

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 84-5

March 6, 1984

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

FROM: William A. Lubbers, General Counsel

SUBJECT: Guideline Memorandum Concerning
United Technologies Corporation, 268 NLRB No. 83

I. Introduction

In United Technologies, a Board majority (herein referred to as the Board) overruled General American Transportation Corporation, 228 NLRB 808 (herein GAT). Accordingly, the Board will "defer" 1/ cases involving allegations of Section 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2) of the Act. And, of course, it will defer cases involving allegations of Section 8(a)(5) and 8(b)(3) of the Act. However, as discussed herein, it does not appear that the Board intended to change the law of deferral in any other respect. Hence, except for the aforementioned extension of the deferral doctrine to other types of cases, the Region should continue to apply extant principles of substantive law and procedure in this area.

II. Extension of the Deferral Doctrine

As noted, the Board's deferral doctrine will now extend to cases involving the following Sections of the Act: 8(a)(1), 8(a)(3), 8(a)(5), 8(b)(1)(A), 8(b)(2), and 8(b)(3). In addition, the Board has previously deferred cases involving Section 8(b)(1)(B) of the Act. 2/

1/ As used herein, the term "defer" means to hold a case in abeyance while the parties use their grievance-arbitration machinery to resolve their dispute.

2/ Columbia Typographical Union No. 101 (Washington Post Co.), 207 NLRB 831, 85 LRRM 1018 (1973); Baltimore Typographical Union No. 12 (A.S. Abell Co.), 201 NLRB 120, 82 LRRM 1127 (1973); Mailers Union No. 36 (Houston Chronicle), 199 NLRB 804, 81 LRRM 1310 (1972).

Accordingly, the Regions should defer cases involving these sections of the Act, assuming that the case is otherwise deferrable. Cases involving other sections of the Act, and which are otherwise deferrable, should be submitted to Advice. In addition, if the Region believes that injunctive relief is warranted in a case, but the case is otherwise deferrable, the Region should submit the case to Advice.

III. Scope of the Grievance-Arbitration Clause

Under extant principles, an unfair labor practice case can be deferred if the grievance-arbitration provisions of the agreement "clearly encompass" the dispute in that case. 3/ This aspect of the deferral doctrine continues to be viable. It was cited with approval in United Technologies, and it was applied to the facts of that case. 4/ Accordingly, the Region should continue to examine the scope of the grievance-arbitration clause. If, as is typical, the clause covers disputes arising under the contract, the Region must examine the contract to determine if there is a provision which may govern the dispute.

IV. Respondent's Willingness to Arbitrate

The Board has reaffirmed the principle that a respondent seeking deferral must be willing to arbitrate the dispute and must be willing to waive any timeliness provisions of the grievance-arbitration clause. 5/

V. Respondent's Alleged Misconduct

The Board has reaffirmed the principle that deferral would be inappropriate "where the respondent's conduct constitutes a rejection of the principles of collective bargaining." 6/ In this regard, the opinion cites with express approval the above-quoted language from the dissent in GAT. In using that language, the GAT dissenters relied upon the following three cases: Mountain State Construction, 203 NLRB 1085; Joseph T. Ryerson, 199 NLRB 461; and North Shore Publishing, 206 NLRB 42. The first

3/ United Technologies, at pp. 6 and 11.

4/ Ibid. at pp. 6 and 11.

5/ Ibid. at pp. 6, 11, and n. 22.

6/ Ibid. at p. 11.

case involved an allegation that the respondent, inter alia, unlawfully terminated the contract. In these circumstances, the Board viewed this conduct as a "complete rejection of the principles of collective bargaining" and declined to defer. 7/ Thus, if a charge alleges that respondent has unlawfully terminated a contract, the charge would not be deferred.

The other two cases (Ryerson and North Shore) involved an allegation that respondent had engaged in conduct designed to interfere with employee rights to resort to the grievance-arbitration machinery. In those cases, the Board declined to defer. However, in subsequent cases, the Board did not apply this principle mechanistically. Rather, the Board inquired into such matters as whether, notwithstanding the alleged misconduct, there was "a workable and freely resorted to grievance procedure." 8/ In United Technologies, the Board indicated its adherence to these principles 9/, and thus the Region should apply them.

VI. Respondent's History

Under previously established principles, the Board considered the respondent's history of prior violations to determine whether present allegations of misconduct should be deferred. 10/ However, the mere fact that a respondent had previously violated the Act did not necessarily mean that the Board would decline deferral with respect to current allegations. The Board's approach to the problem was set forth in United Aircraft.

We continue to believe that an exploration of the nature of the relationship between the parties is relevant to the question of whether in a particular case we ought or ought not defer contractually resolvable issues to the parties' own machinery. Where the facts show a sufficient degree of hostility, either on the facts of the case at bar alone or in the light of prior unlawful conduct of which the immediate dispute may fairly be said to be simply a continuation, there is serious reason to question whether we ought defer to arbitration.

7/ Mountain States Construction, Ibid.

8/ U.S. Postal Service, 210 NLRB 560. See also United Aircraft, 204 NLRB 879, 880.

9/ United Technologies, n. 21.

10/ United Aircraft, 204 NLRB No. 133.

However, the nature and scope of the acts currently alleged to show such hostility, together with a measure of the current impact of any past such acts, must all be evaluated and then together be weighed against evidence as to the developing or maturing nature of the parties' collective-bargaining relationship and the proven effectiveness (or lack thereof) of the available grievance and arbitration machinery. Upon a totality of those facts, it must then be determined whether the parties' agreed-upon grievance and arbitration machinery can reasonably be relied on to function properly and to resolve the current disputes fairly.

Although the Board did not expressly say in United Technologies that it would adhere to these principles, the opinion contained approving references to United Aircraft. ^{11/} In addition, the GAT dissent, cited with approval in United Technologies, rested heavily on the judicial approval of the Board's decision in United Aircraft. In these circumstances, the Region, in determining the deferral question, should consider the respondent's history and should apply the United Aircraft test. If a Region has substantial doubts as to whether deferral is warranted under the test, it may submit the issue to Advice.

VII. Charges Filed by an Individual Employee

The extension of the deferral doctrine to cases involving allegations of Section 8(a)(1) and (3) and 8(b)(1)(A) and (2) raises the problem of a charge filed by an individual employee.

Where the charge is filed by an individual employee and the case is otherwise deferrable, the Region should defer the case. However, a special problem arises if the union, without settling the grievance, refuses to process the grievance through the steps of the grievance procedure or refuses to take the grievance to arbitration. Assuming that the union's refusal is not unlawful and that the refusal is not motivated solely by a desire to avoid deferral, the Region should remove the case from deferral and resume the processing of the case. ^{12/} This result is required by the operation

^{11/} United Technologies at pp. 8 and n. 21.

^{12/} If the refusal is unlawful or if it was motivated by a desire to avoid deferral, the issue of deferral should be submitted to Advice. With particular respect to the latter point, the Region should be alert to the possibility that the employee and the union may have agreed to have the employee file the charge and to have the union refuse to process the grievance, all in an effort to avoid deferral. In such circumstances, there would be a substantial question as to whether the Region should proceed.

of the Board's deferral procedures. That is, the dispute "has not . . . been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration". ^{13/} Further, since it is the union that refuses to process the grievance, as distinguished from an individual who requests to withdraw it, the charging party is wholly blameless for the failure of the grievance arbitration machinery to resolve the dispute. In these circumstances, the Region should not defer. Assuming that the case is litigated, the Region should argue that a refusal by the Board to entertain the unfair labor practice case would be a denial of the employee's right to seek redress for a statutory wrong, and such denial would be an abdication of the Board's public responsibility to provide an avenue for redressing statutory wrongs.

In addition, even if the union will process the grievance to arbitration, but the interests of the union are adverse to those of the charging party-employee, the Board has stated that it would not defer. ^{14/} Accordingly, the Region should not defer such a case.

VIII. Miscellaneous Matters

In n. 17 of United Technologies, the Board stated that "We simply hold that where contractual arbitration procedures have been invoked voluntarily we shall stay the exercise of the Board's processes in order to permit the parties to give full effect to those procedures." (Emphasis supplied). As stated, the sentence seems to suggest that the Board would not defer a case if a grievance had not been filed. ^{15/} However, the very essence of the deferral doctrine is to require the parties to resort to extant grievance arbitration procedures, and to defer the unfair labor practice case pending the outcome of such procedures. Indeed, in the Collyer case itself, the Board deferred the unfair labor practice case even though no party had invoked the grievance arbitration machinery. Accordingly, we do not believe that the Board intended to permit processing of an otherwise deferrable case simply because the parties had not invoked the grievance arbitration machinery. Rather, in context, the Board's footnote simply made the point that, under its deferral doctrine, Board processes are simply stayed and statutory rights are not diminished.

^{13/} United Technologies, p. 12.

^{14/} United Technologies, at p. 10-11.

^{15/} In United Technologies, a grievance had been filed.

IX. Application of United Technologies

The Region should apply United Technologies to all pending and future cases where the respondent seeks deferral. Accordingly, if the case is deferrable under United Technologies and this memorandum, the Region should apply the procedures that it now uses to accomplish a Collyer deferral. However, if the respondent raises deferral for the first time after the hearing has closed, the Region should oppose such deferral on the ground that the issue was not timely raised. 16/ In such situations, the fact that respondent was operating under the principle of GAT would not privilege the tardy raising of the issue. The respondent could have protected itself, as did the respondent in United Technologies, by raising the contention even though then-current Board law was against such a contention. Moreover, in these situations, since the dispute has been litigated before an ALJ, it would make little practical sense, at that point, to abort the NLRB process and start afresh with a grievance-arbitration proceeding.

X. Conclusion

In United Technologies, the Board held that its deferral doctrine would no longer be limited to cases involving allegations of Section 8(a)(5) and 8(b)(3) of the Act. However, apart from this change, it does not appear that the Board intended to alter deferral principles in other ways. Accordingly, except for the fact that these principles will now be applied not only in Section 8(a)(5)-8(b)(3) cases but in other cases as well, the Regions should continue to apply deferral principles as they stood prior to United Technologies. This memorandum is not intended to be a compendium of all such principles. If a case raises novel or complex questions, under these principles or under United Technologies, the case should be submitted to Advice. 17/

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16/ Cutten Supermarket, 220 NLRB 507; Asbestos Workers (Rosendahl, Inc.), 212 NLRB 913; Alameda County Association, 255 NLRB 603.

17/ Since United Technologies did not mention Dubo Mfg. Corp., 142 NLRB 431, the principles set forth in that case should still be applied. Thus, if a case is not deferrable under the principles set forth in United Technologies, and herein, but the parties are voluntarily utilizing the grievance-arbitration machinery with respect to that dispute, the Region can defer the case so long as the parties continue to utilize such machinery.