

73-31

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D. C.

May 10, 1973

ARBITRATION DEFERRAL POLICY UNDER  
COLLYER--REVISED GUIDELINES

Since first announcing in Collyer Insulated Wire, 192 NLRB No. 150, its policy of deferring to the grievance and arbitration procedures of an existing bargaining agreement, the Board has issued a number of decisions in which it has substantially extended and refined this policy.

As I said in the introduction to the guidelines for regional offices contained in the memorandum entitled "Arbitration Deferral Policy under Collyer" which I issued on February 28, 1972, I welcome a policy which encourages the expeditious and private settlement of industrial disputes through deferral on the part of the Board to the arbitral process. For this reason I believe that the public interest will be well served by the extension and development of the Collyer policy which is embodied in the decisions which the Board has issued.

We do not yet know the extent to which the Collyer policy will be successful in encouraging a gain in the prompt, fair and effective settlement of industrial disputes through private contract procedures. However, I feel that I must do all I can to insure that success by working for the uniform and expeditious application of this policy at the regional office level. The Collyer policy has now been expanded by the Board to apply to charges alleging violations of Sections 8(a)(1), (2) and (3) and 8(b)(1)(A) and (B) and 8(b)(2) and (3), in addition to Section 8(a)(5). For this reason and because there are many cases, rather than one, from which the whole of the policy must be drawn, I feel it time that the February 28, 1972, guidelines should be revised and reissued to reflect the Board's amplified views on the subject. Consequently, I am issuing

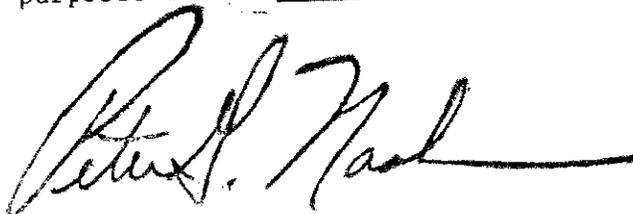
the attached memorandum which supersedes my earlier memorandum. To facilitate comparison with the Collyer guidelines issued February 28, 1971, this revised memorandum follows a format similar to that of its predecessor.

Where significant changes of the earlier guidelines were required by recent expressions of Board policy and by our experience in the administrative application of the Collyer policy, the reasons for the changes are discussed. Some of these changes of particular note are:

1. Broadening the application of the Board's Collyer doctrine to all cases in which (a) the issues are susceptible to resolution under the contract grievance-arbitration procedures, and (b) there is no reason to believe that this machinery will not resolve the issues in a manner compatible with Spielberg standards;
2. (a) Providing the respondent an opportunity to express a willingness to arbitrate the dispute and, thus, to secure deferral of the charge under Collyer (where all other requirements for deferral are met), prior to a final determination of the regional office as to the merits of the unfair labor practice charge;  
  
(b) Requiring as a condition of deferral, that at the latest, respondent express its willingness to arbitrate no more than 7 days after a regional office communicates to the respondent its final determination that the charge is meritorious;
3. (a) Refusing to defer under the Collyer policy in a dispute over a request for information relevant to grievance processing even though the underlying grievance is already before an arbitrator, and;  
  
(b) Refusing to defer charges pertaining to the basic, underlying grievance if deferral is inappropriate as to a dispute over a request for information which is relevant to that grievance;
4. Adopting special criteria for the deferral of charges filed by individual employees, and;
5. Providing the charging party the right, under Board Rule 102.19, to appeal a decision of the regional office to defer action on a charge under the Collyer policy.

It is my hope that these revised guidelines will assist the regional offices in carrying out the Collyer policy in a manner which will best serve the parties who come before the Agency, will encourage the proper disposition of disputes by private procedures and will advance the Board's basic objectives in its adoption and expansion of the Collyer policy.

I would emphasize that these revised guidelines are intended to provide broad, generalized criteria for the implementation of the Collyer policy in the wide variety of cases to which it will apply. Since these guidelines are, in part, generalizations derived from the Board's published decisions and, in part, procedures for the application of the Collyer policy which will be presented for the Board's consideration and adoption or rejection on a case-by-case basis, they cannot be considered "rules" in the conventional sense. Nor can they substitute for the acumen which is necessary for the application of these guidelines to the diverse facts of each particular case in a manner which will best serve the basic essential purposes of the Collyer doctrine.



---

Peter G. Nash

TABLE OF CONTENTS

INTRODUCTION-----1-3

CITATION OF CASES

Collyer Cases-----6-7

    Non-Collyer Cases-----8-9

CIRCUMSTANCES RELEVANT TO DEFERRAL UNDER COLLYER

    I. Character of the Dispute

        (A) Type of violations charged-----10

        (B) Relationship between the unfair labor practice  
            issues and the issues subject to arbitration-----10-14

        (C) Employer enmity toward employee or union rights  
            under the Act-----14

        (D) Willingness to arbitrate the dispute-----15-18

        (E) Good faith in the assertion of privilege for the  
            disputed action-----19

        (F) Disputes over special subject matters

            1. Accretion Issues-----19

            2. Information Issues-----20-23

            3. Obligation to Recognize-----24

            4. Frustration of Arbitration-----24

            5. Existence of Contract-----24

            6. Unlawful Contract Provisions-----25

            7. "Interest", "Negotiability" and "Unit  
                Elimination" Arbitration-----25

        (G) Skills required in the resolution of the dispute-----25

        (H) Respondent's offer to discuss a disputed charge in  
            working conditions before effectuation-----26

    II. Contract Provisions Concerning The Resolution of Disputes-----26-27

        (A) Requirement that the contract procedures for the  
            resolution of the disputes lead to arbitration-----27-28

        (B) Encompassment of the dispute by the arbitration  
            provisions-----28-30

        (C) Arbitration available at the insistence of the  
            charging party-----30

        (D) The binding character of the arbitration result-----31-32

        (E) Obstacles to a quick and fair arbitral resolution  
            of disputes-----32

III. Special Considerations Concerning Charges Filed by Individuals-----	32-36
---	-------

PROCEDURES FOR ADMINISTRATIVE DEFERRAL

I. Initial Disposition of Charges	
(A) Investigation of the merits of the charge and deferral circumstances in potential " <u>Collyer</u> " and " <u>Dubo</u> " situations-----	36-44
(B) Communication to the parties of the decision to defer to arbitration-----	44-45
II. Handling Before Issuance of an Arbitration Award of Charges Deferred Administratively Under the <u>Collyer</u> Policy-----	46-47
III. Handling After Issuance of an Arbitration Award of Charges Deferred Administratively Under the <u>Collyer</u> Policy-----	47
IV. Litigation of the <u>Collyer</u> Deferral Question-----	48
Appendix A-----	49-55
(Outline of <u>Collyer</u> Circumstances and Deferral Procedures)	
Appendix B-----	56
(Sample initial "willingness" letter)	
Appendix C-----	57
(Sample final "willingness" letter)	
Appendix D-----	58-59
(Sample <u>Collyer</u> deferral letter)	
Appendix E-----	60
(Sample <u>Spielberg</u> dismissal letter)	

CITATIONS OF COLLYER CASES

CASES	FOOTNOTES IN WHICH CITED
Abell, A. S. Co., The, 201 NLRB No. 5	3, 4
Anaconda Wire and Cable Co., 201 NLRB No. 125	56
Appalachian Power Co., 198 NLRB No. 7	10, 13
Associated Press, The, 199 NLRB No. 168	1, 5, 6, 8, 29, 34
Atlantic Richfield Co., 199 NLRB No. 135	8, 15, 31, 66
Bethlehem Steel Corp., 197 NLRB No. 121	4, 6, 34, 42, 43, 54
Borden, Inc., 196 NLRB No. 172	13, 29
Champlin Petroleum Co., 201 NLRB No. 9	20
Chase Manufacturing, Inc., 200 NLRB No. 128	11, 27
Collyer Insulated Wire, 192 NLRB No. 150	2, 6, 12, 13, 17, 27, 32, 34 35, 37, 52, 54, 57, 66
Continental Can Co., 202 NLRB No. 78	57
Coppus Engineering Corp., 195 NLRB No. 113	8, 10, 12, 33, 35
Eastman Broadcasting Co., 199 NLRB No. 58	2, 6, 12, 37, 42
Enterprise Publishing Co., 201 NLRB No 118	5
Gary-Hobart Water Corp., 200 NLRB No. 98	48
Great Coastal Express, 196 NLRB No. 129	4, 6, 13, 19, 35, 40, 44
Houston Chronicle Publishing Co., 199 NLRB No. 69	3, 4
Hunter Saw Division of Asko, Inc., 202 NLRB No. 30	86
Kansas Meat Packers, 198 NLRB No. 2	41, 45, 56
Koch, George, Sons, Inc., 199 NLRB No. 26	7, 9, 25, 30, 31, 58
Ladish Co., 200 NLRB No. 165	38
L.E.M. d/b/a Southwest Engraving Co., 198 NLRB No. 99	5, 6, 10, 12, 13 15, 34, 44, 50
McDonald Engineering Co., 202 NLRB No. 113	86

Medical Manor d/b/a Community Convalescent Hospital, 199 NLRB No. 139	12, 17, 28, 37, 63, 80
National Biscuit Co., 198 NLRB No. 4	9, 13, 40, 51, 82
National Heat and Power Corp., 201 NLRB No. 150	29
National Radio Company, Inc., 198 NLRB No. 1	2, 4, 6, 7, 10, 11, 17, 34 37, 42, 44, 54, 56, 57
Norfolk Portsmouth Wholesale Beer Distributors Ass'n., 196 NLRB No. 165	5, 6, 14, 15, 16, 17 34, 42, 44, 50
Oak Cliff-Golman Baking Co., 202 NLRB No. 72	4
Patman, Urban N., Inc., 197 NLRB No. 150	16, 42, 44, 45, 50, 82
Peerless Pressed Metal Corp., 198 NLRB No. 5	4, 18, 19, 37
Radioear Corp., 199 NLRB No. 137	44
Ryerson, Joseph T. & Sons, Inc., 199 NLRB No. 44	2, 6, 7, 8, 23 28, 37, 42, 45, 54
Southwestern Bell Telephone Co., 198 NLRB No. 6	35, 42, 44, 45, 82
Titus-Will Ford Sales, 197 NLRB No.	14
Tulsa-Wisenhunt Funeral Homes, Inc., 195 NLRB No. 20	40, 48, 51
Tyee Construction Co., 202 NLRB No. 4	4, 6, 42, 55, 56
United-Carr Tennessee a Division of TRW, Inc., 202 NLRB No. 112	22
Western Electric, Inc., 199 NLRB No. 45	15
Western Electric, Inc., 199 NLRB No. 49	42, 45, 49, 51
Wrought Washer Mfg. Co., 197 NLRB No. 14	4, 19, 44

CITATIONS OF NON-COLLYER CASES

CASES

FOOTNOTES IN WHICH CITED

Acme Industrial Co., N.L.R.B. v., 385 U.S. 432	22
Arlan's Department Store, 133 NLRB 802	31
Associated Building Contractors of Evansville, Inc., 143 NLRB 678	29
Black-Clawson v. IAM, 313 F. 2d 179	57
Burns, William J. Detective Agency, 182 NLRB 348	27, 29
Combustion Engineering, Inc., 195 NLRB No. 161	20
Crescent Bed Co., 157 NLRB 296	8, 29
Denver-Chicago Trucking Co., 132 NLRB 1416	40
Dubo Manufacturing Corp., 142 NLRB 431	63, 64, 65, 66
Fawcett Printing Corp., 201 NLRB No. 139	22
Heinz, H.J., Co. v. N.L.R.B., 311 U.S. 514	29
Hershey Chocolate Corp., 129 NLRB 1052	56, 57
Hilton-Davis Chemical Co., 185 NLRB No. 58	29
Houston Sheet Metal Contractors Ass'n., 147 NLRB 774	85
International Harvester Co., (Indianapolis Works), 138 NLRB 923	57, 66
Jacobs Transfer, Inc., 201 NLRB No. 34	41, 57
Malrite of Wisconsin, Inc., 198 NLRB No. 3	53, 84
Mastro Plastics Co. v. N.L.R.B., 350 U.S. 270	31
McLean Trucking Co., 202 NLRB No. 102	57
Modern Motor Express, Inc., 149 NLRB 1507	40
Montgomery Ward & Co., 195 NLRB No. 136	86
Porter, H. K., Co., Inc. v. N.L.R.B., 397 U.S. 99	42

Ranch-Way, Inc., 183 NLRB No. 116	27
Republic Steel Corp. v. Maddox, 379 U.S. 650	57
Roadway Express, Inc., 145 NLRB 513	41
Southwestern Bell Telephone Co. v. CWA, AFL-CIO and Local 6222, 454 F. 2d 1333, 79 LRRM 2480	42
Spielberg Manufacturing Co., 112 NLRB No. 1080	2, 39, 57, 66
Steelworker "trilogy"	57
Taft Broadcasting Co., 185 NLRB No. 68	29
Timken Roller Bearing Co., 70 NLRB 500	66
United Aircraft Corp., 188 NLRB No. 96	64
Wertheimer Stores Corp., 107 NLRB 1434	57
Western Electric Company, Inc., 180 NLRB 131	56, 57
Youngstown Cartage Co., 146 NLRB 305	41
Yourga Trucking, Inc., 197 NLRB No. 130	83

CIRCUMSTANCES RELEVANT TO DEFERRAL UNDER  
THE COLLYER POLICY

I. Character of the Dispute

(A) Type of violations charged

The other conditions necessary for deferral being present, charges alleging violations of Section 8(a)(1), (2), (3) and (5) and Sections 8(b)(1)(A) and (B), and 8(b)(2) and (3) will be deferred for arbitration under the Collyer policy. 1/ Charges alleging violations of other sections of the Act in which a substantial question of deferral under the Collyer policy is raised should be submitted to Washington for advice.

(B) Relationship between the unfair labor practice issues and the issues subject to arbitration.

Deferral of an unfair labor practice charge is warranted if there is a reasonable probability that the unfair labor practice issues raised by the charge could be considered and resolved under the contract arbitration procedures in a manner consistent with the standards of Spielberg. 2/ This is likely to be true if the unfair labor practice issues and the arbitration issues both turn on the meaning or application of disputed contract provisions, and particularly so if the contract provisions amount to a "fleshing out" of statutory obligations. 3/ However, a dispute which is subject to the contract grievance and arbitration

1/ In The Associated Press, 199 NLRB No. 168, the charges deferred for prospective arbitration under Collyer included allegations of violations of both Section 8(a)(2) and Section 8(b)(2).

2/ In the discussion and remedy in the Collyer case itself the Board made plain that it was retaining jurisdiction over the dispute in part to insure against the possibility that the arbitration proceeding would not meet the Board's test for deferral to arbitration proceedings already concluded which was established in Spielberg Manufacturing Co., 112 NLRB 1080. In National Radio Company, Inc., 198 NLRB No. 1, the Board even more explicitly made the "crucial determinant" of deferral policy the reasonableness of the assumption that the arbitration procedure will resolve the dispute "in a manner consistent with the standards of Spielberg." The decision in Eastman Broadcasting Co., 199 NLRB No. 58, referred, more generally, to resolution of the dispute through arbitration "in a manner compatible with the purposes of the Act." And in refusing deferral in Joseph T. Ryerson & Sons, Inc., 199 NLRB No. 44, the Board disclaimed any practice of abstaining for prospective arbitration "in cases which present issues which are irresolvable, in conformity with Spielberg" in an arbitration proceeding.

3/ Houston Chronicle Publishing Co., 199 NLRB No. 69; The A.S. Abell Co., 201 NLRB No. 5.

procedures may be deferred even though it does not involve any substantive contract provisions and even though no reasonable construction of the substantive provisions of the contract would preclude a finding that the disputed conduct violated the Act. 4/ Deferral may, therefore, be appropriate where the dispute raises issues of law 5/ and is not dependent upon any interpretation of ambiguous contract provisions. 6/

4/ The Board does not contemplate the denial of deferral merely because no construction of the contract would privilege the respondent's conduct. In Great Coastal Express, 196 NLRB No. 129, the employer agreed that "all conditions of employment in his individual operation relating to . . . general working conditions shall be maintained at not less than the highest standard in effect at the time of the signing of this Agreement." The contract contained no provision explicitly pertaining to employee parking privileges. The respondent unilaterally revoked the right of the employees in the bargaining unit to park in the company lot. The trial examiner found the respondent's purported justification for this change to be both belatedly expressed and spurious. The Board nevertheless deferred under the Collyer policy "in order that the dispute between the parties may be decided by an arbitrator . . ." See also Peerless Pressed Metal Corp., 198 NLRB No. 5; National Radio Co., 198 NLRB No. 1 (as to the respondent's failure to reinstate the employee awards program and to distribute copies of the bargaining agreement); Bethlehem Steel Corp., 197 NLRB No. 121; Wrought Washer Mfg. Co., 197 NLRB No. 14; Houston Chronicle Publishing Co., 199 NLRB No. 69; The A. S. Abell Co., 201 NLRB No. 5; Tyee Construction Co., 202 NLRB No. 34. But cf. Oak Cliff-Golman Baking Co., 202 NLRB No. 72.

5/ See, particularly, Norfolk Portsmouth Wholesale Beer Distributors Assn., 196 NLRB No. 165; L.E.M. d/b/a Southwest Engraving Co., 198 NLRB No. 99; The Associated Press, 199 NLRB No. 168; Enterprise Publishing Co., 201 NLRB No. 118.

6/ In a section of the February 28, 1972, guidelines at page 203, entitled "The contractual origin of the dispute," the regional offices were instructed to defer for arbitration "otherwise meritorious 8(a)(5) charges . . . if a reasonable construction of the substantive provisions of the agreement between the parties (other than the grievance and arbitration provisions) would preclude a finding that the disputed conduct violated the Act." This instruction was based on the Board's emphasis in Collyer Insulated Wire, 192 NLRB No. 150, that "the contract and its meaning . . . /were/ at the center of . . . /the/ dispute."

In more recent cases, however, the Board has broadened the type of dispute which may be deferred for prospective arbitration. The Board recognized in National Radio Co., 198 NLRB No. 1, that the respondent's deferral contention there did not "rest on any presumed primacy of an arbitrator to interpret an ambiguous or contested contract provision." Nevertheless, the Board found reasonable the respondent's assumption that arbitration under the contractual confinement of discipline to "just cause" would lead to a resolution of (contd.)

6/ (continued) the dispute "which will not be 'repugnant to purposes and policies of the Act'." The Board saw the fundamental considerations which were applicable to be the same as those in Collyer; that is, the "asserted wrong is remediable in both a statutory and a contractual forum." The Board believed that the "crucial determinant" of the warrant for deferral to arbitration is "the reasonableness of the assumption that the arbitration procedure will resolve this dispute in a manner consistent with the standards of Spielberg." Subsequently, in restating the Collyer rule in Eastman Broadcasting Co., 199 NLRB No. 58, the Board declared it applicable;

where two basic conditions have been met: (1) the disputed issues are, in fact, issues susceptible to resolution under the operation of the grievance machinery agreed to by the parties, and (2) there is no reason for us to believe that use of that machinery by the parties could not or would not resolve such issues in a manner compatible with the purposes of the Act.

These Board statements of the basic determinants or conditions for deferral do not make a dispute over the meaning or application of contested substantive terms of a contract a prerequisite to deferral under the Collyer policy. The significance of these Board's statements of basic Collyer applicability is borne out in other cases.

In Joseph T. Ryerson & Sons, Inc., 199 NLRB No. 44, the Board saw the first dispute to be over whether the employee had in fact violated a term of the contract, not whether the contract prohibited the conduct ascribed to the employee. In Bethlehem Steel Corp., 197 NLRB No. 121, although the administrative law judge found the contract to be silent on the subject of subcontracting work, and respondent justified its subcontracting only on a claim of inability to do the work without referring to any contract provision bearing on that matter, the Board nevertheless deferred for arbitration. In L. E. M. d/b/a Southwest Engraving Co., 198 NLRB No. 99, there was no substantive contract provision which pertained to the dispute over the hiring of an employee during a strike for employment beginning after the strike terminated, thereby denying reinstatement to an additional striker. In the other dispute treated in that case the respondent refused the union's demands for enforcement of a union security provision not because of any alleged ambiguity or illegality of the provision itself but because it believed that union security discharges effected during the pendency of a UD petition before the Board "might be construed as an unfair labor practice." In Norfolk Portsmouth Wholesale Beer Distributors Assn., 196 NLRB No. 165, the dispute arose over respondent's claim that individual dues checkoff authorizations relied on by the union violated Section 302(4) of the Act, not the contract. See also The Associated Press, 199 NLRB No. 168. In Great Coastal Express, 196 NLRB No. 129, the contract plainly required the maintenance of "all conditions of employment . . . relating to . . . general working conditions" and respondent in withdrawing parking lot

(contd.)

However, where the contract provisions pertaining to the dispute provide or constitute criteria for resolution of the dispute which are inconsistent with the criteria the Board would apply in determining the unfair labor practice issues, deferral would not be appropriate under the Collyer policy. 7/

6/ (continued) privileges asserted no contract provision to justify the revocation of parking lot privileges, belatedly relying instead on an alleged insurance consideration. The dispute in Tyee Construction Co., 202 NLRB No. 34, turned on whether the employer had condoned an unprotected work stoppage, a subject which was not dealt with in the bargaining agreement.

In sum, it appears that the Board intends to apply the Collyer deferral policy to disputes which are susceptible of resolution under contract arbitration machinery in a manner conforming to the purposes of the Act, regardless of whether questions of interpretation of ambiguous substantive contract provisions are at the heart of the dispute. Application of the Collyer policy seems to turn, therefore, on the availability of arbitration for resolution of the dispute (See note 37, infra, and accompanying text) and the coincidence between the issues which would be resolved in arbitration and the issues which are raised by the unfair labor charge under consideration. Hence, the section of the February 28, 1972 guidelines dealing with the contractual origin of the dispute has been omitted from this revision of the Collyer guidelines.

7/ The provisions of the contract in George Koch Sons, Inc., 199 NLRB No. 26, appeared to privilege the union's strike to protest a supervisor's working at less than the rates set for foremen by the contract. However, the Board concluded that since this kind of conduct violates Section 8(b)(1)(B) notwithstanding such contract provisions and since the arbitrator would decide only the question of contract privilege, the contract issue to be considered by the arbitrator in deciding the dispute would not coincide with the unfair labor practice issue which the Board would be required to decide. The Board therefore declined to defer to the contract arbitration machinery there.

The Koch case, considered in the context of other Collyer decisions, seems to reflect the Board's assumption that although an arbitrator will look beyond the confines of the contract and consider such statutory principles as are necessary to a resolution of the dispute (see note 5, supra, and accompanying text), an arbitrator will not, in the event of a conflict between the provisions of the contract and principles of law, depart from the requirements of the contract. In instances of such a conflict between the contract provisions and statutory principles, therefore, the Board apparently does not consider it reasonable to assume that "the arbitration procedure will resolve the dispute in a manner consistent with the standards of Spielberg." National Radio Co., 198 NLRB No. 1. But cf. Joseph T. Ryerson & Sons, Inc., 199 NLRB No. 44, note 1.

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 or charges allege separate disputes over more than one subject matter and the dispute over one of these matters meets the Collyer criteria for deferral, further action on the allegations pertaining to that dispute should be deferred for arbitration even though either dismissal or formal Board proceedings are required as to the remaining dispute. 8/

On the other hand, if a single dispute or related disputes give rise to more than one charge or alleged violation of the Act, further action on all of these charges or allegations may be deferred if deferral of one of these charges or allegations is appropriate under the Collyer policy and the resulting arbitration is likely to resolve a substantial issue common to all these charges or allegations. 9/ An exception to this rule is the case in which one allegation pertains to the refusal of the respondent to furnish information requested in connection with the evaluation or processing of a grievance, as provided at (F) 2, below.

(C) Employer enmity toward employee or union rights under the Act

Deferral of charges for arbitration under Collyer is not warranted where the overall history of the collective relationship demonstrates significant employer enmity toward statutory rights. Determination of whether general enmity exists which would preclude deferral should be based on a consideration of the total bargaining history, including the duration and effectiveness of the collective relationship and the character, frequency and remoteness of unfair labor practices. 10/ A single, animus-motivated unfair labor practice would

8/ The Crescent Bed Co., 157 NLRB 296; Coppus Engineering Corp., 195 NLRB No. 113; Joseph T. Ryerson & Sons, Inc., 199 NLRB No. 144; Atlantic Richfield Co., 199 NLRB No. 135; The Associated Press, 199 NLRB No. 168. See also note 58, infra, and accompanying text.

9/ In National Biscuit Co., 198 NLRB No. 4, the union's fine of non-cooperating members was not subject to an agreement to arbitrate. But because the validity of the fines was dependent upon the union's rights under the contract and because these union contracts rights would be determined through arbitration of the dispute underlying the refusal-to-bargain charge, the Board deferred both the contract-modification 8(b)(3) charge and the 8(b)(1)(A) fine charge. Cf. George Koch Sons, Inc., 199 NLRB No. 26.

10/ The relevant factors were discussed in the February 28, 1972 guidelines at pages 14 and 15 under the heading "History of the Parties and Their Relationship" a section of that earlier memo which is now deemed to be relevant to this general consideration of employer enmity and is, thus, not restated as an independent consideration. The significance of these factors has been mentioned by the Board in (contd.)

not necessarily make deferral inappropriate, but a pattern or a continuing history of such actions denoting general hostility to employee rights and a repudiation of the bargaining principle would require rejection of the deferral procedure. 11/ Employer actions motivated by economic or business considerations and union conduct aimed at advancing legitimate union interests but which nevertheless violates the Act would be deferrable unless the reoccurrence of such actions reflects a deliberate disregard or rejection of statutory obligations.

(D) Willingness to Arbitrate the Dispute

Charges will not be administratively deferred for arbitration under the Collyer policy unless the respondent is willing to submit all aspects of the underlying dispute to arbitration. 12/ Assuming that the

- 10/ (continued) Appalachian Power Co., 198 NLRB No. 7 and National Radio Co., 198 NLRB No. 1. The short duration of the bargaining relationship will not, in itself, be determinative, as indicated by Coppus Engineering Corp., 195 NLRB No. 113, and L.E.M. d/b/a Southwest Engraving Co., 198 NLRB No. 99, where the Board deferred disputes arising soon after the parties entered into their first collective bargaining agreement.
- 11/ National Radio Co., 198 NLRB No. 1; Chase Manufacturing, Inc., 200 NLRB No. 128.
- 12/ In the Collyer case itself the Board set out, as one of the circumstances which weighed heavily in favor of deferral, the fact that the respondent had "credibly asserted its willingness to resort to arbitration . . ." This same "willingness to have the dispute resolved in this manner . . ." was noted by the Board in the next decision in which the Collyer policy was applied. Coppus Engineering Corp., 195 NLRB No. 113. In a subsequent decision the Board said that one of the conditions of deferral is the absence of any reason "to believe that the use of /the grievance/ machinery by the parties could not or would not resolve such issues in a manner compatible with the purposes of the Act." Eastman Broadcasting Co., 199 NLRB No. 58. This condition of deferral would seem to be necessarily predicated on the willingness of the respondent to arbitrate the dispute. In cases in which the time limitation on grievance filing has expired, as has sometimes been true in cases deferred by the Board (e.g. L.E.M. d/b/a Southwest Engraving Corp., 198 NLRB No. 99), this condition could not have been met unless the respondent had been willing to arbitrate notwithstanding the expiration of time limitations. And finally, the Board's Collyer remedy of retaining jurisdiction over the dispute to entertain a motion showing, inter alia, the absence of a prompt arbitral submission obviously contemplates the Board's revocation of deferral and issuance of a decision on the merits of the complaint in the event a prompt arbitral submission is defeated by the respondent's unwillingness to  
(contd.)

respondent has timely expressed a willingness to arbitrate the dispute (and, where appropriate, has disclaimed any intention of asserting in arbitration any procedural defenses based on the expiration of the time limitations for the filing, processing, or arbitration of grievances under the contract, or on the expiration of the contract in effect when the dispute arose), 13/ the following circumstances will not be regarded as inconsistent with the respondent's expression of its willingness to arbitrate: (1) The respondent did not previously propose arbitration of the dispute or contended that the charge should be deferred for arbitration; 14/ (2) the respondent previously refused a demand that the dispute be submitted to arbitration; 15/ and (3) the respondent intends to contest the arbitrability of the underlying dispute in the arbitral forum, 16/ if, upon determination that the matter is arbitrable, the respondent is willing to submit the merits of the dispute to arbitration."

12/ (continued) arbitrate the dispute. Thus, in Medical Manors, Inc. d/b/a Community Convalescent Hospital, 199 NLRB No. 139, the Board cautioned the respondent that jurisdiction was being retained "against the contingency that Respondent might engage in further foot-dragging in such manner that the disputes in issue are not promptly submitted to arbitration.

13/ Collyer Insulated Wire, 192 NLRB No. 150; L.E.M. d/b/a Southwest Engraving Corp., 198 NLRB No. 99; National Biscuit Co., 198 NLRB No. 4; Great Coastal Express, 196 NLRB No. 129; Appalachian Power Co., 198 NLRB No. 7. The disclaimer of intention to rely on temporal limitations imposed on the filing or processing of grievances by the contract or on expiration of the contract must obtain as of the time the region issues the letter of deferral provided for in PROCEDURES FOR ADMINISTRATIVE DEFERRAL, I(B), infra, and must contemplate a continuation of said willingness for a period during which an effort on the part of the charging party to initiate or carry forward grievance proceedings leading to arbitration would be considered by the Board to be reasonably prompt. Deferral is not appropriate, however where the disputed conduct took place at a time when no agreement was in effect making arbitration procedures available for resolution of the dispute, notwithstanding respondent's willingness to arbitrate. Borden, Inc., 196 NLRB No. 172. (See note 64, infra, as to an ad hoc agreement between the parties to arbitrate a dispute in such circumstances.)

14/ Cf. Norfolk Portsmouth Wholesale Beer Distributors Assn., 196 NLRB No. 165; Titus-Will Ford Sales, 197 NLRB No. 4.

15/ L.E.M. d/b/a Southwest Engraving Corp., 198 NLRB No. 99; Norfolk Portsmouth Wholesale Beer Distributors Assn., 196 NLRB No. 165; Western Electric, Inc., 199 NLRB No. 45; Atlantic Richfield Co., 199 NLRB No. 135.

16/ Norfolk Portsmouth Wholesale Beer Distributors Assn., 196 NLRB No. 165; Urban N. Patman, Inc., 197 NLRB No. 150. (See note 46, infra, and accompanying text.)

The respondent's willingness to arbitrate will not be presumed. No case will be deferred for arbitration if the respondent fails or refuses to express its willingness to submit the dispute to arbitration before, or in response to, the region's inquiry on this subject, as provided at PROCEDURES FOR ADMINISTRATIVE DEFERRAL, Sections I A(4), (5) and (7), infra. 17/

17/ In examining the warrant under the Act for abstention pending arbitration in National Radio Co., 198 NLRB No. 1, the Board said that "considerations arising from the increasing caseload before this five-man Board . . . should not be gainsaid . . ." And the Board expressed its belief that "the purposes of the Act are well served by encouraging the parties to arbitration agreements to resolve their disputes without government intervention." (Emphasis added.) In the Collyer case itself, the Board saw its policy as affording arbitration the opportunity to "resolve the underlying dispute and make it unnecessary for either party to follow the more formal, and sometimes lengthy, combination of administrative and judicial litigation provided for under our statute."

It seems obvious that the Board cannot contemplate that this minimization of the formalities and delays of governmental intervention and the alleviation of its caseload is to be accomplished through application of the Collyer policy only at the Board decisional stage of a proceeding. These objectives can be achieved only through administrative deferral of charges for arbitration early enough in the proceeding to avoid the expenditure of regional office time and resources required to fully determine the merits of a charge, and to prepare and present the case before an administrative law judge. If effective deferral is to be achieved, respondent's early expression of its willingness to arbitrate the dispute must be required.

In formulating its Collyer policy, the Board has thus far placed little emphasis on the timeliness of respondent's assertion of its willingness to arbitrate. E.g., Norfolk Portsmouth Wholesale Beer Distributors Assn., 196 NLRB No. 165. Medical Manors, Inc., d/b/a Community Convalescent Hospital, 199 NLRB No. 139. But these cases for the most part were based on complaints issued and heard before the Collyer policy had been fully developed and publicized and before respondents had been given reasonable notice of the Board's change in deferral policy. Certainly, in none of the cases in which the Board deferred to arbitration had the respondent withheld an indication of its willingness to arbitrate when administrative deferral was proposed to the respondent earlier in the proceeding.

(contd.)

Now that the Collyer policy has been more fully developed and is better known, there is a greater warrant for the development of orderly administrative procedures for application of this policy in a manner best effectuating the objectives of the policy. Assuming that the considerations which apply in a case after Board deferral provide a guide to the administrative application of deferral policy, it is significant that in Medical Manors, Inc., d/b/a Community Convalescent Hospital, 199 NLRB No. 139, the Board, upon deferring for arbitration, cautioned respondent against "further foot-dragging in such manner that the disputes in issue are not promptly submitted to arbitration."

In light of these considerations it might be argued that a respondent's refusal to express a willingness to arbitrate after being informed that the preliminary investigation of the regional office established an arguable violation, (See 61, infra.) should be treated as a waiver of the right to do so and to secure deferral thereafter in the unfair labor practice proceeding. To so hold would be consistent with the manner in which the Board handles Collyer deferrals, since the Board does not determine the merits of the alleged violation in deferring to contract arbitration procedures. And deferral before the regional office has fully investigated and finally determined the merits of the charge would preclude any prejudice to respondent's position in the arbitration proceeding which might occur if deferral always followed an administrative finding that the charge is meritorious. And finally, requiring respondent to express its willingness to arbitrate at the earliest possible time in the investigation of the charge would maximize the saving in regional office time and resources necessary to process charges in which deferral is appropriate.

It was concluded, however, that to impose this "waiver" policy so early in the investigation would not be warranted at this time. Until the Board has established some standards of waiver, it may be counterproductive to litigate a number of cases based on this early waiver policy, only to have these cases later deferred if the Board ultimately selects a later time at which waiver occurs. Moreover, such a policy, may not in fact be necessary to meet the Board's objective of reducing the extent of agency intervention in Collyer situations. Because of the potential impact even an administrative determination that a charge has merit may have on any subsequent arbitration, respondents may well prefer, in the vast majority of cases, to express a willingness to arbitrate, and thus secure a deferral, before the regional office makes a final determination of the merits of the charge.

For the foregoing reasons, the instruction in the February 28, 1972 guidelines, that the regional office investigate and determine fully the merits of the charge before deciding whether to defer, is being revoked and the regional offices are now to defer before making a final determination of the merits of the charge, or, in the discretion of the region, even before conducting a full investigation

(contd.)

(E) Good faith in the assertion of privilege for the disputed action

Failure of a party to assert a contract claim or other justification for its disputed action in the course of the development of the dispute or after a charge is filed will not preclude deferral to the contract arbitration procedures. 18/ However, if the justifications which a party does assert for its disputed action are asserted in bad faith, deferral would not be warranted. Bad faith would be evidenced by the fact that the asserted justifications are frivolous and the party did not in fact rely on the asserted justification in taking its action. 19/

(F) Disputes over special subject matters

1. Accretion Issues - Not suitable for deferral under the Collyer policy are disputes over a contractual obligation to include in an existing bargaining unit new facilities or operations acquired by the employer. 20/

17/ (continued) of the charge, if respondent expresses its willingness to arbitrate at either of these points. However, at least until some experience is gained under the procedure outlined in the text above, no contention should be made that respondent's willingness to arbitrate was belatedly expressed unless the region has, in writing, given the respondent notice that complaint will issue, absent settlement, if respondent does not within 7 days notify the region, in writing of its willingness to arbitrate the underlying dispute. See PROCEDURES FOR ADMINISTRATIVE DEFERRAL, Section I(6), infra.

It should be noted that respondent's expression of its willingness to arbitrate the dispute is considered an element of deferral policy which is separate and distinct from respondent's affirmative pleading of the Collyer defense in response to a complaint. Thus, cases dealing with the timely raising of the affirmative Collyer deferral defense (see note 86, infra) are not considered relevant to the question of belatedness in respondent's expression of its willingness to arbitrate.

18/ Peerless Pressed Metal Corporation, 198 NLRB No. 5.

19/ See Peerless Pressed Metal Corporation, 198 NLRB No. 5, note 1. But cf. Wrought Washer Manufacturing Co., 197 NLRB No. 14; Great Coastal Express, 196 NLRB No. 129.

20/ In Combustion Engineering, Inc., 195 NLRB No. 161, the Board refused to defer to an arbitrator's decision that the employees of a facility newly established by the employer had been accreted to the existing bargaining unit and covered by the bargaining agreement. Former Board Member Brown, whose concurrence was necessary to the majority decision in Collyer, expressed serious reservations about surrendering bargaining unit determinations to private parties and applying the Collyer principle to representation cases. But cf. Champlin Petroleum Co., 201 NLRB No. 9.

2. Information Issues - Disputes over a union's or employer's request for information relevant and necessary to the administration of the collective bargaining agreement 21/ or to the evaluation, processing and arbitration of grievances should not be deferred for arbitration, 22/ even though (a) the contract contains provisions pertaining to such requests for information and the contract makes arbitration available to resolve disputes arising over the denial

21/ Cases involving application of Collyer deferral policy to disputes over requested information relevant to contract negotiations should be submitted to Washington for advice.

22/ See United-Carr Tennessee a Division of TRW, Inc., 202 NLRB No. 112. In assessing the warrant for deferral in disputes over the refusal to furnish information relevant to the evaluation and filing of a potential grievance and information relevant and necessary to the processing of a grievance already on file, the Court's decision in N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 64 LRRM 2069, would seem to weigh heavily against deferral for arbitration of a dispute over such information. The question presented in that case was the obligation of an employer "to furnish information that allows a union to decide whether to process a grievance." The Court stated that "even if the policy of the Steelworkers Cases /favoring arbitration/ were thought to apply with the same vigor to the Board as to the courts, that policy would not require the Board to abstain here." After examination of the employer's obligation to furnish the grievance-related information, the Court found the Board's order to the employer to produce the information, "was consistent both with the express terms of the Labor Act and with the national labor policy favoring arbitration which our decisions have discerned as underlying that law." (Emphasis added.) Further, the Court stated that, "Far from intruding upon the preserve of the arbitrator, the Board's action /in requiring that the information be furnished/ was in aid of the arbitral process." See Fawcett Printing Corp., 201 NLRB No. 139.

The Court's decision in Acme Industrial would hardly seem to warrant a distinction, for the purpose of applying deferral policy, between information requested for the purpose of deciding whether to file a grievance and information requested for use in the processing and arbitration of a grievance already on file. In the Acme Industrial case, the information was requested by the union only after the grievance to which it pertained had been filed. And the information there would have manifestly been of use to the union in the processing and arbitration of the grievance.

Moreover, the distinction between a party's requesting information for the purpose of deciding "whether to process a grievance" and a party's requesting information for the purpose of preparing a grievance for presentation in the grievance-arbitration procedures may be a tenuous one. Even in a dispute in which a union has  
(contd.)

of requests for such information, 23/ or (b) the dispute giving rise to the request for information is pending in the arbitral forum. 24/

An unlawful refusal or failure to produce, upon request, information relevant to the evaluation, processing and arbitration of a grievance should not be severed from the dispute which gives rise

22/ (continued) already invoked the grievance procedures, additional information may cast doubt on the substantive merits of the grievance and may contribute either to an adjustment of the dispute or the abandonment of the grievance. Fawcett Printing Corp., 201 NLRB No. 139.

23/ The Board's adoption of the Collyer policy of deferral may provide an additional consideration which now weighs against deferral in the instance of a dispute over information requested in connection with a grievance even where the contract bears on the obligation to furnish this information. Clearly, the unlawful failure to provide information relevant to the arbitration process strikes at the heart of the process itself and inhibits full and fair use of that process. The Collyer policy places a substantially greater reliance on private dispute settlement procedures and therefore makes the full availability of information relevant to the disposition of grievances even more important. Board enforcement of the duty to furnish relevant information is an additional means of assuring that arbitration awards will be supported by substantial evidence bearing on the contractual and statutory issues raised by the dispute, thereby minimizing the number of cases in which the arbitration fails to meet the "fair and regular" test established by Spielberg. Instructive in this regard is the Board's observation in Joseph T. Ryerson & Sons, Inc., 199 NLRB No. 44, that in "declining to intervene in disputes best settled elsewhere we must assure ourselves that those alternative procedures are not only 'fair and regular' but that they are and were open, in fact, for use by the disputants. These considerations caution against our abstention on a claim that a respondent has sought, by prohibited means, to inhibit or preclude access to the grievance procedures."

24/ In disputes already before an arbitrator, the arbitrator may on request require the production of relevant information. Conceivably, then, some disputes over the duty to furnish information could be deferred for disposition by the arbitrator, with the arbitrator's ruling on information requests being reviewed by the Board in the post-arbitration assessment of the arbitration under the Spielberg standards. Yet, upon reflection, it was concluded that such an approach should not be adopted. Thus, it should be recognized that in the dispute over requested information, deferral for disposition by the arbitrator of the underlying dispute would have a particularly anomalous effect in instances in which the

(contd.)

to the grievance in question and unfair labor practice charge. <sup>25/</sup> That is, if deferral is refused as to the dispute over the union's request for information pursuant to the above guidelines, and that

24/ (continued) requested information pertains to an underlying dispute (such as a mere breach of contract) which is not the subject of an unfair labor practice charge. If the charging party were forced to arbitrate the underlying dispute while it lacked information relevant thereto because the arbitrator refused to require that it be produced and if the charging party were to lose that arbitration, the Board might then decide to proceed on the dispute over the requested information (particularly if the respondent has refused either to supply the information or to arbitrate its refusal). But this would provide small comfort to the charging party, for even if the Board were finally to order that this information be produced, the charging party would have, by that time, already lost in the underlying dispute to which the information would have been relevant. Since the underlying dispute was not subject to an unfair labor practice charge, the Board might be powerless to rectify the result which may have flowed from the respondent's unlawful refusal to provide the requested relevant information.

25/ The Board's decision in George Koch Sons, Inc., 199 NLRB No. 26, would seem to require that to the extent the allegations as to the requested information cannot be deferred for arbitration, the allegations pertaining to the dispute to which the information is relevant cannot be deferred for arbitration. These allegations pertain to but two parts of a single dispute or at the least, to closely related disputes which raise one or more common issues.

In the Koch case, the union was charged with the violation of Section 8(b)(1)(B) for fining a supervisor and striking the employer because the supervisor worked at terms below those set by the bargaining agreement. In refusing to defer for arbitration of the strike under the contract, the Board said:

Furthermore, since we are in any event required to take jurisdiction in order to determine the issue of whether the fine was violative of our Act, there seems less reason to defer the other issue raised by the complaint; namely, the Union's conduct with respect to the strike. When an entire dispute can adequately be disposed of under the grievance and arbitration machinery, we are favorably inclined toward permitting the parties an opportunity to do so. One of our reasons for so doing is to avoid litigating the same issues in a multiplicity of forums. But here, since we must perforce determine a part of the dispute, there is far less compelling reason for not permitting the entire dispute to be resolved in a single proceeding. /Emphasis added./

(contd.)

information is relevant to a dispute which is also the subject of a separate unfair labor charge and potential grievance deferral of the latter charge for arbitration should also be refused. 26/

25/ (continued)

Application of this policy would seem particularly appropriate in disputes over requested information for yet another reason. The Board's deferral of the main or underlying dispute for arbitration, while proceeding to litigate the charge based on the refusal to furnish information about the main dispute, would put the charging party in a difficult position and tend to delay unduly the resolution of the main, underlying dispute. Thus, the charging party would be required to proceed immediately to arbitration of the main dispute while it lacked information relevant thereto to which it is entitled --or the charging party would, in the alternative, be required to secure a postponement in the arbitration proceeding until the information issue is litigated in an unfair labor practice proceeding and the Board, or an appellate court, issues an order compelling production of the disputed information. To put the charging party to this choice would obviously tend to defeat the objectives of the Collyer policy of encouraging the quick and fair resolution of disputes. Furthermore, if the Board holds that a disputed action giving rise to a charge and a disputed refusal to furnish information as to that action, also giving rise to a charge, cannot be separated for the purposes of applying Collyer deferral policy, then the respondent who seeks deferral of the charge as to the underlying dispute may be encouraged to furnish information relevant thereto if its failure to do so will operate to preclude deferral as to the underlying disputes.

26/ For example, if a charge or charges are filed alleging violations of the Act based on the respondent's unilateral change of employment conditions and the respondent's failure to produce requested information relevant to the processing of a grievance challenging that change, deferral of the charge based on the unilateral change would be inappropriate if the information issue itself is not deferrable. But if, after the region communicates to respondent its intention to issue a complaint on the refusal of information charge, the respondent supplies the information, the unilateral change issue may be deferred in accordance with the Collyer policy. Otherwise the region should proceed to a Section 8(a)(5) complaint on both the unilateral change and information issues.

3. Obligation to Recognize - Deferral is not appropriate in a dispute in which the employer's basic obligation or willingness to recognize the union is contested. 27/

4. Frustration of Arbitration - Deferral is not appropriate in a dispute in which respondent was attempting to foreclose or frustrate resort to the arbitration procedure. 28/

5. Existence of Contract - Deferral is not appropriate in a dispute where there is a substantial question as to the existence of the contract as a whole at the time the dispute arose, as in instances in which there is a substantial question whether the contract had been agreed to, or had been extended or automatically renewed. 29/

27/ For disputes of this type, see William J. Burns Detective Agency, 182 NLRB 348, and Ranch-Way, Inc., 183 NLRB No. 116. Member Brown in his concurring opinion in the Collyer case expressed the opinion that the Board should not defer to arbitration "where the very process of bargaining, including grievance arbitration, has been repudiated and is, in effect, nonexistent." See also, Chase Manufacturing, Inc., 200 NLRB No. 128.

28/ In Joseph T. Ryerson & Sons, Inc., 199 NLRB No. 44, the Board declined to defer to arbitration in a dispute involving an alleged threat of retaliation made by the employer to a union committeemen in connection with the latter's efforts to process a grievance. The Board stated that the violation with which the employer was charged, if committed, struck at the heart of the grievance and arbitration machinery. Deferral is warranted, the Board ruled, only where the arbitral procedures are "fair and regular" and where, in addition, they are in fact open to the disputants. Militating against deferral was the fact that respondent was alleged to have "sought by prohibited means, to inhibit or preclude access to the grievance procedures." But cf. Medical Manors, Inc., d/b/a Community Convalescent Hospital, 199 NLRB No. 139.

29/ For disputes of this type see William J. Burns Detective Agency, 182 NLRB 348; The Crescent Bed Company, Inc., 157 NLRB 296; and Associated Building Contractors of Evansville, Inc., 143 NLRB 678. Cf. The Associated Press, 199 NLRB No. 168.

The Collyer policy of deferral having been predicated upon the availability of contractual arbitration procedures, 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 at the time the dispute arose. Borden, Inc., 196 NLRB No. 172; Hilton-Davis Chemical Co., 185 NLRB No. 58. Cf. Taft Broadcasting Co., 185 NLRB No. 68. Deferral would not become appropriate where the existence of a contract is disputed, even if the region concludes that agreement between the parties had been reached and is prepared to issue a complaint based on a Heinz theory. 311 U.S. 514.

See also National Heat and Power Corp., 201 NLRB No. 150.

6. Unlawful Contract Provisions - Deferral is not appropriate in a dispute where the contract provisions governing the underlying dispute are unlawful on their face, 30/ or by their express terms call for a result inconsistent with Board policy under the Act. 31/

7. "Interest", "Negotiability" and "Unit Elimination" Arbitration - Cases involving (1) arbitration to establish terms and conditions of employment, i.e., "interest" arbitration as distinguished from "grievance" or "rights" arbitration, 32/ (2) arbitration of disputes over a contractual obligation to negotiate on a particular subject during the contract term, and (3) disputed employer action resulting in the substantial or total elimination of the bargaining unit, should be submitted to Washington for advice. 33/

(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 require the "special skill and expertise" which an arbitrator might possess. 34/

- 30/ George Koch Sons, Inc., 199 NLRB No. 26. See note 7, supra.
- 31/ For example, a dispute over whether the discharge of employees for striking in the face of a no-strike clause violated the Act should not be deferred for arbitration where the region finds that the strike was caused by serious employer unfair labor practices within the meaning of Mastro Plastics Corp. v. N.L.R.B., 350 U. S. 270. Nor should the unfair labor practices over which the strike arose be deferred. See George Koch Sons, Inc., 199 NLRB No. 26, where the Board said "s/ince. . . a part of the dispute must be determined by the Board, there is far less compelling reason for not permitting the entire dispute to be resolved in a single proceeding." However, where the region finds that the employer unfair labor practices are not sufficiently serious to privilege the strike as a protected concerted activity (Arlan's Department Store, 133 NLRB 802), deferral of the entire dispute would be warranted if all other conditions necessary to deferral are met. Atlantic Richfield Co., 199 NLRB No. 135.
- 32/ See Member Brown's concurring opinion in the Collyer case.
- 33/ See Coppus Engineering Corp., 195 NLRB No. 113, where the Board in deciding not to "exercise its authority to interpret contract provisions where necessary to resolve unfair labor practice issues", relied in part on "the minimal effect which the Respondent's alleged unilateral conduct has had upon bargaining unit employees."
- 34/ While in Collyer the Board said, "disputes such as these can be better resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships . . ." the Board seems to have been describing (contd.)

d) Respondent's offer to discuss a disputed change in working conditions before effectuation

An employer's failure or refusal to discuss a disputed change in working conditions before or after effectuating it does not include deferral of a resulting charge for arbitration. 35/

Contract Provisions Concerning the Resolution of Disputes

An unfair labor practice charge will not be deferred for arbitration under the Collyer policy unless the contract makes binding arbitration available to the charging party 36/ for resolution of the

(continued) an advantage of, rather than a condition precedent to, deferral for arbitration. The Board may have seen "disputes such as these" as particularly suited to the special skills of arbitrators, but the Board did 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. And the Board has not withheld deferral even though the arbitrator was presented primarily a statutory issue. Bethlehem Steel Corp., 197 NLRB No. 121; L.E.M. d/b/a Southwest Engraving Co., 198 NLRB No. 99; National Radio Co., 198 NLRB No. 1; Norfolk Portsmouth Wholesale Beer Distributors Assn., 196 NLRB No. 165; The Associated Press, 199 NLRB No. 168; Tyee Construction Co., 202 NLRB No. 34.

5/ See e.g. Collyer Insulated Wire, 192 NLRB No. 150; Southwestern Bell Telephone Co., 198 NLRB No. 6; Great Coastal Express, 196 NLRB 129. 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. Cf. Coppus Engineering Corp., 195 NLRB No. 113. The fact that the employer discussed or offered to discuss the change would not, of course bear on the question of whether the change constituted a midterm contract modification within the meaning of Section 8(d).

36/ The term "available" as used here refers to the encompassment of the dispute by the arbitration procedures and the right of the charging party to invoke these procedures generally. It does not refer to contract time limitations on the filing of grievances and processing them to arbitration. See cases cited in note 13, supra.

Where the charging party is an individual employee, the contract must make arbitration available to the party to the contract, if any, whose interests are in substantial harmony with those of the charging party in order to warrant deferral. See the section titled, "(C) Arbitration available at the insistence of the charging party," infra.

underlying dispute 37/ and there are no obstacles to a quick and fair resolution of the dispute through arbitration.

(A) Requirement that the contract procedures for the resolution of disputes lead to "arbitration"

Unfair labor practice charges will not be deferred for arbitration unless the applicable contract procedures for the resolution of disputes provide for "arbitration." 38/ In determining whether the

37/ The February 28, 1972 guidelines at pages 10 to 12 provided for deferral administratively only where the contract made the grievance and arbitration procedure the "exclusive" means for settlement of the dispute. This guideline was based on the Board's reliance in the Collyer case on the express exclusivity of the contract grievance arbitration procedures. However, in subsequent cases the Board has applied the Collyer policy in the absence of any finding, such as was made in the Collyer case, that "the parties intended to make the grievance and arbitration machinery the exclusive forum for resolving contract disputes." See, e.g., Medical Manors, Inc., d/b/a Community Convalescent Hospital, 199 NLRB No. 139, where the dispute was described as "cognizable" under the contract procedures, and Peerless Pressed Metal Corp., 198 NLRB No. 5, where the grievance procedures leading to arbitration were said to be "available" to either party. Moreover, in setting out the "crucial determinant" and the "two basic conditions" for deferral in National Radio Co., 198 NLRB No. 1, and Eastman Broadcasting Co., 199 NLRB No. 38, the Board did not include the exclusivity of the contract arbitration procedures as a necessary element of deferral. See note 6, supra. Rather, in the Eastman case the Board called for deferral where the disputes issues are "susceptible of resolution" under the contract grievance machinery. Similarly, in Joseph T. Ryerson & Sons, 199 NLRB No. 44, the Board described its Collyer policy as "our growing practice to abstain from action where grievance and arbitration procedures are available to resolve a dispute equally cognizable in either forum." (Emphasis added.) It seems clear, therefore, that the Board predicates deferral on the availability of grievance-arbitration procedures in otherwise suitable circumstances and not on any express or implied agreement of the parties to employ only those procedures in the settlement of their disputes.

38/ Ladish Co., 200 NLRB No. 165, note 4.

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 which have been developed by the Board in the application of the Spielberg 39/ policy should be employed. Thus, the absence of a neutral member on a bipartite panel would not necessarily preclude deferral. 40/ But where, in addition, it appears that all members of the bipartite panel would be arrayed in interest against the charging party, deferral would not be appropriate. 41/

(B) Encompassment of the dispute by the arbitration provisions

The grievance and arbitration provisions of the contract must at least arguably encompass the type of dispute in question. 42/ A contract which subjects all disputes between the parties arising

39/ Spielberg Manufacturing Co., 112 NLRB 1080. See note 2, supra.

40/ Denver-Chicago Trucking Co., 132 NLRB 1416; Modern Motor Express, Inc., 149 NLRB 1507. The Board's reference in Tulsa-Wisenhunt 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. See Great Coastal Express, Inc., 196 NLRB No. 129; National Biscuit Co., 198 NLRB No. 4; Tyee Construction Co., 202 NLRB No. 34.

41/ Roadway Express, Inc., 145 NLRB 513; Youngstown Cartage Co., 146 NLRB 305; Jacobs Transfer, Inc., 201 NLRB No. 34. Cf. Kansas Meat Packers, 198 NLRB No. 2. See note 56, infra.

42/ Certain of the Board's decisions suggest that the dispute must be clearly encompassed by the grievance and arbitration provisions, i.e., must clearly be grievable or within the contractual definition of a grievance, to warrant deferral under Collyer. In determining whether the "two basic conditions for deferral were met in Eastman Broadcasting Co., 199 NLRB No. 58, the Board found that "the grievance-arbitration procedures encompass 'any . . . dispute' arising under the contract and that "each of the issues in this case revolves on matters . . . that come within the compass of the agreed-upon procedures." And in saying in Joseph T. Ryerson & Sons, Inc., 199 NLRB No. 44, that "we have required as a condition of such abstention that the dispute presented in our proceeding be cognizable in the contractual forum," the Board refused deferral, in part, because it did not "clearly appear that the incident complained of . . . could form the basis of a grievance cognizable under the contract." (Emphasis added.) See also Memorandum of the General Counsel entitled "Arbitration Deferral Policy Under Collyer", issued February 28, 1972, notes 26, 27. Cf. H.K. Porter Co., Inc. v. N.L.R.B., 397 U.S. 99.

(contd.)

In other cases, however, deferral was found warranted where the dispute was "arguably", rather than "clearly", encompassed by the grievance-arbitration procedures. In Urban N. Patman, Inc., 197 NLRB No. 150, controversies over wages were expressly excluded from the grievance procedures, but the Board found the dispute to be "arguably one of whether the contract covers the pre-cooked food department employees," which would have been grievable. "Moreover," the Board said, "arbitrability of such disputes is properly determinable by an arbitrator." The grievance-arbitration provisions in Southwestern Bell Telephone Co., 198 NLRB No. 6, encompassed "a difference . . . regarding . . . the true intent and meaning of any specific provision /of the agreement/ or the application of any provision . . . or the dismissal of any employee . . ." and excluded "prospective modifications or amendments of /the agreement/." The Administrative Law Judge found that the contract did not deal with the issues raised by respondent's having acted unilaterally in establishing a separate work force at a new facility working part-time on the basis of a separate seniority system. The Administrative Law Judge concluded that the new plan amounted to a modification of the agreement and that the dispute over respondent's unilateral action was therefore expressly excluded from arbitration. The Board disagreed, finding that "this dispute arguably arises from the collective-bargaining agreement" and pointed out that "if the Union felt that Respondent took action that was outside the contract, it could invoke the grievance procedure." (Emphasis added.) See Southwestern Bell Telephone Co. v. CWA, AFL-CIO, and Local 6222, 79 LRRM 2480, modifying the opinion at 78 LRRM 2832, (C.A. 5, 1971), where, in determining the warrant for a Boys Market injunction, the Court applied a test of "arguable arbitrability." Cf. Western Electric, Inc., 199 NLRB No. 49. Finally, in Norfolk Portsmouth Wholesale Beer Distributors Assn., 196 NLRB No. 165, the respondent had rebuffed the union's efforts to institute grievances, apparently contending that the matter was not arbitrable because the respondent's obligation to make dues deduction was dependent upon whether the individual checkoff authorizations in question violated Section 302 of the Act. The Board disagreed, finding that the ultimate question of respondent's violation of the contract depended upon the validity of the employee checkoff authorizations and that this was "clearly a contract issue fully capable of resolution under the contractual procedures for resolving such dispute." The Board concluded that although the respondent "asserted that the validity of the cards is not arbitrable, this issue of arbitrability should itself be submitted to the arbitrator, as has become the near universal practice under collective-bargaining agreements." See also such cases as Bethlehem Steel Corp., 197 NLRB No. 121; National Radio Co., 198 NLRB No. 1, and Tyee Construction Co., 202 NLRB No. 34.

(contd.)

during the term of the contract to arbitration is deemed to encompass any dispute involving a term or condition of employment. 43/ A contract which subjects disputes over the interpretation, application or alleged violation of the contract to arbitration is deemed to encompass any dispute involving the enforcement or attempted enforcement of any contract provision or the alleged violation of any contract provision. 44/ Contract clauses excluding designated subjects from the arbitration agreement or limiting the scope of the arbitrator's review or remedial powers should be narrowly construed. 45/ Deferral will not be precluded by the fact that a substantial question is raised as to the arbitrability of the dispute, arbitrability being "properly determinable by an arbitrator." 46/

42/ (continued)

In sum, it would appear that the Board considers deferral under the Collyer policy warranted if the dispute underlying the charge is at least arguably encompassed by the grievance-arbitration of the contract.

43/ In Bethlehem Steel Corp., 197 NLRB No. 121, although the Administrative Law Judge found the contract to be silent on the subject of subcontracting work, and the respondent justified its having subcontracted work unilaterally only on a claim of inability to do the work, without referring to any contract provision bearing on that subject, the Board nevertheless deferred for arbitration under a grievance and arbitration procedure which comprehended "any difference" between the parties. Presumably, a grievance-arbitration procedure which encompassed "all disputes between the parties" would constitute a basis for deferral even in instances in which an employer allegedly refused to bargain during the contract term on an "open" subject of bargaining or allegedly made a unilateral change in such a subject.

44/ Great Coastal Express, 196 NLRB No. 129; National Radio Co., 198 NLRB No. 1; L.E.M. d/b/a Southwest Engraving Co., 198 NLRB No. 99; Norfolk Portsmouth Wholesale Beer Distributors Assn., 196 NLRB No. 165; Urban N. Patman, 197 NLRB No. 150; Wrought Washer Manufacturing Co., 197 NLRB No. 14; Southwestern Bell Telephone Co., 198 NLRB No. 6.

Even though the grievance-arbitration provision of a contract is confined to disputes over the application or violation of the contract, an alleged unilateral change in an "open" subject of bargaining would nevertheless be encompassed by the grievance-arbitration provisions if the contract contained a broad "zipper" or management prerogatives clause. Radioear Corp., 199 NLRB No. 137.

45/ Urban N. Patman, 197 NLRB No. 150; Southwestern Bell Telephone Co., 198 NLRB No. 6; Western Electric, Inc., 199 NLRB No. 49; Kansas Meat Packers, 198 NLRB No. 2. But cf. Joseph T. Ryerson & Sons, Inc., 199 NLRB No. 44.

46/ See note 42, supra.

(C) Arbitration available at the insistence of the charging party. 47/

The grievance and arbitration provisions of the contract must make arbitration available for resolution of the dispute at the insistence of the charging party. 48/ Where the contract makes processing of the dispute through the grievance procedures a prerequisite to arbitration, the contract must permit the charging party both to file grievances and to invoke arbitration upon exhaustion of the grievance procedure. 49/ However, arbitration will not be deemed unavailable to a union even though the contract provides for the filing of grievances; which are a prerequisite to arbitration, only by employees, and no such grievance has been filed. 50/ Arbitration is to be considered available to the charging party where, upon exhaustion of the grievance procedure, arbitration procedures may be invoked by the charging party alone or by management and union representatives other than the immediate disputants but not where the arbitration procedures can be invoked only by mutual assent of the immediate disputants. 51/

(D) The binding character of the arbitration result

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. 52/ 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

- 47/ Where the charging party is an individual employee referred to in III, infra, the term "charging party" as used in this section is intended to include the party to the contract, if any, having interests in substantial harmony with those of the charging employee.
- 48/ Tulsa-Wisenhunt Funeral Homes, Inc., 195 NLRB No. 20; Gary-Hobart Water Corp., 200 NLRB No. 98.
- 49/ Western Electric, Inc., 199 NLRB No. 49, note 3.
- 50/ L.E.M. d/b/a Southwest Engraving Co., 198 NLRB No. 99, Norfolk Portsmouth Wholesale Beer Distributors Assn., 196 NLRB No. 165; Urban N. Patman, 197 NLRB No. 150.
- 51/ National Biscuit Co., 198 NLRB No. 4; Tulsa-Wisenhunt Funeral Homes, Inc., 195 NLRB No. 20; Western Electric, Inc., 199 NLRB No. 49, note 3.
- 52/ Collyer Insulated Wire, 192 NLRB No. 150. Several of the decisions in which the Board has deferred under the Collyer policy do not reflect whether the contract made the arbitral result binding on the parties. However, in none of these decisions does it affirmatively appear that arbitration was not binding on the parties.

the parties. 53/

Contracts which make 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 has referred to as a "quick and fair means" for resolving the dispute, 54/ the matter should be submitted to Washington for advice. Where such a claim is predicated on a substantial number or backlog of pending arbitration cases, a comparison of the projected time for issuance of an arbitration award with that for a Board order will be relevant. Where such claims concern the cost of arbitration procedures and the relative disparity of the financial resources available for this purpose to the respective disputants, the number and kinds of issues recently submitted to arbitration by the parties will be relevant.

III Special Considerations Concerning Charges Filed by Individuals

Charges filed by individual employees claiming to be affected adversely by alleged violations of the Act (or filed on their behalf of any person other than a party to the contract) will be deferred for arbitration 55/ if the following conditions are met:

1. The interests of the individual charging party are in substantial harmony with the interests of one of the parties to the collective bargaining agreement, that party being willing to invoke the contractual arbitration procedure available to it and advocate the charging party's position before the arbitrator. 56/

53/ Cf. Malrite of Wisconsin, Inc., 198 NLRB No. 3 in which the Board deferred to the "entire arbitration process" where the charging union had prevailed in arbitration and the employer refused to comply with the award, on the ground that noncompliance with the award was not a matter for the Board's concern.

54/ Collyer Insulated Wire, 192 NLRB No. 150; Bethlehem Steel Corp., 197 NLRB No. 121; National Radio Co., 198 NLRB No. 1; Joseph T. Ryerson & Sons, Inc., 199 NLRB No. 44.

55/ Tyee Construction Co., 202 NLRB No. 34.

56/ In Kansas Meat Packers, 198 NLRB No. 2, the Board refused to defer to arbitration because "the interests of the Charging Parties--the alleged discriminatees--are in apparent conflict with the interests (contd.)"

56/ (continued) of the Union and certain of its officials, as well as with the interests of Respondent." The Board concluded that: Under all the facts and circumstances set forth above--particularly the apparent antagonism between the interests of the discriminatees, on the one hand, and both parties to the collective bargaining contract herein, on the other, and the discriminatees' resultant election to refrain from seeking redress through that contract's grievance procedures--we conclude that it would be repugnant to the purposes of the Act to defer to arbitration in this case as to do so would relegate the Charging Parties to an arbitral process authored, administered, and invoked entirely by parties hostile to their interests.

See also Western Electric Company, Inc., 180 NLRB 131 and cases cited therein; Hershey Chocolate Corp., 129 NLRB 1052.

The existence or lack of a harmony of interests between the charging party and a party to the contract depends in part on the circumstances under which the dispute arose and the conduct and motives of the parties which gave rise to the dispute in question. In the Kansas Meat Packers case the Board, in finding no harmony of interests, relied on the evidence of antagonism between the charging parties and agents of the union and on the employer's acquiescence in the union's efforts to cause their discharge as a consequence of this hostility.

A finding that a harmony of interests exists which would warrant deferral also requires that the contracting party in question be willing to carry the dispute to arbitration and press the charging party's position in that proceeding. In determining that such a harmony of interests was absent in Kansas Meat Packers the Board pointed out that "t/he Union, concededly, never investigated the circumstances of these discharges, never filed a grievance with respect thereto, and did not file unfair labor practice charges." Conversely, in finding a harmony of interests to exist in National Radio Co., 198 NLRB No. 1, the Board assumed that "the Union will be aware of its institutional interests in protecting its officer and leading proponent against discipline which is thought to restrict his activities on the Union's behalf." (Emphasis added.) It seem apparent, therefore, that the Board would not find that a substantial harmony of interests exists where the contracting party in question was adversely affected by respondent's conduct in the dispute and is sympathetic to the position of the charging employee but the interests of this party to the contract are not sufficiently affected to cause it to undertake the protection of the charging employee by invoking the arbitration procedures of the contract and espousing his position therein. Therefore, the regional office should take the position that one of the parties to the contract must be willing to invoke the arbitration procedures of the contract and support the individual charging party's claim therein before the charge will be deferred administratively under the Collyer policy. Anaconda Wire and Cable Co., 201 NLRB No. 125. Cf. Tyee Construction Co., 202 NLRB No. 34.

2. The individual charging party, on his own initiative, does not expressly object to, or expressly refuse to be bound by, the arbitration of the dispute underlying the charge. 57/

57/ It may be argued that if a charge is filed by the aggrieved employee and the requirement of "substantial harmony of interests" is met, the charge should be deferred for arbitration under the Collyer policy even though the individual charging employee expressly objects to the arbitration of his claim. To deny deferral on the basis of an individual charging party's refusal to be bound by arbitration would provide parties to bargaining agreements a convenient means of avoiding deferral and circumventing the Board's Collyer policy. Thus, a party to a contract wishing to avoid arbitration in a dispute involving unlawful coercion or discrimination against individual employees would, instead of filing the charge itself, arrange for an individual discriminatee to file the charge and communicate to the regional office his opposition to the resolution of his claim under the contract arbitration procedures.

In addition, following the Steelworkers "trilogy" in which the Supreme Court placed greater emphasis on arbitration as an integral element of Federal labor policy, the Court has substantially restricted the right of individual employees to seek redress outside the grievance-arbitration machinery of the collective bargaining agreements to which they are subject. Republic Steel Corp. v. Maddox, 379 U.S. 650; Black-Clawson v. IAM, 313 F. 2d 179 (C. A. 1). And former Board Member Brown in his Collyer opinion espoused the view that deferral is appropriate for charges filed by employees and that although an employee may oppose a union's action which violates its duty of fair representation, an employee otherwise is bound by the acts of his bargaining agent and the bargaining agreement to which he is subject. Cf. International Harvester Co., 138 NLRB 923, enf'd sub. nom., Ramsey v. N.L.R.B., 327 F. 2d 784 (C. A. 7), cert. denied, 377 U.S. 1003. McLean Trucking Co., 202 NLRB No. 102, note 5; Continental Can Co., 202 NLRB No. 78.

On the other hand, the Board has indicated, in the cases cited in note 6, supra, that Collyer deferral is dependent upon the likelihood that arbitration will resolve the dispute "in a manner consistent with the standards of Spielberg." National Radio Co., 198 NLRB No. 1. One of the requirements consistently included by the Board in its statement of the Spielberg standards is the requirement that "all parties had agreed to be bound" or "had acquiesced in the arbitration proceeding." It has been concluded, therefore, that in the absence of any contrary holding on the part of the Board, administrative deferral to arbitration under the Collyer policy is not now appropriate where it may be reasonably anticipated that the arbitration proceeding will not meet the "acquiescence" requirement of the Spielberg standards.

(contd.)

This "acquiescence" requirement would preclude deferral under the Collyer policy where the individual charging party affirmatively expresses to the regional office his refusal to be bound by, and opposition to, arbitration of the dispute underlying his charge. In Wertheimer Stores Corp., 107 NLRB 1434, deferral was refused because the arbitration has been "carried through by the Union over the opposition of Weiss." In the Spielberg case itself, the Board distinguished the Wertheimer decision in a manner indicating its continued adherence to the principle that deferral is to be denied where the arbitration "had been carried out over the opposition of the individual involved." In Hershey Chocolate Corp., 129 NLRB 1052, the Board denied deferral, finding that "none of the employees involved herein agreed to be bound by the arbitration proceeding." The Board was there referring not merely to the absence of evidence that the employees expressly agreed to be bound but to their having "specifically advised the arbitrator of their intention to seek other legal resources should the arbitrator's decision be unfavorable." See also Jacobs Transfer, Inc., 201 NLRB No. 34, slip op., n. 2 and pp. 28-30 of the TXD in which a three member panel of the Board, with Chairman Miller concurring on other grounds, adopted the ALJ's refusal to defer to an arbitration award on the ground, inter alia, that the charging party, an individual employee, "did not voluntarily submit the dispute to the contract procedures, [and] did not agree to be bound by the result . . ."

The Spielberg "acquiescence" standard is not, however, considered to require solicitation of an affirmative expression on the part of an individual charging party of his acquiescence in the arbitration of his claim before administrative deferral under the Collyer policy is warranted. In applying this standard in "Spielberg" cases, the Board has apparently presumed the acquiescence of the individual in the arbitration in the absence of evidence to the contrary. In those cases in which the individual's absence from the arbitration hearing and the adequacy of the presentation of his position at the hearing are dealt with under the "fair and regular" test of Spielberg, the Board sometimes refers to the individual claimant's having "acquiesced" in the arbitration proceeding even though nothing appears as to the individual's having expressly done so. E.g. Western Electric Company, Inc., 180 NLRB No. 131.

Where two or more charges are based essentially on the same underlying dispute or dependent upon resolution of a common issue, none of these charges should be deferred if one of these related charges was filed by an individual employee and the special considerations pertaining to such a charge preclude deferral. 58/

PROCEDURES FOR ADMINISTRATIVE DEFERRAL 59/

I. Initial Disposition of Charges

(A) Investigation of the merits of the charge and deferral circumstances in potential "Collyer" and "Dubo" situations 60/

Whenever, in the investigation of a charge alleging a violation of Sections 8(a)(1), (2), (3) or (5) or 8(b)(1)(A), (B), (2) or (3) of the Act, it appears that the alleged violation took place in a bargaining unit represented by an incumbent bargaining representative, the region should proceed as follows:

(1) The region should first determine preliminarily whether the allegations of the charge and the evidence submitted by the charging party in support of the charge and any other evidence at hand establish an arguable violation of the Act. 61/ If this preliminary determination does not establish such a violation of the Act, i.e., the charge is determined to be frivolous or clearly lacking in merit, the charge should be dismissed in accordance with Section 102.19 of the Board's Rules and Regulations.

58/ George Koch Sons, Inc., 199 NLRB No. 26. See note 25, *supra*.

59/ Attached hereto as "Appendix A" is a general outline which may be used by the regional offices as a checklist to assist in the investigation of arbitration deferral cases.

60/ As the bases outlined in the February 28, 1972 guidelines for encouraging voluntary resort to arbitration under the heading "Encouragement of Arbitration" are now substantially the reasons for deferral under the Board's expanded Collyer policy, that section has been omitted from these guidelines.

61/ Whether the charge and evidence at hand "establish an arguable violation of the Act," (i.e., the degree of certainty that a violation was committed which must be established before deferral under the Collyer policy is warranted) depends upon the answer to two questions. First, given the character, credibility and weight of the evidence at hand, what findings of fact are warranted on the basis thereof (i.e., what state of facts does this evidence establish). Second, does this state of facts establish an arguable violation of the Act. i.e., in the absence of further legal research, analysis and necessary policy determinations, can it be concluded, with confidence in the accuracy of the conclusion, that this state of facts does not establish a violation of the Act.

(2) If the preliminary determination establishes an arguable violation of the Act, the region should, either before, during or after completion of a full investigation of the charge, 62/ but in any event before making a final determination of the merits of the charge, ascertain whether deferral of further action on the charge is warranted because the Collyer criteria for deferral to arbitration, set forth in the proceeding sections of this memorandum, are met.

In conducting the investigation of the circumstances bearing on the warrant for deferral to arbitration under the Collyer policy, the region should give the parties notice of the fact of this investigation and of their opportunity to present evidence and views on this subject.

In determining whether deferral is warranted under the Collyer policy, the region should initiate and assume responsibility for investigating and considering the circumstances which would establish prima facie warrant for deferral. These circumstances include the existence of a contract between the parties which makes binding arbitration encompassing the dispute available to the charging party and the fact that the dispute does not concern a special subject matter not suitable for deferral.

62/ For the reasons discussed in note 17, supra, the usual course will be to determine whether the Collyer criteria for deferral are met before the charge is fully investigated. By doing so in instances in which the Collyer criteria are met and respondent timely expresses its willingness to arbitrate, deferral will in most cases obviate the necessity for completion of the full investigation and final determination of the merits of the charge. The purpose, however, of this procedure is to facilitate the regions' processing of Collyer cases and achieve a net minimization of regional efforts in the ultimate disposition of these cases. Accordingly, in instances in which the region, for whatever reason, concludes that these objectives would be better served by further investigation, or by completion of the full investigation, of the charge before determination of whether the Collyer criteria are met, the region is authorized to follow this order in the processing of the case. Thus, the investigation which might ultimately be required--particularly if deferral should finally prove to be either unwarranted or ineffective in resolution of the dispute--may be eased by obtaining all evidence at once because of the travel distances involved or the difficulty in reaching witnesses. Further, the need to obtain evidence which might not be available in a later investigation, either through a diminished cooperation on the part of witnesses and parties or through the disappearance of documents and the attenuation of memory through time, may determine the extent of the investigation to be conducted before deferral for arbitration is considered.

Further, where charges are filed by an individual employee, the region should promptly ascertain whether his interest are in substantial harmony with those of one of the parties to the contract and whether that party is willing to invoke the arbitration procedures of the contract and advocate the charging party's position therein. The region should not solicit the charging party's attitude concerning his willingness to be bound by the arbitral result, but should, rather, consider the unwillingness of the charging party to acquiesce in the arbitration proceeding and award only if it is offered the region by the charging party sui sponte.

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 a history or pattern of respondent enmity toward the union. But the region should investigate and consider any other evidence pertaining to respondent's enmity, the respondent's good faith in its assertion of privilege for its action, and 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.

(3) If the grounds for deferral to arbitration under the Collyer policy are determined not to exist, the region should determine whether deferral is warranted under the Dubo policy. 63/ If deferral

63/ In the February 28, 1972 guidelines at pages 16 to 18 and notes 33 and 35, deferral on the basis of the Dubo policy was described "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.'" The regional offices were instructed to consider the question of deferring under the Collyer policy only after it had been concluded that deferral under the Dubo policy was inappropriate.

Subsequently, the Board expanded its Collyer policy, and at least by implication, narrowed the applicability of Dubo to situations where, despite the absence of conditions necessary for deferral under Collyer, the dispute underlying the unfair labor practice charge is the subject of a grievance proceeding leading to arbitration that would put the dispute to rest. In Medical Manors, Inc., 199 NLRB No. 139, the Board deferred for arbitration a Section 8(a)(5) charge based on the employer's alleged unilateral change in wage rates. Although the union had already secured a court order compelling arbitration of the dispute, the very situation involved in Dubo, the Board made clear that deferral was based on its Collyer policy. Accordingly, omitted from these revised guidelines is the instruction contained in the February 28, 1972 guidelines to consider deferral under the Dubo policy first and only if deferral is not warranted under that policy to consider deferral under the Collyer policy.

is found warranted under the Dubo policy, 64/ further action on the charge should be deferred pending completion of arbitration of the underlying dispute. 65/ The right to appeal to the General Counsel

64/ Deferral under the Dubo policy is warranted in any dispute which is being processed through grievance procedures leading to final and binding arbitration in which it is likely that the dispute will be, or it has been, submitted for arbitration and in which the resulting arbitration award may meet the Spielberg standards for deferral. (See note 66, infra).

Deferral under the Dubo policy would be appropriate, for example, where the contract grievance procedures do not encompass the particular dispute in question but the parties have entered into an ad hoc agreement to arbitrate this particular dispute. So too would deferral be appropriate notwithstanding a pattern of respondent enmity toward the exercise of protected rights which would preclude deferral under the Collyer policy but the union intends nevertheless to carry the dispute to arbitration through the contract grievance and arbitration procedures. However, a pattern of employer enmity would preclude deferral where it is the employer who is carrying the dispute to arbitration over the objection of the union. United Aircraft Corp., 188 NLRB No. 96.

65/ 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-arbitration proceeding. 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 in a manner compatible with the Spielberg standards, the region should reactivate the charge and, upon completing any necessary investigation, should issue complaint or dismiss the charge in accordance with its final determination of the merits of the charge.

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.

the region's decision to defer is not accorded the charging party when the deferral is ordered under the Dubo policy. 66/

66/ In substantial measure the Dubo policy is premised on the same considerations as the Spielberg policy. In the Dubo case itself the Board pointed out that in effectuating the intent of Congress expressed in Section 203(d) of the LMRA, the Board has "recognized existing arbitration awards" under the Spielberg policy and has required resort in some instances to contract grievance and arbitration procedures. The Spielberg policy is, in turn, premised on a "desirable objective of encouraging the voluntary settlement of labor disputes," (International Harvester Co. (Indianapolis Works), 138 NLRB 923) and upon an unwillingness to afford a party two forums for the litigation of essentially the same dispute. In the Collyer decision itself the Board presented the Spielberg case as a refinement of the policy developed in earlier cases in which there had been an arbitral award. The Board cited as one such case Timken Roller Bearing Co., 70 NLRB 500, in which the arbitral award had already issued in favor of the respondent before the Board ruled. The Board, in deferring to the award, said:

It is evident that the Union has concurrently utilized two forums for the purpose of litigating the matter here in dispute. Although the arbitrator determined the issues before him within the framework of the 1943 agreement and expressly refrained from prejudicing the rights of either party before the Board, it would not comport with the sound exercise of our administrative discretion to permit the Union to seek redress under the Act after having initiated arbitration proceedings which, at the Union's request, resulted in a determination upon the merits in favor of the respondent. In the interest of ending litigation and otherwise effectuating the policies of the Act, we shall dismiss the complaint.

A more recent reflection of the Board's reluctance to provide an additional forum for litigation of a dispute already resolved by an arbitrator is to be found in Atlantic Richfield Co., 199 NLRB No. 135. The union had there resisted arbitration, claiming that the broader contract issue had been resolved against the employer in an earlier proceeding. The Board deferred to the more recent award, seeing "no need for this Board to serve as yet a third forum in which an issue of contract interpretation should be allowed to be presented . . ."

Under the Collyer policy, in the exercise of its discretion, the Board requires a charging party to resort to the available grievance and arbitration procedures under the contract. Under the Dubo policy, the Board does not require such a resort to these procedures; rather, it defers because one or the other party to the contract is pressing the dispute to arbitration, and because the Board is unwilling to provide a second forum for the litigation of the same dispute. (continued)

If deferral under the Dubo policy (as well as the Collyer policy) is found not to be warranted, then a full investigation and final determination of the merits of the charge should be completed and the charge disposed of in accordance with Section 102.15 et seq. of the Board's Rules and Regulations, by dismissal of the charge, settlement or issuance of complaint.

(4) If the region determines that deferral of further action would otherwise be warranted under the Collyer policy, the region should ascertain informally whether the respondent is willing to arbitrate the dispute underlying the charge pursuant to the grievance and arbitration provisions of the applicable bargaining agreement, 67/ and waive any contractual time limitations on the filing and processing of grievances to arbitration, if the respondent has not earlier indicated its willingness to arbitrate. 68/

66/ (continued) Under the Dubo policy, since it is not the Board which is causing or requiring the charging party to arbitrate the dispute, there is less reason than under the Collyer policy to provide the right to appeal the deferral of action on a charge to the General Counsel. Nor has experience with the Dubo policy, in the many years in which it has been applied administratively, demonstrated the necessity for such an appeal, perhaps because in many instances the concurrent unfair labor practice charge is filed merely to preserve the charging party's right to resort to the Board for review of the arbitration award under the Spielberg policy in the event the charging party feels the arbitral proceeding or award is unfair or conflicts with the Act. Finally, the limited character of the determination which is made by the region in finding deferral warranted under the Dubo policy would also weigh against providing a right of appeal.

67/ It is contemplated that respondent's assertion of its willingness to arbitrate the dispute and its disclaimer of intention to rely on contract time limitations imposed on the filing or processing of grievances by the contract (or on the expiration of the contract, if that has occurred) must be effective as of the time the region defers further action on the charge by issuing the letter provided for in (B) and Appendix D. It must also be intended to continue in effect for a period during which an effort on the part of the charging party to initiate, or continue in, grievance proceedings leading to arbitration would be considered by the Board to be made with "reasonable promptness."

68/ At the time this informal inquiry with the respondent is made, respondent should be informed that if it does not unequivocally express its willingness to arbitrate the dispute (or if it conditions its willingness upon the region's final determination, after full investigation, that the charge is meritorious and complaint would otherwise be warranted), the region will complete  
(contd.)

(a) If the respondent has earlier expressed, or at this time expresses, its willingness to arbitrate, the region should defer the charge for arbitration by issuance of the letter provided at (B) and Appendix D, below. 69/ Notwithstanding this deferral, however, the region may, in its discretion, conduct such further investigation as may be warranted by the considerations indicated at note 62, supra.

(b) If the respondent does not at this time express its willingness to arbitrate, the region should complete the full investigation and the final determination of the merits of the charge. If, as a result thereof, the charge is found to be without merit, it should be dismissed in accordance with Section 102.19 of the Board's Rules and Regulations. If, on the other hand, the charge is found to warrant issuance of complaint, then the region should proceed in accordance with the instructions at (5)(b), below, beginning at the point indicated by /XX/.

(5) If, notwithstanding the above instructions, grounds for deferral to arbitration under the Collyer policy are found to exist after a full investigation and final determination of the merits of the charge establish that the charge warrants issuance of complaint, the region should ascertain informally 70/ whether the respondent is willing to arbitrate the dispute underlying the charge pursuant to the grievance and arbitration provisions of the applicable bargaining agreement and waive any contractual time limitations on the filing and processing of grievances to arbitration, 71/ if the respondent has not earlier indicated its willingness to arbitrate.

68/ (continued) the investigation and will make a final determination of the merits of the charge and will inform the parties of the results thereof, giving the respondent another opportunity at that time to express its willingness to arbitrate the dispute. If, in the judgment of the region, this communication should be formalized, the region may wish to do so by letter similar to that attached as Appendix C.

69/ It is important to note that at this juncture the region is not authorized to convey to the charging party the respondent's willingness to arbitrate the dispute and to solicit the charging party's intentions on this subject. The region is, instead, required to issue the deferral letter provided for at (B) and Appendix D, infra.

70/ See note 68, supra.

71/ See note 67, supra.

(a) If respondent has earlier expressed, or at this time expresses, its willingness to arbitrate, the region should defer the charge for arbitration by issuance of the letter provided at (B), and Appendix D, below. 72/

(b) If the respondent does not at this time express its willingness to arbitrate, /XX/ the region should inform respondent in writing that a full investigation has been completed; that the charge has been determined to be meritorious; that absent settlement, complaint will issue unless the respondent notifies the region within 7 calendar days, in writing, of its willingness to arbitrate 73/ and that absent such expression of willingness to arbitrate, the region will in any subsequent proceeding on the charge take the position that deferral of further action on the charge is unwarranted by reason of the absence or belatedness of respondent's assertion of its willingness to arbitrate. 74/ If the respondent in response thereto expresses in writing within 7 calendar days its willingness to arbitrate, the region should defer the charge for arbitration by issuance of the letter provided at (B) and Appendix D, below. 75/ If the respondent in response thereto does not so express its willingness to arbitrate, the region should proceed on the charge in accordance with Section 102.15 et seq. of the Board's Rules and Regulations. In this latter event, if respondent, at any time in the proceeding after expiration of the 7 days above provided, raises or urges a Collyer defense, the region should take the position that the defense is lacking in merit by reason of the belatedness of respondent's assertion of its willingness to arbitrate. 76/

(6) In any case in which, after complaint has issued, the region determines that grounds for deferral to arbitration under the Collyer policy exist, the region should proceed essentially in accordance with Section (5), supra. Thus, the region should give respondent the opportunity to express its willingness to arbitrate, if respondent has not already done so, first informally and then, if necessary, in a writing which includes the 7-day limitation on respondent's opportunity to respond. The region should also give respondent notice of the region's intention to urge a "belatedness" contention as to any later expression of respondent's willingness to arbitrate. If respondent has already expressed, or in response to such inquiry expresses its willingness to arbitrate, the region should withdraw the outstanding complaint (pursuant to Section 102.18 of the Board's Rules and Regulations) and defer further action on the charge by issuance of the letter provided in (B) and

72/ See note 69, supra.

73/ See note 67, supra.

74/ A sample letter is attached as Appendix C. In order that a meaningful history of experience under this procedure may be developed, all regional offices should inform their respective Assistant General Counsels of all cases in which deferral under the Collyer policy occurred only after the region was required to make a final determination of the merits of the charge and issue the letter referred to in the text, supra.

75/ See note 69, supra.

76/ See note 17, supra, and VI. Litigation of the Collyer Deferral Question, infra.

Appendix D, below. If the respondent should, in these circumstances, fail or refuse timely to express its willingness to arbitrate, the region should take the position thereafter that any subsequent assertion of respondent's willingness to arbitrate is belatedly made.

(7) In any case in which, for whatever reason, the region did not solicit the respondent's expression of its willingness to arbitrate the dispute underlying the charge before the hearing opens, the region should make no contention based on the belatedness of respondent's expression of its willingness to arbitrate. In any such case, any Collyer defense interposed by the respondent should be treated in accordance with Section IV., Litigation of the Collyer Deferral Question, infra, the region taking the position that even if the defense is timely entered, deferral is not warranted unless respondent, at the time deferral is contemplated, expresses a willingness to arbitrate the dispute in the manner indicated at note 67 and accompanying text, supra.

(B) Communication to the parties of the decision to defer to arbitration

If the region has determined that deferral of action on the charge for arbitration is warranted under the Collyer policy, the region should send to the parties a letter setting forth:

- a. the fact that the region is declining to issue complaint and is deferring further proceedings on the charge pursuant to the Board decision in Collyer and related cases and the General Counsel's public release concerning Collyer deferral; 77/
- b. the circumstances on which the region relies in determining that deferral is warranted, including the fact that the respondent is willing to arbitrate the dispute which is the subject of the charge notwithstanding any contractual time limitations on the filing and processing of grievances to arbitration, or any expiration of the contract, and intends to continue in this willingness to arbitrate the dispute for a period during which an effort on the part of the charging party to initiate, or continue in, grievance proceedings leading to arbitration would be considered reasonably prompt;

77/ If deferral of further action on the charge is being ordered pursuant to Section I(6), supra, the following item (a) should be substituted:

- a. the fact that the region is hereby withdrawing the outstanding complaint pursuant to Section 102.18 of the Board's Rules and Regulations and is declining to issue complaint and is deferring further proceedings on the charge pursuant to the Board decision in Collyer and related cases and the General Counsel's public release concerning Collyer deferral;

- c. the right of the charging party to obtain a review of the region's refusal to issue complaint, because proceedings on the charge are being deferred under the Board's Collyer policy, by filing within 13 days after issuance of this letter an appeal with the Office of Appeals in Washington setting forth the facts and reasons on which the appeal is based; 78/
- d. the region's intention to inquire as to the status of the dispute at intervals of not more than 90 days and to accept and consider at any time any request and supporting evidence submitted by any party to the case for the dismissal of the charge, for continuation of the deferral of action on the charge, or for issuance of complaint;
- e. 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; 79/
- f. the region's intention to revoke its decision to defer and to resume processing of the charge in the event the respondent prevents or impedes the prompt resolution of the dispute through the contract arbitration procedures; 80/
- g. the right of the charging party to secure a review by the region of the arbitration award, when issued, to ascertain whether the award meets the requirements, of the Board's Spielberg policy. 81/

78/ No procedure for appeal of the decision to defer was provided in the February 28, 1972 guidelines. However, experience thus far in the administrative implementation of the Collyer policy has demonstrated the necessity for such a procedure. An appeal procedure will also parallel the Board's handling of Collyer cases wherein the decision to defer and order are made immediately subject to court review by the Board's dismissal of the complaint. Adoption of this procedure is also recommended by the fact that deferral may affect substantial rights and claims of the charging party and the fact that the procedure will aid in insuring uniformity in regional office application of the Collyer policy.

79/ In the event the charge was filed by an individual employee, item e. should read:

- e. the region's intention to revoke its decision to defer and to resume processing of the charge if the dispute has not been promptly settled or submitted to arbitration, or if any one of the special considerations necessary to deferral of charges filed by individual employees is no longer present.

80/ Cf. Medical Manors, Inc., d/b/a Community Convalescent Hospital, 199 NLRB No. 139, note 2.

81/ A sample deferral letter is attached as Appendix D.

## II. Handling Before Issuance of an Arbitration Award of Charges Deferred Administratively Under the Collyer Policy

When any 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 I(B) above, or 90 days after denial of a charging party's appeal of the regional director's decision to defer, 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 any party is dilatory or uncooperative in its response to the region's inquiry, the region should, as part of its inquiry, send letters to all parties to the case asking either (1) why the charge should not be dismissed or (2) why the region should not revoke its decision to defer for arbitration and resume proceedings on the charge, whichever in the region's discretion is the more appropriate in the circumstances.

In the event this inquiry reveals that the parties to the contract 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 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 present circumstances upon which the region relies in deciding to discontinue deferral and to dismiss the charge, and notification to the charging party of its right to appeal the dismissal of the charge to the Office of Appeals.

In the event the charging party is an individual employee and this inquiry reveals that a substantial harmony between the interests of the charging party and those of a party to the contract no longer exists, (as a consequence of which the dispute has not been promptly settled or submitted to arbitration), or that the charging party has, on his own initiative, expressly objected to, and refused to be bound by, arbitration of the dispute, the regional office should notify all parties of the revocation of its decision to defer and of its decision to resume proceedings on 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, or otherwise, the region should notify all parties of the revocation of its decision to defer and of its decision to resume proceedings on the charge.

### III. Handling After Issuance of an Arbitration Award of Charges Deferred Administratively Under the Collyer Policy

When the region's inquiry under II, 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, to the extent any interested party contends that the award fails to do so. 82/ If the award does not meet these standards, the region should resume proceedings on the charge. 83/

If the award meets the Spielberg standards, the region should dismiss the deferred charge. 84/ The dismissal letter should consist of the reasons for which the region found the award to meet the Spielberg standards, and notification to the charging party of its right to appeal the dismissal to the Office of Appeals.

82/ See National Biscuit Co., 198 NLRB No. 4, where in note 8 the Board required that a "request" be made to it to consider issues left unresolved by the arbitration. This approach seems consistent with the Board's policy of allowing the private procedures to work a resolution of the dispute with a minimum of official Board involvement. See also Southwestern Bell Telephone Co., 198 NLRB No. 6; and Urban N. Patman, 197 NLRB No. 150, in which the Board indicated it would specifically review an arbitration decision which found the dispute to be non-arbitrable, a circumstance in which it could hardly be argued that the arbitration disposed of the unfair labor practice issues.

83/ Cf. Yourga Trucking, Inc., 197 NLRB No. 130, wherein the Board held that "the burden to adduce /proof regarding the scope of matters presented in the arbitration proceeding/ rests on the party asserting that our statutory jurisdiction to resolve the issue of discrimination should not be exercised."

84/ If the award is in favor of the charging party and any question is raised as to whether the relief provided for in the award adequately remedies the violations found by the region, the matter should be submitted to Washington for advice. Respondent's unwillingness to comply with such an award does not constitute grounds for refusing to defer to the award and for issuing a complaint, Malrite of Wisconsin, Inc., 198 NLRB No. 3.

A sample dismissal letter is attached as Appendix E.

#### IV. Litigation of the Collyer Deferral Question

In cases in which it has been determined administratively that deferral under the Collyer policy is unwarranted, but the respondent has in its answer to the complaint or in an amendment of its answer raised the Collyer defense affirmatively, the region should not at the hearing enter an objection to the introduction of evidence by respondent on the Collyer issues, (and should, where necessary, support respondent's right to submit evidence relevant and material thereto). 85/ However, the region should respond with all available evidence which bears on the question of deferral and present the grounds upon which it was administratively determined that the unfair labor practice charges should not be deferred for arbitration.

In the event respondent fails to raise affirmatively the Collyer defense in its answer to the complaint or in a timely amendment to its answer, the region should oppose the introduction of evidence by respondent on Collyer issues. 86/

85/ Houston Sheet Metal Contractors Assn., 147 NLRB 774, at 778; NLRB Rules and Regulations, Section 102.23.

86/ In Montgomery Ward & Co., 195 NLRB No. 136, the Board raised a question as to the extent to which the arbitration issue--whether to defer to an award already issued, under Spielberg--was properly before it, the respondent having failed to "clearly affirmatively plead a deferral-to-arbitration defense in its answer . . ." See also Hunter Saw Division of Asko, Inc., 202 NLRB No. 30, n. 2, for Chairman Miller's observation that the "Collyer defense was not raised or litigated at the hearing" and his view that "a respondent seeking to assert this defense has the burden of establishing it by pleading and proving facts sufficient to show the applicability of the principles established in the Collyer line of cases." And see MacDonald Engineering Co., 202 NLRB No. 113; where the Board refused deferral because the Collyer defense was first raised by the respondent before the Board and this issue was therefore not litigated at the hearing.

APPENDIX A

OUTLINE OF THE CIRCUMSTANCES RELEVANT TO DEFERRAL UNDER THE  
COLLYER POLICY AND PROCEDURES FOR ADMINISTRATIVE DEFERRAL

I. Character of the Dispute

(A) Type of violation charged

Alleged violations of Section 8(a)(1), (2), (3), and (5), and Section 8(b)(1)(A) and (B), 8(b)(2) and (3) may be deferred if otherwise appropriate. Charges alleging violations of other sections of the Act which raise Collyer issues should be submitted for advice.

(B) Relationship between the unfair labor practice issues and the issues subject to arbitration

1. Deferral is appropriate whenever it is reasonably probable that the dispute underlying the charge will be resolved under the parties' grievance-arbitration machinery in a manner conforming to the Spielberg standards.
  - a. Charges may be deferred where the unfair labor practice and arbitration issues both turn on a disputed construction, or on the application, of contract provisions.
  - b. Disputes encompassed by the arbitration procedures may also be deferred, even though their resolution does not turn on any interpretation or application of contract provisions and, in fact, raise only issues of law.
2. Deferral is not appropriate where applicable contract provisions, by their terms, establish criteria for resolution of the underlying dispute that are inconsistent with the criteria which the Board would apply in deciding the unfair labor practice issues.
3. Deferral policy should be applied on a "per dispute" basis to the extent different disputes do not involve common issues.

(C) Employer enmity toward employee or union rights under the Act.

1. Deferral is not warranted where the overall history of the bargaining relationship discloses significant employer enmity toward the exercise of protected rights.
2. A continuing history of unfair labor practice conduct denoting a general hostility to employee rights and a repudiation of collective bargaining, particularly where such conduct is motivated by animus, would preclude deferral.

(D) Willingness to arbitrate the dispute

1. Charges will not be administratively deferred unless the respondent expresses its willingness to arbitrate the dispute (notwithstanding contractual time limitations on the processing of grievances to arbitration or the subsequent expiration of the contract) at the time of the deferral and thereafter continues in its willingness to arbitrate for a reasonable period.
2. Not to be regarded as inconsistent with the respondent's expression of willingness are the following circumstances:
  - a. The respondent had not previously proposed arbitration of the underlying dispute;
  - b. the respondent previously refused a demand for arbitration of the dispute;
  - c. the respondent intends to contest the arbitrability of the dispute.

(E) Good faith in the asserting of privilege for the disputed action

1. Failure of a party to assert a contract claim or other justification for its disputed action will not preclude deferral.
2. Bad faith in asserting a justification for the conduct will preclude deferral.

(F) Disputes over special subject matters

Deferral is inappropriate in connection with:

1. Disputes involving unit accretion issues;
2. Disputes over union's request for information relevant to the administration of the agreement or the evaluation, processing and arbitration of grievances. (Where deferral is inappropriate as to a dispute over a refusal of requested information, deferral is inappropriate as to the basic dispute to which the requested information is relevant. Disputes over the denial of information relevant to contract negotiations which raise a Collyer deferral issue should be submitted to Washington for advice.)
3. Disputes in which the employer's basic obligation or willingness to recognize the union is contested.
4. Disputes in which a party is foreclosing, or frustrating resort to, the grievance-arbitration procedure.
5. Disputes in which there is a substantial question as to the existence of the contract as a whole when the dispute arose.

6. Disputes where the contract provisions governing their resolution are unlawful on their face or by their terms call for a result inconsistent with Board policy.
7. Disputes over the negotiation of, or arbitration to establish, contract terms and unit elimination issues, should be submitted to Washington for advice.

## II. Contract Provisions Concerning the Resolution of Disputes

### (A) Requirement that the contract procedures for the resolution of disputes lead to arbitration

Charges will not be deferred unless the applicable contract procedures for the resolution of disputes provide for arbitration according to the criteria developed by the Board under its Spielberg policy.

### (B) Encompassment of the dispute by the arbitration provisions

1. The dispute in question must be arguably encompassed by the grievance-arbitration provisions of the contract, which should be broadly construed.
2. Contract clauses excluding designated subjects from the arbitration machinery, or limiting the scope of the arbitrator's authority, should be narrowly construed.

### (C) Arbitration available at the insistence of the charging party

1. Deferral is appropriate only where arbitration is available at the insistence of the charging party, or if the charging party is an individual, where arbitration is available at the insistence of the party to the contract having interests in substantial harmony with those of the charging party.
2. Deferral is not appropriate where arbitration can be invoked only by mutual assent of the immediate disputants.

### (D) Binding character of the arbitration result

Deferral is inappropriate unless the parties are under a contractual obligation to abide by the terms of the arbitration award, which obligation may be implied by the contract even in the absence of specific contractual provisions stipulating that the award is "final and binding."

2. Contracts making arbitration a prerequisite to other means of resolving the dispute, e.g. strikes, should be submitted for advice.

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

1. Substantial claims that the arbitration procedures do not afford the charging party a "quick and fair" means for resolving the dispute based on pragmatic (e.g., case backlog or excessive costs), as opposed to formal contractual, considerations should be submitted to Washington for advice.
2. Relevant considerations in evaluating such claims would include the projected time for issuance of the award as compared with that for a Board order and the number and kinds of issues recently submitted for arbitration by the parties.

III. Special Considerations Concerning Charges Filed by Individuals

Charges filed by individual aggrieved employees alleging violations of Section 8(a)(1) and (3), 8(b)(1)(A) and (B), or 8(b)(2) will be deferred for arbitration only if:

1. The interests of the charging party are in substantial harmony with the interests of one of the parties to the collective bargaining agreement and this party is therefore willing to invoke the contractual arbitration procedures available to it and advocate the charging party's position before the arbitrator; and
2. the individual charging party does not, on his own initiative, expressly object to, and refuse to be bound by, arbitration of the dispute.

If multiple charges are filed, and all charges are based essentially on the same underlying dispute or dependent upon resolution of a common issue, none of the charges should be deferred if deferral in one of the related charges is unwarranted because of the special considerations applicable to charges filed by an individual employee.

I. Initial Disposition of Charges

A. Investigation of the merits of the charge and deferral circumstances in potential "Collyer" and "Dubo" situations

If Section 8(a)(1), (2), (3) or (5) or 8(b)(1)(A), (B), (2) or (3) violations are charged in a represented bargaining unit, then the region should:

- (1) Preliminarily determine whether the evidence at hand establishes an arguable violation.
- (2) If so, the region should, before or after fully investigating the violation charged, (but before finally determining the merits of the charge) investigate the Collyer deferral "circumstances," including the prima facie circumstances (i.e. the availability of binding contractual arbitration procedures which encompass the dispute and the fact that the dispute does not concern a special subject matter not suitable for deferral) and should consider the evidence of such other Collyer circumstances (e.g. employer enmity, obstacles to quick and fair arbitration) as is already in the region's possession or is offered by the charging party.
- (3) If Collyer deferral is found not warranted, the region should determine whether deferral under the Dubo policy is warranted because grievance procedures leading to binding arbitration are being actively pursued. Deferral under the Dubo policy as distinguished from deferral under the Collyer policy, is not subject to the right of appeal to the General Counsel.
- (4) If Collyer deferral is found to be warranted, the region should ascertain informally whether the respondent is, and will continue for a reasonable period of time after the deferral to be, willing to arbitrate the dispute notwithstanding procedural impediments thereto. (The respondent should be informed of the consequences of its withholding its willingness to arbitrate at this time).
  - (a) If respondent so indicates its willingness to arbitrate, the region should issue the formal deferral letter.
  - (b) If the respondent does not, the region should complete the investigation, and finally determine the merits of the charge. With charges found meritorious, the region should proceed as directed at 5(b) below.

(5) If, notwithstanding the above procedures, deferral for arbitration under the Collyer policy is found warranted after the region's final determination that complaint would otherwise be warranted, the region should informally ascertain respondent's willingness to arbitrate the dispute.

(a) If respondent expresses its willingness to arbitrate, the region should issue the formal deferral letter

(b) If respondent fails to express a willingness to arbitrate, the region should give respondent formal notice of the completion of the investigation and final determination that complaint will issue unless respondent within 7 days expresses in writing its willingness to arbitrate the dispute. If respondent does so, the region should issue the formal deferral letter. If not, the region should issue complaint, absent settlement.

(6) In any case in which, after complaint has issued, the region determines that deferral under Collyer is warranted, the region should proceed essentially in accordance with (5) above, withdrawing complaint and issuing a deferral letter in the event respondent expresses its willingness to arbitrate. In the event respondent does not express in writing its willingness to arbitrate after having been formally offered the opportunity to do so by the region, the region should proceed to hearing on the matter, absent settlement.

(7) If, for any reason, the region has not solicited an expression of respondent's willingness to arbitrate the dispute before the hearing opens, the region should not base any contention on the belatedness of respondent's expression of a willingness to arbitrate the dispute. In such circumstances, the respondent's interposition of a Collyer deferral defense should be treated in accordance with Section IV, below, with the region taking the position where the deferral defense is timely raised that deferral is nevertheless not warranted unless respondent expresses its willingness to arbitrate the dispute.

(B) Communication to the parties of the decision to defer to arbitration

If the region finds deferral to arbitration under the Collyer policy warranted, pursuant to the foregoing instructions, the region should communicate its decision to the parties by the prescribed letter, a model of which is provided in Appendix D, suitably modified in cases in which the charging party is an individual employee and in which an outstanding complaint is being withdrawn.

II. Handling Before Issuance of an Arbitration Award of Charges  
Deferred Administratively Under the Collyer Policy

On appropriate motion of a party to the case or at intervals of no more than 90 days, the region should ascertain the status of disputes in which action on an unfair labor practice charge has been deferred for arbitration. The region should take such action as is warranted by the current status of the dispute.

III. Handling After Issuance of an Arbitration Award of Charges  
Deferred Administratively Under the Collyer Policy

When the region learns that an arbitration award has issued in a case deferred for arbitration under the Collyer policy, the region should dismiss the deferred charge unless the charging party contends the award fails to meet the Spielberg standards. If the charging party so contends, the region should review the award under the Spielberg standards and dismiss the charge or issue complaint, absent settlement, in accordance with the results of this review.

IV. Litigation of the Collyer Deferral Questions

In cases in which it has been administratively determined that deferral to arbitration is not warranted, the region should at hearing support or resist the respondent's introduction of evidence on a Collyer deferral defense depending upon whether respondent has timely pleaded this defense affirmatively, by answer to the complaint or by a timely amendment of its answer. Where the Collyer defense is timely pleaded, the region should present the grounds on which deferral was refused administratively.

APPENDIX B

Respondent

Re: Case Name and Number

The charge in the above-captioned case, charging a violation of Section[s] \_\_\_\_\_ of the Labor Management Relations Act, has been preliminarily considered by this Office.

In accordance with the National Labor Relations Board's arbitration deferral policy announced in Collyer Insulated Wire, 192 NLRB No. 150, and pursuant to "Arbitration Deferral Policy Under Collyer-Revised Guidelines" publically issued by the General Counsel on [date of release], I have determined that further proceedings on this charge should be administratively deferred if the respondent promptly notifies this Office, in writing, that it is willing to arbitrate the dispute which is the subject of the instant charge notwithstanding any contractual time limitations on the filing and processing of grievances to arbitration [and the expiration of the contract] and will continue in its willingness to arbitrate the dispute for a reasonable period of time after action is administratively deferred on the instant charge. If the respondent fails to express its willingness to arbitrate the dispute in the preceding manner, this Office will proceed to a full investigation, and final determination of the merits, of the charge and all interested parties will be informed of the results thereof. If it is thereby determined that issuance of complaint would otherwise be warranted, respondent will then be given another opportunity to assert its willingness to arbitrate the dispute and deferral of further action on the charge will again be considered at that time.

/s/ Regional Director

cc: Other parties

APPENDIX C

Respondent:

Re: Case Name and Number

The charge filed in the above-captioned case, charging a violation of Section/s/ \_\_\_\_\_ of the Labor Management Relations Act, has been carefully considered by this Office. Based on a full investigation and determination of the merits of this charge, it has been concluded that, absent settlement or deferral of the charge for arbitration, issuance of a complaint charging the respondent with violations of the Act is warranted.

The respondent is hereby given the opportunity to notify this Office within seven (7) days from the date of this letter, in writing, of its willingness to arbitrate the dispute underlying this charge and to waive any contractual time limitations on the filing and processing of grievances to arbitration and of its intention to continue in its willingness to arbitrate the dispute for a reasonable period thereafter. In the event the respondent so notifies the region, further action on the charge will be deferred for arbitration under the National Labor Relations Board's decision in Collyer Insulated Wire, 192 NLRB No. 150, and pursuant to "Arbitration Deferral Policy Under Collyer" publicly issued by the General Counsel on /date of release/. If the respondent does not so notify this Office, complaint will issue on the instant charge, and this Office will treat any subsequent expression by respondent of its willingness to arbitrate as belatedly expressed. This Office will thereafter treat the arbitration deferral defense as defective by reason of respondent's failure to assert its willingness to arbitrate in a timely fashion and accordingly oppose any subsequent effort on the respondent's part to secure deferral on the basis of the Board's Collyer policy.

/s/ Regional Director

---

cc: Other parties

APPENDIX D

Charging Party  
Respondent

Re: Case Name and Number

In accordance with the National Labor Relations Board's decision in Collyer Insulated Wire, 192 NLRB No. 150, and pursuant to "Arbitration Deferral Policy Under Collyer - Revised Guidelines" publicly issued by the General Counsel on [date of release], I am 1/ declining to issue a complaint on the instant charge based on my determination that further proceedings on the charge should be administratively deferred for arbitration.

My reasons for deferring the charge are as follows: [insert a concise statement of the circumstances (separately numbered) on which the region relies in determining that deferral is warranted, which circumstances should include the fact that on (date), this Office has been notified by the respondent in this matter, that it is now, and for a reasonable period will be, willing to arbitrate the dispute underlying the charge in the above-captioned case notwithstanding any contractual time limitations on the processing of grievances to arbitration of the subsequent expiration of the contract].

Under Section 102.19 of the National Labor Relations Board's Rules and Regulations, the charging party may obtain a review of my administrative determination to defer further proceedings on this charge by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D. C. 20570, addressing a copy of the appeal to this Office. This appeal must contain a complete statement of the facts and reasons on which it is based. The appeal must be received by the General Counsel in Washington, D. C., by 5:00 p.m. on [date (13 days following date of this letter)]. For good cause shown, however, the General Counsel may grant special permission to extend the time for filing. A request for an extension of time to file an appeal must be in writing and received by the Office of Appeals prior

1/ If deferral is ordered after a complaint has issued, the following should be included at this point:

hereby withdrawing the outstanding complaint in this matter pursuant to Section 102.18 of the Board's Rules and Regulations and I am

to [date]; a copy of such request should be filed with this Office. If the General Counsel determines that deferral of this charge to arbitration is unwarranted, the case will be remanded to me for appropriate action. But if the General Counsel sustains my decision, the case will be remanded to me for deferral as set forth herein.

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

It is my intention to dismiss the charge in the event the charging party 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 the dispute to arbitration. 2/

It is my intention to revoke my decision to defer and to resume processing of the charge in the event the respondent, by conduct inconsistent with its expression of a willingness to arbitrate, prevents or impedes the prompt resolution of the underlying dispute through the contract grievance-arbitration procedures.

If the dispute underlying the charge is not resolved amicably under the grievance procedure, and resort to arbitration proves necessary, the charging party may obtain a review of the arbitrator's final award by addressing a request for review to this Office. The request should be in writing and contain a statement of the facts and circumstances bearing on whether the arbitral proceedings were fair and regular; whether the unfair labor practice issues which gave rise to the charge were considered and decided by the arbitrator; and whether the award is consonant with the purposes and policies of the Labor Management Relations Act. Spielberg Mfg. Co., 112 NLRB 1080.

/s/ Regional Director

cc: Other parties  
General Counsel

2/ If the charging party is an individual employee, this paragraph should read as follows:

It is my intention to revoke my decision to defer and resume processing of the charge if the dispute underlying the charge is not promptly settled or submitted for arbitration, or if the interests of the charging party are otherwise now in conflict with those of both parties to the contract or if the charging party expressly objects to, and refuses to be bound by, the arbitration of the dispute.

APPENDIX E

Charging Party:

Re: Case Name and Number

This Office on [date] administratively deferred further action on the charge in the above matter for arbitration of the underlying dispute pursuant to the grievance-arbitration procedures of the applicable collective bargaining agreement. On [date] an arbitration award issued resolving the instant dispute.

[Alternative #1]

No interested party having contended that the arbitration award fails to meet the standards set by the Board in Spielberg Manufacturing Co., 112 NLRB 1080, for deferral to such awards, it does not appear that further proceedings are warranted. I am, therefore, refusing to issue a complaint in this matter.

[Alternative #2]

It has been contended by [the interested party] that the arbitration award fails to meet the standards set by the Board in Spielberg Manufacturing Co., 112 NLRB 1080, for deferral to such awards in that:

[Statement of the Charging Party's Contention]

As a result of a review of the arbitration proceeding and award and the Charging Party's contention, I have concluded that further proceedings on the charge are not warranted for the following reasons:

[Statement of the reasons relied on for rejection of the Charging Party's contention]

I am, for the foregoing reasons, refusing to issue a complaint in this matter.

[Notification to the Charging Party of its right to obtain a review of this section by filing an appeal with the General Counsel]

/s/ Regional Director

cc: Other parties  
General Counsel