

OFFICE OF THE GENERAL COUNSEL

May 14, 1979

MEMORANDUM 79-36

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

FROM: John S. Irving, General Counsel

SUBJECT: Procedures for Application of the Dubo Policy  
to Pending Charges

I. INTRODUCTION

In General Counsel Memorandum No. 77-58, dated May 25, 1977, I set forth procedures for the handling of Collyer issues in light of General American Transportation Corporation, 228 NLRB No. 102 (herein GAT). Although that memorandum dealt with Collyer issues, it also touched briefly on Dubo issues. With respect to the latter issues, I pointed out that Dubo deferral could be appropriate even in cases which could no longer be deferred under the Collyer policy. 1/ In this regard, I stated: "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." (Emphasis in original.) However, both that memorandum and prior ones focused largely upon the Collyer deferral policy, with only a minimum of procedural guidance being provided for the deferral of cases under the Dubo policy. Given this fact, some diversity may have developed in the application of the Dubo policy in the various Regional Offices. In order to achieve a more uniform handling of these matters, I believe that some refinement of the procedures for the application of the Dubo policy is appropriate at this time. This memorandum will serve that purpose. 2/

II. GENERAL COUNSEL'S DUBO POLICY

Simply stated, the Dubo policy is to defer the further processing of an unfair labor practice case, where the matter in dispute in that case is being processed through the grievance-arbitration machinery, and there is a reasonable chance that use of that machinery will resolve the dispute or set it at rest. In my view, continued maintenance of the Dubo policy is

- 1/ As used herein, the term "deferral" means a suspension in the further processing of the case pending before the Region.
- 2/ This memorandum does not apply to cases which are deferrable under Collyer-GAT.

unquestionably warranted. This policy has the continuing approval of the Board, even though it has been developed largely at the administrative stage in the processing of unfair labor practice charges. It has thus occasioned only infrequent and limited comment by the Board. 3/

In addition to being grounded in precedent, the Dubo policy makes good sense from a practical standpoint. The Dubo policy of deferral for prospective arbitration is premised on substantially the same considerations as the policy which was adopted in Spielberg Manufacturing Co., 112 NLRB 1180, for deferral to arbitration awards already issued. These considerations include the encouragement of the resolution of industrial disputes through grievance-arbitration procedures voluntarily adopted by the parties, an avoidance of the litigation of disputes in a multiplicity of forums, and the conservation of Agency resources. In connection with the last named consideration, it should be noted that the Agency projects that, by fiscal year 1980, its unfair labor practice case intake will exceed 800 per week. In addition, the 1,680 cases pending for hearing before Agency Administrative Law Judges have resulted in cases being scheduled for hearing 4 to 6 months after issuance of complaint.

In view of these considerations which underlie the policy of deferral to arbitral awards already rendered, it obviously makes good sense to hold NLRB processes in abeyance pending an arbitral award, which award can then be reviewed under Spielberg standards. The Board's decision in Dubo is an application of this principle.

### III. PROCEDURES FOR DUBO DEFERRAL

The Collyer guidelines concerning the procedures to be followed for the deferral of charges filed by or on behalf of an individual explicitly provided that the individual should be advised that his/her charge would not be deferred administratively for arbitration if he/she specifically objected to arbitration and did not act inconsistently with such an objection. (Memorandum 73-52, Collyer Deferral of Charges Filed by Individual Employees, issued July 30, 1973; pages 32-26, Revised Guidelines, supra.) As a practical matter, such "individual" charges normally raise matters which are no longer subject to a Collyer-type deferral to the grievance-arbitration machinery. 4/ However, as set forth in General Counsel Memorandum 77-58, these charges are subject to a Dubo-type deferral, provided that the aggrieved individual and the charging union 5/ are voluntarily pursuing the matter through the grievance-arbitration machinery. 6/ Consistent with the

3/ United States Postal Service, 225 NLRB 220; 241 NLRB No. 192. Cf. Youngstown Sheet and Tube Company, 235 NLRB No. 78.

4/ GAT.

5/ I have included the term "charging union" herein to cover those cases where the charging party is the union rather than the aggrieved individual. If the charging party is neither the union, nor the aggrieved individual, nor the agent of the aggrieved individual, the case should be submitted to Advice.

6/ See National Rejectors, 234 NLRB No. 34.

essential condition of voluntarism, a case should be deferred under Dubo only after the individual and the charging union have been given the opportunity to choose between the grievance-arbitration machinery and the Board's processes, and they have voluntarily chosen the former. Conversely, a case should not be deferred where the individual and the charging union have chosen to drop the grievance. If the individual wishes to pursue the grievance but the charging union wishes to drop it, the case should not be deferred, for there would ordinarily no longer be a pending grievance. 7/ Finally, there may be cases where the individual has chosen not to pursue the grievance, but the union continues to process it (e.g. the dispute involving the individual involves others as well, and the union does not wish to separate out an essential part of the overall grievance). The Region should submit such cases to the Division of Advice.

In view of the above, Regional Offices should proceed as follows: At the time when a charge is filed or as soon thereafter as possible, the Region should ask the charging party, the aggrieved individual, and/or the charged party whether the matter in dispute is the subject of a grievance-arbitration proceeding. The Region should also ask to be advised if the matter in dispute subsequently becomes the subject of such a proceeding.

As soon as it is learned that the matter in dispute is the subject of a grievance-arbitration proceeding, the Region should immediately make a determination as to whether the case is deferrable under Dubo. 8/ This determination requires the Region to fully apprise the individual and the charging union of the following options and the consequences of each:

- (1) The individual and the charging union can continue to proceed in the grievance-arbitration machinery. So long as they do so and the grievance continues to be processed, the case pending before the Region will be deferred. Any arbitral award will be reviewed under Spielberg standards. If the award fails to meet such standards, complaint should issue, provided that the charge is determined to be meritorious.
- (2) If the grievance-arbitration procedures is abandoned and the parties do not act inconsistently with such abandonment, the Region would continue to process the charge. However, there can obviously be no guarantee that the charge will

7/ If the individual and the employer continue to process the grievance after the union has dropped it, the case should be deferred.

8/ Where the investigation has already disclosed that the charge is without merit and further investigation is not necessary, the case should be dismissed, absent withdrawal. There is no need or warrant for a Dubo determination in a no-merit case.

be considered meritorious. If it is not meritorious the individual and the charging union may be left with no means of redress at all, since they have abandoned the grievance-arbitration machinery and they would ordinarily be time-barred from reinvoking it.

After the Region has apprised the individual and the charging union of the options and has ascertained their choices, the case should be deferred or not deferred according to the guidelines set forth above. 9/

The foregoing procedures have these advantages:

(1) The individual and the charging union are fully and effectively informed of the options which are available to them and the consequences of the election of each option.

(2) Because the options are presented before a merit determination has been made, the individual and the charging union are encouraged to stay in the grievance-arbitration procedure. For, as noted supra, if they abandon that procedure, and the Region's further investigation discloses that the NLRB charge has no merit, they may then be faced with the prospect of having no means of redress at all.

(3) Since the Dubo determination is made as soon as the Region learns of the pending grievance, the Region will not be faced with the prospect of fully investigating a case, only to have it subsequently deferred and satisfactorily resolved through the grievance-arbitration procedure. 10/

(4) Since the Dubo determination will usually be made before a merit determination, the danger that a Regional determination will influence the arbitral determination

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9/ The Board's decision in Youngstown Sheet and Tube Company, supra, is not inconsistent with these procedures. In that case, the ALJ, whose opinion was adopted by the Board, noted that there was "no particular reason to believe" that the individual had chosen to press his case all the way through the grievance-arbitration machinery. In addition, the ALJ noted that no one had apprised the individual of his options. Accordingly, the ALJ concluded that Dubo deferral was unwarranted. However, under the procedures set forth herein, the Agency clearly informs the individual and the charging union of their options, and the Agency is not left to speculate about their intentions.

10/ There may be cases where the Region may wish to complete the investigation, even if the case has been deferred under Dubo (e.g. to obtain the evidence while it is fresh). The Region should exercise its sound discretion in this regard.

is minimized. 11/

If the Region has questions concerning this memorandum or its application to a particular set of facts, the matter can be discussed with the Assistant General Counsel or submitted to the Division of Advice. 12/



J. S. I.

11/ There will be rare instances where a final determination will be made by the Region in advance of an arbitration. Thus, as noted infra, there may be cases where a determination of no merit is made before the Region learns of the pending grievance. These cases would be dismissed, absent withdrawal.

In addition there may be instances where the Region has found merit to the charge before the Region learns of the pending grievances. These instances should be quite rare. Since most contracts require that grievances be filed within days after the event, and since all parties are under instructions to inform the Region of any grievance, the chances are very slim that the Region would initially hear of a grievance after a full investigation and a determination of merit. However, should this occur and the case has not yet gone to hearing, the Region should defer the further processing of the case so long as the individual and the charging union continue on with the grievance. In this regard, it was noted that the final resolution of the grievance or evidence gleaned from the processing of the grievance may have an impact on whether the prosecution of the case is necessary or warranted.

12/ If the unfair labor practice case involves several closely related matters, only some of which are deferrable under Dubo, the Region should not partially defer. To do so would create separate and piecemeal consideration of these closely related matters. Accordingly, the Region should not defer any of these matters.

On the other hand, if the matters are separable, and merit is found to the non-deferrable part, the Region should submit to Advice the issue of whether there is a procedural impediment to litigating a portion of a case while deferring the remainder.

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