

## NLRB DEFERRAL TO ARBITRATION

The National Labor Relations Act, as amended (hereafter “Act”) does not specifically address the relationship between the NLRB and the grievance-arbitration process. Section 10(a) of the Act, perhaps the most relevant section, provides as follows:

“Sec. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise...”

Thus, Section 10(a) gives the Board exclusive authority to adjudicate unfair labor practices under the Act.

In 1947 Congress passed the Taft-Hartley Act which created the Federal Mediation and Conciliation Service in Title II, Sections 202 - 205(A). Section 203 (d) 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. The Service [FMCS] is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.”

While Section 203(d) declares the arbitration process as “the desirable method for the settlement of grievance disputes which arise over the application or interpretation of an existing collective bargaining agreement, the Courts have not questioned the Board’s exclusive authority to determine whether to defer to the arbitration process with respect to unfair labor practices. In **Carey v. Westinghouse Electric Corp.**, 375 U.S. 261 (1964) the United States Supreme Court, referring to the Decision of the NLRB in **International Harvester Co.**, 138 NLRB 923 (1962), stated:

**“There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held. However, it is equally well established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.**

“The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of grievance and disputes arising thereunder, ‘as a substitute for industrial strife’, contribute significantly to the attainment of this statutory objective. International Harvester Co., 138 NLRB 923, 925-926.” (emphasis supplied)

## **I. Post-Arbitration Deferral.**

In 1955 the Board decided **Spielberg Manufacturing Company, 112 NLRB 1080, 36 LRRM 1152 (1955)**; the landmark case involving the issue of post-arbitration deferral. In **Spielberg, supra**, the parties had agreed, as part of a strike settlement, to arbitrate the employer's refusal to reinstate four strikers accused of picket-line misconduct. An arbitration hearing was held, after which the three-man arbitration panel, in a 2 - 1 award denied the grievance and held that the employer was not obligated to reinstate the four employees. The four employees and the Union actively participated in the hearing and acquiesced in the arbitration proceeding.

Subsequently, the employees filed unfair labor practice charges against the employer. The Trial Examiner found that the employer had violated Sections 8(a)(1) and (3) of the Act by refusing to reinstate the four employees at the conclusion of the strike. The Trial Examiner rejected the employer's two primary defenses: (1) its refusal to reinstate the employees was in accordance with an arbitration award and therefore proper; and (2) the misconduct of the employees during the strike was in any event sufficient to warrant a refusal to reinstate them.

The Board accepted the employer's first defense, and dismissed the complaint in its entirety. The Board stated in its summary that:

- (1) the proceedings appear to have been fair and regular,
- (2) all parties had agreed to be bound, and
- (3) the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act.

The Board then stated:

“In these circumstances we believe that the desirable objectives of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award. Accordingly, we find that the Respondent did not violate the Act when, in accordance with the award, it refused to reinstate the four strikers.”

The Board, in footnote 6 stated that “we do not, by this decision, express any opinion as to the legality of the picket line conduct”.

Subsequent to **Spielberg, supra**, the Board added a fourth standard to the **Spielberg** standards, to-wit, (4) the unfair labor practice issue must have been presented to and considered by the arbitral tribunal. **Monsanto Chemical Co., 130 NLRB 1097 (1961); Ratheon Co., 140 NLRB 883 (1963), set aside on other grounds, 326 F.2d 471 (1st Cir. 1964); Propoco, Inc., 263 NLRB 136 (1982), aff'd, 742 F.2d 1438 (2nd Cir. 1983); and Olin Corp., 268 NLRB 573 (1984)**. In **Olin Corp., supra**, the Board adopted the following standard for deferral to arbitration awards:

“Accordingly, we adopt the following standard for deferral to arbitration awards. We would find that an arbitrator has adequately considered the unfair

labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the **Spielberg** standards of whether an award is ‘clearly repugnant’ to the Act. And, with regard to the inquiry into the ‘clearly repugnant’ standard, we would not require an arbitrator’s award to be totally consistent with Board precedent. Unless the award is ‘palpably wrong,’ i.e., unless the arbitrator’s decision is not susceptible to an interpretation consistent with the Act, we will defer.

“Finally, we would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award.”

In **Southern California Edison Co.**, 310 NLRB 1229 (1993), **enf’d**, 39 F.3d 1210 (D.C. Cir. 1994), the issue before the Board was whether the arbitrator’s decision was “clearly repugnant” to the purposes and policies of the Act. An arbitrator had held that the employer had not violated the collective bargaining agreement when it unilaterally implemented a drug screen program at its San Onofre Nuclear Generating Station. The General Counsel and the Charging Parties argued to the Board that the arbitral award was repugnant because the arbitrator failed to use the Board’s statutory standard which would require a showing that the safety provision set forth in the agreement clearly and unmistakably waived the right to bargain about drug testing.

The Board in **Southern California Edison**, **supra**, disagreed with the General Counsel’s and Charging Parties’ view of the “clearly repugnant” standard as it applied the arbitrator’s decision. The Board stated (l.c. 1231):

“Thus an award can be susceptible to the interpretation that the arbitrator found a waiver, even if the arbitral award does not speak in those terms. Further, given such a finding of waiver, the mere fact that the Board would not have found a waiver is insufficient by itself to establish repugnance. The Board will determine whether a particular award is ‘clearly repugnant to the Act’ by reviewing all the circumstances, including the contractual language, evidence of bargaining history and past practice presented in the case.”

See article of William B. Gould IV, Chair, NLRB, entitled **The NLRB’s Deferral to Arbitration Policy**, 10 **The Labor Lawyer** 719 (1994).

## **II. Pre-Arbitration Deferral**

The next landmark case involving NLRB deferral policies was **Collyer Insulated Wire**, 192 NLRB 837 (1971). In **Collyer**, **supra**, the employer contended that the union’s Section 8(a)(5) charge alleging unilateral changes in conditions of employment should be deferred to the

grievance arbitration provisions of the parties' collective bargaining agreement. The factors for deferral under **Collyer** are:

- a. The employer and union must have a collective bargaining agreement currently in effect that provides for final and binding arbitration.
- b. The employer is willing to process a grievance concerning the allegations in the charge, and will arbitrate the grievance if necessary.
- c. The employer has agreed to waive any time limitations to ensure that the arbitrator addresses the merits of the dispute.
- d. The allegations of the charge appear to be covered by, and are likely to be resolved through, the grievance/arbitration procedure.

Deferral is not appropriate under certain circumstances:

- a. Where the charge alleges a violation of Section 8(a)(4).
- b. Where the charge alleges a party has failed to supply information in violation of Sections 8(a)(5) or 8(b)(3).
- c. Where the charged party's defense is not reasonably based on an interpretation of the collective bargaining agreement.
- d. Where the case involves the resolution of unit determination or other representation type issues.

The application of the Board's **Collyer** policy, and the General Counsel policies adopted pursuant to that decision, are often complex, thus requiring regions and parties to be alert to current Board decisions, Advice and Appeals memos, and relevant OM and GC Memoranda. However, the 1973 General Counsel Memorandum, "Arbitration Deferral Policy under **Collyer**-Revised Guidelines" (May 10, 1973), is still cited as a general source of General Counsel policy in this area. Regional decisions to defer pursuant to Collyer may be appealed to the General Counsel's Office of Appeals.

Deferral pursuant to **Dubo Manufacturing Corp.** is appropriate where a grievance involving the unfair labor practice issue(s) is already actively pending. Unlike **Collyer** deferrals, **Dubo** deferrals are not subject to appeal, as there is no obligation on the charging party's part to file or to continue processing a grievance. The region postpones its determination while the parties voluntarily and actively pursue the dispute via their grievance/arbitration machinery. If the grievance were no longer being pursued, the unfair labor practice investigation would resume.

The most recent guidance offered by the Office of the General Counsel can be found in Operations-Management Memo 05-77 (June 20, 2005) and the case-handing manual 10118.

## Excerpted from Casehandling Manual:

### 10118 Deferrals

Under certain circumstances, it may be appropriate for a Regional Director to defer making a determination on the merits of a charge pending the outcome of proceedings on related matters. Such matters may be pending in the parties' contractual grievance procedure or before the Agency or other Federal, State, or local agencies or courts. Whenever a Regional Director decides to defer action on a case, all parties should be notified of that decision and the basis for it.

#### 10118.1 *Deferral to Contractual Grievance Procedure*

Upon a determination of arguable merit, a Regional Director generally will be required to defer a charge to an available grievance procedure. If the charging party fails to process the ULP issue through the grievance procedure, deferral will generally not be appropriate and dismissal of the charge will be required. Deferral is generally not appropriate in certain circumstances, such as:

- Where the charge alleges a violation of Section 8(a)(4). *Food & Commercial Workers Local 1776*, 325 NLRB 908 (1998).
- Where the charge alleges a party has failed to supply information in violation of Section 8(a)(5) or 8(b)(3). *Clarkson Industries*, 312 NLRB 349, 353 (1993).
- Where the charged party's defense is not reasonably based on an interpretation of the collective-bargaining agreement. *Oak Cliff-Golman Baking Co.*, 202 NLRB 614, 616–617 (1973). (But see GC Memo 02-05 regarding collection cases.)
- Where the case involves the resolution of unit determination or other representation type issues. *St. Mary's Medical Center*, 322 NLRB 954 (1997).

(a) *Collyer Deferral*: Under the Board's policy set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984), certain charges must be deferred to the contractual grievance procedure if the conduct is cognizable under the grievance procedure, the grievance procedure culminates in final and binding arbitration and the charged party waives all timeliness defenses to the grievance. The Board's policy and the procedures implemented in furtherance of this policy by the General Counsel are complex. Thus, current Board decisions, Advice memos, Appeals memos, and OM and GC memos should be consulted as needed. See generally General Counsel's Memorandum, Arbitration Deferral Policy under *Collyer* — Revised Guidelines, May 10, 1973 (Deferral memorandum). Also see Pattern for *Collyer* Deferral letter at Sec. 10118.6.

(b) *Dubo Deferral*: Where a deferral under *Collyer* is inappropriate, the Regional Office may, in appropriate circumstances, defer a charge pursuant to the Board's decision in *Dubo Mfg. Corp.*, 142 NLRB 431 (1963). See generally GC Memo 79-36.

Under the Board's *Dubo* policy, unlike the *Collyer* policy, a charging party is not required to utilize a grievance procedure or face dismissal of its charge and is not entitled to appeal the *Dubo* deferral to the General Counsel. Thus, the Regional Office will defer under *Dubo* only if the charging party has initiated and continues to process a grievance involving the same issue. See General Counsel's Memorandum, Arbitration Deferral Policy under *Collyer* - Revised Guidelines, May 10, 1973 at page 38.

#### *10118.2 Review Following Arbitration*

Following issuance of an arbitration award, the Regional Office should determine whether the award meets the Board's standards as set forth generally in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). If the award meets the Board's standards, the charge should be dismissed, absent withdrawal. If the award does not meet the standards, the Regional Office should not defer to the award and should proceed to complete the investigation.

#### *10118.3 Review Following Grievance Adjustments*

Following an adjustment of a grievance, the Regional Office may, in appropriate circumstances, dismiss the charge, absent withdrawal, based on the grievance adjustment. See generally *Catalytic, Inc.*, 301 NLRB 380 (1991); *Alpha Beta Co.*, 273 NLRB 1546 (1985).

#### *10118.4 Administrative Deferral*

A Regional Office may postpone determination of a ULP charge due to the pendency of closely related matters in other proceedings. In these circumstances, the Regional Office should notify the parties of such decision and the basis for it. Although the Regional Office will normally consider the disposition of the related matter in its eventual determination, the Regional Office is not generally required to defer to the result in the related matter, except for controlling General Counsel determinations or Board decisions. Administrative deferral of a charge may be appropriate in the following circumstances:

(a) *Other Charges:* The Regional Office may postpone determination where the outcome of a closely related ULP charge may affect the disposition of the charge to be deferred. Common circumstances include cases pending administrative appeal and where complaint has issued.

(b) *Representation Cases:* The Regional Office may postpone determination of a ULP charge where the disposition of representation cases before the Regional Office or the Board may impact significant issues raised in the ULP case. Such issues may include supervisory status, appropriate unit or unit clarification issues.

(c) *Other Government Agencies and Courts:* The Regional Office may postpone making a determination of a ULP case where the outcome of a closely related matter pending before other Federal, State, or local Government agencies may significantly impact the disposition of the case to be deferred. For examples, see Sec. 10070. See also Sec. 10118.5.

10118.5 *Periodic Review of Status of Deferred Cases*

In order to determine whether deferral remains appropriate, the Regional Office should, on a quarterly basis, ascertain from the parties the status of the proceedings to which the Regional Office has deferred. Upon resolution of the related proceedings, the Regional Office must promptly review the disposition of the related proceedings and take whatever action is appropriate.

10118.6 *Pattern for Collyer Deferral Letter*

The following pattern should be used for deferral under *Collyer*.

**Collyer Deferral Letter**

[Charging Party and Charged Party]

**Re:** [Case Name]  
[Case Number]

**Appropriate Salutation:**

**The Region has carefully considered the charge filed against [Charged Party name] alleging it violated the National Labor Relations Act. As explained below, I have decided that further proceedings on that charge should be handled in accordance with the Board's deferral policy.**

***Deferral Policy:* The Board's deferral policy provides that this Agency withhold making a final determination on certain unfair labor practice charges when a grievance involving the same issue can be processed under the grievance/arbitration provisions of the applicable contract. *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984). This policy is based, in part, on the preference that the parties should resolve certain issues through their contractual grievance procedure in order to achieve a prompt, fair and effective settlement of their dispute. Therefore, if an employer agrees to waive contractual time limits and process the related grievance through arbitration if necessary, the Regional Office will defer the charge. However, this policy requires that a charge be dismissed if the charging party thereafter fails to promptly file and attempt to process a grievance on the subject matter of the charge.**

***Decision to Defer:* Based on our investigation, I am deferring further proceedings on [(the charge) or (that portion of the charge described below)] to the grievance/arbitration process for the following reasons:**

- 1. The charge alleges:** [Describe allegations being deferred.]

2. The Employer and the Union have a collective-bargaining agreement currently in effect that provides for final and binding arbitration.
3. The Employer is willing to process a grievance concerning the above allegations in the charge and will arbitrate the grievance if necessary. The Employer has also agreed to waive any time limitations in order to ensure that the arbitrator addresses the merits of the dispute.
4. Since the above allegations in the charge appear to be covered by certain provisions of the collective-bargaining agreement, it is likely that such allegations may be resolved through the grievance/arbitration procedure.

***Further Processing of the Charge:*** As explained below, while the charge is deferred, the Region will monitor the processing of the grievance and, under certain circumstances, will resume processing the charge.

***Charging Party's Obligation:*** Under the Board's *Collyer* deferral policy, the Charging Party has an affirmative obligation to file a grievance, if a grievance has not already been filed. If the Charging Party fails either to promptly file or submit the grievance to the grievance/arbitration process, or declines to have the grievance arbitrated if it is not resolved, I will dismiss the charge.

[Note: If charge is filed by an individual, add the following paragraph.]

***Union/Employer Conduct:*** If the Union or Employer fails to promptly process the grievance under the grievance/arbitration process; declines to arbitrate the grievance if it is not resolved; or if a conflict develops between the interests of the Union and Charging Party, I may revoke deferral and resume processing of the charge.

***Charged Party's Conduct:*** If the Charged Party prevents or impedes resolution of the grievance, raises a defense that the grievance is untimely filed or refuses to arbitrate the grievance, I will revoke deferral and resume processing of the charge.

***Inquiries and Requests for Further Processing:*** Approximately every 90 days, the Regional Office will ask the parties about the status of this dispute to determine if the dispute has been resolved and whether continued deferral is appropriate. However, I will accept and consider at any time requests and supporting evidence submitted by any party to this matter for dismissal of the charge, for continued deferral of the charge or for issuance of a complaint.

***Notice to Arbitrator Form:*** If the grievance is submitted to an arbitrator, please sign and submit to the arbitrator the enclosed "Notice to Arbitrator" form to ensure that the Region receives a copy of an arbitration award when the award is sent to the parties.

***Review of Arbitrator's Award:*** If the grievance is arbitrated, the Charging Party may request that this office review the arbitrator's award. The request must be in writing and addressed to me. The request should discuss whether the arbitration process was fair and regular, whether the unfair labor practice allegations in the charge were considered by the

arbitrator, and whether the award is clearly repugnant to the Act. Further guidance on the nature of this review is provided in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984).

***Charging Party's Right to Appeal:*** The National Labor Relations Board Rules and Regulations permit the Charging Party to obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board. If the Charging Party wishes to file an appeal, please note the following:

***Appeal Due Date:*** The appeal must be received by the General Counsel in Washington, DC by the close of business at 5:00 p.m. (EST or EDT, as appropriate) on [14 days from issuance]. However, if the appeal is mailed, it will be considered timely if it is postmarked no later than one day before the due date. The appeal may not be filed by facsimile transmission or through the Internet.

***Extension of Time to File Appeal:*** Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. You may file a request for an extension of time to file by mail, facsimile transmission, or through the Internet. The fax number is (202) 273-4283. Special instructions for requesting an extension of time over the Internet are set forth in the attached Access Code Certificate. While an appeal will be accepted as timely filed if it is postmarked no later than one day prior to the appeal due date, this rule does not apply to requests for extensions of time. A request for an extension of time to file an appeal must be received on or before the original appeal due date. A request that is postmarked prior to the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed through the Internet, a copy of any request for extension of time should be sent to me.

***Appeal Contents:*** The Charging Party is encouraged to submit a complete statement setting forth the facts and the reasons why it believes the decision to defer the charge was incorrect. However, the enclosed Appeal Form (NLRB-4767) by itself will be treated as an appeal if timely filed upon the General Counsel and me.

***Confidentiality/Privilege:*** Please be advised that we cannot accept any limitations on the use of any appeal statement or evidence in support thereof provided to the Agency. Thus, any claim of confidentiality or privilege cannot be honored, except as provided by the FOIA, 5 U.S.C. 552, and any appeal statement may be subject to discretionary disclosure to a party upon request during the processing of the appeal. In the event the appeal is sustained, any statement or material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. Further, we are required by the Federal Records Act to keep copies of documents used in our case handling for some period of years after a case closes. Accordingly, we may be required by the FOIA to disclose such records upon request, absent some applicable exemption such as those that protect confidential source, commercial/financial information or personal privacy interests (e.g., FOIA Exemptions 4, 6, 7(C) and 7(D), 5 U.S.C. § 552(b)(4), (6), (7)(C), and (7)(D)). Accordingly, we will not honor any requests to place limitations on our use of appeal statements or supporting evidence beyond those prescribed by the foregoing laws, regulations, and policies.

***Address for Appeal:*** The appeal should be sent to the General Counsel of the National Labor Relations Board, Office of Appeals, 1099 - 14th Street, N.W., Washington, D.C. 20570. A copy of the appeal should be sent to me.

***Notice to Other Parties of Appeal:*** The Charging Party should notify the other party(ies) to the case that an appeal has been filed. Therefore, at the time the appeal is sent to the General Counsel, please complete the enclosed Appeal Form (NLRB-4767) and send one copy of the form to all parties whose names and addresses are set forth in this letter.

Very truly yours,

Regional Director

Enclosures

cc: General Counsel, Office of Appeals