Union Waiver of Employee Rights Under the NLRA: Part II A Fresh Approach to Board Deferral† to Arbitration*

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The author applies the non-waiver principle developed in Part I of this article to Board deferral to arbitration. Former Chairman Murphy's concurring opinion in General American Transportation Corp. *is evaluated in light of the non-waiver principle. The author analyzes the issues not properly resolved in that opinion, while demonstrating its basic insight.*

In Part I of this essay,[1] I explored the implications of the Supreme Court's holding in *NLRB v. Magnavox Co.*[2] that exclusive bargaining agents do not have the authority to waive certain rights protected by section 7 of the National Labor Relations Act.[3] Drawing on *Magnavox*, I attempted to formulate a comprehensive non-waiver principle delineating those section 7 rights which exclusive bargaining agents should not have authority to sacrifice in the course of discharging their collective bargaining responsibilities.[4]

I also noted that perhaps the most significant citation of the *Magnavox* decision to date appeared in then-Board Chairman Murphy's swing-vote opinion in *General American Transportation Corp.*

† "Deferral" is used to refer both to the *Collyer* doctrine, and in a broader sense, to the *Spielberg* doctrine, more properly described as a doctrine of deference.

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1. Harper, *Union Waiver of Employee Rights Under the NLRA: Part I*, 4 INDUS. REL. L.J. 335 (1981).

2. 415 U.S. 322 (1974).

3. 29 U.S.C. § 157 (1976).

4. The principle would insulate from union waiver the following employee rights: to communicate with each other concerning the identity and strategies of their bargaining agent, to communicate with their employer concerning the identity of their bargaining agent, to associate with, lead or support a bargaining agent, to act to achieve employer recognition and acceptance of a bargaining agent, to act to obtain better terms and conditions of employment from sources outside a bargaining relationship, to assist individuals outside the protected employees' bargaining unit, and to act to protect and rectify the denial of other non-waivable rights.

(*G.A.T.*)[5] concerning Board deferral to arbitration. In this essay, I shall develop the insight of Chairman Murphy's opinion that the *Magnavox* decision may establish statutory limits on the Board's discretion to defer.

I

THE DEVELOPMENT OF BOARD DEFERRAL TO ARBITRATION

Collective agreements negotiated by employers and unions under the authority of the National Labor Relations Act (NLRA or the Act) typically include broad arbitration clauses which provide that a neutral private arbitrator shall resolve disputes arising under the agreement. While unfair labor practice charges are not generally within the ambit of arbitration clauses, arbitrators often do have authority to resolve the pivotal issues underlying many charges. For instance, resolution of a charge that an employer has violated section 8(a)(5) of the Act[6] by unilaterally changing a condition of employment during the term of the agreement may turn on whether the employer's action was authorized by the agreement. Decision on this issue involves an arbitrator's primary responsibility: interpretation of the contract. Similarly, resolution of a charge that an employer has violated section 8(a)(3) of the Act[7] by discharging an employee for his union activity may depend on whether the employer was motivated by a legitimate business justification for the discharge. Because most collective agreements protect employees from being discharged without just cause, an arbitrator also typically has authority to determine whether the employer discharged an employee for a legitimate business reason.

The Board has long recognized that the jurisdiction of private arbitrators may overlap its own jurisdiction to resolve unfair labor practice charges. In a landmark 1955 case, *Spielberg Manufacturing Co.*,[8] the Board first articulated the three conditions under which it would dismiss unfair labor practice changes in deference to an arbitration decision: first, all parties to the arbitration must have "agreed to be bound"; second, proceedings must have been "fair and regular"; and third, the decision of the arbitrator must not have been "clearly repugnant to the purposes and policies of the Act."[9] In a 1963 decision, *Dubo Manufacturing Corp.*,[10] the Board held that it would await completion

5. 228 N.L.R.B. 808, 810, 94 L.R.R.M. 1483, 1486 (1977). *See also* Chairman Murphy's opinion in Roy Robinson, Inc., 228 N.L.R.B. 828, 831, 94 L.R.R.M. 1474, 1477 (1977).

6. 29 U.S.C. § 158(a)(5) (1976).

7. 29 U.S.C. § 158(a)(3) (1976).

8. 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).

9. *Id.* at 1082, 36 L.R.R.M. at 1153.

10. 142 N.L.R.B. 431, 53 L.R.R.M. 1070 (1963).

of pending arbitration proceedings before resolving unfair labor practice charges which might turn on an arbitration decision. Then in a 1971 opinion, *Collyer Insulated Wire*,[11] the Board announced that it would begin consistently to defer decisions on section 8(a)(5) unfair labor practice charges even before arbitration proceedings have commenced.

The Board expanded the implications of *Collyer* and *Spielberg* during the first two-thirds of the seventies. For instance, in *National Radio Co.*[12] the Board extended pre-arbitral deferral to section 8(a)(3) discriminatory discharge cases. Furthermore, in 1974 in *Electronics Reproduction Service Corp.*[13] the Board reversed earlier decisions[14] and held that when reviewing arbitration decisions under *Spielberg*, it would apply a kind of collateral estoppel against grievants who fail to present their entire case to the arbitrator. A grievant in a discipline or

11. 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971). The Board found deferral appropriate in *Collyer* because no claim was made of employer enmity towards the union, the employer asserted its willingness to resort to arbitration under an arbitration clause broad enough to encompass the dispute, and the contract was at the center of the dispute. *Id.* at 842, 77 L.R.R.M. at 1936-37. The Board retained jurisdiction to review the arbitrator's decision under its *Spielberg* standards. *Id.*, 77 L.R.R.M. at 1937. Before *Collyer*, the Board had occasionally deferred to an arbitration process which had not yet commenced, *e.g.*, Consolidated Aircraft Corp., 47 N.L.R.B. 694, 12 L.R.R.M. 44 (1943), *modified*, 141 F.2d 785, 14 L.R.R.M. 553 (9th Cir. 1944), but generally the Board asserted jurisdiction even if the parties might have settled their dispute before a private arbitrator.

Collyer was decided after two sets of Supreme Court decisions stressed the importance of private arbitration to national labor policy. First, in 1960 the famous *Steelworker Trilogy* restricted the authority of federal and state courts to limit arbitrators' jurisdiction, United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), or review their decisions, United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593 (1960). In these decisions, the Court stressed the value of peaceful resolution of disputes by neutral experts chosen freely by the parties. 363 U.S. at 578-81. The Court also emphasized the pronouncement of section 203(d) of the Labor Management Relations Act that "adjustment by a method agreed upon by the parties is declared to be the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . ." 29 U.S.C. § 173(d) (1976).

In the sixties the Supreme Court also made clear that overlapping jurisdictions prevented neither the Board nor arbitrators from deciding issues within their respective authorities. NLRB v. Acme Indus. Co., 385 U.S. 432 (1967) (the Board may adjudicate unfair labor practice charges notwithstanding availability of arbitration); NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967) (the Board has authority to interpret collective bargaining agreement when resolving unfair labor practice charge); Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964) (holding arbitrator's jurisdiction not preempted by Board's jurisdiction); Smith v. Evening News Ass'n, 371 U.S. 195 (1962) (conduct violative of NLRA can also be prosecuted as a contract breach). *See generally* Sovern, *Section 301 and the Primary Jurisdiction of the N.L.R.B.*, 76 HARV. L. REV. 529 (1963). Furthermore, in these decisions the Court noted with apparent approval the Board's *Spielberg* policy of deferring to previously rendered arbitration awards. *E.g.*, NLRB v. C & C Plywood Corp., 385 U.S. at 426; Carey v. Westinghouse Elec. Co., 375 U.S. at 270-71.

12. 198 N.L.R.B. 527, 80 L.R.R.M. 1718 (1972).

13. 213 N.L.R.B. 758, 87 L.R.R.M. 1211 (1974).

14. *E.g.*, Yourga Trucking, 197 N.L.R.B. 928, 80 L.R.R.M. 1498 (1972); Airco Indus. Gases, 195 N.L.R.B. 676, 79 L.R.R.M. 1467 (1972).

discharge case would not be allowed to divide the case by reserving the antiunion motivation issue for resolution by the Board. Gradually, the Board also seemed to loosen the *Spielberg* standard for declining to follow decisions clearly repugnant to the Act, in some cases refusing to overturn awards which the Board almost certainly would have decided differently *de novo*.[15]

In the last few years, however, Board deference to arbitration has ebbed. After mandates from two circuit courts[16] and several preliminary soundings of its own,[17] the Board in *Suburban Motor Freight*[18] expressly rejected the *Electronics Reproduction* collateral estoppel rule. The Board also seems to be applying the *Spielberg* repugnant-to-the-Act review standard more strictly.[19]

However, the Board's most significant retreat from deferral to private arbitration is its decision in *General American Transportation (G.A.T.)*[20] not to require invocation of unused, but available arbitration processes by grievants bringing unfair labor practice charges pursuant to sections 8(a)(1), 8(a)(3), 8(b)(1)(A) and 8(b)(2) of the Act, rather than pursuant to sections 8(a)(5) and 8(b)(3). *G.A.T.* was decided by a sharply divided Board. Two members, Fanning and Jenkins, adhered to their long-standing and consistent opposition to *Collyer* and any pre-arbitral deferral.[21] Members Penello and Walther rejected any retrenchment from the broad deferral of all types of unfair labor practice charges which the Board adopted in *National Radio*.[22] The line between categories of unfair labor practice charges was drawn in the critical swing-vote opinion of then-Chairman Murphy.[23]

Chairman Murphy distinguished sections 8(a)(5) and 8(b)(3) re-

15. *E.g.*, Valley Ford Sales, Inc., 211 N.L.R.B. 834, 86 L.R.R.M. 1407 (1974), *petition for review denied*, 530 F.2d 849 (9th Cir. 1976).

16. Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977); Banyard v. NLRB, 505 F.2d 342 (D.C. Cir. 1974).

17. *E.g.*, United States Postal Service, 245 N.L.R.B. 901, 102 L.R.R.M. 1522 (1979); Max Factor & Co., 239 N.L.R.B. 804, 100 L.R.R.M. 1023 (1978), *enforced*, 640 F.2d 197 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 2314 (1981); Gimbel Bros., Inc., 233 N.L.R.B. 1235, 97 L.R.R.M. 1091 1977); United Stanford Employees Local 680, 232 N.L.R.B. 326, 97 L.R.R.M. 1186 (1977), *enforced*, 601 F.2d 980 (9th Cir. 1979).

18. 247 N.L.R.B. No. 2, 103 L.R.R.M. 1113 (Jan. 8, 1980).

19. *E.g.*, Babcock & Wilcox Co., 249 N.L.R.B. 739, 104 L.R.R.M. 1199 (1980); Sea-Land Serv., Inc., 240 N.L.R.B. 1146, 100 L.R.R.M. 1406 (1979); Douglas Aircraft Co., 234 N.L.R.B. 578, 97 L.R.R.M. 1242 (1978), *enforcement denied*, 609 F.2d 352 (9th Cir. 1979). In addition, the Board may have begun to look more closely at the fairness of arbitration proceedings before deferring to the decisions they produce. *E.g.*, Brown Co., 243 N.L.R.B. 769, 101 L.R.R.M. 1608 (1979) (refusing to defer to award of Joint Management Labor Committee because of membership of interested labor and employee representatives on the Committee).

20. 228 N.L.R.B. 808, 94 L.R.R.M. 1483 (1977).

21. *Id.*

22. *Id.* at 813, 94 L.R.R.M. at 1490-91.

23. *Id.* at 810, 94 L.R.R.M. at 1486.

fusal-to-bargain charges from sections 8(a)(1), 8(a)(3), 8(b)(1)(A) and 8(b)(2) charges. She asserted that the former involve disputes "principally between the contracting parties—the employer and the unions," while the latter involve disputes between the individual employees and either the employer or the union.[24] She further stressed that violations of sections 8(a)(1), 8(a)(3), 8(b)(1)(A) and 8(b)(2) involve interference with individual section 7 rights, which she characterized "as public rights enforceable by governmental rather than private action,"[25] as contrasted with the private contractual rights which she suggested are at issue in most section 8(a)(5) and section 8(b)(3) cases.[26]

The most significant and insightful aspect of Chairman Murphy's *G.A.T.* opinion was her recognition not only that certain statutory rights may not lawfully be stripped from employees by agreements between unions and employers, but also that Board deferral to private arbitration could effect the same unlawful result.[27] Indeed, Chairman Murphy cited *Magnavox* for the broad claim that *no* individual rights may be waived by a union,[28] emphasizing that the Act's encouragement of collective bargaining must rest on its protection of employee freedom of association.[29] She also stated, however, that she would continue to support deferral under *Spielberg* to an already rendered arbitration award when "all the parties, including the affected employee, have voluntarily submitted their disputes to the arbitrator."[30]

Chairman Murphy's opinion fashions the beginnings of a non-waiver principle to limit the Board's discretion to defer to arbitration. Closer analysis of various unfair labor practice charges in terms of the more refined non-waiver principle developed in my previous essay should clarify these statutory limits.

II
REFINEMENT OF CHAIRMAN MURPHY'S *G.A.T.* OPINION

A. The Insight of the Opinion

Chairman Murphy correctly assumed that Board deferral to private arbitration permits an erosion of the section 7 rights protected by

24. *Id.*

25. *Id.* at 812, 94 L.R.R.M. at 1487.

26. *Id.* at 810, 94 L.R.R.M. at 1487. Chairman Murphy had occasion to elaborate her distinction of the rights involved in a section 8(a)(5) dispute in a companion case to *G.A.T.*, Roy Robinson, Inc., 228 N.L.R.B. 828, 831, 94 L.R.R.M. 1474, 1477-78 (1977).

27. 228 N.L.R.B. at 812, 94 L.R.R.M. at 1487-88.

28. *Id.*

29. *Id.* at 811-12, 94 L.R.R.M. at 1487, *citing* Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

30. 228 N.L.R.B. at 813, 94 L.R.R.M. at 1488.

sections 8 and 10 of the Act. Provisions of section 8 declare particular employer and union practices illegal because they obstruct protected employee activities, while section 10 provides means by which the Board can restrain violations of section 8. Any Board decision not to invoke the section 10 processes diminishes, to some extent, the section 7 rights. Clearly Board deferral to arbitration constitutes a decision not to utilize section 10 processes in particular circumstances and therefore burdens the exercise of statutory rights. At the least, the Board's *Collyer* doctrine requires complainants to proceed through a lengthy[31] and expensive[32] arbitration adjudication before obtaining any consideration of their charge by the Board.

Moreover, even after the delay and expense of arbitration, complainants do not obtain *de novo* review of an arbitral decision from the Board. However strictly the Board applies the *Spielberg* "not clearly repugnant to the Act" standard of review,[33] it inevitably permits some unlawful restraints of protected employee activity to go unremedied because of deferral. The "clearly repugnant" standard probably permits Board acceptance of arbitration decisions based on interpretations of the Act different from the Board's own, as well as decisions based on a view of the facts of a controversy which the Board would not have shared after a more thorough hearing before an administrative law judge.[34]

Board acceptance of this erosion seems to rest on a premise that its protection is at least partially waived by unions through the invocation (*Spielberg*) if not the very establishment (*Collyer*) of a private dispute resolution process.[35] The Board proponents of deferral have defended the policy repeatedly as forcing the union "to live up to its agree-

31. While the Board may take longer to resolve unfair labor practice disputes than do arbitrators, *G.A.T.*, 228 N.L.R.B. at 819, 94 L.R.R.M. at 1494 (members Penello and Walther, dissenting), the *Collyer* doctrine delays Board consideration of the unfair labor practice charge. The Court has recognized that procedural delay dilutes statutory rights. NLRB v. C & C Plywood Corp., 385 U.S. 421, 429-30 (1967). In NLRB v. Marine & Shipbuilding Workers, 391 U.S. 418 (1968), the Court held that a union could not require members to spend time exhausting internal union remedies before carrying grievances against the union to the Board. *Id.* at 428. *See* note 103 *infra*.

32. *See* FEDERAL MEDIATION AND CONCILIATION SERVICE ANNUAL REPORT 43 (1978).

33. *See* text accompanying note 9 *supra*.

34. *Cf.* Alexander v. Gardner-Denver Co., 415 U.S. 36, 57-58 (1974) ("[T]he fact finding process in arbitration usually is not equivalent to judicial fact finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; the right and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. . . .").

35. *See* Note, *Labor Law—National Labor Relations Act—NLRB Deferral to Arbitration of Unfair Labor Practice Charge Not Allowed Unless Issue within Competence of the Arbitrator and Clearly Decided*—Banyard v. NLRB, 87 L.R.R.M. 2001 (D.C. Cir., Aug. 14, 1974), 88 HARV. L. REV. 804, 808-09 (1975) [hereinafter cited as Harvard Note].

ment"[36] or as "merely giving full effect" to the parties "own voluntary agreements to submit . . . disputes to arbitration, rather than permitting such agreements to be sidestepped . . ."[37]

When the unfair labor practice complaint alleges the violation of waivable rights, it is sensible to interpret voluntary arbitration agreements as partial waivers of Board protection. However, union agreements to accept some sacrifice of Board protection of employee rights can only be effective if the union has authority to waive these rights. The Supreme Court recognized this fully in *Alexander v. Gardner-Denver Co.*,[38] decided the same term as *Magnavox*. In *Gardner-Denver*, the Court held that an employee's right, under Title VII of the Civil Rights Act of 1964,[39] to a federal district court trial *de novo* of a discrimination charge was not "foreclosed by prior submission of his claim to final arbitration under the non-discrimination clause of a collective bargaining agreement."[40] The *Gardner-Denver* Court expressly rejected an argument that a union agreement to resolve discrimination complaints through an arbitration system waives employee Title VII rights. The Court did not assert that a union may never waive employee rights; indeed, it specifically noted that the right to strike may at least sometimes be waived. Instead, the Court distinguished Title VII rights from rights related to "majoritarian processes" and "the processes of bargaining."[41]

Similarly, last term in *Barrentine v. Arkansas Best Freight System*,[42] the Court rejected a claim that a federal court with jurisdiction to protect Fair Labor Standards Act (FLSA)[43] rights should simply accept the results of a contractual dispute resolution procedure. The Court stressed that prior decisions interpreting the FLSA "emphasized the non-waivable nature of an individual employee's rights to a minimum wage and to overtime pay" under the FLSA.[44] The Court concluded that since these statutory rights were not waivable, their

36. G.A.T., 228 N.L.R.B. at 818, 94 L.R.R.M. at 1490 (members Penello and Walther, dissenting).

37. Collyer Insulated Wire, 192 N.L.R.B. at 842, 77 L.R.R.M. at 1937. *Compare id.* at 850, 852, 77 L.R.R.M. at 1944-45 (member Jenkins, dissenting) (arguing that union should not be able to waive employee statutory rights).

38. 415 U.S. 36 (1974).

39. 42 U.S.C. §§ 2000e-2000e-17 (1976).

40. 415 U.S. at 38.

41. *Id.* at 51. The Court's finding that Title VII rights are non-waivable was unquestionably correct. *See* Harper, *supra* note 1, at 347 n.51. Congress did not intend that the rights of women or certain ethnic minorities to equitable employer treatment could be sacrificed to collective improvement in the conditions of employment. Even absent Title VII, such a sacrifice would violate the union's duty of fair representation. *See* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

42. 450 U.S. 728 (1981).

43. 29 U.S.C. §§ 201-219 (1976).

44. 450 U.S. at 739-41.

protection through the judicial process established by the Act could not be compromised by collective bargaining agreements.[45]

The message of *Gardner-Denver* and *Barrentine* is that deferral is appropriate only when the union has authority to waive all the allegedly violated rights. If the right allegedly violated is non-waivable, the Board has no statutory discretion to defer to private arbitration.

The Board cannot base its authority to defer charges of violations of non-waivable rights on its accepted discretion to balance competing employer and public interests when defining substantive employee rights.[46] One might argue that Board deferral is an appropriate accommodation of public and employer interests in stable collective bargaining regardless of any union intent to waive Board protection of employee rights. However, the non-waiver principle itself delineates how far individual employee rights may be sacrificed to interests in stable bargaining. Therefore, even if the Board does have discretion to defer to arbitration in the face of a union's explicit disclaimer of deferral in a collective bargaining agreement,[47] that discretion does not extend to rights which the union would not have authority to waive.

Nor can the Board rely on its general prosecutorial discretion as authority to defer charges alleging violations of non-waivable rights. While the Board may consider an employee's remedial alternatives and the significance of the charge in order to allocate limited enforcement resources, a blanket policy against full and immediate consideration of any arbitrable charge effectively delegates prosecutorial discretion to unions which should have no control over non-waivable rights or their protection.

B. The Spielberg/Collyer *Distinction*

While Chairman Murphy in her *G.A.T.* opinion correctly assumed that the Board's authority to defer is as limited as union authority to waive employee statutory rights, this premise alone does not support the sharp lines she drew between post-arbitral (*Spielberg*) and pre-arbitral (*Collyer*) deferral. Contrary to Chairman Murphy's *G.A.T.* opinion, the Board's statutory discretion to apply its *Spielberg* guidelines to an arbitration decision is only co-extensive with its discretion to defer,

45. *Id.* at 745. Employee rights created by other statutes, such as the Occupational Safety and Health Act, 29 U.S.C. § 651-678 (1976), should similarly not be waivable. *See* Feller, *The Impact of External Law Upon Labor Arbitration*, in THE FUTURE OF LABOR ARBITRATION IN AMERICA 83-112 (1976).

46. *See, e.g.*, Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

47. Arguably, the Board lacks discretion absent union waiver to compromise to employer or general social interests its protection of even waivable rights which already accomodate a balance of those interests.

as in *Collyer*, to an unused arbitration process.[48]

This conclusion is strongly suggested by the Supreme Court's *Gardner-Denver* and *Barrentine* opinions. These decisions addressed how federal courts, the primary forum chosen by Congress for the adjudication of Title VII and FLSA violations, should treat *completed* private arbitration decisions. *Gardner-Denver* and *Barrentine* held that *de novo* consideration of arbitration awards by the primary forum is necessary. Less stringent review, the Court recognized, would dilute rights granted by Congress and could not be justified if the rights were not waivable by the private parties who created the arbitration process.

Perhaps aware of the implications of *Gardner-Denver*, Chairman Murphy indicated in her *G.A.T.* opinion that post-arbitration deference under the *Spielberg* guidelines is appropriate "where all of the parties, *including the affected employee*, have voluntarily submitted their dispute to the arbitrators."[49] Chairman Murphy thereby suggested that although a union may not waive an employee's right, an employee may waive his or her own right and, in fact, does so by invoking the arbitration process. Consistent with this suggestion, the General Counsel directed the Board's Regional Offices to continue to apply the *Dubo* decision broadly[50] to defer charges, during an already commenced grievance-arbitration process, which would not be deferred under *G.A.T.* prior to invocation of the arbitration process.[51]

There are several reasons why individual employee waiver does not justify the deferral under *Spielberg* and *Dubo* of unfair labor practice charges involving rights not waivable by a bargaining representative. First, few, if any, individual employees consciously waive their statutory rights when they invoke an arbitration process. Almost every

48. Chairman Murphy's distinction of *Spielberg* deference from *Collyer* deferral commanded the allegiance of a majority of the *G.A.T.* Board. *See, e.g.*, Chemical Leaman Tank Lines, Inc., 251 N.L.R.B. 1058, 105 L.R.R.M. 1276 (1980); Atlantic Steel Co., 245 N.L.R.B. 814, 102 L.R.R.M. 1247 (1979); United States Postal Serv., 241 N.L.R.B. 1253, 101 L.R.R.M. 1320 (1979); Kansas City Star Co., 236 N.L.R.B. 866, 98 L.R.R.M. 1320 (1978) (cases after *G.A.T.* applying *Spielberg* review standards to section 8(a)(1) and 8(a)(3) charges). *But see* Max Factor & Co., 239 N.L.R.B. 804, 100 L.R.R.M. 1023 (1978), *enforced*, 640 F.2d 197 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 2314 (1981) (three-member panel including Chairman Murphy holding *Spielberg* inapplicable to section 8(a)(3) charges because arbitration hearing held and decision rendered after hearing and decision of administrative law judge); Timpte, Inc., 233 N.L.R.B. 1218, 97 L.R.R.M. 1545 (1977), *enforcement denied*, 590 F.2d 871 (10th Cir. 1979) (three-member panel including Chairman Murphy refusing after initial Board decision to reopen case record to include arbitrator's decision, in part because conduct allegedly violated sections 8(a)(1) and 8(a)(3)).

49. 228 N.L.R.B. at 813, 94 L.R.R.M. at 1488 (emphasis added).

50. *See* text accompanying note 10 *supra*.

51. *N.L.R.B. Deferral to Grievance Procedures under DUBO*, 4 LAB. L. REP. (CCH) ¶ 9195 (1981). The General Counsel more recently stated that *Dubo* applies even when the "aggrieved individual" has withdrawn from the arbitration process. However, the Counsel stressed that if the union loses such cases in arbitration, the Board would not defer to the arbitration award under *Spielberg*. *See* Memorandum of the NLRB General Counsel, *reprinted in id.* at ¶ 9262.

employee who presses a grievance toward arbitration would be very surprised to learn that assertion of contractual rights will limit protection of any related statutory rights. Any claim that employees voluntarily waive their statutory rights by invoking arbitration thus rests on constructive fictional waiver[52] and ultimately is not compelling.[53]

Moreover, application of *Spielberg* to charges involving non-waivable rights would be inappropriate even if employees were apprised of and fully understood its implications before they agreed to commence arbitration. *Spielberg* forces an employee to give up part of his statutory protection as a condition of invoking a contractual arbitration process. This is true regardless of the intent and desire of the framers of that process to condition access to arbitration on the employee's willingness to give up an independent right. Justifying *Spielberg* as employee waiver of statutory rights thus requires the Board to admit that it effectively forces a particular kind of conditional arbitration clause on all unions in violation of the spirit of the non-concession clause of section 8(d) of the Act[54] and the principles of free contracting which the Court has often asserted underlie the NLRA.[55] Furthermore, it is questionable whether a union which wished to condition access to an arbi-

52. The Board has not conditioned *Spielberg* deference on a complainant employee's actual invocation of or even participation in the arbitration process. *See* International Harvester Co., 138 N.L.R.B. 923, 51 L.R.R.M. 1155 (1962), *enforced sub nom.* Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964), involving deference to an arbitration process of which the employee was not even notified. *But see* Memorandum of the NLRB General Counsel, note 51 *supra* (suggesting the Board will not defer when the arbitration grievant, who may not be the Board complainant, has withdrawn from arbitration).

53. *Cf.* NLRB v. Granite State Joint Board Local 1029, 409 U.S. 213 (1972) (holding union violated section 8(b)(1)(A) by fining strike breakers who had resigned from membership before returning to work, and rejecting view that they had waived section 7 rights by voting for strike and for fines before resignation).

It may be more reasonable to find waiver when the employee accepts a settlement agreement with an employer during an arbitration process. *See* Roadway Express, Inc. v. NLRB, 647 F.2d 415 (4th Cir. 1981). However, in my view, even in such a settlement agreement, any sacrifice of statutory rights should be express to constitute a waiver. *See generally* Roadway Express, Inc., 250 N.L.R.B. 393, 104 L.R.R.M. 1349 (1980), *enforcement denied*, 647 F.2d 415 (4th Cir. 1981).

54. The obligation to bargain collectively "does not compel either party to agree to a proposal or require . . . the making of a concession. . . ." 29 U.S.C. § 158(d) (1976).

55. *E.g.*, H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970) (the Board is without power to compel an employer or a union to accept any contractual provision even as a remedy to an unfair labor practice). Without some forced union acquiesence an employer cannot condition access to the arbitration process on an employee's willingness to waive his statutory rights:

> Although presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement, mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver. Since an employee's rights under Title VII may not be waived prospectively, existing contractual rights and remedies against discrimination must result from other concessions already made by the union as part of the economic bargain struck with the employer. It is settled law that no additional concession may be exacted from any employee as the price for enforcing those rights. J.I. Case Co. v. NLRB, 321 U.S. 332, 338-39 (1944).

Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974).

tration process on employee waiver could do so consistently with the union's own statutory obligation not "to restrain . . . employees in the exercise of the rights guaranteed in section 157. . . ."[56] Section 8(b)(1)(A) surely prevents a union from discriminating against employees who wish to exercise their statutory rights.[57]

Therefore, the basic insight of Chairman Murphy's *G.A.T.* opinion, that limitations on the authority of unions to waive employee statutory rights restrict the authority of the Board to defer unfair labor practice charges to arbitration, applies as much to post-arbitral deference under *Spielberg* as to pre-arbitral deferral under *Collyer*.

C. Categories of Unfair Labor Practices

In her *G.A.T.* opinion, Chairman Murphy also drew sharp lines between categories of unfair labor practices in order to explain when deferral would not be appropriate. Again, her opinion, while intuitively insightful, cannot be completely justified on the basis of the non-waiver principle. Her clearly defined categories do not fully and accurately reflect the activities which should be insulated from union waiver. While much of the incongruity between Chairman Murphy's categories and the non-waiver principle suggested by the *Magnavox* decision can be corrected by the Board's exercise of discretionary deferral, definition of the limits of Board discretion will prevent both erosion of non-waivable rights and unnecessary *de novo* consideration of charges based on waivable rights.

The remainder of this article evaluates in light of the non-waiver principle[58] each type of unfair labor practice categorized by Chairman Murphy as either deferrable (sections 8(a)(5), 8(b)(3)) or non-deferrable (sections 8(a)(1), 8(a)(3), 8(b)(1)(A), 8(b)(2)). Her contrast between violations of employee public rights protected by section 7 and violations of private rights based on collective bargaining agreements proves too facile an interpretation of the *Magnavox*-based principle.[59]

The problem with this contrast, as noted by members Penello and Walther in their *G.A.T.* dissent,[60] is that it distorts the nature of the rights threatened by violations of sections 8(a)(5) and 8(b)(3), Chairman Murphy's deferrable unfair labor practice categories. The rights threatened by violations of sections 8(a)(5) and 8(b)(3) are rights guaranteed by the NLRA independent of any collective bargaining agree-

56. 29 U.S.C. § 158(b)(1) (1976).

57. *See* NLRB v. Marine & Shipbuilding Workers, 391 U.S. 418 (1968) (finding a section 8(b)(1)(A) violation when a union expelled a member for not exhausting intra-union grievance procedures before filing charges with the Board).

58. *See* Harper, *supra* note 1, at 347-57 and note 4 *supra*.

59. *See* 228 N.L.R.B. at 810-11, 94 L.R.R.M. at 1486.

60. *Id.* at 817, 94 L.R.R.M. at 1492-93.

ment. Employers and unions are often found to violate those sections in the absence of any collective bargaining agreement.[61] Section 8(a)(5) charges are attractive candidates for deferral to arbitration not because the right allegedly threatened is *created* by or based on the private agreement, but because the employer usually contends that the union has effectively *waived* the allegedly threatened right in the agreement.[62] Moreover, the rights threatened by violations of at least section 8(a)(5) include rights protected by section 7. The section 7 right to "bargain collectively through representatives of their own choosing"[63] is abridged whenever an employer refuses to bargain.

Any Board authority to defer to arbitration therefore cannot rest on the distinction between private and public rights. The authority to defer instead must be based on the authority of exclusive bargaining agents to waive certain employee statutory rights.

III

BOARD DEFERRAL, SECTION 8 AND THE NON-WAIVER PRINCIPLE

A. Deferral of Section 8(a)(1) or 8(a)(3) Charges: Justifying a Blanket Rule

Chairman Murphy's rule that the Board may not defer any section 8(a)(1) or 8(a)(3) charges paints with too broad a brush. Some 8(a)(1) and 8(a)(3) charges are deferrable and some are not. Charges of violations of expressive and associational rights essential to the representational system and protected by 8(a)(1) and 8(a)(3) are non-waivable and therefore strictly non-deferrable. But 8(a)(1) clearly protects more than these fundamental rights, and 8(a)(3) has been so extended by Board and court interpretation. Despite these theoretical problems, however, considerations of policy and administrative convenience commend, or at least defend, Chairman Murphy's blanket rule.

Section 8(a)(1)[64] protects employees from any interference with, restraint or coercion of the exercise of section 7 rights. This broad provision clearly includes waivable rights protected by section 7. In contrast, section 8(a)(3) on its face only protects from employer discrimination employee membership in a labor organization.[65] Since

61. *E.g.*, NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953).

62. *See* text accompanying note 87 *infra*.

63. 29 U.S.C. § 157 (1976).

64. 29 U.S.C. § 158(a)(1) (1976).

65. 29 U.S.C. § 158(a)(3) (1976) provides:

It shall be an unfair labor practice for an employer . . . by discrimination in regard to

membership in a labor organization is an associational right which is insulated from union waiver,[66] the literal language of section 8(a)(3) only protects non-waivable rights. But section 8(a)(3) has been interpreted more broadly to protect union concerted activities, including certain activities aimed at extracting better terms and conditions of employment from the employer.[67] Since exclusive bargaining agents bear the responsibility to extract better terms and conditions of employment from the employer, they have authority to control and to waive the Act's protection of employees' efforts to obtain better terms.[68]

Since *G.A.T.*, the Board has refused to defer many 8(a)(1) and 8(a)(3) charges which alleged employer interference with waivable rights.[69] Some of these charges rested on alleged interference with the complainant employees' contractual rights.[70] While the Board correctly views a sole employee's assertion of a right secured for many employees under a collectively bargained agreement as section 7-protected activity,[71] any statutory protection should be subject to qualification by the same contract which established the underlying right. Since

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hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

66. *See* Harper, *supra* note 1, at 347-54.

67. *See, e.g.*, ILGWU v. Quality Mfg. Co., 420 U.S. 276, 280 (1975) (discharge of employee for filing grievances held violation of section 8(a)(3) as well as 8(a)(1)); NLRB v. Erie Resistor Corp., 373 U.S. 221, 233 (1965) (discouraging membership in a labor organization "includes discouraging participation in concerted activities . . . such as a legitimate strike.").

68. *See* Harper, *supra* note 1, at 338-42.

69. For instance, the Board has refused to defer several section 8(a)(1) and 8(a)(3) cases in which the complainants alleged employer discrimination against them for vigorously pressing employee grievances. *E.g.*, Melones Contractors, 241 N.L.R.B. 14, 100 L.R.R.M. 1477 (1977); General Motors Corp., 235 N.L.R.B. 49, 97 L.R.R.M. 1472 (1978); Schiavone Constr. Co., 229 N.L.R.B. 515, 95 L.R.R.M. 1124 (1978); Sioux Quality Packers, 228 N.L.R.B. 1034, 94 L.R.R.M. 1679 (1977). In another case a Board panel including Chairman Murphy refused to defer section 8(a)(1) and 8(a)(3) charges against an employer for discharging a union committeeman for his insistence on responding to the request of a fellow employee. Columbus Foundries, Inc., 229 N.L.R.B. 34, 95 L.R.R.M. 1090 (1977), *enforced*, 568 F.2d 204 (5th Cir. 1978). The committeeman claimed violations of a waivable protected activity, giving assistance to a fellow employee in securing fair treatment from an employer. See discussion of NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), in Harper, *supra* note 1, at 357-61. In *G.A.T.* itself, the charge could have been framed as based on a waivable right. Complainant Soape alleged that he was discriminatorily discharged for leaving work to participate in contract negotiations as well as for filing a complaint with OSHA. 228 N.L.R.B. at 821-25. *See also* National Radio Co., 198 N.L.R.B. 527, 80 L.R.R.M. 718 (1972).

70. *E.g.*, W. Carter Maxwell, 241 N.L.R.B. 264, 100 L.R.R.M. 1012 (1979), *enforced*, 637 F.2d 698 (9th Cir. 1981); Youngstown Sheet & Tube Co., 235 N.L.R.B. 572, 98 L.R.R.M. 1347 (1978); United Parcel Serv., 228 N.L.R.B. 1060, 94 L.R.R.M. 1641 (1977).

71. *E.g.*, City Disposal Systems, Inc., 256 N.L.R.B. No. 73, 107 L.R.R.M. 1267 (June 9, 1981); Interboro Contractors, 157 N.L.R.B. 1295, 61 L.R.R.M. 1537 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967). Circuit courts have not given the Board unanimous support on this proposition, however. While at least three additional circuits joined the Second Circuit in approving the doctrine, NLRB v. Roadway Express, Inc., 532 F.2d 751 (4th Cir. 1976) (enforced without published opinion); NLRB v. Ben Pekin Corp., 452 F.2d 205, 206 (7th Cir. 1971); NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217 (8th Cir. 1970), at least two circuits have now rejected the Board's

the union could have eliminated the right entirely by not negotiating the particular provision on which the right depends,[72] it certainly can make protection of the right subject to the arbitration process.

If the Board's blanket rejection of pre-arbitral deferral in all section 8(a)(1) and 8(a)(3) cases is to survive, it must have a sounder basis than the non-waivability of all employee rights protected by those sections. Viewing Board deferral as an acceptance of union waiver reveals several policy justifications for a blanket rule.

To a great extent, the Board can justify a refusal to defer all 8(a)(1) and 8(a)(3) charges by direct application of its "clear and unequivocal" waiver rule.[73] The Board generally only considers a union to have waived a statutory right when the union has expressed its intention to do so by clear and unequivocal signals.[74] The Board thus has applied a rebuttable presumption against waiver. The Board's *Collyer* doctrine, on the other hand, seems to apply a reverse presumption in favor of waiver. Whenever the Board forces a complainant to proceed through arbitration, it seems to presume that negotiation of an arbitration clause expresses the union's willingness to waive some Board protection.

Given congressional and Court[75] encouragement of collectively bargained private arbitration and the fact that Board deferral accepts a partial rather than total waiver of protected rights, this reversal of the Board's general presumption is not unreasonable. On the other hand, the waiver presumption reversal is not necessary and may well be unwise. In the first place, both congressional and Supreme Court expressions of preference for arbitration have directed the subordination of court interpretation of statutory rights.[76] Second, and more important, forcing a union which wins a broad arbitration clause to extract a dis-

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theory, ARO, Inc. v. NLRB, 596 F.2d 713 (6th Cir. 1979); NLRB v. Northern Metal Co., 440 F.2d 881 (3d Cir. 1971).

72. Some members of the Board have been willing to find that even a safety complaint which is not based on a contract provision can constitute concerted activity because of a presumption that individual workers have fellow employee support when they raise a safety issue. *See* Alleluia Cushion Co., 221 N.L.R.B. 999, 91 L.R.R.M. 1131 (1975). Although this position can be cogently defended, the right to engage in such concerted activity to obtain better working conditions should still be available to the union and thus subject to possible compromise in arbitration.

73. Even if the Board could explain deferral without resort to waiver theory, *see* text accompanying note 46 *supra*, it surely can also explain it under a waiver theory.

74. *See, e.g.*, MCC Pacific Values, 244 N.L.R.B. 931, 102 L.R.R.M. 1183 (1979); Rockwell-Standard Corp., 166 N.L.R.B. 124, 65 L.R.R.M. 1601 (1967), *enforced*, 410 F.2d 953 (6th Cir. 1969); Fafnir Bearing Co., 146 N.L.R.B. 1582, 56 L.R.R.M. 1108 (1964), *enforced*, 362 F.2d 716 (2d Cir. 1966).

75. *See* note 11 *supra*.

76. Although the Court once noted that the Board's *Collyer* policy "harmonizes with Congress' articulated concern that '[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . .' § 203(d)," William E. Arnold Co. v.

claimer of waiver from the employer in order to retain primary Board jurisdiction over section 8(a)(1) and 8(a)(3) charges will tip the bargaining balance from its natural position.

In addition to being consistent with the Board's clear waiver rule, Chairman Murphy's bright line rule is also an administratively attractive way for the Board to insure complete protection for all non-waivable rights,[77] since a clear majority of section 8(a)(1) and 8(a)(3) charges allege interference with non-waivable rights or could be reframed to include such a claim. For instance, the Board, applying Chairman Murphy's rule, recently refused to defer section 8(a)(1) and 8(a)(3) charges alleging that complainant shop stewards were discharged for zealously pressing grievances.[78] The Board also declined to defer a section 8(a)(3) charge that a company terminated two union negotiators for their opposition to company proposals.[79] Since the processing of grievances and the negotiation of contracts are within the bargaining representative's exclusive control, these charges seem to be deferrable to the arbitration process negotiated by the representative.[80] However, the charges could also be framed to allege interference with the employees' positions of union leadership, the exercise of an associational right which necessarily entailed participation in grievance processing or contract negotiations. Even employee Soape could have

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Carpenters Dist. Council, 417 U.S. 12, 17 (1974), the Court has never directly reviewed Board deferral of unfair labor practice charges.

77. Whatever the statutory limits on Board deferral to arbitration, there are no statutory limits on the Board's discretion *not* to defer. Section 10(a) of the Act makes this clear by providing that the Board's power "to prevent any person from engaging in any unfair labor practice . . . shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise . . ." 29 U.S.C. § 160(a) (1976). *See, e.g.*, Lodge 743, IAM v. United Aircraft Corp., 337 F.2d 5 (2d Cir. 1964).

Recent circuit court decisions, *e.g.*, Distillery Workers Local 2 v. NLRB, 107 L.R.R.M. 3137 (2d Cir. July 29, 1981); NLRB v. Pincus Bros. Inc., 620 F.2d 367 (3d Cir. 1980); Douglas Aircraft Co. v. NLRB, 609 F.2d 352 (9th Cir. 1979), requiring the Board to defer to arbitration awards should not be read to the contrary. These decisions hold that the Board did not apply its own *Spielberg* guidelines consistently with its other decisions, and are thus nothing more than an application of the general administrative law doctrine that executive agencies must consistently apply their own rules. *See, e.g.*, Carnation Co. v. NLRB, 429 F.2d 1130, 1134-35 (9th Cir. 1970); United States v. McGrath, 181 F.2d 839, 842 (2d Cir. 1950). Since its *Douglas Aircraft* decision, the Ninth Circuit has made clear that the Board has discretion to define its own deferral criteria. Ad Art, Inc. v. NLRB, 645 F.2d 669 (9th Cir. 1980); NLRB v. Max Factor & Co., 640 F.2d 197 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 2314 (1980); NLRB v. Safeway Stores, Inc., 622 F.2d 425 (9th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981).

78. Melones Contractors, 241 N.L.R.B. 14, 100 L.R.R.M. 1477 (1979); Schiavone Constr. Co., 229 N.L.R.B. 515, 95 L.R.R.M. 1124 (1977); Sioux Quality Packers, 228 N.L.R.B. 1034, 94 L.R.R.M. 1679 (1977).

79. Ackerman Mfg. Co., 241 N.L.R.B. 621, 100 L.R.R.M. 1557 (1979).

80. Of course, no viable union would ever expressly agree to a clause which authorized disciplining employees who press grievances or disagree with company proposals in negotiations. However, by accepting a broad arbitration clause a union might indirectly waive full Board protection of employees' grievance processing or contract negotiation activities.

framed his complaint in *G.A.T.* to allege that his discharge for attending contract negotiations constituted interference with his right to serve as a steward in the union.

The Board could separate its protection of non-waivable associational rights from its protection of waivable employee participatory rights by directing deferral only of those charges which the General Counsel and Regional Offices determine to rest on a tenable allegation of interference with waivable rights alone. Yet requiring the General Counsel and Regional Officer to make a determination of the nature of the employer hostility supported by the record would add to an administrative burden which *Collyer* was adopted to ease. If the General Counsel must make this analysis of the facts without the benefit of an arbitrator's decision, he might as well prepare the entire case. Furthermore, given the difficulty of distinguishing associational from participatory rights in a factual context, the General Counsel would inevitably make mistakes eroding the statutory protection of non-waivable employee rights. Therefore, the Board's discretionary adoption of Chairman Murphy's exclusion of all section 8(a)(1) and 8(a)(3) complaints from pre-arbitral deferral perhaps serves the statutory policies more fully and more feasibly than would a more theoretically cogent rule.

These considerations, however, do not similarly justify post-arbitral deference not mandated by statute. First, and most important, a union's actual invocation of an arbitration clause, in contrast to its mere negotiation of such a clause, is a clear statement that it wishes to resolve a particular dispute through its established arbitration process. Second, a Board policy, like that of *Spielberg*, which forces a union to accept the resolution produced by that process does not force it to give up more than it reasonably should have expected.

Furthermore, after an arbitration decision has been rendered, the General Counsel should more easily be able to distinguish tenable allegations of interference with non-waivable associational rights from allegations involving waivable participatory rights. The General Counsel could accept the arbitrator's resolution of any factual issue both presented to arbitration by the union or the complainant and not concerning a non-waivable right. The General Counsel would only press a charge to the Board when evidence, consistent with any arbitrator's decision that no waivable rights had been violated, indicated that a non-waivable right had been threatened. For instance, suppose in *G.A.T.* an arbitrator had already decided that employee Soape had been discharged for the employer's "lack of work" rather than for Soape's participation in contract negotiations. Then the General Counsel need consider only whether there is adequate independent evi-

dence of employer hostility towards union membership or leadership, rather than towards absence from work to participate in negotiations, to warrant non-deference under *Spielberg*. Such post-arbitration consideration should be substantially less burdensome to administer than assessing whether the employer was hostile towards union membership without the benefit of an arbitrator's decision.

An additional administrative reason for the Board to accept post-arbitral deference in certain section 8(a)(1) and 8(a)(3) cases derives from the comparative efficiency of the *Spielberg* doctrine vis-à-vis the *Collyer* doctrine. A Board decision to consider *de novo* any section 8(a)(1) or 8(a)(3) charge already addressed by an arbitrator would add a burden to the Board's docket which neither the statute nor compelling policy considerations require.[81] Furthermore, full Board reconsideration of disputes already resolved by an arbitrator is socially inefficient. The same criticism cannot be leveled against a discretionary rejection of *Collyer* for section 8(a)(1) and 8(a)(3) cases, for if the arbitration process has not commenced, full consideration by the Board is not duplicative.

In sum, a strong case can be made for continued deference under *Spielberg* to section 8(a)(1) and 8(a)(3) charges of interference with waivable rights. However, the Board lacks statutory authority to sacrifice the protection of non-waivable rights by deferring certain 8(a)(1) and 8(a)(3) charges either to an unused arbitration process or to a completed arbitration decision.[82] Chairman Murphy's exclusion of all section 8(a)(1) and 8(a)(3) charges from pre-arbitral deferral seems an appropriate and sensible exercise of the Board's discretion.

B. Deferral of Alleged Violations of Section 8(a)(5)

In *G.A.T.*, Chairman Murphy asserted that because section 8(a)(5) cases involve disputes only between the contracting parties and do not affect individual employee rights they may appropriately be deferred

81. *See* Truesdale, *Is Spielberg Dead?*, 31 N.Y.U. CONFERENCE ON LABOR 47 (1978).

82. Part I of this essay, Harper, *supra* note 1, at 362-89, explains that employee rights to engage in certain strikes should not be waivable. Therefore, the Board should never defer charges of employer interference with these particular strikes. Interestingly, *Spielberg* itself was a case in which the Board inappropriately deferred section 8(a)(3) charges of employee terminations for engaging in strike activity. The Board in *Spielberg* accepted the arbitrator's finding that the employees' termination was justified by their misconduct in a strike which was partly recognitional. 112 N.L.R.B. at 1081, 36 L.R.R.M. at 1153. The union had agreed to submit the past cases of the four employees to arbitration after it gained recognition and during its first negotiation with the employer, but the employees themselves never agreed to waive their statutory rights. *Cf.* Community Medical Serv. of Clearfield, Inc. (Clear Haven Nursing Home), 236 N.L.R.B. 853, 98 L.R.R.M. 1314 (1978) (Board refused to accept a settlement agreement, approved by a collective employee vote, which reinstated alleged unfair labor practice strikers but which refused them back pay).

under *Collyer* to an unused arbitration process.[83] In *Roy Robinson, Inc.*,[84] decided the same day as *G.A.T.*, Chairman Murphy joined the *G.A.T.* dissenters to approve pre-arbitral deferral of a section 8(a)(5) charge that an employer had closed shop without bargaining and without authorization in the collective agreement.

The Board does have statutory authority to defer most section 8(a)(5) charges either before or after arbitration. Again, however, Chairman Murphy's rule cuts too broadly: some 8(a)(5) charges involve alleged interference with non-waivable rights and must not be deferred. The distinction is based, not on whether individual employee rights are affected, but on whether those rights may be waived.

In the typical section 8(a)(5) deferral case, like *Roy Robinson* or *Collyer*, a union or employee charges that an employer has unilaterally changed some term or condition of employment. In response, the employer asserts that the change was authorized by a collective bargaining agreement which also established an arbitration process. The Board has statutory authority to defer such a charge to arbitration because it alleges interference with a protected employee activity, bargaining over terms and conditions of employment, over which the bargaining representative is delegated exclusive control.[85]

However, some section 8(a)(5) charges of employer refusals to bargain involve restraints on employee efforts to achieve employer recognition or acceptance of a bargaining agent. For instance, whenever an employer refuses to recognize or bargain with a union the employees elected as their majority bargaining agent, the company violates section 8(a)(5) by discouraging the protected recognitional efforts of its employees.[86] Deferral of any section 8(a)(5) charges alleging interference with protected recognitional rights is beyond the Board's discretion. Bargaining agents are not delegated authority to control the protected efforts of employees to achieve, maintain, or eliminate employer recognition of the bargaining agents.[87]

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83. 228 N.L.R.B. at 810, 94 L.R.R.M. at 1486.

84. 228 N.L.R.B. 828, 94 L.R.R.M. 1474 (1977).

85. The deferral of even these charges raises the additional issue of whether the union's negotiation (*Collyer*) or invocation (*Spielberg*) of an arbitration process should be presumed a waiver of full Board section 8(a)(5) protection. Since employers typically base their request for deferral of a unilateral change section 8(a)(5) charge on a defense that the change was authorized by the collective agreement, the interpretation of the collective agreement lies at the center of the dispute. A Board presumption that the union has agreed that the arbitrator, as designated interpreter of the agreement, will have first opportunity to resolve the dispute is, therefore, appropriate. *See* St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977).

86. *See, e.g.*, Los Angeles Marine Hardware Co., 235 N.L.R.B. 720, 98 L.R.R.M. 1571 (1978), *enforced*, 602 F.2d 1402 (9th Cir. 1979); Helvetia Sugar Coop., Inc., 234 N.L.R.B. 638, 98 L.R.R.M. 1290 (1978).

87. Harper, *supra* note 1, at 356-57. Of course, a respondent employer could not seek defer-

Though her rule is thus overbroad, Chairman Murphy's categorial exclusion of all section 8(a)(5) charges from her non-deferral policy does not actually threaten the full protection of non-waivable employee recognitional rights. The Board's *Collyer* principles of deferral warrant against deferring any section 8(a)(5) charges which allege threats to non-waivable employee rights. One of the Board's consistently applied conditions of pre-arbitral deferral has been a lack of general employer hostility or enmity towards the union or towards the general exercise of employee protected rights.[88] Most employers whose actions allegedly threaten employee recognitional rights through some violation of section 8(a)(5) also manifest enmity toward the union or the general exercise of employee protected rights.[89] I have found no instances of Board deferral to arbitration of section 8(a)(5) charges involving employer attack on the union's recognitional status.[90]

Nor, under its present guidelines, is the Board likely to defer to rendered arbitration decisions in cases of section 8(a)(5) charges of serious interference with non-waivable employee recognitional rights. Furthermore, unions rarely submit voluntarily to arbitration charges that an employer has repudiated the collective bargaining relationship or has attacked the union's recognitional status. If the Board finds that such submission to arbitration was voluntary and that the arbitrator's decision was fair and reasonable, it is also likely to find that the em-

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ral of most section 8(a)(5) charges alleging interference with recognitional rights, because no arbitration process could exist without recognition and bargaining. And many employers which provoke a section 8(a)(5) charge by withdrawing recognition from a union would be unwilling to invoke even an extant arbitration process with that same union. However, in some instances, employers may seek deferral of charges of interference with recognitional rights. *See, e.g.*, Precision Anodizing & Plating, Inc., 244 N.L.R.B. 846, 102 L.R.R.M. 1399 (1975) (employer limited union access to plant and refused to accept grievances submitted by union). *See also* Meilman Food Industries, Inc., 234 N.L.R.B. 698, 97 L.R.R.M. 1372 (1978), *enforced sub nom.* Meat Cutters Local 304 v. NLRB, 108 L.R.R.M. 2175 (D.C. Cir. 1979) (employer sought deferral after previously repudiating the grievance and arbitration system of expired contract).

88. *See* Nash, Wilder & Banov, *The Development of the Collyer Deferral Doctrine*, 27 VAND. L. REV. 23, 56-58 (1974).

89. *But see, e.g.*, Helvetia Sugar Coop., Inc., 234 N.L.R.B. 638, 98 L.R.R.M. 1290 (1978); Fairfield Nursing Home, 228 N.L.R.B. 1208, 96 L.R.R.M. 1180 (1978). In both cases, the employer threat to employees' recognitional rights resulted from a non-hostile, good faith repudiation of the bargaining relationship. Even in these cases, however, the Board did not defer.

90. The Board seems to have adhered to the position taken by member Brown in his *Collyer* concurring opinion that the Board should not defer to arbitration "where there has been a repudiation of the collective-bargaining process." 192 N.L.R.B. at 845, 77 L.R.R.M. at 1940. Indeed, the Board generally has been careful not to defer section 8(a)(5) charges of employer interference with a grievance-arbitration process. For instance, in St. Joseph's Hospital, 233 N.L.R.B. 1116, 94 L.R.R.M. 143 (1977), the Board did not defer a charge that the employer had refused to provide the union with information necessary to the processing of a grievance. *See* NLRB v. Acme Indus. Co., 385 U.S. 432 (1967). Since employee rights to information for grievance processing are waivable, the Board's decision in *St. Joseph's Hospital* was not statutorily mandated. Yet the decision was well within its discretion to use its deferral authority to best achieve the purposes of the Act. *See also* United-Carr Tenn., 202 N.L.R.B. 729, 82 L.R.R.M. 1795 (1973).

ployer accepted the union's status and its employees' recognitional rights.

Nevertheless, the statutory limits on the Board's authority to defer section 8(a)(5) charges to arbitration should be made clear to preclude loosening of the *Collyer* and *Spielberg* guidelines inconsistent with the full protection of non-waivable recognitional rights. The Board should expressly adopt a policy of non-deferral both before and after arbitration of any section 8(a)(5) charge which alleges an employer's refusal to recognize and accept a union as a full bargaining agent.

C. Deferral of Alleged Violations of Sections 8(a)(2) and 8(a)(4)

Chairman Murphy did not include sections 8(a)(2) and 8(a)(4) in her articulation of bright-line rules for deferral. This omission is curious because these two provisions present the only statutory categories of employee unfair labor practice charges which the Board should never defer, either before or after arbitration, since they protect only non-waivable employee rights.

1. Section 8(a)(2)

After *G.A.T.*, the Board announced in *Servair, Inc.*, that section 8(a)(2) charges should never be deferred to arbitration, even after an arbitral decision has been rendered.[91] This position is correct and deserves a principled justification.

Section 8(a)(2) of the Act prohibits employer domination of, interference with, or support of labor organizations.[92] It protects individual employee rights to choose freely the identity and strategies of the bargaining representative by prohibiting employer actions which distort these choices. In order for collective bargaining to be legitimate, the bargaining agent should not be permitted to waive the rights of individual employees to control the identity and nature of the agent free from employer interference. Therefore, the Board should not defer section

91. Servair, Inc., 236 N.L.R.B. 1278, 1278 n.1, 99 L.R.R.M. 1259, 1259 (1978), *modified*, 102 L.R.R.M. 2705 (9th Cir. 1979). The Board also asserted that it never has delegated section 8(a)(2) charges to arbitration.

The Ninth Circuit refused to enforce the *Servair* Board's order for reinstatement of nineteen employees who struck in protest of the employer's discharge of a Teamster activist who fought another union which was openly backed and assisted by management. The court held the Board should have deferred to the arbitrator's finding that a no-strike clause in the contract justified the employer's action. 102 L.R.R.M. at 2709. The court asserted that section 8(a)(2) charges should be deferred to completed arbitration awards as readily as section 8(a)(3) charges, seemingly because the court failed to understand why most 8(a)(3) charges could not also be considered under section 8(a)(2). *Id.*

92. "It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ." 29 U.S.C. § 158(a)(2) (1976).

8(a)(2) charges to arbitration.[93]

2. Section 8(a)(4)

Section 8(a)(4) proscribes employers from discriminating against any employee because he or she filed charges with or testified before the Board.[94] It protects employee activity directed towards securing statutory rights and ultimately better terms and conditions of employment from the federal government. While exclusive bargaining agents must control employee efforts to obtain better terms or conditions from the *employer*, they do not require control over employees' access to governmental authorities, including the Board. Employee rights to petition the Board should be no more waivable than rights to take concerted action to petition state legislatures or to participate in governmental elections which the Supreme Court in *Eastex, Inc. v. NLRB*[95] found protected by section 7.[96]

Fortunately, the Board seems to appreciate the nature of section 8(a)(4) rights. In *Filmation Associates, Inc.*,[97] decided several weeks before *G.A.T.*, the Board confirmed an earlier panel statement[98] that it would not apply *Spielberg* deference to arbitration decisions on 8(a)(4) charges.[99] The Board should reaffirm its refusal to defer any section

93. While section 8(a)(2) is most directly violated when the incumbent union contracts with the employer for financial support to thwart an organizational campaign of a rival union, the non-deferral policy should not be limited to that type of section 8(a)(2) charge. Note that the *Magnavox* Court did not permit union waiver of the right to distribute pro-union literature. A union should not be able to accept its own subversive infiltration by an employer, even if the acceptance preceded the infiltration. Nor should a union be able to accept employer support of a rival union, even if the acceptance was granted in exchange for employee economic benefits.

94. "It shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." 29 U.S.C. § 158(a)(4) (1976).

95. 437 U.S. 556 (1978).

96. *See* Harper, *supra* note 1, at 352-54. Nor should employers or unions be permitted to condition access to positions of union leadership on waiver of the right to petition the Board. *But see* NLRB v. Wilson Freight Co., 604 F.2d 712, 729 (1st Cir. 1979).

97. 227 N.L.R.B. 1721, 94 L.R.R.M. 1470 (1977).

98. McKinley Transport Ltd., 219 N.L.R.B. 1148, 1148 n.2, 90 L.R.R.M. 1195, 1196 (1975).

99. *See also* United States Postal Serv., 227 N.L.R.B. 1826, 94 L.R.R.M. 1685 (1977).

The *Filmation* majority, however, did not explain adequately why *Spielberg* deference should never apply to 8(a)(4) charges. The majority asserted that an arbitration decision which finds just cause for dismissal does not necessarily determine that the employee's activity at the Board was not a contributing cause of his discharge. *Id.* at 1722, 94 L.R.R.M. at 1471. Of course, the same could be said of the effect of an arbitrator's just cause finding on the employee's 8(a)(1) or 8(a)(3) claim that union activity was a contributing cause of his discharge.

The Board also announced in *Filmation* that it would not defer otherwise deferrable unfair labor practice charges factually related to non-deferrable section 8(a)(4) charges. This policy reasonably avoids duplicative, inefficient fragmenting of an employee's complaint, so long as the Board screens out non-tenable 8(a)(4) charges appended to the complaint in order to avoid deferral.

8(a)(4) charges before or after the arbitrator's decision on the basis of the non-waiver principle.

D. Deferral of Section 8(b) Charges

Section 8(b) of the Act, added by the Taft-Hartley amendments, prohibits certain union, as opposed to employer, practices.[100] In her *G.A.T.* opinion, Chairman Murphy asserted that certain section 8(b) charges, those filed under section 8(b)(1)(A) or 8(b)(2), should never be deferred to an unused arbitration process, while charges filed under section 8(b)(3) should be deferrable.[101] Again, the distinction is insightful, but demands elaboration.

1. Sections 8(b)(1)(A) and 8(b)(2)

The *Magnavox* decision explains why the Board lacks statutory discretion to defer any section 8(b)(1)(A) and 8(b)(2) charges. Analogs of sections 8(a)(1) and 8(a)(3), sections 8(b)(1)(A) and 8(b)(2) respectively proscribe union restraint or coercion of section 7 rights and union attempts to cause an employer to discriminate against an employee.[102] However, violations of sections 8(b)(1)(A) and 8(b)(2), unlike those of sections 8(a)(1) and 8(a)(3), are committed by the bargaining agent claiming waiver authority and should never be deferrable. Certainly, the Board would not permit the bargaining agent to negotiate collective agreements giving it authority, which it would not have had absent agreement, to take disciplinary action against employees who failed to engage in some union activity. The Board should also not permit a union to waive, however partially and indirectly, employee rights to be free of union coercion by compelling deferral to arbitration.[103] Waivability of section 8(b)(1)(A) and 8(b)(2) charges is not symmetrical with the waivability of 8(a)(1) and 8(a)(3) charges. Al-

100. 29 U.S.C. § 158(b) (1976).

101. 228 N.L.R.B. at 810, 94 L.R.R.M. at 1486.

102. Section 8(b)(1) states: "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . ." 29 U.S.C. § 158(b)(1)(A) (1976).

Section 8(b)(2) states:

> It shall be an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . .

29 U.S.C. § 158(b)(2) (1976).

103. The Court in NLRB v. Marine & Shipbuilding Workers, 391 U.S. 418 (1968), therefore was correct to reject a union requirement that members exhaust internal union remedies before filing charges against the union with the Board. Such an exhaustion requirement, like the *Collyer* deferral requirement, conditions access to the Board on a potentially lengthy and burdensome preliminary process, and thereby partially waives rights which the employee seeks to have the Board protect.

though unions are delegated at least partial authority to achieve the best deal for their employees from the employer, neither party to a collective agreement is delegated even partial authority to achieve the best deal for the employees from the union.

The non-waiver principle requires reconsideration of some prominent Board and court decisions upholding the deferral of section 8(b)(1)(a) or 8(b)(2) charges. For example, in *Associated Press v. NLRB*,[104] the D.C. Circuit affirmed a Board dismissal of charges against a union which had demanded that the employer check off and forward union dues of members who allegedly had revoked their checkoff authorization. The employees argued that the union committed an unfair labor practice by requiring the employer to deduct union dues without employee authorization in accordance with section 302(c)(4) of the Labor-Management Relations Act.[105] The union stressed the arbitrator's finding that most of the employees had not revoked authorization within the time limits specified in the authorization,[106] and that these time limits were consistent with section 302(c)(4).[107] The Board had dismissed the complaints of employees covered by the arbitrator's award, and applied *Collyer* to defer the complaints of other employees.[108]

The D.C. Circuit's decision in *Associated Press* should not have turned on Board deferral to arbitration. Whatever the force of the complainants' unfair labor practice theory,[109] it should in no way have been diminished by an arbitration process negotiated by the allegedly offending union.[110]

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104. 492 F.2d 662 (1974), *enforcing* 199 N.L.R.B. 1110, 81 L.R.R.M. 1535 (1972).

105. Section 302(c)(4) provides:

> The provisions of this section shall not be applicable with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.

29 U.S.C. § 186(c)(4) (1976).

106. The arbitrator specifically rejected an argument that the checkoff authorizations permitted employee revocation during any hiatus between successive collective agreements. The arbitrator found the authorizations to be individual contracts between the employer and the employees which survived any collective agreements. 199 N.L.R.B. at 1112-13, 81 L.R.R.M. at 1537. The arbitrator found some employee revocations to be timely, but ineffective. *Id.*

107. *Id.*

108. *Id.* at 1114-15, 81 L.R.R.M. at 1538-39.

109. Their theory was of dubious merit. First, not all union efforts to compel an employer to violate a statute are necessarily unfair labor practices, even if unprotected by the Act. *See Harvard Note*, note 35 *supra*, at 808-09. Second, section 302(c)(4) is not mentioned in section 8; the Board is not responsible for its enforcement. *See* 29 U.S.C. §§ 187(d)-(e) (1976).

110. *See also* International Harvester Co., 138 N.L.R.B. 923, 51 L.R.R.M. 1155 (1962), *enforced sub nom.* Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964), involving an 8(b)(2) charge stemming from the complainant's dismissal after discontinuing union

2. Section 8(b)(3)

Chairman Murphy's contention that section 8(b)(3) charges should be deferrable before as well as after arbitration is likewise basically correct. Roughly analogous to section 8(a)(5), section 8(b)(3) makes it unlawful for a union to refuse to bargain with the employer.[111] Since any employer should have authority to waive its rights to bargain freely with the union representing its employees, any Board deferral of the typical section 8(b)(3) charge of interference with employer rights is within the Board's statutory discretion.

Conceivably, employee interests may be harmed by a union's refusal to bargain or its unilateral change of working conditions. However, so long as the union, as exclusive bargaining agent, acts consistently with its duty of fair representation, no individual employee rights are violated.

The Board has held that certain breaches of an agent's duty of fair representation, such as an unjustifiable refusal to represent an employee, are section 8(b)(3) violations.[112] Since a union obviously cannot waive its own duties of fair representation, charges of such section 8(b)(3) violations should not be deferred and Chairman Murphy's sharp line must again be blurred.[113] This qualification should not be difficult to administer. The Board easily should be able to distinguish duty of fair representation charges from typical deferrable section 8(b)(3) charges of refusals to bargain in good faith.[114]

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membership. While the employee's charge was without merit, the Board should have considered the issue without relying on the arbitrator's decision.

111. 29 U.S.C. § 158(b)(3) (1976).

112. Hughes Tool Co., 147 N.L.R.B. 1537, 56 L.R.R.M. 1289 (1964).

113. Chairman Murphy did not consider whether other categories of section 8(b) charges are deferrable, probably because deferral is sought most often in section 8(b)(1)(A), 8(b)(2), or 8(b)(3) charges. Since a bargaining agent should never be able to waive the protection of employee rights from the agent's own possible unfair actions, any section 8(b) charges which allege interference with employee rights, such as charges filed under section 8(b)(5), should not be deferrable. On the other hand, any section 8(b) charges which allege interference with only employer rights, such as section 8(b)(1)(B) charges, should be deferrable to any arbitration process to which the employer has agreed to be bound. *Contra*, New York Typographical Union No. 6, 237 N.L.R.B. 1241, 99 L.R.R.M. 1111 (1978) (Board refused to defer a section 8(b)(1)(B) charge to arbitration). However, section 8(b)(1)(B) deferrable charges can sometimes also be framed as section 8(b)(2) nondeferrable charges. *See* International Typographical Union v. NLRB, 278 F.2d 6, 11-12 (1st Cir. 1960), *aff'd on other grounds*, 365 U.S. 705 (1961); Local 908, Operative Plasterers' and Cement Masons' Int'l, 185 N.L.R.B. 879, 75 L.R.R.M. 1240 (1970), *enforced*, 454 F.2d 285 (8th Cir. 1972).

114. Chairman Murphy did not address the Board's authority to defer to private arbitration when discharging its responsibilities under section 9 of the Act, 29 U.S.C. § 159 (1976), to define appropriate bargaining units and to conduct representation elections. However, the non-waiver principle makes clear that no union has authority to delegate Board responsibility under section 9 to a private arbitration process.

For instance, the Board should never agree to defer to arbitration awards which purport to define the extent of a union's bargaining unit. This issue arises frequently because many collective bargaining agreements provide that the union is to be recognized as exclusive bargaining repre-

IV
CONCLUSION

The *Magnavox* Court recognized that protection of individual employee rights of free association and self-organization is as fundamental to the purposes of the Act as stable collective bargaining and industrial peace.[115] In Part I, I emphasized that the federal judiciary has not fully appreciated that certain traditional employee rights are not to be sacrificed by no-strike clauses or other provisions in union-management agreements in the name of stable collective bargaining and industrial peace. In this essay, I have stressed the implications of the *Magnavox* decision for Board jurisdiction in relation to private arbitration processes established by union-management agreements.

In my judgment, the courts and the Board too avidly embraced arbitration as a means to resolve labor-management disputes, blinding many judges and Board members to the implications of arbitration for the protection of employee statutory rights. Arbitration is, of course, an essential and central part of our industrial relations system. Because arbitration has aided industrial peace, it is tempting for courts and the Board to subordinate all labor law to its encouragement. It is a temptation which must be resisted. Disputes between employers and employees that do not simply concern terms and conditions of employment, disputes over statutory rights which must be independent of collective bargaining if they are to continue and thrive, must not be settled by arbitration.

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sentative for employees filling certain jobs which might be created in the future. Board deference to arbitration awards enforcing such provisions would permit unions to waive the section 9(b) right to a bargaining unit which can assure new employees "the fullest freedom in exercising the rights guaranteed" by the Act, 29 U.S.C. § 159(b) (1976). This right secures maximum employee control over the selection of the identities and strategies of bargaining agents and therefore should never be waivable. Clearly, it is inappropriate to delegate waiver authority to unions who have never even been selected as the new employees' agent and who may benefit directly by the exercise of the authority.

The Board now seems to appreciate that deference to arbitrators' resolutions of bargaining unit controversies is not appropriate. After initially applying *Spielberg* to bargaining unit cases, *e.g.*, Raley's Supermarkets, 143 N.L.R.B. 256, 53 L.R.R.M. 1347 (1963), the Board reversed ground and refused to defer in a series of decisions. Hershey Foods Corp., 208 N.L.R.B. 452, 85 L.R.R.M. 1312, *enforced*, 90 L.R.R.M. 2890 (3d Cir. 1974); Combustion Engineering, Inc., 195 N.L.R.B. 909, 79 L.R.R.M. 1577 (1972); Woolwich, Inc., 185 N.L.R.B. 783, 75 L.R.R.M. 1191 (1970); Patterson-Sargent Div. of Textron, Inc., 173 N.L.R.B. 1290, 70 L.R.R.M. 1023 (1968); Beacon Photo Serv., Inc. 163 N.L.R.B. 706, 64 L.R.R.M. 1439 (1967). *See also* Collyer Insulated Wire, 192 N.L.R.B. 837, 845, 77 L.R.R.M. 1931, 1938 (1971) (member Brown, concurring). The non-waiver principle would afford the Board a clear rationale for *de novo* consideration of appropriate bargaining unit controversies addressed by arbitrators, as well as definite statutory limits on deferral in other representation cases.

115. 415 U.S. at 325, *citing* Mastro Plastics v. NLRB, 350 U.S. 270 (1956).