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Michael J. Zimmer
University of South Carolina

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WIRED FOR COLLYER: RATIONALIZING NLRB AND ARBITRATION JURISDICTION

MICHAEL J. ZIMMER†

In Collyer Insulated Wire the National Labor Relations Board held that rather than deciding whether changes in working conditions made by an employer during the term of a collective bargaining agreement violated § 8(a)(5) of the National Labor Relations Act, the Board would defer to an arbitrator. In the past, the Board has occasionally couched the rationale for its decisions in terms of deferral. Therefore, the major question presented is whether Collyer is another random deferral case or whether it signifies a major change towards a general and predictable policy of deferral.

The National Labor Relations Board is well known for its ad hoc use of precedent. Therefore, reliance on a single NLRB decision as an

* My special thanks to my colleague, Bill Toal, and to Craig K. Davis, a third-year student in the University of South Carolina School of Law, who served as my research assistant.
† Assistant Professor of Law, University of South Carolina.
3. Id. §§ 151-68 [hereinafter referred to as NLRA].
4. There are various institutional and structural explanations for the Board’s failure to follow precedent. All Board action initiates at the regional level, with the regions answerable to the General Counsel and ultimately to the Board. Although the Board may review a regional director’s refusal to proceed, there appears to be no judicial review of the General Counsel’s decision not to proceed. Amalgamated Street, Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 305 n.2 (1971) (Douglas, J., dissenting); Vaca v. Sipes, 386 U.S. 171, 182 (1967); United Elec. Contractors Ass’n v. Ordman, 366 F.2d 776 (2d Cir. 1966), cert. denied, 385 U.S. 1026 (1967). But cf. Lesnick, Preemption Reconsidered: the Apparent Reaffirmation of Garmon, 72 Colum. L. Rsv. 469, 483 (1972) [hereinafter cited as Lesnick]. While the General Counsel and regional directors are theoretically bound by precedent, the criteria used in a decision not to proceed were unavailable to the public until very recently. See Sears, Roebuck & Co v. NLRB, 346 F. Supp. 751 (D.D.C. 1972). Cases that go to a hearing are decided by trial examiners who, while bound by Board precedent, act independently of the NLRB. 29 U.S.C. § 154(a) (1970). Rulings are reviewed at the Board level, but NLRB review procedures contribute even more to the ad hoc treatment of precedent. If one of a Board member’s legal assistants deems a case clear cut, a decision is drafted for approval
announcement of a general policy is risky. However, the decision in Collyer, announcing a new "developmental step" toward increasing deferral to arbitration* may merit such reliance and is worth examining for three reasons. First, Board members have given sufficient fanfare to Collyer to indicate that the decision may be taken seriously. Second, General Counsel Peter G. Nash has made public his memorandum to regional directors indicating how Collyer should be implemented, which is an opening into the bureaucratic process that may prove insightful. Third, the Board has developed the Collyer doctrine in subsequent cases in a manner showing remarkable control and concern for consistency.

THE BACKDROP OF THE SUPREME COURT

Courts and Arbitration

The start of any analysis of the role of arbitration in collective bargaining is Textile Workers Union v. Lincoln Mills. In a § 301 action to order arbitration, the Supreme Court rejected the common law rule against enforcement of executory agreements to arbitrate, created a

by a panel of three Board members. Only the most important cases are discussed by the whole Board. THE DEVELOPING LABOR LAW 820-22 (C. Morris ed. 1971) [hereinafter cited as DEVELOPING LABOR LAW]. See also Toward an Improved Labor Judiciary, NLRB Press Release, No. R-1230 (May 26, 1972) (Chairman Miller).

A more pragmatic reason for the Board's cavalier treatment of precedent may be found in the nature of the problems before the NLRB. Behavioral decisions must be made on the basis of little data. Conclusions concerning the coercive impact of speech or bad faith bargaining must of necessity be ad hoc based on seat of the pants judgments. See Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971). See also Getman, Goldberg & Herman, The National Labor Relations Board Voting Study: A Preliminary Report, 1 J. LEGAL STUDIES 233 (1972).

5. 192 N.L.R.B. at —, 77 L.R.R.M. at 1938.
8. See text accompanying notes 165-266 infra.
10. Section 301 (a) of the National Labor Relations Act provides:
Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
federal law of collective bargaining to be fashioned "from the policy of our national labor laws," and ordered arbitration. This case set the stage for a rapid legalization and federalization of arbitration as a means of resolving disputes arising during the term of collective bargaining agreements. As a result of the flowering of this new forum for conflict resolution in the employment sector, many questions arose concerning the relationship of arbitration to other existing forums. One of the first questions was whether courts or arbitrators determine whether a collective bargaining agreement providing for arbitration is binding on an employer. In *John Wiley & Sons v. Livingston,* an employer, Interscience, had an agreement with a union that included an arbitration provision, but the agreement had no provision binding successor employers. When Interscience merged with Wiley, the union brought suit for arbitration. The Supreme Court, per Justice Harlan, ruled that in § 301 suits, the proper function of the court is to determine if the employer is bound by the collective bargaining agreement:

The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.

In *United Steelworkers v. American Manufacturing Co.,* one of the famed Steelworkers Trilogy, an employee was off work due to an industrial injury for which he received a workmen's compensation settlement based on a 25 per cent permanent partial disability. He filed a grievance, and the union sought arbitration to have him reinstated in his old job. The court of appeals affirmed a summary judgment for the employer holding the grievance was a "frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement." In an opinion by Justice Douglas, the Supreme Court reversed, holding that it was not the proper function of courts to determine whether the claimed contract right was reasonable, meritorious, or related to a specific provision in the written agreement. Rather a court should be confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.

11. 353 U.S. at 456.
13. Id. at 547.
The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.16

In *United Steelworkers v. Warrior & Gulf Navigation Co.*,17 the contract excluded from arbitration "matters which are strictly a function of management."18 The union sought arbitration challenging the subcontracting of work formerly done by unit employees. The district court dismissed the case, holding that contracting out was strictly a function of management and was, therefore, not arbitrable.19 The court of appeals affirmed.20 The Supreme Court, however, reversed, holding that courts should resolve questions of interpretation of the arbitration clause by applying a strong presumption of arbitrability. Here the exclusion clause did not explicitly exclude subcontracting or contracting out, so the judgment whether contracting out is strictly a management function should be made by an arbitrator, rather than the court:

In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.21

The objective of national labor policy which is central to the Court's favoring of labor arbitration over judicial process may be summed up in one phrase from *Warrior & Gulf*, "arbitration is the substitute for in-

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16. 363 U.S. at 568.
18. Id. at 576.
21. 363 U.S. at 584-85. See Note, *Labor Injunctions, Boys Markets, and the Presumption of Arbitrability*, 85 Harv. L. Rev. 636 (1972), which calls for closer court scrutiny of arbitrability where the employer seeks an injunction against a strike in violation of a no-strike clause. See also Gateway Coal Co. v. Mine Workers, 446 F.2d 1157 (3d Cir. 1972) (refusal to order arbitration or enjoin a strike over alleged mine safety violations despite a no-strike clause).
The central nature of this judgment is shown in *Local 174, Teamsters v. Lucas Flour Co.*,23 where the Court incorporated, as a matter of law, an implied no-strike clause in every collective bargaining agreement that provided for arbitration but did not include a no-strike clause. This implied clause is coextensive with the scope of the arbitration provision and, presumably, is the basis for a federal or state court injunction should a strike occur over a dispute that could be submitted to arbitration.24 The incorporation of a no-strike clause into the collective bargaining agreement undermines or at least alters the bargain struck by the parties, implying that industrial peace takes precedence over collective bargaining.

One recent case seems to step back a bit from the strong presumption of arbitrability. In *Iowa Beef Packers, Inc. v. Thompson*,25 the Supreme Court granted certiorari to decide whether employees with Fair Labor Standards Act claims must exhaust contract remedies before bringing federal suit. In a per curiam opinion issued after oral arguments, the Supreme Court dismissed the writ of certiorari as improvidently granted on the ground that the arbitration provision was so narrow that the employees had no contractual remedies to which they could resort.26 Although the Iowa Supreme Court had held that the controversy was "undoubtedly arbitrable,"27 the United States Supreme Court found that the claim of the employees was not arbitrable since the contract limited arbitration to grievances "pertaining to a violation of the Agreement."28 Justice Douglas dissented because the holding questioned the continued

22. 363 U.S. at 578. Implicit in the Trilogy is the judgment that arbitration is superior to judicial process in the settlement of employment disputes. The parties trust an arbitrator because they are allowed to decide how the arbitrator is chosen, who he or she is, and the rules under which the decision will be made. See Bond, *The Concurrence Conundrum: The Overlapping Jurisdiction of Arbitration and the National Labor Relations Board*, 42 S. Cal. L. Rev. 4, 12-18 (1969) [hereinafter cited as Bond]. If the parties are dissatisfied with the results, they may bargain for new rules or select arbitrators more carefully in the future. Another factor is the unique, organic or constitutional character of collective bargaining agreements. Judges, schooled in the traditional law of contracts, may not be sensitive to the realities of industrial self-government. An arbitrator, however, is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.


28. 405 U.S. at 230.
vitality of the strong presumption of arbitrability established in *American Manufacturing* and *Warrior & Gulf*.\(^2^9\)

While it is possible *Iowa Beef Packers* indicates an anti-arbitration attitude, it is only a per curiam opinion dismissing certiorari. Further, a case decided later in the term discounts any anti-arbitration impact of *Iowa Beef Packers* by holding that even such a traditional court doctrine as laches cannot be interposed to interfere with arbitration.\(^3^0\) Thus, there seems to be no major shift in attitude toward the Trilogy policy of keeping courts out of the arbitration process.

The insulation that arbitration enjoys from court decision on the merits of a dispute is further demonstrated by the standard of review of arbitration awards in \$ 301 enforcement actions. In *United Steelworkers v. Enterprise Wheel & Car Corp.*,\(^3^1\) a group of employees was discharged for striking to protest the discharge of another employee. Finding the employees' action improper but not warranting discharge, the arbitrator ordered reinstatement even though the contract had expired by the time the award was rendered. The Supreme Court, again by Justice Douglas, described the contractual wellspring from which the arbitrator must draw his powers:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.\(^3^2\)

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29. *Id.*
30. *International Operating Eng'rs Local 150 v. Flair Builders, Inc.*, 406 U.S. 487 (1972). In this case the union brought a \$ 301 suit for arbitration to enforce a master contract, claiming that the company had signed a memorandium agreeing to be bound to any future master contract. The memorandium was signed in 1964 but the union did nothing to pursue its memorandum rights after a master agreement was signed in 1966 until 1968, just as the master contract was about to expire, when it brought suit. Though the district court, *International Operating Eng'rs Local 150, No. 68-C-2091* (N.D. Ill. April 14, 1969), and circuit court of appeals, *International Operating Eng'rs Local 150, 440 F.2d 557 (7th Cir. 1971)*, found the suit barred by laches, the Supreme Court ordered arbitration. The district court had found the master contract binding because of the memorandum agreement, and the master agreement provided for arbitration of "any difference." 406 U.S. at 488, 491. Reasoning that the issue of laches is a "difference" the Court held that arbitration was necessary. *Id.* at 491. See also *Legion Utensils Co. v. Trenz, 66 CCH LAB. CAS. ¶ 52,666* (N.Y. Sup. Ct. June 16, 1971) (holding that the issue of *res judicata* is for the arbitrator and not the court).
32. *Id.* at 597.
However, courts are cautioned not to exercise activism on review:

The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. . . [Arbitrators] sit to settle disputes at the plant level — disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.\(^3\)

In sum, the Court has required courts to bow out of labor disputes arising under a collective bargaining agreement except to determine whether the defendant in a § 301 action is bound by the labor agreement and whether the dispute is arbitrable—with a strong presumption of arbitrability. In actions to enforce arbitration awards the court must enforce the award unless it clearly manifests infidelity to the contract.\(^4\)

**Individual Employees, § 301 Suits and Arbitration**

Many questions also arose about the rights of individual members of bargaining units to bring suits to enforce collective bargaining agreements. In *Smith v. Evening News Association,*\(^3\) a member of one union brought a state court suit after he had been locked out of his job because of a strike by another union. He claimed that the clause in his contract, prohibiting discrimination because of union membership, had been violated when the employer had allowed non-union employees to come to work and be paid while locking out employees belonging to non-striking unions. The Supreme Court held that a state court suit for wages (in the form of damages) is a § 301 action, that state and federal courts have jurisdiction over such suits even though the conduct concededly was an unfair labor practice, and that § 301 actions may be brought by individual employees.\(^3\) Since the collective bargaining agreement contained no grievance-arbitration provisions, the Court made no holding on an em-

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\(^3\) Id. at 596.

\(^4\) Some lower courts are developing individual due process in the relatively few cases where awards have been successfully challenged. In *Howerton v. J. Chistenson Co.,* 76 L.R.R.M. 2337 (N.D. Cal. Feb. 22, 1971), the court indicated that, where an employee claimed that the union failed to represent him, it would make a factual inquiry into the union's good faith and examine the record for any inference of hostility. In *Local 13, Longshoremen v. Pacific Maritime Ass'n,* 441 F.2d 1061 (9th Cir. 1971) an arbitrator's award upholding a local union officer's discharge was set aside after a search of the record revealed an inference that the international union was hostile to the local officer.

\(^3\) 371 U.S. 195 (1962).

\(^3\) Id. at 200.
ployee's rights and obligations when provision is made for arbitration.

Justice Black, in dissent, questioned the wisdom of duplicate forums for decision — the courts and the Board. Apparently anticipating future cases in which the additional forum of arbitration is available, Black raised the due process claim affected employees may possess:

Finally, since the Court is deciding that this type of action can be brought to vindicate workers' rights, I think it should also decide clearly and unequivocally whether an employee injured by the discrimination of either his employer or his union can file and prosecute his own lawsuit in his own way. I cannot believe that Congress intended by the National Labor Relations Act either as originally passed or as amended by §301 to take away rights to sue which individuals have freely exercised in this country at least since the concept of due process of law became recognized as a guiding principle in our jurisprudence. And surely the Labor Act was not intended to relegate workers with lawsuits to the status of wards either of companies or of unions.37

The problem of what to do when arbitration procedures are available but a grieved employee does not use them was faced in Republic Steel Corp. v. Maddox.38 A mine closed, and an employee, without any resort to grievance or arbitration, brought a state court suit for severance pay due under the contract. Justice Harlan, writing for the majority, held that:

[F]ederal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress.39

Justice Black again dissented on due process grounds. His position was that an employee may not want the union to handle his dispute, may not

37. Id. at 204-05.
39. Id. at 652 (emphasis in original). One exception is that an employee may bring suit without exhausting grievance procedures if such efforts would be futile. Zamora v. Massey-Ferguson, Inc., 336 F. Supp. 588 (S.D. Iowa 1972); Sedlarik v. Gen. Motors Corp., 54 F.R.D. 230 (W.D. Mich. 1971); Imbrumone v. Chrysler Corp., 336 F. Supp. 1223 (E.D. Mich. 1971); Fulsom v. United-Buckingham Freight Lines, Inc., 324 F. Supp. 135 (W.D. Mo. 1970). See also Wagner v. Columbia Hosp. Dist., —- Ore. —- , 485 P.2d 421 (1971), where a discharged employee sued both her employer and her union. The defendants sought arbitration but it was held that the employee need not pursue arbitration since the union would be her representative in arbitration and the union had demanded her discharge for refusing to join the union.
want the long and discouraging grievance process, and may not want an arbitrator's decision. While he would follow *Textile Worker's Union v. Lincoln Mills* and hold companies and unions to their agreements to arbitrate, he felt that such a decision was:

>a far cry from saying, as the Court does today, that an ordinary laborer . . . must, if the union's contract with the employer provides for arbitration of grievances, have the doors of the courts of his country shut in his face to prevent his suing the employer to get his own wages for breach of contract."

After reviewing some reasons an employee might consider arbitration inferior to a court trial, he concludes that

an employee is just as capable of trying to enforce payment of his wages or wage substitutes under a collective bargaining agreement as his union, and he certainly is more interested in this effort than any union would likely be.

Once it was determined that an aggrieved employee would have to exhaust any contractual remedies providing for arbitration before initiating a § 301 action, the next question was what could employees do when the union, which typically controls the decision of what grievances will be taken to arbitration, settles claims against the interest of some employees. So far the insulation of arbitration from judicial review has permitted management and labor to control the grievance process leading up to arbitration. In *Humphrey v. Moore*, two auto carriers hauled cars from Ford's Louisville plant. They agreed that one of them would subsequently do all the hauling and would acquire operating rights from the other. The Detroit Joint Conference Committee, made up equally of union and employer representatives, settled the question of what to do about the jobs by dovetailing the seniority lists. Based on seniority, most jobs went to the employees of the company that had sold its rights. The employees of the acquiring company who were adversely affected brought a state court suit to enjoin the settlement. The Supreme Court, by Justice White,

41. 379 U.S. at 664.
42. The reasons suggested by Justice Black include the absence of a jury trial, the absence of instructions in the law, special evidence rules, no explication of the reasons for a decision, no requirement that witnesses be sworn, no requirement that records be complete and the limited nature of judicial review. He did not elaborate the advantages of arbitration to employers and unions which are not available to employees. For example, employees are denied the right to select the arbitrator and the right to determine the applicable rules, standards and remedies.
43. 379 U.S. at 668.
44. 375 U.S. 335 (1964).
found that the employees' action was a § 301 case, but held that the settlement did not violate the union's duty of fair representation:

[W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another.\textsuperscript{45}

Due process protections of the employees adversely affected by the settlement were satisfied because they had notice of the hearing and because three stewards representing them were present and allowed to state their position at the hearing.

In \textit{Vaca v. Sipes},\textsuperscript{46} the Court made it clear that unless the employee can show the union breached its duty of fair representation, he has no recourse in a § 301 court action against his union or employer. In \textit{Vaca} an employee sued his union in state court alleging the union had refused to take his grievance to arbitration. His grievance was that he had been wrongly discharged by not being allowed to return to his job after an illness. In an opinion by Justice White, the Supreme Court held that a union breaches its duty of fair representation when its action towards a member is arbitrary, discriminatory or taken in bad faith.\textsuperscript{47} While a union may not ignore a meritorious grievance or process it in a perfunctory fashion, settlement of a grievance short of taking it to arbitration is not a breach of the duty of fair representation. Thus, a union may "swap" or trade off grievances as long as its motive is a good faith balancing of different elements within the union.

Dissenting, Justice Black summarized what he thought was the wrongful impact of \textit{Vaca}:

The rule is that before an employee can sue his employer under § 301 of the L.M.R.A. for a simple breach of his employment contract, the employee must prove not only that he attempted to exhaust his contractual remedies, but that his attempt to exhaust them was frustrated by "arbitrary, discriminatory, or . . . bad faith" conduct on the part of his union.\textsuperscript{48}

Cases since \textit{Vaca} demonstrate the difficulty employees now face when

\textsuperscript{45} Id. at 349.
\textsuperscript{46} 386 U.S. 171 (1967).
\textsuperscript{47} Id. at 190.
\textsuperscript{48} Id. at 203-04.
challenging union-employer action under grievance-arbitration procedures. 49

In *Amalgamated Street, Electric Railway & Motor Coach Employees v. Lockridge*, 50 the Supreme Court further insulated union-management control of the grievance-arbitration process from judicial interference. In September, 1959, Lockridge, a Greyhound bus driver, revoked his previous authorization for checkoff of union dues. His dues then became payable directly to the union. Lockridge's failure to pay his October dues by November 2, resulted in union suspension from membership and caused Greyhound to remove him from employment pursuant to the union security provision in the collective bargaining agreement. The union constitutional provision relied upon to suspend Lockridge required that dues must be paid by the fifteenth of the month in order to continue the member in good standing... and where a member allows his arrearage... to run into the second month before paying the same, he shall be debarred from benefits for one month after payment. Where a member allows his arrearage... to run over the last day of the second month without payment, he does thereby suspend himself from membership... 51

The union security clause in the collective bargaining agreement relied on to discharge Lockridge required employees to "remain members as a condition precedent to continued employment." 52

Lockridge sued the union in an Idaho state court on two counts. The first claimed that the union acted wantonly, willfully and wrongfully in causing plaintiff to be deprived of his employment. Count two was based on a theory that the union had breached a contract implied under Idaho law between Lockridge and his union, the terms of which were established by the union constitution and by-laws. The trial court, affirmed by the Idaho Supreme Court, 53 gave Lockridge a judgment of $32,678.56 against the union. 54

Despite the language in the complaint and the undercurrent feeling

49. See cases collected in 2 A.B.A. SECTION OF LABOR RELATIONS LAW, 1972 COMMITTEE REPORTS 88-89 [hereinafter cited as A.B.A. REPORT].


51. 403 U.S. at 278.

52. Id. A comparison of these provisions reveals that both the union and the company were mistaken in assuming that Lockridge could be suspended before the last day of the second month. Simply being a member not-in-good-standing is insufficient to justify discharge under the collective bargaining contract since the union security clause merely required union membership and not membership in good standing.


54. 403 U.S. at 282.
that the union was lashing back at Lockridge for revoking his checkoff authorization, the Supreme Court read the record as including no finding of fact on union motivation. Rather, Justice Harlan for the majority held that the state court had decided the case as a simple breach-of-contract action. Based on the rule in San Diego Building Trades Council v. Garmon, the Court held that state court jurisdiction of the claim was pre-empted because the union's conduct was arguably prohibited under § 8 of the NLRA.

The breach-of-contract description is somewhat confusing because there are two "contracts" involved. The first contract is the collective bargaining agreement between the union and Greyhound. While it is not clear from the opinions, presumably this contract provided for arbitration. That being the case, Maddox and Vaca make it clear that the employee must exhaust his contractual remedies and, even if he did, the union and employer can be sued in state or federal court under the national labor law only by a showing that the union breached its duty of fair representation by arbitrary or bad faith conduct.

According to the Supreme Court, the second contract, the one implied to exist under state law from the relationship of a member to his union with the terms established by the union constitution, was the basis of the decision by the Idaho courts. Unlike the Vaca standard of bad faith conduct, a simple mistaken construction, though reasonably made, would support a finding under Idaho contract law that the union breached its contract with a member. The Court in Lockridge pre-empted this standard because it was inconsistent with the Vaca requirement. In essence, then, Lockridge protects the rule in Vaca from intrusion by state courts applying a standard inconsistent with the national labor policy in § 301. As a result of Lockridge, the only state or federal court jurisdiction that remains in employee suits against union and management is where the employee pleads and proves that the union breached its duty of fair representation, i.e., that it acted in an arbitrary or bad faith way towards the aggrieved employee.

Justice Douglas, joined in dissent by Justice Blackmun, rightly points out that the high standard of proof required to be successful in a Vaca action leaves employees only one practical recourse: filing § 8 charges against both the employer and union. Douglas claims an NLRB remedy is slow, remote, expensive, and, because of the unreview-
able discretion of the General Counsel to decide not to pursue a case, uncertain. If Collyer becomes a general policy of deferral to arbitration of charges filed with the NLRB by individuals, the complaints of those employees will be channelled into the arbitration system. A court review of their claims would be available only after proof that the union breached its fair representation duty.

It is likely that the restriction of individual employees' remedies will be the basis of further due process challenges. In *Steele v. Louisville & Nashville Railroad*, the duty of fair representation was imposed on unions because of the immense power over employees incident to their status of exclusive bargaining representative. Subsequently, in *Vaca*, the high standard of proof required to maintain such an action was used as a bar to protect union and management from employee challenges to their operation of the grievance-arbitration systems. According employees full rights of participation in the grievance-arbitration process would require their access to the kind of control over the process presently shared by labor with management, i.e., decisions on how an arbitrator is selected, who he or she is and the rules under which the arbitrator will operate. Such full participation would seem to clash immediately and violently with the principle of the exclusive status of the bargaining representative. Even a less intrusive rule, such as one providing employees access to the courts under a simple breach of contract standard or to compel arbitration under the rules as laid out in the contract, still offends the exclusive bargaining principle.

However, the interest of employees affected adversely by union-company decisions should, at some point, outweigh the desirability of insulating the process so as to allow some review by another body. A rule allowing a discharged employee to have a day in court or arbitration is a comparatively insignificant interference with the exclusive bargaining relationship. Involved are the expenses and efforts of management either in litigation or arbitration and, for the union, the expense and effort involved in an arbitration. To meet these problems, the parties to the bargaining relationship could adopt special provisions, including allocation of costs. The problem with such a rule arises in the *Humphrey v. Moore* situation, where the union makes a decision among competing interests of different employees. Subjecting this decision to challenge in a court or through arbitration would more seriously disrupt the exclusive bargaining status. However, a rule might properly be developed that

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60. 323 U.S. 192 (1944).
61. As a practical matter, the expense and the burdens of litigation may continue to discourage employee suits despite a relaxation of the *Vaca* rule.
allows individuals or groups of employees to have a neutral hearing based on a simple breach of contract standard whenever the issue involves only a question of their relationship to the employer, while a higher standard could be imposed to review questions involving inter-employee relationships. Allowing employees access to arbitration to challenge either a union or union-management decision with a presumption running in favor of that decision might be the optimum rule. Benitted by such a presumption, the arbitrator would only have to decide if the union got something of benefit for the unit or some unit members that would justify the sacrifice required of the affected employees.

**Competing Unions, § 301 Suits and Arbitration**

In addition to protecting union-management operations within the arbitral process from attack by employees, the Supreme Court has also insulated the arbitration process of one collective bargaining relationship from interference by another union whose interests might be affected. In *Carey v. Westinghouse Electric Corp.*, the IUE had a production and maintenance unit at a Westinghouse plant that excluded all salaried technical employees. An abutting Federation unit included all salaried technical employees but excluded production and maintenance employees. In a grievance filed under its contract, IUE claimed that, in the engineering lab, certain employees represented by Federation were performing production and maintenance work. When Westinghouse refused to arbitrate on the ground it was a representation issue exclusively for NLRB determination, the IUE brought suit in state court to compel arbitration. Throughout the dispute the Federation refused to be party to arbitration under the IUE contract.

Justice Douglas for the Court analyzed the "jurisdictional" case as either a work assignment issue (that IUE wanted Federation employees removed from the work and wanted it assigned to IUE members) or a representation case (that the employees presently doing the claimed work continue doing it but that they be represented by the IUE). Even though Federation would not be party to the arbitration and could not be bound by the outcome, arbitration was ordered:


64. 375 U.S. 261 (1964).
If it is a work assignment dispute, arbitration conveniently fills a gap and avoids the necessity of a strike to bring the matter to the Board. If it is a representation matter, resort to arbitration may have a pervasive, curative effect even though one union is not a party.\(^6\)

Justice Harlan concurred on the ground that the hazard of "duplicative proceedings" was conjectural.\(^6\) Subsequently the conjecture was removed and the hazard of not only duplicate but of triplicate proceedings was realized. In the arbitration that followed, the arbitrator found the issue to be a representation matter and he split the employees between the two unions based on their individual wage levels.\(^6\) Though the opinion of the Court suggested that the Board should show deference to an award,\(^6\) the Board decided the case on its merits, refusing to defer, because the award failed to "clearly reflect the use of and be consonant with Board standards."\(^6\) The Board found all the employees to be part of the salaried and technical unit represented by the Federation.

*Carey* was an exercise in futility because of an inherent limitation of arbitration: it is a system to resolve disputes based on voluntary participation of the parties to the dispute. Generally, union and management, as parties to a collective bargaining relationship, agree both to arbitration to resolve disputes arising during the term of the contract and to the rules for arbitration; i.e., what kind of dispute can be taken to arbitration, who can force arbitration, when and how the arbitrator is selected, and what standard and remedies the arbitrator will apply. Arbitration will not be effective, and probably will not operate fairly, where all the concerned parties do not have a chance to participate in the creation and operation of the arbitration system.\(^7\) There is no essential difference between *Carey*, where two unions and an employer were disputing, and *Humphrey*, *Vaca* or *Lockridge*, where one union, an employer and one or more employees

\(^6\) Id. at 272.
\(^6\) Id. at 273.
\(^6\) 375 U.S. at 271. Justices Black and Clark dissented, arguing that the rights of the Federation and its members would be sacrificed without due process if the NLRB gave any weight to the arbitration proceedings between IUE and Westinghouse. Id. at 274. *See also* Jones, *An Arbitral Answer to a Judicial Dilemma: The Carey Decision and Trilateral Arbitration of Jurisdictional Disputes*, 11 U.C.L.A. L. Rev. 327 (1964).
\(^7\) For an example of the ineffectiveness of arbitration involving competing organizations, see Hotel Employer's Ass'n, 47 Lab. Arb. 873 (1966), where the arbitrator, operating under a collective bargaining agreement between a union and an employer's association, struck down an agreement with a civil rights group allegedly coerced from the employers by unlawful picketing and threats of violence. The union was not party to the agreement and the civil rights group was not party to, nor represented during, the arbitration proceedings.
had conflicting interests in a dispute. The parties to the dispute who are not full participants in the arbitration process have little or no chance to insert themselves into the arbitration process through the courts. Their only option is to take their case to the NLRB. As in the preceding section, the question is whether the balance struck so heavily in favor of arbitration is justified, especially if the Collyer principle applies thereby restricting NLRB jurisdiction over the dispute.

**The NLRB and the Arbitration Process**

While arbitration is substantially insulated from court interference, the Supreme Court has allowed the NLRB to exercise extensive jurisdiction concurrent with arbitral jurisdiction. In *Beacon Piece Dyeing & Finishing Co.*, the Board clearly held that a mere unilateral change in working conditions violated § 8(a)(5) because the employer had refused to bargain before effecting the changes. The Board declined to defer to a possible contractual remedy in favor of vindicating a statutory policy of open access to the Board for unfair labor practice charges:

"[We have] consistently held that the collective-bargaining requirement of the Act is not satisfied by a substitution of the grievance procedure of a contract, unless the grievance provisions of the contract contain a waiver of the statutory right "expressed in clear and unmistakable terms.""

The NLRB analog of *John Wiley & Sons v. Livingston* (which decided that courts have jurisdiction to determine that a collective bargaining agreement is binding on labor and management) is *NLRB v. Strong.* In *Strong* a multi-employer association bargained a contract for its members. Five days after the effective date, Strong refused to sign the contract and sought to withdraw from the association. The Supreme Court affirmed the Board finding that the employer has violated §§ 8(a)(1) and (5):

Here the unfair labor practice was the failure of the employer to sign and acknowledge the existence of a collective bargaining agreement which had been negotiated and concluded on his behalf.

The real argument in the case concerned the proper forum to determine

72. Id. at 961.
76. 393 U.S. at 359.
the remedy for the breach of contract. The company argued that, once the Board made the determination that the company was bound by the contract, arbitration was the proper forum to determine the remedies. The Board, which had ordered the payment of fringe benefits as provided in the contract, convinced the majority that it had remedial power:

Admittedly, the Board has no plenary authority to administer and enforce collective bargaining contracts. . . . But the business of the Board, among other things, is to adjudicate and remedy unfair labor practices. Its authority to do so is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . ." § 10(a), 61 Stat. 146, 29 U.S.C. § 160(a). Hence, it has been made clear that in some circumstances the authority of the Board and the law of contract are overlapping, concurrent regimes, neither preempting the other. 77

Where there is no question that a collective bargaining agreement binds the parties, the Board has jurisdiction to hear § 8(a)(5) cases even in the face of arbitration provisions. In NLRB v. Acme Industrial Co., 78 the agreement contained procedures for processing grievances culminating in compulsory and binding arbitration. When the employer moved some machinery out of the plant, the union asked for information about the move to assess its rights under two contract clauses, one stating it was a company policy not to subcontract work normally performed by unit members where layoffs will result and the other providing that affected employees had a right to a job transfer when equipment was moved to a new location. After the company refused to provide the information, the union filed grievances and a § 8(a)(5) charge. The Board found a violation since the information requested was necessary to evaluate the grievances and since the agreement contained no clause by which the union clearly and unmistakably waived its statutory right to such information. 79 The Supreme Court upheld the Board and found that the NLRB was not required to defer to arbitration. Justice Stewart distinguished the Trilogy cases by indicating that the Board had greater expertise in enforcing the Act than did courts in deciding breach of collective bargaining contract actions. 80 Thus, the expertise of arbitrators did not outweigh that of the Board.

77. Id. at 360.
78. 385 U.S. 432 (1967).
80. 385 U.S. at 436-37.
In a companion case to Acme, the Supreme Court justified further intrusion of Board jurisdiction into collective bargaining. In NLRB v. C & C Plywood Corp., the agreement in effect had no arbitration provisions and had a "zipper" clause, waiving for the term of the contract the right to bargain collectively with respect to all subject matter not specifically covered by the contract even if the matter was not within the contemplation or knowledge of either or both parties at the time the contract was negotiated. Based on a section allowing the company to grant individual merit or premium pay raises for special fitness or aptitude, the company installed an incentive pay system for employees in several classifications assigned to glue spreading crews. The Board found the company's unilateral action during the term of the contract had violated § 8(a)(5). The Supreme Court upheld the Board, saying:

the Board has not construed a labor agreement to determine the extent of the contractual rights which were given the union by the employer. It has not imposed its own view of what the terms and conditions of the labor agreement should be. It has done no more than merely enforce a statutory right which Congress considered necessary to allow labor and management to get on with the process of reaching fair terms and conditions of employment — "to provide a means by which agreement may be reached." The Board's interpretation went only so far as was necessary to determine that the union did not agree to give up these statutory safeguards. Thus, the Board, in necessarily construing a labor agreement to decide this unfair labor practice case, has not exceeded the jurisdiction laid out for it by Congress.

The bargain C & C Plywood struck in order to get a contract with a zipper clause but without arbitration was, to some extent, undermined by the Court's decision allowing the Board to exercise the power to resolve disputes in a manner functionally equivalent to that of an arbitrator. Had the company predicted that the Board would be imposed in an "arbitrator's role," it may well have exercised its bargaining power to gain advantage in other areas. It may be that the unexpressed but pivotal judgment made by the Supreme Court is that the availability of Board processes is as likely to be a successful substitute for individual strife as is arbitration. Under that analysis, leaving the option to the union to go to the Board or to arbitration would minimize the number and severity of

83. 385 U.S. at 428.
strikes during the term of collective bargaining agreements. The question unanswered by C & C Plywood is why access to courts is not as adequate a source of dispute resolution as the NLRB or arbitration.

A question arising because of the concurrent jurisdiction of the Board and arbitration is whether that jurisdiction is completely coextensive. The Supreme Court in Strong, Acme and C & C Plywood, and the Board in C & S Industries, Inc., have indicated that the NLRB does not have jurisdiction over every breach of contract claim. But in effect it seems the Board does have plenary power since there are no clear stops in the Board rule. Under the Board's "clear and unmistakable waiver" doctrine almost any dispute that arises during the term of a contract can be and is decided.

In the Board analog to the Amalgamated Street, Electric Railway & Motor Coach Employees v. Lockridge situation (where a member claims his union has violated the union constitution), the Supreme Court has approved the principle that union members must have unimpeded access to the Board. NLRB v. Marine & Shipbuilding Workers involved a union member who claimed his local president had violated the

85. Professor Schatzki has listed some cases of minimal impact and importance where the Board has exercised § 8(a) (5) jurisdiction:

Unilateral changes held unlawful include abolition of Christmas bonuses (no matter how zealously identified as voluntary and no matter how steadfastly kept out of contracts despite union efforts to the contrary) [Beacon Journal Publishing Co., 164 N.L.R.B. 734 (1967)], switching a single employee from a Monday through Friday shift to a Tuesday through Saturday shift [Long Lake & Lumber Co., 160 N.L.R.B. 1475 (1966)], abolition of a job classification resulting in a single reclassification [Eaton Yale & Towle, Inc., 171 N.L.R.B. 600 (1968)], institution of a code of conduct for employees to supplant a similar code that had been implemented unilaterally but without union protest [General Elec. Co., 192 N.L.R.B. No. 9, 77 L.R.R.M. 1561 (July 14, 1969)], and withdrawal of a free employee service worth approximately 32½ cents per year per employee [Seattle First Nat'l Bank, 176 N.L.R.B. No. 97, 73 L.R.R.M. 1549 (June 15, 1969)].

Schatzki, supra note 79, at 225. However, § 8(d) denies the Board the authority to impose specific contract terms on the parties to a collective bargaining relationship. H. K. Porter Co. v. N.L.R.B., 397 U.S. 99 (1970). The pertinent language of § 8(d) provides that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d) (1970).

Arbitrators are similarly limited. The exercise of such power would be struck down as altering the contract or deciding an "interests versus rights" arbitration beyond the scope of the arbitration provision in all but the rarest of cases. See Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711 (1945), for a discussion of "interests versus rights" questions in the Railway Labor context. See also E. ELKOURI & F. ELKOURI, How Arbitration Works 29-47 (rev. ed. 1960) [hereinafter cited as ELKOURI]. But see West Towns Bus Co. v. Street Elec. Ry. & Motor Coach Employees, 26 Ill. App. 2d 398, 168 N.E.2d 473 (1960), ordering arbitration to determine the terms of a new contract.
union constitution and caused his employer to discriminate against him. The union expelled him for failing to exhaust his intra-union remedies before filing § 8(b)(1)(A) charges with the Board. A second § 8(b)(1)(A) charge was filed because of the expulsion, on which the Board found a violation. The Supreme Court held that the strong public policy in favor of open access to the Board supported the decision that it is unlawful for a union to expel a member for taking his claim to the Board:

In the present case a whole complex of public policy issues was raised by Holder's original charge. It implicated not only the union but the employer. The employer might also have been made a party and comprehensive and coordinated remedies provided. Those issues cannot be fully explored in an internal union proceeding. There cannot be any justification to make the public processes wait until the union member exhausts internal procedures plainly inadequate to deal with all phases of the complex problem concerning employer, union, and employee member.

Arbitration and Individual Claims
Under Statutes Other Than the NLRA

In statutory areas outside the NLRA that relate to employment, the Supreme Court has recently run a rather unsteady course in determining the proper role for arbitration. In U. S. Bulk Carriers, Inc. v. Arguelles, a union-member seaman worked under a collective bargaining agreement that provided for arbitration. After returning from a voyage to

90. 391 U.S. at 425.
91. 400 U.S. 351 (1971).
Vietnam, Arguelles brought suit in federal court pursuant to the Seaman’s Relief Act for wages due under the contract and for a statutory penalty for failure to pay wages at the proper time. The employer defended on the ground that Arguelles was required to exhaust the grievance-arbitration procedures available in the contract before a court action could be brought. Justice Douglas, writing for the majority, held that the seaman had a right of direct access to the courts without any need to exhaust available arbitration procedures. The rationale was that, historically, seamen have been special wards of admiralty. Because of that status and since there was no clear showing in the passage of § 301 that Congress meant to abrogate seamen’s direct access to courts long provided in the Seaman’s Relief Act, seamen, as a limited exception to the general rule, need not exhaust their contractual remedies. Justice White dissented on the ground that the entire dispute, including the determination of the statutory penalty, depends on a resolution of the collective bargaining questions. He cited Fair Labor Standard Act cases for the proposition that statutory claims may be settled by arbitrators and that courts should defer to arbitration.

Arguelles could have two effects. It could be a harbinger of a changing attitude on the Court that individuals with claims connected with their employment have greater access to courts for the resolution of their claims regardless of the existence of arbitration. The other, more limited, effect seems more likely in view of recent cases. In that view Arguelles is a narrow, peculiar exception to the general rule of accommodation in favor of arbitration. In Andrews v. Louisville & Nashville Railroad decided after Arguelles, a railroad worker filed a state suit for wrongful discharge because his employer did not allow him to return to work after allegedly recovering from injuries suffered in an auto accident. After removal to federal court, the case was dismissed because the employee had failed to exhaust the arbitration remedies provided for railroad workers under the Railway Labor Act. This decision was directly in opposition to Moore v. Illinois Central Railroad. Moore held that a railroad employee who elected to treat his employer’s breach of the employment

93. 400 U.S. at 356.
94. Id. at 371.
95. Fallick v. Kehr, 369 F.2d 899 (2d Cir. 1966); Beckley v. Teyssier, 332 F.2d 495 (9th Cir. 1964); Evans v. Hudson Coal Co., 165 F.2d 970 (3d Cir. 1948); Donahue v. Sesquemanna Collieries Co., 138 F.2d 3 (3d Cir. 1943).
97. Id. at 321.
99. 312 U.S. 630 (1941).
contract as a discharge was not required to resort to the remedies afforded under the Railway Labor Act for adjustment and arbitration of grievances, but was free to commence in state court an action based on state law for breach of contract.\footnote{100}

Justice Rehnquist, writing for the majority in \textit{Andrews}, agreed with the trial court and specifically overruled \textit{Moore}.\footnote{102} Thus, an employee must exhaust the arbitration procedures provided by the Railway Labor Act before coming to court since the only source of petitioner's right not to be discharged is the collective bargaining agreement between the employer and the union.\footnote{102} Justice Douglas dissented on the ground that the only issue involved was whether the employee had sufficiently recovered from his injuries to perform his prior duties.\footnote{103} Despite this being a very typical kind of case for an arbitrator to handle, Justice Douglas suggests this case did not present an issue involving a collective bargaining agreement.

Were the Court in a mood to expand \textit{Arguelles}, \textit{Andrews} would have been a likely case to do it by reaffirming \textit{Moore}. Two other cases have recently reached the Court, and in each it has struggled with uncertain results to accommodate arbitration with statutory claims of individuals bearing on their employment. In \textit{Dewey v. Reynolds Metals Co.},\footnote{104} Dewey claimed he had been discharged because of his religious beliefs. He was fired for refusing to work as scheduled on Saturday and for refusing to find a replacement. An arbitrator had denied Dewey's grievance which made an "identical claim set forth in his [court] complaint."\footnote{105} His complaints filed with a state fair employment practices commission and with the Office of Federal Contract Compliance were denied, but the Equal Employment Opportunity Commission found probable cause that Title VII of the Civil Rights Act of 1964 had been violated.\footnote{106} The district court found for Dewey,\footnote{107} but the Sixth Circuit reversed on two grounds. First, the district court erred in applying EEOC regulations that were not yet in effect at the time of discharge.\footnote{108} More importantly for this paper, the arbitration award should be given final and finding effect since:

It is clear that if the arbitrator of the grievances had granted an award to Dewey, instead of to Reynolds, the award would have

\footnotesize{
100. \textit{Id.} at 634.
102. \textit{Id.} at 324.
103. \textit{Id.} at 426.
104. \textit{429 F.2d} 324 (6th Cir. 1970).
105. \textit{Id.} at 327.
106. \textit{Id.}
}
been final, binding and conclusive on Reynolds. Reynolds would not have been permitted to relitigate the award in the courts.\textsuperscript{109}

Granting certiorari because of a conflict in the circuits,\textsuperscript{110} the Supreme Court, with Justice Harlan taking no part, affirmed per curiam by an equally divided Court.\textsuperscript{111} That decision is not binding on lower courts and it could be distinguished as only involving the question of the application of the EEOC Regulations, but it obviously will have some impact.\textsuperscript{112}

The second case concerned the federal wage-hour law. Although there is longstanding precedent that employees claiming violation of the Fair Labor Standard Act must exhaust their contract remedies before initiating a lawsuit,\textsuperscript{113} the issue came before the Court in \textit{Iowa Beef Packers, Inc. v. Thompson}.\textsuperscript{114} Employees worked under a collective bargaining agreement that provided for a nonpaid lunch period during which the company required them to be "on call". The employees brought a FLSA suit in state court to recover overtime compensation, claiming that being "on call" rendered the lunch period "work time". Finding for the employees, the trial court, affirmed by the Iowa Supreme Court,\textsuperscript{115} held that employees need not exhaust grievance-arbitration provisions in their

\textsuperscript{109} Id. at 331.

\textsuperscript{110} Hutchings \textit{v. United States Indus., Inc.}, 428 F.2d 303 (5th Cir. 1970); Bowe \textit{v. Colgate-Palmolive Co.}, 416 F.2d 711 (7th Cir. 1969). \textit{Cf. Fekete \textit{v. United States Steel Corp.}}, 424 F.2d 331 (3d Cir. 1970).


\textsuperscript{112} \textit{Dewey} has already had effect in the Sixth Circuit. \textit{See Spann \textit{v. Joanna Western Mills Co.}}, 446 F.2d 120 (6th Cir. 1971) (reaffirming the rationale of \textit{Dewey}). \textit{But see Newman \textit{v. Avco Corp.}}, 451 F.2d 743 (6th Cir. 1971), where the court stated that \textit{Dewey} is based on an estoppel rationale rather than on the doctrine of election of remedies. Newman was not estopped from bringing the action because the arbitrator had no authority under the contract to decide the issue of alleged racial discrimination. The court treated \textit{Spann} as a true estoppel situation since the employee in that case had already accepted reinstatement as provided in the award before he reasserted his claim for back pay.

The Fifth Circuit has adopted the \textit{Dewey} rationale in \textit{Rios \textit{v. Reynolds Metals Co.}, 467 F.2d 54 (1972)}.

The EEOC seems to be moving towards the use of private arbitration to resolve title VII claims. At the mid-term meeting of the Committee on Equal Employment Opportunity Law of the A.B.A.'s Section on Labor Law, Jack Pemberton, Acting General Counsel of the EEOC, said that the Commission may favor such an approach if appropriate conditions were attached. At a minimum he indicated, the aggrieved party should be independently represented, should have available discovery procedures, and that the arbitration panel should be independent of either the company or union.


\textsuperscript{113} \textit{See} cases cited in note 95 \textit{supra}.

\textsuperscript{114} 405 U.S. 228 (1972). For a discussion of the \textit{Iowa Beef Packers} case, see text accompanying notes 25-30 \textit{supra}.

\textsuperscript{115} \textit{Thompson \textit{v. Iowa Beef Packers, Inc.}}, 185 N.W.2d 738 (Iowa 1971).
contract before bringing suit.\textsuperscript{116} The Supreme Court granted certiorari on that question\textsuperscript{117} but then dismissed it as improvidently granted because the grievance was not arbitrable under the narrow arbitration provision.\textsuperscript{118} Justice Douglas dissented on the issue of arbitrability and reprimanded the Court for not deciding the case on the merits.\textsuperscript{119} But also, he would extend to wage-hour claims the \textit{Arguelles} principle of the open courthouse door.

\section*{The Collyer Decision}

Once the background of Supreme Court opinions has been established, \textit{Collyer Insulated Wire}\textsuperscript{120} can be put in perspective. In \textit{Collyer}, three incidents were in dispute. During the negotiations preceding the contract in effect when the case arose, the company tried without success to bargain for a wage increase for skilled maintenance personnel above the across-the-board increase given all employees. After the negotiations, both the company and the union continued to discuss a raise for the skilled maintenance employees. The company finally told the union that in five days it would institute a twenty cent per hour increase. The union continued to object, claiming that changes should only be based on a re-evaluation of all jobs in the plant. A second issue concerned the removal of one of the two maintenance machinists assigned to each worm gear maintenance crew and their replacement by a machine operator and helper. The third question concerned rate changes for extruder machine operators.

The complaint as issued, claimed the company made unilateral changes in certain wages and working conditions in violation of § 8(a)(5). The company defended that the changes made were sanctioned by the collective bargaining agreement in effect between the company and the union and that any claim that its actions exceeded contract authorization should be remedied through the grievance and arbitration provisions of the agreement. While the trial examiner found the company had violated § 8(a)(5), the Board disagreed.\textsuperscript{121} In an opinion by Chairman Miller and Member Kennedy, with a concurrence by Member Brown, the Board held:

\begin{quote}
We find merit in respondent's exceptions that because this dispute in its entirety arises from the contract between the parties'
\end{quote}

\textsuperscript{116} 405 U.S. at 228.
\textsuperscript{117} Iowa Beef Packers, Inc. v. Thompson, 404 U.S. 820 (1972).
\textsuperscript{118} 405 U.S. at 229-30.
\textsuperscript{119} \textit{Id.} at 230, 232.
\textsuperscript{120} 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (Aug. 20, 1971).
relationship under the contract, it ought to be resolved in the manner which that contract prescribes.\textsuperscript{122}

The Miller-Kennedy opinion is structured around one central principle: arbitrators are better able than the NLRB to resolve disputes arising during the course of a bargaining agreement because they have special skill and experience deciding bargaining relationship issues. Support for this assumption is marshalled by showing the contract issues presented in the case:

(a) the extent to which [company] actions were intended to be reserved to the management, subject to later adjustment by grievance and arbitration; (b) the extent to which the skill factor increase should properly be construed . . . as a "change in the general scale of pay" or, conversely, as "adjustments in individual rates . . . to remove inequalities or for other proper reason"; (c) the extent, if any, to which the procedures . . . governing new or changed jobs and job rates should have been made applicable to the skill factor increase here; and (d) the extent to which any of these issues may be affected by the long course of dealing between the parties.\textsuperscript{123}

The judgment that arbitrators have more expertise in deciding bargaining relationship issues seems not to be based on any hard data. It could be premised on acceptance of the Trilogy rhetoric about arbitrators,\textsuperscript{124} or, it could be based on the simple analysis that since Board personnel must involve themselves with many different kinds of cases and issues, only a small portion of their work concerns bargaining relationship questions. Arbitrators, on the other hand devote almost all of their efforts to such issues.

Structuring a deferral policy around this judgment can cause some difficulty, since that is not the same judgment underlying the Supreme Court's policy in the Trilogy. The premise underlying the Court's approach is that a fully developed arbitration process, as well as concurrent NLRB jurisdiction, are adequate substitutes for use of economic force to resolve disputes arising during the term of a contract. By making its judgment, the Collyer majority avoided coming to grips with the question of what impact a policy of deferral will have on the incidence and severity of employment strife occurring over contract disputes.

\textsuperscript{121} Id. at ———, 77 L.R.R.M. at 1932.
\textsuperscript{122} Id. at ———, 77 L.R.R.M. at 1934.
\textsuperscript{123} Id.
\textsuperscript{124} See note 22 supra.
Some interesting inferences can be drawn about the health of a collective bargaining relationship when parties to a dispute either forego entirely grievance-arbitration procedures or proceed concurrently before the Board and in arbitration. Where the grieving party foregoes or rejects arbitration, a strong suspicion arises that the collective bargaining relationship is suffering severe distress. The issue for the Board is whether a policy of deferral that channels the parties into arbitration promotes the re-establishment of a healthy or at least tolerable relationship. If arbitration produces a result both sides can live with, that may put the parties back on the path to a normal relationship, but a fruitless experience may drive the parties further apart tending to make their estrangement permanent.

While renunciation of arbitration might be a litmus test of estrangement in a collective bargaining relationship, attempting to operate concurrently in arbitration and before the Board seems to raise the inference of tactical maneuvering. There are several advantages for the challenging party in using the Board to resolve disputes. First, the charging party need not bear the cost nor the burden of prosecution while still putting the cost of defense on the opposing party. Second, the "clear and unmistakable waiver" rule used by the Board to decide § 8(a) (5) claims arising during the term of a labor contract\(^\text{125}\) is an easy standard under which to show a violation.\(^\text{126}\) These two tactical reasons give the charging party advantages in having the Board actually decide the case. The third reason for going to the Board and to arbitration simultaneously is to delay any final decision of the dispute. Assuming advantage to the grieving party if the dispute is kept alive, filing arbitration grievances while also filing unfair labor practice charges prevents final arbitration decision-making since (1) Board determinations take precedence and (2) the Board takes time to investigate the charges and to decide whether to issue a complaint. The Collyer majority, in focusing their opinion on the expertise of arbitrators, precluded consideration of this roadblock effect.

After setting out its central thesis on the superior expertise of arbitrators, the Collyer opinion cites a litany of authority for the proposition that the Board has jurisdiction over § 8 disputes even when other means of settlement have been agreed upon by the parties, but that the Board may, in its discretion, defer to such agreed-to means of settlement.\(^\text{127}\) In the past,\(^\text{125}\) See notes 79, 85 supra & text accompanying.

\(^{126}\) Schatzki, supra note 79, at 225.

the Board has generally deferred to an award rendered by an arbitrator, but the majority confesses that in the pre-award situation the Board has been "less clear", with no principle being consistently applied.

In an attempt to show the use of a deferral principle in cases predating the Nixon Board, the majority quotes at length from *Joseph Schlitz Brewing Co.*, describing it as the most significant recent case:

[W]here, as here, the contract clearly provides for 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 contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties. This particular case is indeed an appropriate one for just such deferral. The parties have an unusually long established and successful bargaining relationship; they have a dispute involving substantive contract interpretation almost classical in its form, each party asserting a reasonable claim in good faith in a situation wholly devoid of unlawful conduct or aggravated circumstances of any kind; and they have a clearly defined grievance-arbitration procedure which Respondent has urged the Union to use for resolving their dispute; and, significantly, the Respondent, . . . offered to discuss the entire matter with the Union prior to taking such action.

The majority then attempts to indicate how the similarity of facts be-

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Investigation of the Board's use of jurisdictional discretion shows that the ad hoc basis on which the Board reaches decisions had led to contradiction, confusion, and quite possibly arbitrariness. The jurisdictional rationales seem mainly to be frost-filling applied when the Board agrees with the results of the arbitrator.

*Id.* at 51. See also *Lev & Fishman, Suggestions to Management: Arbitration v. The Labor Board*, 10 B.C. IND. & COX. L. REV. 763 (1969), where it is suggested that deferral has involved more "backfilling and sidestepping in this area of Board law than in any other area." *Id.* at 783.


tween *Collyer* and *Schlitz* leads them to their decision that deferral is proper in *Collyer*:

Here, as in *Schlitz*, this dispute arises within the confines of a long and productive collective-bargaining relationship. The parties before us have, for 35 years, mutually and voluntarily resolved the conflicts which inhere in collective bargaining. Here, as there, no claim is made of enmity by Respondent to employees' exercise of protected rights. Respondent has credibly asserted its willingness to resort to arbitration under a clause providing for arbitration in a very broad range of disputes and unquestionably broad enough to embrace this dispute. Finally . . . the dispute is one eminently well suited to resolution by arbitration. The contract and its meaning in the present circumstances lie at the center of this dispute. In contrast, the Act and its policies become involved only if it is determined that the agreement between the parties, examined in the light of its negotiating history and the practices of the parties thereunder, did not sanction Respondent's right to make the disputed changes, subject to review if sought by the Union, under the contractually prescribed procedure. That threshold determination is clearly within the expertise of a mutually agreed-upon arbitrator.\(^{132}\)

What is unclear and what may prove troublesome is the extent to which factual identity to *Schlitz* is now necessary to trigger a deferral decision. The weakness is that the Board in *Collyer* has made its decision turn on the judgment of arbitral expertise. While that judgment may well be correct, the majority chose not to suggest any doctrinal basis for defining where the broad principle of deferral will be effective. Without a discussion of either the nature of arbitration or of policy considerations favoring elimination of dual jurisdiction, the majority relied on a factual comparison to a prior case which led to the desired result. The threat is that future cases, where a deferral issue is raised, will continue to be handled on an ad hoc, result oriented basis. Perhaps sensitivity to common law methodology is necessary. However, the Board's failure to explain what facts or conditions were essential to their holding in *Collyer* could stimulate inconsistent and undesirable decisions.

The majority in *Collyer* dismissed the complaint but retained jurisdiction over the dispute so the case could be reopened upon a showing that:

\(^{132}\) *Id.*
(a) the dispute has not, with reasonable promptness after the issuance of this decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or, (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.\textsuperscript{133}

One question that will arise is whether the complaining party can avoid arbitration through various dilatory tactics and then still be able to return to the Board. Since such a reopening would be a bonanza for the party seeking delay, the rule should not allow reopening of the case where arbitration failed due to conduct of the party who originally filed unfair labor practice charges.

To secure a majority, Miller-Kennedy relied on the concurrence of Member Brown, who has long been a deferral advocate.\textsuperscript{134} Based on the characterization of a contract dispute either as an interests dispute to acquire rights in the future or as a rights dispute to assert a right that accrued in the past,\textsuperscript{135} Brown suggests that the Board only defer where the dispute is a rights dispute. The clear-cut case of an interests dispute is the drafting of new contract terms for the future when no present agreement was in effect. More difficult cases occur when a collective bargaining agreement is in effect but no terms in the contract specifically bear on the subject matter of the dispute. Brown's argument is that where the dispute is

\textsuperscript{133} Id. at \textsuperscript{77} L.R.R.M. at 1938. The second condition which the Board said must be met before the case could be reopened ties pre-award deferral policy to the past award review standard established in Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). 192 N.L.R.B. at \textsuperscript{77} L.R.R.M. at 1938.


\textsuperscript{135} In interest disputes the arbitrator drafts an agreement that will bind the parties in the future while arbitrators in rights disputes merely interpret an existing or prior agreement between the parties. See Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 723 (1945); Elektron, \textit{supra} note 85, at 29-47.

On September 11, 1972, the Board heard oral arguments on the issue of deferral in a case where an employer's association insisted on the arbitration of new contract terms ("interest" arbitration) as a mandatory subject of bargaining. Mechanical Contractor's Ass'n, No. 2-CA-12413 (N.L.R.B., filed July 30, 1971).
not encompassed by language in the agreement, the dispute is an interests dispute because it has not been bargained by the parties. Thus, Brown would replace the present Board standard of a "clear and unmistakable waiver" for deciding bargaining duty cases arising during the term of a contract with his interests-rights analysis. Drawing such a distinction is subject to the same criticism levelled against the "clear and unmistakable waiver" doctrine: it does not give full force to the institutional or organic nature of a collective bargaining agreement.  

Great sensitivity is required to determine why a subject is unexpressed in the agreement or in bargaining history. It may be so much a part of the shared experience that the subject is an unstated assumption underlying all that goes on. Conversely, there are unexpressed subjects that truly have had no impact in the collective bargaining relationship. Brown attempts to solve this problem by saying that in disputes that are "ambiguous", i.e., it is not clear whether the dispute is an interests or rights dispute, he would defer. This exception seems so broad and all-inclusive as to devour the rule, leaving no real limit on deferral.

Unlike the Miller-Kennedy opinion, Brown does suggest the range of Board cases beyond § 8(a) (5) in which deferral would be appropriate. He would defer "whether the disputes involved alleged violations of—§§ 8(a) (5), (3),  

or (1) or whether brought by the employer, the union, or an employee". He justifies binding the employee to the acts of the union by arguing that another rule would interfere with "the statutory objective of fostering voluntary settlements by parties to collective-bargaining agreements". In most situations the union is a strong advocate of an employee's position in a dispute, but there is a problem in two situations. The first is where the union must take a position on a dispute among competing individuals or groups of employees all of whom are represented by the same union. Whichever side the union takes adversely affects the position of some employees. The second situation is

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136. This theory underpins the Steelworkers Trilogy, see text accompanying notes 14-22, 31-34 supra. Professor Cox perhaps has said it best:

There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.

Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1498-99 (1959) [hereinafter cited as Cox].

137. 29 U.S.C. § 158(a) (3) (1970) (employer discrimination to encourage or discourage union membership made an unfair labor practice).


139. Id. at —, 77 L.R.R.M. at 1940.
where the union or union and management are both hostile towards one particular employee. Despite the due process problems, Brown would not give Board protection to those employees but would leave them to their contractual fate.

One area where Brown would narrow the scope of deferral is in representation cases. Thus, he would not follow *Raley's Inc.*, where an arbitration award ordered that some jobs constituted an accretion to that union's unit. In *Raley's*, a representation case brought by the union that lost the jobs because of the first union's award, the Board deferred to the award even though the challenging union had not been a party to the arbitral proceedings. In such situations Brown would not defer because he considers unit determinations central to the Board’s public policy function. Another objection to *Raley's* is that all the parties to the dispute were not party to the arbitration process, thereby making it unlikely that the excluded party’s interests would be fairly treated.

Member Fanning dissented in *Collyer* on several grounds. The contract did not require arbitration to be the exclusive remedy for disputes. Fanning indicated he would defer only when the parties had agreed to a provision prohibiting either party from taking disputes to a court or agency. Further, he would not defer in this case since neither party had actually resorted to their grievance-arbitration procedures to resolve this particular dispute. Fanning characterizes the Board’s deferral as forcing arbitration or making it compulsory. However, arbitration is compulsory only in the sense that no other forum can decide the dispute. The Board will not re-enter the case until there has been an unsuccessful attempt at arbitration. The parties contracted to submit disputes to arbitration, so the Board’s deferral policy is no more than holding the parties to their executory agreement. Citing *Local 357, Teamsters v. NLRB*, and *H. K. Porter Co. v. NLRB*, Fanning then predicts the Supreme Court would strike down a deferral policy as beyond the Board’s grant of authority. However, he fails to address himself to the support the Supreme Court has given the concept of Board deferral in *Smith v.*

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141. 192 N.L.R.B. at —, 77 L.R.R.M. at 1942.
142. *Id.* at —, 77 L.R.R.M. at 1941.
143. *Id.*
144. *Id.* at —, 77 L.R.R.M. at 1938.
145. 365 U.S. 667 (1961). The Supreme Court struck down the Board’s requirements for agreements providing for hiring halls.
146. 397 U.S. 99 (1970). The Supreme Court held that the Board lacked power to remedy § 8(a) (5) violations by ordering the inclusion of a checkoff provision in a collective bargaining agreement.
147. 192 N.L.R.B. at —, 77 L.R.R.M. at 1944.
Evening News Association, 148 Carey v. Westinghouse Electric Corp. 149 and NLRB v. Marine & Shipbuilding Workers. 150

Fanning also dissented on the ground that the expertise of arbitrators extends only to the interpretation of bargaining agreements and that arbitrators are unqualified to apply the NLRA, even to factual situations that are typical to their arbitrational experience. 151 He also suggests that arbitrators might be prone to overlook union and management unfair labor practices because unions and companies jointly pay the arbitrator's fees. 152 The majority attempted to counter these difficulties by retaining jurisdiction should the grievance or arbitration process have "reached a result which is repugnant to the Act." 153

The dissent of Member Jenkins is more substantial. Although the charge in Collyer was filed by the union and not an individual employee, Jenkins raised the due process question that deferral will cut off the Board as a forum for the resolution of the statutory claims of individual employees without providing those individuals an adequate substitute. Starting with Amalgamated Street, Electric Railway & Motor Coach Employees v. Lockridge, 154 Jenkins equates the jurisdiction of state courts to hear individual employee complaints with the jurisdiction of the arbitration process to resolve employee claims arising during the term of a collective bargaining agreement. 155 Based on that equation, he suggests that the Supreme Court would strike down the Board's deferral to arbitral authority since arbitrators would be deciding statutory questions using contract standards. 156 However, the fact that the Court has given such consistent and strong support to arbitration makes it questionable whether the Court will now strike down a policy that channels to arbitration individual employee's claims arising under the NLRA. It seems likely that the Court would find arbitration an adequate substitute forum for the NLRB. 157

151. 192 N.L.R.B. at ——, 77 L.R.R.M. at 1943.
152. Id.
156. Id. at ——, 77 L.R.R.M. at 1945-47.
157. The ultimate case testing this conclusion would be an employee's claim that he had been disciplined for violating a contract provision prohibiting taking claims to the NLRB. In NLRB v. Scrivener, 405 U.S. 117 (1972), the Supreme Court construed § 8(a)(4) broadly to prohibit the discharge of employees for giving statements to a Board field examiner. Section 8(a)(4) makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he had filed charges or given testimony under this Act." 29 U.S.C. 158(a)(4) (1970). While
Jenkins criticizes arbitration as a process for the resolution of disputes. He first rejects the majority's use of Carey, Smith and the Steelworkers Trilogy on the ground that none of those cases involved an unfair labor practice. Although the conduct underlying unilateral change of contract charges is the same whether reviewed by the Board or an arbitrator, Jenkins, as did Fanning, insists that the statutory standard is so different that arbitrators have no expertise to determine the statutory issue. Jenkins then criticizes arbitration as being slow, expensive, and in increasing disfavor by union and management.

Scrinever did not involve a collective bargaining agreement, the policy of unrestricted access to the Board arguably would supersede any contract provision disciplining individual employees for resorting to the Board without first exhausting grievance-arbitration procedures provided in the contract. But the issue of whether an employee can be discharged for going to the Board with a grievance is separable from the issue of whether the Board, once a charge has been filed, should defer to arbitration. Thus the resolution of our hypothetical case is still unclear.

Jenkins correctly suggests, 192 N.L.R.B. at ----, 77 L.R.R.M. at 1946, that the Board must come to grips with NLRB v. Marine & Shipbuilding Workers, 391 U.S. 418 (1968). There, the Court held that a union could not terminate an employee's membership merely because a rule requiring the exhaustion of internal union remedies was violated. However, the legality of a rule denying access to the Board is wholly different from a policy of deferral to another authority. In any event, the employee does gain something by having initial access to the Board because the Board may decide not to defer. Even if the Board defers, the employee gains since the NLRB retains jurisdiction to determine whether an award is compatible with the statute.

Whether an arbitrator should determine the legality of a provision continues to be a much discussed issue. No matter which way a particular arbitrator goes, however, the Board, under Collyer, retains jurisdiction to decide whether the statutory question has been resolved in a manner repugnant to the Act. For a discussion of the arbitrator's proper approach to the legality issue, see Meltzer, Labor Arbitration and Overlapping and Conflicting Remedies of Employment Discrimination, 39 U. Cin. L. Rev. 30 (1971) [hereinafter cited as Meltzer]. See also Waks, The "Dual Jurisdiction" Problem in Labor Arbitration: A Research Report, 23 ARB. J. (n.s.) 201, 226 (1968), where the author concludes from a study of cases raising statutory questions that, companies, unions and arbitrators take no special pains in the routine case to preclude the possibility that a party disappointed by the award will try to re-litigate the issue before the NLRB.

Reference to NLRB policies was found in only 54 of the 338 cases studied by Waks. Id. at 226-27. This certainly suggests that the parties to arbitration agreements are not thinking in terms of later recourse to the public forum.

Perhaps the time has come for further inquiry into the attitudes of management and labor towards arbitration. More fundamentally, research is necessary to make a qualitative assessment of how well arbitration works. See Kilberg & Blach, Making Realistic the Arbitration Alternative, 50 J. OF URBAN L. 21 (1972), where suggestions are made to improve the mechanics of arbitration.
Finally, Jenkins suggests that there is no practical limit to the policy of deferral and that deferral undermines the Board's "clear and unmistakable waiver" doctrine:

The majority is reading out of our jurisdiction the statutory protection against all unfair labor practices which may involve in part, and perhaps distantly, the interpretation of a contract provision, where the contract contains an arbitration clause. Most unfair labor practices can be connected somehow to contract terms or existing practices, by broad construction of general clauses, by the necessary inquiry into existing practices, by "waiver", or otherwise.\(^1\)

Presumably, the only cases the Board would hear involving contract disputes arising during the term of the contract would be where the agreement did not provide for arbitration.\(^2\) A good argument can be made that the clear and unmistakable waiver doctrine is out of phase with the prevailing view of collective bargaining relationships, and should therefore be displaced. Professor Schatzki points out that the doctrine is based on the assumption that parties in collective bargaining relationships intend to waive nothing unless they somewhere make express waivers,\(^3\) but that assumption is unwarranted in light of the accepted view that collective bargaining agreements are organic, constitutional documents that must be fleshed out through experience and interpretation. The Board's approach seems less able than arbitration to sort out unexpressed assumptions from truly neglected subjects. Indeed, one of the reasons for the special, insulated status given the arbitration process is that arbitration can sensitively perform a judicial function in the development of the common law of the shop.\(^4\) Moreover, with continued concurrent jurisdiction, problems of differing standards and inconsistent results may arise. Deferral both eliminates an unwarranted doctrine and provides for consistency and predictability. Thus, Jenkin's conclusion that the clear and unmistakable waiver doctrine has been undermined *sub silentio* by a policy of deferral seems accurate as well as appropriate.

*Progeny of Collyer*

Shortly after *Collyer* was decided the term of Member Brown expired. Whether *Collyer* would have any lasting effect depended on the

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position the new Board member would take. Until February 23, 1972, when the new nominee was finally selected, the Board suspended action on the fate of Collyer because of the two-to-two deadlock. During this period General Counsel Peter G. Nash issued and made public his memorandum to the regional offices interpreting and establishing procedures effectuating Collyer. Since it has become clear that new Member Penello has joined the Miller-Kennedy camp supporting a general deferral policy, there has emerged a pattern of cases indicating the future of the Collyer principle. One general conclusion is that the policy of deferral is developing along the general lines of the Steelworkers Trilogy in determining the relationship of courts to arbitration. Also, Members Miller, Kennedy and Penello have been careful to control the decision process so that a rather consistent application of the doctrine has evolved. This control has been exercised by having the full Board consider all questions of deferral on which the three majority members agree that deferral is appropriate. A final conclusion is that the General Counsel has taken a view of Collyer that is much narrower than that taken by the Board.

One recent case reveals a new analysis quite different from Collyer, although the result is the same. In National Radio Co., a case before the full Board, employee O'Connell had handled most of the grievance duties for the union pursuant to a contract that provided "time lost...in settling grievances shall be paid by the Company." In 1968, O'Connell had been paid for 1520 hours under this provision; in 1969 he was paid for 1195 hours. The contract further provided that stewards "shall be permitted free movement within the plant," but that the employer had the "right to establish rules pertaining to the operation of the plant." Under its plant rule power, the company told O'Connell that he must report to his supervisor before leaving the department and indicate where he was going and how long he would be gone. O'Connell refused to report and, after a number of warnings, was discharged.

A grievance was filed along with §§ 8(a)(3) and (5) unfair labor practice charges. In the dance between competing forums, an arbitrator was selected and simultaneously an NLRB hearing was held on the

166. This is possible because at least one member of the majority sits on every three member panel and any member of a panel can have the case considered by all the members of the Board.
168. Id. at --, 80 L.R.R.M. at 1719.
169. Id.
170. Id.
grievance. When the regional director refused to stay the hearing on the unfair labor practices, the arbitrator continued the arbitration pending the outcome of the Board action. The trial examiner found the company had violated both §§ 8(a)(3) and (5). The Miller-Kennedy-Penello majority found that, like Collyer, the entire "controversy is, at bottom, a substantial dispute over the meaning of contract provisions." To support that conclusion the majority cited four issues: 1) the plant rule provision; 2) the "free movement" provision; 3) the "just cause" for discharge standard; and 4) the question of the extent to which the contract had been affected by the parties' course of dealing.

The General Counsel tried to distinguish Collyer by indicating that in National Radio a § 8(a)(3) charge could survive on a mere showing of anti-union animus, whereas the § 7 charge in Collyer necessitated a contractual breach. Although the majority characterized the problem as a grave concern requiring a cautious approach, they accepted the company's argument that the proper basis of deferral is a policy of administrative abstention:

Respondent's contention that our authority is improvidently invoked does not rest on any presumed primacy of an arbitrator to interpret an ambiguous or contested contract provision. Abstention is urged on the straight forward basis that the contract prohibits discipline for other than "just cause" and provides a mechanism for the quick and fair vindication of employee rights when that clause is violated.

Implicit in Respondent's argument, as we apprehend it, is the assumption that the arbitration proceeding will lead to a resolution

171. Id. at 80 L.R.R.M. at 1721.
172. Id.
173. The majority acknowledged this problem: there exists a narrow penumbra of the dispute wherein it is possible that adoption of the reporting procedure was within Respondents contractually sanctioned domain and, so, no breach of agreement, but nevertheless prohibited by the Act because undertaken for discriminatory motive.


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 activity except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment authorized in section 8(a)(3).

Id.
of the dispute which will not be "repugnant to purposes and policies of the Act."²¹⁷⁵

Thus the majority accorded arbitration the status of a forum capable of deciding disputes beyond sheer contract claims. The basis for the conclusion is the integral part arbitration plays in virtually all collective bargaining agreements and the ever increasing demand for the services of arbitrators. As to discharge situations, the Board indicated that "just cause" discipline cases are the most frequent type of case arbitrated.²¹⁷⁶

Because the Board was seeking a "rational accommodation" between arbitration and Board authority and since it viewed the systems to be of equal competence, the majority decided to channel cases to arbitration to relieve the Board of some of its ever-increasing caseload.²¹⁷⁷ Another reason given for accommodation in favor of arbitration is the unsettling effect of concurrent attempts to resolve a dispute which inevitably results in Board interference in the arbitration process.²¹⁷⁸ National Radio itself was a perfect example. After a hearing on the merits, the arbitrator was forced to delay his decision because the regional director insisted on proceeding with the Board hearing. As a result, everyone involved was required to suffer through the expense and effort of two complete, de novo hearings to determine the consequences of one factual occurrence.²¹⁷⁹

Although the majority in National Radio announced the new doctrine of abstention, the emergence of the principle does not seem necessary to the decision of that case. Deferral could have been justified via a Collyer analysis, reasoning that "just cause" discipline cases basically are contract interpretation questions within the expertise of arbitrators even though the decision necessarily involves a finding on the question of anti-union animus. One explanation for the shift might be the majority's realization that the Collyer rationale, which is limited to a comparison of the expertise of the Board and arbitrators, does not allow a discussion of all the factors necessary to rationally accommodate two systems of con-

¹⁷⁵. 198 N.L.R.B. at ——, 80 L.R.R.M. at 1722.
¹⁷⁶. Id. at ——, 80 L.R.R.M. at 1723.
¹⁷⁷. Id. at ——, 80 L.R.R.M. at 1723 n.12.
¹⁷⁸. Id. at ——, 80 L.R.R.M. at 1722-23 n.8.
¹⁷⁹. The regional director's refusal to delay the NLRB proceeding was in violation of the Board policy established in Dubo Mfg. Co., 142 N.L.R.B. 431 (1963). In 1967, the then General Counsel Arnold Ordman described Dubo as having established a policy of deferral when the grievance - arbitration procedure is being actively pursued . . . if it appears that there is a substantial likelihood that the utilization of the procedure will set the dispute at rest.

Ordman, Arbitration and the NLRB—A Second Look, in BNA LABOR RELATIONS YEARBOOK: 1967, 197, at 202 (1967). Yet the Dubo policy, like so many other Board deferral policies, has been honored more in the breach than in the observance.
conflict resolution. The language in National Radio makes it easier to discuss such policy questions as caseload, the interference factor when competing forums have concurrent jurisdiction over the same dispute, and the kinds of cases where the Board should retain original jurisdiction rather than defer.

An alternate, and probably more accurate, explanation is that the majority opinions in Collyer and National Radio were written by two different Board members. It is assumed that Miller wrote Collyer because of his frequent strong statements in favor of deferral, and that either Kennedy or Penello wrote National Radio. Between the two, the best guess would seem to be Member Kennedy since he had more experience on the Board. More fundamentally, the language in National Radio closely compares with Kennedy's language and approach in several other cases.180

It may be that Miller and Penello accepted the majority opinion without distinguishing their approach by way of concurrence because they agreed with the result and felt that the potential was slight for conflicting results. If so, they underestimated the risk that Collyer and National Radio might result in alternate methods of analysis, making Board supervision of the regional offices and administrative law judges more difficult. Further, the Board's ambiguity creates a problem of litigation technique because it is not clear whether "arbitrator expertise" or "rational accommodation" theories should be pursued.

Statutory Issues Where Board Will Defer

In Appalachian Power Co.,181 a case much like National Radio and issued on the same day, the Board used a Collyer analysis, rather than a National Radio approach, to defer a contract issue in a § 8(a)(3)

180. In Airco Indus. Gases, 195 N.L.R.B. No. 120, 79 L.R.R.M. 1467 (March 1, 1972), Kennedy, in dissent, argued for deferral whether or not the record clearly indicated that the NLRB claim had been litigated:

If the parties here, having chosen to have the basic issue of the justness of the discharge determined by an arbitrator, failed adequately to present as thorough a case as could have been developed on the issue of discrimination it was not for want of a proper forum in which such issue could, and should, have been raised.

Id. at ——, 79 L.R.R.M. at 1469.

In Yourga Trucking, Inc., 195 N.L.R.B. No. 130, 80 L.R.R.M. 1498 (1972), the majority indicated that the party seeking deferral to a prior award must prove that the statutory issue could have been raised. Member Kennedy, in a separate opinion, stated that he would defer to a prior arbitration decision even if, with the benefit of hindsight, a statutory issue could have been raised. Kennedy's positions and language in both Airco and Yourga compare with the language in National Radio to make it likely that Kennedy drafted that opinion as well.

case. An employee had been granted a leave of absence under a provision which allowed leaves to "[a]n employee who is selected as [a union] representative . . . in matters pertaining to the bargaining units." While on union leave he was active in organizing efforts at unorganized company installations. After the union won an election at a plant of a sister company, the company cancelled his leave because his conduct on leave was "both contrary to the letter as well as the intent of the [leave] provisions."

While the Miller-Kennedy-Penello majority could have applied the National Radio abstention analysis by saying that it was rational to allow an arbitrator to decide the penumbral issue of whether the company's action was discriminatorily motivated, their opinion instead stated the issue exclusively as a contract question. The opinion dealt with the problem of anti-union motivation in three steps. First, the majority held that a contract provision which would prohibit an employee from acting as a union organizer while on leave is not "so inherently destructive of statutory rights as to amount, without more, to a per se violation of Section 8(a)(1) and (3) of the Act." Had the majority found the clause to be a per se violation of § 8(a)(3), they would not have deferred. This appears to be an attempt to express a limitation on deferral in § 8(a)(3) cases. This reasoning is similar to that found in National Radio, where the Board indicated that there may be some limit to deferral where a claim of anti-union animus is made:

[Although the alleged violation of Section 8(a)(3) subsumes a charge of union animus by Respondent, we believe this case must be distinguished from those in which a history of such animus or pattern of action subversive of Section 7 rights has been alleged.]

The second step in the Appalachian Power analysis was characterizing as "overdrawn" the trial examiner's finding that the company acted out of animus even if its interpretation of the contract was correct. That finding was based on the company's distribution of letters during

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182. Members Fanning and Jenkins again dissented; this time on the ground that the employee must be protected in the exercise of his § 7 rights to engage in concerted activity whether or not he is on leave of absence.
183. 198 N.L.R.B. at —, 80 L.R.R.M. at 1732.
184. Id.
186. 198 N.L.R.B. at —, 80 L.R.R.M. at 1724. The General Counsel's Collyer memorandum, see note 7 supra & text accompanying, would not allow deferral where the employer's contractual claim was used to conceal an effort to undermine the union.
the organization campaign claiming the employee had violated the terms of his leave by engaging in organizational activities. The majority held that this activity was proper since it merely dissipated the inference that the company had sponsored the union by granting the leave. Thus, by deciding this animus issue on the merits the Board created a second limitation on deferral in § 8(a)(3) cases. At this level, the Appalachian Power and National Radio cases conflict. Under National Radio, the determination of the discriminatory motivation of the employer (even when the action taken could be justified by contract) would be a penumbral issue to be decided by the arbitrator rather than the Board.

The third step in Appalachian Power was to defer to arbitration to determine whether the company’s action in revoking the leave of absence was justified under the contract. Under the Appalachian Power analysis, before deferral is ordered there must be a finding that the statutory issue is coextensive with the contract issue. Because the right to leave was entirely derived from the contract, the statutory issue of discrimination was completely eliminated if the company had the contract right to cancel the leave. If the company breached the contract, it also committed an unfair labor practice which presumably would be remedied by the arbitrator’s award. The end result of Appalachian Power is to cause duplicate proceedings to decide one dispute by dividing the issues between the Board and arbitration.

Both National Radio and Appalachian Power indicate a limit on deferral where employer enmity toward employee or union rights is involved. But in Malrite, Inc., where the company attempted to undermine the union, the Board deferred to an award that had been ignored by the employer. The agreement, covering radio station employees, provided for separate engineer and announcer jobs to be scheduled during the day but allowed a “combo” engineer-announcer on the late night shift. After securing the written consent of the individual employees affected, the company began assigning “combos” around the clock, paying them a higher wage rate than was provided in the contract. Despite the finding by the trial examiner that the soliciting of the consent of individual employees constituted individual bargaining calculated to undermine the union as exclusive bargaining representative, and despite the refusal of the em-

188. Id.
189. The Board could have avoided duplication by addressing the last issue first and deferring on that issue. The Board could have retained jurisdiction and decided the penumbral issue if it became necessary to do so. While this approach still would involve decisions by duplicate forums, it would eliminate the hazards of the concurrent operation of both forums.
ployer to comply with an arbitration award, the Miller-Kennedy-Penello majority deferred to the award. The fact that an award had already been issued might make some difference in this case since the union could bring a § 301 action in state or federal court to enforce the award. But the entire course of this employer's conduct would seem to fit within the exception from deferral whether that exception is described as a "pattern of subversive activity" (to use National Radio language) or "conduct inherently destructive" of statutory rights (Appalachian Power language). The opinion fails to discuss National Radio or Appalachian Power and by that failure raises questions whether the language expressing some limit on deferral because of a company animus claim carries any meaning.

Another area in which the Board indicated it would defer to arbitration is the determination of the legality of authorizations by individual employees for the checkoff of union dues. In Beer Distributors Association a panel of Miller and Kennedy in the majority, with Fanning in dissent, deferred to arbitration in a § 8(a)(5) case where the union claimed management had unilaterally ceased the checkoff of union dues required by the contract. The employers had argued that the individual authorization cards were invalid because they were in violation of § 302 of the Labor-Management Relations Act and that the question of the cards' validity was not arbitrable. The majority held that the determination whether the cards violated § 302 was for the arbitrator:

[W]hether the authorizations were valid will determine in this case the ultimate question of whether Respondents did or did not violate the agreement by refusing to make the deductions. That is clearly a contract issue fully capable of resolution under the contractual procedures for resolving such disputes.

While it is true that determining the statutory issue will determine the contract issue, this analysis is the converse of that used in Collyer and Appalachian Power. In those cases the statutory issue could be resolved

191. For a discussion of deferral to awards that have already been rendered, see notes 244-66 infra.
193. Section 302(c)(4) provides that an employer may pay to labor organizations:

money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, that the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.

by first determining the contract question. Here the contract question is dependent on the statutory issue of the legality of checkoff authorizations. The explanation for deferral in this case may be that the enforcement of checkoff authorizations is a matter for court enforcement by the parties and the NLRB is without jurisdiction to enforce § 302. Thus, if the Board normally cannot determine the legality of checkoff authorizations, it was not surrendering any of its jurisdiction in *Beer Distributors*.

The failure of the Board to describe the unusual nature of a case involving § 302 might cause trouble in situations such as representation cases where the Board has primary jurisdiction to decide statutory questions. *Beer Distributors* could be applied by saying that determination of the representation question would decide the contract question thereby making the whole issue capable of resolution under the arbitration provisions. Without a clear declaration of the limits of *Beer Distributors*, the regional offices and administrative law judges might defer to arbitration in cases where the Board would not.

Since the Board has consistently deferred in § 8(a)(5) cases, it was predictable that the deferral policy would be extended to § 8(b)(3) cases involving claims of union failure to bargain in good faith. In *Teamsters Local 70 (National Biscuit Co.)*, the employer filed § 8(b)(3) charges citing the union's refusal to allow drivers to continue collecting money on their delivery routes. It was claimed that this union edict unilaterally altered a contract provision requiring drivers to collect money and that it also violated a clause requiring all past practices to remain in effect for the term of the contract. The Miller-Kennedy-Penello majority deferred to arbitration because "the resolution of this dispute necessarily depends upon a determination of the correct interpretation of a contract. . . ."

In cases involving representation issues, even when cast in unfair labor practice terms, the Board has refused to defer, though the question is yet to be faced by the full Board. Apparently, Member Brown's position in his concurring opinion in *Collyer*, that representation questions should be decided by the Board, has carried some weight in several cases since his departure.

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197. For a discussion of deferral in representation cases, see notes 200-06 infra.
198. 198 N.L.R.B. No. 4, 80 L.R.R.M. 1727 (July 31, 1972).
199. *Id.* at ----, 80 L.R.R.M. at 1729. In discussing the relation of § 8(b)(1)(A) charges to the § 8(b)(3) claim the Board held that a determination of the contract claim in the union's favor would make resolution of the § 8(b)(1)(A) claim unnecessary. *Id.* at ----, 80 L.R.R.M. at 1730 n.8. For a discussion of deferral to intra union remedies, see notes 211-14 infra.
200. See the discussion of Brown's position in the text accompanying note 140.
resolution of a representation issue was *Ipco Hospital Supply Corp.*.\(^{201}\) The case came before the Board as a § 8(a)(2)\(^{202}\) claim; the employer had closed an office at which the union had a clerical unit and had moved the office to a new location. Although only one employee moved to the new location and none of the employees at the new office were solicited by or joined the union, the employer, as a part of a settlement agreement of a strike at the new facility, recognized the union as the exclusive bargaining representative. A panel of Miller, Fanning and Jenkins unanimously adopted the trial examiner’s findings that there should be no deferral:

[T]he issue before the Board is whether the exclusive recognition of the Union provided for in the settlement agreement was an unfair labor practice. Obviously, this is a matter falling within the special competence of the Board to resolve. As the case before the Board does not essentially involve a dispute over the terms and meanings of a contract, as was the situation in *Collyer*, there are no policy considerations warranting deference to arbitration.\(^{203}\)

In *Combustion Engineering, Inc.*\(^{204}\) a panel of Fanning, Jenkins and Kennedy refused to defer to an award by an arbitrator which had held appropriate a unit made up of two plants. The company had opened a new plant eight miles from the original but there had been no production or employee interchange between the plants:

[T]he question of whether the existing contract was intended, or can be construed, to cover those employees at East Windsor who were hired after its effective date is a question for the arbitrator, but his conclusion on that issue does not govern or guide the Board in its disposition of the issue presented here.... [I]t is nevertheless the obligation of the Board to determine whether the employees at East Windsor constituted an accretion to the existing unit.\(^{205}\)

Both *Ipco* and *Combustion Engineering* were decided in March, 1972. In June, a panel with Kennedy and Penello in the majority and

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\(^{201}\) *Ipco*. This position undermines two earlier cases which indicated that it was proper to defer in representation cases. See *Carey v. Westinghouse*, 375 U.S. 261 (1964); *Raley’s, Inc.* 143 N.L.R.B. 256 (1963).


\(^{204}\) 195 N.L.R.B. at ——, 79 L.R.R.M. at 1642.

\(^{205}\) Id. at ——, 79 L.R.R.M. at 1579.
Jenkins in dissent, departed from those cases and deferred to arbitration in a representation issue case. In *Urban N. Patman, Inc.*, the employer was a member of a multi-employer association that bargained on behalf of the sausage industry. In addition to the sausage department which was covered by the association agreement, the employer operated a pre-cooked foods department. The pre-cooked foods employees had been paid according to the sausage makers contract until the employer discovered that his labor costs were not competitive. After requesting the union and employees to accept a lower rate, which request was refused, the employer closed for the annual shutdown. The employees came back to work at the lower wages after the employer indicated he would not reopen at the higher rates. The union then filed § 8(a)(5) charges because of the unilateral change of rates. The company defended on the ground that the contract did not cover the pre-cooked foods employees.

Had the panel followed *Ipco* and *Combustion Engineering*, the question of the coverage of the sausage industry agreement and the existence of arbitration would not defeat the Board policy of hearing representation questions. Instead, the panel deferred to arbitration. The one way *Patman* may be distinguished from *Ipco* and *Combustion* is to view the case as having no representational aspect. That can be done if the employer argued that no question existed over the inclusion of the pre-cooked foods employees in the unit represented by the union but that the only question was whether there had ever been any bargaining that resulted in a collective bargaining contract for those employees. Possibly by sacrificing the representation defense, the employer channeled the dispute into arbitration. If this distinction is not made, it appears that the operation of the deferral principle in representation cases is unsettled and may be moving toward a broader application of the deferral policy.

The Board has yet to decide several areas of Board jurisdiction where a policy of deferral might be applied. On September 11, 1972, the Board heard oral arguments on a case in one such area. In *Mechanical Contractor's Association* the question was whether the Board should defer to arbitration where an employer’s association insisted, as a mandatory subject of bargaining, on the use of arbitration to establish future contract terms. Since former Member Brown would not defer to “interest” arbitration, the outcome in the *Mechanical Contractors* case should

207. No. 2-CA-12413 (N.L.R.B., filed July 30, 1971).
208. General Counsel Nash, in his Collyer memorandum, indicated that he would have the regional offices solicit Washington for advice on whether to defer in such cases. *See Collyer memorandum, supra* note 7, at 15,018.
be a good indicator of Brown's continuing influence and of present limitations on the deferral doctrine.

Another area yet unresolved is the *NLRB v. Acme Industrials Co.* question where the request by a bargaining representative for information it considered relevant and necessary to process a grievance was denied. Because the duty to supply information is part of the basic § 8(a)(5) duty to bargain, it may be argued the Board should decide such cases. Refusing to provide information about grievances, however, strikes at the integrity of the grievance-arbitration procedures agreed to by the parties. Perhaps the best way to answer that threat is to channel the parties into arbitration so they become accustomed to it as an open and functioning system. A policy of deferral to arbitration in refusal to provide information cases therefore seems especially appropriate.

A final unresolved area of Board jurisdiction that might warrant application of a deferral policy is the question of the role of intra-union remedies in § 8(b)(1)(a) cases. Under their jurisdiction to hear duty of fair representation questions, courts have required the exhaustion of intra-union grievance procedures as a condition precedent to suit. By analogy, the Board could decide to defer § 8(b)(1)(a) cases to intra-union procedures. To date the Board has not had a suitable case arise involving the question. An issue that would arise is whether the intra-

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210. The General Counsel's memorandum on *Collyer* suggests that arbitration should not be deferred to in such cases unless the underlying grievance is already before the arbitrator. See *Collyer* memorandum, *supra* note 7, at 15-017-18.

211. Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization or its agents

1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.


213. However, there is some indication in Teamsters Local 70 (National Biscuit), 198 N.L.R.B. No. 4, 80 L.R.R.M. 1727 (July 31, 1972), that the Board will defer in such cases. In Local 70 the employer asserted an 8(b)(3) claim, arguing that a union order to its members not to collect cash on delivery routes constituted a unilateral alteration of the agreement. The Board deferred to union-management arbitration. An 8(b)(1)(A) claim, arising in the same case, could not be similarly treated because intra-union discipline is beyond the scope of union-management arbitration. Rather than deciding the merits as it did in *Appalachia Power*, see text accompanying notes 181-89 *supra*, the Board delayed hearing the 8(b)(1)(A) charge since it:

is dependent on a finding that Respondent unilaterally altered the terms and conditions of employment . . . a finding . . . that Respondent did not alter the terms and conditions of the contract would make unnecessary the entertainment of the allegation of an 8(b)(1)(A) violation.

198 N.L.R.B. at —, 80 L.R.R.M. at 1730 n.8.
union remedies are sufficiently like arbitration to warrant deferral. The typical intra-union grievance system provides a hearing or trial at the local level, before local officials appointed to hear the case, as well as some right of appeal to the union hierarchy. Usually no provision is made for an outside arbitrator. However, the Board has indicated that it would defer to a joint council system for the resolution of management-labor conflicts and joint council systems typically do not provide for outside arbitrators.214

Standard of Arbitrability

In the wake of Collyer, it is important to examine the current standards set for determining (1) whether a claim is substantial enough to invoke the arbitration process; and (2) whether a dispute is within the scope of the arbitration provision. The Supreme Court, in United Steelworkers v. American Manufacturing Co.,215 held that courts should not screen a claim before ordering arbitration except to determine that on its face the claim is governed by the collective bargaining agreement. While General Counsel Nash would not defer to arbitration unless the claim was reasonable,216 the Board seems to be moving toward the position of a court in a § 301 suit to order arbitration; that is, deferring to arbitration when the case is the typical sort of collective bargaining dispute, whether or not there is language in the contract bearing on the dispute. In Teamsters Local 70 (National Biscuit Co.),217 the majority held that a dispute was arbitrable as long as one interpretation is not compelled. In Appalachian Power Co.,218 the Board indicated that a dispute is arbitrable where the contractual provisions are susceptible of dual meanings, one consistent with the company's position and the other consistent with the union's position. In Beer Distributors Association,219 Southwestern Bell Telephone Co.,220 and Urban N. Patman, Inc.,221 the Board deferred to arbitration because the disputes arguably arose from the collective bargaining

214. Teamsters Local 70 (National Biscuit), 198 N.L.R.B. No. 4, 80 L.R.R.M. 1727 (July 31, 1972). For a discussion of what constitutes arbitration for deferral purposes, see notes 229-33 infra.


216. Collyer memorandum, supra note 7, at 15,015.


220. 198 N.L.R.B. No. 6, 80 L.R.R.M. 1711, 1712 (July 31, 1972).

agreements between the parties. In *Peerless Pressed Metal Corp.*,\(^{222}\) the majority indicated that, in a unilateral imposition of an incentive wage system situation, it would not defer to arbitration a claim that a provision for individual merit pay justified a general system of incentive pay because such a claim is "nearly frivolous."\(^{223}\) However, the majority held that the employer's claim that the unilateral adoption of the incentive system was justified by bargaining history need not be meritorious before the Board would defer. Thus, the Board deferred where the employer had no contract language to rely on because it used bargaining history to support its contract defense.\(^{224}\)

The problem of whether a particular dispute falls within the ambit of the contract's arbitration provision must be viewed in light of the presumption of arbitrability used in deferral cases.\(^{225}\) The General Counsel seems to indicate that there should not be a close review of arbitrability before deferral is ordered.\(^{226}\) In *Beer Distributors Ass'n.*,\(^{227}\) the employer argued that the determination of the legality under § 302 of employee checkoff authorizations was not arbitrable. Apparently referring to the *Steelworkers* Trilogy, the Board deferred to arbitration indicating that the "issue of arbitrability should itself be submitted to the arbitrator, as has become the near universal practice under collective-bargaining agreements."\(^{228}\) That seems a good indication that the Board will decide questions of arbitrability using the same sort of presumption of arbitrability used by courts in § 301 actions.

**Final Binding Arbitration**

An ancillary question that has arisen in several post-*Collyer* cases is which systems used by union-management to resolve their disputes will be accorded the status of arbitration for the purposes of deferral. In *Tulsa-Whisenhunt Funeral Homes, Inc.*,\(^{229}\) the full Board refused to defer be-

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222. 198 N.L.R.B. No. 5, 80 L.R.R.M. 1708 & n.2 (July 31, 1972).
223. *Id.* at ——, 80 L.R.R.M. at 1708 n.1.
224. The Board deferred despite the fact that both sides had abandoned incentive proposals during the bargaining negotiations. *See also* Great Coastal Express, Inc., 196 N.L.R.B. No. 129, 80 L.R.R.M. 1097 (May 2, 1972), where the Board deferred a dispute concerning employee parking privileges even though there was no reference to such privileges in the contract.
228. *Id.* at ——, 80 L.R.R.M. at 1237. *See also* Urban N. Patman, Inc., 197 N.L.R.B. No. 150, 80 L.R.R.M. 1481, 1483 (June 15, 1972), where the deferral order specifically reserved Board jurisdiction to reopen the case if "the dispute has been duly found by the arbitrator not to be arbitrable."
cause the arbitration provision of the contract did not provide for final binding arbitration:

[W]henever the Respondent's general manager denies a grievance at the final step, the contract binds no one to any further procedure for peaceful resolution of the dispute. Thereafter, only by ad hoc agreement of the parties can any forum of third parties or a neutral arbitration be convened to resolve the dispute.\(^\text{230}\)

However, in *Teamsters Local 70 (National Biscuit Co.)*,\(^\text{231}\) the Miller-Kennedy-Penello majority decided to defer to a typical Teamster provision for the resolution of disputes. Under that system, disputes not resolved by a local union and the employer immediately involved are referred to a Joint Council on which union and employers have equal representation. A majority at that level may make a binding decision on the dispute or submit it to binding arbitration. If the Joint Council deadlocks, the parties to the dispute may resort to strikes and lockouts. Acknowledging that this system does not provide for binding arbitration on demand by either party, the majority distinguished *Tulsa-Whisenhunt* on the ground that the National Biscuit contract provides for mandatory submission to a Joint Council made up of union and employer representatives who are not immediately involved in the dispute.\(^\text{232}\) Since neither the grieving party nor the party grieved against can block the resolution of the dispute under this system, the majority decided to defer. The majority relied on the historical judgment that such bipartite grievance procedures have worked well and have provided, in the overwhelming percentage of cases, swift resolution of disputes without resort to strikes or lockouts.\(^\text{233}\)

For deferral, therefore, it is not necessary for the grievance resolution system to require final binding resolution by a neutral arbitrator of all disputes. Nor is it necessary that the parties have given up the right to strike or lockout over unresolved disputes. All that is needed is a tribunal removed from the immediate parties to the dispute that may, but need not, finally determine the issue.

**INDIVIDUAL EMPLOYEE GRIEVANCES**

In the normal case involving a claim by an individual employee, the structure of arbitration assumes that the union will adequately represent

\(^{230}\) Id. at ——, 79 L.R.R.M. at 1267.


\(^{232}\) Id. at ——, 80 L.R.R.M. at 1729.

\(^{233}\) Id. at ——, 80 L.R.R.M. at 1729-30 n.5.
the individual employee's interests in the grievance-arbitration process. That assumption poses problems when the union and the individual employee are antagonistic or have conflicting interests. In *Kansas Meat Packers*, two employees, one of whom was a union steward, had increasingly strained relations with the union business agent as well as management over safety issues. The conflicts ultimately resulted in their discharge. During the dispute, the employees quit the union and stopped the checkoff of dues. The steward resigned his union position following a verbal altercation with the business agent. There was credited testimony by a supervisor that they were fired at the insistence of the business agent. Following the discharges, the union did nothing to investigate or to file grievances concerning the discharges; nor did the union file unfair labor practice charges. Section 8(a)(1) and (3) charges were filed by the discharged employees. A panel of Miller, Jenkins and Kennedy refused to defer:

Under all the facts and circumstances set forth above—particularly the apparent antagonism between the interests of the discriminatees, on the one hand, and both parties to the collective-bargaining contract herein, on the other and the discriminatee's resultant election to refrain from seeking redress though that contract's grievance procedures—we conclude that it would be repugnant to the purposes of the Act to defer to arbitration in this case as to do so would relegate the Charging Parties to an arbitral process authored, administered and invoked entirely by parties hostile to their interests.

Thus, the test to determine whether there should be deferral is whether the interests of the union and the employee are in substantial harmony. The panel indicated that it had deferred in *National Radio Co.* because there the test had been satisfied and thus there was no ground for assuming that the employee's interests would be inadequately represented under the contractual procedures.

Several questions are raised by *Kansas Meat Packers*. Focusing on the relationship between the individual and his union and placing such importance on the representation of the employee by the union challenges

234. See notes 35-63 supra, for a discussion of the limited right of access to courts that an employee has for review of his union's representation.
236. Id. at ___, 80 L.R.R.M. at 1746 (emphasis in original).
the continued vitality of *International Harvester Co.* In that case the Board deferred to an arbitration award in a § 8(a)(3) case even though the union had sought the discharge of the employee and the employee's position had been presented in arbitration by the employer. Under *Kansas Meat Packers* the conflict that existed between the employee and his union would cause the Board to hear the case rather than deferring it to arbitration.

A pragmatic question resulting from *Kansas Meat Packers* is whether the regional staffs will exercise much sensitivity in determining the quality of the relationship between an employee and the bargaining representative. By reputation at least, the personnel at the regional level of the Board have been reluctant to process charges filed by individual employees. Since the General Counsel assumed that the policy of deferral would not be applied in § 8(a)(3) cases, the *Collyer* memorandum does not establish the procedures that might be used to meet the *Kansas Meat Packers* rules.

The most significant question is what scope will be given the "substantial harmony of interest" rule. Both *National Radio* and *Kansas Meat Packers* were § 8(a)(3) cases in which employees challenged company action discharging them; and the rule may be limited to such cases. However, employees who are adversely affected by a union decision among competing employees or groups of employees could claim that there was substantial conflict between themselves and their unions. One example is where a union must decide between seniority rights of two groups of employees competing for a limited number of jobs as in *Humphrey v. Moore.* No matter what position the union takes, some employees will be adversely affected. If those employees file § 8(a)(5) charges against the employer and § 8(a)(3) charges against their union, *Kansas Meat Packers* is a basis for denying deferral to arbitration. The ultimate restraint on *Kansas Meat Packers* seems to be the principle of the exclusive bargaining status of the union, which can only be defeated by a showing of arbitrary or bad faith conduct.

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239. The two cases may be distinguishable in that an arbitration award had already been rendered in *International Harvester Co.* Whether the employee was represented by the union or the employer, the Board might defer in such a case because the employee has had a hearing before a neutral arbitrator.


The *Collyer* opinion indicated that it had been consistent Board policy to defer to arbitration awards where the awards met the so-called *Spielberg* standards that (1) the proceedings be fair and regular; (2) all parties agreed to be bound; and (3) the decision not be repugnant to the purpose and polices of the Act. The cases since *Collyer* have focused on an additional factor subsequently grafted onto the third criteria; that is, whether the unfair labor practice issue has been considered by the arbitrator. *Airco Industrial Gases* was a § 8(a)(3) case where an employee was discharged, allegedly because he had been negligent on the job. An arbitrator's award upheld the discharge. Both union and management were represented by counsel at the arbitration hearing and each side was given full opportunity to present evidence. However, the record of the hearing disclosed that no evidence had been introduced and there was no discussion by the arbitrator that the employee had filed about 200 grievances in the two years preceding his discharge. Because of the failure to discuss the issue of the pretextual discharge, a panel of Fanning and Jenkins, with Kennedy in dissent, refused to defer to the award:

In the face of an arbitration award that gives no indication that the arbitrator ruled on the unfair labor practice issue, deferral would result in an extension of the Spielberg doctrine which we are unwilling to make.

In support of their conclusion, they cited *Kalamazoo Typographical Local 122*, saying that no deference was given to the arbitrator's award in that § 8(b)(1)(A) case because the arbitrator there had specifically disavowed handling any unfair labor practice aspects of the case. The *Airco* approach provides a practical solution to the longstanding controversy whether arbitrators should decide statutory issues or whether
they should confine their decisions to contract matters: defer where the arbitrator treated the statutory issue and do not defer when the arbitrator either declined to decide the statutory claim or failed to show that the issue had been litigated.

Perhaps the *Airco* case also provides a means for the Board to protect individual employees from the "rigged" award situation. An arbitration is rigged when the result is agreed to by union and management before the hearing and this result is made known to the arbitrator; the hearing and decision then serve as a sham to deceive the grievant that he or she has had a fair hearing. Of course the determination that an arbitration was rigged would be a basis for a successful lawsuit under *Vaca v. Sipes*251 as well as §§ 8(a)(1) and (3), 8(b)(1)(A) and (B),252 and 8(b)(2)(B)253 and (3)254 claims before the Board. *Airco* is itself a case that smells of a rigged award: a union steward who was vociferous in asserting 200 grievances in two years is foreordained to be considered a nuisance by management and he may also be a thorn to the union. The discharge of such an employee for whatever reason should be closely scrutinized. Working the discharge through the entire grievance-arbitration process, including a hearing where both union and management are represented by counsel, without ever raising the vigorous union activities of the grievant seems to be a red flag for a rigged case. That is further reinforced in *Airco* by the fact that the discharged employee, and not the union, filed the unfair labor practice charge. It is possible, however, that *Airco* was not rigged but rather was a simple case of incompetence or inadvertence on the part of the union and its counsel in failing to raise the discriminatory discharge issue.

The dissent by Kennedy follows his analysis in *National Radio*, deferring to the results of arbitration whether or not the parties fully litigated every question in that forum:

If the parties here, having chosen to have the basic issue of the justness of the discharge determined by an arbitrator, failed adequately to present as thorough a case as could have been developed on the issue of discrimination, it was not for want of

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251. 386 U.S. 171 (1967). *See* text accompanying notes 46-49 *supra*.
253. *Id*. § 158(b)(2) (union causing employer to violate § 8(a)(3) made an unfair labor practice). *See* also note 137 *supra*.
254. *Id*. § 158(b)(3) (union refusal to bargain collectively made an unfair labor practice).
a proper forum in which such issue could, and should, have been raised.\textsuperscript{255}

A strict "no interference rule" raises a problem since the parties who develop and present cases in arbitration may lack the legal expertise to discover, research and litigate statutory issues. Such a rule would result in further lawyerization and legalization of the arbitration process which may not be desirable.

A panel of Miller and Penello with Kennedy concurring, cited \textit{Airco} with approval and refused to defer to an award in \textit{Yourga Trucking, Inc.}\textsuperscript{256} This was another § 8(a)(3) charge filed by an individual employee. The employee, who had a grievance filed on his behalf in the morning, was fired in the early afternoon, allegedly for showing up drunk for his truck driving job. A joint area committee had upheld the discharge, leaving unanswered whether the alleged discriminatory motive issue had been presented to the committee. Deciding to dismiss the complaint on the merits, the majority refused to defer because the employer had failed to meet its burden of proof to show that the discrimination issue had been litigated before the committee:

We face here the further question of which party to a proceeding under the Act must adduce proof regarding the scope of matters presented in the arbitration proceeding. We hold that the burden to adduce such proof rests on the party asserting that our statutory jurisdiction to resolve the issue of discrimination should not be exercised.\textsuperscript{257}

In \textit{Montgomery Ward & Co.},\textsuperscript{258} an employee was fired allegedly for falsifying a route sheet and for taking an extra paid supper break. He filed a grievance and an unfair labor practice charge claiming that, after he had been vocal in a gripe meeting of employees, the manager had vowed to get rid of him. A grievance board of two representatives of the union and two employer representatives held a hearing and decided to reinstate him without back pay on the condition that he withdraw the Board charge. The employee refused the offer, and the Board refused to defer, holding, "we are not satisfied that the statutory issue of discriminatory discharge had been either raised or resolved in the arbitration proceeding."

\textsuperscript{255} 195 N.L.R.B. at ——, 79 L.R.R.M. at 1469.
\textsuperscript{256} 197 N.L.R.B. No. 130, 80 L.R.R.M. 1498 (June 26, 1972).
\textsuperscript{257} Id. at ——, 80 L.R.R.M. at 1499. Kennedy concurred in the dismissal solely as an accommodation to the joint area committee's decision. Id. at ——, 80 L.R.R.M. at 1500.
\textsuperscript{259} Id. at ——, 79 L.R.R.M. at 1506.
One recent case involved the issue whether an award is repugnant to the Act. In *Combustion Engineering, Inc.*, a panel of Fanning, Jenkins and Kennedy acknowledged that an arbitrator could determine, as a question of contract, whether a collective bargaining agreement covers the employees at an employer's newly opened plant located eight miles from the existing plant. The arbitrator conceded his task was one of contract interpretation but found it proper to take into consideration Board standards in determining appropriate units. In applying those standards the arbitrator found the two plant units to be appropriate, with the new plant being a "normal accretion" to the existing unit. However, the Board agreed with the trial examiner that the arbitrator had relied too much on insignificant factors. Accordingly, the Board did not defer to the award. That decision may be based on two grounds. First, using the *Spielberg* criteria, the award was repugnant to the policies of the Act since the arbitrator had misapplied the Board accretion standards. A second basis for the decision is the policy judgment that deferral is inappropriate in representation cases.

One final case, *Malrite, Inc.*, raised the issue of whether the Board would take on the enforcement of arbitration awards. The employer refused to comply with an award of an arbitrator that the company violated the contract by assigning "combo" engineer-announcers to jobs that had been previously performed by two separate employees. A Miller, Kennedy and Penello majority, with the dissent of Fanning and Jenkins, deferred to the arbitration process thereby requiring the union to initiate a § 301 court action to enforce the award:

In its formulation of the Spielberg standards the Board did not contemplate its assumption of the functions of a tribunal for the determination of arbitration appeals and the enforcement of arbitration awards. If the Board's deference to arbitration is to be meaningful it must encompass the entire arbitration process, including the enforcement of arbitral awards. It appears that the desirable objective of encouraging the voluntary settlement of labor disputes through the arbitration process will best be served by requiring that parties to a dispute, after electing to re-

261. 195 N.L.R.B. at --, 79 L.R.R.M. at 1579.
262. Id. at --, 79 L.R.R.M. at 1578.
263. Id.
264. For a discussion of deferral in representation cases, see notes 200-06 supra.
sort to arbitration, proceed to the usual conclusion of that process—judicial enforcement—rather than permitting them to invoke the intervention of the Board.\[266\]

**Regional Office Procedures**

The *Collyer* memorandum issued by General Counsel Nash outlines procedures the regional offices are to follow in handling cases raising deferral issues.\[267\] Those procedures have the effect of increasing the amount of work needed to investigate and make the decision whether a complaint should issue. The memorandum envisions complete investigation of the merits of a case before any decision is made concerning deferral to arbitration:

The region should consider whether to defer action on an unfair labor practice charge for arbitration under the *Collyer* policy only after the charge has been fully investigated and after the region has determined that . . . *Collyer* arbitration deferral policy aside, the charge would warrant issuance of a complaint.\[268\]

While allowing the investigation on deferral to be done concurrently with the investigation of the merits “to avoid the duplication of effort,”\[269\] this procedure adds unnecessary work. The effort put into the investigation of the merits is wasted where it is decided to defer to arbitration.\[270\]

Presumably, the argument in favor of this approach is that there can only be deferral where there is jurisdiction and there cannot be a determination of jurisdiction without a complete investigation of the merits. Another argument is that the regions should exercise due caution since a decision not to issue a complaint assented to by the General Counsel is not reviewable in court. Finally, *Collyer* rests its decision on the greater expertise of arbitrators to decide contract disputes and does not speak to considerations of efficiency. Even *National Radio*, which views deferral from the broader perspective of accommodation, only considered the factor of efficiency in terms of reducing the caseload before the Board itself and not the regional offices.

Nevertheless, broad considerations of efficiency, as well as a policy to minimize NLRB interference in arbitration, suggest that regional personnel investigate and determine deferral questions before investigating

\[266\] 195 N.L.R.B. at —, 80 L.R.R.M. at 1594.
\[267\] *Collyer* memorandum, *supra* note 7.
\[268\] *Id.* at 15,022.
\[269\] *Id.*
\[270\] Of course, the results of an investigation would be useful should the decision be made to reassert jurisdiction. However, that would be an inefficient use of investigative resources should the number of reopened cases be small.
the merits of the charge.\footnote{271} The model implicitly suggested in the cases following \textit{Collyer} is the procedural framework used by courts in § 301 suits. The first step would be to determine the existence of a binding contract between union and management. The second step is to determine whether the claim, on its face, is governed by the collective bargaining agreement, viewing that agreement as an organic or constitutional document. The third step is to determine whether the dispute is arbitrable under a strong presumption of arbitrability, leaving the ultimate determination of arbitrability to the arbitrator. Grafted on to the court tests would have to be further steps to conform with Board decisions. One such step would be inquiry into the nature of the conflict resolution system to determine if it should be accorded the status of arbitration. Another question to be answered is whether the dispute concerned an area of the Board’s primary jurisdiction where it would not defer, such as representation issues. A third question would be whether deferral should be applied where there existed a substantial conflict of interest between the union and the aggrieved employee. In the post award situation, the \textit{Spielberg} criteria\footnote{272} could continue to form the procedural framework.

\textbf{Conclusion}

The hypothesis upon beginning the research for this paper was that deferral was a bad idea because it would further insulate union-management actions in the collective bargaining contract from challenge by employees. That hypothesis has not been sustained for several reasons. The system of concurrent jurisdiction did not do a very sensitive job of handling employee claims against union and management. Further, the ever increasing crunch of expanding caseload and limited resources restricts the number of cases the Board as an agency can competently handle. Thus, the NLRB cannot afford the luxury of providing duplicate forums used mostly to achieve strategic ends by parties to collective bargaining disputes.

Overall, the development of deferral has been encouraging since it has proceeded rather consistently and rationally. 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 and in the application of its criteria in reviewing awards. In sum, the abstention, rational accommodation language of \textit{National Radio} provides a better basis to discuss the issues appropriate to a rational development of the deferral policy than does the language of the \textit{Collyer} opinion.

\footnote{271} Such a procedure would result in more cases being dismissed with a retention of jurisdiction since claims that are eligible for deferral but otherwise without merit would be included. A motion to reopen because arbitration did not result or was deficient would trigger an investigation of the merits and permit a dismissal by the region.

\footnote{272} \textit{See} notes 244-45 \textit{supra} & text accompanying.