NOTES

NLRB DEFERRAL TO ARBITRATION: THE EVOLUTION OF THE SPIELBERG DOCTRINE

The National Labor Relations Board (NLRB or the Board) administers the provisions of the National Labor Relations Act (NLRA or the Act). A primary duty of the NLRB is to ensure the legal and fair resolution of disputes that parties have agreed to submit to arbitration. One of the major questions concerning the proper relationship of the arbitral process to the NLRB is the subject of concurrent jurisdiction between an arbitrator and the Board over the resolution of labor disputes. Interpretation and enforcement of contract provisions in a collective bargaining agreement are the duties of an arbitrator; resolution of unfair labor practice disputes is the function of the NLRB. The jurisdictions of an arbitrator and the Board often overlap, however, because most grievances asserted under the terms of an arbitration clause in a collective bargaining agreement also can be charged as unfair labor practices under the Act and thus are within the jurisdiction of the NLRB. This problem of overlapping jurisdiction between arbitrators and the NLRB is further complicated because most collective bargaining agreements incorporate provisions of the NLRA, thus rendering many breaches of collective bargaining agreements viola-


tions of the NLRA as well. The question thus arises whether, as a matter of policy, the NLRB should defer to the decision of the parties' arbitrator, to which the parties have agreed contractually to be bound, or whether the NLRB should assume jurisdiction, either before or after arbitration, and settle the suit.

Resolution of the concurrent jurisdiction issue requires an accommodation of two competing policies. On the one hand, Congress has stated that "[f]inal 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." Similarly, the Supreme Court has emphasized the central role that arbitration plays in our national labor policy, and has acknowledged the considerable discretion of the Board to defer to an arbitration award and to decline to exercise its authority over alleged unfair labor practices if, in the Board's opinion, declining jurisdiction will serve the aims of the NLRA. These congressional and Supreme Court declarations, in turn, have encouraged the NLRB to extend substantial deference to arbitration awards because submission to grievance and arbitration proceedings of disputes that might involve unfair labor practices would be discouraged substantially if the disputants thought the Board might give de novo consideration to an issue that an arbitrator could resolve.

On the other hand, in section 10(a) of the NLRA, Congress gave the Board the power to prevent any person from engaging in unfair labor practices and provided that "[t]his power shall not be affected by any other means of adjustment or prevention that has

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been or may be established by agreement, law, or otherwise." Hence, the Board has authority to consider unfair labor practice allegations even though an arbitrator can rule or has ruled on the same charges. In this regard, the Supreme Court has determined that the Board is not bound by an arbitration award, and numerous courts have determined that the Board can fashion its own remedies in order to effectuate the NLRA mandate to prevent unfair labor practices. Accordingly, the Board has disregarded arbitration awards that conflict with the NLRA or challenge the integrity of the Board.

The Board currently defers to arbitration or other private settlements in appropriate circumstances. The underlying rationale of this deferral policy is the Board's desire to avoid duplicating an arbitrator's efforts when the Board processes an unfair labor practice claim. In addition, by following this policy the Board can lighten its heavy workload. The issue is not efficiency, however, but whether Congress intended to invest the Board with exclusive jurisdiction over unfair labor practice disputes or to permit concurrent jurisdiction between the Board and an arbitrator, which sometimes could lead to dual litigation. Although an argument has been made in favor of the Board's exclusive jurisdiction, congressional silence in the wake of the Board's development of deferral policy implies congressional approval of that policy. Additionally,


11. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945); NLRB v. International Longshoremen's Local 27, 514 F.2d 481, 483 (9th Cir. 1975); NLRB v. Walt Disney Prods., 146 F.2d 44, 48 (9th Cir. 1944), cert. den., 324 U.S. 877 (1946).


15. See note 33 & accompanying text infra.

the courts have interpreted section 10 of the NLRA as giving the Board a discretionary right to exercise its jurisdiction in disputes involving unfair labor practices. Nonetheless, when the Board and an arbitrator reach different results, the Board’s decision prevails.

The basis of the postarbitral deferral policy is *Spielberg Manufacturing Co.*, in which the Board determined that it would defer to an existing arbitration award and dismiss an unfair labor practice charge if "the [arbitration] proceedings appear to have been fair and regular, all parties agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." The Board later added another factor to the *Spielberg* test by asking whether the arbitrator considered and ruled on the unfair labor practice issue.

The Board subsequently extended the *Spielberg* doctrine to the prearbitral setting in *Collyer Insulated Wire*, stating that the Board would defer prospectively to an arbitration award that satisfied the *Spielberg* criteria. Nevertheless, the Board reserved jurisdiction to review the arbitral award subject to the *Spielberg* criteria. Although a majority of the Board later rejected the *Collyer* prearbitral deferral policy as applied to individual rights cases under sections 8(a)(1) and 8(a)(3) of the Act, the *Spielberg* defer-


23. Id. at 843, 77 L.R.R.M. at 1938.

24. In General Am. Transp. Corp., 228 N.L.R.B. 808, 94 L.R.R.M. 1483 (1977), two members of the Board rejected *Collyer*-type deferral to arbitration on the ground that such deferral conflicted with the language and policy of the Act. Two members of the Board, however, continued to support *Collyer*. The Chairman, although continuing to adhere to *Spielberg*, concurred with the decision not to defer on the ground that *Collyer*-type deferral was inappropriate in individual rights cases arising primarily under sections 8(a)(1) and
NLRB DEFERRAL TO ARBITRATION

rational doctrine appears to be a firmly established NLRB policy. The careful balance struck in Spielberg, however, has endured decisions that have eroded the Board's discretion to hear various unfair labor practice issues, which, in some cases, have been labelled an abdication of Board authority and responsibility.

Time and the complexity of labor relations have subjected the Spielberg doctrine to applications and modifications not envisaged in the original decision. In order to curb a runaway trend of deferral to arbitration and to protect the public's need for access to a public forum, two federal courts of appeal would add two additional requirements to the Spielberg test: that the arbitrator "clearly decided" the unfair labor practice issue on which the Board later is urged to give deference, and that the arbitrator decided only issues within its competence. This Note will review the effect of judicial opinions on the NLRB's development of the Spielberg deferral doctrine and examine the propriety of the Board's present deferral policy.

PRE-Spielberg DEFERRAL

When Congress passed the National Labor Relations Act in 1935, it sought to proscribe unfair labor practices that interfered with an employee's section 7 rights to bargain collectively without undue influence or interference from management. Section 10 of the Act, which empowered the Board to remedy unfair labor prac-

27. See Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977); Banyard v. NLRB, 505 F.2d 342 (D.C. Cir. 1974).
29. Section 8 of the NLRA enumerates the conduct that comprises unfair labor practices. Id. § 8 (current version at 29 U.S.C. § 158 (1976)).
30. Id. § 7 (current version at 29 U.S.C. § 157 (1976)).
was silent on the Board's right to defer to the arbitration process. When the original bill was drafted, however, Senator Wagner proposed that section 10 include the proviso that "[t]he Board may, in its discretion, defer its exercise or [sic] jurisdiction over any such unfair labor practice in any case where there is another means of prevention provided for by agreement." This deferral language was deleted prior to final enactment, indicating some congressional opposition to deferral.

Initially, the NLRB refused to defer to the judgments of arbitrators. In 1943, in *Consolidated Aircraft Corp.*, however, the Board for the first time decided to defer rather than to exercise its jurisdiction. *Consolidated Aircraft* concerned an unfair labor practice allegation arising from a collective bargaining agreement. The Board regarded the dispute as one of contract interpretation and stated that it did "not deem it wise to exercise [its] jurisdiction where the parties have not exhausted their rights and remedies under the contract as to which the dispute has arisen." The NLRB thus sought to encourage the settlement of collective bargaining contract interpretation and administration difficulties through arbitration rather than through submission to the NLRB.

One of the early cases supporting the Board's present policy of deferring to arbitration was *Timken Roller Bearing Co.* In *Timken*, the Board refused to exercise its jurisdiction in deference to an arbitrator's award, even though an unfair labor practice apparently had occurred. The Board held that the union could not invoke the NLRB's assistance after having initiated arbitration.

31. *Id.* § 10 (current version at 29 U.S.C. § 160 (1976)).
34. In *Rieke Metal Prods. Corp.*, 40 N.L.R.B. 867, 10 L.R.R.M. 82 (1942), the employer contended that the arbitration award estopped the union from instituting action in an NLRB proceeding. The Board disagreed, however, stating that its jurisdiction was "concerned not with private rights, but rather with enforcement of a public policy over which the Board, pursuant to section 10(a) of the Act, has exclusive jurisdiction, 'not affected by any other means of adjustment.'" *Id.* at 874, 10 L.R.R.M. at 82 (footnote omitted).
35. 47 N.L.R.B. 694, 12 L.R.R.M. 44 (1943), enforced in pertinent part, 141 F.2d 785 (9th Cir. 1944).
36. *Id.* at 706, 12 L.R.R.M. at 45; see 6 *Suffolk U.L. Rev.* 720, 725 (1972).
proceedings that resulted in a decision on the merits.\textsuperscript{38} Although the Board implied that its refusal to assert jurisdiction was based more on the union’s election of remedies than on the weight of the arbitrator’s award,\textsuperscript{39} \textit{Timken} illustrates that the Board was willing to recognize the arbitrator’s authority and competence.

In 1947 the Labor Management Relations Act (LMRA), also known as the Taft-Hartley Act,\textsuperscript{40} amended the NLRA. Section 301 of the LMRA\textsuperscript{41} authorized judicial enforcement of any contract between an employer and a labor union, and section 203(d) of the LMRA\textsuperscript{42} stated that arbitration enjoyed a preferred position in labor law. Arguably, sections 301 and 203(d) override section 10(a) of the Act\textsuperscript{43} and indicate a congressional intent to encourage arbitration.\textsuperscript{44} In addition, section 14(c)\textsuperscript{45} of the amended Act authorizes the Board to decline jurisdiction if, in the opinion of the Board, its decision to decline jurisdiction would not have a substantial effect on commerce.

\textbf{The Spielberg Deferral Doctrine}

In 1955, in \textit{Spielberg Manufacturing Co.},\textsuperscript{46} the Board attempted to resolve the overlapping jurisdiction problem between arbitrators and the NLRB by developing a three-pronged test to determine whether deferral was appropriate in a particular case. According to the test developed in \textit{Spielberg}, the Board would decline to exercise its jurisdiction and would defer to an arbitrator’s award if “[t]he 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.”\textsuperscript{47}

\textsuperscript{38} Id. at 501, 18 L.R.R.M. at 1371.

\textsuperscript{39} Id.


\textsuperscript{41} Id. § 301(a), 61 Stat. 156 (current version at 29 U.S.C. § 185(a) (1976)).

\textsuperscript{42} Id. § 203(d), 61 Stat. 154 (current version at 29 U.S.C. § 173(d) (1976)). See text accompanying note 5 supra. See also Gateway Coal Co. v. UMW, 414 U.S. 368, 382 (1974); Nabisco, Inc. v. NLRB, 479 F.2d 770, 773 (2d Cir. 1973).

\textsuperscript{43} See note 9 & accompanying text supra.

\textsuperscript{44} See generally Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 449-56 (1957).


\textsuperscript{46} 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).

\textsuperscript{47} Id. at 1082, 36 L.R.R.M. at 1153; accord, Local 715, Int’l Bhd. of Electrical Workers v.
Accordingly, the *Spielberg* deferral policy represented the Board’s view that “the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators’ award.”

In *Spielberg*, the employer and the union agreed to arbitrate a dispute over the reinstatement of four workers who were discharged for picket line misconduct during a strike. The parties agreed to be bound by a majority decision of a three-person arbitration panel. Two of the arbitrators held that the employer did not have to reinstate the discharged employees. Subsequently, the union filed an unfair labor practice charge with the Board, which dismissed the complaint on the basis of the three above-mentioned criteria.

Underlying the Board’s decision in *Spielberg* were the policies of furthering the voluntary resolution of labor disputes, leaving the parties to the method of dispute resolution mutually agreed upon, and avoiding an unjust and costly result were the respondent required to defend himself in two forums on the same charge. Although critics regarded *Spielberg* as the initial step toward abdication of the Board’s authority, supporters of *Spielberg* maintained that the third prong of the *Spielberg* test provided an adequate safeguard against abuse or abdication of authority. Nonetheless, the *Spielberg* doctrine rarely has been criticized. In any event,

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49. 112 N.L.R.B. at 1081, 36 L.R.R.M. at 1154.

50. Id. at 1081, 36 L.R.R.M. at 1153.

51. Id.

52. Id. at 1082, 36 L.R.R.M. at 1153.

53. See notes 13, 14 & accompanying text supra.


56. Siegel, N.L.R.B. Deferral to Arbitration in Unfair Labor Practices, in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-SIXTH ANNUAL CONFERENCE ON LABOR 19, 31 (1974) (“I recently had the occasion to research every Supreme Court comment on *Spielberg*. I have yet to find an adverse Supreme Court comment on *Spielberg*.”).
the Board’s decision in *Spielberg* that deferral was appropriate was made easier by the close relationship between factual and statutory questions presented in the case and by the fact that the issues before the NLRB clearly had been decided in the earlier arbitration proceedings.\textsuperscript{57} The decades following *Spielberg* raised the more difficult questions of whether deferral was appropriate when the statutory and factual questions were not closely related and whether deferral was appropriate if the issue was not clearly decided in arbitration.\textsuperscript{58} As a result, the *Spielberg* doctrine was modified, interpreted, and adjusted as the NLRB sought to apply the three *Spielberg* criteria to areas not originally contemplated by the Board in its *Spielberg* decision.\textsuperscript{59}

**EXPANDING THE *Spielberg* DEFERRAL DOCTRINE**

Based upon its underlying policy considerations, a steady expansion of the *Spielberg* doctrine occurred in the 1960’s.\textsuperscript{60} In 1960 the Supreme Court narrowed the scope of judicial review of arbitration awards in the *Steelworkers Trilogy*,\textsuperscript{61} declaring the arbitrator’s expertise as superior to that of the “ablest judge.”\textsuperscript{62} Although the Court did not address explicitly the relationship between the arbi-

\textsuperscript{57} See Simon-Rose, supra note 54, at 203.


\textsuperscript{59} See Local 715, Int’l Bhd. of Electrical Workers v. NLRB, 494 F.2d 1136, 1137-38 (D.C. Cir. 1974) for an illustration of the breadth with which courts have interpreted the *Spielberg* doctrine. See also Covington, *Arbitrators and the Board: A Revised Relationship*, 57 N.C.L. Rev. 91 (1978) (suggesting a doctrine for accommodation).


trator and the NLRB in disputes involving collective bargaining agreements, the Court's unqualified praise of the arbitral process as a technique for settling a wide range of labor disputes had significant impact on the Board.

In the wake of the Supreme Court's praise of arbitration expressed in the Steelworkers Trilogy, the Board extended the Spielberg doctrine's applicability in International Harvester Co. In International Harvester, the Board determined that it would "voluntarily withhold" its authority to adjudicate statutory unfair labor practice claims arising from the same facts as an arbitrated contract dispute "unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act." The Board elaborated upon the "clearly repugnant" criterion by stating that the arbitrator's findings of law and fact would stand unless "palpably wrong."

In International Harvester the employee claimed that his seniority had been reduced improperly by the arbitrator. In arbitration the employer represented the employee in his dispute with the union, but the employee was not present at the arbitration hearing because he was never notified. This lack of notice caused the employee to lose the opportunity to present evidence on his own behalf and to examine witnesses. Nevertheless, the Board deferred to the arbitrator's decision because the record indicated no fraud, collusion, or serious procedural infirmity had been present during arbitration. Under these circumstances the question arises how an aggrieved employee can be expected to show fraud, collusion, unfairness, or whatever might constitute "serious procedural

64. Id. at 927, 51 L.R.R.M. at 1157. By adopting this policy the Board altered the language of Spielberg. See Comment, supra note 47, at 1192, which suggests that International Harvester was a drastic extension, instead of a mere variance, of the Spielberg doctrine.
65. 138 N.L.R.B. at 928-29, 51 L.R.R.M. at 1158. But cf. Comment, supra note 47, at 1206 (arguing that this standard was a "remarkable misdelegation of authority").
67. Id. at 928, 51 L.R.R.M. at 1157.
68. Id.
irregularities. 69 International Harvester thus indicated the Board was willing to compromise employee rights in order to maintain a liberal deferral policy.

By 1962 the basic premise of national labor policy as determined by the Supreme Court and the Board was the promotion of industrial peace through collective bargaining and arbitration. 70 Consequently, the interests of labor and management further compromised individual employee rights in the name of deferral to arbitration. 71 Moreover, the Supreme Court applauded the liberal deferral policy of International Harvester in its 1964 decision of Carey v. Westinghouse Electric Corp. 72 In Carey, the Court compelled an employer to arbitrate an inter-union dispute although the Court conceded that the arbitrator's decision may not put an end to the dispute.

The expanded deferral policy established in International Harvester was never effectively put into practice, however, and after the Supreme Court decided Carey the Board began to restrict the application of the Spielberg doctrine. 73 Accordingly, the Board added a fourth consideration to the Spielberg test, conditioning deferral on whether the arbitrator had considered the unfair labor practice issue. The Board made this fourth requirement a part of the deferral criteria in Monsanto Chemical Co., 74 which the Board reaffirmed in Raytheon Co. 75

73. See, e.g., Westinghouse Elec. Corp., 162 N.L.R.B. 768, 64 L.R.R.M. 1082 (1967). Between 1960 and 1964, the Board deferred in only 23% of the cases in which arbitration was discussed. Comment, supra note 47, at 1193. This statistic, however, does not account for the many cases in which the General Counsel, acting as the prosecutorial arm of the NLRB in the precomplaint stage, concluded that the Board presumably would defer to an arbitrator's decision. See Truesdale, Is Spielberg Dead?, in Proceedings of New York University Thirty-First Annual National Conference on Labor 47, 51-52 (1978).
In *Monsanto Chemical* the arbitrator specifically declined to pass on the issues regarded by the arbitrator as statutory rather than contractual.\(^6\) The Board declined to defer to the arbitrator's award and sustained a discharge action taken by the employer because the arbitrator refused to consider the allegation that union activities played a part in the discharge.\(^7\)

In *Raytheon Co.*,\(^7\)\(^8\) the trial examiner overturned an arbitration award upholding the discharge of two employees for inciting a work stoppage in violation of a no-strike provision. The award was overturned because the arbitrator decided only the contractual issue of whether the employees had violated the no-strike clause of their contract and not the statutory issue of whether the employees had engaged in a concerted activity protected by the LMRA. Thus, as in *Monsanto*,\(^7\)\(^9\) the Board rejected the arbitrator's decision because the arbitrator had not considered the unfair labor practice issue.\(^8\) Although the Board's decision was reversed on appeal,\(^8\) the reversal was not due to the Board's use of the more restrictive *Monsanto* deferral policy.\(^8\) Hence, the more restrictive *Monsanto* deferral criteria were established firmly as a Board policy.

Further impetus for a tightened deferral policy came from the Supreme Court in *NLRB v. C & C Plywood Corp.*\(^8\) and *NLRB v.*

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\(^{7}\) 130 N.L.R.B. at 1099, 47 L.R.R.M. at 1452.


\(^{7}\) See notes 74-77 & accompanying text supra.

\(^{8}\) 140 N.L.R.B. at 884-85, 52 L.R.R.M. at 1130.

\(^{9}\) Raytheon Co. v. NLRB, 326 F.2d 471 (1st Cir. 1964).

\(^{8}\) The United States Court of Appeals for the First Circuit reversed the Board's order, which held discharge of two employees violative of provisions of the LMRA, because the Board misconstrued the question before it. *Id.* at 475. The questions properly before the Board in determining the propriety of the discharge were what the employer believed and not whether that belief was reasonable, and whether the employer's representative was telling the truth when he said he believed the employees upon whom the employer's representative relied and not whether the examiner felt that these employees were unworthy witnesses. *Id.* Thus, the court based its reversal of the Board's order on questions of fact not related to the Board's newly restricted deferral policy.

\(^{8}\) 385 U.S. 421 (1967).
Acme Industrial Co.,\textsuperscript{84} which together suggested that Board intervention was proper in contractual disputes notwithstanding collective bargaining agreement provisions for handling labor disagreements. In \textit{C & C Plywood}, the Court held that the Board need not defer to arbitration in an unfair labor practice situation despite the fact that the NLRB's decision to assume jurisdiction required the NLRB to interpret a provision of the collective bargaining agreement relied on as a defense by the employer.\textsuperscript{85} In \textit{Acme Industrial}, the Court held that a binding arbitration provision in a collective bargaining agreement did not preclude the Board from directing the employer to produce information needed by the bargaining representative in the proper performance of its representative duties.\textsuperscript{86} Accordingly, in both \textit{C & C Plywood} and \textit{Acme Industrial}, the Court affirmed an NLRB policy of interjecting itself into the contractual dispute resolution arena.\textsuperscript{87}

The Board did not ignore the Supreme Court's preference for a less restrictive deferral policy as expressed in \textit{C & C Plywood} and \textit{Acme Industrial}.\textsuperscript{88} In \textit{Unit Drop Forge},\textsuperscript{89} for example, the Board accepted jurisdiction despite the availability of arbitration, explaining that action was necessary because of an unduly long delay. The Board said that it would regard as no more than secondary any contract interpretation aspect of what is regarded basically as an unfair labor practice dispute.\textsuperscript{90} Furthermore, the Board declared that the availability of arbitration was not intended to preclude the Board from exercising its undoubted authority, as mandated by Congress, to assert jurisdiction over unfair labor practices.\textsuperscript{91}

By 1970, however, the NLRB had abandoned its contracted deferral policy. In \textit{Local 1522, International Brotherhood of Elec-
trical Workers,92 the Board held that new information raised in an unfair labor practice hearing may not be sufficient reason to ignore the previously rendered arbitration award.93 This Board decision and the Supreme Court's about-face in Boys Markets, Inc. v. Retail Clerks Local 77094 ushered in a new era of deference to the arbitration process.

In Boys Markets, the Supreme Court emphatically reiterated the strong preference for the use of available grievance procedures as the Court first had enunciated in the Steelworkers Trilogy95 Although the courts always possessed the authority to enjoin strike violence,96 until Boys Markets the Court interpreted the anti-injunction provisions of the Norris-La Guardia Act97 as preventing the enjoining of peaceful picketing even though the collective bargaining agreement provided for mandatory arbitration of the grievance dispute that caused the strike.98 Because the Court desired to facilitate the congressional policy favoring the voluntary establishment of mechanisms for the peaceful resolution of labor disputes, the Court in Boys Markets expressly overruled its earlier precedent to the contrary99 and held that under section 30(a) of the LMRA,100 a peaceful strike can be enjoined when the contract contains no-strike and binding arbitration clauses, the strike causes irreparable harm, and a request to invoke available grievance procedures has been refused.101

93. Id. at 132, 136-37, 73 L.R.R.M. at 1091-92.
95. Id. at 252-53.
99. The Supreme Court expressly overruled its opinion in Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962), which held that § 4 of the Norris-LaGuardia Act barred a federal district court from enjoining a strike in breach of a no-strike clause in a collective bargaining agreement even though the agreement contained binding arbitration provisions enforceable under § 301(a) of the LMRA. 398 U.S. at 238.
101. 398 U.S. at 254.
Extension of Deferral to the Prearbitral Setting

The NLRB formulated the Spielberg doctrine to determine whether deferral to completed arbitral decisions was proper; the Board had not applied consistently the Spielberg deferral policy in situations where the contractual grievance and arbitration systems available to the parties had not been used. In particular, the Board drew no distinction for deferral purposes between cases in which arbitration was pending and cases in which arbitration had been discontinued or had never been initiated. The Board, perhaps recognizing the inconsistency in maintaining a deferral policy that purported to effectuate national labor policy through private settlements yet which did not promote actively the use of those private means of dispute resolution in the first instance, began to modify its deferral policy in Jos. Schlitz Brewing Co.

In Jos. Schlitz, the Board refused to exercise its jurisdiction over an alleged unfair labor practice because the interpretation and implementation of the provision in question, if found objectionable by the union, should have been arbitrated pursuant to the procedures mutually agreed upon. Under the circumstances, if the collective bargaining agreement provided for grievance and arbitration machinery and the arbitration process likely would have resolved both the unfair labor practice issue and the contract interpretation issue consistently with the purposes of the Act, the Board would refuse to assert jurisdiction and would require the parties to arbitrate the dispute. The Jos. Schlitz criteria, however, could not be met if, given the circumstances, arbitration would be

105. Id. at 1463.
107. Id. at 142, 70 L.R.R.M. at 1473.
futile. Thus, the Board in *Jos. Schlitz* exhibited its reluctance to assert jurisdiction of disputes if arbitration, although available, had been bypassed.

In *Collyer Insulated Wire Co.*, the Board reaffirmed the *Jos. Schlitz* rationale and expanded the deferral concept to include the requirement that parties involved in disputes use contractually agreed upon methods of arbitration prior to seeking Board review. Significantly, both *Boys Markets* and *Jos. Schlitz* are cited prominently in *Collyer*, thus indicating the Board's recognition and implementation of the Supreme Court's *Boys Markets* preference for private dispute resolution. After an erratic history of deferral, the NLRB decided to defer uniformly, thus promulgating the *Collyer* doctrine.

*Collyer Insulated Wire Co.*

In *Collyer*, the Board found that the contract between the parties, and its meaning under the circumstances presented, was the center of the dispute. The necessary determination, according to the Board, clearly was within the expertise of a mutually agreed upon arbitrator. In the Board's opinion, the Supreme Court made clear that either party had available effective legal means to ensure that arbitration would occur and suggested that the arbitration process had become the predominant forum for the administration of collective bargaining contracts. Significantly, because the Board realized its *Jos. Schlitz-Collyer* deferral policy was a "developmental step" in the treatment of the overlapping jurisdic-

108. *Id.*
110. *Id.* at 841-43, 77 L.R.R.M. at 1936-37.
111. *Id.* at 839, 77 L.R.R.M. at 1934.
112. The Board relied on *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964), which applauded the Board's deference decision in *International Harvester*, and on *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962), in which the Supreme Court observed that in the past the Board had declined to exercise its jurisdiction over unfair labor practices. 192 N.L.R.B. at 840, 77 L.R.R.M. at 1934-35. *International Harvester* and *Evening News*, however, are distinguishable. *International Harvester* dealt with a jurisdictional dispute which, under § 10(k) of the Act, the Board may refuse to hear by deferring to the agreed upon arbitration; *Evening News* held that when the collective bargaining agreement did not contain an arbitration clause the courts had jurisdiction to hear a breach of contract claim that might constitute an unfair labor practice.
The Board in *Collyer* determined it would retain jurisdiction and reconsider the disputants’ allegations upon a showing that either the problem had not been settled within a reasonable time after the *Collyer* decision or that the arbitration procedures were unfair or had reached a result repugnant to the NLRA.\(^{115}\)

The *Collyer* majority opinion generated strong dissenting opinions. Member Fanning regarded the majority position as verging on “compulsory arbitration,” exhorting that “[n]either Congress nor the courts have attempted to coerce the parties in collective bargaining to resolve their grievances through arbitration.”\(^{116}\) In addition, Member Fanning concluded that “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.”\(^{117}\) Finally, Member Fanning noted the potential problem of assuming that arbitrators, who were paid jointly by a union and an employer to adjudicate private rights and obligations, would be willing to decide these private questions in accordance with public rights or national labor policy.\(^{118}\)

Member Jenkins also dissented and observed that the majority’s decision was “a complete reversal of Board precedent.”\(^{119}\) Member Jenkins questioned how the Board could deny Board access to individuals who sought to vindicate public rights in light of the Supreme Court’s holding in *NLRB v. Industrial Union of Marine & Shipbuilding Workers*\(^ {120}\) that unions could not impede an employee’s access to the Board by internal union rules and discipline.\(^ {121}\) In addition, Member Jenkins mentioned the prohibitive costs of arbitration and the inability of arbitrators to provide “cease and desist” orders and other binding remedies.\(^ {122}\)

The majority decision in *Collyer* relied upon the same policy

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114. Id. at 843, 77 L.R.R.M. at 1938. Notably, the *Spielberg* “agreed to be bound” criterion is now presumed in the existence of a contractual arbitration procedure.

115. Id.

116. Id. at 847, 77 L.R.R.M. at 1941-42 (Fanning, Member, dissenting).

117. Id. at 848, 77 L.R.R.M. at 1942 (Fanning, Member, dissenting).

118. Id. at 849, 77 L.R.R.M. at 1943 (Fanning, Member, dissenting).

119. Id. at 850, 77 L.R.R.M. at 1944 (Jenkins, Member, dissenting).

120. 391 U.S. 418 (1968).

121. 192 N.L.R.B. at 852, 77 L.R.R.M. at 1946 (Jenkins, Member, dissenting).

122. Id. at 854-55, 77 L.R.R.M. at 1948-49 (Jenkins, Member, dissenting).
considerations underlying the Spielberg doctrine, that is, encouraging "the voluntary resolution by parties of their disputes through their own agreed-upon methods."\textsuperscript{123} Even though the Board's opinion in Collyer has been criticized,\textsuperscript{124} the Supreme Court has discussed favorably the Board's discretionary power not to exercise its jurisdiction.\textsuperscript{125}

When the unfair labor practice allegations grow out of differences between the parties as to the interpretation or application of their collective bargaining agreement, the principal issue is whether the complained of conduct is permitted by the parties' contract. Complaints alleging violations of sections 8(a)(5) and 8(b)(3) of the Act\textsuperscript{126} fall into this category. Because no allegation of interference with an individual employee's basic rights under section 7 of the Act\textsuperscript{127} is asserted, such issues are based on conduct assertedly in derogation of the contract and properly are suited to the arbitral process, resolution of which, as a rule, will dispose of the unfair labor practice issue.\textsuperscript{128}

On the other hand, in cases alleging violations of sections 8(a)(3), 8(a)(1), 8(b)(1)(A), and 8(b)(2),\textsuperscript{129} which arguably also involve contract violations, the determinative issue is whether the conduct was unlawfully motivated or whether it otherwise interfered with employees in the exercise of their rights under section 7 of the Act.\textsuperscript{130} Statutory rights, unlike contractual rights, lawfully cannot be reduced or eliminated by the employer, the union, or

\textsuperscript{123} 192 N.L.R.B. at 843-44, 77 L.R.R.M. at 1937-38.
\textsuperscript{124} See Getman, Collyer Insulated Wire: A Case of Misplaced Modesty, 49 Ind. L.J. 55 (1973); Novack, supra note 69. See also note 209 infra.
\textsuperscript{126} Sections 8(a)(5) and 8(b)(3) of the Act prohibit a refusal to bargain collectively by an employer and a union, respectively. National Labor Relations Act § 8(a)(5), (b)(3), 29 U.S.C. § 158(a)(5), (b)(3) (1976).
\textsuperscript{127} See note 30 & accompanying text supra.
both. As a result, because the central issue in such cases is not whether the conduct was permitted by contract, an arbitrator's resolution of the contract issue will not resolve necessarily the unfair labor practice issue. Nonetheless, the Board will defer to an arbitrator's award under Spielberg if all of the parties, including the affected employee, voluntarily have submitted the dispute to arbitration. Because the national policy in favor of labor arbitration is based upon the encouragement of the voluntary resolution of disputes, compelling an unwilling party to go to arbitration when that party charges that an individual's section 7 rights have been violated deprives that party of access to the Board's investigative and legal expertise. Nonetheless, less than a year after Collyer the Board in National Radio extended prearbitral deferral to a case alleging violations of sections 8(a)(3) and 8(a)(5).

In National Radio, the contractual and statutory issues were not necessarily coextensive. The Board deferred to arbitration despite the possibility that the acts of the employer could amount to "no breach of [the contract] agreement, but [which would] nevertheless [be] prohibited by the Act because undertaken for a discriminatory motive." Although the Board recognized that it could be charged with abdicating its responsibility by deferring to unrelated statutory considerations, it maintained that deference was in the best interests of a "quick and fair vindication of employee rights." More importantly, the Board reasoned that, if
the parties in their collective bargaining agreement had agreed to arbitration, they should "seek resolution of their dispute under the provisions of their own contract." At the same time, the Board continued to adhere to its retention of jurisdiction position as stated in Collyer, reserving the authority to examine the fairness of the award and its consistency with the policies of the Act. Given these circumstances, the Board refused to equate its abstention with abdication of responsibility.

Members Fanning and Jenkins, dissenting in National Radio, declared that the majority's action amounted to nothing less than a "subcontracting to a private tribunal of the determination of rights conferred and guaranteed solely by the statute. Such action mocks the statute and the reason for this Board's existence." They also questioned the arbitrator's competence to decide tough statutory questions with the same degree of expertise that the Board could ensure under the NLRA. The dissenting members believed that such deferral discouraged uniformity of decisions and sacrificed the individual's right to a full Board review. Given the National Radio holding, few legal issues, if any, clearly fell outside the Spielberg-Collyer deferral doctrine.

than the arbitrator is empowered to decide, or will award." Id. at 535, 80 L.R.R.M. at 1726-27 (Fanning & Jenkins, Members, dissenting).

139. Id. at 531, 80 L.R.R.M. at 1722.

140. See note 115 & accompanying text supra.

141. 198 N.L.R.B. at 532, 80 L.R.R.M. at 1723 (retaining jurisdiction although dismissing complaint).

142. Id. at 531, 80 L.R.R.M. at 1722.

143. Id. at 533, 80 L.R.R.M. at 1724 (Fanning & Jenkins, Members, dissenting).

144. Id. at 533, 80 L.R.R.M. at 1724-25 (Fanning & Jenkins, Members, dissenting). Members Fanning and Jenkins stated that the "special competence of arbitrators in contract disputes does not exist in the field of statutory rights. [A]rbitrators do not have the expertise in statutory issues which the Board has necessarily acquired through long, intimate, and specialized experience." Id. at 533, 80 L.R.R.M. at 1725.

145. Id., accord, Local 2188, Int'l Bhd. of Electrical Workers, 494 F.2d 1087, 1091 (D.C. Cir. 1974) (dictum) ("Successive arbitration awards could produce a variety of ad hoc solutions to the same problem, all consistent with the Act, but no uniform rule. In such circumstances further abstention by the Board might be contrary to Federal labor policy."); Radiocar Corp., 199 N.L.R.B. 1161, 1163, 81 L.R.R.M. 1402, 1404 (1972) (Fanning & Jenkins, Members, dissenting) ("The result will open the door to an erratic lack of uniformity in areas in which legal principles rather than contract interpretation are at issue.").

Electronic Reproduction Service Corp.

Subsequently, in the 1974 case of *Electronic Reproduction Service Corp.*, the contours of the deferral doctrine were expanded further to include a principle similar to collateral estoppel: henceforth, the Board would defer to arbitration awards in employee discharge or discipline cases if a party could have presented but elected not to present evidence regarding any alleged unlawful discrimination, unless bona fide reasons existed for the party's failure to present such evidence. Against the weight of earlier Board decisions on point, the Board in *Electronic Reproduction* held that when the Board deferred to an arbitration award, the arbitrator would be presumed to have determined adequately all related unfair labor practice claims unless "unusual circumstances" prevented the introduction of such evidence. In effect, the *Electronic Reproduction* policy forced

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149. The Board indicated that following *Spielberg* it would continue to defer to post-arbitration awards in section 8(a)(3) discrimination cases although it would no longer defer to prospective arbitration. See, e.g., General Am. Transp. Corp., 228 N.L.R.B. 808, 94 L.R.R.M. 1483 (1977).

150. 213 N.L.R.B. at 761-62, 87 L.R.R.M. at 1215-16. The Board distinguished its *Monsanto* and *Raytheon* decisions, in which deferral was not deemed to be proper, by finding that in those cases the arbitrator decided not to consider the statutory issues at all and made that intent fairly clear. *Id.*

151. In *John Klann Moving & Trucking Co.*, 170 N.L.R.B. 1207, 67 L.R.R.M. 1585 (1968), enforced, 411 F.2d 261 (6th Cir. 1969), the Board refused to defer because the arbitration committee never had been presented with, nor had it considered sua sponte, the statutory question. In *DC Int'l Inc.*, 162 N.L.R.B. 1383, 64 L.R.R.M. 1177, rev'd on other grounds, 385 F.2d 215 (8th Cir. 1967), the Board refused to defer because the issue of an unjustified discharge was never raised directly or by inference.

152. 213 N.L.R.B. at 762, 87 L.R.R.M. at 1216; accord, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) ("A mere ambiguity in the opinion accompanying an award is not a reason for refusing to enforce the award."); *Terminal Transp. Co.*, 185 N.L.R.B. 672, 673, 75 L.R.R.M. 1130, 1132 (1970) ("Nor is there reason to disturb the
the parties to plead and prove all unfair labor practice charges in the initial arbitration proceedings. By adopting this policy, the Board intended to foreclose the inefficiency of dual litigation by denying a party "two bites of the apple." By so deferring, and by presuming that the arbitrator had decided the unfair labor practice claims presented below, the Board in *Electronic Reproduction* held that the deferral rationales expressed by the Board in two prior cases, *Airco Industrial Gases-Pacific* and *Yoruga Trucking, Inc.*, were overruled except in unusual circumstances. In *Airco* the Board held that it would not defer to an arbitration award unless the unfair labor practice issue had been presented to and considered by the arbitrator. Similarly, in *Yoruga Trucking*, the Board held that the party urging deferral had the burden of proving that the statutory issue actually had been presented to and was resolved by the arbitrator because the party urging deferral was presumed to have the strongest interest in establishing that the issue had been previously litigated. *Electronic Reproduction* shifted this burden under its "presumption" onto the party claiming that the issue had not or could not have been resolved in arbitration. According to the Board, the policies underlying *Airco* and *Yoruga Trucking* had led to an "artificial separation of issues" and had encouraged fo-

award because the grievance committee, in its decision, made no findings and did not mention the nature of the grievance.") *Contra*, Local 715, Int'l Bhd. of Electrical Workers v. NLRB, 494 F.2d 1136, 1139 (D.C. Cir. 1974) ("In fact, this reasoning appears to contradict the Board's own decisions to the effect that deferral is not appropriate with respect to an issue not considered by the arbitration panel.").

153. The majority described the practice of purposefully withholding evidence as "furthering the very multiple litigation which Spielberg and Collyer were designed to discourage." 213 N.L.R.B. at 761, 87 L.R.R.M. at 1215-16; cf. Coulson, *Title Seven Arbitration in Action*, 27 Lab. L.J. 141, 145 (1976) (arguing for a "waiver" solution to the problems caused by dual litigation).

154. 213 N.L.R.B. at 761, 87 L.R.R.M. at 1215. The issue is, however, whether Congress intended to permit such dual litigation. See note 14 & accompanying text supra. Variations of the "two bites of the apple" theory include dual or multiple litigation, and double jeopardy. See generally 213 N.L.R.B. at 761, 87 L.R.R.M. at 1215.

159. 197 N.L.R.B. at 928, 80 L.R.R.M. at 1499.
rum shopping and dual, piecemeal litigation.\textsuperscript{160} In allowing an arbitrator's decision to stand "in the absence of procedural irregularity or statutory repugnancy,"\textsuperscript{161} however, the Board in \textit{Electronic Reproduction} severely curtailed the number of unfair labor practice cases over which the Board could assert jurisdiction.

The dissenting members in \textit{Electronic Reproduction}, Members Fanning and Jenkins, strongly opposed such a liberal policy of deferring statutory issues to arbitration because individual rights protected by the NLRA could be circumvented by union-employer "sweetheart" agreements\textsuperscript{162} which contrived the parties out of the Act through the insertion of arbitration clauses.\textsuperscript{163} In effect, said the dissenting members, deference to awards issued by arbitrators who possessed little or no expertise in interpreting the Act threatened the equal protection and uniform application of the public rights guaranteed by the NLRA.\textsuperscript{164} The "slippery slope" of liberal deferral, the dissent predicted, could have "no stopping

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\item \textsuperscript{160} 213 N.L.R.B. at 761, 87 L.R.R.M. at 1215.
\item \textsuperscript{161} \textit{Id. Contra}, Gulf States Asphalt Co., 200 N.L.R.B. 938, 82 L.R.R.M. 1008 (1972) (Fanning & Jenkins, Members, concurring in part and dissenting in part). The dissent argued that the majority's presumption placed a burden on the General Counsel to prove that an arbitrator did not dispose of the statutory violations by "proving a negative, an almost impossible task." \textit{Id.} at 941, 82 L.R.R.M. at 1011.
\item \textsuperscript{162} A "sweetheart" agreement is a collective bargaining agreement entered into as a result of collusion between an employer and a union. The use of courts to enforce rights obtained by such a method would constitute abuse of legal process. \textit{See Sperry v. Retail Clerks Local 782, 202 F Supp. 708, 710 (W.D. Mo. 1962).}
\item \textsuperscript{163} 213 N.L.R.B. at 765, 87 L.R.R.M. at 1219-20. The dissent felt that the rationale of Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), should be extended to labor relations and unfair labor practices cases as well as to Title VII cases. The dissent argued that "arbitration vindicates only the 'contractual right under a collective-bargaining agreement,' and not the 'independent statutory rights accorded by Congress.'" 213 N.L.R.B. at 766, 87 L.R.R.M. at 1220 (quoting Alexander v. Gardner-Denver Co., 415 U.S. at 49-50). \textit{See also Joseph T. Ryerson & Sons, 199 N.L.R.B. 461, 464-66, 81 L.R.R.M. 1261, 1266-67 (1972) (Fanning & Jenkins, Members, dissenting).}
\item The dissent added that "it also means that the stronger party can compel the weaker to abandon the protection of the Act through insistence on an arbitration clause and that 'sweetheart' agreements can flout the Act with impunity." 213 N.L.R.B. at 765, 87 L.R.R.M. at 1219. \textit{See also Tyee Constr. Co., 202 N.L.R.B. 307, 310, 82 L.R.R.M. 1548, 1551 (1973) (Fanning & Jenkins, Members, dissenting) ("Statutory rights are then reduced to contract rights and will disappear").}
\item \textsuperscript{164} 213 N.L.R.B. at 765, 87 L.R.R.M. at 1219. The dissent continued: "Arbitration is essentially alien to determination of public rights. Arbitrators have no expertise in the interpretation of the Act. The Board does. [P]ublic rights cannot be the 'plaything of private treaty.'" \textit{Id.}
point short of the bottom."\textsuperscript{165}

**Judicial Resistance to Deferral**

Although the Supreme Court has not ruled directly on the issues of either postarbitral or prearbitral deferral by the Board, prior to *Electronic Reproduction* the Court tacitly approved of the Spielberg deferral doctrine.\textsuperscript{166} An analogous issue, however, was addressed by the Court in *Alexander v. Gardner-Denver Co.*\textsuperscript{167} one month prior to the Board's decision in *Electronic Reproduction*. In *Gardner-Denver*, the Court held that an employee's statutory right to a trial de novo under Title VII of the Civil Rights Act of 1964\textsuperscript{168} was not foreclosed by prior submission of the employee's claim to final and binding arbitration under the nondiscrimination clause of a collective bargaining agreement.\textsuperscript{169} If statutory rights were distinct from the employee's contract rights, the Court stated, the doctrine of selection of remedies or waiver was inapplicable.\textsuperscript{170}

The effect the narrow guidelines for administrative deferral enunciated by the Supreme Court in *Gardner-Denver* had on areas other than Title VII questions was uncertain.\textsuperscript{171} The Court noted

\textsuperscript{165} Id. in essence, the dissent felt that the Board's jurisdiction was not intended to be merely one means of dispute resolution, but the primary means of resolution. Id. at 763, 87 L.R.R.M. at 1217.


\textsuperscript{167} 415 U.S. 36 (1974).


\textsuperscript{169} 415 U.S. at 49.

\textsuperscript{170} Id. at 50-51. The Court stated:

The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. [T]he relationship between the forums is complementary. Thus, the rationale behind the election-of-remedies doctrine cannot support the decision [T]here can be no prospective waiver of an employee's rights under Title VII. [W]aiver of these rights would defeat the paramount congressional purpose behind Title VII.

Id.

that in Title VII cases deference to an arbitral forum was inconsistent with the congressional mandate that federal courts exercise final responsibility for enforcement of Title VII. Commentators, therefore, made the analogous argument that the Board lacked congressional authority to refer statutory questions to an arbitrator when final responsibility for enforcement of the NLRA lay with the Board. Moreover, the Court in *Gardner-Denver* said that deferral to arbitration of Title VII questions made the process of dispute resolution lengthy, procedurally complex, and costly: exactly what arbitration was conceived to avoid.

Nonetheless, in *Electronic Reproduction* the Board circumvented the holding in *Gardner-Denver* by distinguishing the private right of action under Title VII from the administrative action under the NLRA. The Board also relied on sections 201 and 203(d) of the LMRA as declarations of the purpose and policy of the Act. Subsequent judicial decisions, however, followed the basic rationale of *Gardner-Denver* and persuaded the Board to discard its *Electronic Reproduction* presumption.

In *Banyard v. NLRB*, the United States Court of Appeals for

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*Gardner-Denver* will have slight effect upon *Collyer* and *Spielberg* policies).

172. 415 U.S. at 56.

173. See, e.g., Novack, supra note 69, at 796-97 (juxtaposing employee's NLRA rights with Title VII rights).


175. See Newman, *NLRB Deferral to Arbitration in Unfair Labor Practices*, in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-SIXTH ANNUAL CONFERENCE ON LABOR 37, 40 (1974) ("Arbitration started out many years ago as an informal, quick, cheap way of settling disputes. It now has become, in general, a very formal, time-consuming, expensive way of settling disputes").


178. Id. § 203(d), 61 Stat. 153 (current version at 29 U.S.C. § 173(d) (1976)).


181. 505 F.2d 342 (D.C. Cir. 1974).
the District of Columbia Circuit reversed two NLRB decisions which gave controlling effect to arbitral decisions involving safety issues in which the arbitrators upheld the discharge of employees. The court noted that its approval of Board deferral under the *Spielberg* doctrine was "conditioned upon the resolution by the arbitral tribunal of congruent statutory and contractual issues." 182 Although the court in *Banyard* acknowledged the Board's power to give controlling effect to a prior arbitration award in an unfair labor practice proceeding, 183 the court sought to ensure the "congruence" between statutory and contractual issues by holding that the Board could not defer unless the original *Spielberg* standards, plus two additional requirements, were satisfied: first, the arbitrator clearly must have decided the unfair labor practice issue to which the Board might later be urged to give deference; and second, the resolution of the unfair labor practice issue had to have been within the competence of the arbitrator. 184

The court in *Banyard* noted that the one sentence statement, "Claim of Union denied," gave no indication whether the safety issue had been considered by the arbitrators. 185 The court held that the Board could not speculate on what standards arbitrators applied in reaching their arbitral decisions. 186 Moreover, the court suggested that the record gave no indication whether the standard applied to the contractual issue was congruent with the standard that the Board would apply to the statutory unfair labor practice issues. 187 Thus, *Banyard* represented a much more moderate position on the question of deferral than did the broad scope drawn in *Electronic Reproduction*; 188 statutory rights protected by the

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182. Id. at 348. Absent this congruency between the statutory and contractual issues, "the Board's abstention goes beyond deferral and approaches abdication." Id.
183. Id. at 346-46.
184. Id. at 347-48. These further limitations on the Board's discretion may be viewed either as independent requirements, creating a five-pronged *Spielberg* test, or as extensions of two of the three existing *Spielberg* criteria of whether the proceedings were fair and regular and whether the result was repugnant to the Act. See Ad Art, Inc. v. NLRB, 645 F.2d 669 (9th Cir. 1980).
185. 505 F.2d at 348-49.
186. Id.
188. Commentators have criticized the additional *Banyard* criteria. See R. GORMON, LABOR LAW 742 (1976); 88 HARV. L. REV. 804 (1975).
NLRA could not be contracted out of the Act through the use of "sweetheart" agreements, and individual rights protected by the Act would be guaranteed more uniformly and could not be made subject to the limited expertise of arbitrators.

The significance of Banyard was amplified by the Court of Appeals for the Ninth Circuit in Stephenson v. NLRB,189 which held that the NLRB had deferred improperly to an arbitration award ordering the reinstatement of an employee because the evidence failed to establish that the arbitration panel clearly decided the unfair labor practice issue.190 Although the court in Stephenson noted the Board's laudable intent to encourage the voluntary settlement of labor disputes,191 the court described Electronic Reproduction as "an unjustifiable extension of its deferral policy"192 and stated that "the Board cannot abdicate its duty to consider unfair labor practice charges by deferring when it has no lawful or reasonable basis for doing so."193

The court in Stephenson noted that the arbitrator's field of competence was limited to areas of contractual disputes and should not encroach upon the Board's jurisdiction over unfair labor practices as mandated by section 10 of the NLRA.194 The legislative history of section 10 did not indicate that arbitration was meant as a substitute for Board resolution of statutory issues. Moreover, arbitrators are not bound to apply definitions of contractual standards proscribed by the Board or the courts.195 Instead, arbitrators are obligated to effectuate the intent of the parties to the contract.196

The court in Stephenson concluded that the application of the

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189. 550 F.2d 535 (9th Cir. 1977). For an analysis of the "clearly decided" and competence requirements adopted by the court in Stephenson, see id. at 538 n.4. See also, NLRB Deferral to Arbitration Decisions, 11 Loy. L.A. L. Rev. 199 (1977).

190. 550 F.2d at 540-41.

191. Id. at 539. See also Johannesen & Smith, supra note 148, at 741.

192. 550 F.2d at 539.

193. Id.

194. Id. See note 1 supra. See also 88 Harv. L. Rev. 804 (1975) (arbitrators not bound to apply or enforce rights under the NLRA).

195. 550 F.2d at 540; see Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974) ("The arbitrator has no general authority to invoke public laws that conflict with the bargain between the parties.")

presumption rationale of *Electronic Reproduction* would penalize the employee despite the ambiguity of whether the arbitration panel was willing or able to consider the unfair labor practice issues.¹⁹⁷ "Such a result," said the court, "is not consistent with the policies of the Act."¹⁹⁸ The Ninth Circuit thus expressly rejected the *Electronic Reproduction* deferral policy and adopted the two additional criteria for deferral established in *Banyard.*¹⁹⁹ Applying the five-pronged test of *Banyard*, the court found that the "clearly decided" requirement had not been satisfied and remanded the case to the Board for consideration of the unfair labor practice charge.²⁰² The court declared that substantial and definitive proof must exist that the statutory issue and evidence expressly were presented to the arbitrator and that the arbitrator's decision indisputably resolved the statutory issue.²⁰³

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¹⁹⁷. 550 F.2d at 541. *See* Roy Robinson Chevrolet, 228 N.L.R.B. 828, 836, 94 L.R.R.M. 1474, 1482 (1977) (Fanning & Jenkins, Members, dissenting) (deference based upon ignorance of what the arbitrator decided will lead only to "contractual chaos").

¹⁹⁸. 550 F.2d at 541.

¹⁹⁹. *Id.*

²⁰². *Id.* The court found that the arbitration award met the three *Spielberg* criteria as well as the competence requirement. *Id.* at 540.

²⁰³. *Id.* at 538 n.4; *see* St. Luke's Memorial Hosp., Inc. v. NLRB, 623 F.2d 1173, 1178-79 (7th Cir. 1980) (mere finding of "just cause" for discharge does not dispose of issue of discriminatory motive); Bloom v. NLRB, 603 F.2d 1015, 1020 (D.C. Cir. 1979) (record must yield clear indication that the arbitration panel specifically dealt with the statutory issues underlying the unfair labor practices charge).

The dissent in *Stephenson* cautioned that, by restricting the scope of the Board's discretion to defer, the majority was tinkering dangerously with the vitally important arbitration machinery. 550 F.2d at 542 (Kunzig, J., dissenting). Judge Kunzig said: "There is no need to move into the area of *Banyard*. To put more requirements on top of *Spielberg* may well make effective use of the arbitration process extremely difficult." *Id.*, *see* NLRB v. Max Factor & Co., 640 F.2d 199 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 2314 (1981) (no useful purpose for precluding deferral because of uncertainty about whether the arbitrator intended to decide the statutory issues as long as the award clearly was not repugnant to the Act). The dissent reiterated the "two bites of the apple" fear expressed by the Board in *Electronic Reproduction*, *see* note 146 & accompanying text *supra*, that the parties could withhold key evidence from the arbitration proceedings in order to obtain de novo review by the Board should the parties be dissatisfied with the arbitration award. 550 F.2d at 542 (Kunzig, J., dissenting).
Restricting Collyer

In 1977, the Board in *General American Transportation Corp.* significantly contracted the Collyer doctrine in the prearbitral context by limiting it to its original scope. *General American Transportation* involved alleged violations of sections 8(a)(3) and 8(a)(1) of the Act based on an alleged discriminatory discharge of a union steward. In a three to two decision, the Board held that it would no longer defer to arbitration in cases involving alleged violations of individual employee rights under sections 8(a)(3), 8(a)(1), 8(b)(1)(A), and 8(b)(2) of the Act. In so holding, the Board expressly overruled *National Radio* and its progeny, which had expanded the Collyer deferral doctrine to include cases involving alleged violations of sections other than section 8(a)(3) discrimination.

Members Fanning and Jenkins, who wrote the majority opinion...
in *General American Transportation* and who consistently opposed the *Collyer* doctrine, determined that no public rights enumerated under the Act could be relegated to a privately selected tribunal. Dissenting Members Penello and Walther reiterated the Board's *National Radio* position that deferral to arbitration would be proper in actions involving unfair labor practice charges. Although Chairman Murphy concurred with the majority, the Chairman refused to join with the majority in totally overruling *Collyer*. In reassessing *Collyer* and its subsequent extension to cases not within its original, limited scope, the Chairman distinguished conduct the legality of which turned on an interpretation of the contract and conduct which, aside from the contract provisions, interfered with statutorily protected rights. In the latter group of cases, she said, the Board should not defer because resolution of the dispute turns on an interpretation of the Act, rather than the contract. Thus, although the Chairman disagreed with the majority's position that Board deferral was improper if the dispute concerned purely contractual rights, because the *Collyer* doctrine had been expanded to include the deferral of disputes concerning statutory rights, the Chairman joined the majority in expressly overruling *National Radio* and its progeny. In theory, then, the majority of the Board reduced the *Collyer* prearbitral deferral doctrine to its original scope.

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209. Members Fanning and Jenkins rejected the *Collyer* policy, stating, "The Board has a statutory duty to hear and to dispose of unfair labor practices and the Board cannot abdicate or avoid its duty by seeking to cede its jurisdiction to private tribunals." General Am. Transp. Corp., 228 N.L.R.B. at 808, 94 L.R.R.M. at 1484. See Atleson, *supra* note 71 (arguing that excessive harm to individuals outweighs any benefits of deferral to arbitration).

210. 228 N.L.R.B. at 808-09, 94 L.R.R.M. at 1484. Members Fanning and Jenkins rejected the argument that *Collyer* had reduced substantially the Board's workload, considering any reduction insignificant compared with the sacrifice of statutory protections. *Id.* at 809-10, 94 L.R.R.M. at 1485-86. The same members railed against the caseload argument in *National Radio*. See *National Radio Co.*, 198 N.L.R.B. at 535-36, 80 L.R.R.M. at 1727 (Fanning & Jenkins, Members, dissenting).

211. 228 N.L.R.B. at 814-16, 94 L.R.R.M. at 1489-91 (Panello & Walther, Members, dissenting).

212. *Id.* at 810-11, 94 L.R.R.M. at 1486 (Murphy, Chairman, concurring).


214. 228 N.L.R.B. at 810-11, 94 L.R.R.M. at 1487 (Murphy, Chairman, concurring).

215. *See* notes 109-13 & accompanying text *supra*. 
In *Roy Robinson Chevrolet*, the companion case to *General American Transportation*, the Board reaffirmed the original *Collyer* doctrine. The Board held, again three to two, that in cases involving contractual disputes between the union and the employer, the Board would continue to defer to prospective arbitration, even though the Board also could resolve the disputes under sections 8(a)(5) or 8(b)(3), the refusal-to-bargain sections of the Act. Chairman Murphy, again casting the deciding vote, reasoned that the facts presented a pure contract issue particularly suited to the arbitral process. In the subsequent case of *Texaco, Inc.*, however, Chairman Murphy noted that although section 8(a)(5) charges were, in general, appropriate cases for arbitration, a case involving charges under several sections, only one of which is a section 8(a)(5) charge, should not be fragmented, but should be heard in its entirety by the Board.

*Restricting Spielberg*

In 1977 the Board also decided *Filmation Associates, Inc.*, in which the Board held that it would no longer defer in any case involving an employee’s allegation under section 8(a)(4) that he had been discriminated against for filing an unfair labor practice charge with the Board or for testifying at a Board proceeding. The Board ruled that it would not defer even in the context of a completed arbitral award under *Spielberg*, because ensuring protection

218. 228 N.L.R.B. at 831, 94 L.R.R.M. at 1477 (Murphy, Chairman, concurring).
219. 233 N.L.R.B. 375, 96 L.R.R.M. 1534 (1977). The majority found that the arbitration award “[left] unremedied Respondent’s misconduct, with no restraint on such misconduct in the future.” *Id.* at 376, 96 L.R.R.M. at 1535.
220. *Id.* at 375 n.2, 96 L.R.R.M. at 1535 n.2.
222. Section 8(a)(4) makes unlawful an employer’s discharge or other discrimination against an employee because he has filed charges or given testimony under the Act. National Labor Relations Act § 8(a)(4), 29 U.S.C. § 158(a)(4) (1976).
against section 8(a)(4) violations was the responsibility of the Board alone. The Board's newly established restrictions on deferral threatened the viability of the Spielberg doctrine. Since 1977, the Board rarely deferred in the prearbitral setting; these cases usually involved pure contract questions that could be resolved without reaching section 8(a)(5) unfair labor practice issues. The Board has shown great reluctance to defer in cases involving alleged violations of section 7 rights and in cases where the union's interests might clash with those of employees.

Since 1977, the results were mixed in cases which fell under the postarbitral Spielberg doctrine. Although the Board continued to defer to awards under the Electronic Reproduction rationale if the arbitrator clearly had not been presented with an unfair labor practice claim, the Board recognized the judicial resistance to

223. 227 N.L.R.B. at 1721-22, 94 L.R.R.M. at 1470-71. The Board reasoned that it has "the duty to preserve the Board’s processes from abuse" and that this responsibility "may not be delegated to the parties or to an arbitrator." Id. at 1721, 94 L.R.R.M. at 1471.


225. In Croatian Fraternal Union, 232 N.L.R.B. 1010, 97 L.R.R.M. 1132 (1977), the employer decided to subcontract work and ban employee telephone calls, and in Roy Robinson Chevrolet, 228 N.L.R.B. 828, 94 L.R.R.M. 1471 (1977), the employer decided to close the body shop of an automobile dealership.


deferral expressed by the courts in cases such as Banyard\textsuperscript{229} and Stephenson.\textsuperscript{230} This judicial resistance led to the eventual demise of the broad deferral policy encouraged by Electronic Reproduction\textsuperscript{231} as heralded initially in \textit{Kansas City Star Co.}\textsuperscript{232} and finally expressed in \textit{Suburban Motor Freight, Inc.}\textsuperscript{233}

In \textit{Kansas City Star}, the Board was faced with two questions under \textit{Spielberg}: the degree to which the Board would scrutinize an arbitrator's decision, and the extent to which the Board would rely on an arbitrator's decision in ruling on an issue that was not specifically before the arbitrator but was tied inextricably to issues that were present in the case.\textsuperscript{234} The Board deferred to the findings of the arbitrator in resolving the legality of the discharge of several strikers and the subsequent recission of the collective bargaining agreement.\textsuperscript{235} To answer the questions presented under \textit{Spielberg}, the Board in \textit{Kansas City Star} attempted to determine the meaning of the requirement announced in \textit{Raytheon Co.}\textsuperscript{236} that the arbitrator have considered the unfair labor practice in his decision. Although the preferable course might have been for the arbitrator to pass explicitly on the alleged unfair labor practice, the Board required only that the arbitrator consider all of the evidence relevant to the unfair labor practice in reaching a decision.\textsuperscript{237} Consequently, the Board recognized that the \textit{Spielberg} doctrine could be satisfied if the arbitrator's decision implicitly resolved the unfair

\begin{itemize}
\item \textsuperscript{229} See notes 181-88 & accompanying text \textit{supra}.
\item \textsuperscript{230} See notes 189-200 & accompanying text \textit{supra}.
\item \textsuperscript{231} See notes 146-65 & accompanying text \textit{supra}.
\item \textsuperscript{232} 236 N.L.R.B. 866, 98 L.R.R.M. 1320 (1978).
\item \textsuperscript{233} 247 N.L.R.B. \textemdash, 103 L.R.R.M. 1113 (1980).
\item \textsuperscript{234} 236 N.L.R.B. at 868, 98 L.R.R.M. at 1322; see Truesdale, \textit{supra} note 73.
\item \textsuperscript{235} 236 N.L.R.B. at 867, 98 L.R.R.M. at 1321.
\item \textsuperscript{236} 140 N.L.R.B. 883, 52 L.R.R.M. 1129 (1963), \textit{vacated on other grounds}, 326 F.2d 471 (1st Cir. 1964); see notes 78-81 & accompanying text \textit{supra}.
\item The requirement of \textit{Raytheon} that the arbitrator must consider and rule on the unfair labor practice issue had been integrated by several courts into their analyses of whether the third \textit{Spielberg} requirement had been met. See, e.g., Bloom v. NLRB, 603 F.2d 1015 (D.C. Cir. 1979); Dreis & Krump Mfg. Co. v. NLRB, 544 F.2d 320 (7th Cir. 1976). Other courts have emphasized that the requirement of \textit{Raytheon} is separate from the third \textit{Spielberg} requirement, which these courts maintain was intended to cover an arbitrator's decision which, on its face, conflicted with the Act. See, e.g., NLRB v. General Warehouse Corp., 643 F.2d 965 (3d Cir. 1981); Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977).
\item \textsuperscript{237} 236 N.L.R.B. at 868, 98 L.R.R.M. at 1321-22.
\end{itemize}
labor practice issue.238

The Board in *Kansas City Star* determined that on the first issue, which concerned the discharge of workers, the arbitrator not only made all of the factual findings necessary to deciding the legality of the discharges, but he also decided that the discharges did not violate the Act.239 On the second issue, however, which concerned the recission of the collective bargaining agreement, the arbitrator had not determined the legality of recission under the Act.240 Nevertheless, the Board deferred to the arbitrator’s findings with respect to both issues because the findings were comprehensive and settled the unfair labor practice question.241 Chairman Murphy, who agreed with the majority, expressed her disagreement with *Electronic Reproduction*, which she criticized as showing Board willingness to defer to an arbitrator’s award even though the record did not indicate clearly whether the arbitrator had considered the unfair labor practice issue.242

The Board reiterated the holding of *Kansas City Star* in *Atlantic Steel Co.*,243 in which the Board deferred to the decision of an arbitrator dismissing an unfair labor practice complaint in its entirety because the arbitrator had found that the employee had been discharged properly for using obscenity in describing a supervisor to another employee in the hearing of the supervisor. The arbitrator found that the employee’s discharge was for cause because the employee was discharged for insubordination.244 Although the arbitrator did not discuss explicitly the alleged unfair

238. *Id.* at 869, 98 L.R.R.M. at 1324 (Truesdale, Member, concurring). “[W]hile the arbitrator did not pass on the legality of recission, he was required to rule on every factual and legal question necessary to the resolution of this issue, since the legality of recission turns on whether Respondent could legally discharge the strikers, and whether the strike was legal.” *Id.* (footnote omitted); see *Clara Barton Terrace Convalescent Center*, 225 N.L.R.B. 1028, 1029, 92 L.R.R.M. 1621, 1623 (1976) (implicit decision was clearly repugnant to the Act).


242. *Id.* at 867 n.1, 98 L.R.R.M. at 1321 n.1. *See also* *Local 715, Int'l Bhd. of Electrical Workers v. NLRB*, 494 F.2d 1136, 1139 (D.C. Cir. 1974) (deferral inappropriate with respect to an issue not considered by the arbitration panel).


244. *Id.* at 814-15, 102 L.R.R.M. at 1248.
labor practice, the arbitrator's findings were complete and comprehensive, and were "factually parallel" to the alleged unfair labor practice.\textsuperscript{245}

The Board finally expressly overruled \textit{Electronic Reproduction} in \textit{Suburban Motor Freight}\textsuperscript{246} and returned to the pre-\textit{Electronic Reproduction} standard for deferral; hereafter, the Board decided not to defer to an arbitration award that did not indicate whether the arbitrator decided the statutory issue.\textsuperscript{247} In \textit{Suburban Motor Freight} the Board determined that deference to an arbitration award that reinstated an employee was not appropriate because the unfair labor practice charge against the employer for the discriminatory discharge of the employee was not presented to and considered by the arbitrator.\textsuperscript{248} The Board reasoned that although \textit{Electronic Reproduction} promoted the statutory purpose of encouraging collective bargaining relationships, the \textit{Electronic Reproduction} deferral policy derogated the equally important policy of protecting employees' section 7 rights.\textsuperscript{249} The Board thus determined that it could "no longer adhere to a doctrine which forced employees in arbitration proceedings to seek simultaneous vindication of private contractual rights and public statutory rights or risk waiving the latter."\textsuperscript{250} Accordingly, the Board in \textit{Suburban Motor Freight} recognized that the union's interest in arbitration may not coincide with that of the individual\textsuperscript{251} and that the \textit{Electronic Reproduction} deferral policy sometimes deprived individuals of statutory rights under the pretense of encouraging private dispute resolution.\textsuperscript{252}

\begin{itemize}
\item \textsuperscript{245} Id. at 815, 102 L.R.R.M. at 1249.
\item \textsuperscript{246} 247 N.L.R.B. \textemdash, 103 L.R.R.M. 1113 (1980).
\item \textsuperscript{247} Id. at \textemdash, 103 L.R.R.M. at 1114. Before \textit{Electronic Reproduction}, the party urging Board deferral had the burden of proving that the issue was litigated before the arbitrator. See notes 155-59 & accompanying text \textit{supra}.
\item \textsuperscript{248} Id., see Simon-Rose, \textit{supra} note 54, at 211-12, 215.
\item \textsuperscript{249} 247 N.L.R.B. at \textemdash, 103 L.R.R.M. at 1114; see Simon-Rose, \textit{supra} note 54, at 209-12.
\item \textsuperscript{250} 247 N.L.R.B. at \textemdash, 103 L.R.R.M. at 1114.
\item \textsuperscript{251} Id., see note 227 \textit{supra}. See also Pacemaker Yacht Co., 253 N.L.R.B. No. 95 (1981) (deferral not warranted where interests of union are not in substantial harmony with those of the employee-grievant).
\item \textsuperscript{252} 247 N.L.R.B. at \textemdash, 103 L.R.R.M. at 1114 (quoting Schatzki, \textit{ Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?}, 123 U. PENN. L. REV. 897, 908 n.32 (1975) ("One's mind would need to be very fertile, indeed, to conjure up a more shocking sacrifice of individual rights on the altar of institutionalism.")).
\end{itemize}
Under *Suburban Motor*, therefore, the Board will not defer to an award if it is shown that evidence relevant to the unfair labor practice has been withheld intentionally from the arbitration proceeding.\(^{253}\) Although at first blush this return to pre-*Electronic Reproduction* analysis might appear to encourage a "second bite of the apple," the petitioner runs the risk that the Board nonetheless will defer by finding the evidence complete or the Board still may consider the petition on the merits and find no unfair labor practice violation, as it did in *Suburban Motor*\(^ {254}\)

If the alleged contractual breach also can be challenged as a statutory breach, and the arbitral award implicitly resolves both the contractual and statutory issues, deference seems proper even if the statutory issue was not presented specifically to the arbitrator.\(^ {255}\) This proposition reconciles the interplay of the principles of *Atlantic Steel* and *Suburban Motor* because neither case requires an explicit discussion by the arbitrator of the unfair labor practices. By virtue of the factual findings and the similarity of the contractual and statutory issues, the award indicates that the arbitrator resolved the unfair labor practice issue.\(^ {256}\)

If the statutory claim is incapable of being alleged as a contractual breach, a twofold review seems appropriate. In this situation, protection of an individual's statutory rights under section 7 of the Act warrants the full investigative resources and expertise of the Board. Even if the statutory claim is capable of being alleged as a contractual breach, however, the dreaded proposition that a party intentionally would withhold evidence from the arbitration proceeding in order to obtain a "second bite of the apple" is largely exaggerated in light of the risks the petitioner would run.\(^ {257}\) The more common sequence of events, however, is that at arbitration an individual may not allege or present evidence in support of an


\(^{257}\) See note 254 & accompanying text *supra*. 
unfair labor practice because of ignorance of his statutory rights. If an unfair labor practice rests on factual issues of contract interpretation, however, the arbitrator may be in a superior position to resolve the statutory issue. Similarly, when resolution of the unfair labor practice issue involves mainly factual, as opposed to statutory, issues, the Board may be obligated to recognize the arbitrator's decision. The Board and the courts, however, do not always agree in characterizing the nature of the controversy according to these standards.

In NLRB v. Pincus Brothers, Inc., the United States Court of Appeals for the Third Circuit determined that the Board abused its discretion in refusing to defer to an arbitrator's decision. In Pincus Brothers, the arbitrator determined that an employee had been discharged justifiably for circulating leaflets that were critical of certain employer policies. The employee filed a charge with the NLRB alleging that she had been discharged in violation of section 8(a)(1) of the NLRA, which protected employees' section 7 rights. The Board subsequently determined that the employee's activity was protected by section 7, and it refused to defer to the

258. See Truesdale, supra note 254, at 16106.
259. Id.
260. See Bloom v. NLRB, 603 F.2d 1015, 1020 (D.C. Cir. 1979); Stephenson v. NLRB, 550 F.2d 535, 538 n.4 (9th Cir. 1977).
261. See NLRB v. Pincus Bros.-Maxwell, 620 F.2d 367, 375 (3d Cir. 1980); Stephenson v. NLRB, 550 F.2d 535, 538 n.4 (9th Cir. 1977).
262. See, e.g., Ad Art, Inc. v. NLRB, 645 F.2d 669 (9th Cir. 1980); NLRB v. Max Factor & Co., 640 F.2d 197 (9th Cir. 1980), cert. denied, 101 S. Ct. 2314 (1981); NLRB v. Pincus Bros.-Maxwell, 620 F.2d 367 (3d Cir. 1980).
263. 620 F.2d 367 (3d Cir. 1980). In Pincus Brothers the court split three ways on the proper standard of review of the Board's decision: abuse of discretion, legal error, or substantial evidence. The predominant standard of review employed by the courts has been the abuse of discretion standard. See Hawaiian Hauling Serv., Ltd. v. NLRB, 545 F.2d 647, 676 (9th Cir. 1976), cert. denied, 431 U.S. 965 (1977). But cf. Cook Paint & Varnish Co., v. NLRB, 648 F.2d 712 (D.C. Cir. 1981) (substantial evidence standard); Roadway Express, Inc. v. NLRB, 647 F.2d 415 (4th Cir. 1981) (substantial evidence standard, but same result obtained if abuse of discretion standard had been applied).
264. 620 F.2d at 370-71.
265. Id. at 371.
The arbitrator’s decision. The Third Circuit reversed, stating that the employee’s conduct was “arguably unprotected” by the Act and that the arbitrator’s award was not repugnant to the Act. Accordingly, because the conduct characterized by the arbitrator was permissible under the Act, the Board should have deferred to the arbitrator’s award. Thus, the court emphasized: “We hold only that where there are two arguable interpretations of an arbitration award, one permissible and one impermissible, the Board must defer to the decision rendered by the arbitrator.” In finding that the subject of arbitration in Pincus Brothers concerned only waivable individual collective bargaining rights, the Third Circuit declared that the societal rewards of arbitration outweighed a need for uniformity of result or a correct resolution of the dispute in every case.

The United States Court of Appeals for the Ninth Circuit disregarded the holding in Pincus Brothers in NLRB v. Max Factor & Co., in which the court declined to apply an interpretation of the Board’s self-imposed Spielberg criteria that differed from the Board’s historic approach. Although the arbitrator sustained an employee’s discharge as having been for good cause, the court enforced the Board’s decision, which held that Max Factor violated the Act and that the employee should be reinstated. The Ninth Circuit maintained that Pincus Brothers’s “arguably unprotected” standard was inherently imprecise and thus unsuitable as a test in Spielberg cases. Instead, the court in Max Factor observed that the Board had wide discretion to defer under Spielberg, and that if

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266. Id.
267. Id. at 376-77.
268. Id. at 377. The court in Pincus Bros. relied on the Ninth Circuit’s opinion in Douglas Aircraft Co. v. NLRB, 609 F.2d 352 (9th Cir. 1979), which set aside the Board’s refusal to defer to an arbitration decision that was based on two independent grounds, one permissible and one impermissible under the Act. In Douglas Aircraft the Ninth Circuit held that the Board could not disregard the permissible ground in making its deferral decision because the award on that basis was not “clearly repugnant” to the Act. Id. at 354-55.
269. 620 F.2d at 374.
270. 640 F.2d 197 (9th Cir. 1980), cert. denied, 101 S. Ct. 2314 (1981).
271. Id. at 200.
272. Id. at 204 & n.7. The court felt that the “arguably unprotected” standard would force the Board to rule out every arguable rationale for finding the employee’s conduct unprotected before it could assert statutory jurisdiction, thereby complicating the determination of the scope of its discretionary powers. Id.
the Board determined that the arbitrator’s decision differed from a
decision that was appropriate under the NLRA, the Board could
decline to defer on the ground that the award was clearly repug-
nant to the Act.\textsuperscript{273} Foremost, however, the court in \textit{Max Factor}
found that “[e]nforcing the Act’s protection may be important
enough to outweigh the interest in encouraging arbitration, even in
cases where the conduct was ‘arguably unprotected.’”\textsuperscript{274} Even if
the controversy could be characterized as mainly factual, the
Board still did not abuse its wide discretion if it refused to defer.\textsuperscript{275}

The subject of arbitration in \textit{Pincus Brothers} involved not only
individual collective bargaining rights, but also protected statutory
rights, which may not be waived by a collective bargaining agree-
ment.\textsuperscript{276} Because the Board has primary responsibility and power
to adjudge unfair labor practices,\textsuperscript{277} the Board possesses an un-
matched expertise in distilling and identifying the coercive effects
of employer conduct.\textsuperscript{278} For this reason the determination of public
rights that may be “arguably” protected or unprotected falls more
appropriately within the province of the Board. The potential
harm to individuals and the need for uniformity of decision upon
which litigants may rely outweigh the benefits provided by the ar-
bitration machinery.\textsuperscript{279} Thus, the Ninth Circuit’s view appears
more consistent with the path generally taken by the courts, which
gives deference to the Board’s administrative discretion to exercise
its authority over the unfair labor practice charge and refuses to
defer to the arbitral award.

\textsuperscript{273} Id. at 203-04.
\textsuperscript{274} Id. Although the Board has wide discretion to apply its \textit{Spelberg} standards, see
Hawaiian Hauling Serv., Ltd. v. NLRB, 545 F.2d 674, 676 (9th Cir. 1976), \textit{cert. denied}, 431
U.S. 965 (1977), it cannot announce a new deferral policy and then ignore the new policy,
“thereby leading litigants astray who depended on it.” NLRB v. Horn & Hardart Co., 439
F.2d 674, 679 (2d Cir. 1971).
\textsuperscript{275} 640 F.2d at 204. The court noted that the Board, in deciding whether to defer, can
observe factors other than the obviousness of the protected status of the employee's con-
duct. \textit{Id.} at 204 n.7.
\textsuperscript{276} See NLRB v. Magnavox Co., 415 U.S. 322 (1974) (unlike rights in the economic area,
\S 7 rights cannot be waived by a union in a collective bargaining agreement).
\textsuperscript{277} National Labor Relations Act \S 10(a), 29 U.S.C. \S 160(a) (1976).
\textsuperscript{278} Cook Paint & Varnish Co. v. NLRB, 648 F.2d 712 (D.C. Cir. 1981).
\textsuperscript{279} See note 209 supra.
CONCLUSION

In the interest of promoting industrial peace and avoiding duplicative litigation, the Spielberg doctrine evolved as a means of accommodating the national policy in favor of the private resolution of labor disputes through consensual arbitration.\textsuperscript{280} The concept of deferral to the arbitration process, however, is valuable only if the deferral concept includes adequate restraints against abuse or abdication of responsibility\textsuperscript{281} Although the delicate balance struck in Spielberg was altered by the Board's decisions in National Radio, Electronic Reproduction, and similar cases emphasizing the convenience of the arbitral machinery, the trend in recent years has been toward a more moderate deferral policy with less risk to the individual's section 7 rights.\textsuperscript{282}

In recent years the dialogue between the Board and the courts centered on the amount of consideration that the arbitrator paid to the statutory issue in rendering his decision. Two federal courts of appeals, in enforcing deferral to arbitration, require that the statutory and contractual issues be "congruent" and that the statutory issue be "clearly decided," as supported by "substantial and definitive proof."\textsuperscript{283} The Board approached its standard by requiring a "parallelism" between the statutory and contractual issues, as supported by "complete and comprehensive findings."\textsuperscript{284} The Board, however, has not said that the statutory issue must be presented specifically to the arbitrator. As long as the record indicates by dis-

\textsuperscript{280} See Boys Mkts. Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 252 (1970), in which the Supreme Court characterized the arbitral process as "the central institution in the administration of collective bargaining contracts."

\textsuperscript{281} See Associated Press v. NLRB, 492 F.2d 662, 667 (D.C. Cir. 1974); Covington, supra note 59.


\textsuperscript{283} See Stephenson v. NLRB, 550 F.2d 535, 538 & n.4 (9th Cir. 1977); Banyard v. NLRB, 505 F.2d 342, 347 (D.C. Cir. 1974); accord, NLRB v. General Warehouse Corp., 643 F.2d 965, 969 n.16 (3d Cir. 1981).

\textsuperscript{284} See notes 245, 256 & accompanying text supra.
cussion or factual findings that the arbitrator considered and ruled on the statutory issue, the Board recognizes an "implicit" resolution of the statutory issue. Although the Board's deferral policy seems liberal, the burden of proving that the arbitrator resolved the statutory issue is on the party urging deferral. Hence, the Board has drawn more distinctly the parameters of the Spielberg deferral doctrine.

An argument can be made in support of the general competency of arbitrators to decide difficult statutory questions. Arbitrators who are either unwilling or unqualified to resolve statutory questions, however, should not be required to do so. Section 203(d) of the LMRA did not amend the NLRA by substituting the arbitration process for Board jurisdiction, but instead incorporated arbitration into the labor relations arena. A broad deferral policy that derogates the Board's power to resolve statutory questions would complicate the arbitration process by making deferral more legalistic, more costly, and less intuitive. Moreover, the inability of an arbitrator to ensure compliance with the arbitrated decision and the lack of uniformity in arbitrated cases further

286. See notes 158-59, 247 & accompanying text supra.
288. See Belkin, supra note 26.
290. See Raytheon Co., 140 N.L.R.B. 883, 886, 52 L.R.R.M. 1129, 1131 (1963); Simon-Rose, supra note 54, at 216 ("No construction of Section 203(d) supports the proposition that the Board can employ the arbitration process as an additional forum for the resolution of unfair labor practice charges.").
291. See Zalusky, Arbitration: Updating a Vital Process, in AFL-CIO AMERICAN FEDERATIONIST, Nov. 1976, at 1 (Arbitration "is taking on the appearance of a courtroom procedure."); Simon-Rose, note 54 supra, at 208 ("If cost becomes an overwhelming factor the employees are necessarily going to be short-changed.").
militate against a broad deferral policy. Indeed, a broad deferral policy could lose the very advantage of arbitration—a quick and informal mechanism for dispute resolution—thus spelling the end of arbitration provisions in collective bargaining agreements.294

The more circumscribed deferral policy reestablished in recent cases such as Kansas City Star, Atlantic Steel, and Suburban Motor preserves the theoretical underpinnings of Spielberg in particular and respects the integrity of the arbitration process in general. Although these decisions placed limitations on the function and scope of the arbitrator’s authority, the decisions also delineated a substantial area of authority for arbitrators.295 The arbitrator should be regarded as more than a hearing officer whose role is limited to gathering evidence; however, the Board and the courts have not yet set definite limits on the scope of the arbitrator’s authority. At present, the Board defers to an arbitrator’s award only if the parties chose the arbitral forum, the proceedings were fair and regular, no facial errors appear in the arbitrator’s factual findings, the arbitrator considered Board law, and his legal conclusion is consistent with Board law.296

BRIAN S. TAYLOR

296. See text accompanying notes 234-42 supra; Truesdale, supra note 73, at 60.