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Robert N. Covington

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ARBITRATORS AND THE BOARD: A REVISED RELATIONSHIP

ROBERT N. COVINGTON†

In a series of decisions released over the past twelve months,¹ the National Labor Relations Board has significantly modified its policy on deferral, a procedure under which the Board withholds full consideration of a case in favor of detailed consideration through privately constituted grievance-settlement processes created by collective bargaining agreements. The thrust of these recent decisions is to restrict the situations in which the Board will defer. That the decisions were not unanimous reflects a strong division within the Board,² as a result of which it seems reasonably likely that as Board membership changes, and as new cases with only slightly different fact patterns come before the Board, there will be further reconsideration and development.

Although deferral cases have never constituted a major portion of the Board's work, the deferral concept has attracted a great deal of attention³ and generated considerable disagreement. These doctrines

† Professor of Law, Vanderbilt University, and Member, The Labor Law Group; B.A. 1958, Yale University; J.D. 1961, Vanderbilt University.

1. Douglas Aircraft Co., 234 N.L.R.B. No. 80, 97 L.R.R.M. 1242 (Jan. 31, 1978) (charge under National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970); recognition of arbitral decision denied); General Am. Transp. Corp., 228 N.L.R.B. No. 102, 94 L.R.R.M. 1483 (Mar. 16, 1977) (charge under § 8(a)(3); deferral request denied); Roy Robinson Chevrolet, 228 N.L.R.B. No. 103, 94 L.R.R.M. 1474 (Mar. 16, 1977) (charge under National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970); deferral for purpose of allowing arbitration granted); Filmation Assocs., 227 N.L.R.B. No. 237, 94 L.R.R.M. 1470 (Jan. 1, 1977) (charge under National Labor Relations Act § 8(a)(4), 29 U.S.C. § 158(a)(4) (1970); recognition of arbitral decision denied).

2. In most of these cases the deciding vote on whether to defer has been cast by former Chairman Murphy, with Members Fanning (now Chairman) and Jenkins consistently voting against deferral, and Members Walther and Penello voting in favor.

3. The literature is vast. A few of the valuable contributions are Atleson, *Disciplinary Discharges, Arbitration and NLRB Deference*, 20 BUFFALO L. REV. 355 (1971); Getman, *Collyer Insulated Wire: A Case of Misplaced Modesty*, 49 IND. L.J. 57 (1973) (opposed to deferral generally); Isaacson & Zifchak, *Agency Deferral to Private Arbitration of Employment Disputes*, 73 COLUM. L. REV. 1382 (1973) (favoring board deferral); Schatzki, *A Response to Professor Getman*, 49 IND. L.J. 76 (1973) (opposing deferral in individual rights cases, pre- and post-award; favoring it otherwise); St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1157-59 (1977) (neutral); Teple, *Deferral to Arbitration: Implications of NLRB Policy*, 29 ARB. J. 65 (1974) (generally favorable to deferral); Zimmer, *Wired for Collyer: Rationalizing NLRB and Arbitration Jurisdiction*, 48 IND. L.J. 141 (1973); Zimmer, *A Little Bit More on Collyer Insulated Wire*, 49 IND. L.J. 80 (1973) (favoring board deferral). In addition, deferral has been a recurrent subject of discussion in the proceedings of the National Academy of Arbitrators.

At one time or another, virtually every position urged in this article has been suggested in this

concern a significant interface between private and public forums. To decide that an issue is more properly resolved by private processes is, by definition, to decide that government should not intervene (or perhaps it would be more proper to say that government should intervene only in support of the private process). Such cases, therefore, stake out the territorial limits of private as opposed to public decisionmaking and serve an important symbolic function as vehicles for defining Board philosophy on intervention. Moreover, such decisions are significant for union and management strategists because they define the range of issues that the parties may reasonably plan to settle through their own grievance procedures. Finally, the deferral concepts are significant because they affect the scope of the responsibilities placed on the federal courts by section 301 of the Taft-Hartley Act⁴ as interpreted by the Supreme Court in the *Steelworkers Trilogy* cases, *United Steelworkers v. American Manufacturing Co.*,⁵ and *United Steelworkers v. Warrior & Gulf Navigation Co.*,⁶ and *United Steelworkers v. Enterprise Wheel & Car Corp.*,⁷ and their progeny.⁸ The *Trilogy* opinions charged federal district courts to act in support of the arbitration process by requiring that the parties resort to arbitration and by withholding consideration of any case until arbitration procedures have been completed.⁹ Therefore, the practical importance of deferral from the perspective both of the Board and of the parties, the recent restatement of positions by a divided Board, and the general philosophic importance of determining the proper scope of government intervention suggest that this is an appropriate time to review the doctrines and their underlying rationales.

In a perceptive paper prepared for the Wingspread Conference,¹⁰

literature. Indeed, Professors Schatzki and Atleson have articulated conclusions similar to those presented here in several respects, but for somewhat different reasons. The author does not share their skepticism with respect to arbitrator abilities and concern for employee interest in associational freedom or with respect to whether regional offices of the Board and the Board itself can make fair determinations of what has happened in arbitration.

4. Labor Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185 (1970).

5. 363 U.S. 564 (1960).

6. 363 U.S. 574 (1960).

7. 363 U.S. 593 (1960).

8. See, e.g., *General Warehousemen Local 767 v. Standard Brands, Inc.*, 560 F.2d 700 (5th Cir. 1977) (divided court held arbitrator's award enforceable despite possibility that its rationale might be regarded as inconsistent with NLRB certification; opinion reviews several major cases).

9. *United Steelworkers v. American Mfg. Co.*, 363 U.S. at 568; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 585; *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 596.

10. The Wingspread Conference was a conference sponsored by the American Arbitration Association at Wingspread Center in Racine, Wisconsin in November 1975. The purpose of the conference was to subject the future of labor arbitration in the United States to the scrutiny of prominent legal scholars and practitioners.

Professor Thomas G.S. Christensen asserted that any real and lasting solution to the problems posed by the coexistence of arbitral and Board forums must focus on determining when arbitration is clearly the better and more appropriate forum, rather than on when arbitration is as appropriate as Board procedures.¹¹ Viewed in the abstract, Christensen's assertion is patently open to question: if a private decisionmaker, such as an arbitrator, is equally as desirable as a public decisionmaker, such as the NLRB, why should Congress, which has the power to allocate jurisdiction between the two competing forums, prefer the Board over an arbitrator? Yet, that question misconceives the basis of Christensen's assertion. Congress has chosen in this case to allocate jurisdiction to both arbitrators and the Board, but has made only the Board accountable to Congress for the Board's exercise of that jurisdiction.¹² As a result, it is the Board, one of the "competitors" for jurisdiction, that must account for not exercising the jurisdiction entrusted, or for unduly interfering with the arbitral forum. In such a situation, the accountable party must clearly prefer its own jurisdiction lest it be called to task for undue inactivity and sloth.

Proceeding on the basis of Christensen's assertion, it is the thesis of this article that the Board's current policy on when to defer to private settlement processes has not always afforded those private processes the area of operation that is appropriate for them, and at other times has preferred those processes when it would have been better for the Board to consider a case more fully. Nonetheless, in the recent decisions there are the ingredients for a rational deferral policy, and a generally improved stance seems to have resulted.¹³

11. Christensen, *Private Judges-Public Rights: The Role of Arbitration in the Enforcement of the National Labor Relations Act*, in AMERICAN ARBITRATION ASSOCIATION, *THE FUTURE OF LABOR ARBITRATION IN AMERICA* 49 (1976).

12. "Accountable" is used here in two senses. First, the Board's decisions are subject to judicial review and are not self-enforcing. 29 U.S.C. § 160(e), (f) (1970). Second, the Board is obligated to report annually to the Congress and the President on the discharge of its duties. *Id.* § 153(c) (Supp. V 1975).

13. In suggesting that the criteria used by the Board to determine deferral are not totally appropriate, it is essential to note that when one says "Board" one may at times be using that term to refer to the regional offices, and to the General Counsel. Because the initial decision to proceed with a matter is ordinarily made at the regional office level, and because in practice that decision is ordinarily final, the availability of relief from the Board is dependent on these decisions. In addition to the criteria developed below, therefore, see text accompanying notes 28-71 *infra*, it is essential that any deferral doctrine be one that is capable of being consistently applied by the various regional offices. Otherwise, the remedies available to parties would depend on the fortuitous circumstance of where a given plant was located, a result not defensible either in theory or in practice. See Ordman, *Arbitration and the NLRB—A Second Look*, in *THE ARBITRATOR, THE NLRB AND THE COURTS*, 20 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS

I. DEVELOPMENT OF PRESENT BOARD DOCTRINE

Because the deferral doctrines have received extensive attention in articles and addresses,¹⁴ it is fortunately unnecessary to examine each of the decisions entered by the Board over the past twenty-three years. In order to put the following discussion into perspective, however, it is necessary to review a few of the most important and widely known cases decided by the NLRB, and to relate these cases to a few of the relevant judicial developments. In doing so, it is convenient to subdivide the cases into those in which deferral followed resolution of a dispute by contractual means and those in which the Board deferred either before or during the private settlement process. Although there are some obvious differences between the two situations, the underlying policies are quite similar.

A. *Post-Decision Deferral*

Spielberg Manufacturing Co.,¹⁵ which was decided by the Board in June 1955, involved a strike settlement agreement between the employer and the union in which it was decided that the issue of whether four individual employees had engaged in strikeline misconduct would be submitted to arbitration. The subsequent arbitration upheld discharges for such misconduct. The four strikers charged in a complaint before the Board that their dismissals violated section 8(a)(3) of the National Labor Relations Act.¹⁶ The Board held that it would not afford relief to the parties, but would instead recognize the arbitrator's award. The Board relied upon three criteria in reaching its decision: (1) the fairness and regularity of the private proceedings;¹⁷ (2) the agreement of the parties to be bound by the arbitrator's decision; and (3) the fact that the decision was not clearly repugnant to the purposes and policies of the Act. The Board noted that it had not terminated its jurisdiction over the arbitration process insofar as it had retained the power to refuse to recognize the binding effect of any arbitration award

47 (1967) (remarks of General Counsel on existing doctrine); *Workshop Sessions in id.* at 173-202 (comments of Harvey Letter, Regional Attorney of NLRB).

14. See authorities cited in note 3 *supra*.

15. 112 N.L.R.B. 1080 (1955).

16. National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), provides: "It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization"

17. 112 N.L.R.B. at 1082. It is not required that the grievance procedure adhere to the formalities of courtroom procedure.

that would in any sense be at odds with the statute the Board is empowered to enforce.¹⁸

Problems arise with each of these three criteria. As for the fair and regular requirement, there will of course be instances of arbitrator (or party) misconduct so serious that it is appropriate to disregard an award;¹⁹ inasmuch as many grievance procedures do not require the making of transcripts, however, determining unfairness or irregularity will at times be difficult.²⁰

The agreement of the parties to be bound raises questions of arbitrability, in the sense of determining whether the arbitrator stayed within the bounds of the submission. While the matter is not free from debate, it is generally supposed that this language is roughly the equivalent of that in *Enterprise Wheel*, in which the Supreme Court held that the "essence" of the arbitrator's decision must be based on the contract.²¹

Whether an award is repugnant to the purposes and policies of the Act has proved to be the most troublesome point. Some cases are quite simple; if an arbitrator enters an award, compliance with which would require a violation of the Act, then the Board obviously will not defer.²² But what is to be done if a decision from a contract forum does not specifically address a relevant statutory issue? In *Electronic Reproduction Service Corp.*,²³ the Board was asked to defer to an award in a section 8(a)(3) case even though the arbitrator had not addressed the issue of whether certain discharged employees had been fired because of their union activities. The union had chosen not to place the anti-union animus evidence before the arbitrator, despite specific urging that it do so. As the Board majority put it,

18. See *NLRB v. Walt Disney Prods.*, 146 F.2d 44 (9th Cir. 1944), *cert. denied*, 324 U.S. 877 (1945). The case involved a charge that the employer discharged a worker because of his union activities. The employer argued that the existence of an arbitral forum meant that this dispute would be resolved peaceably and thus could not burden interstate commerce. The court rejected the argument, reasoning that some arbitral awards might themselves act as a burden on commerce. *Id.* at 48.

19. See, e.g., *Gateway Transp. Co.*, 137 N.L.R.B. 1763 (1962) (failure to give adequate notice).

20. Professor Atleson would apparently say "impossible." See Atleson, *supra* note 3, at 372-73.

21. 363 U.S. at 597.

22. See the discussion in *Buckstaff Co.*, 40 Lab. Arb. 833 (1963) (Young, Arb.). For the reasons that might lead to such a result, see Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, in *THE ARBITRATOR, THE NLRB AND THE COURTS*, *supra* note 13, at 14-19.

23. 213 N.L.R.B. 758 (1974).

In this case . . . it appears plain that everyone knew at the arbitration hearing that there were issues of discrimination, and the Union was urged by Respondents to present any testimony that it had with respect to these issues. Yet while it appears that the Union did present some unfair labor practice evidence with respect to Brown [one of the discharged employees], it does not appear that it submitted any such evidence with respect to [discharged employees] Bosch and Grossman. Thus a forum was available, but no one introduced evidence clearly relevant to the discrimination issue relating to two out of the three grievants. We believe this kind of practice to be detrimental both to the arbitration process and to our own processes and to be a means of furthering the very multiple litigation which *Spielberg* and *Collyer* were designed to discourage.

. . . .

Accordingly, we believe the better application of the underlying principles of *Collyer* and *Spielberg* to be that we should give full effect to arbitration awards dealing with discipline or discharge cases, under *Spielberg*, except when unusual circumstances are shown which demonstrate that there were bona fide reasons, other than a mere desire on the part of one party to try the same set of facts before two forums, which caused the failure to introduce such evidence at the arbitration proceeding.²⁴

While the *Spielberg* doctrine has been widely approved by the courts, the refinement of that doctrine in *Electronic Reproduction Service* has been rejected by the Court of Appeals for the District of Columbia Circuit and, more recently, by the Court of Appeals for the Ninth Circuit. In *Banyard v. NLRB*,²⁵ the Court of Appeals for the District of Columbia Circuit stated that in addition to the three criteria enunciated by the Board in *Spielberg* two other standards should be met before deferral is proper: (1) the arbitral tribunal must have clearly decided the unfair labor practice issue on which the Board is asked to defer; and (2) the arbitral tribunal must have acted within its competence.²⁶

These two additional criteria have been criticized.²⁷ First, they increase the opportunity for forum shopping, which the Board sought to counter in *Electronic Reproduction*.²⁸ Second, a requirement that a contract grievance procedure "clearly decide" an issue injects a need for formality of consideration and decision that is inconsistent with the

24. *Id.* at 761.

25. 505 F.2d 342 (D.C. Cir. 1974).

26. *Id.* at 347.

27. *See, e.g.*, 88 HARV. L. REV. 804 (1975).

28. 213 N.L.R.B. at 761.

nature of many grievance systems.²⁹ Third, the “clearly decided” requirement ignores the possibility that full and satisfactory resolution of a problem may be possible under a contract without consideration of an unfair labor practice issue.³⁰ Fourth, the “competence” requirement either adds nothing of significance to the requirement that the dispute be one that the parties have agreed to submit to arbitration, or adds considerations of fitness and qualification of the decisionmakers that should ordinarily be reserved to the parties.³¹ Despite these arguments, the Court of Appeals for the Ninth Circuit decided to adopt the *Banyard* rationale in *Stephenson v. NLRB*³² because of the desirability of ensuring that protections specifically afforded by the National Labor Relations Act be given full consideration by some forum.³³

In addition to the concern over the criteria to be used in making a post-decision deferral, other *Spielberg* area problems concern the situation in which the subject matter of the case in question is so peculiar in nature that deferral is inappropriate. In a limited number of instances, the Board has been called on to defer to arbitral decisions concerning the scope of the bargaining unit, or related representation questions³⁴—questions which for convenience may be thought of as arising basically from section 9³⁵ of the Act rather than from section 8.³⁶ Frequently, such controversies take the form of bipartite proceedings, even

29. Consider, for example, the situation in which both parties agree that an issue should be avoided for personal reasons. In one case of which the writer is aware, an arbitrator was asked to determine whether certain work rules were in effect at an industrial facility. When it became clear that the decision might hinge on whether a certain foreman had done an adequate job of communicating the rules, both parties suggested to the arbitrator that he omit this matter from his opinion (although not from consideration) because to include it would cause distress to the foreman, who was about to retire due to ill health and was an exceedingly popular person who held the confidence of both management and workers. The arbitrator willingly complied although the resulting opinion was one he would prefer not to have reviewed by Board or court.

In some instances, of course, decisions “on the spot” without opinion are requested because of the immediacy of a problem.

30. The easiest illustration is a discharge that the grievant claims was because of anti-union animus but the employer claims was justified by the grievant’s misconduct. If the arbitrator finds the employer has failed to prove the misconduct, neither decision nor remedy would be altered by exploring the anti-union animus issue.

31. The *Banyard* opinion uses “competence” primarily in a jurisdictional sense. In *Stephenson v. NLRB*, 550 F.2d 535 (9th Cir. 1977), it is used to mean both jurisdiction and expertise. *Id.* at 538 n.4.

32. *Id.* at 538.

33. *Id.* at 540.

34. *See, e.g.*, *Raley’s, Inc.*, 143 N.L.R.B. 256 (1963). A recent illustration of the complexities that can result in the courts from such proceedings is *General Warehousemen Local 767 v. Standard Brands*, 560 F.2d 700 (5th Cir. 1977).

35. National Labor Relations Act § 9, 29 U.S.C. § 159 (1970).

36. *Id.* § 8, 29 U.S.C. § 158 (1970 & Supp. V 1975).

though there are three interested parties—the employer and two competing unions. Since it is unlikely that all possible issues can be effectively presented in a two-party proceeding, it has been suggested that Board application of the *Spielberg* deferral doctrine to representation cases is inappropriate.³⁷

A similar problem arises when the subject matter concerns violations of section 8(a)(4)³⁸ (or cases alleging violations with section 8(a)(4) overtones), an area in which the Board has a significant interest in maintaining the availability and the integrity of its own processes. Consequently, a majority of the Board decided in *Filmation Associates*³⁹ to withhold *Spielberg* deferral if a section 8(a)(4) charge is brought. The Board majority in *Filmation*, Chairman Murphy and Members Fanning and Jenkins, reached this decision even though the arbitration opinion to which deferral was asked included findings that: “(1) pursuit of grievances ‘played no part in the decision of the Company to discharge the Grievant’; (2) the Grievant was not discharged for union activity; and (3) ‘the filing of the [unfair labor practice] charge was not instrumental or even significant, as a reason for the discharge of the Grievant.’ ”⁴⁰

B. *Deferral Prior to the Issuance of an Award*

Deferral to a grievance-settlement process may be requested either before that process has been set in motion, or while it is going forward. The latter situation is ordinarily referred to as a *Dubo* case, from the style of a leading Board opinion, *Dubo Manufacturing Corp.*⁴¹ In *Dubo*, the charging parties were employees who had been threatened by their employer with discharge because of their involvement in a walkout in protest of the employer's refusal to permit an employee to return from sick leave without first obtaining a medical certificate.⁴² The propriety of the walkout was being tested in court-ordered arbitration at the time this charge (together with others) came before the

37. See, e.g., Comment, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191 (1968). The bipartite nature of the forum does not preclude judicial compulsion to arbitrate. *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964).

38. National Labor Relations Act § 8(a)(4), 29 U.S.C. § 158(a)(4) (1970), provides: “It shall be an unfair labor practice for an employer . . . (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.”

39. 227 N.L.R.B. No. 237, 94 L.R.R.M. 1470 (Jan. 1, 1977).

40. *Id.* at —, 94 L.R.R.M. at 1472.

41. 142 N.L.R.B. 431, 812 (1963), *supplemental decision*, 148 N.L.R.B. 1114 (1964), *enforced*, 353 F.2d 157 (6th Cir. 1965).

42. 148 N.L.R.B. 1114, 1115 (1964).

Board.⁴³ Inasmuch as the court order made it highly likely that the arbitration would proceed on schedule, it is hardly surprising that the Board decided to defer ultimate disposition of the matter until that proceeding closed. *Dubo* has also been interpreted to apply to situations in which arbitration is continuing with the consent of both parties.⁴⁴

Deferral prior to the commencement of grievance-settlement procedures has come to be known as a *Collyer* situation. *Collyer Insulated Wire*⁴⁵ involved charges of violations of section 8(a)(5)⁴⁶ stemming from unilateral changes in pay rates by an employer. The interpretation of two sections of the applicable collective agreement were critical to the outcome, since the employer urged that those provisions specifically permitted the action taken.⁴⁷ The Board voted three-to-two to defer. The five members of the Board wrote four opinions. Chairman Miller's opinion favoring deferral was joined by Member Kennedy. They placed considerable emphasis on section 203(d) of the Taft-Hartley amendments,⁴⁸ which declares the private-settlement procedure agreed upon by the parties to be the desirable method of resolving disputes arising out of the collective bargaining agreement, and on the opinions of the United States Supreme Court in *Carey v. Westinghouse Electric Corp.*⁴⁹ and the *Steelworkers Trilogy* cases, in which the special industrial expertise of arbitrators was praised.

Those congressional and judicial declarations led Chairman Miller and Member Kennedy to conclude that the Board should seek to work out an accommodation between the arbitral forum and the Board's own tribunal. They stated that this type of controversy is one that centers more nearly on the collective bargaining agreement than on the statutes, and that therefore the arbitral forum would be peculiarly appropriate.⁵⁰ Moreover, they noted that the parties had been engaged in harmonious collective bargaining relationships for a considerable period and that by retaining jurisdiction it would be possible to retain control for purposes of determining whether the *Spielberg* criteria were

43. *Id.* at 1116.

44. See Office of the General Counsel, Memorandum 77-58, 95 LAB. REL. REP. (BNA) 152, 154 (1977).

45. 192 N.L.R.B. 837 (1971).

46. National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970), provides: "It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

47. 192 N.L.R.B. at 837.

48. Labor Management Relations (Taft-Hartley) Act § 203(d), 29 U.S.C. § 173(d) (1970).

49. 375 U.S. 261 (1964).

50. 192 N.L.R.B. at 839.

met.⁵¹

Member Brown went further in a concurring opinion, stating that "the labor industrial community views such procedures as an integral part of collective bargaining."⁵² This rationale would mean that to engage in arbitration is to do no more than fulfill one's duty to bargain collectively under sections 8(a)(5) or 8(b)(3)⁵³ of the statute. Members Fanning and Jenkins dissented in separate opinions. They pointed out that the contract in question called for arbitration to commence within certain time limits that had expired. They also objected to arbitration deferral on the grounds that section 10(a)⁵⁴ of the Act forbids the Board to "cede" its jurisdiction in this fashion. Finally, they noted that deferral is likely to be urged by regional offices very strenuously, so that a charge reaching a Board panel is probably one that the charging party feels quite strongly is not suited to the arbitral forum.⁵⁵

Member Brown stated in his opinion in *Collyer Insulated Wire* that he would be ready to defer in 8(a)(3) cases even before the arbitration process had begun,⁵⁶ but the Board did not endorse that point of view until its decision in *National Radio Co.*⁵⁷ The charging party in *National Radio* alleged that he had been discharged because of his active pursuit of grievances on behalf of members of the union.⁵⁸ The employer, on the other hand, alleged that it was quite willing for the discharged employee to engage in grievance handling. For a variety of reasons, however, the employer felt it was desirable to know the employee's whereabouts while at work, and therefore the employer instituted a requirement that the employee notify the employer before going away from his normal work station for grievance-handling purposes.⁵⁹ The employee was discharged for persistent violations of this notice requirement after receiving several warnings. The majority opinion, announcing that deferral would be utilized in 8(a)(3) cases, heavily emphasized the same factors that had been involved in *Collyer*:

51. *Id.* at 842-43.

52. *Id.* at 844 (Brown concurring). The extent to which arbitration is a "judicial" procedure or a "negotiating" procedure is a matter of continuing debate. See Hepburn & Loiseaux, *Nature of the Arbitration Process*, 10 VAND. L. REV. 657 (1957); Wirtz, *Arbitration is a Verb* in ARBITRATION AND THE PUBLIC INTEREST, 24 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 30 (1971) (much of which deals with interest rather than rights arbitration).

53. National Labor Relations Act § 8(b)(3), 29 U.S.C. § 158(b)(3) (1970).

54. *Id.* § 10(a), 29 U.S.C. § 160(a).

55. 192 N.L.R.B. at 847, 849 (Fanning, dissenting); *id.* at 854 (Jenkins, dissenting).

56. *Id.* at 845 (Brown, concurring).

57. 198 N.L.R.B. 527 (1972).

58. *Id.* at 527.

59. *Id.* at 538-39.

the congressional and judicial favoring of arbitration; the saving of time and energy to the Board; that disputes of this sort are rooted in the contract as well as the statute; and that adequate control of pre-award deferral could be maintained by retaining jurisdiction for the limited purpose of ascertaining whether *Spielberg* criteria had been met.

In an extended dissent, Members Fanning and Jenkins added to their prior objections one that was to prove important when Board personnel changed. They noted that the rights involved in 8(a)(3) cases are individual rights, while the signatories to the collective bargaining agreement are not the individual employees but rather the union and the employer.⁶⁰ They also objected on the ground that the deferral decisions of the Board had led to a situation in which the parties "may contract themselves out of the act to any extent they choose"⁶¹—a result the Congress surely would not have intended. Moreover, they argued, these decisions were placing substantial costs on private parties that they would not have had to bear if the matter had been handled entirely by Board personnel.⁶² They also raised the question whether arbitrators would be willing to include considerations of employees' section 7⁶³ rights in making "good cause" discharge determinations.⁶⁴

National Radio remained the controlling case from 1972 until the Board's 1977 decisions, *Roy Robinson Chevrolet*⁶⁵ and *General American Transportation Corp.*,⁶⁶ in which deferral was urged by the employer respondent. The outcome was to defer in *Roy Robinson*, an 8(a)(5) case, but not to defer in *General American Transportation*, an 8(a)(3) case. Members Walther and Penello favored deferral in both cases, arguing essentially the same points previously made in *Collyer* and *National Radio*.⁶⁷ Members Fanning and Jenkins would have refused to defer in both cases for the reasons set forth in their prior decisions and also because the deferral doctrine had not resulted in the

60. *Id.* at 533 (Fanning & Jenkins, dissenting).

61. *Id.* at 534.

62. *Id.* at 535.

63. National Labor Relations Act § 7, 29 U.S.C. § 157 (1970).

64. 198 N.L.R.B. at 534 (Fanning & Jenkins, dissenting).

65. 228 N.L.R.B. No. 103, 94 L.R.R.M. 1474 (Mar. 16, 1977).

66. 228 N.L.R.B. No. 102, 94 L.R.R.M. 1483 (Mar. 16, 1977).

67. The Walther-Penello dissent in *General American Transportation* quotes extensively from the Brown opinion in *Collyer* and the majority opinion in *National Radio* on the importance of arbitration in general and the extent of congressional endorsement of arbitration. *Id.* at —, 94 L.R.R.M. at 1490, 1493 (Penello & Walther, dissenting). They add to this references to approval of deferral by the courts of appeals, *id.* at —, 94 L.R.R.M. at 1490-92, and summarize the results of an internal study of how deferral has affected the work of the Board, *id.* at —, 94 L.R.R.M. at 1494.

efficiencies envisioned by the *Collyer* majority.⁶⁸ The swing vote was that of Chairman Murphy, who agreed with Members Walther and Penello that deferral itself is not inappropriate under the National Labor Relations Act, but who stated that the arguments favoring deferral in 8(a)(3) cases are not sufficiently strong to overcome the disadvantages.⁶⁹

In *General American Transportation*, Chairman Murphy gave five reasons for refusing to defer in 8(a)(3) cases. First, the determination of whether section 8(a)(3) has been violated depends upon whether the conduct complained of was unlawfully motivated, an issue that the Board is particularly expert in handling, and that arbitrators are "not qualified to decide."⁷⁰ Second, the right protected by section 8(a)(3) is the right to full freedom of association, a right which is a "cornerstone of all Section 7 rights."⁷¹ Because of its fundamental importance, such a right cannot "lawfully be reduced or eliminated either by the employer, the union, or by both."⁷² Third, the rights protected by section 8(a)(3) are "public rights" that "must be protected by the Board in its public capacity."⁷³ Fourth, the rights created by a collective bargaining agreement are essentially related to the employer and the union, and the contract is therefore one "in which the employee has virtually no role to play."⁷⁴ Fifth, the individual employee cannot compel the union "to process the grievance through arbitration if the grievance is resolved against the employee."⁷⁵ The union's decision may be based on considerations of cost or other factors not related to whether an employee's section 7 rights have been invaded.

On the other hand, Chairman Murphy stated that in the typical 8(a)(5) case, the essential question is ordinarily whether employer conduct is permitted by the collective bargaining agreement. Because interpretation of the agreement is a field in which arbitrators have special competence, a policy of deferral would seem to be appropriate.⁷⁶

68. *National Radio Co.*, 198 N.L.R.B. at 535 (Fanning & Jenkins, dissenting); see *Collyer Insulated Wire*, 192 N.L.R.B. at 843.

69. *General Am. Transp. Corp.*, 228 N.L.R.B. at —, 94 L.R.R.M. at 1486-87.

70. *Id.* at —, 94 L.R.R.M. at 1486 n.11.

71. *Id.* at —, 94 L.R.R.M. at 1487.

72. *Id.* at —, 94 L.R.R.M. at 1487-88.

73. *Id.* at —, 94 L.R.R.M. at 1488.

74. *Id.*

75. *Id.*

76. *Id.* at —, 94 L.R.R.M. at 1486.

With all due respect to Chairman Murphy, it must be acknowledged that because the factual settings in these two cases were not consistent with her position the reasoning at times seems strained and unduly abstract. The charging party in *General American Transportation* alleged that he had been laid off because of his involvement while a union steward in filing and pursuing OSHA complaints. The company's response was that the employee was laid off because of lack of work. The applicable collective agreement provided that the employer would not exercise its right to lay off employees "for the purposes of discrimination against any employee."⁷⁷ The grievance-arbitration provision of the agreement was broadly worded. Thus, Chairman Murphy adopted her position that 8(a)(3) cases should not be subject to deferral in a setting that could hardly have been more representative of the type of case arbitrators handle most often.

In *Roy Robinson*, the charge under section 8(a)(5) stemmed from the decision of the employer to subcontract its body shop operation.⁷⁸ This decision was made under a collective agreement without specific language on subcontracting.⁷⁹ Moreover, the decision was announced four days after a heated exchange between the employer's president and a body shop employee who was engaged in what the employer regarded as unfair picket line activity.⁸⁰ Thus, while the charge was framed in terms of section 8(a)(5), there were clear overtones of anti-union animus.

In all events, pending review by the courts, the present situation is that a majority consisting of Members Fanning and Jenkins and Chairman Murphy will decline to defer in cases alleging violations of sections 8(a)(1),⁸¹ 8(a)(3), 8(b)(1)(A)⁸² and 8(b)(2),⁸³ while Member Penello will continue to vote to defer in those cases, as well as to vote with Chairman Murphy to defer in cases brought under sections 8(a)(5)

77. *Id.* at —, 94 L.R.R.M. at 1489.

78. 228 N.L.R.B. at —, 94 L.R.R.M. at 1474.

79. *Id.*

80. *Id.* at —, 94 L.R.R.M. at 1478-79.

81. National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1970).

82. *Id.* § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A).

83. *Id.* § 8(b)(2), 29 U.S.C. § 158(b)(2). The likelihood of deferral in cases brought under sections other than 8(a)(3) and 8(a)(5) has never been great. As a result, this article pays scant attention to such cases. It is unlikely that arbitration will be available in any 8(b) cases since few grievance procedures provide for filing of grievances against unions. Violations of no-strike agreements would be more likely to involve arbitrator-court coordination than arbitrator-Board coordination.

and 8(b)(3). The attitude of Member Truesdale is yet to be determined.

II. CRITERIA FOR DEFERRAL DECISIONS

It is relatively easy to distill from these major cases the criteria that the members of the Board agree should be applied in deciding whether to defer in a particular case: (1) congressional intent with respect to the allocation of decisionmaking responsibilities should be followed; (2) the more competent forum should be utilized, whenever feasible, to determine a dispute; (3) the forum that will give the more complete relief should be preferred; (4) effective counsel and investigative support should be made available to the parties; (5) costs of dispute resolution should be minimized and should be borne by the appropriate parties; (6) the content of the normative doctrine applied by arbitral and Board forums should be as congruent as possible; (7) conflicts of interest between a union and its members should not be permitted to interfere with the members' exercise of section 7 rights; (8) whatever deferral doctrines are developed should be sufficiently certain of application so that the parties may predict with confidence whether such a doctrine will be applicable to them; and (9) deferral must not impair the integrity and credibility of Board actions. The members of the Board agree on the appropriateness of virtually all of these criteria; on the application of these same criteria, however, the Board members differ substantially.⁸⁴

84. The following brief chart indicates the points in *Filmation*, *Roy Robinson* and *General American Transportation* at which the members of the Board address these values.

Factor 1: Fanning, Jenkins: *General Am. Transp. Corp.*, 228 N.L.R.B. at —, 94 L.R.R.M. at 1484; Murphy: *id.* at —, 94 L.R.R.M. at 1487; Penello, Walther: *id.* at —, 94 L.R.R.M. at 1490-91.

Factor 2: Fanning, Jenkins: *Filmation Assocs.*, 227 N.L.R.B. at —, 94 L.R.R.M. at 1471; Murphy: *General Am. Transp. Corp.*, 228 N.L.R.B. at —, 94 L.R.R.M. at 1486-87; Penello, Walther: *id.* at —, 94 L.R.R.M. at 1491.

Factor 3: Fanning, Jenkins: *Roy Robinson Chevrolet*, 228 N.L.R.B. at —, 94 L.R.R.M. at 1479.

Factor 4: Murphy: *General Am. Transp. Corp.*, 228 N.L.R.B. at —, 94 L.R.R.M. at 1489; Penello, Walther: *Filmation Assocs.*, 227 N.L.R.B. at —, 94 L.R.R.M. at 1473.

Factor 5: Fanning, Jenkins: *Roy Robinson Chevrolet*, 228 N.L.R.B. at —, 94 L.R.R.M. at 1480; Murphy: *General Am. Transp. Corp.*, 228 N.L.R.B. at —, 94 L.R.R.M. at 1488. Penello, Walther: *id.* at —, 94 L.R.R.M. at 1493.

Factor 6: Fanning, Jenkins: *Roy Robinson Chevrolet*, 228 N.L.R.B. at —, 94 L.R.R.M. at 1479-80; Murphy: *General Am. Transp. Corp.*, 228 N.L.R.B. at —, 94 L.R.R.M. at 1486 n.11; Penello, Walther: *Roy Robinson Chevrolet*, 228 N.L.R.B. at —, 94 L.R.R.M. at 1475.

Factor 7: Murphy: *General Am. Transp. Corp.*, 228 N.L.R.B. at —, 94 L.R.R.M. at 1488-89; Penello, Walther: *id.* at —, 94 L.R.R.M. at 1493-94.

A. Congressional Intent

Each side in the deferral controversy can point to statutory language favoring its position. In support of their position in opposition to deferral Members Fanning and Jenkins consistently refer to language in section 10(a) of the National Labor Relations Act providing that the Board's power to prevent any person from engaging in any unfair labor practice "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise."⁸⁵ Members Penello and Walther, on the other hand, consider their position in favor of deferral supported by language in section 203(d) of Taft-Hartley⁸⁶ providing that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." To add to the confusion, the legislative history of these provisions is less than clear-cut. Section 10(a) was amended by the Taft-Hartley Act to eliminate prior language that stated NLRB jurisdiction should be "exclusive."⁸⁷ This may have been done, however, only to permit NLRB cession of jurisdiction to state labor relations boards.⁸⁸ At the same time, the conference committee that produced the final version of Taft-Hartley rejected a Senate-passed provision that would have made refusal to carry out the terms of a collective bargaining agreement arbitration provision an unfair labor practice.⁸⁹

The result of all of this is that the Congress placed its stamp of approval on two different forums, arbitrators and the Board. The courts have recognized this by approving the application by the Board of its *Spielberg*⁹⁰ and *Collyer*⁹¹ doctrines. In giving their approval to

Factor 8: Fanning, Jenkins: *id.* at —, 94 L.R.R.M. at 1485-86; Penello, Walther: *Filmation Assocs.*, 227 N.L.R.B. at —, 94 L.R.R.M. at 1473-74.

Factor 9: Fanning, Jenkins: *id.* at —, 94 L.R.R.M. at 1471; Penello, Walther: *id.* at —, 94 L.R.R.M. at 1473.

85. National Labor Relations Act § 10(a), 29 U.S.C. § 160(a) (1970).

86. Labor Management Relations (Taft-Hartley) Act § 203(d), 29 U.S.C. § 173(d) (1970).

87. 29 U.S.C. § 160(a) (1970), *as amended by Labor Management Relations (Taft-Hartley) Act of 1947*, ch. 120, § 10(a), 61 Stat. 136.

88. *See* H.R. REP. No. 510, 80th Cong., 1st Sess. 23, *reprinted in* [1947] U.S. CODE CONG. & AD. NEWS 1135, 1158-59.

89. The *Collyer* majority relied very little on legislative history. *See* 192 N.L.R.B. at 840 n.7. It is interesting that Senator Wagner's original proposal for a labor relations act envisioned that the Board would have broad jurisdiction as an arbitral forum as well as its other powers. *See* S. 2926, 73d Cong., 2d Sess. § 206 (1934), *reprinted in* I NLRB LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 10-11 (1949).

90. *See* *Filmation Assocs.*, 227 N.L.R.B. at —, 94 L.R.R.M. at 1473 n.8.

Board deferral doctrines, however, the courts have never indicated that it would be proper to use similar theories, such as election of remedies.⁹² In *Alexander v. Gardner-Denver Co.*,⁹³ in which the Supreme Court rejected arguments favoring deferral by the courts to arbitral awards in Title VII⁹⁴ cases, the Court took the opportunity to discuss the arguably analogous NLRB situation. The Court emphasized that the use by the parties of arbitration does not preclude later Board consideration of the case.⁹⁵ The present state of the case law would thus seem to be that the Board is entitled to develop its own deferral doctrines, so long as the effect of those doctrines is not to remove from the Board significant areas of responsibility entrusted to it by the Congress.

On the whole, this outcome seems reasonable. Though it is doubtful that the Congress in 1947 could appreciate the detailed problems of overlapping forums, it is quite clear that those engaged in drafting the Taft-Hartley Act were fully aware of the significance of arbitration as a dispute-settlement mechanism, as well as of the possibility that the jurisdiction conferred on the federal district courts by section 301 might require those courts to interpret provisions of the National Labor Relations Act without prior specific guidance from the Board. Nonetheless, they were willing to enact a statute that did not fully resolve these potential conflicts. Ultimately, it must be assumed that Congress anticipated that the courts, with their supervisory power over the Board, would work out the conflicts in some fashion.

B. *Competence of Forum*

The question of when arbitration may provide a more competent⁹⁶

91. See Roy Robinson Chevrolet, 228 N.L.R.B. at —, 94 L.R.R.M. at 1475 nn.4 & 5.

92. See *Timken Roller Bearing Co. v. NLRB*, 161 F.2d 949 (6th Cir. 1947) (arguing against this approach).

93. 415 U.S. 36 (1974).

94. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975).

95. 415 U.S. at 50.

96. The question of how competent arbitrators are, as a group, in conducting hearings, making findings of fact, interpreting contracts, and applying principles of law, is the subject of fierce debate. The polar views are usually thought to be those expressed in the *Steelworkers Trilogy*, praising arbitral expertise, and those expressed by Judge Hays in P. HAYS, *LABOR ARBITRATION: A DISSENTING VIEW* (1966). The problem is not one of measuring absolute competence, of course, but of measuring the competence of arbitrators relative to that of NLRB administrative law judges and other groups of decisionmakers. It is impossible to evaluate arbitrator ability with real confidence because few arbitrators submit opinions for publication and because arbitrators often restrict their practice geographically or by case load. In addition, other factors besides ability are taken into consideration by parties in selecting an arbitrator. It has therefore been

forum than the Board is not an easy one. An initial problem is whether the standards for selection of arbitrators in the United States are sufficient to guarantee even minimal competence. One of the primary concerns expressed by the Supreme Court in *Gardner-Denver* was that arbitrators are less likely to be competent in applying Title VII doctrine than in applying the "law of the shop."⁹⁷ Concern has often been expressed that many arbitrators in the labor relations field are not law trained and thus might fail to grasp some of the subtleties of legal positions taken by the parties. In addition to this concern, it must be added that not all arbitration procedures call for the participation of a neutral third party. There are quite a number of bipartite grievance committees in existence,⁹⁸ whose members are drawn from management and union personnel at the plant in which the dispute originated.

The question can be raised whether it is appropriate for the National Labor Relations Board to get into the business of evaluating individual competence, a difficult and no doubt distasteful task, or whether it should simply leave the matter to the parties. The preferable view, surely, is that the Board should not ignore the competence issue. If there is to be deferral, one result is that rights conferred on individuals by the Congress will be significantly affected by the decisions of arbitrators. Since the Board has been given the primary task of defending those rights,⁹⁹ it is preferable not to defer unless there are

impossible to develop a consensus even about what credentials should be viewed as appropriate. See Aaron, *Should Arbitrators Be Licensed or "Professionalized"?*, in ARBITRATION 1976, 29 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 152 (1976).

Consequently, discussions of arbitrator competence tend to have an a priori flavor. Each of us tends to generalize from a few observations, and to bring to these discussions deep-seated personal evaluations that are unlikely to be changed. It is patently obvious that the writer's personal experience (a very limited one) has made him optimistic about the quality of the arbitration experience. Personal optimism, however, seems too slight a foundation for assertions of expertise, so one falls back on two other bases for urging that arbitral ability to handle these issues is adequate: (1) *The market*. If arbitrators were as incompetent as some have asserted, the demand for their services would not have increased so markedly over the past 30 years. (2) *The nature of the issues*. The issue of anti-union animus raises the gravest objections to arbitral disposition, and yet this is the very sort of issue that we entrust regularly in civil litigation to nonexpert lay judges—the members of juries. This latter argument, however, is very weak because in the Board process there are experienced decisionmakers available for just such questions. Thus in the final analysis one in the writer's position relies most heavily on the simple proposition that the customers of arbitration keep coming back for more; it is reasonable to suppose, therefore, that arbitral competence is at least sufficient for the tasks entrusted to that forum by the parties.

97. 415 U.S. at 57.

98. See generally 1 ABA SECTION OF LABOR RELATIONS LAW, 1971 PROCEEDINGS 42 (1972) (remarks of William J. Curtin). That this device poses tougher problems in *Spielberg* cases than those posed by the neutral third party device is indicated by the *Banyard* and *Stephenson* cases, both of which involved essentially bipartite procedures. But see *Humphrey v. Moore*, 375 U.S. 335 (1964).

99. See 29 U.S.C. § 160(a) (1970).

minimal guarantees of competence present. It is fortunate that objective criteria are available that can be used by the Board to avoid ad hoc individual competence determinations. Membership in the National Academy of Arbitrators and appointment to panels of the American Arbitration Association and the Federal Mediation and Conciliation Service are not guarantees of spectacular brilliance. These appointments are made, however, with sufficient care that it would be appropriate for the Board to regard these credentials as strong indicators of minimal competence.¹⁰⁰

Guaranteeing minimal competence is only the beginning. For the reasons noted earlier, deferral should be indulged in only when arbitration is likely to be the more competent forum. This is likely to be the case at least in respect of those types of judgments that arbitrators have been most frequently called upon to make. Experience, in other words, is the most significant reason for assuming competence. This is the basis of Chairman Murphy's conclusion in *Roy Robinson* that deferral is appropriate in the typical 8(a)(5) case.¹⁰¹ Inherently, such cases involve the question whether contract language permits management to act as it did, and since the "name of the game" for arbitrators is interpreting contract language, surely this is the type of matter arbitrators are most competent to decide. This competence would be peculiarly important in making a deferral decision since the bulk of the Board's own work does not involve contract interpretation.

When one turns to the 8(a)(3) discipline and discharge cases, it is more difficult to concur with Chairman Murphy's assessment of arbitrator competence. She indicates considerable skepticism regarding the ability of arbitrators to decide issues of anti-union animus and in particular to detect pretext.¹⁰² Discipline and discharge cases, however, are those most commonly submitted to arbitration.¹⁰³ Among the arguments most frequently put forward in such cases is that other em-

100. See generally Aaron, *supra* note 96, at 152.

101. 228 N.L.R.B. at —, 94 L.R.R.M. at 1477. This viewpoint is further buttressed because the issue involved in *Roy Robinson*—management's privilege to subcontract—is one of the issues the Court in the *Steelworkers Trilogy* indicated is within the peculiar competence of arbitrators. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 584.

102. *General Am. Transp. Corp.*, 228 N.L.R.B. at —, 94 L.R.R.M. at 1486 n.11, 1489. Chairman Murphy states that arbitrators are not "qualified" to decide the anti-union animus issue because in order to be qualified one must be specifically charged to consider the issue, and the only persons so charged are the administrative law judges serving in the NLRB. This argument has the same obvious circularity as the "public rights" argument and thus fails to add significantly to the strength of her opinion. She also argues that contract language may at times preclude the arbitrator from considering discrimination issues—a more telling point.

103. See O. PHELPS, *DISCIPLINE AND DISCHARGE IN THE UNIONIZED FIRM* 18 (1959).

ployees who have given the company the same cause for disciplinary action have not received the same treatment as that meted out in the grievant's case.¹⁰⁴ To assist them in determining the real reason for the discharge or for the disciplinary action, arbitrators have developed a special order of presentation of such cases: the employer is required to present its case first, thereby giving the union a greater opportunity to analyze and refute the employer's "just cause" argument by showing that this just cause is not the true reason for the company's conduct.¹⁰⁵ Thus, pretext is very common grist for the arbitrator's mill, and Chairman Murphy's skepticism with regard to arbitrator competence on this issue seems ill founded.

This is not the end of the matter, however, for in determining whether arbitration is likely to be the more competent forum it is necessary to look at the level of expertness likely to be available at the Board. On this score, Chairman Murphy's position seems more reasonable. The Board considers a significant number of anti-union animus cases each year, many of them involving disciplinary action and discharges. In formulating its doctrine, the Board has developed an extensive jurisprudence with regard to what constitutes "cause" for discharge under the language of section 10(c),¹⁰⁶ and in this respect, it is clear that Board competence is likely to be at least equal to that possessed by arbitrators. Inasmuch as deferral in a *Collyer* situation is appropriate only when arbitration is likely to be the more fitting tribunal, these discipline and discharge cases would not seem to be the proper ones in which to defer.

That conclusion is still subject to challenge, however, because of an additional aspect of the competence determination that is essentially jurisdictional in nature. Consider the case of *X*, an employee discharged allegedly because of insubordination. At a Board hearing it is demonstrated that *X* is not a union official, nor particularly involved in union affairs, and that the act of insubordination involved was *X's* fail-

104. See Summers, *Arbitration of Unjust Dismissal: A Preliminary Proposal*, in AMERICAN ARBITRATION ASSOCIATION, *THE FUTURE OF LABOR ARBITRATION IN AMERICA* 159, 163-64 (1976).

105. The procedure is so widespread that it is mentioned in manuals for use by nonlawyers. See R. COULSON, *LABOR ARBITRATION—WHAT YOU NEED TO KNOW* 61 (2d ed. 1978). More conventional is PROBLEMS OF PROOF IN ARBITRATION, 19 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 221, 229 (1967).

106. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1970). See generally DEVELOPING LABOR LAW 122-32 (C. Morris ed. 1971). Board precedent has developed to the point of distinguishing between the types of employer conduct that may be termed "inherently destructive" of employee rights and the types that have only a mildly adverse effect, with different standards of proof with respect to employer motivation for each of the categories. See *NLRB v. Bogart Sportswear Co.*, 485 F.2d 1203 (5th Cir. 1973).

ure to return to his post after arguing with his supervisor about the accuracy of the wall clock that allegedly signaled the end of a coffee break. There is no proof of anti-union motivation. In such a circumstance, no Board remedy would be appropriate.¹⁰⁷ In an arbitral forum, however, it would be appropriate under most collective agreements for the union to show that similar acts by other employees with virtually identical disciplinary records resulted in nothing more than a written reprimand or a brief suspension. It is possible in such a situation that the arbitrator would order modification of the discharge to conform more nearly to the discipline meted out in the past for similar rule infractions.¹⁰⁸ It is thus quite possible that in discipline and discharge cases the arbitral forum can consider a much broader range of issues than are appropriate for the Board, and it is therefore likely that arbitration would provide finality of decision.

If one is willing to accept the argument that ability to weigh evidence with respect to pretext is very similar in both forums, and if it is correct to say that in such cases the arbitral forum is the more likely to consider the fullest range of issues in the case, then arbitration is arguably the more competent forum. In saying this, it has been assumed that arbitrators are willing to consider anti-union animus in connection with the good cause issue.¹⁰⁹ Quite obviously, there are collective agreements that would forbid an arbitrator to do this;¹¹⁰ in such cases, virtually no argument can be made that deferral would be appropriate.

C. *Efficacy of Remedy*

Neither arbitral awards nor Board orders are self-enforcing. It is for the party who wishes to have the award or order enforced to get a court order if the opposing party does not voluntarily comply. Board and arbitral remedies are also similar in that each forum has demonstrated considerable ingenuity in seeking to tailor remedies to the facts

107. See *Borkin Packing Co.*, 208 N.L.R.B. 280 (1974).

108. See generally E. TEPLÉ, *ARBITRATION AS A METHOD OF RESOLVING DISPUTES* 125-43 (1972); R. SMITH, L. MERRIFIELD & D. ROTHSCHILD, *COLLECTIVE BARGAINING AND ARBITRATION* 412-19 (1970); Summers, *supra* note 104, at 163-64.

109. The most recent BNA survey indicates that about half of the current major collective agreements forbid employer discrimination based on union membership. 2 *COLLECTIVE BARGAINING NEGOTIATIONS & CONT.* (BNA) § 95, at 5-6 (1975). In addition, some arbitrators would doubtless imply such an obligation from recognition or union security clauses.

110. For example, there are agreements (and submissions) that charge the arbitrator to consider only the question whether an employee did in fact violate a work rule.

of individual cases.¹¹¹ This is not to say that the remedial powers are identical. Particularly significant is the ability of the parties to a collective agreement to agree to specific limits on the scope of arbitral power.¹¹² For example, in some agreements an arbitrator is forbidden to modify the severity of discipline once it has been found that just cause for the imposition of discipline is present. Any limitation of this sort on the scope of relief available through the privately constituted system makes deferral by the Board less appropriate.

The usual remedy provided by arbitration and by the Board for wrongful discharge is the same: reinstatement with back pay. The differences, when they are present, do not provide a consistent basis for preference. First, an arbitrator (in the absence of a clause restricting arbitral power such as that described above) is generally thought to have the power to require that the disciplinary action imposed be modified to "make the punishment fit the crime" in light of all the circumstances of the case, and not simply anti-union animus. Because Board decisions on 8(a)(3) "liability" issues tend to be "all-or-nothing," the Board's remedy powers tend to be used in an "all-or-nothing" way. This is a clear advantage in favor of utilizing the arbitral forum. On the other hand, in a case in which management asserts frivolous defenses to a charge of wrongful conduct, the Board has the advantage because it may order reimbursement of litigation expenses.¹¹³ Ordinarily, the costs of arbitration are specifically allocated under the provisions of the collective agreement (at times being evenly divided, at times being imposed more heavily on the losing party), and it would be inappropriate for an arbitrator to deviate from the specifics of such an agreement. In addition, there is available to the Board the privilege of seeking preliminary injunctive relief under section 10(j)¹¹⁴ in order to maintain the status quo during the conduct of Board proceedings. Parties may undoubtedly seek similar relief pending arbitration under section 301 of the Taft-Hartley Act,¹¹⁵ but it is unclear whether essentially similar doctrines would be applied in the two situations.¹¹⁶ While the conclusion is not totally clear, it would appear that neither forum has

111. See D. McDowell & K. Huhn, *NLRB Remedies for Unfair Labor Practices* 81-121 (1976); Note, *Discharge in the "Law" of Arbitration*, 20 *VAND. L. REV.* 81, 123-39 (1966).

112. See Fleming, *Arbitrators and the Remedy Power*, 48 *VA. L. REV.* 1199, 1205 (1962).

113. *Tiidee Prods., Inc. v. International Union of Electrical Workers*, 426 F.2d 1243, 1253 n.15 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970).

114. National Labor Relations Act § 10(j), 29 U.S.C. § 160(j) (1970). The Board has invoked this preliminary injunctive remedy only rarely.

115. See *Boys Market, Inc. v. Retail Clerks, Local 770*, 398 U.S. 235, 253 (1970).

116. For example, to what extent is the General Counsel's decision to seek an injunction enti-

an advantage over the other as far as remedies in discharge and disciplinary action cases are concerned.

When one turns from discipline and discharge cases to cases dealing with unilateral change without prior bargaining, conduct that is governed by section 8(a)(5) of the Act, the situation is even more difficult to assess. In the event either an arbitrator or the Board finds that an employer has improperly instituted unilateral change, such as discontinuing a bonus or subcontracting work previously done by employees in the bargaining unit, the typical remedies (other than the bargaining order) are quite similar. They are likely to include an order to pay the bonus, or to pay back wages lost because of an improper denial of work, plus restoration of conditions prior to the unilateral change.¹¹⁷ Such a restoration order will be denied if practical circumstances, such as the removal of equipment, preclude reasonable compliance.¹¹⁸ In this connection, the Board's power to seek preliminary injunctive relief, such as maintenance of the status quo, may be of importance in a limited number of situations. The effectiveness of Board remedies for 8(a)(5) violations, however, has often been questioned because there is a good deal of uncertainty regarding the circumstances under which the Board will do more than order the parties back to the bargaining table.¹¹⁹

On the other hand, whether arbitrators can require the parties to bargain is also subject to question. In practice, it is quite clear that arbitrators often encourage the parties to bargain. Those arbitrators who accept the philosophy of arbitration espoused by such prominent figures as Professor Aaron¹²⁰ think of this as one of their major tasks. The techniques available for this purpose are numerous. One can indicate the possibility of an adverse decision at a time prior to issuance of an opinion, with the expectation that this will lead the parties back to

tled to a deference that would be denied private parties? See *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1192-93 (5th Cir. 1975).

117. See, e.g., *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874 (3d Cir. 1968).

118. See, e.g., *Avila Group, Inc.*, 218 N.L.R.B. 633, 642-43 (1975).

119. There has thus far been little commentary on the Board's "new" retroactive bargaining order, enunciated in *Trading Port, Inc.*, 219 N.L.R.B. 298 (1975). See *Drug Package, Inc. v. NLRB*, 570 F.2d 1340 (8th Cir. 1978) (retroactive remedy inappropriate because of ruling on 8(a)(5) issue and because respondent's conduct predated *Trading Port*).

There are proposals now before the Congress to provide stronger 8(a)(5) remedies. See H.R. 8410, 95th Cong., 1st Sess. (1977).

See also *Ex-Cell-O Corp. v. NLRB*, 449 F.2d 1058 (D.C. Cir. 1971); *NLRB v. Tiidee Prods., Inc.*, 426 F.2d 1243 (D.C. Cir.), cert. denied, 400 U.S. 950 (1970), decision on remand, 196 N.L.R.B. 158 (1972).

120. Aaron, *Some Procedural Problems in Arbitration*, 10 VAND. L. REV. 733 (1957).

the negotiating table. During the process of arbitration, issues may at times be clarified in such a way that the parties can detect possibilities of agreement that did not emerge at the early stages of a dispute-settlement process. Thus, it can be said with confidence that arbitration, even on the judicial model, can encourage bargaining.

The question still remains, however, whether an arbitrator has the formal power to require bargaining. At times, this power is clearly provided for in the collective agreement. For example, an arbitrator may be called on to enforce provisions of a wage-reopening clause that envisions bargaining; but in the absence of a specific clause of this sort, the likelihood of a bargaining order type of award is minimal. Professor Getman has suggested that a duty to bargain may be implied from the typical union-recognition clause,¹²¹ but this position has been challenged vigorously within the arbitral community¹²² and is probably endorsed by only a small number of arbitrators. The present situation is, therefore, one in which a bargaining order award is unlikely to emerge from the arbitral forum. This brings one back to the question whether the bargaining order, which simply requires the parties to do that which the statute requires in the first place, has any real force. So long as one restricts the universe of inquiry in this matter to Board proceedings alone, the bargaining order certainly seems a toothless remedy.¹²³ Yet, that perspective is unduly restrictive. When the Board seeks enforcement of its bargaining orders, it does so in the United States Courts of Appeals, and if enforcement is granted, further-noncompliance constitutes contempt.¹²⁴ The use of the contempt power has not been widespread in 8(a)(5) cases, but at least some courts of appeals have demonstrated an inclination to take this power very seriously.¹²⁵ These courts are willing to impose quite significant contempt sanctions for failures to bargain in good faith, sanctions that include both heavy fines and the possibility of incarceration.¹²⁶ When one thinks of bargaining orders not simply as redeclarations of statutory duties, but rather as the prelude to contempt proceedings, their

121. Ralph Rogers & Co., 48 Lab. Arb. 40 (1966) (Getman, Arb.).

122. See, e.g., 18 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 120-29 (1965); Christensen, *supra* note 11, at 80-81.

123. There may, of course, be ancillary relief as well, such as an order to pay a Christmas bonus that was unilaterally discontinued. See DEVELOPING LABOR LAW 391-92, 857-58 (C. Morris ed. 1971).

124. See D. McDowell & K. Huhn, *supra* note 111, at 245-46, 245 n.10.

125. See the discussion of *NLRB v. Schill Steel Prods.*, 480 F.2d 586 (5th Cir. 1973), in D. McDowell & K. Huhn, *supra* note 111, at 247-48.

126. D. McDowell & K. Huhn, *supra* note 111, at 246-48.

significance as Board remedies looms larger, and the existence of such powers in the Board forum makes deferral seem much less attractive.

The preceding paragraphs make out a substantial case that the Board's remedy powers in connection with 8(a)(5) cases may well be more complete than those available under collective agreements through arbitration. This ignores, however, the realities of what the Board can actually manage to do, given the limitations of its staff and the great demands on its time. In practice, 10(j) injunctions are rarely sought.¹²⁷ They tend to be limited to the most extreme and important cases, cases in which deferral is unlikely in the first place. Likewise, one rarely sees contempt orders sought with respect to 8(a)(5) orders. The potential advantages thus available through Board procedures are seldom useful to the parties.

On the other side is the great advantage of the arbitral forum—speed. Arbitrators do not always proceed at the same pace; some are extremely dilatory. For the most part, however, it is clear that the arbitral forum provides a decision with considerably greater speed than does the Board.¹²⁸ This is of tremendous importance in both 8(a)(3) and 8(a)(5) cases. If an 8(a)(3) case involves discharge, for example, not only is an employee out of work without income, but potential back pay liability for the employer is also accruing. In 8(a)(5) cases, the greater the time between institution of the charge and the final decision, the greater the chances for changes to occur that will make a restoration of circumstances order inappropriate. So long as arbitration can provide a significant advantage in terms of quickness of decision, this advantage appears to be sufficient to outweigh the theoretical availability of more substantial remedies through the Board, particularly since in practice these remedies are rarely used.

127. See NLRB General Counsel's Report on Injunction Proceedings, 90 LAB. REL. REP. (BNA) 12 (1975).

128. Given the variety and volume of grievance procedures in the United States, generalizations are difficult, and in recent years there have been complaints about delay and technicality in the arbitral forum. See, e.g., Killingsworth, *Arbitration Then and Now*, in LABOR ARBITRATION AT THE QUARTER-CENTURY MARK, 25 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 11 (1973). The best known response of arbitrators is the development of new expedited procedures, which apparently have achieved greater speed and reduced costs per case, although not without drawbacks. See Murray & Griffin, *Expedited Arbitration of Discharge Cases*, 31 ARB. J. 263 (1976). Probably the most important determinant of quickness of decision is the choice of arbitrator. An arbitrator with a heavy case load must fit a new submission into an already crowded schedule, while a less well-known arbitrator is more likely to be available promptly. Thus, speed of arbitration is dependent on the maintenance of a substantial pool of arbitrators acceptable to parties. The efforts of the National Academy to develop such a pool may be followed by reading the committee reports in the annual meeting proceedings.

D. Effectiveness of Counsel and Investigative Support

While the respondent generally will be represented by privately retained counsel in either forum, the charging party has the option of allowing Board personnel from the General Counsel's office to represent his interests in Board actions. Therefore, with respect to the issue of effectiveness of counsel and investigative support, it is necessary to focus on the representation of the charging party. Because charging parties retain rights to participate in Board proceedings¹²⁹ and to continue as participants represented by private counsel even when the case has reached the courts,¹³⁰ it is theoretically possible for an aggrieved party to regard the availability of NLRB counsel and staff as an "add-on." Because of costs, however, this privilege of intervention is used sparingly, and the charging parties are usually content to allow Board personnel from the General Counsel's office to take the leading role in the great majority of Board actions. Thus the real question is whether one forum affords the charging party more effective representation than the other.

The principal advantages of having Board personnel are the benefits associated with an efficiently functioning bureaucracy. The standards of minimal competence are high, and there are devices in place to provide quality control, so that if Board personnel begin to falter in their work, they will be reassigned or replaced.¹³¹ The advantages do not include individual superiority of available counsel: virtually any arbitrator can point to a number of cases in which the representation provided an aggrieved employee by the union could not have been better. And it is arguable that the advantages of Board personnel are not as great in 8(a)(5) cases involving interpretation of the collective agreement. In that situation, union personnel engaged in the arbitration process are likely to have participated in the original negotiation, and thus are more able to develop effective lines of questioning and argument concerning the nature of the bargaining history involved.¹³² No

129. See 29 U.S.C. § 160(b) (1970); 29 C.F.R. § 101.10 (1977).

130. See 29 U.S.C. § 160(f) (1970).

131. This does not imply that all Board agents are equally capable or that they have applied Board doctrine consistently in all cases. See Report of the Chairman's Task Force, 93 LAB. REL. REP. (BNA) 221, recommendations 14 & 42 (1976). Nonetheless, the general tone of that report is favorable toward Board personnel. The General Counsel has been vigorous in seeking critical comments concerning poor handling of cases, and the training programs for Board staff have recently been reinvigorated. See 1 ABA SECTION OF LABOR RELATIONS LAW, 1977 PROCEEDINGS 63-64 (1977).

132. See, e.g., Liebes, *Preparing the Case for Arbitration*, in THE ARBITRATOR, THE NLRB AND THE COURTS, *supra* note 13, at 359, 361-62.

matter how able the Board attorney assigned to such cases is, it is difficult for him or her to appreciate the nuances, subtleties and personal interplay of the bargaining room.

E. Allocation and Minimization of Costs

Opponents of deferral have long recognized that cost is one of their strongest arguments.¹³³ Why, they ask, should it be necessary for either employers, employees or unions to pay private counsel and staff to vindicate their rights under the National Labor Relations Act when Congress has established a publicly funded office whose principal task is to vindicate those same rights? Professor Schatzki's response that the National Labor Relations Act was not enacted for the purpose of protecting "feeble" unions seems a bit facetious.¹³⁴ He and others, however, have suggested stronger rationales. First, it is appropriate to infer from union negotiation of arbitration clauses that unions are willing to bear arbitration expenses.¹³⁵ Second, because arbitration offers the opportunity for a more rapid vindication of union or employee rights, it is quite possible that by choosing arbitration the union may realize a gain through the continued accumulation of dues. Moreover, to the extent that rights grounded in the collective agreement are identical in content to those provided by the statute, the rights involved are both "private" and "public," and our society has always expected those who seek the vindication of private rights to pay their own litigation expenses.¹³⁶

There is one argument, however, that may well provide a rationale for selecting a particular body of fact situations for deferral. In its 1974 opinion in *NLRB v. Magnavox Co.*,¹³⁷ the United States Supreme Court singled out freedom of association as the keystone interest protected by the National Labor Relations Act.¹³⁸ So fundamental is this right that it may not be waived by the bargaining representative (although the mode of exercise is subject both to employer regulation and bargaining).¹³⁹ Because section 8(a)(3) is aimed at protecting employees against employer conduct engaged in for the purpose of infringing

133. See Getman, *supra* note 3.

134. See Schatzki, *supra* note 3, at 78.

135. See General Am. Transp., 228 N.L.R.B. at —, 94 L.R.R.M. at 1493 (Penello & Walther, dissenting).

136. See *Alyeska Pipeline Serv. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

137. 415 U.S. 322 (1974).

138. *Id.* at 325-26.

139. See, e.g., 29 U.S.C. § 164(b) (1970) (union-security clauses).

freedom of association, it is obvious that 8(a)(3) cases are pivotal to the maintenance of our statutory labor law scheme and, therefore, the use of public funds to protect this interest is peculiarly appropriate.

While section 8(a)(5) rights are also "public" by definition, it has long been recognized that the right to bargain on a nonassociational-freedom issue can be waived by the bargaining agent,¹⁴⁰ although such waiver will not be inferred lightly.¹⁴¹ Thus, there is less reason to justify the expenditure of public funds. In addition, a failure-to-bargain charge is likely to involve the job protections available to a large number of union members and, therefore, the union will be more willing to use its own limited funds in pursuing a resolution through arbitration.

That a public law-enforcing agency may decide to leave certain matters to enforcement at private cost is hardly novel. Torts are often crimes (conversion, trespass to chattels and battery, for instance) as are some breaches of contract (bad checks given in fulfillment of a promise to pay). That a district attorney would choose to pay scant attention to check collection cases, in part because other avenues of redress are open to the victims, and to devote the time saved to the trial of felony cases, would not shock most of us. We would be shocked, however, if the same district attorney justified a refusal to try a person indicted for murder on the grounds that the victim's family can sue the miscreant in tort. The analogy is not perfect—this is not to suggest that refusals to bargain are misdemeanors and discriminatory discharges felonies—but it does point up that enacting a right or duty into statute, thereby making it public, provides the agent charged with enforcement only modest guidance about what priority to assign that enforcement activity as compared to others. It also illustrates that the availability of a roughly parallel private remedy does not necessarily justify a low priority. The opportunity is created to choose to use taxpayer funds to vindicate a right when that right is made public, but the choice itself is not compelled.

F. Congruence of Normative Doctrine

There are at least two reasons why the Board should not defer to the arbitral forum when the content of doctrine applied in the arbitral forum may not protect the same interests as those protected by Board

140. *Ador Corp.*, 150 N.L.R.B. 1658 (1965).

141. *C & C Plywood Corp.*, 148 N.L.R.B. 414, *enforcement denied*, 351 F.2d 224 (9th Cir. 1965), *rev'd*, 385 U.S. 421 (1967).

doctrine. The first reason applies both to *Spielberg* and to *Collyer* situations. If arbitral forum doctrine does not afford protection to those rights that are guaranteed by section 7 of the National Labor Relations Act, and the Board defers either to an arbitral decision or to the arbitral process, then in effect the charging party, whether employer, union or employee, has been deprived of rights guaranteed by public law as a result of an act of the agency charged with protecting those rights. This is clearly not to be countenanced.

The second reason applies primarily to *Collyer* cases. As a practical matter, if the Board stays its hand in favor of a forum that will apply a different doctrine, it encourages both forum shopping and bifurcation of proceedings. Given a choice of two routes, a party will obviously seek to follow the route that leads to application of the more favorable doctrine. Likewise, in the event the forum deferred to under *Collyer* fails to apply Board doctrine, there is a greater reason to believe that the disfavored party will treat the arbitration process cavalierly and that he will then urge the Board to allow him a "second bite of the apple."¹⁴² Thus, a second proceeding will be necessary and the advantage of arbitral speed and efficiency will be lost.

In some cases it is very easy to determine whether the content of arbitral doctrine and the content of Board doctrine will be essentially the same in a given case. In a *Spielberg* situation in which the grievance-settlement procedure has resulted in a written opinion that sets forth the reasons for the particular outcome, it should be fairly simple to tell whether those reasons are congruent with Board doctrine, or whether they are instead "repugnant to the policies and purposes of the Act."¹⁴³ Even in *Collyer* cases, this determination is sometimes quite simple. The collective agreement may enunciate doctrine that incorporates public law by reference, or on the other hand, it may adopt language that on its face is violative of the policies of the Act. The appropriateness of deferral is thus made clear by looking to the agreement (or possibly to the submission), which spells out the doctrine to be applied by the arbitrator. In most *Collyer* cases, however, absolute certainty of doctrinal congruence is not likely to exist. The discharge clause of the agreement may stipulate that an employee can be discharged only for "cause," but from the context in which the term appears, it may not be possible to determine its precise meaning. Thus,

142. See Getman, *supra* note 3, at 68 (deferring even though inconsistency of doctrine will result in bifurcation of proceedings).

143. *Spielberg Mfg. Co.*, 112 N.L.R.B. at 1082.

the question whether the "cause" referred to is identical to that referred to in section 10(c) of the Act is unanswerable at the preliminary stage when the Board must make its deferral decision.

To complicate the matter further, arbitrators are sharply divided on the question of the extent to which it is appropriate for them to apply principles of public law in reaching their decisions.¹⁴⁴ This division is in part due to the Supreme Court's position that in order to be proper an arbitral decision must be drawn from the agreement. But agreements are construed by some from the perspective of implying congruence between agreement and public law whenever possible,¹⁴⁵ and by others from the perspective of regarding the two as entirely separate and not to be applied together unless explicitly called for.¹⁴⁶ This lack of unanimity within the arbitral community, coupled with the fact that arbitration is not a precedent-oriented system, means that Board deferral decisions, made as they are at preliminary stages of the dispute-settlement process, must be rendered on the basis of a reasonable prediction of whether arbitral doctrine and Board doctrine are likely to coincide.

In the 8(a)(3) area, the likelihood of coincidence is very strong. In *General American Transportation*, Members Fanning and Jenkins theorized that an arbitrator might well find that "good cause" for discharge exists without delving further into the matter to determine whether that cause was actually only a pretext for the employer's true motivation.¹⁴⁷ In the absence of empirical research, it is not possible to demonstrate the truth or falsity of their conclusion,¹⁴⁸ but it would appear to be unjustified. As noted in the section on competence, discharge cases are

144. For an overview of this problem, see DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION, 21 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 42-82 (1968). This includes comments by four of the strongest arbitrators: Richard Mittenhall, Bernard Meltzer, Robert Howlett and Theodore St. Antoine.

145. Howlett, *The Role of Law in Arbitration: A Reprise*, in *id.* at 64-75.

146. Meltzer, *The Role of Law in Arbitration: A Rejoinder*, in *id.* at 58-64.

147. 228 N.L.R.B. at —, 94 L.R.R.M. at 1485.

148. See Getman, *supra* note 3, at 58 n.6. Getman notes that a study of 2,300 arbitration cases indicated 338 involved potential National Labor Relations Act issues, but that only 54 of these 338 indicated on their face consideration of these issues. This does not, however, prove the point that arbitrators are inhospitable to proof of anti-union animus. If, for example, I handled a case in which the "cause" for discharge was tardiness and the grievant's proof indicated that no other employee had ever received more than a reprimand for each misconduct, and also presented proof that a foreman had spoken harshly of the dischargee's activities as a union steward, it is quite likely I would dispose of the case on the basis that the employer lacked "just cause" for discharge and say nothing at all about the possibility of anti-union animus. This would not indicate lack of interest on my part, but only that having reached a conclusion that would result in an award wholly favorable to the alleged discriminatee I saw no reason to go further with the grievant's other proof and thus have to charge the parties with additional time.

among the most commonly submitted to arbitrators, and judgments with respect to the motivation of an employer are inherent in a large number of these situations. Few arbitrators would be unwilling to accept a union demonstration that an alleged cause for discharge was actually a mask for encouraging or discouraging union membership, and virtually none would regard this motivation as "just cause."¹⁴⁹

This general identity between Board doctrine and normal arbitral doctrine with respect to "cause" should not be allowed to obscure one area in which there may be a significant difference between the two forums. The NLRB has developed a concept that certain management conduct is so "inherently destructive" of bargaining agent rights that the conduct violates section 8(a)(1) without regard to the question of anti-union animus ordinarily involved under section 8(a)(3).¹⁵⁰ An example would be the dismissal of all union officials from the employ of the company because of their insistence in taking time off from work for the purpose of representing the members. This "inherently destructive" concept has no general equivalent in most collective agreements and, therefore, no corollary in ordinary arbitral doctrine. It is possible that such a doctrine could be implied from the typical union recognition clause,¹⁵¹ but it is doubtful that arbitrators would be eager to accept this implication. Even if the doctrine were to develop, however, it seems improbable that it would parallel Board doctrine. This group of "inherently destructive" cases, therefore, is not an apt one for deferral.

With respect to management's power to make unilateral changes, in one sense Board doctrine and arbitral doctrine can be very similar.¹⁵² If an arbitrator finds that the collective agreement gives management the right to make a certain decision independently, either because the union has waived any rights to object or because such a decision is a matter of inherent management rights, then a grievance would be disallowed. If the Board were to find that management is empowered by the contract to make a certain decision without prior consultation, either because the matter is specifically reserved to management or because the union has waived its rights to bargain further

149. See F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 646-47 & n.170 (3d ed. 1973).

150. See Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 *CORNELL L.Q.* 491 (1967) (best statement of rationale for doctrine). The concept was approved by the Supreme Court in *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34-35 (1967).

151. See *Ralph Rogers & Co.*, 48 *Lab. Arb.* 40 (1966) (Getman, Arb.).

152. The question is explored well in *Isaacson & Zifchak*, *supra* note 3.

on the issue, then an 8(a)(5) charge would be dismissed. The two competing forums, however, have not always been so in step with one another.¹⁵³ While it is impossible to find arbitral unanimity on virtually any subject, prior to the Board's 1971 decision in *General Motors Corp.*¹⁵⁴ the bulk of arbitral opinion probably would have allowed a broader sphere for employer decision than the Board would have.¹⁵⁵ To some extent, this may still be the case, but not to nearly so large a degree.¹⁵⁶

But what of waiver? On this there remains a divergence of opinion within the arbitration community that defies precise definition. Most arbitrators will consider the same types of evidence, bargaining history, past practice of the parties and so on,¹⁵⁷ but the willingness of individual arbitrators to infer restrictions on management's freedom of action varies substantially.¹⁵⁸ On the other hand, Board doctrine has become quite firm in this area. Waiver, in the Board's view, is not readily to be implied from "zipper" clauses,¹⁵⁹ or from the absence of specific restrictions on management in the agreement.¹⁶⁰

The difference between Board attitudes and the attitudes of some arbitrators with regard to "zipper" clauses and related issues is of less significance in those situations in which there has been a long history of continuous bargaining. In such cases, histories of past practice and

153. See generally MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS, 9 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS (1956) (virtually all arbitrator positions on question are put forward).

154. 191 N.L.R.B. 951 (1971), *enforced sub nom.* UAW v. NLRB, 470 F.2d 422 (D.C. Cir. 1972).

155. See *Fibreboard Paper Prods. Corp.*, 138 N.L.R.B. 550 (1962), *enforced*, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964).

156. In *General Motors*, the Board refused to disavow *Fibreboard*, but applied it in such a fashion that the restrictions on management's freedom of action became much less significant.

157. See generally F. ELKOURI & E. ELKOURI, *supra* note 149, at 252-95.

158. See Killingsworth, *Management Rights Revisited*, in ARBITRATION AND SOCIAL CHANGE, 22 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 1 (1970).

159. A "zipper" clause purports to relieve management of the duty to bargain collectively with respect to any subject not covered in the agreement. See *Radioear Corp.*, 214 N.L.R.B. 362 (1974).

160. See Herman, *Administrative Deference to Private Arbitration*, in LABOR LAW DEVELOPMENTS 1975, at 335, 338-39 (1975). Herman discusses the curious history of *Radioear Corp.*, 199 N.L.R.B. 1161 (1972), *deferred to arbitration*, 61 Lab. Arb. 709 (1973) (May, Arb.), *complaint dismissed*, 214 N.L.R.B. 362 (1974), which may have indicated an acknowledgment by the Board of error in its prior views of lack of finality of bargaining agreements. It is, however, difficult to develop a wholly satisfying conclusion because the second Board decision was reached on a 2-1-2 basis.

While some arbitrators are willing to embrace similar doctrines, others have been constantly critical of the Board's perspective ever since its decision in *Jacob Mfg. Co.*, 94 N.L.R.B. 1214 (1951).

testimony with respect to the content of negotiations can often resolve questions that otherwise might have to be determined on the basis of an abstract philosophy of inherent management rights. If, for example, an employer has been paying the same Christmas bonus for ten years and then suddenly discontinues it without notification to the union or discussion of the matter, it is highly likely that arbitral and Board decisions on management privilege would be identical. When, on the other hand, a bonus that has been maintained outside a bargaining relationship and that has varied substantially in amounts over the years is discontinued during the first year of an employer's initial collective agreement, the likelihood of arbitrator and Board divergence is much greater. All of this suggests that with respect to 8(a)(5) issues, the presence or absence of such a history may be a primary reason for granting or denying deferral.¹⁶¹

G. Conflict of Interests

In the arbitral forum, a grievant's case is ordinarily pleaded and proved by his union. Quite obviously, if there is a significant divergence of interests between grievant and union, and if the interest of the grievant is in protecting a contract right identical to a statutory right, then deferral is inappropriate. For this reason, one should not permit deferral in 8(b)(1)(A) or 8(b)(2) cases involving charges brought by individual employees.¹⁶²

But what of divergences that alone are not sufficient to justify an 8(b)(2) charge, but that may nevertheless be evident in an 8(a)(3) or 8(a)(5) type of case? Consider, for example, the situation in which the union has made an objective, good faith determination that the best interests of most employees would be served by acquiescing silently in a unilateral management change of production process, the impact of which is the dismissal of a small group of skilled workers. In one sense, the union's decision not to take the matter to arbitration seriously prejudices the interests of the employees who stand to lose their jobs. On the other hand, if the matter goes to the Board as an 8(a)(5)

161. See Collyer Insulated Wire, 192 N.L.R.B. at 842.

162. It is, of course, possible that in rare instances an employee may be provided counsel by an employer or third party in an arbitration proceeding involving such an issue, and that a grievance procedure clause may be broad enough to permit thorough consideration of the issue by an arbitrator. Even so, the difficulties likely to be encountered by a grievant at odds with his or her union are substantial. Obtaining willing witnesses, uncovering evidence of past practice and "sizing up" one's opponent are tasks more likely to be performed well by an experienced union steward than by an individual grievant.

case, and the Board enters a bargaining order, it is likely that the union will be willing, in good faith and without violating its duty of fair representation, to bargain away the very same jobs. How, then, can one say this possible divergence has prejudiced the dismissed employees?¹⁶³

For one thing, the dismissed employees have lost all opportunity to benefit through pre-arbitration negotiations. While arbitration itself tends to be a "yes" or "no" affair, the pre-arbitration bargaining negotiations ordinarily offer a variety of alternatives, some of which might serve the interests of the majority union well, while also restricting the privileges of the affected minority less severely than the decision developed unilaterally by management. Thus, if the union chooses to acquiesce in management's unilateral action rather than to force the matter to arbitration, the detriment is not merely loss of the status quo, but also loss of the opportunity to engage in the process of negotiation, which may present the only real possibility of satisfactorily accommodating the interests of all parties concerned.

The Board's remedy in such a case is most likely to be a bargaining order (with or without a direction to restore the status quo plus back pay).¹⁶⁴ But in a situation of this sort, the more important aspect of the grievance dispute-settlement mechanism is not arbitration, but the pre-arbitration conferences between union and management, for those conferences are likely to be on a negotiation model rather than a judicial model. Thus the Board can encourage the parties to engage in pre-arbitration negotiation simply by deferring to the arbitral forum. Indeed, perhaps one may wonder whether Board deferral in 8(a)(5) or 8(b)(3) cases should not be premised on an understanding that the parties will engage not only in arbitration but also in the last step of their grievance process prior to arbitration.

With respect to 8(a)(3) discipline and discharge cases, the significance of conflicts of interests is clear, and the potential for harm to the individual is great. After all, discipline imposed on a single individual within a large unit, and for reasons that are not likely to be shared by any significant number of fellow workers, competes for union attention with other grievances that may affect larger numbers of workers. Since resources are likely to be limited, it would not be unnatural for the

163. The same argument can be applied to the situation in which the union has pursued the matter with less than full vigor.

164. The arbitral award, if any, is likely to be a direction to restore the status quo and compensate for lost wages. Additionally, with regard to Board action, the chances of dismissal are good, and, therefore, there may be no remedy at all.

union to prefer the multi-member grievance over the one-member grievance. It is possible, therefore, that the union's decision with respect to priorities may be sufficiently rational to avoid breaching the duty of fair representation, and thus there may be no independent judicial remedy available.¹⁶⁵

H. *Certainty of Application*

There are three principal reasons for wishing a deferral doctrine to be clear and certain in application. First, parties who can feel reasonably certain that an arbitral decision would have no impact on a Board decision, and who realize that a charge before the Board is very likely, can save themselves the time and expense of arbitration. Second, parties who know that an arbitral decision is likely to have an impact on Board treatment of a case are more likely to present their arguments and evidence as effectively as possible in the arbitration, thus giving the process the greatest chance to succeed in putting the matter to rest. Third, clarity of Board doctrine makes it easier for the regional offices to treat parties uniformly so that the accident of geography does not unduly affect outcomes.¹⁶⁶

On the surface, the outcome of *General American Transportation* and *Roy Robinson* would appear to provide much greater certainty with respect to whether the Board would defer in a given case: in an 8(a)(5) case, deferral is available as a possibility; in an 8(a)(3) case, it is not. Unfortunately things are rarely so simple. As Chairman Murphy herself intimates, there are quite a number of situations in which 8(a)(3) charges can readily be added to charges under section 8(a)(5).¹⁶⁷ Indeed, the *Roy Robinson* case is one in which it is possible to infer from the sequence of events that the decision to subcontract, and thus to discharge, may in part have been motivated by a desire to discourage certain types of union activity, such as the picket-line activity engaged in by the body shop workers in that case. That it is unwise to rely on

165. See, e.g., *Union News Co. v. Hildreth*, 295 F.2d 658 (6th Cir. 1961).

166. It is also possible that greater clarity might affect party willingness to arbitrate, but the motives behind refusing to arbitrate are sufficiently varied that one is hesitant to put that justification forward.

The need for certainty in this area should not be thought of as equivalent to the need for certainty of substantive Board doctrine. The Board's view of what does and does not violate § 7 is likely to have an effect on day-to-day conduct of the workplace. Since an adjective doctrine such as the deferral policy is going to come into play only after an alleged violation of contract and statute has taken place, it is less likely to have such an impact.

167. *Roy Robinson Chevrolet*, 228 N.L.R.B. at —, 94 L.R.R.M. at 1477.

section numbers is also made clear in *Douglas Aircraft Co.*,¹⁶⁸ a recent *Spielberg* case. Although that case arose under section 8(a)(3), the reasons given for not deferring were clearly the same reasons that were given in *Filmation*, a section 8(a)(4) case.

To a degree, the difficulty in achieving certainty of application of deferral doctrines is a result of the informality of prehearing procedures in Board cases. There is no discovery in the ordinary sense, relatively little exchange of information, and no opportunity for the taking of depositions.¹⁶⁹ It is unlikely, however, that the Board will adopt more formal prehearing procedures. One of the chief complaints about the National Labor Relations Board is that its procedures already take too long and are unduly cumbersome and technical. The addition of formal prehearing discovery would create more potential for delay and would stretch the Board's already strained resources even further. Thus, whatever deferral policy is to be developed must rest on the assumption that deferral decisions will be made on the basis of the award, opinion, and whatever documentation—such as transcripts, copies of briefs, and the like—may be available at the time the general counsel issues a complaint. Only if that written record is unusually complete will it be possible in most instances to avoid the need for an administrative hearing.

Since the Board's doctrines in this area are currently in flux, the temptation to ask for a "second bite" is unusually strong; one must anticipate a possible increase in the number of matters brought to the Board following an outcome in arbitration adverse to the interests of the charging party. Similarly, in *Collyer* cases one would readily anticipate a use by many charging parties of the device of listing section 8(a)(3) on the charge form in addition to a listing of section 8(a)(5). Perhaps the most regrettable aspect of *General American Transportation*, in retrospect, is that the Board chose not to adopt the very thoughtful and specific guidelines developed for use by the regional offices in the revised Nash memorandum.¹⁷⁰ Virtually all the factors that have been discussed in the previous paragraphs of this sec-

168. 234 N.L.R.B. No. 80, 97 L.R.R.M. 1242 (Jan. 31, 1978).

169. In *Douglas Aircraft*, the respondent and the union attempted to provide additional information with respect to the nature of the arbitrator's decision by holding a "clarification hearing" in the arbitration case. The majority opinion of the Board simply states: "This Board will not sanction and defer to such a prejudicial procedure." Precisely what aspect of the clarification hearing was prejudicial is not stated. *Id.* at —, 97 L.R.R.M. at 1244.

170. General Counsel Memorandum, Arbitration Deferral Policy Under Collyer-Revised Guidelines, May 10, 1973, 83 LAB. REL. REP. (BNA) 41 (1973).

tion are treated in that memorandum, and while it is possible to differ with the resolution of each problem by Mr. Nash, the analysis of substantive principle and procedural devices are, to this reader, infinitely clearer and easier to follow than those in the *General American Transportation* opinions. At present, regional offices of the Board must now operate under a directive that includes these bemusing paragraphs:

(2) If the charge contains meritorious allegations that certain acts are violative of Section 8(a)(5) and that other acts are violative of Section 8(a)(1) or (3) and if all of these acts are closely related or inextricably intertwined, the Region should issue complaint alleging all violations. Similar policies should be followed with respect to Section 8(b)(3) allegations which are closely related or inextricably intertwined with Section 8(b)(2) or 8(b)(1)(A) allegations.

(3) If the charge contains meritorious allegations that certain acts are violative of Section 8(a)(5) and that other acts are violative of Section 8(a)(1) or (3), and if the former acts are not closely related or inextricably intertwined with the latter acts, the Region should apply the traditional Collyer guidelines to the former allegations and issue complaint on the latter allegations. A similar policy should be followed as to charges which allege 8(b)(3) allegations and 8(b)(2) or 8(b)(1)(A) allegations.¹⁷¹

One must sympathize with the statement by the distinguished editor of one of the loose-leaf reporting services in the labor relations field who recently told a group of attorneys and labor and management representatives: "I simply don't think it is possible to know at present when the Board will and will not defer to anything."¹⁷²

I. Integrity and Credibility of Board Actions

It is obvious that as a matter of internal concern, the Board must maintain a high level of credibility among workers in order for its processes to be taken seriously. The Board is therefore appropriately concerned with retaining maximum opportunity to make decisions on whether its processes have been abused, its name and power appropriated to improper private use, or whether access to its procedures may have been interfered with. It is for this reason that the Board has decided not to defer under *Collyer* in 8(a)(4) cases, and this underlying concern is surely the rationale for the *Filmation* and *Douglas Aircraft* decisions in the *Spielberg* area.

171. Office of the General Counsel, Memorandum 77-58, *supra* note 44, at 153-54.

172. The statement was not intended for attribution, but the present writer will attest to its having been made in early March 1978 and to its being greeted with loud and lengthy applause.

It would seem, nevertheless, that it is possible for the Board to take better advantage of the arbitration process even in cases of this sort, though one must concur in the Board's judgment that outright deferral in such matters will rarely be appropriate.

III. PROPOSALS FOR CLARIFICATION

Any suggestions for the content of a more rational accommodation of NLRB and arbitral processes must take into account not only the criteria developed above, but also the decisions of the ultimate arbiter of national labor policy, the Supreme Court. The Court has never instructed the NLRB, as it has the lower federal courts, to give way so that an arbitrator can render the initial decision in a dispute. Nor has the Court denied the existence of the Board's power to defer in proper cases.¹⁷³ There are, nevertheless, a few principles that may be derived from major court decisions that are clearly relevant to this problem: (1) the responsibilities of the National Labor Relations Board and those of arbitrators overlap;¹⁷⁴ (2) arbitrators possess a special expertise in the interpretation of collective bargaining agreements and are skilled in applying those agreements to the circumstances of industrial practice;¹⁷⁵ (3) National Labor Relations Board deferral doctrine should not be viewed as an election of remedies concept;¹⁷⁶ (4) the cornerstone interest protected by the National Labor Relations Act is individual freedom of association;¹⁷⁷ (5) the maintenance of order in the industrial community requires that certain individual freedoms, such as the right of an individual employee to protest employer decisions on hiring practices, be restricted so the employer can handle such matters through negotiations and arbitrations with a recognized bargaining agent;¹⁷⁸ (6) the decisions of the bargaining agent in negotiation and in the handling of the grievances must not disregard the fundamental interests of individual workers;¹⁷⁹ and (7) the therapeutic significance of arbitration is not

173. The Court has spoken favorably of deferral several times, perhaps most strongly in *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12 (1974).

174. *C & C Plywood Corp.*, 148 N.L.R.B. 414 (1964), *enforcement denied*, 351 F.2d 224 (9th Cir. 1965), *rev'd*, 385 U.S. 421 (1967).

175. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

176. *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974).

177. *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974).

178. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975); *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974).

179. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).

wholly dependent on the binding effect of the resulting decision.¹⁸⁰

There has been a regrettable all-or-nothing quality to some of the discussion in this area. This is unfortunate, not only because of the emotional heat occasionally generated, but also because an all-or-nothing view is simply nonsensical: the National Labor Relations Board cannot give all, because to do so would violate the basic charge entrusted to it by the Congress. Accommodation, not abdication, is what is needed. In the following suggestions, four possible treatments of arbitral decisions and grievance disputes-settlements processes will be employed: (1) total disregard of the arbitral decisional forum; (2) treatment of arbitral findings and decisions as evidence; (3) recognition of an arbitral decision as the final appropriate disposition of a dispute; and (4) deferral to the arbitral process, by staying Board processes for a time so that the grievance-settlement procedures provided by contract may be utilized, despite the objections of one or more parties.

A. *The Spielberg Cases*

The wisdom of the *Spielberg* recognition of arbitral decisions is clear. This doctrine permits the conservation of Board resources, minimizes duplication of effort, and raises no difficulty with respect to costs since the costs of the arbitration have already been incurred and allocated. There are, however, three problems in this area that need to be addressed.

First is the question of what to do about an arbitral decision once the Board has decided that it will not recognize the decision as the ultimate disposition of the dispute. The rational alternatives are to disregard the decision or to give the decision weight as evidence. The opinion in *Filmation* seems to imply that a majority of the Board will simply disregard arbitral findings once they have determined recognition of the award is inappropriate.¹⁸¹ That is unfortunate, for it detracts from the significance of a dispute-settlement process that carries the specific endorsement of the Congress in section 203(d) of Taft-Hartley. The better view, surely, would be that practice urged in the Court's famous footnote 21 to *Alexander v. Gardner-Denver*:

We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargain-

180. *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964).

181. *See* 227 N.L.R.B. at —, 94 L.R.R.M. at 1471.

ing agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.¹⁸²

By leaving open the possibility that arbitral findings of fact and interpretations of the contract will be given great weight in later Board proceedings, the Board would encourage the parties to enter the arbitration forum fully prepared to give maximum effort to the disposition of the matter in that forum. Surely this would be in keeping with the therapeutic objectives described by the Supreme Court in *Carey*.¹⁸³

Second, with passage of time it has become increasingly clear that very few scope-of-unit representation matters are presented to arbitral forums in such a way that recognition of the resultant award as dispositive can be appropriate. Accordingly, the Board's ordinary course of action should be to treat arbitral opinions in these matters as evidence and to give the arbitral findings such weight as may be justified in light of the factors listed in the *Gardner-Denver* footnote.

Third, because of the importance of freedom of association rights in the statutory scheme, the *Banyard* and *Stephenson* opinions merit careful consideration by the Board in these disputes. After all, it should not be difficult to make a prima facie demonstration of arbitrator expertise through a showing of past education, experience, or appointment to a Federal Mediation and Conciliation Service or American Arbitration Association panel. Demonstrating that the arbitrator considered the charge that an employee was singled out for special treatment because of his union sympathies will clearly be much more difficult in the case of decisions without written opinions. In particular, it would be difficult, though not impossible, to demonstrate this if the grievance has been settled prior to the arbitration stage. Many cases will involve written opinions, but even for those that do not, there may nonetheless be a written record of some sort, including the griev-

182. 415 U.S. at 60 n.21.

183. 375 U.S. at 272.

ance itself, a statement of the disposition of the grievance at each stage of the proceedings, and possibly a submission to the arbitral forum. This means putting a premium on formality in the grievance-settlement procedure, even though one of the perceived advantages of such systems is their relative lack of formality. When one balances that perceived advantage against the importance of the interests involved, however, the better view would seem to be that the Board should recognize grievance-settlement decisions as binding only if it can be demonstrated that the right to free association has been given specific protection. With respect to other matters, the *Banyard* and *Stephenson* requirements seem superfluous. The bargaining agent can waive its bargaining privileges, should it choose to do so, unless such a waiver violates the duty of fair representation. There is nothing shocking, therefore, about requiring that a union raise its full set of arguments at the arbitration forum, or be held to have waived them in non-associational-freedom cases.

B. *Dubo* Cases

The rationale underlying the *Dubo* case is in some way similar to that involved in *Carey*. Even if the parties' disputes may not be fully resolved through the arbitration proceeding, it is wise to let the "therapy" of arbitration take place; and clearly it is appropriate to encourage this by delaying Board activity for a time. Therefore, unless a case involves circumstances that would lead to requesting a 10(j) injunction, the present Board attitude of restraint is appropriate.

C. *Collyer* Cases

Can these cases be satisfactorily resolved by slight modification of the *Dubo* doctrine? In *Spielberg* cases, arbitration has already been completed on a voluntary basis. In *Dubo* cases, the process is already under way, either because the parties have commenced the process voluntarily or, as in *Dubo* itself, because there is a court order requiring that the process be continued. In *Collyer* cases, on the other hand, the impact of deferral is to require a party to go to arbitration who does not wish to. In many instances, of course, it would be possible for the respondent in a *Collyer* situation to have gone into a federal district court to obtain an order requiring arbitration. In other instances, going into court would not be possible because of the expiration of time limits or other similar technical deficiencies in the request for arbitration. This obviously raises the possibility that the Board might con-

sider a policy under which it would stay its hand in those cases in which it would be possible for a party to obtain a court order enforcing an arbitration agreement. In that way, *Collyer* cases would be handled essentially by an extension of the *Dubo* principle. Unfortunately, the apparent simplicity of that approach is deceptive. The Board would soon find itself trying to "second guess" arbitrability decisions made by the courts, and would find itself involved in technical constructions of arbitration agreements that could be both difficult and time consuming. Moreover, that approach would not reflect most of the policy judgments outlined above.

In discussing Board policy, it is important to remember that in all likelihood there will continue to be considerable activity by regional offices encouraging the parties to work out their own problems even when formal deferral would not be appropriate. Because the decision to withhold a complaint is not reviewable, there could thus develop a gap between Board policy and regional office practice. It is unlikely, however, that this will happen. Both former General Counsel Nash and present General Counsel Irving have been very sensitive to problems of Board-arbitrator overlap and have provided the regional offices with memoranda setting out guidelines that should have the effect not only of promoting uniformity among the front offices but also of ensuring that the informal practices of those offices reflect the general counsel's understanding of Board attitudes.¹⁸⁴

While the reasoning in *General American Transportation* and in *Roy Robinson* has been criticized occasionally in this essay, the emerging thrust of these recent decisions is sound. The underlying position being taken is that the right of individual workers to freedom of association is of such importance that the Board should not stay its processes in order to require those rights to be adjudicated in a private forum. There are, however, several reasons why these cases may cause difficulty.

First, one can envision the situation in which a single discharged employee wishes to press forward with arbitration of his claim that he was wrongfully dismissed, but the union, perhaps because of costs, does not want to go forward, preferring to leave the matter to the Board. In such cases, when the group interest is minimal and the individual interest strong, there is no justification for either a court or the Board to

184. See Office of General Counsel, Memorandum 77-58, *supra* note 44 (General Counsel Irving); General Counsel Memorandum, Arbitration Deferral Policy Under Collyer-Revised Guidelines, May 10, 1973, *supra* note 170 (former General Counsel Nash).

require the union to proceed, unless the union's refusal to proceed violates its duty of fair representation. On the other hand, if it is the judgment of the grievant that proceeding quickly is better than waiting for the Board to handle the matter, then the policies underlying section 9(c)¹⁸⁵ would indicate that the Board should consider giving this judgment effect. If the respondent-employer is willing to arbitrate the matter and the grievant is willing to provide the funding for the presentation of his own case, then deferral would seem appropriate unless the union is able to demonstrate that arbitration is a totally unsuitable forum.

Second, it is unfortunate that the opinions in these cases are written so often in terms of subsections. The same conduct can violate several sections of the Act, or conduct violative of one section may be intertwined with conduct violative of another. Surely, the important point is not what section number happens to be selected at the time a charge is filed, when the full range and complexity of the case may not yet be understood. Rather, the focus should be on the issues of individual freedom of association or of Board integrity and credibility that are raised in the case. These opinions should be read to require that the Board not defer in cases involving these issues, whatever the adventitious selection of section number may have been.

Finally, one hopes that the Board will soon resolve any apparent inconsistencies between its own view of waiver of the right to bargain and the view held by arbitrators. The Board and arbitrators are now somewhat more likely to take similar views of what decisions are inherently those of management, but when one turns to the issue of waiver, whether the two forums will agree remains doubtful. If this is indeed the case, then the propriety of deferral in such cases is likewise doubtful.

Such modest emendations of the doctrines developed in the recent cases is surely not too much to hope for. The ingredients for these changes are already present in the divergent views of the members of the Board. The most recent appointee is a person with Board experience who is likely to prove sensitive to the legitimate claims of each forum because of his past experience in dealing administratively with *Collyer* problems.

The ease with which these adjustments could be made is best demonstrated by articulating them in the form of a relatively

185. National Labor Relations Act § 9(c), 29 U.S.C. § 159(c) (1970).

comprehensive set of "rules" on Board grievance procedure accommodation. The four suggested rules reflect the balancing of interests set out in the prior discussion. Rule I is limited to determinations made by neutrals, and is based on the *Gardner-Denver* opinion. Rule II is a restatement of the *Spielberg* doctrine, modified to take into account the primacy of freedom of association rights and the Board's responsibility to protect its own processes. Since the freedom of association cases would not be entitled to recognition, the balance of value calls for rejecting the *Banyard* rule. It is important to remember that if recognition is not available under Rule II, evidentiary weight can still be given under Rule I. Rule III is a restatement of the *Dubo* doctrine, making explicit its inapplicability in cases in which the Board would ordinarily seek preliminary injunctive relief. Rule IV adopts the outcome of *General American Transportation*, but modifies it to allow an individual employee to choose between the more rapid arbitral resolution of a grievance and the less costly (in out-of-pocket terms) Board resolution when only the individual's rights are involved.

A SUGGESTED DOCTRINE FOR ACCOMMODATION

Rule I

- A. The National Labor Relations Board will admit as evidence in unfair labor practice cases determinations of issues relevant to such cases made in contractually provided grievance systems, if:
- (1) the determination is in writing; and
 - (2) the determination was made by a neutral(s) (whether designated as arbitrator, umpire, referee or other title) or by a board chaired by a neutral.
- B. The weight to be accorded such a determination depends upon:
- (1) the specificity and clarity of the determination;
 - (2) the regularity of the procedures employed;
 - (3) the education, training and experience of the neutral(s) making the determination; and
 - (4) the extent to which the determination was made on the basis of doctrine developed by this Board.

Rule II

- A. The National Labor Relations Board will recognize as final and binding the resolution of a dispute by a grievance-settlement proc-

ess when the dispute arguably involves both questions of contractual and National Labor Relations Act statutory interpretation if:

- (1) the parties had agreed to be bound by the resolution;
 - (2) the procedures employed in the process were fair and regular;
 - (3) the resolution of the dispute is not repugnant to the purposes and policies of the National Labor Relations Act; and
 - (4) the dispute does not involve to any significant degree the exercise by employees of the rights of freedom of association, nor the integrity and accessibility of the Board's procedures.
- B. A party who wishes to have the Board recognize an award makes out a prima facie case for such recognition upon a showing by a preponderance of the evidence that:
- (1) there is an agreement providing for resolution of grievances by procedures that afford the charging party or his representative an opportunity to be heard;
 - (2) the dispute was of the sort covered by such an agreement; and
 - (3) the procedures resulted in a resolution of the dispute, including disposition of the issue that is the express or implied subject of the charge(s) before the Board.
- C. A party opposing recognition of resolution of the dispute through grievance procedures must present clear and compelling proof that one of the standards set out in paragraph A above was not met.
- D. If a party who moves for recognition demonstrates that the resolution of a dispute by the grievance procedures would be entitled to recognition except for a failure to resolve a particular issue raised by the charge, the Board will recognize such resolution provided the moving party proves by clear and compelling evidence that (a) the undisposed of issue could have been considered in the grievance procedure, and that (b) a party other than the moving party intentionally omitted to raise that issue. The opposing party, however, can avoid recognition by demonstrating that there was adequate justification for failing to raise the issue in the grievance procedure forum.

Rule III

- A. If a charge brought before the Board involves issues substantially identical to issues currently under submission to a grievance procedure, and if the parties are continuing to seek resolution of the issue through such a procedure, either voluntarily or as the result

of a court order, the Board will withhold consideration of the issue pending outcome of the grievance procedure.

- B. The Board will not withhold consideration of an issue with regard to which it is the Board's obligation to seek relief under section 10, subsections (j), (k), or (l),¹⁸⁶ of the National Labor Relations Act.

Rule IV

- A. A respondent charged with commission of an unfair labor practice may move that the Board withhold consideration of one or more issues involved in that charge on the ground that such issue may properly be resolved through an existing grievance procedure. The Board will grant such motion if:

- (1) the charge does not involve significant issues of the rights of employees to freedom of association or of the integrity or availability of Board processes, and
- (2) the movant demonstrates that
 - (a) the grievance procedures are provided for by an agreement between an employer and a representative of employees who have engaged in bargaining for a significant period;
 - (b) the grievance procedures appear to be fair and regular;
 - (c) the issue is one that falls within the range of issues subject to such grievance procedures; and
 - (d) the movant waives his privilege to object to such procedural irregularities as failure to file a grievance within the proper time.

- B. In making the determination whether a given issue is subject to resolution through a grievance-settlement procedure, the Board will apply the standards developed in the federal courts pursuant to the decision in *United Steelworkers v. Enterprise Wheel & Car Corp.*

- C. If the Board would grant a motion to withhold its consideration but for the fact that an issue of freedom of association is presented, the Board will grant the motion if the movant shows that the affected employee(s) desires that the matter be resolved through the grievance system, and that they are willing to assume the responsibility for pursuing the issue in that forum. The privilege of bar-

186. National Labor Relations Act § 10(j)-(l), 29 U.S.C. § 160(j)-(l) (1970).

gaining representatives to participate pursuant to section 9(a)¹⁸⁷ must be preserved in such cases.

- D. The Board will not withhold consideration of any issue with regard to which it is the Board's obligation to seek relief under section 10, subsections (j), (k), or (l), of the National Labor Relations Act.
- E. The Board will retain jurisdiction of any matter in respect of which a motion to withhold consideration is granted, in order to determine whether the standards set out in Rule II have been met.
- F. Only in the most exceptional circumstances will the Board stay its procedures for a period exceeding 180 days.

None of the rules incorporates an election of remedies doctrine, but Rules I, II and III implicitly recognize that significant savings in cost are possible if the initial decision on an issue is reasonably likely to be final. Repugnancy is dealt with primarily in terms of burden of proof, in Rule II, paragraphs B and C. The closest issue in these rules is whether Rule II, paragraph B, is appropriate when there has been no participation by a neutral party. Since recognition is not afforded by Rule II in freedom of association cases, however, bipartite resolution through the grievance process seems so nearly akin to bargaining that the rule stated seems sensible. If freedom of association cases remain the subject of outright recognition under *Spielberg*, then the party seeking recognition should carry the burden of showing consistency of resolution with Board doctrine, and the *Banyard* doctrine should be adopted.

187. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1970).