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A PROPOSAL TO END NLRB DEFERRAL TO THE ARBITRATION PROCESS

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In January 1984 the NLRB, reconstituted by President Reagan's appointees, announced significant changes in the Board's policies concerning deferral to the arbitration processes established by employers and unions in their collective bargaining agreements.[1] The new policies are redolent with the politics of a changed administration rather than expertise in labor relations. The changes continue the Board's uncertain treatment of the relationship between its jurisdiction to prevent unfair labor practices and arbitrators' decisions concerning collective bargaining agreements.[2] The newly announced policies are consistent with the conviction that the federal government should sharply reduce its regulatory activities, transferring its previous responsibilities to local governments or private initiative. These policies are also consistent with a view that labor unions are not desirable institutions that deserve protection to ensure their continued existence and growth. They reflect a buoyant optimism that, despite the problems associated with unbridled pursuit of self-interest, all will go well if government will only go away.

There certainly will be judicial challenges to, and probably rejection of, at least portions of the new policies. The certainty of judicial review thus makes it appropriate to reconsider the entire policy of Board deferral to the arbitration process. This article is such a reconsideration and proposes that courts should no longer permit the Board to pursue a policy of deferral. Primary responsibility for development of the policy governing the relationship between the prevention of unfair labor practices and the arbitration process should be placed upon the General Counsel of the NLRB, who now in fact makes the decisions and thus produces the law in action even under Board announced policies. Questions of deferral have arisen in part because of the unsatisfactory state of the law concerning the duty to bargain during the term of a collective bargaining agreement. The present law suggests that actions taken, usually by employers, may be either violations of the duty to bargain or violations of the collective bargaining agreement. The proposed

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1. United Technologies Corp., 268 N.L.R.B. No. 83, 115 L.R.R.M. 1049 (1984); Olin Corp., 268 N.L.R.B. No. 86, 115 L.R.R.M. 1056 (1984).

2. *See infra* text accompanying notes 64–81.

clarification of the law will eliminate that apparent overlapping of jurisdictions. Other questions now considered under the rubric of deferral would be better treated simply as evidentiary matters to be considered in determining whether a complaint should issue on an unfair labor practice charge. The General Counsel, whose office is an administrative agency for the purposes of the Administrative Procedure Act,[3] should use rule-making procedures to promulgate the rules concerning the effect of a prior arbitration award in determining whether a complaint shall issue.[4] This would not ensure judicial review of refusals to issue complaints based upon an assessment of evidentiary matters in every case, but it would offer the opportunity for review of the policies followed by the General Counsel with respect to arbitration awards.[5] The General Counsel should also publish at least a representative sample of arbitration decisions found to justify the dismissal of charges.

THE NLRB'S DEFERRAL POLICIES

It is not the purpose of this paper to provide a review of the Board's evolution of deferral policies or criticisms of the individual developments which occurred in the process of that evolution. That has been done thoroughly and excellently by commentators as they observed that process of evolution.[6] A short summary statement should suffice.

3. Section 2(a) of the Administrative Procedure Act defines an agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. § 551(1) (1976). The General Counsel is appointed by the President, by and with the advice and consent of the Senate, for a term of four years. Labor Management Relations Act, 29 U.S.C. § 153(d) (1982). The NLRB General Counsel thus is not an employee of the Board, as are the general counsels of many other agencies. He has under the statute "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . ." 29 U.S.C. § 153(d).

See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148, 158–59 (1975) (the Supreme Court held that advice and appeal memoranda, which explain decisions by the General Counsel not to file a complaint, are "final opinions" made in the adjudication of a case as adjudication is defined under the Administrative Procedure Act).

4. The Labor-Management Relations Act, 29 U.S.C. § 153(d), does not specifically confer power on the General Counsel to promulgate rules, but the general grant of rulemaking power in section 6 of the Act, 29 U.S.C. § 156 (1982), to the "Board" should extend to the General Counsel of the Board.

5. *See infra* text accompanying notes 100–08.

6. Atleson, *Disciplinary Discharges, Arbitration and NLRB Deference*, 20 BUFFALO L. REV. 355 (1971); Christensen, *Private Judges, Public Rights: The Role of Arbitration in the Enforcement of the National Labor Relations Act*, in THE FUTURE OF LABOR ARBITRATION IN AMERICA 49 (1976); Covington, *Arbitrators and the Board: A Revised Relationship*, 57 N.C.L. REV. 91 (1978); Getman, Collyer Insulated Wire: *A Case of Misplaced Modesty*, 49 IND. L.J. 57 (1973); Schatzki, *NLRB Resolution of Contract Disputes Under Section 8(a)(5)*, 50 TEX. L. REV. 225 (1972); Sherman, *Comment on The NLRB and Arbitration*, in PROCEEDINGS OF THE TWENTY SEVENTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 138 (1975); Teple, *The NLRB Policy of Deferral to Arbitration*, 5 U. TOL. L. REV. 563 (1974); Zimmer, *Wired for* Collyer: *Rationalizing NLRB and Arbitration Jurisdiction*, 48 IND. L.J. 141 (1973); Comment, *Judicial Review and the Trend Toward More Stringent NLRB Standards on Arbitral Deferrals*, 129 U. PA. L. REV. 738 (1981).

The possibility of deferral arises in two contexts. The first is when an arbitrator has rendered an award. The question then is whether the Board should defer, giving effect to that award in a subsequent unfair labor practice proceeding. In this context, the Board's decision on deferral will vary with the type of unfair labor practice under consideration in the subsequent proceeding. The second context is when the arbitration process has not begun, or if begun, has not yet been completed. Here, the question is whether the Board should stay its process until the arbitration has been completed. Here also, the Board's response to the deferral problem will vary, depending upon the unfair labor practice charged.

The Board has approached all deferral questions, regardless of context and type of unfair labor practice, from a broad reading of section 10(a) of the Labor Management Relations Act of 1947.[7] That section, which empowers the Board to prevent unfair labor practices, contains the express statement that the power granted, "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise."[8] The Board views arbitration as a means of adjustment established by agreement and therefore a process which cannot affect its power to prevent unfair labor practices.[9]

The Board's deferral policies where an arbitrator's award had been rendered were first stated in a 1955 decision, *Spielberg Manufacturing Co.*[10] As part of a strike settlement agreement the parties had agreed to arbitrate the question of whether four strikers should be reinstated despite the employer's assertion that they had engaged in unprotected conduct on the picket line. The case, therefore, involved the questions of whether alleged strike misconduct occurred and, if so, whether it justified termination of the employment of certain strikers. The Board stated that it would defer to an arbitrator's award if (1) the arbitration proceedings appeared to have been fair and regular, (2) all parties had agreed to be bound, and (3) the decision was not clearly repugnant to the purposes and policies of the Act.[11] The Board accepted the arbitration conclusion that the strikers had engaged in misconduct which justified termination of their employment without deciding whether it would have decided the case as did the arbitration panel.[12] In 1961 in *Monsanto Chemical Co.*,[13] the Board added a fourth

7. 29 U.S.C. § 160(a) (1959).

8. *Id.*

9. *See* Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1081–82 (1955); Collyer Insulated Wire, A Gulf & Western Systems Co., 192 N.L.R.B. 837, 841 (1971).

10. 112 N.L.R.B. 1080.

11. *Id.* at 1082.

12. *Id.*

13. 130 N.L.R.B. 1097 (1961); *see also* Raytheon Co., 140 N.L.R.B. 883, 884 (1963), *vacated on other grounds*, 326 F.2d 471 (1st Cir. 1964).

requirement that the unfair labor practice issue have been presented to and considered by the arbitrator. This position was reversed in 1974 by the decision in *Electronic Reproduction Service Corp.*,[14] in which a divided Board held that it would defer to an arbitration award in a discipline or discharge case, even though it appeared that evidence on the unfair labor practice charged had not been presented to the arbitrator. An exception would be made where bona fide reasons, other than the attempt to preserve the opportunity for trial before two forums, were established for the failure to present evidence on the unfair labor practice in the arbitration proceeding.[15]

The *Electronic Reproduction* decision provoked a sustantial amount of controversy, which led to its overruling in 1980, again by a divided Board, in *Suburban Motor Freight*.[16] That case held that the Board would not defer to an arbitration award which bore no indication that the arbitrator had ruled on the statutory issue of discrimination, and placed the burden on the party seeking deferral to prove that the issue of discrimination was litigated before the arbitrator.[17] *Suburban Motor Freight* was reaffirmed by a majority of the Board as recently as August 1982 in *Propoco, Inc.*[18] A dissenter in *Propoco* argued that the Board should defer to the arbitration award if: "(1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) it appears from the record that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice."[19]

In January 1984 the Board, reconstituted by President Reagan's appointments, decided *Olin Corp.*[20] and overruled *Suburban Motor Freight*. The majority adopted the standards suggested by the dissent in *Propoco* for determining when the Board will defer to an arbitration award, to which the majority added a new definition of repugnancy to the policies and purposes of the Act. The majority will no longer require that an award be totally consistent with Board precedent. It will defer to an award which is not "palpably wrong," that is to say not susceptible to an interpretation consistent with the Labor Management Relations Act. The majority also placed on the party objecting to deferral the burden of showing that the standards for deferral have not been met.[21]

14. 213 N.L.R.B. 758, 759–61 (1974).
15. *Id.* at 762.
16. 247 N.L.R.B. 146 (1980).
17. *Id.* at 146–47.
18. Professional Porter & Window Cleaning Co., Division of Propoco, Inc., 263 N.L.R.B. 136 (1982).
19. *Id.* at 145.
20. 268 N.L.R.B. No. 86, 115 L.R.R.M. 1056 (1984).
21. As Member Zimmerman noted in his partial dissent, there appears to be no sound procedural ground for placing this burden on the General Counsel, who was not a party to the arbitration

The Board's deferral practices, where the arbitration process had not been completed, began with a case entitled *Dubo Manufacturing Corp.*[22] In that case the Board withheld its processes until the completion of an arbitration proceeding which a federal district court had ordered.[23] It was not until 1971, in *Collyer Insulated Wire,*[24] that a Board majority announced a policy of deferral to arbitration even though the process had not been undertaken. That case involved a charge that changes by the employer in wage rates of maintenance employees were unilateral changes that violated the duty to bargain. The employer contended it was authorized to make such changes under the collective bargaining agreement and was willing to arbitrate the dispute under the terms of an arbitration clause that was unquestionably broad enough to encompass the dispute.[25] The majority dismissed the complaint, but retained jurisdiction over the charge pending a showing that the dispute was not amicably settled in the grievance and arbitration procedures, that the procedures were not fair and regular, or that they reached a result repugnant to the Act.[26] As the conditions of retaining jurisdiction indicate, the majority viewed its action as a withholding of its undoubted power to remedy an unfair labor practice and not as recognition that the willingness to arbitrate a contractual dispute could constitute a discharge of the duty to bargain during the term of the agreement.

One year later, in *National Radio,*[27] a majority of the Board extended the *Collyer* doctrine to charges of violation of 8(a)(3), again viewing the action as a witholding of its undoubted power to remedy an unfair labor practice. Of course, a willingness to arbitrate whether there was just cause for discharge could not eliminate the unfair labor practice if the discharge was the result of anti-union motivation. (An arbitration decision that the action challenged in Collyer was permitted by the agreement would establish that there had been no refusal to bargain.) As a review of the commentary will indicate,[28] the *National Radio* decision was controversial, and it lasted only five years. In 1977 a divided Board, in *General American Transportation*

proceeding. Of course, in most if not all cases, the General Counsel's position that there should be no deferral will support the position of the charging party who may have been a party to the arbitration proceeding. Individual employees, however, are seldom parties with power to control the course of an arbitration proceeding. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 131–32 (1973).

22. 142 N.L.R.B. 431 (1963).

23. *Id.* at 432.

24. 192 N.L.R.B. 837 (1971).

25. *Id.* at 837–38. Other factors favoring arbitration and limiting the scope of the decision were that (1) the parties had a long and productive collective bargaining relationship, (2) there was no claim of enmity, (3) the contract obligated the parties to arbitrate disputes, (4) the meaning of the contract was at the center of the dispute, and (5) the arbitrator could resolve both the contractual dispute and the unfair labor practice charge. *Id.* at 842.

26. *Id.* at 843.

27. 198 N.L.R.B. 527 (1972).

28. *See supra* note 6.

Corp.,[29] held that deferral would not be practiced when the unfair labor practices charged were violations of 8(a)(3) and 8(a)(1). On the same day, a different Board majority, in *Roy Robinson Chevrolet*,[30] retained the *Collyer* principle of deferral when the charges were of violation of 8(a)(5). The division of views among the Board members warned that the new rules did not have a guaranteed permanence. In January 1984, on the same day that it decided *Olin Corp.*, the reconstituted NLRB overruled *General American Transportation Co*. The overruling decision, *United Technologies Corp.*,[31] announced that the *Collyer principle* would be applied to charges of violations of sections 8(a)(1) and (3) and 8(b)(1)(A). Board Member Zimmerman, a hold-over appointee of President Carter, dissented in both cases.

On March 6, 1984, the General Counsel of the NLRB issued a memorandum to regional directors establishing guidelines for deferral pursuant to the Board's decision in *United Technologies*.[32] He noted that for deferral to occur, the grievance-arbitration provisions of the agreement must "clearly encompass" the dispute, the charged party must be willing to arbitrate the dispute and waive any timeliness requirements of those provisions, and, despite the alleged misconduct, there must be "a workable and freely resorted to grievance procedure." The history of the relationship between the parties is to be considered in determining whether the grievance and arbitration machinery can reasonably be relied upon to function and resolve the dispute fairly. A special problem arises if a charge is filed by an individual and the union refuses to process the grievance to arbitration. In such a case deferral should not be practiced unless the union's refusal is motivated solely by reason of a desire to avoid deferral.[33] Nor should deferral be practiced if the interests of the union are adverse to those of the charging party.[34]

29. 228 N.L.R.B. 808, 808–09 (1977).

30. 228 N.L.R.B. 828, 829 (1977). Chairman Murphy provided the swing vote by voting to make one majority in *Roy Robinson Chevrolet* and to make another majority in *General American Transp. Co.*

31. 268 N.L.R.B. No. 83, 115 L.R.R.M. 1049 (1984).

32. Memorandum GC 84–5, March 6, 1984, in News and Background Information, 115 Lab. Rel. Rep. 334. The General Counsel did not follow the rulemaking provisions of the Administrative Procedure Act in promulgating the memorandum. For an argument that refusal of a regional office to issue a complaint on the basis of the memorandum is subject to judicial review and correction because of the violation of the APA, see Peck, *The Administrative Procedure Act and the NLRB General Counsel's Memorandum on Fair Representation Cases: Invalid Rulemaking?* 31 LAB. L.J. 76 (1980).

33. Footnote 12 of the Memorandum suggests that regional personnel be alert to the possibility that the employee and the union may have agreed to have the union refuse to process the grievance, all in an effort to avoid deferral.

34. For a recent decision holding that deferral to arbitration would have been improper see Handrickson Bros., Inc., 272 N.L.R.B. No. 74, 1984–85 NLRB (CCH) § 16,735 (1984).

SOURCES OF THE DEFERRAL PROBLEM

There would be no need to consider whether the NLRB should defer to the arbitration process if the law had developed to give a preemptive effect to the NLRB's jurisdiction to determine whether an unfair labor practice had occurred. At one time there was a belief that Congress had entrusted the NLRB with responsibility for development of a single, uniform, and centrally administered system of labor law. This belief was so strong that the Board was said to have an exclusive competence with respect to activities arguably subject to sections 7 or 8 of the Labor Management Relations Act.[35] The law did not continue to develop that way, perhaps because of a weakening conviction that all problems affecting employment would be resolved by promoting the process of collective bargaining. New constituencies developed, and employees could no longer be viewed simplistically as either organized or unorganized. Persons seeking protection from racial discrimination, sex discrimination, age discrimination, etc., formed separate organizations. These organizations frequently viewed labor unions with hostility because of their complicity in the discriminatory practices that were to be challenged. Employees in these organzations did not want the responsibility for vindicating their diverse interests assigned to one centralized labor agency. The assignments, therefore, were made instead to the newly created agencies, such as the Equal Employment Opportunity Commission, or older agencies which had not been intimately involved with the collective bargaining process, such as the Wage and Hour Administrator of the Department of Labor. Those agencies, following the predictable process of administrative growth, developed independent programs for accomplishment of the missions as defined in their statutory authorizations.

More to the point, it was established that conduct which might be an unfair labor practice could also be the subject of a suit for violation of a collective bargaining agreement,[36] the subject of an arbitration proceeding,[37] or a suit against a union for breach of the duty of fair representation.[38] The NLRB no longer enjoyed an assured primacy with respect to development of labor policy for the nation. The complications grew with recognition of the NLRB's jurisdiction to interpret collective bargaining agreements in resolving unfair labor practices, even though it was clear that Congress had not intended to confer upon the Board a general jurisdiction to decide claims for breach of contract.[39] The Board asserted this jurisdic-

35. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959).

36. *See* Smith v. Evening News Ass'n, 371 U.S. 195, 196–97 (1962).

37. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). *Cf.* Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

38. Vaca v. Sipes, 386 U.S. 171 (1967).

39. NLRB v. C & C Plywood Corp. 385 U.S. 421, 426–27 (1967); *see also* Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

tion despite the presence of an arbitration clause broad enough to permit consideration of whether the alleged unfair labor practice was a breach of contract.[40]

Another source of difficulty in establishing the appropriate relationship between the NLRB and the arbitration process is the unsettled and uncertain status of that process itself. The Supreme Court's decisions in the Steelworkers Trilogy[41] did successfully sluice an enormous number of cases from the courts to arbitrators, but did so on terms that do not ensure consistency and uniformity of results. Arbitrators are not required to apply the law that courts would apply.[42] The proper approach of courts to arbitration awards is to refuse to review the merits of dispute; mere ambiguities in an opinion accompanying an award are not basis for setting the award aside.[43] Generally, courts are unwilling to require an arbitrator to recognize a decision in a prior arbitration as a controlling precedent.[44] A consequence is a perception that arbitrators do not follow prior decisions in cases arising between the same parties on the same or a similar issue, even though there are a considerable number of cases in which arbitrators have given controlling effect to a prior award.[45] This perceived lawlessness of arbitration is a

40. C & S Indus., Inc., 158 N.L.R.B. 454 (1966).

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

42. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. at 598–99.

43. *Id.* at 596, 598.

44. W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 764-66 (1983); IBEW Local 199 v. United Tel. Co., 738 F.2d 1564 (11th Cir. 1984); Little Six Corp. v. Mine Workers Local 8332, 701 F.2d 26, 27–28 (4th Cir. 1983); Butler Armco Indep. Union v. Armco, Inc., 701 F.2d 253, 255–56 (3rd Cir. 1983); Boston Shipping Ass'n, Inc., v. International Longshoremen's Ass'n, 659 F.2d 1, 2–3 (1st Cir. 1981); New Orleans S.S. Ass'n v. General Longshore Workers, 626 F.2d 455, 468 (5th Cir. 1980), *aff'd sub. nom.* Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 457 U.S. 702 (1982); Riverboat Casino, Inc. v. Local Joint Executive Bd., 578 F.2d 250, 251 (9th Cir. 1978); Westinghouse Elevators v. S.I.U. de Puerto Rico, 583 F.2d 1184 (1st Cir. 1978); United Elec. Radio & Machine Workers v. Honeywell, Inc., 522 F.2d 1221, 1228 (7th Cir. 1975); Atlantic Richfield Co. v. Atlantic Independent Union, 537 F. Supp. 371, 373 (E.D. Pa. 1982); Typographical Workers Union v. Bulletin Co., 484 F. Supp. 1164, 1165 n.1 (E.D. Pa. 1980); Machinists v. Associated Trans., Inc., 92 L.R.R.M. 2342, 2344 (D.N.C. 1976); Michigan Shippers v. Local 299, Teamsters, 61 L.R.R.M. 2466, 2469 (E.D. Mich. 1966). *But see* Oil, Chem. & Atomic Workers, Local No. 4-16000 v. Ethyl Corp., 644 F.2d 1044 (5th Cir. 1981), *later app.*, 703 F.2d 933 (5th Cir. 1983); IBEW Local 199 v. United Tel. Co., 112 L.R.R.M. (BNA) 2666, 2668 (D. Fla. 1982); Todd Shipyards Corp. v. Industrial Union of Marine & Ship Bldg. Workers, 242 F. Supp. 606 (D.N.J. 1965).

45. *E.g.*, Detroit Edison Co., 73 Lab. Arb. (BNA) 565, 568–69 (1979) (Lipson, Arb.); Board of Educ. of Cook County, 73 Lab. Arb. (BNA) 310, 313–14 (1979) (Hill, Arb.); Bofors-Lakeway, Inc., 72 Lab. Arb. (BNA) 159, 161–62 (1979) (Kelman, Arb.); General Tel. Co. of Ohio, 70 Lab. Arb. (BNA) 240, 244–45 (1978) (Ellmann, Arb.); Todd Shipyards Corp., 69 Lab. Arb. (BNA) 27 (1977) (Jones, Arb.); Reynolds & Reynolds Co., 63 Lab. Arb. (BNA) 157, 158 (1974) (High, Arb.); Mallinckrodt Chem. Works, 50 Lab. Arb. (BNA) 933, 935–36 (Goldberg, Arb.); Board of Educ., City of New York, 45 Lab. Arb. (BNA) 43, 46 (1965) (Rock, Arb.); Braun Baking Co., 43 Lab. Arb. (BNA) 433, 440–41 (1964) (May, Arb.); Sears, Roebuck & Co., 39 Lab. Arb. (BNA) 567, 574 (1962) (Gillingham, Arb.);

barrier to acceptance of an award as an amplification of the agreement between the parties, or an agreed upon completion of the negotiation process that eliminates an ambiguity left in the agreement after the actual negotiations. It also facilitates the NLRB's dismissal of an arbitration as merely the view of another (and inferior) tribunal about the meaning to be given contractual language.

The Board has also found reason to assert its unfair labor practice jurisdiction because many, though not all, arbitrators accept a reserved management rights view of collective bargaining which preserves for management all those powers which are not specifically limited by the agreement.[46] A consequence of that acceptance is that an employer is permitted to take unilateral action affecting terms and conditions of employment unless restrained by the statutory obligation to bargain with the union. The Board attempted to limit this opportunity for employer unilateral action by holding that (1) a contractual waiver of a union's right to bargain must be clear and unequivocal; or (2) there must be clear and unmistakable evidence that the union consciously intended to waive its right to bargain about a specific subject.[47] This led to rejection of arbitrator's views of what the parties had agreed upon.

The Supreme Court's decision last year in *Metropolitan Edison Co. v. NLRB*[48] gives support to the NLRB's view that awards of arbitrators are merely relevant and not controlling with respect to determining the meaning of a collective bargaining agreement. The Court referred approvingly to

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Brewers Bd. of Trade, Inc., 38 Lab. Arb. (BNA) 679, 679–80 (1962) (Turkus, Arb.); Tennessee Coal, Iron & Railroad, 6 Lab. Arb. (BNA) 426, 429 (1945). *See* F. ELKOURI & E. ELKOURI, *supra* note 21, at 377; *see also* Washington Hosp. v. National Union of Hosp. & Health Care Employees, 442 F.Supp. 93, 95 (W.D. Pa. 1978).

46. Killingsworth, *The Presidential Address: Management Rights Revisited,* in ARBITRATION AND SOCIAL CHANGE, PROCEEDINGS OF THE TWENTY-SECOND ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 1 (1969); Phelps, *Management's Reserved Rights: An Industry View,* and Goldberg, *Management's Reserved Rights: A Labor View,* in MANAGEMENT RIGHTS AND THE ARBITRAITON PROCESS, PROCEEDINGS OF THE NINTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS, 102, 118 (1956); F. ELKOURI & E. ELKOURI, *supra* note 21, at 412–19; *see also* Celanese Corp. of America, 33 LAB. ARB. (BNA) 925, 944 (1960) (Arbitrator C. Allan Dash, Jr., reported that a review of 64 published awards on the subject of contracting out indicated that only approximately one-third of the arbitrators adopted a reserved rights theory, and even in those cases the arbitrators denied the merits of the grievance).

47. Beacon Piece Dyeing & Finishing Co., 121 N.L.R.B. 953, 956 (1958); Eaton, Yale & Towne, Inc., Unit Drop Forge Div., 171 N.L.R.B. 600, 601 (1968); Southern Materials Co., 181 N.L.R.B. 958, 960 (1970), *enforcement denied,* NLRB v. Southern Materials Co., 447 F.2d 15 (4th Cir. 1971); Bunker Hill Co., 208 N.L.R.B. 27, 33 (1973), *modified,* 210 N.L.R.B. 343 (1974). A recent decision of the Board, reconstituted by President Reagan's appointments, suggests that as with the "Nixon Board," the requirements for establishing a waiver may be relaxed. Columbus & S. Ohio Elec. Co., 270 N.L.R.B. No. 95 (1984); *see* Radioear Corp., 214 N.L.R.B. 362 (1974), *supplementing* 199 N.L.R.B. 1161 (1972); Bancroft-Whitney Co., 214 N.L.R.B. 57 (1974).

48. 460 U.S. 693 (1983).

the requirement that a waiver of statutory right be clear and unmistakable.[49] It held that a union's failure to obtain a change in contract language after two unfavorable arbitration awards did not establish a waiver of union officials' protection against discipline for failure to act to achieve compliance with a no-strike clause.[50] The decision does not give the NLRB full freedom to disregard arbitration awards because the Court specifically noted that they may be relevant to establishing waiver of the statutory right.[51] In the *Metropolitan Edison* arbitration, however, the arbitrators had not specifically stated that the agreement clearly and unmistakably imposed a duty to act on officials,[52] and the agreement contained a provision stating that an award would be binding only for the term of that agreement.[53] It is, nonetheless, anomalous that the decision was soon followed by the Board's announcement of new policies of increased deferral to the arbitration process.

The major source of the NLRB's deferral problem is the unsatisfactory state of the law concerning the duty to bargain during the term of a collective bargaining agreement. It is amazing that the leading case on the subject is the Board's 1951 decision in *Jacobs Manufacturing Co.*,[54] in which the Board members expressed four different views of the problem. The usually accepted reading of the opinions produces a rule that there is a continuing duty to bargain about a subject that was neither discussed in negotiations nor expressly covered by the collective bargaining agreement. It relieves the parties from a duty to negotiate only about subjects that were discussed in the negotiations or are expressly covered by a provision in the collective bargaining agreement.[55] That rule does not fit well with the practicalities of negotiation in which the acceptability of a proposed agreement is determined not only by what is in the proposal but also by what is not in it. A "deal" consists not only of what is given and taken, but of what is not given or taken. Stylish new items, such as dental plans or vision plans, are known to negotiators and their absence from a proposal will be noted even though not mentioned. Moreover, parties discussing changes in their relationship assume a continuation of the undiscussed portions of their relationship and most certainly do not contemplate changes in undiscussed matters which would destroy the acceptability of the proposed agreement.

49. *Id.* at 1477–78.
50. *Id.*
51. *Id.* at 1467–68 n.13.
52. *Id.*
53. *Id.* 1472 n.5.
54. 94 N.L.R.B. 1214, *enforced*, NLRB v. Jacobs Mfg. Co., 196 F.2d 680 (2d Cir. 1952).
55. R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION, AND COLLECTIVE BARGAINING 458–61 (1976). The Board has required evidence that in the discussions the union clearly and unmistakably waived its right to bargain about a specific subject. *See supra* note 47.

The *Jacobs* rule that there is a continuing duty to bargain during the term of an agreement provides a basis for continued involvement of the NLRB with the contractual relationship between the parties even though they have negotiated in good faith and reached an agreement which has its own dispute resolution procedures. This involvement fits uncomfortably with the well-established proposition that Congress did not intend the NLRB to serve as a forum in which suits might be brought for breach of contract.[56] As previously noted, the Board's rule requiring a clear and unmistakable waiver of the duty to bargain further enlarges the possibility of conflict and permits the Board to reject conclusions reached by arbitrators about the relationship between the parties.[57]

Another criticism of the *Jacobs* rule arises from the uncertainty that remains concerning the propriety of a strike after an impasse has occurred in the negotiations concerning a new and previously undiscussed subject. A broad and comprehensive no-strike clause in the agreement may settle the matter by a prohibition of all strikes for any purpose, but the teaching of the Supreme Court's decision in *Mastro Plastics*[58] is that very clear and explicit language will be required to accomplish that result. Absent such a clause, the statutory answer is uncertain.

Section 8(d) of the Labor Management Relations Act of 1947[59] provides that where a collective bargaining agreement is in effect, "no party to such contract shall . . . modify such contract" unless that party serves written notice on the other party and "continues in full force and effect, without

56. During consideration of the legislation that became the Taft-Hartley Act of 1947, the Conference Committee eliminated provisions which would have made it an unfair labor practice for a party to violate the terms of a collective bargaining agreement. Senator Taft explained that the provisions were eliminated because of objections to making the meaning of every collective bargaining agreement subject to determination by the Board rather than the courts. 93 Cong. Rec. 6608 (1947), *reprinted in* 1 Legis. Hist. of L.M.R.A., at 1539. *See* NLRB v. C & C Plywood Corp., 385 U.S. 421, 426–28 (1967).

57. The decision approved by the Supreme Court in Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983), is illustrative. *See also* Bethlehem Steel Corp., 252 N.L.R.B. 982 (1980), *aff'd. in part, enforcement denied sub. nom.* Fournelle v. NLRB, 670 F.2d 331, 342 n.19 (D.C. Cir. 1982) (an instance in which the NLRB and its administrative law judge ignored an arbitration award).

58. 350 U.S. 270 (1956). The no-strike provision in *Mastro Plastics* read,

> 5. The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppage during the term of this agreement.

Id. at 281. The provision was held not to prohibit a strike to protest serious unfair labor practices. *Id.* at 284. *Cf.* Arlan's Dep't Store of Michigan, Inc., 133 N.L.R.B. 802, 807 (1961). The Board has held that a strike to protest unlawful unilateral action of an employer violated a no-strike provision because the employer's unfair labor practice was not sufficiently serious to threaten the bargaining relationship. Dow Chemical Co., 212 N.L.R.B. 333 (1974). The Court of Appeals for the Third Circuit disagreed, and remanded the case for reconsideration in light of the employer's failure to seek a Boys Markets injunction and attempt to arbitrate the dispute. United Steelworkers v. NLRB, 530 F.2d 266 (3d Cir. 1976).

59. 29 U.S.C. § 158(d) (1982).

resorting to strike or lockout, all terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later." The section also provides that the duties imposed, "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."

If, pursuant to *Jacobs*, there is a duty to bargain about new and previously undiscussed subjects during the term of a contract, their addition to the agreement would appear not to be a modification of the terms and conditions contained in the contract within the meaning of that exception from the duty to bargain. From this, it would follow that the addition of new and previously undiscussed matters would not "modify" the contract in a manner requiring written notice, unless the word "modify" in the first part of section 8(d) has a meaning different from "modification of the terms and conditions contained in a contract" in the latter part of that section. If no notice is required, the prohibition against strikes for sixty days after notice would be inapplicable. But even if notice is required, that requirement would prohibit a strike for only 60 days after notice was given. The only remaining statutory prohibition against a strike over a new and previously undiscussed subject would be the prohibition against strikes until the expiration date of the contract.

If, contrary to what *Jacobs* suggests, a party seeking to add a new and previously undiscussed subject is seeking to "modify" the contract within the meaning of section 8(d), the prohibition against "resorting to strike" prior to the termination of the contract appears applicable on a literal reading of that section. However, the Supreme Court's decision in *NLRB v. Lion Oil Co.*[60] suggests that a literal reading be rejected. In that case, the Court held that section 8(d) was not violated by a strike occurring before a contract had terminated when that strike occurred during the reopening of the contract after notice and pursuant to a reopening provision in the contract. In so holding, the Court said, "It would be anomalous for Congress to recognize such a duty [to bargain] and at the same time deprive the union of the strike threat which, together with 'the occasional strike itself, is the force depended upon to facilitate arriving at satisfactory settlements.'"[61] That observation appears applicable to bargaining about new and previously undiscussed subjects of bargaining if Congress did intend by section 8(d) that there be a duty to bargain about such subjects.

60. 352 U.S. 282 (1957).

61. *Id.* at 291 (footnote omitted).

There are but a few cases dealing with the legality of strikes during the term of a collective bargaining agreement over new and previously undiscussed subjects, and they do not clearly answer the question about their legality.[62] Perhaps this is because unions accept the package concept of negotiation and believe that it would reflect adversely on their good faith or ethics if economic weapons were used during the term of an existing agreement for the purpose of obtaining new and additional concessions. Nevertheless, the *Jacobs* rule creates this potential for legal strikes in support of new bargaining demands during the term of a collective bargaining agreement. This potential subverts section 8(d)'s evident purpose of obtaining stability and labor peace.

The question of whether a term or condition is contained in a collective bargaining agreement comes before the NLRB more frequently in cases in which an employer has taken unilateral action, contending that it was authorized, or not prohibited, by the agreement.[63] In these cases the employer, charged with a violation of its duty to bargain, frequently suggests deferral to the arbitration process. If deferral was not practiced, the Board in the past was likely to apply its rule requiring a clear and unmistakable waiver of the duty to bargain and conclude that the employer has violated its duty to bargain.[64] The remedial order, directing the employer to bargain with the union about the matter on which it has taken

62. United Mine Workers, Local 9735, v. NLRB, 258 F.2d 146 (D.C. Cir. 1958) involved a strike to obtain shift seniority at a mine after an arbitrator's decision that arrangements for such seniority had not been made, although they were permitted by the National Agreement. A majority of the court held that the strike was to obtain that seniority, not to modify the agreement, and therefore did not violate Section 8(d). Judge Burger dissented, arguing that the award had become a part of the agreement. 258 F.2d at 149–51. The decision has been cited with approval in related contexts by other courts. General Elec. Co. v. NLRB, 443 F.2d 602, 604 (5th Cir. 1971); NLRB v. Deaton Truck Line, Inc., 389 F.2d 163, 170 (5th Cir. 1968); Trailways of New England v. Amalgamated Ass'n of Street, Elec. Railway and Motor Coach Employees, 343 F.2d 815, 818 (1st Cir. 1965), *cert. denied,* 382 U.S. 879 (1965). However, another court, rejecting the NLRB's argument to the contrary, indicated that Section 8(d) should be construed to preclude all strikes during the term of an agreement. Local 3, United Packinghouse Workers v. NLRB, 210 F.2d 325 (8th Cir.), *cert. denied,* 348 U.S. 822 (1954). For cases holding that it is a violation of Section 8(d) to strike without notice in protest of an employer's refusal to bargain, see Puerto Rico Junior College, 265 N.L.R.B. 72 (1982); Local 156, United Packinghouse Workers, 117 N.L.R.B. 670 (1957). *See also* R. GORMAN, *supra* note 55, at 462–63 (1976); Wollett, *The Duty to Bargain Over the "Unwritten" Terms and Conditions of Employment,* 36 TEX. L. REV. 863, 873–76 (1958).

63. *E.g.,* NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967); Bunker Hill Co., 208 N.L.R.B. 27, *modified,* 210 N.L.R.B. 343 (1974).

64. Tocco Div. of Park-Ohio Indus., Inc., v. NLRB, 702 F.2d 624 (6th Cir. 1983); Island Typographers, Inc., 252 N.L.R.B. 9 (1980), *enforcement denied,* NLRB v. Island Typographers, Inc., 705 F.2d 44 (2d Cir. 1983); Aeronca, Inc., 253 N.L.R.B. 261 (1980), *enforcement denied,* Aeronca, Inc. v. NLRB, 650 F.2d 501 (4th Cir. 1981); International Woodworkers Local 3-10 v. NLRB, 380 F.2d 628 (D.C. Cir. 1967); Western Foundries, Inc., 233 N.L.R.B. 1033 (1977); Bunker Hill Co., 208 N.L.R.B. 27, *modified,* 210 N.L.R.B. 343 (1974); T.T.P. Corp., Jam Handy Prod. Div., 190 N.L.R.B. 240 (1971).

unilateral action, initially appears to support the union's position. Particularly is this so if the order requires reimbursement of any economic losses suffered by employees because of the unilateral action. In general, however, a union's opportunity to bargain on a new and previously undiscussed subject with an employer that proposed such negotiations will be greatly diminished in value by the uncertainty of whether a strike after impasse would violate section 8(d). If it did, strikers would not have the protection of the Act.[65] Even if the conclusion is that a strike would not violate section 8(d), the cost to employees of strike action may be entirely disproportionate to what is at stake on a single issue on which the employer has taken unilateral action. The union would be in a better position if unilateral actions affecting wages, terms, and conditions of employment were not permitted and neither party could insist upon negotiations on a new and previously undiscussed subject. Employers would also be protected from demands for new benefits.

Such a rule for the duty to bargain during the term of an agreement was proposed in 1950 by authorities as eminent as Professors Cox and Dunlop.[66] Their proposal became the basis for Member Reynolds' dissent in *Jacobs Manufacturing Co.*,[67] but it did not prevail at the Board nor has it found support in the courts. It has, however, received support from some commentators.[68] In his text on labor law published in 1976, Professor Gorman indicated that the proposal has continued viability by setting out Member Reynolds' view.[69] Given the expected reopening of the question of NLRB deferral to the arbitration process, the proposal deserves reconsideration.

THE PROPOSED SOLUTION TO DEFERRAL PROBLEMS

Basic to the proposal is the concept that, unless a contrary understanding is expressly stated, a collective bargaining agreement should be deemed to

65. Section 8(d) specifically provides "Any employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of [sections 8, 9, and 10 of this Act]." 29 U.S.C. § 158(d) (1982).

66. Cox and Dunlop, *The Duty to Bargain Collectively During the Term Of An Existing Agreement*, 63 HARV. L. REV. 1097 (1950).

67. 94 N.L.R.B. 1214, 1231 n.36 (1951).

68. I made a proposal based upon the Cox and Dunlop article in a paper presented in 1969 at the Southwestern Legal Foundation. Peck, *Accommodation and Conflict Among Tribunals: Whatever Happened to Preemption?*, 15 LABOR LAW DEVELOPMENTS 121, 151–61 (1969). Professor Hanley made a similar proposal the year before. Hanley, *The NLRB and the Arbitration Process: Conflict or Accommodation?* 14 LABOR LAW DEVELOPMENTS 151 (1968). Professor Christensen has given a partial endorsement. Christensen, *supra* note 6, at 79.

69. R. GORMAN, *supra* note 55, at 460–61. The basic argument is restated in A. COX, D. BOK & R. GORMAN, LABOR LAW—CASES AND MATERIALS 659 (1981).

carry forward for its duration the prevailing terms and conditions of employment even though they are not expressly stated in the contract. The concept is in accord with the practicalities of the negotiation process, in which the acceptability of a proposed contract is determined not only by what it contains but also by what it does not contain. This does not mean that every aspect of employment is frozen as though there had been cast over the work establishment a spell as potent as that which brought an end to activity in the palace of Sleeping Beauty. A dynamic view of the employment relationship produces an understanding that procedures may exist for determining how newly hired employees work out a labor pool, bid for and receive promotions to better jobs, how piece rates or incentive pay adjustments are made, or that, depending upon seasonal factors or changes in business, the employer determines how many shifts will be scheduled and the time at which they begin. As Cox and Dunlop put it:

> Thus, at any given time the *status quo* is made up of (a) the modes of procedure followed in making decisions concerning matters subject to continuous review and (b) the basic substantive terms and conditions of employment which are changed only upon annual or biennial review.[70]

Some matters, such as the products to be made and the prices at which they will be sold, may have an effect upon employment but they are generally understood by the parties to be matters to be decided, without regard to the frequency of such decisions, by management. (Moreover, the Supreme Court and the NLRB are currently removing those matters from the area of mandatory bargaining despite their effects upon employment.[71]) The Cox and Dunlop proposal does, however, involve rejection of the reserved management rights theory and imposes limitations on management action affecting wages and terms or conditions of employment even though those limitations are not expressly stated in the collective bargaining agreement.

If a collective bargaining agreement is deemed to carry forward for its duration the prevailing terms and conditions of employment, whether mentioned in the agreement or not, unilateral action with respect to a term or condition of employment would constitute a modification of the agreement, and hence a violation of section 8(d), unless that action was authorized by the agreement. Moreover, a proposal that such a change be made would be a proposal that the agreement be modified, and hence, pursuant to section 8(d), the duty to bargain would not require the other party to discuss or agree to the proposal.

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70. Cox and Dunlop, *supra* note 66, at 1118–19.

71. *E.g.*, First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); United Technologies, 269 N.L.R.B. No. 162 (1984).

Cox and Dunlop argued,[72] and it has since been authoritatively established,[73] that the duty to bargain applies to administration of a collective bargaining agreeement and the processing of grievances during the term of the agreement. Cox and Dunlop also argued that during the term of a collective bargaining agreement an offer to follow the contract grievance procedure satisfies any duty to bargain collectively with respect to a matter to which the procedures *may* apply.[74] That formulation leads to the conclusion that the duty to bargain has been fulfilled by a good faith offer to follow a grievance and arbitration procedure even though ultimately an arbitrator decides that the procedure was inapplicable. An arbitrator might reach such a conclusion either on procedural grounds or because the grievance procedure of the agreement limited an arbitrator's jurisdiction to determining the meaning and application of the agreement and the arbitrator concluded the dispute was not expressly or by implication covered by the agreement.

This result produces an unacceptable difficulty because of the six month limitation period for the filing of unfair labor practice charges established by section 10(b).[75] Unless there is an unusually speedy arbitration proceeding to challenge the unilateral action taken, more than six months will have passed from the time the action was taken until the award issued. Continued adherence to the practice unilaterally established after it was decided the grievance procedure did not apply to the dispute could be considered a violation of the duty to bargain. However, such an approach to the problem is unsatisfactory because the Board would be unable to provide a remedy for losses suffered prior to the award when no unfair labor practice was occurring.

The complete remedy is available, however, if, given a finding that an unfair labor practice was committed, it is also found to have occurred at the time the unilateral action was taken. The question of whether that unilateral action was an unfair labor practice may be determined later, when the arbitrator decides whether or not the grievance and arbitration procedure was applicable to the dispute created by the unilateral action. Awaiting the arbitrator's decision requires a stay of proceedings on a charge filed within six months after the action was taken. The problem is administrative or procedural, involving timing and scheduling of hearings, and not one of the substantive law of collective bargaining. Comparable problems with statutes of limitations have been handled by stays of proceedings in other areas of substantive law: e.g., a suit for personal injuries may be instituted but

72. Cox and Dunlop, *supra* note 66, at 1099–1101.
73. NLRB v. Acme Indus. Co., 385 U.S. 432, 436 (1967).
74. Cox and Dunlop, *supra* note 66, at 1101–07.
75. 29 U.S.C. § 160(b) (1982).

continued to permit determination of the full extent of injuries,[76] or a prosecutor may delay obtaining an indictment or issuing an information for a year and a day after a grievous assault to determine whether death occurring in that period makes the crime a homicide.[77]

If the party charged with a violation of the duty to bargain is willing to arbitrate and the arbitrator decides that the challenged action was authorized, it should be held that the duty to bargain has been discharged.[78] The

76. The longer period of the statute of limitations applicable to personal injury actions permits delay in the filing of such suits. Moreover, it is frequently in the interest of both parties to permit determination of the full extent of injuries, and motions for continuances are not likely to be opposed. If such a suit is filed and a requested continuance opposed, the matter falls within the sound discretion of the trial judge. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2352 (1971). Accordingly, the practice has not been the subject of reported appellate decisions. Moreover, Rule 27 of the Federal Rules of Civil Procedure, and its counterparts in state rules of civil procedure, permit the taking of depositions for the purpose of perpetuating testimony, making it possible to withhold the filing of suit in cases in which death penalty is a possibility. *See* Mosseller v. United States, 158 F.2d 380 (2d Cir. 1946).

77. *Cf.* United States v. Lovasco, 431 U.S. 783 (1977); State v. Randolph, 61 Idaho 456, 102 P.2d 913 (1940); *see also* Amsterdam, *Speedy Criminal Trial: Rights and Remedies,* 27 STAN. L. REV. 525, 527 n.11 (1975).

78. This was the holding of the Second Circuit Court of Appeals in Liquor Salesmen's Union Local 2 v. NLRB, 664 F.2d 318 (2d Cir. 1981), *cert. denied,* Liquor Salesmen's Union Local 2 v. Charmer Indus., Inc., 456 U.S. 973 (1982). The court pointed out that an employer's change of procedures for handling C.O.D. deliveries and payments did not constitute a change in the rules or working conditions, and hence there was no duty to bargain. 664 F.2d at 325.

A pre-Taft-Hartley Act decision of the Court of Appeals for the Sixth Circuit held that an employer's duty to bargain can be channeled into a grievance and arbitration procedure, with a consequence that the duty to bargain was not violated by refusal to discuss those grievances so long as a strike continued. Timken Roller Bearing Co. v. NLRB, 161 F.2d 949, 955 (6th Cir. 1947). Early Board decisions supported the proposition that the duty to bargain can be channeled into the grievance and arbitration procedures established by a collective bargaining agreement. Consolidated Aircraft Corp., 47 N.L.R.B. 694 (1943), *enforced as modified,* 141 F.2d 785 (9th Cir. 1944); Crown Zellerbach Corp. 95 N.L.R.B. 753 (1951); Textron Puerto Rico (Tricot Div.), 107 N.L.R.B. 583 (1953); McDonnell Aircraft Corp., 109 N.L.R.B. 930 (1954); United Tel. Co., 112 N.L.R.B. 779 (1955); National Dairy Prod. Corp., 126 N.L.R.B. 434 (1960). *See* Peck, *supra* note 68, at 138–39.

The development was arrested by the decision in Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410 (1964), in which the Board rejected an employer's defense that a charge of unlawful unilateral action should be dismissed because the union had not used the grievance and arbitration procedures of the collective bargaining agreement. *Id.* at 1416. It was revived temporarily by the decision in Joseph Schlitz Brewing Co., 175 N.L.R.B. 141 (1969), in which the Board dismissed in its entirety a complaint of unilateral action because the union failed to respond to the employer's good faith suggestion that the dispute be resolved in the grievance and arbitration procedures of their agreement. *Id.* at 142. The development was then transformed by the *Collyer* decision, 192 N.L.R.B. 837 (1971), into a principle of deferral rather than a recognition of a defense on the merits.

The Court of Appeals for the Ninth Circuit has stated that arbitration concerning the propriety or fairness of an employer's policy after it has been put into effect was not a substitute for the bargaining required by the Act. Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403, 408 (9th Cir. 1978). The arbitration awards to which the Board refused to defer in that case appear to have been based on a reserved management rights theory of collective bargaining. Alfred M. Lewis, Inc., 229 N.L.R.B. 757, 757 (1977). They would not serve to discharge the duty to bargain under the proposal here advanced. *See supra* text following note 71.

only question remaining for the Board should be whether the contract as interpreted by the arbitrator violates any provision of the Act other than the duty to bargain: e.g., is the agreement, as construed by the arbitrator, lawful if it permits an employer to subcontract certain work or to adjust incentive pay rates?[79] The arbitrator is the reader of the contract, chosen by the parties,[80] and his decision should be authoritative and controlling concerning the meaning to be given contract language because the parties provided that arbitration was the method to be used to resolve disputes about their agreement. There is no occasion for the Board to substitute its reading of the contract for that of the arbitrator and find that it did not authorize action which the arbitrator found it had authorized. Therefore, there is no occasion for the Board to defer to the arbitration process.

Likewise, if the arbitrator decides that the challenged action violated the collective bargaining agreement and the party taking that action complies with the award, remedying its breach in the manner prescribed by the arbitrator, no violation of the duty to bargain should be found. The action, though erroneous, was taken in good faith and subject to revision by an agreed-upon procedure. It was not a rejection of the obligation to bargain with the other party to the relationship; it was merely a breach of contract, and the Board was not charged with the responsibility for removing breaches of contract.[81] Again, there is no occasion for the Board to defer to the arbitration process.

If the arbitrator concludes that the dispute was not subject to the grievance and arbitration procedure, an unfair labor practice may have been committed when the unilateral action was taken. Whether or not it did will turn upon whether it was a change in the substantive terms and conditions of employment prevailing at the time the agreement was made; or whether it was a change of the sort permitted by the procedures then existing for making decisions concerning matters subject to continuous review. If it was the former, the action constituted a modification of the contract in violation of section 8(d). That question is to be resolved by the NLRB in the exercise of its powers to prevent unfair labor practices, and presents no occasion for deferral to the arbitration process.

Problems will arise in determining whether the arbitrator's decision denying a grievance was based upon a conclusion that the disputed action was authorized by the agreement or whether the arbitrator accepted the

79. *But cf.* Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) (discussed *supra* text accompanying notes 48–53).

80. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny,* 75 MICH. L. REV. 1137, 1140 (1977). The arbitrator's authoritative reading of the contract makes it unnecessary to consider whether a statutory right has been waived with sufficient clarity.

81. *Supra* note 56.

theory of reserved management rights and the conclusion was that the agreement had not specifically limited the employer's authority. The problems will be complicated when the agreement contains a management's rights clause and the arbitrator relies upon both the presence of the clause and the reserved management rights theory. The NLRB should bear responsibility for solving these problems in the course of determining whether an unfair labor practice has been committed. If it concludes that the arbitrator's decision was based upon a reading of the management's rights clause, the question remaining is not that of whether to defer, but whether such a clause is unlawful. As a generalization, management's rights clauses are not illegal.[82] Unions may upon occasion have been willing to accept them because of the Board's insistence upon language clearly and unequivocally waiving the right to bargain, but recent developments by a reconstituted Board suggest that such reliance by unions is unwise.[83] Unions may properly be bound for the term of an agreement to the meaning which their chosen "reader" gave that agreement. They should not be bound, however, solely by the arbitrator's view of collective bargaining that employers retain all rights not specifically limited by the agreement.

Discussions between the General Counsel's representatives and the charged party provide the suitable occasion for determining whether the grievance and arbitration provision of a collective bargaining agreement is broad enough to cover the dispute. Decision at the Board level comes too late, and in fact most decisions on deferral are now made at the level of the regional office.[84] If the provision is broad enough to cover the dispute and the charged party is willing to arbitrate, an incentive to obtain a clear statement as to whether the action was authorized by the agreement could be provided by requiring for the ultimate dismissal of the charge that the arbitrator's decision and award include findings or conclusions that the action taken was so authorized. The charged party will seek such a decision and award rather than one resting on the reserved rights of management theory of collective bargaining. If a complaint issues, the charged party will obtain review of the decision concerning the basis of the arbitrator's decision and award. If the General Counsel's representative decides that the action was found to be authorized by the agreement, he will dismiss the charge, with a consequence that the charging party may obtain no review. That, however, is the current situation for parties whose charges are subject to the present deferral policy.[85]

82. NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 405 (1952).

83. *E.g.*, Columbus & S. Ohio Elec. Co., 270 N.L.R.B. No. 95 (1984) ("Zipper" clause is a clear and unmistakable waiver of a union's right to bargain over the elimination of a Christmas bonus that the employer had given for forty years).

84. *See infra* note 95.

85. *See infra* text accompanying notes 95–97.

The NLRB should continue to give support to the arbitration process during the term of a collective bargaining agreement. Thus, as in *NLRB v. Acme Industrial Co.*,[86] the Board may aid the arbitration process by providing compulsory process similar to subpoenas and discovery mechanisms without interfering with the arbitration process. As the Court noted in that case, the Board's assertion of jurisdiction in no way threatened the power that the parties had given the arbitrator to make binding interpretations of the labor agreement.[87] The Board might go further without threatening the power the parties gave the arbitrator and find violations of the duty to bargain when a party refuses to arbitrate, is dilatory about arbitration, or refuses to comply with an award.[88]

What has been proposed is supported by the provision found in section 203(d) of the Labor Management Relations Act concerning arbitration. That section provides:

> (d) Final adjustment by a method agreed upon by the parties is declared to be *the* desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.[89]

As the italics emphasize, arbitration is "the" preferred method for resolving disputes concerning the application or interpretation of a collective bargaining agreement. It is not merely "a" preferred method or a "tolerated" method for resolving such disputes. If it is the preferred method, its product should be preferred to that of the NLRB whenever the question is one of meaning and application of a collective bargaining agreement. Arbitration is given no such preference for the resolution of other types of disputes which involve unfair labor practices.

JUDICIAL REVIEW OF CURRENT BOARD DEFERRAL POLICY

The Supreme Court has in several decisions made approving references to the NLRB's policy of deferring to the arbitration process,[90] but those expressions of approval give little insight as to whether the Court would approve specific aspects of that policy in its varied evolutionary stages. The

86. 385 U.S. 432 (1967).

87. *Id.* at 438.

88. To the contrary, the Board has held that a refusal to arbitrate is not a violation of the duty to bargain. Sucesion Mario Mercado e Hijos, 161 N.L.R.B. 696, 700 (1966). The holding seems inconsistent with the recognition that the duty to bargain extends to administration of a collective bargaining agreement. *See* NLRB v. Acme Indus. Co., 385 U.S. 432 (1967).

89. 29 U.S.C. § 173(d) (1982) (emphasis added).

90. NLRB v. City Disposal Systems, Inc., 104 S. Ct. 1505, 1515 (1984); William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12, 18 (1974); Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 270–71 (1964).

courts of appeal have been almost unanimous in holding that the NLRB has a wide discretion concerning deferral to the arbitration process.[91] Some courts have suggested that the discretion is limited by a requirement that the Board announce and follow its policies until such time as they are changed through formal rulemaking or adjudication.[92] However, three courts of appeals[93] have stated a disagreement on the merits with the Board's former *Electronic Reproduction* rule.[94] As stated at the outset, judicial challenges to the Board's most recent revision of its deferral policies may be predicted with confidence. The cases in which such challenges are made will fall into the two categories developed in the Board's evolution of its policies: (1) cases in which the question involves the effect to be given in a pending unfair labor practice proceeding to a previously issued arbitration award, and (2) cases in which the question is whether the Board's processes should be stayed pending the completion of an arbitration proceeding that may resolve the dispute.

There are substantial barriers to obtaining judicial review in both categories of cases. When the Board's processes are stayed, that stay is almost always accomplished at the regional level by a decision to withhold the issuance of a complaint on the charge filed.[95] The same is true of dismissals

91. NLRB v. Magnetics Int'l, Inc., 699 F.2d 806, 809 (6th Cir. 1983); NLRB v. Designcraft Jewel Indus., Inc., 675 F.2d 493, 495–96 (2nd Cir. 1982); Ad Art, Inc. v. NLRB, 645 F.2d 669, 674 (9th Cir. 1980); NLRB v. Pincus Bros., Inc.-Maxwell, 620 F.2d 367, 372 (3d Cir. 1980); Stephenson v. NLRB, 550 F.2d 535, 537 (9th Cir. 1977).

92. NLRB v. Motor Convoy, Inc., 673 F.2d 734, 736 (4th Cir. 1982); Designcraft Jewel Indus., Inc., 675 F.2d 493, 495 (2d Cir. 1982); St. Luke's Memorial Hosp., Inc. v. NLRB, 623 F.2d 1173, 1178 (7th Cir. 1980); NLRB v. Horn & Hardart Co., 439 F.2d 674, 679 (2d Cir. 1971); *see also* NLRB v. Wolf & Munier, Inc., 747 F.2d 156 (3d Cir. 1984) (remanding a case to the Board for determination of whether a joint conference committee's decision in a grievance proceeding was a resolution of the statutory issue of the employee's supervisory status).

93. NLRB v. Magnetics Int'l, Inc., 699 F.2d 806, 811 (6th Cir. 1983); Stephenson v. NLRB, 550 F.2d 535, 538 (9th Cir. 1977); Banyard v. NLRB, 505 F.2d 342, 348 (D.C. Cir. 1974). For decisions approving the Board's decision in *Suburban Motor Freight*, placing the burden on the party seeking deferral to prove the unfair labor practice was litigated before the arbitrator, see NLRB v. Designcraft Jewel Indus., Inc., 675 F.2d 493 (2d Cir. 1982); NLRB v. General Warehouse Corp., 643 F.2d 943 (3d Cir. 1981); Pioneer Finishing Corp. v. NLRB, 667 F.2d 199 (1st Cir. 1981), *cert. denied*, 460 U.S. 1080 (1983); St. Luke's Memorial Hosp., Inc., v. NLRB, 623 F.2d 1173 (7th Cir. 1980); *see also* NLRB v. Motor Convoy, Inc., 673 F.2d 734 (4th Cir. 1982) (requiring deferral to an award that did not expressly resolve the unfair labor practice charge because resolution of the contractual dispute necessarily resolved the unfair labor practice question).

94. The rule provided for deferral in a discipline or discharge case even though it appeared that evidence on the unfair labor practice was not presented to or considered by the arbitrator. Electric Reproduction Serv. Corp., 213 N.L.R.B. 758 (1974).

95. Board member Zimmerman, in his dissenting opinion in *Olin Corp.*, cited agency statistics indicating that between October 1, 1981, and the end of December 1983, in excess of 3800 cases had been deferred pursuant to *Collyer* and *Dubo* standards. During the same period in only 163 previously deferred cases did the General Counsel issue complaints pursuant to *Suburban Motor Freight* and *Spielberg* standards. Over 1700 previously deferred cases were dismissed, withdrawn, or settled. Olin Corp., 268 N.L.R.B. No. 86, at 25, 115 L.R.R.M. 1056, 1064 (1984).

of charges because of prior arbitration awards. The decision of the General Counsel (and his representatives) not to issue a complaint is generally said to be unreviewable.[96] In addition, there are the statements of courts of appeals that the NLRB has a broad discretion concerning deferral to arbitration awards.[97] Thus, a challenge to a refusal to issue a complaint upon the basis of the Board's recent decision in *United Technologies* will involve the difficulties of an attack upon two discretionary determinations. However, the principal reason for recognizing an unreviewable discretion of the General Counsel is to avoid judicial supervision of the day to day issuance of complaints and the attendant appraisal of the sufficiency of the evidence to justify that action.[98] That reason carries no weight when the challenge is to the general policy of *United Technologies,* which has been accepted by and incorporated in the General Counsel's memorandum to regional directors.[99] His acceptance of the rule announced in *United Technologies* makes it apparent that decisions to defer to the arbitration process will not be the product of an exercise of his discretion, but instead his acceptance of a rule announced in a Board decision of an unfair labor practice case, which would have been subject to judicial review to determine its validity. Moreover, unless judicial review of that policy is granted, the General Counsel will administer a significant portion of the "law in action" to persons filing unfair labor practice charges without a judicial determination of the validity of that policy.

Some assistance with the problem may be gained from a brief review of a similar problem arising from the general proposition that Board decisions in representation cases are generally not subject to direct judicial review in federal district courts.[100] (The absence of such review serves an apparent Congressional purpose of avoiding delays in the establishment of collective bargaining relationships, manifested by provision in the Act only for review of Board decisions in unfair labor practice cases.) For many years the Board exercised discretion concerning the volume of business required in determining whether it would effectuate the policies of the Act to assert its jurisdiction in particular cases. However, judicial review was granted and the Supreme Court disapproved of the Board's general policy of refusing to assert jurisdiction over labor unions as employers with respect to their own employees.[101] Likewise, the judicial review was granted and the Supreme

96. Vaca v. Sipes, 386 U.S. 171, 182 (1967); United Elec. Contractors Ass'n v. Ordman, 366 F.2d 776 (2d Cir. 1966), *cert. denied,* 385 U.S. 1026 (1967).

97. *See supra* note 91.

98. United Elec. Contractors Ass'n v. Ordman, 366 F.2d 776 (2d Cir. 1966).

99. *See supra* note 32 and accompanying text.

100. American Fed'n of Labor v. NLRB, 308 U.S. 401 (1940). *Cf.* Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943).

101. Office Employees Int'l Union, Local 11 v. NLRB, 353 U.S. 313 (1957). The NLRB had

Court disapproved of the Board's general policy of refusing to assert jurisdiction over employers in the hotel industry.[102] These decisions were extensions of the Supreme Court's decision in *Leedom v. Kyne*,[103] in which the Court struck down Board action that it characterized as in excess of its delegated powers and contrary to a specific prohibition in the Act.[104] Perhaps, as Judge Gibbons of the Third Circuit argued,[105] the Board's assertion of authority to determine when complaints should proceed to hearing is in conflict with the "final authority" conferred by section 3(d) on the General Counsel over the issuance of complaints. This assertion may also be inconsistent with the express, but limited, provision for deferral to arbitration found in section 10(k) of the Act with respect to jurisdictional disputes.[106] If so, it could be subject to judicial review pursuant to *Leedom v. Kyne*. Even if that conflict does not exist and the policy concerning issuance of complaints is considered discretionary, courts might order the General Counsel to re-exercise his discretionary power upon a correct view of the law, much in the same manner as the Interstate Commerce Commission long ago was directed to proceed with a case it had erroneously concluded was not within its jurisdiction.[107] The language of section 706 of the Administrative Procedure Act would support such an order in a challenge to the legality of the Board's deferral policies. It provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law . . . . The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed . . . .[108]

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dismissed complaint issued on unfair labor practice charges, making possible review under the provisions of the Act.

102. Hotel Employees Local 255 v. Leedom, 358 U.S. 99 (1958). This case began as a suit in a federal district court after a regional director had dismissed a petition for a representation election on the basis of previously announced jurisdictional standards. Hotel Employees Local 255 v. Leedom, 147 F.Supp. 306 (D.D.C. 1957), *aff'd*, 249 F.2d 506 (D.C. Cir. 1957), *rev'd*, 358 U.S. 99 (1958).

103. 358 U.S. 184 (1958).

104. *Id.* at 188.

105. NLRB v. Pincus Bros., Inc.-Maxwell, 620 F.2d 367, 385 (3d Cir. 1980). A similar controversy over whether the Board or the General Counsel should determine what level of interstate commerce justified the issuance of a complaint was ultimately resolved in favor of the Board. Haleston Drug Stores, Inc. v. NLRB, 187 F.2d 418 (9th Cir. 1951), *cert. denied*, 342 U.S. 815 (1951); *see* Note, *The Taft-Hartley Act*, 64 HARV. L. REV. 781 (1951).

106. 620 F.2d at 387.

107. ICC v. United States *ex rel.* Humboldt Steamship Co., 224 U.S. 474 (1912). For a more recent case of judicial review of action committed to discretion and not merely ministerial, see Naporano Metal & Iron Co. v. Secretary of Labor, 529 F.2d 537 (3d Cir. 1976); *see also* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 23.9–23.13 (2d ed. 1983).

108. 5 U.S.C. § 706 (1982). *See also* K. DAVIS, *supra* note 107, at § 23.9. The Administrative Procedure Act does not, however, provide an independent jurisdictional grant for judicial review. Califano v. Sanders, 430 U.S. 99 (1977).

THE PROPRIETY OF PRE-ARBITRAL DEFERRAL

On the merits, challenges to pre-arbitral deferral should succeed with respect to most unfair labor practice charges. Section 203(d) of the Labor Management Relations Act does underscore the importance of arbitration in the national labor relations policy, but it declares arbitration to be the desirable method for settlement of grievance disputes "arising over the application or interpretation of an existing collective bargaining agreement." Unless the existence of the unfair labor practice charged turns upon the application or interpretation of a collective bargaining agreement, the purpose of the section is not served by deferral. The Supreme Court's decision in *Lincoln Mills*[109] concluded that agreements to arbitrate should be enforceable to make collective bargaining agreements enforceable, not for the purpose of preventing unfair labor practices violating sections 8(a)(1) and (3) or 8(b)(1)(A). The cases making up the Steelworkers Trilogy[110] and establishing arbitration as a "kingpin" of national labor policy involved disputes concerning the meaning and application of terms of collective bargaining agreements, and not charges of unfair labor practices.

Most frequently violations of section 8(a)(1) and (3) occur because of employer opposition to unions and collective bargaining. It is therefore important to remember that, despite some limiting language added by the Taft-Hartley Act, the still declared policy of the United States is to eliminate obstructions to commerce "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[111] It is the NLRB, and not privately chosen arbitrators, that has been empowered to prevent the commission of unfair labor practices, and thus pursue that policy. The policy statement indicates that, while the Board is to prevent undesired practices of labor organizations, it is not to sit by passively observing a conflict between employers and unions and the employees they represent. The deferral policies recently announced with respect to charged violations of sections 8(a)(1),(3) and 8(b)(1)(A) shift the costs of achievement of the policy from the Board to those whom the statutory provisions

109. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 453 (1957).

110. United Steelworkers v. American Mfg. Co. 363 U.S. 564, 567–68 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

111. 29 U.S.C. § 151 (1983).

were intended to protect. Those costs usually are substantial.[112] The concept of a victim-financed enforcement of law is both so unusual and offensive as to require its rejection without resort to a comparative evaluation of the strengths and weaknesses of Board processes and the arbitration process as means of preventing unfair labor practices.[113]

Deferral—preferably described as a stay of proceedings—should be permitted where it will permit the determination of whether the taking of unilateral action constituted a violation of the duty to bargain. In such cases, the stay should be recognized as the solution to a problem of administration, scheduling, or procedure, and not considered a mysterious matter of the relationship between unfair labor practice law and the arbitration process. The question is simply whether an unfair labor practice was committed, and it may be answered by an arbitrator's decision. Recognizing the propriety of a stay on this basis undercuts the argument for deferral on other unfair labor practices. Unless the existence of the unfair labor practice turns upon the meaning and application of the collective bargaining agreement there is no need to get the arbitrator's authoritative reading of the contract, even though the arbitrator might provide a remedy for an unfair labor practice, as, for example, with a common sense conclusion that a discharge motivated by anti-union considerations is not a discharge for just cause.

Occasionally, whether a violation of section 8(a)(3) or (1) has occurred may turn upon the meaning and application of a provision in a collective bargaining agreement: e.g., does the no strike clause of the agreement impose an obligation on union officials to prevent work stoppages or permit the imposition of more severe discipline upon union officials who participate in a work stoppage? In some cases an arbitrator, or arbitrators, may have already given an authoritative reading of the contract, in which case the only question should be whether that reading violates provisions of the Act or other applicable statutes. In other cases there may be no prior

112. In 1980, the average total cost for the services of an arbitrator reported to the Federal Mediation and Conciliation Service was $1,011.74. FEDERAL MEDIATION AND CONCILIATION SERVICE THIRTY-THIRD ANNUAL REPORT, FISCAL YEAR 1980 37 (1981). These costs are generally shared equally by the parties. To these costs there must be added the expenses of each party which may exceed the total fees and expenses of the arbitrator, particularly if the party is represented by an attorney.

113. Generally speaking, such an evaluation would give preference to the Board's processes. *See supra* text and note 6. Arbitrators must maintain acceptability to both employers and unions if they are to be selected for subsequent cases. An arbitrator's willingness to find a violation of a collective bargaining agreement may affect his acceptability for similar cases. The condemnation of a party for having violated basic statutory rights of employees much more likely casts the role of protagonist upon the arbitrator, and thus has an even greater effect upon acceptability. Hopefully arbitrators would not allow this consideration to affect their decisions, but the existence of the biasing possibility certainly works as a disqualification for judging charges of statutory violations.

interpretation of ambiguous language or consideration of past practices, and arbitration of the dispute may provide the answer to whether or not an unfair labor practice has been committed. In such a case a stay should be permitted if the claimed reading is plausible and the defense offered in good faith, even though it requires the charging party to bear a share of the arbitration expenses. That party should not be permitted to circumvent the agreed upon procedures for determining the meaning and application of these collective bargaining agreements. If the charging party is an individual employee and the union refuses to arbitrate, the Board should be able to proceed as it did in *C & C Plywood*[114] and determine the meaning of the contract itself. Otherwise the matter should be recognized as the granting of a stay for the purpose of determining whether an unfair labor practice was committed.

THE PROPRIETY OF POST-ARBITRAL DEFERRAL

It is important to remember that most post-arbitral deferral decisions are made in the regional offices, resulting in dismissals of charges, and do not occur at the Board level in its decisions.[115] As a consequence, because of a general acceptance that such decisions are not reviewable, most of those decisions have not been subjected to judicial scrutiny. However, some of the cases decided by the Board have been subjected to judicial review by parties arguing either that it was error to defer to the award or that it was error to refuse to defer to the award. As mentioned above,[116] three courts of appeals have disapproved of the rule announced in the Board's 1974 decision in *Electronic Reproduction Service*. Four other courts of appeals[117] have stated their approval of *Suburban Motor Freight,*[118] which overruled *Electronic Reproduction*. Nevertheless, in its recent decision in *Olin Corp.*[119] the Board restored the policy it had pursued in *Electronic Reproduction,* making modifications in the formula by which that policy will be pursued.

The modifications announced probably will not save the resuscitated policy. As mentioned above, the *Electronic Reproduction* rule required

114. *Supra* note 39. In some cases the Union's refusal to arbitrate may be a violation of its duty of fair representation. *See* R. GORMAN, *supra* note 55, at 695–728 (1976).

115. *See supra* note 95. The Board itself deferred to prior arbitration awards in only 13 cases in the period from 1977 to 1980; in the same period of time it did not defer to prior awards in 58 cases. The total number of *Spielberg* deferral cases reaching the Board during that period was, therefore, only 71. Comment, *Judicial Review and the Trend Toward More Stringent NLRB Standards on Arbitral Deferrals,* 129 U. PA. L. REV. 738, 771 app. (1981).

116. *Supra* note 93.

117. *See supra* note 93.

118. *Supra* note 14.

119. *Supra* note 1.

deferral even though the arbitrator had not passed on the unfair labor practice issue, unless the party seeking to avoid deferral established bona fide reasons, other than the desire to make possible trial in two forums, for the failure to introduce evidence on the unfair labor practice at the arbitration hearing. *Olin Corp.* varies this formula by establishing for deferral a requirement that the contractual issue before the arbitrator be "factually parallel" to the unfair labor practice issue and that there have been a general presentation to the arbitrator of the facts relevant to resolving the unfair labor practice issue. However, the stringency of these standards for deferral is effectively negated by placing the burden on the party seeking to avoid deferral the obligation of showing that the standards for deferral had not been met. This cannot be done merely by showing that the award is not consistent with Board precedent. The award must be shown to be palpably wrong—not susceptible to an interpretation consistent with the Act. Thus, deferral may occur simply because the General Counsel fails to prove what did not happen at the arbitration hearing.[120]

The recently announced formula offers so little assurance that the act has not been violated that the courts probably will reject it for the same reason they rejected the *Electronic Reproduction* standards. Prior to the Board's decision in *Electronic Reproduction,* the Court of Appeals for the District of Columbia concluded that deferral was proper only where the resolution of the contractual issues is congruent with the resolution of the statutory issues; otherwise, it said, Board abstention would constitute not deferral but abdication.[121] It therefore added to the *Spielberg* standards the prerequisites that "the arbitral tribunal (A) clearly decided the issue on which it is later urged that the Board should give deference, and (B) the arbitral tribunal decided an issue within its competence."[122] The Ninth Circuit Court of Appeals, specifically rejecting the *Electronic Reproduction* rule, gave its approval to the D.C. Circuit's decision, adding a definition of what the "clearly decided" requirement means: "substantial and definite proof that the unfair labor practice issue and evidence were expressly presented to the arbitrator and the arbitrator's decision indisputably resolves that issue in a manner entirely consistent with the Act."[123] The Court of Appeals for the Sixth Circuit likewise gave its approval to the D.C. Circuit's decision[124] and after referring to the Ninth Circuit's amplification of the proof necessary for

120. *See supra* note 21 and accompanying text. In a recent, post *Olin Corp.* decision, the Board accepted the testimony of an employer representative of an arbitration panel to establish what evidence was presented at the arbitration hearing. Hilton Hotels Corp. d/b/a The Denver Hilton Hotel, 272 N.L.R.B. 4 (1984).

121. Banyard v. NLRB, 505 F.2d 342, 348 (D.C. Cir. 1974).

122. *Id.* at 347.

123. Stephenson v. NLRB, 550 F.2d 535, 538 n.4 (9th Cir. 1977).

124. NLRB v. Magnetics Int'l, Inc., 699 F.2d 806, 810–11 (6th Cir. 1983).

deferral, stated that any doubts regarding the propriety of deferral would be resolved against the party urging deferral.[125] The *Olin Corp.* formula for allocating the burden of proof is, of course, directly in conflict with the Sixth Circuit's treatment of doubts concerning the propriety of deferral, which assures that at least one Court of Appeals will not accept the new deferral policies. Despite statements that the Board has broad discretion with respect to deferral to the arbitration process, other courts will probably not accept policies which leave such doubts that the act has been enforced.

A PROPER TREATMENT OF PRIOR AWARDS AS EVIDENCE

The Board in *Olin Corp.* was responding to the judicial concern for "congruence" between the contractual issues and the statutory issues when it established the standard for deferral that the contractual issue be "factually parallel" to the unfair labor practice issue.[126] The "congruence" and "factually parallel" formulations might serve adequately as a test for the effect to be given arbitral determinations of factual issues relevant in an unfair labor practice case. They do not adequately address problems of contract interpretation and unilateral action created by the previously discussed unsatisfactory state of the law concerning the duty to bargain during the term of a collective bargaining agreement. If the proposed view of that duty were adopted there would be no need to develop a system of accommodation between two overlapping jurisdictions concerned with the meaning of the contract and the bargaining obligation. Some cases might involve a question of whether the contract as construed by the arbitrator violated a provision of the Act.[127] For the most part, however, what are now considered problems of post-arbitral deference would be seen as merely evidentiary problems. The question would be whether the arbitration decision adequately disposed of the factual issues in the unfair labor practice case in a way that justified dismissal of a charge based on principles of res judicata or collateral estoppel.

The decision would turn on pragmatic considerations such as the evidence presented, the additional evidence which might have been available with adequate investigation and discovery, the procedures followed, the arguments presented, the arguments considered, and the disposition made of those arguments. As noted with some frequency, most arbitrators are

125. *Id.* at 811.

126. Member Hunter, dissenting in Propoco Inc., 263 N.L.R.B. 136, 145 (1982), expressed the view that the proposed test of factually parallel issues comported with the views of reviewing courts.

127. An arbitrator might, for example, decide a representation dispute on the basis of contract language in a manner inconsistent with the Board's rules concerning accretions to exisitng units, or a dispute concerning no solicitation rules in a manner violative of section 8(a)(1).

unlikely to conclude that a discharge or discipline is for "just cause" if it has a controlling source in anti-union motivation, and they are probably as competent as administrative law judges to make that factual determination. If the issues in such a case are only factual and the arbitrator concludes and states after full and fair presentation of evidence, that the challenged action was not based upon improper motivation, that decision might be accepted as sufficient reason for dismissing a charge. Even in such cases consideration must be given to the care, detailed consideration, and understanding of proof of causation revealed by the decision.[128]

If the problem is one of weighing evidence at the investigatory stage of a proceeding, it is, as stated above, one better treated by the General Counsel than the Board. It is, of course, representatives of the General Counsel in the regional offices who are responsible for determining whether evidence produced by a charging party justifies investigation by Board field examiners, and whether, considering evidence produced by an investigation, a complaint should issue.[129] There are no great policy questions in such determinations and only generalized statements can be made concerning the process of decision of whether a complaint should issue. It is at this point, however, that meaningful support can be given to the arbitration process. Deferral later by the Board, or even an administrative law judge, does not spare the parties the expense of a second proceeding.[130] With a record already made there is little justification for refusing to make an independent determination of the facts for the purposes of the unfair labor practice proceeding.

The Board's Statement of Procedures, Rules and Regulations now informs the concerned public how that investigation is carried out.[131] It should be supplemented with statements concerning the detail and form of arbitration decisions which will be given weight in the assessment of the evidence supporting a charge. As Professor Morris has suggested,[132] the General Counsel should also publish decisions and awards considered in determining that a charge should be dismissed, or at least a representative

128. *See* NLRB v. Transportation Management Corp., 462 U.S. 393, 395 (1983); Wright Line, A Div. of Wright Line, Inc., 251 N.L.R.B. 1083, 1089 (1980).

129. NLRB: Statement of Procedures, Rules, and Regulations, 29 C.F.R. §§ 101.4–101.6 (1984).

130. *But see supra* note 105.

131. 29 C.F.R. §§ 101.4–101.6.

132. Morris, *NLRB Deferral to the Arbitration Process: The Arbitrator's Awesome Responsibility,* in PROC. OF THE ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ABSENTEEISM, RECENT LAW, PANELS, AND PUBLISHED DECISIONS 51 (W. Gershenfeld ed. 1984). Professor Morris suggests that such publication could be required pursuant to NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975), and that such publication would not violate the confidentiality requirements of the Code of Professional Responsibility for Arbitrators because it would be a publication required or permitted by law within the meaning of 2C1(e) of the Code. *Id.* at 69.

sample of such decisions and awards should be indexed and made available for publication by private supporting services.

If the problems with what is now considered post-arbitral deferral go beyond the question of whether the evidence will support the issuance of a complaint, the award should not have a controlling effect. For example, arbitrators may not have the legal competence to decide whether a refusal to use unsafe equipment is a protected concerted activity, whether a contractual limitation on distribution of literature interferes with section 7 rights, or whether a provision permitting discipline of shop stewards adopts a prohibited form of discrimination. Decisions of arbitrators competent to determine the meaning of contractual provisions relating to those matters carry no guarantee that the Labor Management Relations Act has been enforced. Indeed, as frequently noted, arbitrators are retained by the parties to decide cases on the basis of the collective bargaining agreement and not as public judges to enforce the external, public law.[133] It may be that an arbitrator's decision will establish the facts of an event or course of action in a manner that will permit the regional office or the General Counsel to decide that on that fact pattern no violation can be established. That decision should be made much like the decisions made in regional offices after completion of a field investigation, and should not be an acceptance of the arbitrator's conclusion about statutory issues.

This suggested limitation on the role of prior arbitration awards in unfair labor practice proceedings is supported by three relatively recent decisions of the Supreme Court. The first decision, *Alexander v. Gardner-Denver Co.*,[134] involved the question of the effect of a prior arbitration award upon a suit under Title VII of the Civil Rights Act of 1964. The Court decided that the contractual and statutory rights were separate, that an individual did not forfeit his statutory right by asserting a contractual right, and rejected an election of remedies argument.[135] Likewise rejected were the arguments that it was unfair to give an employee two strings to his bow (sometimes colloquially rephrased as two bites at the apple), while the employer has but one, and the argument that permitting subsequent resort to the courts would

133. *See, e.g.*, American Federation of Television and Radio Artists, Cleveland Local, AFL-CIO (AFTRA) v. Store Broadcasting Co., 745 F.2d 392 (6th Cir. 1984). *See generally,* Howlett, *The Arbitrator, the NLRB, and the Courts,* in PROC. OF THE 20TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, THE ARBITRATOR, THE NLRB AND THE COURTS 67 (D. Jones ed. 1967); Meltzer, *Ruminations about Ideology, Law, and Labor Relations,* 34 U. CHI. L. REV. 545 (1967); Mittenthal, *The Role of Law in Arbitration,* in PROC. OF THE 21ST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION 42 (C. Rehmus ed. 1968); Platt, *The Relations Between Arbitration and Title VII of the Civil Rights Act of 1964,* 3 GA. L. REV. 398 (1969).

134. 415 U.S. 36 (1974).

135. *Id.* at 51.

undermine the arbitration process.[136] Employees have two bows, not one, and the reasons for employer acceptance of arbitration provisions are strong enough to ensure their continuous use despite an occasional use of both the processes of arbitration and the judicial process. Of greater pertinence for present purposes is the fact that the Court's appraisal of the arbitration process found it wanting as a vehicle for vindication of Title VII rights.[137] The Court concluded that it would not therefore adopt a policy requiring courts to defer to arbitration awards by analogy to the NLRB's *Spielberg* decision. Instead, the Court suggested that the arbitral decision could be admitted by the district court and "accorded such weight as the court deems appropriate."[138] Limiting the effect of the prior award to its evidentiary impact, of course, supports the proposal made above.

The significance of *Alexander v. Gardner-Denver Co.* for the NLRB's deferral problems might be limited, if one accepted the proposition that elimination of employment discrimination on the basis of race, sex, national origin, etc., has a much higher priority in national employment policies than protection of section 7 rights under the Labor Management Relations Act or the protection and promotion of the collective bargaining process. It could also be limited by consideration that frequently the unlawful employment practices challenged in a suit under Title VII had been jointly established by managements and unions, or that unions at least had a complicity in the continuation of those practices, making arbitration a suspect process for vindication of Title VII rights.

These arguments lost most of their force in 1981, when the Supreme Court decided *Barrentine v. Arkansas-Best Freight System.*[139] In that case the Court held employees were not barred from asserting claims for wages under the minimum wage provisions of the Fair Labor Standards Act after having submitted a wage claim based on the same underlying facts for a final and binding decision by a joint grievance committee. After noting the

136. *Id.* at 54–55.

137. *Id.* at 56–59.

138. *Id.* at 60. In footnote 21 of the decision the Court said:

> 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-bargaining 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.

139. 450 U.S. 728 (1981).

important role of arbitration in the national labor policy, the Court rejected the argument that submission of the claims for resolution in the binding grievance procedures barred the plaintiffs from asserting their statutory claims in court.[140] In doing so, it relied upon its prior decision in *Alexander v. Gardner-Denver Co.*, finding unpersuasive the argument that a Fair Labor Standards Act claim was based upon disputed subjects at the heart of the collective-bargaining process, and hence one for which deferral was more appropriate.[141] It would not permit the statutory claim to be precluded by arbitration because (1) the union might without breaching its duty of fair representation decide not to support the claim vigorously in arbitration, and (2) the competence of arbitrators relates "primarily to the law of the shop, not the law of the land."[142] Arbitrators competent at making factual determinations might not be competent to decide whether the statute had been violated, and even if a particular arbitrator had competence to deal with statutory issues, he might not have the contractual authority to do so.[143] Moreover, the remedial powers of an arbitrator are not the same as those of a court under the statute.[144] As in *Gardner-Denver,* the statutory right was considered to be independent of the contractual right.[145] The majority's rejection of a valid distinction between *Gardner-Denver* and the case before it was underscored by Chief Justice Burger's argument in dissent that the Civil Rights Act embodied much more important and fundamental rights than those created by the Fair Labor Standards Act.[146] As it had done in *Gardner-Denver,* the Court noted that an arbitral decision might have evidentiary bearing on a subsequent FLSA suit in court.[147] And, consistent with the suggestion made here concerning the meaning of a collective bargaining agreement, the Court stated its expectation that in determining whether time was non-compensible under a bona fide collective bargaining agreement a trial court would defer to a prior arbitration decision construing the relevant provisions of the collective-bargaining agreement.[148]

140. *Id.* at 734–37.
141. *Id.* at 737–38.
142. *Id.* at 742–43 (quoting *Gardner-Denver,* 415 U.S. 36, 57 (1974).
143. *Id.* at 744.
144. *Id.* at 744–45.
145. *Id.* at 745–46.
146. *Id.* at 749 (Burger, C.J., dissenting).
147. *Id.* at 743–44, n.22.
148. *Id.* at 741–42, n.19. *See* American Federation of Television and Radio Artists, Cleveland Local, AFL-CIO (AFTRA) v. Store Broadcasting Co., 745 F.2d 392, 398 (6th Cir. 1984), in which while ordering the enforcement of an arbitration award, the court expressed the view that the rationale of *Barrentine* would apply equally as well to NLRA complexities of the relationship of arbitration decisions to public law.

Most recently, in April 1984, the Supreme Court again held that an arbitrator's award in a proceeding under a collective bargaining agreement should not be given preclusive effect, this time in a suit under section 1983 of the Reconstruction Civil Rights Act.[149] Once again, arbitration was found wanting as an adequate substitute for judicial protection of federal rights. The arbitrator's expertise did not extend to the complex legal questions arising under section 1983; the arbitrator did not have authority to enforce public laws; the union's exclusive control of access to the arbitration forum made arbitration unsuitable for enforcement of individual rights; and arbitral fact-finding was not generally the equivalent of judicial fact-finding. Nevertheless, as in *Barrentine* and *Gardner-Denver,* the arbitral award might be admitted in evidence in the 1983 action for what weight it might carry.

The three decisions are consistent in their view that contractual rights are separate and distinct from statutory rights. They are consistent in their views of the limitations of the arbitration process for solving disputes other than those concerning the meaning and application of a collective bargaining agreement. They limit the possible significance of a prior arbitration decision in a subsequent court action to its evidentiary value. They do not permit a prior arbitration to deprive protected parties of their statutory rights. Deferral is appropriate only in those situations in which the statutory right turns upon the meaning of a provision in a collective bargaining agreement. In short, they support the proposal made here.

CONCLUSION

The *Spielberg* case presented the relatively simple question of whether controlling effect should be given to an arbitral conclusion that certain strikers had engaged in picket line misconduct that justified the termination of their employment. The question was largely, although not exclusively, whether the Board should conduct a second fact-finding proceeding. From that modest beginning the Board has developed elaborate formulas to govern the relationship between its jurisdiction and the arbitration process. The development, perhaps better described as a meandering, has been marked by advances as well as major retreats, followed by uncertain returns to previously abandoned principles. The Board's failure to develop a realistic and satisfactory rule concerning the duty to bargain during the term of a collective bargaining agreement has greatly aggravated the problems of the relationship between the Board and the arbitration process. That failure

149. McDonald v. City of West Branch, Michigan, 104 S. Ct. 1799 (1984).

produced a pre-arbitral deferral policy, later applied to unfair labor practices unrelated to the bargaining process. The confusion created by the changes in policy obviously have been undesirable. More to be regretted is that the policies pursued, and particularly those recently adopted, lead to the loss of statutory rights of individuals and failures to enforce the policies of the National Labor Relations Act.

Recent decisions of the Supreme Court establish that the arbitration process, important as it is, should not be given a preferred position that frustrates achievements of the policies of statutes governing the employment relationship. The predictable challenges to the recently adopted deferral policies will provide courts with opportunities to consider whether the Board should be permitted to defer to arbitration awards. The major problem involves charges that unilateral action taken by a party violates the duty to bargain. It should be recognized as a problem of administration, scheduling, and procedure best handled by the General Counsel of the Board. His representatives should postpone decisions of whether to issue a complaint only where arbitration may establish the meaning and effect to be given to a collective bargaining agreement and thus permit determination whether or not an unfair labor practice has occurred. In other cases, arbitration awards should be given only what persuasive effect the General Counsel's representatives conclude they have as evidentiary matter.