Federal Labor Laws

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XXXV. Arbitration and the Board – NLRB Deferral Doctrines

A. The Relationship between Contract Violations and the Duty to Bargain

1. While the National Labor Relations Board does not have the specific authority to enforce collective bargaining agreements, the legal obligations under Taft-Hartley and the contractual obligations under a collective bargaining agreement are often directly related.

2. It is clear that the Board has the power to interpret a collective bargaining agreement, if interpretation is necessary to determine whether the employer has changed conditions of work unilaterally in violation of its duty to bargain.[1]

3. The Board does not have exclusive jurisdiction over disputes which fall within the purview of the unfair labor practice sections. If an employer action constitutes an unfair labor practice and a contractual violation, state courts still retain jurisdiction over the contract violation under Section 301.[2]

4. If there is an actual conflict between an arbitrator's award and a ruling of the National Labor Relations Board, the ruling of the Board takes precedence.[3] However, the number of cases in which this might occur is limited.

    a. In most cases, an arbitrator is asked to determine specific contractual issues, not unfair labor practice or representation issues.

    b. Logically, the contractual issues and the legal issues should be kept separate. The Board may have to interpret a contract to enforce the unfair labor practice sections of the law, but it does not enforce the underlying contractual rights.

    c. Similarly, the arbitrator should look exclusively to the contract to determine the issues raised in arbitration. While there may be legal implications in a grievance case, it is not the role of the arbitrator to enforce legal rights.

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[1] NLRB v. C & C Plywood Corp., 385 U.S. 421, 64 LRRM (1967).

[2] Smith v. Evening News Association, 371 U.S. 195, 51 LRRM 2646 (1962).

[3] Carey v. Westinghouse Electric Corp., 375 U.S. 261, 55 LRRM 2042 (1964).

5. Since many cases involve factual situations which could lead to both unfair labor practice charges and to grievances under a collective bargaining agreement, the Board has developed a series of policies under which it accepts the private resolution of the underlying dispute as dispositive of the unfair labor practice issue.

B. Board Deferral Doctrines

1. The origin of the deferral doctrines of the NLRB is a 1955 case[4] in which an issue involved both an alleged contract violation and an unfair labor practice. The Board established a set of criteria which it has since used, with some modifications, to determine whether it should accept and recognized the award of an arbitrator as determinative of the unfair labor practice issue. The *Spielberg* criteria are:

    a. The proceedings in arbitration must appear to be fair and regular,

    b. The parties must agree to be bound by the decision of the arbitrator,

    c. The decision of the arbitrator must not be "clearly repugnant" to the purposes and policies of the Act, and

    d. The arbitrator must consider and decide the unfair labor practice issue.[5]

2. In a related case, the Board decided that if a grievance and an unfair labor practice charge have both been filed, but the grievance has not yet been arbitrated, the Board should withhold action on the unfair labor practice until the grievance procedure is exhausted.[6]

3. The major controversy surrounding the deferral doctrines center on the *Collyer* doctrine[7] under which the Board defers to the existence of a grievance procedure.

    a. Under *Collyer* deferral, a union is expected to use its grievance procedure to resolve the unfair labor practice issues. The Board defers to the existence of a grievance procedure rather than to the results achieved in the voluntary mechanisms.

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[4] Spielberg Manufacturing Co., 112 NLRB 1080, 36 LRRM 1152 (1955).

[5] This fourth criteria was not originally mentioned in *Spielberg*, but was articluated in later cases, i.e., Raytheon Co., 140 NLRB 883, 52 LRRM 1129 (1963).

[6] Dubo Manufacturing Co., 142 NLRB 812, 53 LRRM 1070 (1963).

[7] Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1967).

b. The Collyer doctrine has been severely criticized as an abandonment of the Board's administrative obligation to enforce the law. While the *Dubo* and *Spielberg* doctrines allow deferral, a union seeking to pursue its potential remedies through the Board is not prevented from doing so. Under *Collyer*, the union is forced to use the contractual remedy.

4. In recent developments surrounding the deferral doctrine, the categories of case that are subject to the *Collyer* doctrine have been expanded. In a 1984 case, the Board took the position that virtually all potential Section 8(a)(1),(3) and (5) cases which are subject to a grievance procedure are to be deferred, unless the interests of the member and the union are clearly divergent or unless the unfair labor practice goes to the heart of the collective bargaining relationship.[8]

5. During the mid-1980's, the Board has also revised the interpretation of the *Spielberg* criteria in two significant cases.

   a. In the first case, the Board revised the fourth *Spielberg* criteria for deferral to an arbitrator's award.[9] In *Olin*, the Board ruled that the criterion would be met if the grievance was based on facts which were substantially similar to those underlying the unfair labor practice, whether the arbitrator specifically addressed the unfair labor practice issue or not.

   b. In its 1985 *Alpha Beta* case,[10] the Board also weakened the third Spielberg criteria, indicating that the arbitrator's award will be accepted as long as it is not "palpably wrong," giving credence to awards which go much farther than the previous standard.

C. The Relationship between Board Deferral and the Judicial Preference for Arbitration

1. The rationale behind judicial preference for arbitration of labor disputes is substantially different than the Board's defense of its deferral doctrines. While the courts have recognized that arbitrators may have special expertise in resolving labor disputes that judges do not share, the same logic does not apply to the deferral doctrine. Theoretically, individuals appointed to serve as members of the National Labor Relations Board should have some special knowledge of labor relations and the collective bargaining process.

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[8] United Technologies Corp., 268 NLRB 557, 115 LRRM 1049 (1984).

[9] Olin Corp., 268 NLRB 573, 115 LRRM 1056 (1984).

[10] Alpha Beta Co., 273 NLRB 1546, 118 LRRM 1202 (1985).

2. The issue before a court in a § 301 suit and before an arbitrator in an arbitration case are identical. Each tribunal is charged with enforcement of a collective bargaining agreement. However, the issue before the National Labor Relations Board is substantively different.

3. Many of the relative advantages of arbitration over litigation do not apply to the comparison of arbitration and adjudication before the NLRB.

   a. While arbitration is relatively inexpensive if compared to litigation, it is very costly if compared to the costs of pursuing an unfair labor practice case.

   b. Under the deferral doctrines, particularly the *Collyer* doctrine, the union is seriously hampered strategically. It must pursue the grievance issue even if the appropriate issue fits better under the Board procedures.

   c. While arbitration is a less time consuming process than litigation, it may or may not be quicker than adjudication.

   d. It is easier for an employer to subtly undermine a union through misuse of the negotiated grievance procedure. If the union has no remedy for efficient correction of on the job disputes other than a distressed grievance procedure, the legal as well as the contractual rights of the membership are adversely affected.

D. Comparative Notes: Board Deferral and Remedies under Other Laws

1. The deferral doctrines of the National Labor Relations Board have not been copied by other federal agencies. It is possible for a union or a member to pursue simultaneously violations of the collective bargaining agreement and other federal labor related laws, such as OSHA and Title VII.

2. While the courts may look at an arbitration award over an employment discrimination case or a safety and health case as persuasive, there is no blanket policy forcing a union to pursue arbitration as the only available remedy for other legal violations.[11]

[11] Alexander v. Gardner-Denver Co., 415 U.S. 36, 7 FEP 81 (1974).