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A LITTLE BIT MORE ON COLLYER INSULATED WIRE

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I have several brief observations on Professor Getman's article.¹ First, his major thesis, that the National Labor Relations Board is a "good" decisionmaker, is true,² but was never really in question. Because the NLRB generally resolves conflicts as well as other forums³ does not necessarily lead to the conclusion that the NLRB ought to continue exercising jurisdiction over cases that could be heard either by it or by an arbitrator. Due to the finite resources available to the NLRB, its ever-increasing caseload and the improbability of increasing the Board's efficiency,⁴ the question is how, not whether, the Board will cut back its treatment of individual cases. Although the Board could continue to handle the

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1. One is personal gratification: Someone out there read my article, and even if critical, showed interest enough to respond.

2. However, at least in the § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970), area, Professor Getman seems to concede that the Board's "clear and unmistakable waiver" rule ought to be changed to be made consistent with general labor contract interpretations. Getman, *Collyer Insulated Wire: A Case of Misplaced Modesty*, 49 IND. L.J. 57, 71 (1973).

3. It seems to me every forum has its strengths and weaknesses. My article describes some weaknesses of the courts, the NLRB and arbitration. See Zimmer, *Wired For Collyer: Rationalizing NLRB and Arbitration Jurisdiction*, 48 IND. L.J. 141 (1973).

4. Chairman Miller of the NLRB insists that all of this is true beyond peradventure:

Ever since I began to make public addresses in my capacity as Chariman of the National Labor Relations Board, I have been preaching sermons on the need to update and modernize the decision-making structure for deciding cases under this Act.

I shall not bore you, therefore, with any lengthy dissertation today on the need for reform. I am sure that you are all aware that the need is genuine. This five-man Board decided over 1400 cases in the fiscal year which closed June 30 of this year, and we expect to decide more than that in the current fiscal year. I have said publicly and privately that I believe we can still manage to handle the current year's projected caseload, but I doubt that we will be able to cope much longer than this year with the growing caseload. I am perfectly serious about that. I am not just crying "wolf" to try to get somebody's attention.

I honestly do not see how it will be physically possible for five Board Members to handle many more cases than are projected for the current fiscal year. We already have too little time adequately to consider our present cases, and any substantial further caseload will either make us rubber stamps for whatever decisions our Administrative Law Judges make, or we will gradually develop a hopelessly insurmountable backlog.

Address by Chairman Miller, entitled "Routes to Reform," to the Labor Relations Law Section, American Bar Association, in Washington, D.C., Aug. 7, 1973. No one seems to be claiming he is crying wolf.

entire spectrum of its present jurisdiction thereby stretching even thinner its present resources, an appealing alternative is to reduce its jurisdiction selectively. I think that the Board's decision to devote its resources to those cases exclusively within its jurisdiction while deferring to arbitration in cases that can be heard in either forum is rational.⁵

The resource allocation argument is supported by the General Counsel's move to increase efficiency in determining deferral questions at the regional level. The first guidelines of the General Counsel to the regional offices envisioned complete and final investigation of the merits of a case prior to consideration of the deferral question.⁶ Such a procedure would tend to expand the amount of work required at the regional level in cases involving a deferral issue. However, the revised guidelines issued this spring change the investigative procedure.⁷ Now, the regional office makes a preliminary determination whether a violation of the National Labor Relations Act⁸ has occurred based on the evidence initially submitted by the charging party. If a violation has arguably occurred, the regional office immediately undertakes the determination of the deferral issue.⁹ Moving as quickly as possible to consideration of the deferral issue should increase efficiency and save agency resources.¹⁰

5. So far defining the scope of the principle in *Collyer Insulated Wire*, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (Aug. 20, 1971), has required quite a bit of discussion in numerous cases. Two reasons suggest themselves. First, the language of *Collyer* makes it difficult to predict the limits of the deferral principle. Thus, litigation was necessary to set those limits. Second, numerous cases may have been necessary to convince Board watchers—including the General Counsel's office, regional personnel and the labor-management community—that deferral was an idea whose time had come.

6. P. Nash, *Arbitration Deferral Policy under Collyer*, Feb. 28, 1972, reprinted in CCH 1973 LAB. L. REP. ¶ 9,002, at 15,022.

7. See Nash, *Arbitration Deferral Policy Under Collyer—Revised Guidelines*, 83 L.R.R.M. 42, — (May 10, 1973), [hereinafter cited as Nash].

8. 29 U.S.C. §§ 151-68 (1670) [hereinafter referred to as NLRA].

9. Nash, *supra* note 7, at —.

10. [T]he usual course will be to determine whether the *Collyer* criteria for deferral are met before the charge is fully investigated. By doing so in instances in which the *Collyer* criteria are met and respondent timely expresses its willingness to arbitrate, deferral will in most cases obviate the necessity for completion of the full investigation and final determination of the merits of the charge. The purpose, however, of this procedure is to facilitate the regions' processing of *Collyer* cases and achieve a net minimization of regional efforts in the ultimate disposition of these cases. Accordingly, in instances in which the region, for whatever reason, concludes that these objectives would be better served by further investigation, or by completion of the full investigation, of the charge before determination of whether the *Collyer* criteria are met, the region is authorized to follow this order in the processing of the case. Thus, the investigation which might ultimately be required—particularly if deferral should finally prove to be either unwarranted or ineffective in resolution of the dispute—may be eased by obtaining all evidence at once because of the travel distances involved or the difficulty in reaching witnesses. Further, the need to obtain evidence which might not be available

Second, in addition to considerations of efficiency, dual jurisdiction increases the potential for one party to use a conflict as a vehicle to disrupt the collective bargaining relationship beyond merely delaying the final decision. *National Radio Co.*¹¹ is a perfect example. In that case, a grievance was filed along with unfair labor practice charges. An arbitrator was selected, and he held a full evidentiary hearing on the case. Before the arbitrator could render an award, however, the regional director of the NLRB insisted on holding a *de novo* hearing. Thus, there were duplicate hearings, and because a Board decision takes precedence, a complete frustration of the arbitration process.

It is not clear why the *National Radio* case happened in this way. The regional director may have merely wished to clear his docket. Also, the charging party may have desired a Board hearing for several reasons. It could have felt that the arbitration hearing had not gone well, and it wanted another shot at trying the case. On the other hand, the charging party may have wanted to delay the decision or to damage either the other party or the collective bargaining relationship for some unknown reason.

It is, I think, hard to object to the use of the tactical advantage that exists incident to dual jurisdiction. However, the larger question is whether the system of dual jurisdiction should survive given tactical use that can be made of it. If the national labor policy as articulated by the Supreme Court¹² is to contain industrial strife, at some point the potential for industrial strife incident to a dual jurisdiction system would seem to be so great that dual jurisdiction becomes unsupportable.¹³ Whether or not dual jurisdiction actually leads to increased industrial strife is a judgment that can best be made after an appropriate statistical inquiry.

A policy of deferral by the Board does not end dual jurisdiction entirely because a charging party disappointed at the resolution of the dispute by arbitration can return to the Board to request relitigation by claim-

in a later investigation, either through a diminished cooperation on the part of witnesses and parties or through the disappearance of documents and the attenuation of memory through time, may determine the extent of the investigation to be conducted before deferral for arbitration is considered.

Id. at — n.62.

11. 198 N.L.R.B. No. 1, 80 L.R.R.M. 1718 (July 31, 1972).

12. The national labor policy to which I refer is that concerning Board jurisdiction in *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967), and arbitration in the *Steelworkers* trilogy. *United Steelworkers of America v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

13. Presumably *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967), is not affected by dual jurisdiction problems because no arbitration clause was presented to pose a problem of concurrent Board and arbitration jurisdiction. However, *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), where arbitration was available, does raise the spectre of insupportable dual jurisdiction.

ing that the arbitration award fails to meet the *Spielberg* standards.¹⁴ Only time will tell how many charging parties will be so dissatisfied that they will seek further Board litigation. When a charging party does return to the Board, the possibility of relitigation exists. When this occurs, however, the Board's investigation can be simple and straightforward: did the arbitrator consider the statutory issue or not?¹⁵ If the statutory issue was not considered, it should be determined by the Board. This will sometimes lead to extended, bifurcated litigation which is undesirable. A suggestion that might ameliorate this problem would be for arbitrators who decline to treat statutory issues to refuse jurisdiction of the entire case. This would permit the charging party to go to the Board for final investigation and litigation of the entire case. If the regional office determines that the statutory issue was considered by the arbitrator, the *Spielberg* questions must be answered concerning the fairness of the proceedings and the consistency of the award with the purposes of the NLRA.¹⁶

My third observation involves the substantial harmony rule which requires that the Board will continue to exercise jurisdiction when the interests of the charging party conflict with both union and management. This rule improves the system of general dual jurisdiction for several reasons. First, the reputation of the regional offices is that they have not been sensitive to the claims of employees where those claims are not supported by their union.¹⁷ If this reputation is supported by the facts, it is unfortunate. However, the development of the substantial harmony rule may lead to a change in attitude among personnel at the regional level. Second, and more fundamentally, the arbitration process ceases to be a fair forum where the claim asserted is not supported by one of the two parties—labor or management—who have set up and who operate the arbitration system. Where employees have claims antagonistic to the interests of their union, arbitration probably will not operate fairly, and in those cases the Board is the only practical forum for resolving disputes. For that reason, the Board should assert jurisdiction in this area.

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

15. Where deferral has occurred the perceptive arbitrator will obviously make clear in the award what he or she considered the issues to be, including the statutory issues that were decided.

16. 112 N.L.R.B. at 1081-82.

17. Weyand, *Present Status of Individual Employee Rights*, PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-SECOND ANNUAL CONFERENCE ON LABOR 171, 203 (T. Christensen & A. Christensen eds. 1970). That reputation probably should be investigated in some appropriate way to determine if it is deserved or not.