

TO : All Regional Directors, Officers-  
in-Charge, and Resident Officers

February 28, 1972

FROM : Peter G. Nash  
General Counsel

SUBJECT: ARBITRATION DEFERRAL POLICY UNDER COLLYER

JOSEPH E. DeSIO  
ASSOCIATE GENERAL COUNSEL

The attached memorandum is intended to provide guidelines for regional office handling of Section 8(a)(5) charges affected by the arbitration deferral policy announced by the Board in Collyer Insulated Wire, 192 NLRB No. 150, 77 LRRM 1931.

TABLE OF CONTENTS

INTRODUCTION----- 1

"CIRCUMSTANCES" RELEVANT TO DEFERRAL UNDER COLLYER----- 2-15

I Character Of The Dispute----- 2-9

(A) Type of violations involved----- 2

(B) The contractual origin of the dispute----- 2-5

(C) Disputes involving alleged enmity toward employee  
or union rights under the Act----- 5-6

(D) Respondent's willingness to arbitrate----- 6-7

(E) Good faith in the assertion of a contract claim  
or the willingness to arbitrate----- 7

(F) Disputes over special subject matters----- 8

(G) Skills required in the resolution of the dispute----- 8

(H) Respondent's offer to discuss a disputed change in  
working conditions before effectuation----- 9

II Contract Provisions Concerning The Resolution of Disputes----- 9-13

(A) Requirement that the contract procedures for the  
resolution of disputes constitute "arbitration"----- 9-10

(B) Exclusivity of arbitration as the means of  
resolving the dispute----- 10-12

(C) Encompassment of the dispute by the arbitration  
provisions----- 12-13

(D) The binding character of the arbitration procedure----- 13

(E) Obstacles to a quick and fair arbitral resolution  
of the dispute----- 13

III History Of The Parties And Their Relationship----- 14-15

(A) The history of the bargaining between the parties----- 14-15

(B) Employer enmity generally to employee exercise of  
rights guaranteed by the Act----- 15

PROCEDURES FOR ADMINSTRATIVE DEFERRAL FOR PROSPECTIVE ARBITRATION----- 16-23

I Procedual Implications Of The Collyer Decision----- 16-17

II Initial Disposition Of Charges----- 17-21

(A) Investigation and determination of the merits of  
the charge----- 17-18

(B) Encouragement of arbitration----- 18

(C)	Investigation of the circumstance pertaining to deferral under the <u>Collyer</u> policy-----	19-20
(D)	Communication to the parties of the decision to defer under <u>Collyer</u> -----	20-21
III	Handling Of Deferred Charges Before Issuance Of An Arbitration Award-----	22
IV	Handling Of Deferred Charges After Issuance Of An Arbitration Award-----	22-23
V	Litigation Of The <u>Collyer</u> Deferral Question-----	23
APPENDIX: Pattern for Deferral Letter under <u>Collyer</u>		

ARBITRATION DEFERRAL  
POLICY UNDER COLLYER

INTRODUCTION

With the Board's enunciation of a new arbitration deferral policy in Collyer Insulated Wire, 192 NLRB No. 150, a significant proportion of the 8(a)(5) charges filed in the regional offices may be affected by a contractual obligation to arbitrate. Achievement of uniformity and the efficacious handling of these cases will be promoted by the development and consistent application of criteria for identification of cases to which the Collyer policy is applicable and by the formulation of explicit procedures for the handling of these cases. The instructions which follow are intended to serve this function during a period in which the Board is delineating and defining further the full scope of its arbitration deferral policies.

It is clear, however, that issues will arise for which the Board's decisions and these instructions will provide no clear guidance. Such cases should be submitted to Washington for advice and will provide a basis for further review and refinement of these instructions.

General case handling considerations:

The Collyer decision does not attempt to define the reach of the Board's new deferral policy nor to set out the administrative procedures for its implementation; the Board itself recognized its decision as "a developmental step in the Board's treatment of these problems . . ." So, at least in the short run, the administration of this policy can only proceed on the basis of deductions and inferences drawn from the circumstances upon which the Board relied in the Collyer case and the incorporated Schlitz decision.

As one long interested in the development and refinement of labor relations policies and practices which are conducive to the expeditious and private settlement of industrial disputes, I much favor the Board's deferral to the arbitral process to the broadest extent consonant with the objectives of the Statute. But in formulating field instructions for the implementation of the Board's Collyer decision I must, as General Counsel of the Board, also consider the generality of the terms in which the Board announced this new deferral policy and the absence of clear predictability of the Board decisions which will follow this "developmental step." These considerations and the finality which attends my dismissal of charges in the exercise of my authority under Section 3(d) of the Act persuade me that in cases raising significant questions about the applicability of the Collyer policy the preferred course is to allow access to the Board for the authoritative resolution of these questions through Board adjudication and decision.

"CIRCUMSTANCES" RELEVANT TO DEFERRAL  
UNDER THE COLLYER POLICY

I Character Of The Dispute

(A) Type of violations involved

The Collyer policy of deferral for arbitration will be applied only to disputes involving alleged refusals to bargain violative of Section 8(a)(5) of the Act and not to charges alleging violations of other sections of the Act. 1/ Analogous 8(b)(3) violations 2/ in which the circumstances of the dispute might meet the Collyer requirements for deferral should be submitted to Washington for advice.

A charging party's gratuitous inclusion of an 8(a)(3) allegation which investigation does not substantiate in a charge sounding principally in Section 8(a)(5) would not preclude deferral after dismissal of the 8(a)(3) allegation.

(B) The contractual origin of the dispute

Otherwise meritorious 8(a)(5) charges should be deferred for arbitration if a reasonable construction 3/ of the substantive provisions of the agreement between the parties (other than the grievance

1/ The complaint in the Collyer case alleged the violation of Section 8(a)(5) and the principal opinion of the Board made no reference, even by indirection, to the applicability of its deferral policy to 8(a)(3) violations. Thus, the principal opinion failed either to endorse or reject Member Brown's express contention that the Board's arbitration deferral policy should be applied to Section 8(a)(3) and 8(a)(1) violations as well as 8(a)(5) violations. In the more recent decision of Tulsa-Whisenhunt Funeral Homes, Inc., 195 NLRB No. 20, Chairman Miller and Member Kennedy, in refusing deferral on another ground, found it unnecessary to "reach the question, not yet resolved by the Board, whether and in what circumstances the principles relied on in Collyer may be applicable to alleged violations of Section 8(a)(3)."

2/ E.g., Westgate Painting and Decorating Corp., 186 NLRB No. 140; Rochester Telephone Corp., 194 NLRB No. 144.

3/ Where the asserted construction of the contract is plainly correct, and the disputed conduct was therefore privileged by the contract (and, of course, where the charge lacks merit even in the absence of the contract defense), the charge would be dismissed, leaving no question of deferral for consideration. Conversely, where the disputed conduct would otherwise violate the Act and the asserted construction of the contract interposed as a defense to the charge is plainly insubstantial or unreasonable, the dispute would not be

and arbitration provisions) would preclude a finding; that the disputed conduct violated the Act. <sup>4/</sup> Accordingly, deferral would be appropriate, assuming other requirements for deferral are met:

- in a dispute over wages, hours or other working conditions which are, by a reasonable construction of the contract, covered by substantive provisions which refer to these conditions;
- in a dispute to which a management prerogative or a "zipper" clause is, by a reasonable construction, applicable even though this clause does not contain any explicit reference to the subject matter of the dispute and even though application of this clause might depend on evidence extraneous to the contract, such as the past practices of the parties and the

<sup>3/</sup> (continued) considered to be in fact contractual in origin; therefore deferral would not be warranted and complaint would issue.

In citing the reference in the Schlitz case to employer action "not patently erroneous" and based on "a substantial claim of contractual privilege" and to "a reasonable claim [asserted] in good faith," the Board seemed to contemplate a contract claim which was neither so compelling as to preclude any conflicting construction or so unconvincing as to suggest bad faith on the part of its proponent.

Member Brown in a similar vein, said, "The Board should not defer where the dispute is not covered by the contract and, therefore, involves the acquisition of new rights. I would reach a different result where the contract is ambiguous. In such a case a party may be exercising an accrued right, and the party's action might be justified by the ultimate interpretation of the contract. Thus, I would defer where a good-faith dispute over the interpretation or application of a contract exists. . . ." (Emphasis added, footnotes omitted)

<sup>4/</sup> The Board referred to the contractual origin of the dispute in the Collyer case in various ways. Thus, the dispute was seen to be "essentially a dispute over the terms and meaning of the contract." The dispute "in its entirety arises from the contract between the parties and from the parties' relationship under the contract." And "the contract and its meaning in present circumstances lie at the center of the dispute." But perhaps the contractual element of such a dispute was more explicitly identified by the Board when it stated that the question of deferral arises "only when a set of facts may present not only an alleged violation of the Act but also an alleged breach of the collective bargaining agreement subject to arbitration." And in enumerating the factors favoring deferral, the Board said that in the Collyer dispute, which was one eminently suited for resolution by arbitration, "the Act and its policies become involved only if it is determined that the agreement between the parties, examined in light of the negotiating history and the practices of the parties

bargaining history. 5/

Deferral would not be appropriate:

- in a dispute over the basic obligation or willingness of the employer to recognize the union; 6/
- in a dispute in which there is substantial question as to the existence of the contract as a whole at the time the dispute arose, e.g., where there is substantial question whether the contract had been agreed to or had been extended or had automatically renewed; 7/
- in a dispute which does not involve a construction of the terms and meaning of any substantive contract provision but which is nevertheless arbitrable pursuant to a provision making all disputes between the parties arbitrable during the term of the contract (See (F), below, with respect to submission to Washington for advice in certain special areas.);
- in a dispute involving the practices of the parties which are not covered by the contract and which are not subject to an alleged union waiver of bargaining rights which is embodied in the contract.

4/ (continued) thereunder, did not sanction Respondent's right to make the disputed changes . . ."

In sum, the Board seems to have been referring to a dispute in which issues of substantive contract interpretation would have to be resolved against the respondent as a prerequisite to finding that the disputed conduct violated the Act.

5/ That the Board contemplated the application of deferral policy where evidence extraneous to the contract is relevant to its construction is indicated by the Board's reference to arbitral interpretation of the Collyer contract "in light of its negotiating history and the practices of the parties thereunder . . ." And one of the issues raised by the Employer's action in the Collyer case included, as the Board framed this issue, the extent to which the more overt contract issues "may be affected by the long course of dealing between the parties."

6/ E.g., William J. Burns International Detective Agency, 182 NLRB No. 50; Ranch-Way, Inc., 183 NLRB No. 116.

7/ E.g., William J. Burns International Detective Agency, *supra*; The Crescent Bed Company, Inc., 157 NLRB 296; Associated Building Contractors of Evansville, Inc., 143 NLRB 678.

The Collyer policy of deferral having been predicated upon the contractual undertaking to arbitrate, the requisite basis for deferral would be lacking where there is substantial doubt as to the existence of the contract as a whole, or the arbitration provisions thereof. Cf. Hilton-Davis Chemical Co., 185 NLRB No. 58; Taft Broadcasting Co., 185 NLRB No. 68.

To the degree it is possible to define and identify separate disputes, deferral policy should be applied on a "per dispute" basis. Thus, where a charge alleges disputes over more than one subject matter and the dispute over one of these matters meets the Collyer criteria and that dispute can be fairly viewed as separable from the remaining allegations of the charge, further action on the allegations pertaining to that dispute would be deferred for arbitration <sup>8/</sup> unless the remaining allegations of the charge would preclude deferral.

(C) Disputes involving alleged enmity toward employee or union rights under the Act <sup>9/</sup>

Unfair labor practice charges should not be deferred for arbitration where:

-- there is credible evidence that the disputed conduct alleged to have violated Section 8(a)(5) was not motivated by legitimate business or economic considerations and that the purported claim of contract privilege was intended to justify or conceal an effort to undermine the union. <sup>10/</sup> (Where, absent actual antiunion motivation, the disputed conduct nevertheless had the inherent effect of undermining the union, the matter should be submitted for advice. Cf. N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26 (1967)).

-- the disputed conduct, if unlawful, constituted a violation of Section 8(a)(3) and/or Section 8(a)(2) as well as Section 8(a)(5), e.g. an employer's recognition of a rival union while contractually obligated to recognize and bargain with an incumbent bargaining representative. (Where a determination of whether the employer violated Section 8(a)(3) or is obligated to reinstate alleged unfair labor practice strikers is dependent on whether the disputed conduct violated Section 8(a)(5), the matter should be submitted for advice. For example, a dispute over an employer's alleged unilateral change of a working condition in breach of the bargaining agreement, where the employer discharged employees who struck to protest the alleged unilateral change, should be submitted for advice);

<sup>8/</sup> Cf. The Crescent Bed Co., *supra*.

<sup>9/</sup> The Board relied in Collyer on the fact that "no claim is made of enmity by Respondent to employees' exercise of protected rights." And in the part of the Schlitz case quoted by the Board the situation was characterized as "wholly devoid of unlawful conduct or aggravated circumstances of any kind" and the alleged unilateral action there "was not designed to undermine the Union."

<sup>10/</sup> Whether the employer discussed or offered to discuss a disputed change in working conditions before effectuating the change should be considered relevant to a determination of the employer's motivation in making the change. See (H), below.

-- although the disputed conduct itself would warrant deferral, there is credible evidence of other substantially related conduct violative of Sections 8(a)(3) or (1) or conduct violative of Section 8(a)(5) which evidences employer rejection of statutory collective bargaining obligations.

As noted above, a charging party's gratuitous inclusion of an 8(a)(3) allegation which investigation does not substantiate in a charge sounding principally in Section 8(a)(5) would not preclude deferral after dismissal of the 8(a)(3) charge.

(D) Respondent's willingness to arbitrate

Unfair labor practice charges will not be deferred for arbitration unless, at the time deferral of the charge is being considered, the respondent is willing to submit the dispute to arbitration notwithstanding either the expiration of any time limits the contract may contain on the filing and processing of the dispute through the grievance and arbitration procedures 11/ or the expiration of the contract containing the arbitration procedure which was in effect when

11/ Apparently important to the Board's decision in the Collyer case was the fact that the Respondent "has credibly asserted its willingness to resort to arbitration . . ." But the majority opinion does not make clear whether the time limitations of the contract governing the filing for grievance-arbitration proceedings bear any relationship to the requirement that the respondent be willing to arbitrate the dispute.

The Board retained jurisdiction over the dispute in Collyer -- rather than dismissing the complaint "outright" -- in part because of the contrary state of the law at the time the dispute arose. This might suggest the possibility that in the future, when parties are presumed to know their obligations under the Collyer policy, the Board will dismiss "outright" where the charging party has allowed the time limits to expire without filing for arbitration. At best, however, this possibility was considered speculative.

On the other hand, dissenting Member Fanning stated that "The time limits . . . have passed . . ." and for this reason he asserted that by compelling the arbitration of a grievance no longer contractually arbitrable, the majority disposition of the case "verges on the practice of compulsory arbitration." The majority opinion rejects this contention, saying that it was "merely giving full effect" to the arbitration agreement between the parties, but making no mention of the arbitration time limits of the contract on which Member Fanning based his contention.

It thus appears that the majority of the Board considered the question of time limits on the filing of grievances to have been irrelevant to its decision. It was enough for the Board's purpose that the respondent was willing to arbitrate despite any time limitations contained in the contract. So viewed the Board's

the dispute arose. 12/

Respondent's assertion of its willingness to submit the matter to arbitration need not be formalized or guaranteed in any particular manner. But if the region decides to defer action on the charge, the region should, in the confirming letter of deferral, express its understanding of the respondent's willingness to arbitrate the dispute notwithstanding any contractual time bars or expiration of the contract and its understanding of the respondent's intention not to contend against the arbitrability of the dispute before the arbitrator or to otherwise obstruct resolution of the dispute through arbitration.

(E) Good faith in the assertion of a contract claim or the willingness to arbitrate

An employer's withholding or failing to assert a claim of contract privilege until a charge is filed and is under investigation would not, standing alone, establish that the claim is being asserted in bad faith. 13/ However, where an employer first asserts a contract claim or its willingness to arbitrate after complaint issues or where the employer earlier rejected or obstructed timely and appropriate union efforts to resolve the dispute through the grievance-arbitration procedures of the contract, the question of whether the employer's asserted willingness to arbitrate an asserted contract claim should be considered belated and in bad faith should be submitted to Washington for advice.

11/ (continued) decision indicates that a party which seeks deferral of a charge for arbitration must be willing to waive any arbitration time limitations which the contract may contain.

12/ In the Collyer case itself the contract under which the dispute arose expired more than a month before the Board's decision issued.

13/ The Board in the Schlitz discussion twice referred to the respondent's good faith, first, as to respondent's assertion of a reasonable claim and, second, as to its belief in its contract right at the time it effected the unilateral change. And the Board characterized the respondent as "the party which in fact desires to abide by the terms of its contract." These statements support a view that an employer's undue delay in its assertion of a claim of contractual right is to some extent relevant to a determination whether the claim is asserted in good faith.

It could be argued that an employer's withholding a claim of contract privilege until the charge is filed indicates either that the employer did not in fact act in reliance on the contract and the dispute was therefore not contractual in origin or that the employer deliberately withheld its claim in order to avoid resolution of the dispute through the contract grievance machinery. The Board's decision in the Schlitz case lends some support to this argument.

(F) Disputes over special subject matters

Not suitable for deferral are disputes over a contractual obligation to include in an existing bargaining unit new facilities or operations acquired by the employer. 14/

Disputes over a union's request for information relevant and necessary to its evaluation and processing of grievances, even though arbitrable under the particular bargaining agreement, should not be deferred for arbitration. 15/ However, in instances in which the underlying grievance is already before an arbitrator, the question of deferral of the dispute over the request for information should be submitted to Washington for advice.

Cases involving (1) an obligation to resort to arbitration to establish terms and condition of employment, i.e., "interest" arbitration as distinguished from "grievance" or "rights" arbitration, (2) a requirement to resolve by arbitration disputes over the obligation during the contract term to negotiate on a particular subject, and (3) disputed employer action resulting in substantial or total elimination of the bargaining unit, should also be submitted for advice.

(G) Skills required in the resolution of the dispute

If deferral is otherwise appropriate, a dispute should be deferred for arbitration even though the resolution of the dispute may not involve the "special skill and expertise" which an arbitrator might possess. 16/

13/ (continued) However, the facts of the Collyer case itself militate against this argument. Nothing in that case indicates that during the development of the dispute respondent asserted any claim of contract right; in the letter respondent sent to the union after several meetings with the union setting out its position on the most significant of the disputed changes, respondent asserted no claim that the change was privileged by the contract.

14/ Member Brown, whose concurrence was necessary to the majority decision in Collyer, expressed reservations about surrendering unit determinations to private parties. His reservations would probably include questions of accretion to the bargaining unit, even though the parties had resolved the question by executory agreement.

15/ The Court's decision in N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 64 LRRM 2069, was believed to weigh against deferral for arbitration in disputes over a union's request for grievance information.

An employer's denial to a union of information relevant to grievance processing might also be viewed as precluding the "quick and fair means" the Board referred to for resolving disputes and as evidencing a purpose on the part of an employer to obstruct the efficient working of the arbitral process.

16/ While the Board said, ". . . disputes such as these can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships . . .," the Board seems to have been describing an advantage of, rather than

- (H) Respondent's offer to discuss a disputed change in working conditions before effectuation

An employer's failure to discuss, or to offer to discuss, a disputed change in working conditions before or after effectuating it 17/ does not necessarily preclude deferral of a resulting charge for arbitration. 18/

## II Contract Provisions Concerning the Resolution of Disputes

- (A) Requirement that the contract procedures for the resolution of disputes constitute "arbitration"

Unfair labor practice charges will not be deferred for arbitration unless the applicable contract procedures for the resolution of disputes provides for "arbitration." In determining whether the person, persons or body provided in the contract for the last-stage resolution of the dispute are arbitrators or arbitral bodies, and that the contract therefore provides for "arbitration", the criteria for this determination

16/ (continued) a condition precedent to, deferral for arbitration. While the Board may have seen "disputes such as these" as particularly suited to the special skills of arbitrators, the Board does not suggest, and it would be anomalous to infer, that the simplicity of the issues involved in the dispute would weigh in favor of Board assertion of jurisdiction.

17/ An employer's having discussed or offered to discuss such a change may bear on a determination of the employer's motivation in making the change, as well as on whether the employer made the change unilaterally. The fact that the employer discussed or offered to discuss the change would not, of course, bear on the question whether the change constituted a midterm contract modification within the meaning of Section 8(d).

18/ In the Schlitz case the Board did cite Respondent's having "offered to discuss the entire matter with the Union prior to taking such action." As that case involved an alleged modification of the contract in violation of Section 8(d)--to which an offer to discuss the change would not have been relevant--it appears that the Board considered the offer relevant to the deferral question alone.

However, in Collyer the trial examiner found, and the Board noted, that one of the disputed changes in working conditions found unlawful by the examiner had been discussed with the union, but the other "had not been made the subject of bargaining between the union and the employer." Nevertheless, the Board drew no distinction between the two changes made by Respondent in deferring the case for arbitration. It would seem, therefore, that the Board does not consider a respondent's failure to discuss an allegedly unlawful change with the union a bar to deferral of the dispute for arbitration.

which have been developed by the Board in the application of the Spielberg <sup>19/</sup> policy should be employed. Thus, the absence of a neutral member on a bipartite panel would not necessarily preclude deferral. <sup>20/</sup> But where, in addition, it appears that all members of the bipartite panel are or would be arrayed in interest against the charging party, deferral would not be appropriate. <sup>21/</sup>

(B) Exclusivity of arbitration as the means of resolving the dispute

An unfair labor practice charge will not be deferred for arbitration under the Collyer policy unless the contract provides that the procedures culminating in binding arbitration shall be the exclusive means for settlement of the dispute underlying the charge. Arbitration is to be considered "exclusive" if the contract which makes arbitration of the dispute in question available to the charging party <sup>22/</sup> also prohibits the charging party's resort to any means other than the contract grievance-arbitration procedures for resolution of a covered dispute. <sup>23/</sup>

<sup>19/</sup> Spielberg Manufacturing Co., 112 NLRB 1080.

<sup>20/</sup> Denver-Chicago Trucking Co., 132 NLRB 1416; Modern Motor Express, Inc., 149 NLRB 1507. The Board's reference in Tulsa-Whisenhunt Funeral Homes, Inc., 195 NLRB No. 20, n. 1, to "a forum of third parties" was not deemed sufficient to infer Board rejection of the relevance of the Denver-Chicago principle to the Collyer deferral policy.

<sup>21/</sup> Roadway Express, Inc., 145 NLRB 513; Youngstown Cartage Co., 146 NLRB 305.

<sup>22/</sup> To be considered "exclusive," the contractual grievance-arbitration procedures must, of course, permit the initiation of grievances and must compel the arbitration of unresolved grievances at the unilateral instance of the charging party.

Although a contract may give only an individual employee or group of employees the right to present arbitrable grievances, arbitration shall nevertheless be deemed available to the union in a particular dispute if the disputed action of the employer is prejudicial to the interests of individual employees. If the disputed action is prejudicial to the interest of the union alone, and not to the interests of individual employees (as in a unilateral improvement of a term or condition of employment), and the contract provides for the filing of arbitrable grievances only by employees, the matter should be submitted to Washington for advice.

<sup>23/</sup> In the Collyer case the contract provided that all disputes arising under the contract "shall be settled and determined solely and exclusively by the conciliation and arbitration procedures . . ." and the Board found that "the parties intended to make the grievance and arbitration machinery the exclusive forum for resolving contract disputes." And in rejecting the "compulsory arbitration" contention of Member Fanning, the Board asserted that it was merely giving effect to "voluntary agreements to submit all such disputes

Exclusivity of the arbitration provisions of the contract will be determined on the basis of the grievance-arbitration provisions of the contract and the fair inferences drawn from these provisions which make it reasonably clear that the parties intended that as to covered disputes the charging party is proscribed from imposing its position in the dispute on the respondent through any means other than the grievance and arbitration procedures.

While exclusivity of the arbitration provisions may be expressly stated in the contract, as in the Collyer case, it may also be implied by the imperative or categorical tenor of the provision for the submission of disputes to arbitration (e.g., "Disputes shall . . ." "All disputes will be . . ." "Disputes must be . . .") in conjunction with the fact that the result of the arbitration is made final and binding on the parties. 24/ Arbitration agreements having

23/ (continued) to arbitration rather than permitting such agreements to be sidestepped and permitting the substitution of our processes, a forum not contemplated by their own agreement." Member Brown, in concurring in deferral to the arbitration agreement, expressed the view that Federal labor policy requires that parties resolve their differences "through their own agreed-upon methods where, as in the instant case, their agreement provides that 'All questions, disputes, or controversies under this Agreement shall be settled and determined solely and exclusively by the conciliation and arbitration procedures provided in this agreement.'" (See also the discussion of Tulsa-Whisenhunt Funeral Homes, Inc., in footnote 24, below)

Of some relevance, however, may be the fact that in the Schlitz decision, which was extensively examined and relied on by the Board, it does not appear whether the contract limited the parties to the grievance-arbitration procedures for the resolution of their disputes. And the recital in Collyer of the "circumstances of this case which weigh heavily in favor of deferral," contains no mention of the "exclusivity" of the arbitration provisions of the contract.

Were the Board to subsequently decide, in the further development of its arbitration policy, or make clear, that the mere availability to the charging party of binding arbitration would warrant deferral to the arbitration agreement, no change in the procedures set out in this memorandum would be required except to substitute a requirement of "availability" of arbitration for the present requirement of "exclusivity."

24/ In Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, the contract provided that differences between the parties "shall be submitted" to arbitration which shall be "binding," but it did not expressly provide that arbitration was to be the exclusive method for the settlement of disputes between the parties. In ruling that a strike over a dispute violated this contract, notwithstanding the absence of an express no-strike clause, the Court relied on a doctrine

these "Lucas Flour" elements are therefore to be treated for deferral purposes as if they expressly provided that arbitration shall be the exclusive method for resolution of contract disputes between the parties. 25/

(C) Encompassment of the dispute by the arbitration provisions

To warrant deferral the dispute underlying the unfair labor practice charge must be encompassed by the arbitration provisions of the contract; that is, the subject matter of the dispute under consideration must be included in the subjects which the contract makes arbitrable. 26/ This determination must be based on the language of the agreement and the inferences which may be fairly drawn from this language. It is not necessary that these provisions encompass all potential disputes arising under the contract; it is enough that the

24/ (continued) applied by lower courts to disputes which "a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration . . ." (emphasis added)

In the Collyer decision the Board referred several times to the contractual obligation of the parties to submit their disputes to arbitration. In contrast, the contract in Tulsa-Whisenhunt Funeral Homes, Inc., supra, provided for arbitration only upon the mutual assent of the parties. Chairman Miller and Member Kennedy in explaining their refusal to defer, pointed out that in Collyer "the decision to defer to that arbitral process rested in substantial part on our conclusion that 'the contract between the Respondent and the Union unquestionably obligates each party to submit to arbitration any dispute arising under the contract and binds both parties to the result thereof.'"

25/ In a contract which makes arbitration available to the charging party but which does not prohibit the charging party's resort to other means for resolving the dispute (i.e., it does not expressly provide that arbitration shall be the exclusive means for resolving disputes and does not provide that "all disputes shall be submitted to arbitration" or the like), the arbitration procedures would not be considered "exclusive" and would not warrant deferral. While such a contract may guarantee the availability of arbitration to the charging party, that fact would not warrant deferral; the Collyer policy of deferral is viewed as predicated not on the availability of arbitration to the charging party, but on the charging party's having prospectively and voluntarily obligated itself by contract to seek redress by no means other than arbitration in contract disputes with the respondent.

26/ See United Steelworkers of America v. Warrior and Gulf Navigation Company 363 U.S. 574, at 582, where the Supreme Court stated: "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."

Among the circumstances relied on by the Board in Collyer was the fact that the arbitration clause was "unquestionably broad enough

particular dispute in question is encompassed by these provisions. 27/

The willingness of the respondent to arbitrate the dispute in question or the expiration of the contractual time limits would not be considered relevant to the determination of whether the dispute is encompassed by the arbitration provisions; the determination to be made is whether the parties have contractually undertaken to arbitrate the kind of dispute which is the subject of the unfair labor practice charge.

(D) The binding character of the arbitration procedure

Unfair labor practice charges will not be deferred for arbitration under Collyer policy if the arbitration provisions of the contract do not make the results reached in such proceedings "binding" or "final and binding" on the parties. 28/ The term "binding" is considered to refer to a contractual obligation to abide by the terms of the arbitration award or decision, which obligation may be inferred even in the absence of the specific term "binding." Contractual reference to a party's right to judicial review of an award (as well as "case law" or statutory right to such review) would not be considered inconsistent with a determination that the award is binding on the parties.

Contracts which make mandatory or exclusive arbitration a prerequisite to the resort to other means for resolution of a dispute, most often strikes, should be submitted to Washington for advice.

(E) Obstacles to a quick and fair arbitral resolution of the dispute

In cases in which a substantial claim is made that for pragmatic, rather than formal contractual, reasons the arbitration procedures do not in fact afford the charging party what the Board referred to as a "quick and fair means" for resolving the dispute, the matter should be submitted to Washington for advice. Such claims might be predicated on a substantial number or backlog of pending arbitration cases, the undue cost of these procedures and the relative disparity of the financial resources available for this purpose to the disputants.

26/ (continued) to embrace this dispute." While the term "unquestionably" might suggest that a high degree of certainty should be required in determining whether the dispute is embraced by the arbitration provisions, the Board's use of that term was believed merely to reflect the particular facts of that case.

27/ Cf. Hoffman Beverage Co., 163 NLRB 971; Morton Salt Co., 190 NLRB No. 32.

28/ The basic premise of the Collyer decision--enforcement of voluntary contractual undertakings to arbitrate contract disputes--could be argued to warrant deferral for arbitration even though it is not binding on the parties. However, the contract in Collyer made the arbitrator's decision "final and binding on the parties," a fact

### III History of the Parties and Their Relationship

#### (A) The history of the bargaining between the parties

Deferral of an unfair labor practice charge for arbitration is not warranted in instances in which substantial evidence demonstrates that the relationship between the parties has not been "successful" and "productive" and that the parties have not "mutually and voluntarily resolved the conflicts which inhere in collective bargaining." 29/

This determination of the quality of the relationship may be based on unfair labor practice findings and settlements, 30/ Section 301 suits, strikes and lockouts, as well as the arbitration experience of the parties, including the willingness with which the respondent has carried out past arbitration awards against it without forcing the other party to legal process for the enforcement of such awards. While this evidence would not be limited to the Section 10(b) period of the charge, the weight given such evidence should be diminished in direct relation to the remoteness in time of the conduct and by evidence of an intervening improvement in the relationship. However, where a substantial issue is raised concerning the quality of the relationship, the matter should be submitted to Washington for advice if deferral is dependent upon the quality of the relationship.

Where a dispute arises during the first contract between the parties and there has been little grievance and arbitration experience under that contract and no history of bargaining between the parties in any other unit, the matter should be submitted to Washington for advice

28/ (continued) mentioned by the Board in its discussion. And the concept of arbitration to which the Board referred throughout its decision seems to assume implicitly the obligation of the parties to honor the arbitral result. Indeed, the word "resolve," which the Board frequently used in various forms connotes a degree of finality which only inheres in a binding arbitration award. See also, Tulsa-Whisenhunt Funeral Homes, Inc., supra.

29/ In characterizing instances in which deferral is warranted the Board spoke of "established bargaining relationships" and described the Collyer relationship as a "long and productive" one in which the parties "for 35 years, mutually and voluntarily resolved the conflicts which inhere in collective bargaining." In the Board's quotation from the Schlitz case it was recounted that the parties had "an unusually long established and successful bargaining relationship." Earlier in the Schlitz opinion the Board, in explaining its refusal to exercise jurisdiction, pointed out testimony which disclosed "many years of a satisfactory strike-free working relationship."

30/ As the decision concerning deferral for arbitration under the Collyer policy is a matter of discretion with the Board, the Board may consider circumstances, such as past settlements of unfair labor practice charges, in reaching this decision which would not be considered in reaching an unfair labor practice finding.

if deferral is dependent upon the duration of the relationship. 31/ Such a dispute might exist where the employer succeeded to and accepted the bargaining agreement of a predecessor employer.

(B) Employer enmity generally to employee exercise of rights guaranteed by the Act

Deferral is not warranted where there is substantial evidence of a history of employer violations of the Act of a kind which demonstrates deliberate interference with the right of employees to engage in protected concerted activity or which demonstrates deliberate rejection of the principles and practices of collective bargaining which are imposed by the Act. 32/ This evidence may include unfair labor practice findings and settlements without regard to the limitation of Section 10(b) but, again, the weight given this evidence should be diminished in direct relation to its remoteness in time and to intervening improvement in the relationship.

31/ The Board's discussion of the length and quality of the relationship may well relate to the issue of whether or not arbitration is likely, in fact, to settle the dispute. Thus, in submitting for advice the question raised by the length or quality of the relationship between the parties, the region should include any other available evidence bearing on whether arbitration is likely to settle the dispute.

32/ The Board pointed out in Collyer that, as in Schlitz, "no claim is made of enmity of Respondent to employees' exercise of protected rights."

PROCEDURES FOR ADMINISTRATIVE DEFERRAL FOR  
PROSPECTIVE ARBITRATION

I Procedural Implications of the Collyer decision

The Board did not explicate its views as to the manner in which deferral policy should be administratively implemented at case handling stages prior to Board decision. However, the Board's rationale and its comments about, and manner of, disposition of the Collyer complaint are believed to warrant adoption of the following basic premises for the development of case handling procedures applicable in cases in which the question of deferral for arbitration is raised:

1. The question of deferral for arbitration, under the Collyer policy, of a refusal to bargain charge will not be considered or investigated unless either party has raised with the other party or the region the question of whether the conduct alleged to violate the Act was privileged by the collective bargaining agreement or unless the merits of the charge are clearly dependent upon an interpretation of the contract, whether or not any party has raised the question of contract privilege or deferral for arbitration.
2. If a charge pertains to a dispute to which the Collyer policy of deferral for arbitration is applicable, further proceedings on the charge will be deferred for a suitable period to allow the parties an opportunity to resort to the arbitral process.
3. If, after a charge has been so deferred, the charging party is responsible for the failure of the arbitral process to function the charge will be dismissed.
4. If, after a charge has been so deferred, the respondent is responsible for the failure of the parties to resort to arbitration (and the dispute has not been otherwise settled), the charge will be reactivated and processed without regard to the contract arbitration procedures.
5. Wholly apart from the question of deferral for arbitration under the Collyer policy, deferral of action on an unfair labor practice charge will continue to be the appropriate course under the Dubo policy where the grievance-arbitration procedures of the contract are being actively pursued and

it appears that the utilization of these procedures stands a reasonable chance of setting the dispute to rest. 33/

## II Initial Disposition of Charges

### (A) Investigation and determination of the merits of the charge

The region should consider whether to defer action on an unfair labor practice charge for arbitration under the Collyer policy only after the charge has been fully investigated and after the region has determined that deferral is not warranted under the Dubo policy (see footnote 35, below), and that Collyer arbitration deferral policy aside, the charge would warrant issuance of a complaint. During the investigation of the merits of the charge, the region may concurrently procure evidence bearing on the question of deferral for arbitration under the Collyer policy in order to avoid the duplication of effort and delay which would in some cases be occasioned by the separate, successive investigation of these two aspects of the charge. The region should nevertheless determine the merits of the charge before considering deferral of the charge for arbitration under the Collyer policy and should dismiss charges which it finds to be lacking in merit. 34/

33/ Applicable to charges arising under other Sections of the Act, as well as to 8(a)(5) charges--but most often applied to Section 8(a)(3) charges, the Dubo policy was in 1967 referred to by then General Counsel Arnold Ordman as a practice of deferring action on a charge when the "grievance-arbitration procedure is being actively pursued . . . if it appears that there is a substantial likelihood that the utilization of the procedure will set the dispute at rest." Ordman, Arbitration and the NLRB--a Second Look, Labor Relations Yearbook--1967, 197 at 202.

The "circumstances" and procedures treated in the body of this memorandum pertain only to deferral under the Collyer policy, a policy which is basically premised on a preexisting contractual agreement to arbitrate contractual disputes and which is applicable where the parties are not engaged in an arbitration proceeding or in a proceeding under the grievance-arbitration procedures of the contract. Collyer deferral is to be distinguished from deferral under the Dubo policy; the latter is applicable where the dispute is being arbitrated or the dispute is in the grievance stages of a procedure which leads to arbitration.

34/ See footnote 4, above.

Cases should be submitted to Washington for advice on the issue of arbitration deferral under Collyer only if the merits of the charge have been fully investigated and the region has found the charge to be otherwise meritorious or if the region seeks advice on the merits of the charge as well.

(B) Encouragement of arbitration

If a charge is found to be meritorious, and the underlying dispute is not, and has not been, the subject of any grievance-arbitration proceeding, then the region should issue complaint on the charge unless: (1) the contract between the parties provides for binding arbitration which can be unilaterally invoked by the charging party, (2) the respondent has contended that the contract privileged the allegedly unlawful conduct or the merits of the charge are dependent on an interpretation of the contract, and (3) there is substantial likelihood that utilization of the contractual arbitration procedures would lay the dispute to rest. Where all of these elements exist, then the region should encourage the parties voluntarily to submit the dispute to arbitration (if the region in its discretion believes that there is significant likelihood that the parties would be willing to do so). If, as a consequence of this encouragement, the parties voluntarily undertake to arbitrate the dispute, the region should inform the parties that the charge is being deferred on the basis of the Board's Dubo policy. 35/

35/ Deferral under the Dubo policy is appropriate where (1) the dispute is currently set for, or in, arbitration; (2) the parties have agreed to arbitrate the particular dispute in question; (3) either party has filed suit, or secured an order, to compel arbitration of the underlying dispute; or (4) the charging party has filed a grievance under a contractual procedure culminating in arbitration which can be unilaterally invoked by the charging party. However, in this last instance, where it appears that the charging party filed the grievance (and processed it to the extent necessary to prevent extinction of its contract claim) merely to preserve its rights under the contract pending a determination of whether complaint will issue on its charge and the charging party does not intend to pursue further the contract grievance in the event complaint issues, then the charge should not be deferred under the Dubo policy; rather, the charge in these circumstances should be processed in accordance with the instructions beginning at (A), above, without regard to the fact of this pro forma filing of a grievance.

After the region has deferred further action on a charge for arbitration under the Dubo policy, the region should inquire periodically concerning the status of the grievance or arbitration proceeding.

(C) Investigation of the circumstances pertaining to deferral under the Collyer policy

If a charge has been found to be meritorious and if the underlying dispute is not the subject of a current grievance-arbitration proceeding other than a grievance filed pro forma (see footnote 35, above), and if all of the 3 elements described in (B), above, exist but the parties do not voluntarily undertake to arbitrate the dispute, then the region should conduct or complete its investigation of the "circumstances" which are relevant to deferral for arbitration under the Collyer policy. The parties should be given informal notice of the fact of this investigation and of their opportunity to present evidence and views on the subject.

The order in which the region investigates the "circumstances" bearing on deferral under Collyer is left to the discretion of the region. In the interest of minimizing the extent of this investigation the region should bear in mind that at the point at which this investigation clearly reveals a circumstance or circumstances which would preclude deferral, the investigation of the remaining "circumstances" may be discontinued and the complaint may be issued absent settlement. Where, however, it appears that complaint and hearing will ensue, the region should be prepared to address itself to all elements of a Collyer contention raised by respondent.

In determining whether deferral is warranted, the region should initiate and assume responsibility for investigating and considering the "circumstances" which would establish prima facie warrant

---

35/ (continued) Where, as a result of such an inquiry or of a party's having brought the matter to the attention of the region, it appears for any reason that the dispute will not be arbitrated or that an arbitration award will not resolve the dispute underlying the charge, the region should reactivate the charge and proceed in accordance with the instructions beginning at (A), above. In assessing the "circumstances" pertaining to deferral of such a reactivated charge under the Collyer policy (and particularly in assessing the employer's "good faith," as provided in Section I(E), above), the region should give due weight to the circumstances which resulted in discontinuance of the grievance or arbitration proceeding short of the issuance of an award resolving the dispute.

When a party, or the region's periodic inquiry, discloses that an arbitration award has issued in a dispute in which the charge was deferred for arbitration under the Dubo policy, the award should be reviewed under the Spielberg doctrine and the charge should be dismissed or complaint should be issued accordingly. Any question raised as to whether the relief provided for in an award in favor of the charging party adequately remedies violations found by the region or as to whether the respondent has refused to comply with the award should be submitted for advice.

for deferral. These "circumstances" include the existence of a contract between the parties; the existence of contract provisions which could reasonably be argued to privilege the disputed conduct; the existence of contractual provisions for arbitration which would encompass the dispute, which are exclusive and binding, and which make arbitration available to the charging party; the fact that the dispute does not concern a special subject matter not suitable for deferral; and the respondent's willingness to arbitrate.

The region should also consider such evidence as is already in its possession which pertains to the remaining "circumstances" relevant to the question of deferral. This evidence may include regional office records and Board decisions concerning unfair labor practice findings or settlements and evidence already obtained in the investigation of the subject unfair labor practice charge pertaining to employer enmity and the duration and quality of the relationship between the parties. But the region should investigate and consider any other evidence pertaining to the history of the relationship, to employer enmity, to the employer's good faith in its assertion of a contract claim or its willingness to arbitrate, and to obstacles to a quick and fair arbitral resolution of the dispute, only in the event and to the extent such evidence has been produced by the charging party in support of a contention against deferral. 36/

(D) Communication to the parties of the decision to defer under Collyer

If, on the basis of its investigation and consideration of the "circumstances" pertaining to deferral of action on the charge for arbitration under the Collyer policy, the region determines that deferral is appropriate, the region should orally or in writing inform the parties of that decision. In the event the charging party, upon being so informed, objects to deferral or requests that it be informed in writing of the reasons for the deferral, the region should send to the parties a letter 37/ setting forth:

1. the fact that the region has determined that further proceedings on the charge are being deferred, pursuant to the Board decision in Collyer and the General Counsel's public release concerning Collyer deferral;
2. The reasons for which the charge is being deferred;

36/ This is intended to avoid unnecessary investigations which might disturb presently amicable bargaining relationships.

37/ Appended hereto is a pattern letter to the parties, to be modified as circumstances in the particular case warrant.

3. the region's intention to dismiss the charge in the event the charging party does not promptly submit the dispute to arbitration through the contract arbitration procedures or in the event the charging party notifies the region in writing that it does not intend to submit the dispute to arbitration;
4. the region's understanding that the respondent has expressed a willingness to arbitrate the dispute and to waive any bar to an arbitral decision resolving the dispute underlying the charge, and the region's intention to issue complaint in the event the respondent, by conduct inconsistent with its expression of willingness to arbitrate, prevents or impedes the prompt resolution of the dispute through the contract arbitration procedures;
5. the region's intention to inquire as to the status of the dispute periodically, and no later than 90 days later, and to accept and consider at any time any request and supporting evidence submitted by either party to the case for the dismissal of the charge, for continuation of the deferral of action on the charge, or for the issuance of a complaint.

If the region receives the notification from the charging party referred to in item 3 of the deferral letter, the region should issue a dismissal letter the contents of which consists of the above letter and the fact of the charging party's notification of its intention not to arbitrate. In the absence of such notification, the deferred charge should be handled in accordance with III, below.

In the event the charging party, upon being informed by the region of its determination to defer action on the charge for arbitration under the Collyer policy, does not object to the deferral and does not request that it be informed in writing of the reasons for the deferral, the region should confirm its having so informed the parties by a letter like that described above but from which item 2 has been omitted. If, after sending such a confirming letter, the region receives from the charging party the notification referred to in item 3 in the letter, the region should issue a dismissal letter the content of which consists of the reasons for the region's determination that deferral of the charge for arbitration was warranted and the fact of the charging party's notification of the region that it does not intend to arbitrate.

### III Handling of Deferred Charges Before Issuance of An Arbitration Award

When either party requests the region to take any action on a charge deferred under the Collyer policy (and in the region's discretion the request warrants the region's inquiring as to the status of the dispute at that time) or, in the absence of such a request from a party, no later than 90 days after issuance of the deferral letter provided for in II(D), above, the region should inquire of the parties as to the status of the dispute which has been deferred for arbitration and as to the parties' efforts to resolve this dispute. If the information available to the region does not adequately reveal the status of the dispute because either or both parties are dilatory or uncooperative in their response to the region's inquiry, the region should, as part of its inquiry, send letters asking either

(1) why the charge should not be dismissed or (2) why complaint should not issue, whichever in the region's discretion is the more appropriate in the circumstances.

In the event this inquiry reveals that the parties are actively engaged in efforts to settle or arbitrate the dispute, the region should notify the parties in writing that having reviewed the status of the dispute underlying the charge, the region has decided to extend the deferral of action on the charge for up to 90 days.

In the event this inquiry reveals that the charging party has not made, or is no longer making, reasonably prompt efforts to settle or to arbitrate the dispute, the region should dismiss the charge, issuing a dismissal letter which incorporates the original deferral letter, the reasons for which the region originally decided to defer action on the charge (if such reasons were not included in the original deferral letter) and the present circumstances upon which the region relies in deciding to discontinue deferral and to dismiss the charge.

In the event this inquiry reveals that the respondent has interfered with or obstructed the submission of the dispute to arbitration by reliance on contractual time bars to arbitration, by refusing to participate in preparation of the submission or selection of an arbitrator, by taking the position that the dispute is not arbitrable, or otherwise, the region should issue complaint on the charge after giving respondent an opportunity to enter into a settlement of the charge.

### IV Handling Of Deferred Charges After Issuance Of An Arbitration Award

When the region's inquiry under III, above, or the charging party or the respondent, brings to the attention of the region an arbitration award which resolves the dispute underlying the deferred charge, the region should determine whether the award meets the standards for deferral to such awards under the Spielberg doctrine. If not, the region should issue complaint. If the award meets these standards, the region should dismiss the deferred charge. 38/

38/ If the award is in favor of the charging party and any question is raised either as to whether the relief provided for in the

A P P E N D I X

Pattern for Deferral under Collyer

Charging Party  
Respondent

Case name  
Case number

Gentlemen:

The charge in the above-captioned case, charging a violation of Section 8(a)(5) of the National Labor Relations Act, has been carefully investigated and considered.

Pursuant to the decision of the National Labor Relations Board in Collyer Insulated Wire, 192 NLRB No. 150, and the public release of the General Counsel dated / /72 I have determined that further proceedings on this charge should be administratively deferred at this time for the following reasons:

- 1.
- 2.
3. etc., etc., etc.

It is my intention to dismiss the charge in the event /the charging party/, the charging party in this matter, does not promptly submit the dispute underlying the charge to the contract arbitration procedures or in the event /the charging party/ notifies me in writing that it does not intend to submit this dispute to arbitration.

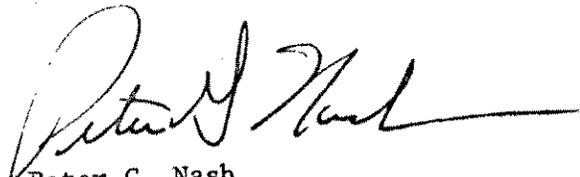
It is my understanding that /the respondent/ has expressed a willingness to arbitrate the dispute which is the subject of the instant charge and to waive any bar to an arbitral decision resolving the dispute underlying the charge. It is my intention to reactivate the charge and issue complaint thereon <sup>in</sup> the event /the respondent/, by conduct inconsistent with this expression of willingness to arbitrate, prevents or impedes the prompt resolution of the underlying dispute through the contract arbitration procedures.

It is also my intention to inquire as to the status of the dispute periodically, and no later than 90 days hence, and to accept and consider at any time any request and supporting evidence submitted by either party to this matter for the dismissal of the charge, for continuation of the deferral of action on the charge, or for the issuance of a complaint.

The dismissal letter should consist of the reasons for which the region found the award to meet the Spielberg standards, the original deferral letter, and the reasons for which the region originally determined to defer action on the charge under the Collyer policy (if such reasons were not included in the original deferral letter).

V Litigation Of The Collyer Deferral Question

The region should not at hearing enter objections to the introduction of evidence by respondent on Collyer issues (and shall, where necessary, support respondent's right to submit evidence relevant and material thereto). However, the region should respond with all available evidence which distinguishes Collyer and argue against deferral if it has been administratively determined that the unfair labor practice charge should not be deferred for arbitration.



Peter G. Nash

38/ (continued) award adequately remedies the violations found by the region or whether the respondent has refused to comply with the award, the matter should be submitted for advice.