inconvenient for one of the parties. (That party need not be the financially weaker one—indeed while Professor Getman is concerned with poor charging parties, he does not limit his criticism of *Collyer* in such a way as to protect only those parties.) To put it another way, Professor Getman would allow any party, poor or rich, having bargained for the arbitration provisions and other contents of the contract, to ignore the provisions of the agreement and seek another forum when the latter tribunal may give it a better deal.

Professor Getman responds that *Collyer* is not enforcing real volun-

about in negotiating a contract? However, the resolution of *Fibreboard* problems is not helpful in deciding about what, if anything, parties are required by law to negotiate during the terms of a contract.

10. 29 U.S.C. §§ 151-83 (1970).

11. 192 N.L.R.B. at —, 77 L.R.R.M. at 1937.

tarism, as I argue it does, because the benefits of voluntarism are lost when one party no longer desires arbitration.¹² But that assumes the party doesn't want arbitration. More realistically, the party running to the Board prefers the Board to arbitration (as any union would under the prevailing Board law prior to *Collyer*), but I suppose the party would prefer even more to make the call on a two-headed coin flip. The preference for something else hardly destroys the nature of voluntarism. If the alternative forum (the Board) is removed as a possibility (as two-headed coins have been), the unhappiness in not getting to the Board will largely evaporate (unless there are independent reasons to justify the Board's exercise of jurisdiction over the dispute).

Professor Getman also argues that one cannot infer from a broad arbitration clause "an intention by either party to remove cases from the Board's jurisdiction."¹³ In one sense, he is correct. But he is also wrong. While the parties undoubtedly did not express or possibly consider such an idea, both fully understood that disputes over the meaning of the contract were solely for the arbitrator. If it is true, as it seems to me it must be, that there can be no finding of a violation of § 8(a)(5)¹⁴ based upon the commission of an alleged unilateral act when the collective bargaining contract authorizes the act in question, then the Board's role is necessarily one of contract interpretation only, the very role the parties contracted to leave with the arbitrator. Since an important purpose of the Act was to obtain legally enforceable contracts as a product of the collective bargaining process, it makes no sense to undo the contract. Indeed, it is counterproductive to that purpose of the Act.¹⁵

12. Getman, *supra* note 3, at 67.

13. *Id.*

14. 29 U.S.C. § 158(a)(5) (1970).

15. Professor Getman makes several other arguments to refute positions I have previously taken. Since I believe our fundamental disagreement is set out in the text, I shall refrain from a point-by-point response. Moreover, a full reading of my article, *NLRB Resolution*, *supra* note 2, will supply many responses to Professor Getman and provide a more sympathetic (than his) treatment of my support of the *Collyer* doctrine.

However, I cannot resist one comment. Professor Getman denies, or at least questions, the arbitrators' special competence. Indeed, one senses almost Haysian hostility to that private process. But, isn't that hostility virtually irrelevant to the issue in *Collyer*? The parties wanted arbitration, whether it is good or bad. (If they wanted a coin flip to resolve their problems, why shouldn't the Board honor that, too, so long as only the employer's and the collective's interests are involved?) Second, I do not believe that Professor Getman seriously denies the greater desirability of tribunals selected by the parties to solve ad hoc situations than that of the national agency, which must rule by generalized fiats which are not even arguably focused on the needs of the particular parties. Moreover, whether or not a particular arbitrator has any expertise for the particular case (in truth, some do and some don't), it is ironic that Professor Getman should be arguing against their expertise and, inferentially, in favor of the Board's. See Getman & Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681 (1972).