

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM 77-58

May 25, 1977

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

FROM: John S. Irving, General Counsel

SUBJECT: Regional Office Handling of Collyer Issues  
in Light of the Board's Decision in  
General American Transportation Corporation,  
228 NLRB No. 102

On March 16, 1977, the Board issued its decision in General American Transportation Corporation, 228 NLRB No. 102 (herein referred to as GAT). It is clear from that decision that a majority of the Board will no longer apply the Collyer deferral policy to cases alleging a violation of Section 8(a)(1), 8(a)(3), 8(b)(2), or 8(b)(1)(A) of the Act. 1/ The decision did not address whether and to what extent this new policy is to apply retroactively to pending cases or only prospectively to cases arising in the future. Because of that lack of clarity, my office filed the attached Motion for Clarification with the Board on April 8, 1977. A panel majority of the Board denied that motion on May 20, 1977. In view of that action, it is my responsibility, as General Counsel vested with Section 3(d) authority, to decide the appropriate way to handle the cases that were pending in Regional Offices as of March 16, 1977. This memorandum sets forth guidelines with respect to the processing of such pending cases as well as cases filed after March 16, 1977.

I. Cases Pending On March 16, 1977

As set forth in the attached motion, the cases pending on March 16, 1977, fall into two broad categories. First, as of that date, there were certain cases pending in the Regional Offices which were in the process of being investigated. There was no decision concerning the merits of the case or concerning whether the case should be deferred under the then-existing Collyer policy. Secondly, as of the same date, there were other cases which had been deferred by the Regional Offices under the old Collyer policy and which, pursuant thereto, were in the grievance-arbitration channel.

1/ The term "cases", as used herein, shall refer to cases involving these allegations. Further, the term "8(a)(1)" as used herein means independent, rather than derivative, 8(a)(1) allegations.

As to the pending cases in the first category, the Regions should apply the GAT policy to such cases. <sup>2/</sup> These cases, which allege violations of Section 8(a)(1), 8(a)(3), 8(b)(1)(A), or 8(b)(2), involve "alleged interference with individual employees' basic rights under Section 7 of the Act." <sup>3/</sup> Accordingly, these cases are to be resolved through NLRB processes, and any violations should be remedied by the Board.

The pending cases in the second category are in an entirely different posture. These cases have been deferred to grievance-arbitration under the then prevailing Collyer principles. The parties, relying on that deferral, are proceeding through the grievance-arbitration machinery. Indeed, the respondent in many of these cases is proceeding through that machinery even though, because of contractual time limitations on the filing of a grievance, it is not contractually required to do so. In these circumstances, I believe that the parties should be encouraged to remain in the grievance-arbitration channel. <sup>4/</sup> The application of the old Collyer policy to these cases would provide such encouragement. A charging party's abandonment of the grievance-arbitration channel would result in a dismissal of the charge, and the respondent's abandonment of that channel would result in the issuance of a complaint in a meritorious case. Thus, the parties would be encouraged to stay in the channel to which the Regional Office, operating under then prevailing principles, has referred them.

In addition, it is clear that the discontinuation of the Collyer policy to such cases, i.e. the application of GAT to such cases, would have undesirable consequences. To apply the GAT policy would mean that the General Counsel would make a final administrative merit determination in such cases. If the charge were without merit, it would be dismissed and the Charging Party would have no recourse to the Board. Moreover, in those cases where respondent has waived contractual time limitations to secure a Collyer deferral, the Charging Party would have no redress under the grievance-arbitration procedures. On the other hand, if the charge had merit, complaint would issue in all such cases, absent settlement. Our data indicate that there are 162 pending cases in this second category. To place some or all of these cases into the litigation pipeline would exacerbate the already existing problems caused by the crowded trial docket and would result in a further delay

<sup>2/</sup> The GAT policy to be applied to cases in this category is the same as that set forth below in connection with the discussion of cases filed after March 16.

<sup>3/</sup> See GAT slip op. at p. 10.

<sup>4/</sup> Nothing contained herein would of course affect the rights of these parties under the Board's Spielberg policy. See Spielberg Manufacturing Company, 112 NLRB 1080.

of the processing of the cases that are now in that pipeline. Further, this extensive litigation would all be for naught if the Board were to ultimately decide that the new GAT policy did not apply to pending cases. In that event the result of this extensive litigation would be that agency resources would have been needlessly expended and more importantly, could result in serious prejudice to employee rights.

For all of the foregoing reasons, I have concluded that it would best effectuate the Act to continue to apply the Collyer doctrine to these "Collyered" cases.

11. Cases Filed After March 16, 1977

As to charges filed after GAT issued, the GAT policy should be applied even if the events that are the subject of the charges occurred before the issuance of GAT. As noted supra, under that policy the Board draws a distinction between 8(a)(5) and 8(b)(3) charges on the one hand and 8(a)(3), 8(a)(1), 8(b)(1)(A), and 8(b)(2) charges on the other. The former are to be deferred if they meet the traditional Collyer tests, while the latter are not to be deferred.

If the post-GAT charges involve allegations in both categories, the Region should proceed as follows:

(1) If the charge alleges that the same conduct violated both Section 8(a)(5) and Section 8(a)(3) or (1), the Region should issue complaint alleging all violations. 5/

Similarly, if the charge contains meritorious allegations that the same act is violative of both Section 8(b)(3) and 8(b)(2) or 8(b)(1)(A), the Region should issue complaint alleging all violations.

(2) If the charge contains meritorious allegations that certain acts are violative of Section 8(a)(5) and that other acts are violative of Section 8(a)(1) or (3) and if all of these acts are closely related or inextricably intertwined, the Region should issue complaint alleging all violations. 6/ Similar policies should be followed with respect to Section 8(b)(3) allegations which are closely related or inextricably intertwined with Section 8(b)(2) or 8(b)(1)(A) allegations.

5/ Support for this position may be found in former Chairman Murphy's concurring opinion in GAT at page 12 and in her concurring opinion in Roy Robinson Chevrolet, 228 NLRB No. 103 at pages 11-12.

6/ Diversified Industries, 208 NLRB 233; George Koch Sons, Inc., 199 NLRB 166.

(3) If the charge contains meritorious allegations that certain acts are violative of Section 8(a)(5) and that other acts are violative of Section 8(a)(1) or (3), and if the former acts are not closely related or inextricably intertwined with the latter acts, the Region should apply the traditional Collyer guidelines to the former allegations and issue complaint on the latter allegations. 7/ A similar policy should be followed as to charges which allege 8(b)(3) allegations and 8(b)(2) or 8(b)(1)(A) allegations.

### III. The Role of Dubo Manufacturing, 142 NLRB 812

Before discussing the role of Dubo, it is useful to distinguish between Collyer and Dubo deferrals. If the General Counsel considers a case appropriate for Collyer deferral, the Charging Party is, in effect, told that he must invoke the grievance-arbitration procedure and that, if he fails to do so or if he abandons the grievance-arbitration procedure, his charge will be dismissed, absent some legitimate justification for his action. If a case is not considered appropriate for Collyer deferral, the Charging Party in a meritorious case is entitled to the issuance of complaint, absent settlement. However, even in these non-Collyer cases, if the Charging Party is in the grievance-arbitration channel and voluntarily elects to stay there, his charge can be deferred so long as he continues in that channel. Such a deferral is a Dubo deferral.

The GAT decision did not alter the distinction between Dubo and Collyer; nor did it undermine the validity of Dubo deferrals. Rather, the GAT decision merely broadened the area of non-deferral under Collyer. In cases to which the GAT policy applies, Charging Parties will no longer be "forced", on pain of dismissal, to pursue the grievance-arbitration procedure. But even in such cases, if the Charging Party is in the grievance-arbitration channel and voluntarily elects to stay there, after having been apprised of his "entitlement" under GAT to a General Counsel or Board determination, there is nothing in GAT that suggests that his case cannot be deferred under Dubo so long as he opts to continue in that channel. To the contrary, former Chairman Murphy's concurring opinion in GAT suggests that such deferral would be appropriate. 8/ Consequently, Dubo can still be applied to all non-Collyer cases, including those which are non-Collyer because of the GAT policy.

  
J.S.I.

Attachment

7/ J. Weingarten, Inc., 202 NLRB 446.

8/ See GAT, p. 16.

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MEMORANDUM 77-58

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL AMERICAN  
TRANSPORTATION CORPORATION

and

Case 23-CA-5361

PERRY SOAPE, JR., an Individual

MOTION FOR CLARIFICATION

On March 16, 1977, the Board issued its decision in the above-captioned case. It is clear from that decision that a majority of the Board would not apply the Collyer deferral policy to cases alleging a violation of Section 8(a)(1), 8(a)(3), 8(b)(2), or 8(b)(1)(A) of the Act. 1/ The decision is unclear, however, concerning whether and to what extent this new policy is to apply retroactively to pending cases or only prospectively to cases arising in the future. As set forth herein, the resolution of this issue will affect the processing of a substantial number of pending cases. Accordingly, we seek clarification concerning this question.

At the outset, it should be noted that the cases pending on the date of the Board's decision fall into various categories. Firstly, as of that date, there were certain cases pending in the Regional Offices which were in the process of being investigated. There was no decision concerning the merits of the case or concerning whether the case should be deferred under the then-existing Collyer policy. Secondly, as of the same date, there were other cases which had been deferred by the Regional Offices under the old Collyer policy and which, pursuant thereto, were in the grievance-arbitration channel. Our preliminary check indicates that

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1/ The term "cases", as used herein, shall refer to cases involving these allegations.

there were 162 cases in this category. 2/ This category, in turn, breaks down into a number of sub-categories: (1) those which are still in the grievance stage; (2) those which are beyond the grievance stage and the parties are selecting an arbitrator; (3) those which are set for arbitral hearing; (4) those which have been heard by an arbitrator but not yet decided. 3/

From the foregoing, it is clear that there are a substantial number of pending cases. It is equally clear that the resolution of the issue raised by this motion will have a marked impact on the processing of these cases. Ordinarily, such an issue could be presented to the Board by the issuance of appropriate complaints or resolved administratively by the General Counsel acting under his Section 3(d) authority. But both of these approaches are fraught with practical difficulties. If the General Counsel believed that it was reasonably arguable that the Board intended for the new Collyer policy to apply to some or all of the aforementioned cases pending in the Regional Offices, he could, upon a determination of prima facie merit, issue an appropriate complaint in all such cases, or conceivably he could issue complaints in representative cases in each category, while holding the others in abeyance pending resolution of the issues presented in the representative cases. 4/ However, to place some or all of these cases into the litigation pipeline would exacerbate the

2/ There may also have been a few additional cases which were deferred by the Board itself under the old Collyer policy and which, pursuant thereto, were in the grievance-arbitration channel. However, the last such case was deferred on November 15, 1974. Bell Telephone Co., 214 NLRB 980. It is unlikely that the parties in that case are still in the grievance-arbitration channel.

3/ We assume, absent a contrary indication from the Board, that those cases which have been heard and decided by an arbitrator are subject to review under the standards of Spielberg, 112 NLRB 1080. See n. 20/ of Chairman Murphy's concurring opinion.

4/ Of course, if the General Counsel were to inform a charging party of his intention to issue a complaint in light of the new Collyer policy and if the parties, including the charging party, were to nonetheless choose to stay in the grievance-arbitration channel, the General Counsel would not issue complaint in that case, but would continue to defer the case under Dubo Manufacturing, 142 NLRB 431. U.S. Postal Service,

already existing problems caused by the crowded trial docket and would result in a further delay of the processing of the cases that are now in that pipeline. Further, this extensive litigation would all be for naught if the Board were to ultimately decide that the new Collyer policy did not apply to the pending cases. The result of this exercise would be that agency resources would have been needlessly expended. In addition, if the General Counsel took the position that the new Collyer policy applied to such cases, a respondent may choose to abort the grievance-arbitration procedure on the grounds that the grievance was not timely filed under the contract. 5/ In cases where the charge is considered meritorious, the charging party would not be harmed by this, since a complaint would be issued and the case would be litigated before the Board. But in cases where the charge is ultimately considered to be without merit, the charging party would be left with no recourse at all. 6/

Conversely, if the General Counsel were of the view that the Board intended for the old Collyer policy to apply to some or all of the cases pending in the Regional Offices, he could decline to issue complaints in these cases and leave the Charging Parties to the grievance-arbitration machinery for their relief. However, if the Board in fact intended that the new Collyer policy would apply to such cases, the General Counsel would have "erroneously" deprived these Charging Parties of Board adjudication and relief.

In view of the foregoing considerations, we earnestly seek the Board's clarification of these matters. 7/ There is precedent for the

5/ In many of the cases, respondent waived its "time rights" under the contract in order to secure a Collyer deferral.

6/ Under the General Counsel's Collyer policy, a case can be deferred under Collyer prior to the ultimate administrative determination as to whether the charge is complaint-worthy.

7/ We do not believe that the Board clearly answered the questions raised herein in its decision. The only possible reference to the matter that we can find is n. 20 of Chairman's Murphy's concurring opinion. The  
(continued)

Board's making a declaration, in a landmark decision announcing a new policy, as to whether that new policy is to apply retroactively or only prospectively. Thus, for example, in Siemons Mailing Service, 122 NLRB 81, the Board expressly said that its new jurisdictional policies would apply "to all future and pending cases." (Emphasis in original) Similarly, in Excelsior Underwear 8/ the Board expressly made a pronouncement as to whether the new policy set forth therein would apply retroactively or only prospectively. It held that the policy "is to be applied prospectively only." 9/ For the reasons set forth supra, we believe it particularly appropriate for the Board to make a similar pronouncement concerning its new Collyer policy, inasmuch as the Board's pronouncement, one way or the other, will vitally affect the processing of a substantial number of cases and the important rights of the parties involved in those cases.

Accordingly, we respectfully request that the Board clarify its decision to indicate whether, and to what extent, the Board's new Collyer policy would apply retroactively to cases in each of the categories described supra. To assist the Board in this endeavor, we set forth below several important considerations which bear on the resolution of these matters.

7/ (continued) Chairman states that she would "honor an arbitrator's award under the Spielberg guidelines even if the award resulted from deferral by our Regional Offices under the prevailing Collyer policy." Conceivably, she is suggesting that a case which has been deferred by a Regional Office under the old Collyer policy should remain in the grievance-arbitration channel under that policy. On the other hand, we note that the footnote and the relevant text are focused on a Spielberg discussion rather than a Collyer discussion. Thus the footnote may simply mean that Spielberg would apply to a case which was deferred by a Regional Office and which has already been decided by an arbitrator. (See n. 3, supra) In any event, the footnote does not clearly and unequivocally answer the question posed herein and it does not distinguish among the various categories of pending cases.

8/ 156 NLRB 1236.

9/ Ibid at n. 5.

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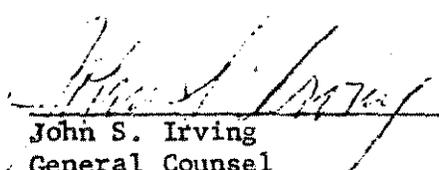
For purposes of analysis, it is useful to separate the cases in category No. 1 from those in category No. 2. The former category includes "fresh" cases in which no Regional decision has been made concerning the merits or concerning the Collyer issue, i.e., the issue of whether the case should be deferred to grievance-arbitration. Thus, in these cases, the parties have not taken any actions pursuant to a Regional decision to defer under Collyer. Accordingly, the application of the new Collyer policy to such cases would not undercut "actions in reliance" based upon official determinations made under then-prevailing principles. These considerations would militate in favor of applying the new Collyer policy to such cases. On the other hand, the Board may deem it equitable and just to apply its newly declared policy only to new cases, i.e., those filed after the declaration of the new policy.

The cases in category No. 2 are in an entirely different posture. These cases have been deferred to grievance-arbitration under the then prevailing Collyer principles. The parties, relying on that deferral, are proceeding through the grievance-arbitration machinery. Indeed, as noted supra, the respondent in many of these cases is proceeding through that machinery even though, because of contractual time limitations on the filing of a grievance, it is not contractually required to do so. In these circumstances, the Board may wish to encourage the parties to remain in the grievance-arbitration channel. The application of the old Collyer policy to these cases would provide such encouragement. A charging party's abandonment of the grievance-arbitration channel would result in a dismissal of the charge, and the respondent's abandonment of that channel would result in the issuance of a complaint in meritorious cases. Thus, the parties would be encouraged to stay where they are. A policy of encouraging the parties to stay where they are may be particularly appropriate for those cases in which the parties have gone relatively far in the grievance-arbitration process.

(See the discussion supra, regarding sub-categories 1, 2, 3 and 4).

On the other hand, given the individual statutory rights involved in these cases, the Board may wish to provide a Board forum for the resolution of these cases irrespective of when they were filed and where they are in the grievance-arbitration procedure.

We have set forth above some of the considerations which, in our view, bear on the issues raised herein. However, for the reasons expressed supra, we reiterate our firm belief that it is for the Board to resolve these issues by clarifying its decision at this time. To leave such questions to future cases would result in a substantial amount of unnecessary litigation. Further, during the substantial period required for Board decisions in the cases in each of the categories, the parties in the many pending cases would be "in limbo" concerning their respective rights. Consequently, we ask that the Board set forth its views concerning whether the old or new Collyer policy would apply to cases in each of the categories and sub-categories listed above. Finally, in view of the large number of pending cases that would be affected by the Board decision, we respectfully request that the Board render its clarifying opinion as soon as possible.

  
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John S. Irving  
General Counsel

April, 1977

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL AMERICAN  
TRANSPORTATION CORPORATION

and

Case 23-CA-5361

PERRY SOAPE, JR., an Individual

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the General Counsel's Motion for Clarification in the above-captioned case has this day been served by first-class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C

this 8th day of April, 1977.