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THE NEW "WORK RELOCATION" AND "DEFERRAL" POLICIES OF THE REAGAN LABOR BOARD MAJORITY

by

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In January 1984 the National Labor Relations Board decided three cases which have been widely discussed and either criticized by organized labor or supported by leaders of various management groups. These decisions were made by a new Board majority consisting of three members appointed to the Board by President Ronald Reagan. The decisions which involve "work relocation" and "deferral to arbitration" are discussed below.

A. Work Relocation

Consider the situation where an employer for economic reasons seeks modifications in the labor cost provisions of a collective bargaining contract in the second year of a three year contract, and the employer tells the union that unless it consents to the modifications, the employer will close the plant and relocate the work to another company plant with lower labor cost. May the employer do so? This issue was first addressed by the Board in 1982 in the Milwaukee Spring decision; and the Board decided that the employer could not relocate work from its Milwaukee plant to its nonunion Mchenry, Illinois plant in mid-term of the collective bargaining contract. The employer appealed the decision to the United States Court of Appeals for the Seventh Circuit. In the interim period changes occurred in the membership of the Board and the new Board majority asked the U.S. Court of Appeals to return the case to the Board. In January of 1984 the Board reversed its 1982 holding on the basis that no applicable work-preservation clause existed in the collective bargaining contract restricting the employer from removing the work at mid term. The dissent argued that the work removal was proscribed under Section 8(d) of the NLRA as an indirect attempt to modify contractually-promised wage rates which are mandatory subjects of bargaining, stating that the employer " . . . cannot avoid this obligation merely by unilaterally relocating the work to

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another of its facilities, just as it could not by unilaterally reducing the wage rate.\(^3\)

B. NLRB Deferral to Arbitration

In arbitration of grievances, the arbitrator is appointed by the parties pursuant to an arbitration clause in a collective bargaining agreement. The powers and duties of an arbitrator are limited by the terms of the collective bargaining agreement. The arbitrator is generally confined to the question of whether or not a particular action was valid under the collective bargaining agreement. The arbitrator is concerned then with private rights under a private agreement between private parties. In contrast the NLRB has the statutory obligation to resolve unfair labor practice charges under the amended National Labor Relations Act. The Board's powers are statutory. It is concerned with public, rather than private rights. What is the law when a particular action affects both a private contractual right and at the same time a public right guaranteed by statute? The answer to this question has been a changing one over the past fourteen years, tied to the changing political climate and the resulting changing membership of the Board. It is essential to recognize that the law in this area is not well settled, and is subject to possible change or modification again in the near future.

Deferral to Existing Arbitration Awards

As a general rule the NLRB has the statutory power to resolve unfair labor practice charges in matters relating to contract interpretation and is not ousted from jurisdiction by the existence of contract grievance-arbitration machinery. However, under the Board's Spielberg standards, the Board will defer to an existing arbitration award when (1) the arbitration proceedings were fair and regular, (2) all parties had agreed to be bound by the award, and (3) the result's were not "clearly repugnant to the purposes and policies of the Act."\(^4\) Thus, if a party was not allowed to be present at an arbitration proceeding, or to present witnesses or to crossexamine witnesses or to have a reasonable time to prepare its case, the Board would not defer to the award and would consider the unfair practice charge on its merits.

The Spielberg requirement that the award "not be repugnant to the purpose and policies of the Act" received significant Board focus in recent years. The Board had required a showing that the statutory unfair labor practice issue was in fact brought to the arbitrator's attention,\(^5\) and, the statutory unfair labor practice issue was actually discussed in the arbitrator's decision.\(^6\) In Suburban Motor Freight, Inc.,\(^7\) the Board held that it would not honor the results of an arbitration proceeding under Spielberg unless the unfair labor practice issue before the Board was both
presented to and considered by the arbitrator. In Suburban Motor Freight, an employee, Ralph Singleton, was discharged by the Company in both April and July of 1978, and was reinstated without back pay as a form of reduced discipline pursuant to separate arbitral decisions rendered by a local grievance committee. The complaint before the Board alleged that Singleton had been disciplined on the two occasions for discriminatory anti-union purposes in violation of Sections 8(a)(3) and (1) of the Act. Neither Singleton nor the Union representing Singleton raised the unfair labor practice issue in either of the two arbitration proceedings. The Board refused to defer; however, it upheld that administrative law judge's determination that the discipline was not illegally motivated. Thus under Suburban Motor Freight an individual was allowed to present the matter first to an arbitrator as a contract violation, and then, where the resolution was unsatisfactory and the matter not barred by the six-month time limit for filing charges with the Board set forth in Section 10(b) of the NLRA, present the same matter to the Board as a statutory violation cast in statutory rather than contractual terms.

In Olin Corporation the Board overruled Suburban Motor Freight. The Board in Olin restated its commitment to follow the basic Spielberg standards, and added the following analysis to determine whether the arbitrator has adequately considered the unfair labor practice issue: (1) the contractual issue must be factually parallel to the unfair labor practice issue and (2) the arbitrator must have been presented generally with the facts relevant to resolving the unfair labor practice issue. The Olin Board majority also changed existing law by requiring the General Counsel in representing the charging party to establish that the arbitral process was deficient such that the Board should not defer to the award. The dissent in Olin expressed the position that the majority's decision represented an impermissible abdication of the Board's authority to prevent unfair labor practices, contrary to the language of Section 10(a) of the Act.

Required Grievance-Arbitration Machinery Instead of Board Proceedings

As developed below, a changing Board policy existed in recent years on the matter of whether and in what type of cases should grievants be required to use contractual grievance-arbitration machinery instead of Board proceedings. The changes reflected the different Board majorities over this period of time.

In its 1971 Collyer Insulated Wire decision, the Board announced that it would defer, at least contingently, to available contract arbitration procedures where alleged
wrongful conduct may violate both the contract and the NLRA. Under Collyer, the Board held it would dismiss charges where grievance-arbitration machinery was available to the parties to resolve disputes even though an award had not been rendered or arbitration proceedings had not been instituted. The Board retained jurisdiction for the limited purpose of ensuring compliance with the Spielberg standards once the arbitration award was rendered.

Although Collyer involved an employer who had allegedly violated Section 8(a)(5) of the Act by making unilateral changes in certain wages and working conditions, it was soon extended to cover other violations. For example, in 1972 in National Radio Co., where an employer allegedly violated Section 8(a)(3) of the Act by discharging a union official for failing to notify his supervisor that he was going to another part of the plant on a grievance matter, the Board deferred under the Collyer rule. The impact of Collyer, however, was severely cut back by the Board in its 1977 General American Transportation Corp. (GATC) decision. In GATC the Board majority held that it would no longer defer arbitration in cases of alleged employer discrimination violative of Section 8(a)(3) or cases of interference with protected rights violative of Section 8(a)(1), or cases involving union coercion violative of Section (b)(1). However, in Roy Robinson Chevrolet, a companion case to GATC, where the union alleged a violation of Section 8(a)(5), the Board majority held that the Board would continue to defer under Collyer in cases involving Section (a)(5) violations where the dispute was subject to, and resolvable by, contractual grievance-arbitration procedures. The Board reasoned that in the former situation, in cases alleging violations of Sections 8(a)(1), 8(a)(3), and 8(b)(1), the determinative issue is not whether the conduct was permitted by the contract, but whether the conduct was unlawfully motivated, or interfered with employees in the exercise of their rights under Section 7 of the NLRA; in the latter situation, in cases alleging violation of Section 8(a)(5), the principal issue is whether the conduct complained of is permitted by the parties' contract, such issue being eminently suited to the arbitral process.

In its 1984 United Technologies decision a new Board majority overruled GATC and returned to the Board deferral policy set forth in Collyer and National Radio. The United Technologies decision involved allegations that management harassed and threatened a grievant in an attempt to intimidate her into withdrawing a grievance. The employee had filed a grievance claiming that her foreman had engaged in an "act of aggression" - that he threw a bag of parts at her. The grievant and her union steward indicated that they would take the grievance to the second step, at which point the foreman's supervisor told the employee that the company
had been nice to her in the past and failed to discipline her even though she was responsible for a lot of rejects. The Union considered this statement a threat.

The Board concluded that the underlying facts made the case "eminently well suited for deferral." It stressed that the dispute involved a statement by a single foreman made to a single employee and a shop steward during the course of a routine first-step grievance meeting and that the union contract established that such disputes are subject to the grievance-arbitration provisions. The Board also relied on the fact that the employer expressed "its willingness, indeed its eagerness, to arbitrate and dispute." The Board held that it would defer its involvement and instead allow the parties to resolve disputes through contractually-agreed arbitration procedure, where an employer and a union have voluntarily elected to create a dispute resolution machinery culminating in final and binding arbitration. The Board stated that it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery.

The dissent stated the position that it is improper for employees to be required to pursue the private adjudication of their public rights through arbitration. The dissent believes that the public rights of employees should be adjudicated by the Board.

C. Conclusion

I see no merit in substituting my judgment for that of the NLRB concerning its recent decisions as discussed above. The decision for a broad-scale deferral to arbitration policy is contained in the Board's United Technologies decision, and the limited review standards concerning an arbitrator's decision where an unfair labor practice is alleged as stated in the Board's Olin Corporation decision. The new deferral and review policies will result in a reduction in the Board's workload and will result in a corresponding savings in the Board's salaries and expenses. In order for an arbitrator to effectively rule on unfair labor practices charges, she or he must have a general competence in the area of Labor Law and statutory construction, and must have knowledge of the leading decisions of the Board and the courts interpreting the National Labor Relations Act. I submit that many labor arbitrators do not have such background and training and simply are not competent to resolve the statutory issues involved in these disputes. I urge the NLRB to set up a series of courses in the various regions throughout the country for the training of labor arbitrators on matters relating to the resolution of the statutory issues that may confront arbitrators in the resolution of unfair
labor practice disputes. With arbitrators doing the work formerly performed by the Board, the resultant monetary savings to the Board could be applied to a partial funding of such courses.

FOOTNOTES

1. Milwaukee Spring Division of Illinois Coil Spring Company and UAW, 265 NLRB No. 28 (1982).

2. 268 NLRB No. 87 (1984).


10. 198 NLRB 527 (1972).

11. 228 NLRB 102 (1977).