Arbitrators and the NLRB: The Nature of the Deferral Beast*

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Neither reason nor policy commends the NLRB's practice of deferral to arbitration. Instead, the Board should adopt a policy which allows the charging party to decide whether the Board or arbitration is the appropriate forum for adjudicating a grievance which is also arguably an unfair labor practice.

I

INTRODUCTION

The overlapping concerns of arbitrators, the NLRB and the courts have been frequently debated, written about, and discussed in journals and published proceedings of meetings. As is commonly known, the NLRB's Collyer2 and Spielberg3 decisions precipitated debate in 1971 and 1955, respectively. With the exception of the external law issue, perhaps no arbitration issue has inspired more discussion than that of deferral. One must ask: Can more be said about how overlapping

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2. Collyer Insulated Wire Co., 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971). In Collyer, the Board announced it would refuse to resolve certain unfair practice charges within its jurisdiction if the issue is one an arbitrator may resolve.
3. Spielberg Manufacturing Co., 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955). In Spielberg, the Board reserved the right to refuse to consider an unfair practice charge where an arbitrator has already resolved the underlying issue. The Board announced that it would defer to arbitration when "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." Id. at 1082.
NLRB-arbitral-judicial issues are being or should be handled by the Board, courts, and arbitrators?

Although Collyer and Spielberg are old and familiar cases, their progeny give fresh insights into the thinking of NLRB members as to their applicability. These cases illustrate that in recent years, Board members have divided sharply over the proper scope of the Collyer pre-arbitration deferral policy. This article will argue that the Collyer doctrine should be totally abandoned by the NLRB, given its uncertainty of application, weak supporting rationale, and questionable benefits. As between the NLRB and arbitration forums, the choice of forum should be left to the charging party, since it is best able to evaluate its interests.

II

THE COLLYER DOCTRINE

Collyer Insulated Wire Co. came before the NLRB when, during the term of a collective bargaining agreement, the company unilaterally increased wage rates and decreased the number of employees who worked on a worm gear. The agreement arguably precluded the company from making either change. Hence, the NLRB announced a policy of deferral to arbitration in all cases involving common jurisdiction between the Board and arbitrators.4

The Board reasoned that the dispute was "over the terms and meaning of the contract"5 and therefore should be resolved pursuant to contract grievance and arbitration machinery. The Board also noted that the contract was at the center of the dispute and that an arbitrator, possessing special skills, was peculiarly qualified to resolve such disputes.6 The majority did not, however, explain why the arbitrators' special abilities in contract disputes are necessarily greater than those of the Board. In his dissenting opinion, member Fanning expressly rejected the "expertise" argument:

I find it impossible to accept the majority's assertion that an arbitrator rather than the Board, with the help of its staff and Trial Examiner, has more expertise and is more competent to judge such a dispute in a manner to effectuate the policies of the Act.7

Thus, from the outset, the Collyer doctrine was criticized for distorting the relative capabilities and roles of the Board and arbitrators. Subsequent cases applying Collyer have failed to dispose of these initial misgivings.

5. Id.
6. Id. at 839, 77 L.R.R.M. at 1934.
7. Id. at 848, 77 L.R.R.M. at 1942.
III

THE LIMITATIONS OF PRE-ARBITRAL DEFERRAL

A. An Uncertain Majority

The history of the Collyer decision is one of fits and starts and confusing turns. Roy Robinson Chevrolet and General American Transportation Corp., companion cases decided by the NLRB on the same day, are illustrative. Three opinions were filed in each case, one by members Fanning and Jenkins, arguing against all pre-arbitration deferral, one by members Penello and Walther, in favor of deferral in all disputes covered by a collective bargaining agreement and subject to arbitration, and a third by Chairman Murphy, in favor of deferring in certain refusal-to-bargain cases and not deferring in discipline cases. The opinions thus reflect a two-two-one split. Chairman Murphy aligned with members Fanning and Jenkins, to the extent that they would not defer in discipline cases, and with members Penello and Walther, to the limited extent that they would defer in refusal-to-bargain cases. In essence, two sets of Board members partially agreed with Chairman Murphy's result, but no member agreed with her reasoning in support of limited deferral.

Although the Spielberg decision was unanimous, almost every other Board case applying either Collyer or Spielberg has been a split decision. Thus, each change in Board membership threatens the survival of the doctrine itself.

To complicate matters further, the Board has on occasion reversed its application of the doctrine. An example is Suburban Motor Freight, Inc., one of the Board's more recent Collyer-Spielberg variants. There the Board determined that it would no longer defer to an arbitrator's decision in a discipline case if the unfair practice issue before the Board was both presented to and considered by the arbitrator. The case, like many Board decisions, is one in which an earlier case (Electronic Reproduction Service Corp.) was overruled to restore the status

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10. Id. at 808, 832, 94 L.R.R.M. at 1478, 1483.
11. Id. at 813, 828, 94 L.R.R.M. at 1474, 1489.
12. Id. at 810, 831, 94 L.R.R.M. at 1477, 1486.
quo of an even earlier case (Airco Industrial Gases—Pacific 16).

Collyer enjoys only tenuous support on the Board because the members possess fundamentally different views concerning the Board's role in how deferral questions should be decided. What are the characteristics of Collyer-Spielberg issues that make them so amenable to such profound disagreement at the Board? Perhaps the opponents of NLRB deferral mistrust arbitrators and the arbitration process. 17 Alternatively, these critics may take the more neutral view that Congress never intended deferral of any cases within the Board's jurisdiction, even assuming that arbitration might be a better forum for resolving the question. 18 To the many arguments raised in opposition to Collyer, it should now be added that the Board's indecision, its shifting majorities, its constant creation and re-creation of exceptions to the general rule also support abandonment of pre-arbitration deferral by the NLRB.

Before Collyer, a party filing an NLRB charge only had to consider whether the charge had arguable merit in alleging a violation of the NLRA. Immediately following Collyer and until 1977, a party contemplating filing an unfair practice charge in an NLRB regional office had to consider the following:

A. Whether the unfair practice charge had arguable merit as an alleged NLRA violation;
B. Whether the subject of the unfair practice charge was arguably a subject covered by the grievance-arbitration clause of a governing collective bargaining agreement;
C. Whether the NLRB would eventually perceive the subject of the unfair practice charge as a subject also covered by the grievance-arbitration clause of a governing collective bargaining agreement and defer on Collyer grounds, and, if so;
D. Whether those persons who in fact control the decision to seek arbitration might be persuaded to pursue the grievance to arbitration and, if so;
E. Whether, on reaching the arbitration level of the grievance arbitration process, the arbitrator would decide that the dispute was arbitrable and decide it on the merits. 19

17. See the discussion of the Board's opinions in Roy Robinson Chevrolet, 228 N.L.R.B. at 828 and General American Transportation Corp., 228 N.L.R.B. at 808, and text accompanying notes 31-36 infra.
18. This view is part of the rationale of dissenting members Fanning and Jenkins in Collyer and its progeny. See 192 N.L.R.B. at 853, 77 L.R.R.M. at 1947.
19. In Collyer, the contractual time within which to seek arbitration had expired by the time the NLRB made its decision. Id. at 847, 77 L.R.R.M. at 1941. Collyer proponents discount this as a problem by noting that the party seeking deferral, usually the respondent employer, must agree to waive arbitrability defenses as a condition to deferral. See Nash, supra note 1, at 138.
Now, however, following Roy Robinson Chevrolet\textsuperscript{20} and General American Transportation,\textsuperscript{21} and with recent elaborations of Spielberg,\textsuperscript{22} a potential charging party must consider not only the applicability of old law but also the ramifications of recent decisions and the possible changes still newer deferral law might make in the future.

This does not suggest a need to repeal all general rules of law that are subject to exceptions. We often gain from a flexible application of exceptions to an otherwise rigidly applied rule, even at the expense of uncertainty of application. But deferral policies do not fit that mold. As applied to Collyer deferral, the NLRB's shifting majorities and exceptions undermine the element of predictability of result that is a valuable inducement to settlement. Stating the matter in terms of the allocation of scarce and finite decisionmaking time, determinations whether an employee was discharged for union activity, or whether a company illegally refused to bargain with a union, are more important than whether and under what circumstances the NLRB should defer to arbitration.

\textbf{B. The Time Factor}

Implicit in Collyer is the premise that the NLRB saves time by invoking the doctrine. The Collyer rationale is that some cases which otherwise would reach the Board without a deferral policy will never do so because a swift and expert arbitrator will resolve the claim for the parties.\textsuperscript{23} But does Collyer save time, as the NLRB suggests? Relevant to the answer are subsidiary questions concerning the nature of the concurrent jurisdiction cases subject to deferral and the manner in which they are resolved by arbitration and the NLRB.

Proponents of deferral assume that arbitration is invariably the swifter route, emphasizing the extreme time lag between NLRB dispositions and comparing that with the most expeditious grievance handling.\textsuperscript{24} This comparison fails, however, to consider quick resolution by the NLRB at the regional level through settlement, withdrawal, or dismissal in a matter of weeks, as contrasted with the rather common long-delayed arbitration case.\textsuperscript{25} For instance, the time between

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\item \textsuperscript{20} 228 N.L.R.B. 828, 94 L.R.R.M. 1474 (1977).
\item \textsuperscript{21} 228 N.L.R.B. 808, 94 L.R.R.M. 1483 (1977).
\item \textsuperscript{23} In General American Transportation Corp., members Walther and Penello generalize that arbitration is faster than the Board's processes. 228 N.L.R.B. at 819, 94 L.R.R.M. at 1494. Their use of statistical data in support of that view is criticized at note 29 infra and accompanying text.
\item \textsuperscript{24} See note 23 supra.
\item \textsuperscript{25} Almost all annual reports of the Federal Mediation and Conciliation Service (FMCS) show that the costs of arbitration have increased annually. According to FMCS data, arbitrators'
grievance filing and a final award averages about eight months.26 Hence, the NLRB’s implicit assumption that arbitration is always faster is open to serious question. In fact, when the Board is criticized for delay, its usual response is a reference to the small percentage of NLRB cases that reach the Board,27 and the short time in which most remaining cases are closed through settlements, dismissals and withdrawals following investigation.28

Indeed, statistics cited by members Walther and Penello in favor of deferral have the paradoxical effect of actually refuting their very arguments. Dissenting in *General American Transportation Corp.*, they said:

In an unpublished Board study of the effect of *Collyer* over a 2 ½ year period . . . a total of 1,632 cases had been deferred by the Board’s Regional Offices under *Collyer*. Arbitrators’ decisions issued in 473 of these cases. Of these 473 decisions, the Regions scrutinized 159 at the request of the charging parties in light of the *Spielberg* standards. On 33 occasions, the Regions revoked the *Collyer* deferrals either because the respondents refused to proceed to arbitration or the arbitration awards were deficient under the *Spielberg* standards. In 24 of these 33 instances, issuance of a complaint was made unnecessary by the respondent’s signing of a settlement agreement. *Further, of the 1,632 deferred cases, 437 were settled through the contract grievance procedure without the need of proceeding to arbitration.* . . .29

Thus, the data of NLRB members who favor pre-arbitration deferral demonstrate that to obtain the benefit of 437 settlements through the grievance procedure and without arbitration, the Board had to scruti-

26. *See* note 25 *supra*.
27. According to annual reports of the NLRB, about 5% of unfair practice filings reach the Board members as contested cases. In 1978, 25% of the 37,192 unfair practice charges were closed by settlement or adjustment in advance of a hearing before an administrative law judge, 33% by withdrawal before complaint, and 37% by administrative dismissal. 43 NLRB ANN. REP. 9 (1978).
28. NLRB regional offices complete their investigations of unfair practice charges in a median time of 47 days in investigated cases culminating in the issuance of complaints. *Id.* at 11. The Board’s annual reports do not show the median time required by regional offices to dispose of all cases not resulting in a hearing before an administrative law judge. The median time for disposing of all such cases is probably in the same vicinity. That time, of course, compares more than favorably with the average of 223.5 days required to complete arbitration proceedings and receive an award in 1978. *See* notes 25-26 *supra* and accompanying text.
29. 228 N.L.R.B. at 818, 94 L.R.R.M. at 1494 (emphasis added).
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nize 159 or 33.5% of the total. Absent the *Collyer*/Spielberg doctrine, in all of those 159 instances, the time spent reviewing the award in light of *Spielberg*, as well as deferral in the first instance, could have been spent as a single proceeding on the merits. It is unclear how many of the 33 revoked *Collyer* deferrals were rescinded for refusals to arbitrate. But of that number, all were considered thrice by the Board’s regional offices: at the decision to defer, the decision to revoke deferral, and the decision on the merits. Absent *Collyer*, those three reviews would have been reduced to one, a decision on the merits. And in the twenty-four instances in which no complaint was issued because of settlement, the same result could have been reached in a single proceeding on the merits. *Collyer* encumbers both the Board and parties with additional Board-created work, resulting in a loss of time to both.

In essence, the Board’s erroneous view of arbitration as a swift grievance resolution process that charging parties should always use when available is really a convenient rationalization for the Board’s understandable desire to reduce its mounting caseload. This interest diminishes, however, when deferral cases are viewed as part of an industrial relations dispute-resolution process in which the interests of charging parties in the expeditious resolution of disputes are at least as great as the Board’s interest in managing its caseload. Even if those who favor deferral are correct in assuming that deferral reduces the NLRB’s caseload, this reduction generally is at the expense of increased litigation time for a charging party.30 The prevailing societal interest in resolving labor disputes and the illusory advantages of deferral as well as the Board’s failure to agree upon basic ground rules undermine arguments in favor of continued adherence to the *Collyer* doctrine.

C. The Board’s Erroneous Perceptions

1. “Just Cause” vs. Union or Concerted Activities

With *Roy Robinson Chevrolet* and *General American Transportation* the Board limited its deferral policy to unilateral change allega-

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30. If the NLRB itself split two-two-one and three-two in *Collyer*/Spielberg cases, charging parties can be forgiven for making the incorrect choice of a forum. In the extreme case, a charging party can file originally with the NLRB, receive an NLRB decision to defer (T1), pursue arbitration to completion and receive an adverse decision from the arbitrator (T2), file with the NLRB under *Spielberg* and receive a favorable decision on grounds of repugnancy (T3). Obviously, T1 + T2 + T3 would consume more time than T1 as a decision on the merits. *Collyer* proponents respond that a charging party should have known the Board’s deferral policies and instead pursued arbitration as an original forum. But that forces a potential charging party to arbitrate or attempt to arbitrate any reasonably close deferral case, rather than chance the inordinate delay of the three-step process. Thus, the degree to which *Collyer* compels arbitration is increased by virtue of a charging party having to err on the side of arbitration, even in those instances when filing with the NLRB alone would consume less time and cost far less than pursuing arbitration.
tions. Both cases reveal Board members' skewed perceptions of how arbitrators decide grievance issues and illustrate that the NLRB is far removed from the reality of grievance arbitration.

For example, Chairman Murphy's opinion in *Roy Robinson Chevrolet* states:

(ln cases alleging violations of Section 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2), although arguably also involving a contract violation, the determinative issue is not whether the conduct is permitted by the contract, but whether the conduct was unlawfully motivated or whether it otherwise interfered with, restrained, or coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act. In these situations, an arbitrator's resolution of the contract issue will not dispose of the unfair labor practice allegation. Nor is the arbitration process suited for resolving employee complaints of discrimination under Section 7. . . .

This assumes that an arbitrator interpreting a just-cause clause in a collective bargaining agreement might not find a contract violation, even though the arbitrator determined that the motivation for the discharge or other discipline was union or concerted activities. But this is certainly not an acceptable rationale for distinguishing between discipline cases and refusal to bargain cases for deferral purposes.

Most arbitrators are aware that a host of reasons found to have motivated discipline might be a breach of a just cause clause. That Board members may find a violation of the Act in discipline cases only when discipline was motivated by union or concerted activities does not mean that, conversely, an arbitrator is precluded from finding or is unqualified to find such discipline to be without just cause. Virtually every arbitrator who found union activity to be the motivation behind discipline would sustain a challenging grievance. Indeed, arbitrators are prone to find just cause violations for any reason that appears to be arbitrary or fundamentally unfair. This would include any discharge or discipline that had no satisfactory explanation.

Furthermore, it is unnecessary in an arbitration proceeding (unlike Board proceedings in all unfair practice cases) to establish a specific motive for discipline. The NLRB may find many arbitrary reasons for disciplinary action, but if antiunion animus is not among them, the

31. 228 N.L.R.B. at 811, 94 L.R.R.M. at 1486-87.

32. The view that section 8(a)(3) allegations require an expertise not generally possessed by arbitrators was voiced at the 1974 meeting of the National Academy of Arbitrators. Professor William Murphy, posing a question for General Counsel Nash of the NLRB, said: "If we move to 8(a)(1) and 8(a)(3) cases, a violation may rest on a specific finding of anti-union motivation or may turn on much more subtle and difficult questions of unwarranted employer interference with employee rights protected by Section 7. There, an arbitrator's competence with a contractual standard of just cause gives him no background for dealing with the problem, and the arbitrator without legal training lacks the competence to deal with the statutory issues." PROCEEDINGS OF THE TWENTY-SEVENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 143 (1974).
Board must find no violation of the NLRA. In the same case, an arbitrator who found no rational reason to support the discipline would sustain the grievance. In sum, an arbitrator interpreting a just cause clause is at least as likely—if not more so—to sustain a grievance in a discharge case as is the NLRB in an unfair practice case alleging similar facts and a violation of the NLRA. The Board’s conclusion that “the arbitration process [is not] suited for resolving employee complaints of discrimination under Section 7” assumes that the inherent arbitrariness of a discharge for concerted activities has some mysterious quality known only to the NLRB. In fact the arbitrary feature of discipline on account of union activity or concerted activities is but one among hundreds of types of arbitrary behavior that arbitrators consider when allegations are made under just cause clauses.

2. Arbitral vs. NLRB Remedies

Just cause cases can also be viewed from the perspective of remedy, an area in which arbitrators operate with far more flexibility than does the Board. Arbitrators commonly—too commonly for many employer representatives—convert disciplinary discharges into suspensions or otherwise reduce discipline penalties, all depending upon the equities as perceived by the arbitrator. In contrast, evidence in a Board proceeding either does or does not support, for example, an allegation of discrimination because of union activity. All of the essential elements of a violation may not be satisfied, including employer knowledge of union activity or discrimination because of union activity. Given the nature of the allegation, the NLRB has little leeway to reduce a discharge to a lesser form of penalty. An NLRB discharge case that falls just short of satisfying all of the elements of proof required to sustain a section 8(a)(3) violation will result in dismissal, unless some other section of the NLRA is found to have been independently violated. The same facts heard by an arbitrator might well result in a reduction of the discharge to some lesser form of discipline, not only because the employer’s reasons for the discharge are found to be par-

33. In American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965), the Supreme Court noted: “[i]t has long been established that a finding of violation under [section 8(a)(3)] will normally turn on the employer’s motivation.” See NLRB v. Brown, 380 U.S. 278 (1965); Radio Officers’ Union v. NLRB, 347 U.S. 17, 43 (1954); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1937).

34. 228 N.L.R.B. at 811, 94 L.R.R.M. at 1486-87. The view that arbitrators lack expertise in deciding union or concerted activities discipline cases appears to be based also on the erroneous notion that most section 8(a)(3) discharge cases, for example, present sophisticated issues of law. In fact, those cases invariably raise disputed questions of fact and no question of law. In short, they are cases which a charging party will win if the facts alleged in the complaint are established at the hearing.

35. See note 31 supra.
tially lacking in proof, but because the arbitrator regards discharge as too severe under the circumstances.

In all of these respects, it is true that an arbitrator would not be resolving statutory unfair practice allegations. But Chairman Murphy was almost certainly incorrect when she wrote in *Ray Robinson Chevrolet* that in section 8(a)(3) cases “an arbitrator’s resolution of the contract issue will not dispose of the unfair labor practice allegation.”

Almost any arbitral disposition in favor of a grievant in a discipline case will end the underlying controversy, including underlying elements of antiumion animus. If the arbitrator incorrectly decides against the grievant, *Spielberg* policy gives the NLRB an opportunity to vindicate statutory violations not redressed by the arbitrator. But the possibility of an arbitrator rendering an incorrect decision in this regard is no greater than the possibility of the Board reaching the wrong result in discipline cases—as it surely sometimes must.

On matters other than the burden of proof and production of evidence, the general approach to deciding NLRB and arbitrated discipline cases scarcely differs, either in the kinds of evidence that would be introduced or the way an administrative law judge or arbitrator would react to that evidence. For example, it would weigh heavily against the employer in either forum if the employer’s reasons for discipline—excessive tardiness or lack of productivity—were not sustained by the evidence. The finder of fact in both the Board and arbitration forums would tend to infer that the affirmative defense was merely a pretext and that union activity actually motivated the employer’s decision to discipline.

3. **The Questionable Distinction Between “Contract” and “Individual” Disputes**

Elsewhere in *General Transportation*, Chairman Murphy further revealed her view, and perhaps that of other NLRB members, of the arbitration process. Her opinion stated: “In cases alleging [refusal-to-bargain violations] the dispute is principally between the contracting parties—the employer and the union—while in [discipline cases] the dispute is between the employee on the one hand and the employer and/or the union on the other.” Implicit is the notion that, as a dispute between contracting parties, the refusal to bargain case is more properly the province of arbitrators who interpret contracts, and that a dispute between an “individual” and the employer raises individual

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36. See note 31 *supra* and accompanying text.

37. This of course assumes that the facts compel the arbitrator to find that union or concerted activities motivated the discipline.

38. 228 N.L.R.B. at 810, 94 L.R.R.M. at 1486.
rights questions which are more properly the province of the NLRB. Both the premise and the conclusion lack precision.

Before the NLRB, the union is generally the charging party in cases alleging section 8(a)(3) violations. The union is likewise the charging party in nearly all arbitrated cases and is certainly a party in all arbitrated cases arising under collective bargaining agreements in the private sector. In discipline cases invoking NLRA principles, the grievant's interest in the outcome, while personal and terribly important to the grievant, can hardly be characterized as being less important than the union's interest in sustaining a charge alleging some form of retribution for union activities. The union's survival as the exclusive representative is often at stake in cases alleging discrimination during the first stages of an organizing campaign. Thus, the union is a real party in interest in those cases, as well as the nominal charging party.

Ironically, Chairman Murphy's observations concerning the alignment of parties in discipline cases would have made more sense as applied to discipline cases not involving union activity. There the union's interest in winning a grievance generally pales with its interest in winning a case where the union's survival as exclusive representative is at stake. But those are not the NLRB-arbitration concurrent jurisdiction cases. Thus, Chairman Murphy's view of NLRA discipline cases as being between the employee and the employer is more amenable to criticism when applied to union activity cases.

4. Refusal-to-bargain Cases

The preceding discussion of the non-deferral policy in discipline cases is meant to criticize more the reasoning behind the Board's policy than the policy itself. Importantly, the rationale behind the decision not to defer in discipline cases is inextricably linked to the arguments in support of continued deferral in refusal-to-bargain cases.

What kinds of refusal-to-bargain cases are these? How are they decided by arbitrators? How by the NLRB? Are there material differences between the two approaches that justify a forced resort to arbitration, even though the NLRB has jurisdiction?

Although all these cases arise under section 8(a)(5) of the NLRA,

39. During the 1978 fiscal year, the NLRB received a total of 27,056 unfair practice charges against employers, of which 14,968, or 55%, were filed by unions. 43 NLRB ANN. REP. 239 (1978). The figures provided are not broken down by types of unfair practice charges filed by unions, individuals and employers.

40. 29 U.S.C. § 158(a)(5) (1976). Unilateral-change cases also arise under section 8(b)(3) of the NLRA, 29 U.S.C. § 158(b)(3) (1978), which makes it an unfair practice for a labor organization to refuse to bargain in good faith. Section 8(b)(3) charges, though, are a distinct minority of the total cases filed annually with the NLRB. By comparison, section 8(a)(5) allegations of refusal-to-bargain comprise 19.7% of the total number of charges filed annually, or four times the number of section 8(b)(3) charges. See 43 NLRB ANN. REP. 241 (1978). The Board's reports do
they should be classified more narrowly since deferral policies have no application in many kinds of refusal-to-bargain cases. Refusal-to-bargain charges usually involve either a party who engages in surface bargaining, or an employer who unilaterally changes working conditions either: (1) during negotiations and in advance of an agreement or (2) after an agreement has been reached and in arguable derogation of the agreement. Ordinarily, deferral has no application in surface bargaining cases, since the challenged conduct occurs during negotiations for an agreement. Likewise, deferral does not apply where the change was not in breach of an existing agreement. Only the post-contract, unilateral-change case appears to be the type of case to which pre-arbitration deferral applies. Collyer itself was such a case. In deferring in that case, the Collyer Board stated:

In our view, disputes such as these can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by application by this Board of a particular provision of the [NLRA].

Thus, arbitrators are too expert to be avoided in unilateral-change cases, but not expert enough to replace the NLRB in discipline cases. This appears to summarize the Board's judgment of arbitrators when Collyer, Robinson and General Transportation are read together.

One need not argue that the Board is more skilled than arbitrators in deciding unilateral-change cases, any more than it is necessary to argue that arbitrators are more skilled than the NLRB in deciding discipline cases. It is sufficient to demonstrate that the Board is no less competent than arbitrators to decide those unilateral-change cases involving arguable contract violations. This thesis can be tested by comparing what arbitrators and the NLRB do when deciding such cases.

When the Board considers an allegation of unilateral change based upon a breach of contract, it must (1) find a unilateral change; (2) determine whether the subject of the change is a mandatory subject of bargaining; and, if so, (3) determine whether the change breached the agreement. The underlying theory of this type of section 8(a)(5) violation is that a contract, having been mutually arrived at, ought to be amended only through negotiations leading to a mutual agreement.

not show a further breakdown of refusal-to-bargain charges, but unilateral-change cases of the kind that might fall within the concurrent jurisdiction of arbitrators are undoubtedly a still smaller percentage of the Board's total refusal-to-bargain workload.

43. See NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967), and Collyer itself, discussed at notes 3-7 supra and accompanying text. An arbitrator might of course find that a subject not expressly included in an existing agreement became an implied part of the agreement by way of past practice.
44. 192 N.L.R.B. at 839, 77 L.R.R.M. at 1934.
Because a unilateral change of contract terms is the antithesis of a mutually agreed upon contract amendment, the NLRA protects the bargaining relationship by requiring a threshold attempt to negotiate proposed changes in contract terms.\textsuperscript{45} When the NLRB interprets an agreement in such cases, it decides only that "the union did not agree to give up these statutory safeguards."\textsuperscript{46} Thus, the statutory violation is also the breach of the agreement. The Collyer Board concluded that this congruence is what makes such cases so amenable to the "special skill and experience" of arbitrators. What the opinion failed to answer is why the Board lacks skill and experience in deciding refusal-to-bargain cases.

The sole basis for concluding that arbitrators have a special expertise and competence in these cases is that the Board decides relatively few unilateral-change cases involving arguable contract violations.\textsuperscript{47} It is true that arbitrators always interpret agreements in labor grievances. Yet beyond this difference and apart from the obvious inconsistency with the Board's judgment that arbitrators are not sufficiently expert to decide contract discipline cases, the Board has overlooked other factors in its determination that arbitration is the proper forum for unilateral-change cases.

Overlooked is the Board's experience with other types of refusal-to-bargain cases. Surface bargaining cases,\textsuperscript{48} unilateral-change cases which do not involve arguable breaches of contract,\textsuperscript{49} and pure mandatory-subject-of-bargaining cases\textsuperscript{50} all raise issues that bring the Board into intimate contact with the collective bargaining process. The Board is familiar with the jargon and the nomenclature of the process leading to an agreement. It has a sense of bargaining table dynamics and thus, it is familiar with the meaning of the resulting contract terms. The Board is at least as competent as arbitrators to determine whether a merit wage increase contradicts the terms of an agreement, or whether a subcontracting clause permits or precludes a company from unilaterally contracting out work.

\textsuperscript{45} If this is not the underlying theory of a unilateral change of contract terms violation of section 8(a)(5), it is difficult to perceive why such allegations would be regarded as violations of the NLRA, rather than purely the breach of an agreement, requiring interpretation of the agreement, and hence being beyond the NLRB's jurisdiction. That view seems to have been rejected by the Supreme Court in \textit{C & C Plywood}. That case acknowledged that the NLRB lacks jurisdiction generally to interpret collective bargaining agreements, but held that the Board may do so to the limited extent of determining in a unilateral-change case whether the union waived its statutory protection against unlawful refusals to bargain. \textit{See generally Schatzki, NLRB Resolution of Contract Disputes Under Section 8(a)(5)}, 50 Tex. L. Rev. 225, 246-65 (1972).

\textsuperscript{46} 385 U.S. at 428.

\textsuperscript{47} \textit{See} note 40 \textit{supra} and accompanying text.

\textsuperscript{48} \textit{See} note 41 \textit{supra}.

\textsuperscript{49} \textit{See} note 42 \textit{supra}.

Furthermore, neither forum will result in radically different remedies. An arbitrator who finds a contract breach will fashion a remedy accordingly, ordering in a wage-change case, for example, that proper wages be paid per the agreement. Similarly, the NLRB remedy would be an order to refrain from taking unilateral action. Like the administrative law judge in Collyer, the Board would also require that the employer reinstate the wage scales set out in the agreement.

**D. Federal Policy and Voluntariness**

There remains the question whether the Board’s policy of pre-arbitral deferral finds support in something other than the manner in which arbitrators and the Board decide cases. The Board wrote in Collyer:

> We believe it to be consistent with the fundamental objectives of Federal law to require the parties here to honor their contractual obligations rather than, by casting this dispute in statutory terms, to ignore their agreed upon procedures.\(^5\)

This statement, perhaps more than anything else in Collyer or its successors, demonstrates the Board’s unfamiliarity with the realities of grievance arbitration. Not only did the Board seem unaware of the complex range of factors that must be considered by a union in determining whether a case should be taken to arbitration: it further failed to acknowledge that arbitration clauses call for arbitration upon demand and not simply whenever a dispute arises. Dissenting member Fanning was surely not overstating the case when he characterized Collyer as a case that “verges on the practice of compulsory arbitration.”\(^5\)

Indeed, the Board’s response to the Fanning dissent turns on the Collyer majority’s misconceived distinction between compulsory and voluntary arbitration:

> We are not compelling any party to agree to arbitrate disputes arising during a contract term, but are merely giving full effect to their own voluntary agreements to submit all such disputes to arbitration, rather than permitting such agreements to be side-stepped and permitting the substitution of our processes, a forum not contemplated by their own agreement.\(^5\)

Until Collyer, no one was aware that absent a breach of the duty of fair representation, an agreement to arbitrate required arbitration. And no decision has so far held that seeking a Board remedy rather than an arbitration remedy is *per se* a breach of the duty of fair representation.

It should be noted, however, that there are two points at which the terms “compulsory” and “voluntary” arbitration might become an is-

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52. *Id.* at 847, 77 L.R.R.M. at 1941.
53. *Id.* at 842, 77 L.R.R.M. at 1937 (emphasis added).
issue. One is when the agreement to arbitrate on demand is reached. The other is when arbitration clause is implemented. Governmental insistence upon an arbitration clause, even though neither party may desire one, would be compulsory arbitration of one kind. It is at this level that the Collyer majority found no governmental or other compulsion to enter into an agreement to arbitrate. But government could refrain from insisting upon agreements to arbitrate and yet insist that all agreements to arbitrate upon demand be read as requiring arbitration of all contract disputes. This would be governmental compulsion of a different order, but compulsion nonetheless. Indeed, the latter form of compulsion is arguably the more coercive. For even with a mandatory arbitration clause, a union would remain free (assuming no breach of the duty of fair representation) to arbitrate only when it thought that was in its best interests. In the other circumstance the union would have no choice but to arbitrate.

It is this insistence that a party arbitrate which the Board has substituted for agreements to arbitrate upon demand. Nevertheless, the national policy of favoring arbitration, distorted by the Collyer Board to mean a national policy in favor of arbitrating all contract disputes, was never intended to do more than make arbitration available as a voluntary means of dispute resolution.

IV

THE NEED FOR PARTY CHOICE

Since its inception, the Collyer doctrine of pre-arbitral deferral has been characterized by confusion and uncertainty of application and supported by dubious policies. Given Collyer's lack of tangible benefits in the area of effective employer-employee conflict resolution, all indications point to its abandonment. Nevertheless, one important issue would remain: if deferral were rejected, where should the decision-making authority as to choice of forum reside in common jurisdiction cases? The most reasonable and perhaps only answer to this question is that the policy of pre-arbitral deferral should give way to a choice by the charging party whether to arbitrate or file a charge with the NLRB.

Numerous variables can influence the decision to arbitrate and difficult subjective considerations may influence a choice of one forum or the other. Charging parties are surely in a better position than the NLRB to weigh the advantages and disadvantages of either forum. They understand where the tactical advantages lie and are more familiar with the economic and political realities of the arbitration process, including its subtleties and unwritten rules. The NLRB, in contrast, is far removed from the pre-arbitration grievance process. Any choice it
makes (as was done in Collyer) can cause an unacceptable hardship on a party that might be better off in another forum.

When presented with a choice between the NLRB and arbitration, a charging party would prefer one forum over the other for reasons of anticipated victory and swift resolution. These factors might favor the NLRB in some instances and grievance arbitration in others.

The notion that a party choosing between the NLRB and arbitration forums seeks an advantage of time and efficiency is borne out by the nature of the common jurisdiction cases. Within that limited class, the small difference between arbitration and the NLRB minimizes any chance of greater success in one forum than another. Charging parties are aware of this and would seek what the NLRB now denies them in such cases: the speedier, more efficient forum.

Moreover, leaving the choice to the charging party recognizes that in at least some cases the NLRB is the only realistic option. The Collyer Board's easy assumptions concerning the voluntary nature of arbitration ignore the internal economic and political realities of grievance arbitration. These realities include a union's unwillingness or inability (e.g., for economic reasons) to pursue a grievance to arbitration, as well as the numerous means available to an employer to delay or resist arbitration.

In sum, the labor-management dispute resolution process works best when the choice of forum is left to the charging party, since it is in the best position to make a rational choice. As previously stated, Board deferral before arbitration only creates additional delays elsewhere in the overall scheme. The Board saves neither its own time, given its disagreement over the application of Collyer, nor litigation time for parties, when it makes the choice of forum itself.

V CONCLUSION

This discussion has omitted an analysis of the caselaw supporting and opposing deferral. The deferral issue is not, however, one of legal compulsion. Courts will continue to approve deferral as long
as the Board does so. Alternatively, the courts would allow the Board not to defer. The courts would regard a Board decision either way as a legitimate exercise of its discretion.\textsuperscript{58} This discretion, however, has so far been exercised improperly in favor of deferral. The Board should recognize \textit{Collyer}'s faulty underpinnings and overrule the doctrine in favor of a policy allowing the charging party to choose the forum in common jurisdiction cases.

\textsuperscript{58} See Lodges 700, 743, 1746, IAM \textit{v. NLRB}, 525 F.2d 237 (2d Cir. 1975).