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Labor Law—NLRB Deferral to Arbitration Decisions—Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977)

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I. INTRODUCTION

The National Labor Relations Board (NLRB) is charged with administering the provisions of the National Labor Relations Act (NLRA).¹ In particular, one of the Board's duties is to ensure the legality and fairness of arbitrated decisions. However, beginning with the *Spielberg Manufacturing Co.*² decision in the mid-1950s, the Board has developed a policy favoring deference to arbitration decisions whenever such deference would not be repugnant to the purposes and policies of the NLRA. The careful balance struck in *Spielberg* has been upset in recent years by decisions which have, at least, eroded the Board's discretion to hear various unfair labor practice issues, and which in some instances have approached actual abdication of Board authority and responsibility.³

The Ninth Circuit recently subjected this rapidly expanding deferral policy to close scrutiny in *Stephenson v. NLRB*.⁴ The Ninth Circuit concluded that the Board had overstepped its powers by using liberalized

1. 29 U.S.C. §§ 151-168 (1970). The National Labor Relations Act § 10(a) is codified at 29 U.S.C. § 160(a) (1970) and provides in pertinent part: "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . ." See generally *Monsanto Chem. Co.*, 130 N.L.R.B. 1097, 1099, 47 L.R.R.M. 1451, 1452 (1961); *Monsanto Chem. Co.*, 97 N.L.R.B. 517, 520, 29 L.R.R.M. 1126, 1128 (1941), *enforced*, 205 F.2d 763 (8th Cir. 1953).

2. 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955). *Spielberg* was actually an offspring of an earlier deferral doctrine formulated in *Timken Roller Bearing Co.*, 70 N.L.R.B. 500, 18 L.R.R.M. 1370 (1946). See generally *Radio Television Technical School, Inc. v. NLRB*, 488 F.2d 457, 461 (3d Cir. 1973); Comment, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191, 1192 (1968). The term "arbitration" for the purposes of this note will denote voluntary grievance arbitration. Prior to the 1940s, arbitration was rarely used to settle grievance disputes. Today, it is used in nearly 95% of labor-management agreements in the private sector. See generally Cohen & Eaby, *The Gardner-Denver Decision and Labor Arbitration*, 27 LAB. L.J. 18 (1976).

3. See, e.g., *T.I.M.E.-DC, Inc. v. NLRB*, 504 F.2d 294, 302 (5th Cir. 1974); *Fikse Bros. (Stephenson)*, 220 N.L.R.B. 1301, 1301-02, 90 L.R.R.M. 1354, 1355-56 (1975) (Member Fanning, dissenting); *National Tea Co.*, 198 N.L.R.B. 614, 615, 80 L.R.R.M. 1736, 1738 (1972). The use of the term "abdication" is not intended as a personal attack upon the Board members. Rather, it is used to highlight the use and misuse of powers given to the Board through many generations of Board members. See also Belkin, *Are Arbitrators Qualified to Decide Unfair Labor Practice Cases?*, 24 LAB. L.J. 818, 819-20 (1973).

4. 550 F.2d 535 (9th Cir. 1977) (Senior Circuit Judge Barnes and Judge Ely for the majority; Judge Kunzig, by designation, dissenting).

tests for deferral which were never envisaged in the original *Spielberg* doctrine, and which were not sustainable in light of the mandate given to the Board by Congress.⁵ *Stephenson* represents a classic example of the refusal of reviewing courts to allow an administrative board to relinquish its power to private means of resolution, especially when, as here, the Board's express purpose was to serve the public sector's needs through a public forum.⁶

II. FACTS OF THE CASE

Arthur Stephenson entered the employ of respondent Fikse Brothers on July 5, 1973, as a diesel repair mechanic at \$3.50 per hour. The shop was covered by a union contract which set forth wage rates for union members, but there was no requirement that Stephenson join the union.⁷ Initially Stephenson chose not to join the union, and even though he was paid at a lower \$3.50 wage rate, he received benefits and privileges not available to the union members.⁸ Late in 1973 Stephenson joined the union. At that point his relations with management turned sour, the benefits and privileges ceased, and Stephenson was discharged for incompetence for reasons that were later determined to be unjustified.⁹ Stephenson instituted the required arbitration proceedings,¹⁰ and although he prevailed therein, he was dissatisfied with the actual sum awarded to him.¹¹ Stephenson then brought his claim before an administrative law judge¹² who affirmed the award rendered in the arbitration

5. The most liberal of these tests is enunciated in *Electronic Reproduction Serv. Corp.*, 213 N.L.R.B. 758, 87 L.R.R.M. 1211 (1974), *overruled in* *Stephenson v. NLRB*, 550 F.2d 535, 541 (9th Cir. 1977), and discussed at notes 71-89 *infra* and accompanying text.

6. *See generally* *National Licorice Co. v. NLRB*, 309 U.S. 350, 362-63 (1940); *Banyard v. NLRB*, 505 F.2d 342, 347 (D.C. Cir. 1974); *Shoreline Enterprises of America, Inc. v. NLRB*, 262 F.2d 933, 944 (5th Cir. 1959); *Tyee Constr. Co.*, 202 N.L.R.B. 307, 310, 82 L.R.R.M. 1548, 1552 (1973) (Members Fanning and Jenkins, dissenting).

7. *Fikse Bros.*, 220 N.L.R.B. 1301, 1302-03, 90 L.R.R.M. 1354, 1355 (1975).

8. These benefits included the right to drink coffee at work, the free use of shop coveralls, as well as other privileges. *Id.* at 1302, 90 L.R.R.M. at 1355.

9. *Id.* at 1302, 90 L.R.R.M. at 1356. The true reason appears to have been related to Stephenson's increased interest and involvement with union activities. Respondent *Fikse Bros.*, however, contended that Stephenson was discharged for smoking near containers of flammable solvent after numerous warnings regarding such practices.

10. *Id.* at 1304, 90 L.R.R.M. at 1354-55. Stephenson's employment contract contained a mandatory grievance-arbitration clause. Under the *Collyer* doctrine (discussed at text accompanying notes 49-55 *infra*) the parties would normally be required to exhaust their contractual remedies prior to seeking Board review.

11. Stephenson was seeking the difference in wages paid and what he claimed was owed to him since he was hired (\$1,800). He was awarded \$250 in the arbitration decision. *Id.* at 1304, 90 L.R.R.M. at 1354.

12. *See* 29 U.S.C. § 160(a) (1970).

decision. An appeal was taken to the NLRB, which in turn upheld the decisions rendered below, based on the deferral practice established in *Spielberg* and later broadened in *Electronic Reproduction Service Corp.*¹³ Stephenson, pursuant to the Labor Management Relations Act (LMRA),¹⁴ invoked the reviewing power of the Ninth Circuit Court of Appeals which reversed the ruling of the administrative law judge and the Board, and held that deferral was inappropriate in this instance. The court held that only when it is clear that an arbitration panel is competent to resolve the issues subject to deferral, and only when those issues are, in fact, clearly decided, can deferral be properly exercised.¹⁵ With these two additional requirements, the Ninth Circuit in *Stephenson* converted the three-pronged deferral test of *Spielberg* into a more restrictive five-pronged test as originally formulated by the District of Columbia Circuit Court of Appeals in *Banyard v. NLRB*.¹⁶

III. STATUTORY BASIS FOR THE NLRB'S DEFERRAL POLICY

Section 10(a) of the National Labor Relations Act¹⁷ states that the NLRB's power to remedy unfair labor practices "shall not be affected by

13. 213 N.L.R.B. 758, 87 L.R.R.M. 1211 (1974). Although claiming not to rely on the discredited *Electronic Reproduction* decision as the administrative law judge had admittedly done, the dissent reasoned that the majority's decision perpetuated the rationale of that now discredited case. *Fikse Bros.*, 220 N.L.R.B. at 1301, 90 L.R.R.M. at 1355 (Member Fanning, dissenting). See also notes 71-89 *infra* and accompanying text.

14. 29 U.S.C. § 160(f) (1970), reading in part: "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals" Ironically, since the Board's policy on deferral was established, most cases have been subject to abstention and deferral at the regional office level and have never reached the five-member Board, making review by the court of appeals impossible. See Simon-Rose, *Deferral Under Collyer by the NLRB of Section 8(a)(3) Cases*, 27 LAB. L.J. 201, 213 (1976) [hereinafter cited as Simon-Rose].

15. *Stephenson v. NLRB*, 550 F.2d 535, 539 (9th Cir. 1977). Normally the findings of the Board will not be disturbed if there is substantial evidence to support the findings. See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951); *NLRB v. International Longshoremen's Local 27*, 514 F.2d 481, 483 (9th Cir. 1975); *NLRB v. Northern Metal Co.*, 440 F.2d 881, 885-86 (3d Cir. 1971).

16. 505 F.2d 342 (D.C. Cir. 1974). The two new restrictions require that the arbitral panel be competent to decide the issues in question, and that the arbitrator actually decide those issues adjudged to be within the arbitrator's competence. These requirements are merely added to, and do not replace, *Spielberg's* three-pronged test. Of the two additional requirements, the "competency" criterion seems to have the rougher edges. As yet, no definite rule to determine an arbitrator's competency has been devised. See notes 123-25 *infra* for a discussion of the issue of whether arbitrators are competent to decide statutory issues at all.

17. 29 U.S.C. § 160(a) (1970). See also *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964).

any other means of adjustment . . . that has been or may be established by agreement"¹⁸ The Board has held that it is not bound by an arbitration award¹⁹ and can fashion its own remedies if such remedies are appropriate in order to carry out the statutory mandate to correct unfair labor practices.²⁰ It has openly disregarded arbitration awards which are at odds with the statute, or where the Board's integrity is challenged by the complaint itself.²¹

Nevertheless, courts have consistently held that it is within the Board's discretionary power to defer to arbitration awards in appropriate situations.²² The concept of nearly automatic deference on contractual or factual issues has never been a matter of conflict.²³ Rather, it is in the

18. 29 U.S.C. § 160(a) (1970). See also *National Radio Co.*, 198 N.L.R.B. 527, 80 L.R.R.M. 1718 (1972) (Members Jenkins and Fanning, dissenting). The dissent quoted the following language: "[T]he Board may, in its discretion, defer its exercise of jurisdiction over any such unfair labor practice in any case where there is another means of prevention provided for by agreement" *Id.* at 535, 80 L.R.R.M. at 1726 (citing I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1301 (1935) & II NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 2351 (1935)). The dissent argued that the fact that this passage was struck from the final draft of the NLRA provides proof of Congress' intent to reject expansive deferral policies. Cf. *Johannesen & Smith, Collyer: Open Sesame to Deferral*, 23 LAB. L.J. 723, 738 (1972) ("The Board cannot substitute its judgment for that of the parties concerning which process—statutory or contractual—to use in the settlement of contract disputes.").

19. *Hawaiian Hauling Serv., Ltd. v. NLRB*, 545 F.2d 674, 675 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2921 (1977).

20. *NLRB v. International Longshoremen's Local 27*, 514 F.2d 481, 483 (9th Cir. 1975). *Accord*, *NLRB v. Walt Disney Prods.*, 146 F.2d 44, 48 (9th Cir. 1945), *cert. denied*, 324 U.S. 877 (1946), in which the Ninth Circuit stated: "Clearly, agreements between private parties cannot restrict the jurisdiction of the Board. . . . [W]e believe the Board may exercise jurisdiction in any case of an unfair labor practice when in its discretion its interference is necessary to protect the public rights defined in the Act." *Id.* (citations omitted). *But cf.* *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (interpreting § 8 of the NLRA as designed "to avoid 'a rigid scheme of remedies'"). See also *Radio Television Technical School, Inc. v. NLRB*, 488 F.2d 457 (3d Cir. 1973); *National Tea Co.*, 198 N.L.R.B. 614, 80 L.R.R.M. 1736 (1972).

21. See *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964). *Accord*, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50 n.13 (1974); *Monsanto Chem. Co.*, 130 N.L.R.B. 1097, 1099, 47 L.R.R.M. 1451, 1452 (1961).

22. *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964). The Supreme Court reasoned in *Carey* that "the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged labor practices if to do so will serve the fundamental aims of the Act." *Id.* at 270-71. *Accord*, *NLRB v. Strong*, 393 U.S. 357, 360-61 (1969); *NLRB v. International Ass'n of Bridge Workers Local 378*, 473 F.2d 816, 817 (9th Cir. 1973) (per curiam). Cf. *Siegel, NLRB Deferral to Arbitration*, 26 N.Y.U. CONF. ON LAB. 19, 22-23 (1974) (arguing that power to defer is within Board's ancillary jurisdiction). See also 29 U.S.C. § 173(d) (1970); *Monsanto Chem. Co.*, 130 N.L.R.B. 1097, 1098-99, 47 L.R.R.M. 1451, 1452 (1961).

23. See *Coulson, Title Seven Arbitration In Action*, 27 LAB. L.J. 141, 143 (1976) ("[C]ontractual language is recognized as the touchstone of the arbitrator's authority."). *But see* *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 429 (1967); *National Radio Co.*, 198

area of statutory construction, an area exclusively reserved for the Board by the NLRA, where there has been divergence of opinion.²⁴

The major stumbling block in establishing a workable deferral policy appears to be in reconciling the competing congressional policies between the independence of the Board and the favoring of arbitration as a means of resolving labor disputes.²⁵ The former principle relates to the notion that the NLRB is an independent and autonomous protector of statutory rights in the realm of labor relations;²⁶ this doctrine requires free access by individuals to the Board in order to vindicate statutory rights.²⁷ On the other hand, of an equally compelling nature is the congressional policy supporting the concept of deference to arbitration and giving "full play" to that method of dispute resolution whenever possible.²⁸ The Labor Management Relations Act states that arbitration enjoys a preferred position in labor law.²⁹ The Supreme Court has added the view that arbitration has served the national interest by reducing industrial

N.L.R.B. 527, 533, 80 L.R.R.M. 1718, 1725 (1972) (Members Fanning and Jenkins, dissenting).

24. The debate centers on whether Congress meant that statutory issues should be exclusively decided de novo by the Board, or whether the Board members can act as a reviewing body and delegate decisional power elsewhere. *See* NLRB v. Strong, 393 U.S. 357, 361 (1969).

25. Lodges 700, 743, 1746, Int'l Ass'n of Machinists v. NLRB, 525 F.2d 237, 245 (2d Cir. 1975); Local 2188, Int'l Bhd. of Electrical Workers v. NLRB, 494 F.2d 1087, 1090 (D.C. Cir.), *cert. denied*, 419 U.S. 835 (1974); Collyer Insulated Wire Co., 192 N.L.R.B. 837, 841, 77 L.R.R.M. 1931, 1935 (1971). *See also* Simon-Rose, *supra* note 14, at 202, stating that the problem resulted from the failure of Congress "to explain what impact, if any, LMRA Section 203(d) would have on the Board's exclusive authority to administer the NLRA pursuant to Section 10(a) of the Act."

26. The Board's statutory mandate is found in NLRA § 10(a), 29 U.S.C. § 160(a) (1970). *See* note 1 *supra*.

27. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 55 (1974). *See also* NLRB v. Industrial Union of Marine Workers, 391 U.S. 418, 424-25 (1968) (stating that "the overriding public interest makes unimpeded access to the Board the only healthy alternative . . .").

28. Gateway Coal Co. v. UMW, 414 U.S. 368, 381-82 (1974); Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 270-71 (1964); Lodge 1327, Machinists Workers v. Fraser & Johnson Co., 454 F.2d 88, 91 (9th Cir. 1971), *cert. denied*, 406 U.S. 920 (1972). Full play is given to arbitration agreements because of the extent of their use. *See, e.g.*, U.S. BUREAU OF LABOR STATISTICS, DEPT. OF LABOR, BULL. NO. 1425-1, MAJOR COLLECTIVE BARGAINING AGREEMENTS 1 (1964) (finding that approximately 94% of all collective bargaining agreements provide for arbitration of some or all contract disputes).

29. The Labor Management Relations Act § 203(d), 29 U.S.C. § 173(d) (1970) states in pertinent part: "[F]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." *See* Gateway Coal Co. v. UMW, 414 U.S. 368, 382 (1974); Nabisco, Inc. v. NLRB, 479 F.2d 770, 773 (2d Cir. 1973). *See also* S. REP. NO. 105, 80th Cong., 1st Sess. 23 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 429 (1948).

strife and by offering an alternative to economic coercion.³⁰ The legislative history of the 1947 amendments to the LMRA provides further evidence of the congressional policy to encourage the voluntary settlement of contractual disputes through the machinery established by the parties while in the process encouraging self-government in labor-management relations.³¹ It is the delicate balance between these two competing policies that the Ninth Circuit in *Stephenson* seeks to preserve.

IV. THE DEFERRAL DOCTRINE'S DEVELOPMENT IN CASE LAW

A. *The Ninth Circuit: Early Starter—Late Bloomer*

The Ninth Circuit is not a newcomer to the issue of when deferral to an arbitration award is appropriate. In *NLRB v. Walt Disney Productions*³² the Ninth Circuit made one of the earliest pronouncements on the wisdom of the deferral doctrine in holding that the Board should not exercise its deferral powers in an unfair labor practice case when in the Board's opinion its "interference" is necessary to protect the public rights as defined in the NLRA.³³ Until the mid-1970s, however, the Ninth Circuit rarely dealt with the scope of the deferral doctrine, unlike the other circuits and the Board.³⁴ Therefore, because much of the development of the deferral doctrine has taken place outside the Ninth Circuit, an examination of those decisions is important to a proper understanding of the *Stephenson* decision.³⁵

B. Spielberg: *The Cornerstone of Deferral*

As suggested earlier, the policy of deferring to arbitration decisions was carried on informally long before the *Spielberg Manufacturing Co.*

30. *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 18 (1974); *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 454 (1957).

31. When reporting out its bill the senate committee commented:

[I]t is not intended that the National Labor Relations Board shall undertake to adjudicate all disputes alleging breach of labor agreements. Any such course would be inimical to the development by the parties themselves of adequate . . . voluntary arbitration machinery. It is the purpose of this bill to encourage free-collective bargaining; it would not be conducive to that objective if the Board became the forum for trying day-to-day grievances

S. REP. NO. 105, 80th Cong., 1st Sess. 23 (1947).

32. 146 F.2d 44 (9th Cir. 1944), *cert. denied*, 324 U.S. 877 (1945).

33. *Id.* at 48. The court also stated: "The result is inevitable that the NLRB may exercise its jurisdiction . . . and is in no way governed by the NWLB [National War Labor Board] policy favoring arbitration." *Id.*

34. Although the Ninth Circuit had some opportunities to decide deferral questions in the years between *Disney* and *Stephenson*, it chose not to set any new trends.

35. Certainly the *Stephenson* majority's reliance on the District of Columbia Circuit's opinion in *Banyard* is reason enough to explore the deferral policies in other circuits and of the various Board members. See note 91 *infra* and accompanying text.

decision.³⁶ In effect, the Board's decision in *Spielberg* brought the deferral policy out into the open. The court formulated a three-pronged test for proper deferral to arbitration: first, that the proceedings be fair and regular in their award; second, that all parties have previously agreed to be bound by the arbitration decision; and third, that the decision of the arbitration panel not be clearly repugnant to the purposes and policies of the NLRA.³⁷ The court's determination in *Spielberg* that deferral should be allowed was made easier by the close relationship between factual and statutory questions and by the fact that the issues had been clearly decided in the earlier arbitration proceedings.³⁸ The Board, at that time, did not have to face the more difficult questions of whether deferral was appropriate when the statutory and factual questions were not closely related, or whether it was appropriate when the issue was not clearly decided in arbitration.³⁹

The Board's underlying policy considerations in *Spielberg* are based on encouraging the voluntary resolution of labor disputes, allowing for the final adjustment of a dispute by a method mutually agreed upon by the parties, and preventing the expense and injustice which would result were the respondent required to defend himself in two forums on the same charge.⁴⁰ In addition, it was strongly argued in *Spielberg* that if the Board would still give de novo consideration to an issue previously

36. 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955). See *Wertheimer Stores Corp.*, 107 N.L.R.B. 1434, 33 L.R.R.M. 1398 (1954); *Monsanto Chem. Co.*, 97 N.L.R.B. 517, 29 L.R.R.M. 1126 (1951), *enforced*, 205 F.2d 763 (8th Cir. 1953); *Timken Roller Bearing Co.*, 70 N.L.R.B. 500, 18 L.R.R.M. 1370 (1946), *rev'd on other grounds*, 161 F.2d 949 (6th Cir. 1947).

37. 112 N.L.R.B. at 1082, 36 L.R.R.M. at 1153. See also *Electrical Workers Local 715 v. NLRB*, 494 F.2d 1136, 1138 (D.C. Cir. 1975); *Cloverleaf Div. of Adams Dairy Co.*, 146 N.L.R.B. 1410, 1423, 56 L.R.R.M. 1321, 1325-26 (1964) (concurring opinion); *Raytheon Co.*, 140 N.L.R.B. 883, 886, 52 L.R.R.M. 1129, 1131 (1963), *set aside on other grounds*, 326 F.2d 471 (1st Cir. 1964); Comment, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191, 1192 (1968).

38. See *Simon-Rose*, *supra* note 14, at 203.

39. See *Stephenson v. NLRB*, 550 F.2d 535, 539 n.7 (9th Cir. 1977) ("In *Spielberg*, the Board's deference was reasonable as the unfair labor practice issue was so concomitant with an issue involving contractual interpretation that the latter was dispositive of the former."); *Local 2188, Int'l Bhd. of Electrical Workers v. NLRB*, 494 F.2d 1087, 1091 (D.C. Cir. 1974). Cf. *National Radio Co.*, 198 N.L.R.B. 527, 80 L.R.R.M. 1718 (1972), *overruled in General Am. Transp. Corp.*, 94 L.R.R.M. 1483 (1977) (the first case to deal with a dispute that did not have intertwined statutory and contractual issues). For a discussion of *National Radio Co.*, see notes 63-70 *infra*.

40. Defending in two forums on the same charge is known as the "two bites of the apple" or dual theory of litigation, explored more fully in notes 76-79 *infra*. This concept is traceable to the early deferral doctrine decisions. See, e.g., *Associated Press v. NLRB*, 492 F.2d 662, 667 (D.C. Cir. 1974); *Timken Roller Bearing Co.*, 70 N.L.R.B. 500, 501, 18 L.R.R.M. 1370, 1371 (1946).

resolved by arbitration, little progress towards the peaceful resolution of industrial disputes could be accomplished.⁴¹ Critics have pointed to *Spielberg* as the first step towards abdication of the Board's authority.⁴² *Spielberg* supporters cite the Board's tremendous caseload as reason enough for liberal deferral policies;⁴³ the third prong of the *Spielberg* test (that the decision not be repugnant to the statute) appears, to *Spielberg*'s supporters, to be an adequate safeguard against abuse or abdication of responsibility.⁴⁴

Aside from those critics who shun all deferral policies as an abdication of the Board's authority, the *Spielberg* doctrine has rarely been criticized in its twenty-year tenure.⁴⁵ Rather, problems have resulted in the interpretation and modification of the basic *Spielberg* guidelines to areas beyond the bounds originally contemplated in that decision.⁴⁶ *Stephenson* similarly supports *Spielberg*'s basic requirements, but requires a more exacting standard in the areas of competency and clarity of the arbitration panel's record before deferral can be considered properly exercised.⁴⁷

The *Spielberg* doctrine was designed to test whether deferral to a *finalized* arbitration award is proper.⁴⁸ In *Collyer Insulated Wire Co.*,⁴⁹

41. In *Associated Press v. NLRB*, 492 F.2d 662, 667 (D.C. Cir. 1974), Judge Skelly Wright, writing for a unanimous court, stated: "We think it clear that submission to grievance and arbitration proceedings of disputes which might involve unfair labor practices would be substantially discouraged if the disputants thought the Board would give de novo consideration to the issue which the arbitrator might resolve."

42. See, e.g., *Simon-Rose*, *supra* note 14, at 211-13.

43. *National Radio Co.*, 198 N.L.R.B. 527, 532, 80 L.R.R.M. 1718, 1723 (1972), *overruled in General Am. Transp. Corp.*, 94 L.R.R.M. 1483 (1977). In *General Am. Transp. Corp.*, the Board stated: "The reduction in our workload is insignificant, and the sacrifice of statutory protection is substantial." 94 L.R.R.M. at 1486. This is the same rationale that the dissent in *National Radio* put forth against the caseload argument. See *National Radio Co.*, 198 N.L.R.B. at 535-56, 80 L.R.R.M. at 1727 (Members Fanning and Jenkins, dissenting).

44. *Associated Press v. NLRB*, 492 F.2d 662, 667 (D.C. Cir. 1974). See generally Comment, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191, 1192 (1968).

45. Siegel, *NLRB Deferral to Arbitration in Unfair Labor Practices*, 26 N.Y.U. CONF. ON LAB. 19, 31 (1973) ("I have recently had the occasion . . . to research every Supreme Court comment on *Spielberg*. I have yet to find an adverse Supreme Court comment on *Spielberg*."). See also *Simon-Rose*, *supra* note 14, at 216.

46. See generally *Electrical Workers Local 715 v. NLRB*, 494 F.2d 1136, 1137-38 (D.C. Cir. 1975) for an illustration of the breadth with which courts have interpreted the *Spielberg* doctrine.

47. *Stephenson v. NLRB*, 550 F.2d 535, 536-37 (9th Cir. 1977). The *Stephenson* majority merely criticized the unjustified extension of the *Spielberg* doctrine by cases such as *Electronic Reproduction* (discussed at notes 71-89 *infra* and accompanying text). The *Stephenson* court did not disapprove of *Spielberg*'s basic elements.

48. Note, *Alexander v. Gardner-Denver and Deferral to Labor Arbitration*, 27 HASTINGS L.J. 403, 408 (1975).

49. 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971).

the deferral concept was expanded to include the requirement that parties involved in disputes utilize contractually agreed upon methods of arbitration *prior* to seeking Board review. Importantly, the Board will retain jurisdiction over the matter

solely for the purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the [LMRA].⁵⁰

The decision in *Collyer* relied upon the same policy considerations underlying the *Spielberg* formula, to wit, encouraging "the voluntary resolution by parties of their disputes . . . through their own agreed-upon methods."⁵¹ The *Collyer* doctrine has been discussed favorably by the United States Supreme Court,⁵² and according to a Second Circuit Court of Appeals opinion, "The validity of the *Collyer* doctrine is no longer seriously in doubt."⁵³ Notwithstanding the general acceptance of *Collyer*, two members of the NLRB continually dissent in cases affirming the doctrine.⁵⁴ However, the impact of these dissents on other Board members and on courts confronted with the issue has been negligible.⁵⁵

C. *The Development of Deferral Policies: Prelude to Abdication?*

During the twenty years following *Spielberg* the Board and reviewing courts approved a steady expansion of the deferral doctrine into sensitive areas of the Board's jurisdiction.⁵⁶ The first expansion of the *Spielberg*

50. *Id.* at 843, 77 L.R.R.M. at 1938.

51. *Id.* at 843-44, 77 L.R.R.M. at 1938.

52. *William E. Arnold Co. v. Carpenters Council of Jacksonville*, 417 U.S. 12, 16 (1974).

53. *Lodge 700, Int'l Ass'n of Machinists v. NLRB*, 525 F.2d 237, 239 (2d Cir. 1975).

54. *See, e.g., McLean Trucking Co.*, 202 N.L.R.B. 710, 712, 82 L.R.R.M. 1652, 1654 (1973) (Members Fanning and Jenkins, dissenting).

55. In *General Am. Transp. Corp.*, 94 L.R.R.M. 1483 (1977), Members Fanning and Jenkins authored a plurality opinion which expressed their opposition to *Collyer*. Chairman Murphy (concurring, 94 L.R.R.M. at 1486) points out that such a holding was wholly unnecessary to a resolution of the issue before the Board.

56. The expansion received its impetus during the 1960s. *See, e.g., Local 1522, Int'l Bhd. of Electrical Workers*, 180 N.L.R.B. 131, 73 L.R.R.M. 1091 (1969); *International Harvester Co.*, 138 N.L.R.B. 923, 51 L.R.R.M. 1155 (1962), *aff'd sub nom. Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964). However, the expansion did not reach its full proportions until the 1970s with such decisions as *Electronic Reproduction Serv. Corp.*, 213 N.L.R.B. 758, 87 L.R.R.M. 1211 (1974), and *National Radio Co.*, 198 N.L.R.B. 527, 80 L.R.R.M. 1718 (1972).

doctrine came in *International Harvester Co.*⁵⁷ where the Board stated that it would "voluntarily withhold" its authority to adjudicate statutory unfair labor claims that arose from the same arbitrated contractual claims "unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, serious procedural irregularities, or that the award was clearly repugnant to the purposes and policies of the Act."⁵⁸ The arbitrator's findings on law and fact would stand unless "palpably wrong,"⁵⁹ and the Board was free to adopt the arbitral award as a complete remedy.⁶⁰ Soon after *International Harvester, Local 1522, International Brotherhood of Electrical Workers*⁶¹ followed with a similar fact situation and added the factor that new information raised in the unfair labor practice hearing may not be sufficient reason itself to ignore the previously rendered arbitration award.⁶²

In *National Radio Co.*,⁶³ a recently overruled extension of *Collyer*, the Board tried to extend the deferral doctrine to cases where the applicable questions of contract and statutory protections were not necessarily co-extensive.⁶⁴ While the Board appeared to appreciate the impact that deference to unrelated statutory considerations could have, it justified the policy as being in the best interests of a quick and fair vindication of employee rights.⁶⁵ In the context of the case, the Board refused to equate

57. 138 N.L.R.B. 923, 51 L.R.R.M. 1155 (1962), *aff'd sub nom.* Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964).

58. *Id.* at 927, 51 L.R.R.M. at 1157. The Board, by this policy, varied the language of *Spielberg*. See Comment, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191, 1192 (1968), suggesting that this was a drastic extension, rather than a mere variance, of the *Spielberg* doctrine.

59. 138 N.L.R.B. at 928-29, 51 L.R.R.M. at 1158. *But cf.* Comment, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191, 1206 (1968) (arguing that this policy was a "remarkable misdelegation of authority").

60. See, e.g., *Local 715, Int'l Bhd. of Electrical Workers v. NLRB*, 494 F.2d 1136, 1138 (D.C. Cir. 1974). See also *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082, 36 L.R.R.M. 1152, 1153 (1955).

61. 180 N.L.R.B. 131, 73 L.R.R.M. 1091 (1969).

62. *Id.* at 132, 136-37, 73 L.R.R.M. at 1091-92.

63. 198 N.L.R.B. 528, 80 L.R.R.M. 1718 (1972), *overruled in General Am. Transp. Corp.*, 94 L.R.R.M. 1483 (1977).

64. The majority realized that whereas in *Collyer* the statutory and contractual issues were sufficiently intertwined, this was not necessarily the case in *National Radio*. For this reason, the court felt it must be especially cautious since "a contractually sound and entirely proper arbitration award might fail to dispose of all issues arising under the Act." 198 N.L.R.B. at 530, 80 L.R.R.M. at 1721.

65. *Id.* at 530-31, 80 L.R.R.M. at 1722. In addition, the majority stated that "[t]he intervention of this Board, by contrast, can sometimes be an unsettling force." *Id.* at 532, 80 L.R.R.M. at 1723. The dissent in *National Radio* reacted sharply to this argument that Board intervention creates instability by stating:

[I]f the statutory protection is to be meaningful, of course Board decisions finding unlawful conduct may be "unsettling" to the parties who have agreed to an arbitration provision The significance of the "unsettling effect" of a Board decision

abstention with abdication.⁶⁶

The dissenting Board members in *National Radio* did not share the majority's enthusiasm for abstention. They strongly cautioned against such broad "subcontracting" of public authority to private tribunals,⁶⁷ and questioned the arbitrator's competence in deciding the tough statutory questions with the same degree of protection that the Board could guarantee under the NLRA.⁶⁸ As in *International Harvester*, the dissenting members believed that such deferral discourages uniformity.⁶⁹ In addition, Member Jenkins suggested that a liberal deferral policy sacrifices the individual's right of a comprehensive Board review to the interests of efficiency through arbitration.⁷⁰

The expansion of the deferral doctrine was evident in a 1974 case, *Electronic Reproduction Service Corp.*⁷¹ This case was a formidable obstacle to the Ninth Circuit's attempt in *Stephenson* to define more clearly the limits of the deferral doctrine. In *Electronic Reproduction*, against the weight of previous Board opinions on point,⁷² the NLRB

is simply that the protection of statutory rights often requires more than an arbitrator is empowered to decide, or will award.

Id. at 535, 80 L.R.R.M. at 1726-27.

66. *Id.* at 531, 80 L.R.R.M. at 1722.

67. *Id.* at 533, 80 L.R.R.M. at 1724 (Members Fanning and Jenkins, dissenting). The dissent reasoned: "To compel the victim of this alleged discrimination to resort to arbitration is not 'deferral,' but a subcontracting to a private tribunal of the determination of rights conferred and guaranteed solely by the statute. Such action mocks the statute and the reason for this Board's existence." *Id.*

68. In comparing an arbitrator's ability to resolve a statutory issue with the Board's ability to approach the same issue, the dissenting opinion of Members Fanning and Jenkins stated:

The special competence of arbitrators in contract disputes, which is the only substantive justification the Supreme Court has found for ordering the contracting parties to arbitrate rather than litigate, does not exist in the field of statutory rights. The arbitration process cannot use the Board's investigative or legal resources and capabilities, and arbitrators do not have the expertise in statutory issues which the Board has necessarily acquired through long, intimate, and specialized experience.

Id. at 533, 80 L.R.R.M. at 1725.

69. *Id.* ("Uniformity disappears, the preemption doctrine is frustrated, private tribunals proliferate with no real prospect of review of their actions, and anarchy begins to intrude."). See also *Collyer Insulated Wire Co.*, 192 N.L.R.B. 837, 855, 77 L.R.R.M. 1931, 1949 (1971) (Member Jenkins, dissenting) ("It disposes only of the individual case, rather than settling a principle.").

70. *Collyer Insulated Wire Co.*, 192 N.L.R.B. 837, 855, 77 L.R.R.M. 1931, 1949 (1971) (Member Jenkins, dissenting). See *Pye, Collyer's Effect on the Individual Charging Party*, 25 LAB. L.J. 561, 569 (1974); *Siber, The Gardner-Denver Decision: Does It Put Arbitration In a Bind?*, 25 LAB. L.J. 708, 713 (1974). See also Member Fanning's dissent in *National Radio* in which he stated: "The 'therapy of arbitration' which the majority illogically imports into this case leaves the patient to die without benefit of the protection Congress intended him to have." 198 N.L.R.B. at 534, 80 L.R.R.M. at 1726 (footnote omitted).

71. 213 N.L.R.B. 758, 87 L.R.R.M. 1211 (1974).

72. See, e.g., *John Klann Moving Co.*, 170 N.L.R.B. 1207, 67 L.R.R.M. 1585 (1968),

handed down its broadest and most controversial decision on the deferral policy to date—a policy which was flatly rejected in *Stephenson*.⁷³ The Board in *Electronic Reproduction* held that when the Board defers to an arbitration award, it will be presumed that the arbitrator has adequately determined all related unfair labor practice claims unless “unusual circumstances are shown which demonstrate that there were bona fide reasons . . . which caused the failure to introduce such evidence at the arbitration proceeding.”⁷⁴ The Board held that this presumption not only applies to evidence that was actually presented on the unfair labor practices claim, but also to other evidence which the parties had an opportunity to present, but did not.⁷⁵ In effect, the *Electronic Reproduction* decision gave birth to an estoppel policy⁷⁶ in an attempt to force the

enforced, 411 F.2d 261 (6th Cir. 1969); *D.C. Int'l, Inc.*, 162 N.L.R.B. 1383, 64 L.R.R.M. 1177, *rev'd on other grounds*, 385 F.2d 215 (8th Cir. 1967). In *D.C. Int'l*, the Board, in refusing to defer to the arbitrator's decision, found that the issue of an unjustified discharge was never raised directly or by inference, much less litigated before the committee. In *John Klann*, the Board also concluded that the arbitrator's award should not be given controlling weight because the arbitration committee was never presented with, nor did it, sua sponte, consider the question of whether the reasons advanced by the respondent for the discharge were specious.

73. *Stephenson v. NLRB*, 550 F.2d at 541.

74. 213 N.L.R.B. at 762, 87 L.R.R.M. at 1216. *Accord*, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (“A mere ambiguity in the opinion accompanying an award . . . is not reason for refusing to enforce the award.”); *Terminal Transp. Co.*, 185 N.L.R.B. 672, 673, 75 L.R.R.M. 1130, 1132 (1970) (“Nor is there reason to disturb the award because the grievance committee, in its decision, made no findings and did not mention the nature of the grievance.”). *Contra*, *Local 715, Int'l Bhd. of Electrical Workers v. NLRB*, 494 F.2d 1136, 1136 (D.C. Cir. 1974) (“In fact, this reasoning appears to contradict the Board's own decisions to the effect that deferral is not appropriate with respect to an issue not considered by the arbitration panel.”). *See also* *Raytheon Co.*, 140 N.L.R.B. 883, 884-85, 52 L.R.R.M. 1129, 1130 (1963), *rev'd on other grounds*, 362 F.2d 471 (1st Cir. 1964); *Monsanto Chem. Co.*, 130 N.L.R.B. 1097, 1099, 47 L.R.R.M. 1451, 1452 (1961). The Board in *Monsanto* stated: “It manifestly could not encourage the voluntary settlement of disputes or effectuate the policies or purposes of the Act to give binding effect in an unfair labor practice proceeding to an arbitration award which does not purport to resolve . . . [that] issue.” *Id.*

75. 213 N.L.R.B. at 761-62, 87 L.R.R.M. at 1215-16. The majority in *Electronic Reproduction* likened the practice of purposefully withholding evidence as “furthering the very multiple litigation which *Spielberg* and *Collyer* were designed to discourage.” The Board distinguished the *Monsanto* and *Raytheon* decisions by finding that in those cases, where deferral was not deemed to be proper, the arbitrator had decided *not* to decide the statutory issues at all, and had made that intent fairly clear. *See also* *Hawaiian Hauling Serv., Ltd. v. NLRB*, 545 F.2d 674, 675 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2921 (1977).

76. *See* *Filmation Assocs., Inc.*, 94 L.R.R.M. 1470 (1977) (Members Penello and Walthier, dissenting). “Moreover, like the doctrines of *res judicata* and *collateral estoppel* . . . *Spielberg* is intended to promote economy of litigation. A party having had the opportunity fairly to litigate an issue in one forum and lost ought not be permitted to try the same issue in another forum.” *Id.* at 1473 (citations omitted). *Accord*, *Timken Roller Bearing Co.*, 70 N.L.R.B. 500, 501, 18 L.R.R.M. 1370, 1371 (1946), *rev'd on other grounds*, 161

parties to plead and prove all their unfair labor practice contentions in the initial arbitration proceedings.⁷⁷ If they did not so disclose, they could face exclusion of that evidence in later Board action. The reason for prohibiting a party "two bites of the apple"⁷⁸ is grounded in the inefficiency of dual litigation.⁷⁹ It is upon that theoretical basis that *Electronic Reproduction* was decided.

By allowing deference on a hazy record below, and by presuming that the arbitrator had considered the statutory issues inherent in the unfair labor practice charges, the *Electronic Reproduction* decision directly confronted and overruled two earlier Board decisions.⁸⁰ In *Airco Industrial Gases*,⁸¹ the Board had determined that deference would not be accorded to the result of an arbitration proceeding where the issue sought to be given deference had not been presented to the arbitral forum. In

F.2d 949 (6th Cir. 1947). Cf. Cohen & Eaby, *The Gardner-Denver Decision and Labor Arbitration*, 27 LAB. L.J. 18, 21 (1976) (deferral discussed in the context of Title VII questions); Johannesen & Smith, *Collyer: Open Sesame to Deferral*, 23 LAB. L.J. 723, 741 (1972) (describing this doctrine of dual litigation in "double jeopardy" terms). *Contra*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974). In accord with the dissenting opinion in *Electronic Reproduction*, the majority in *Gardner-Denver* stated that the protections given under the controlling act cannot be waived. There can be no waiver "since waiver of these rights would defeat the paramount congressional purpose." *Id.*

77. The majority stated that:

Instead [of a quick and fair means of dispute resolution], such an artificial separation of the issues seems likely to lead, as it did herein, to piecemeal litigation in which a party may well prefer to have "two bites of the apple," trying part of the discharge case before the arbitrator, but holding back evidence material to its claim so as to be able to pursue the matter in yet another proceeding before this Board.

213 N.L.R.B. at 761, 87 L.R.R.M. at 1215. For viable answers to the argument that de novo review by the Board gives a party "two bites of the apple," see Coulson, *Title Seven Arbitration in Action*, 27 LAB. L.J. 141, 145 (1976) (arguing for a "waiver" solution to the problems caused by dual litigation). *Accord*, Cohen & Eaby, *The Gardner-Denver Decision and Labor Arbitration*, 27 LAB. L.J. 18, 21 (1976).

78. Variations on the term "two bites of the apple" include dual or multiple litigation, and double jeopardy. *See generally* *Electronic Reproduction Serv. Corp.*, 213 N.L.R.B. at 761, 87 L.R.R.M. at 1215.

79. Despite this inefficiency, the issue is whether Congress intended to permit dual litigation. If so, only congressional mandate can remedy any wasteful practices the legislators have instituted. Several commentators on this dual litigation theory believe that Alexander v. Gardner-Denver, 415 U.S. 36 (1974) severely deflated its rationale. In *Gardner-Denver*, the Supreme Court concluded that even though arbitration was "final and binding" on the employer and the union, in bringing an action under the statute "the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process." *Id.* at 54. *See* Siber, *The Gardner-Denver Decision: Does it Put Arbitration in a Bind?*, 25 LAB. L.J. 708, 717 (1974).

80. The Board's rationales in *Airco Indus. Gases*, 195 N.L.R.B. 676, 79 L.R.R.M. 1467 (1972) and *Yourga Trucking, Inc.*, 197 N.L.R.B. 928, 80 L.R.R.M. 1498 (1972) may still be viable in the wake of *Banyard's* and *Stephenson's* support of the basic tenets upon which those "overruled" cases rest. *See* *Stephenson v. NLRB*, 550 F.2d 535 (9th Cir. 1977).

81. 195 N.L.R.B. 676, 79 L.R.R.M. 1467 (1972).

Yourga Trucking, Inc.,⁸² the Board held that the party asserting that the NLRB should give controlling effect (defer) to an arbitration award has the burden of demonstrating that the statutory issue had been presented in the arbitration proceedings.⁸³ *Electronic Reproduction* shifted this burden onto the party claiming the issue had not or could not have been decided in arbitration under its "presumption" rationale.

Reiterating the belief stated in *National Radio* that discharge cases are best decided by arbitrators since contract issues are difficult to separate from statutory claims, the majority in *Electronic Reproduction*, by overruling the *Airco* and *Yourga* precedents, drastically narrowed the number of unfair labor practices cases in which jurisdiction by the Board could be asserted.⁸⁴ In the interest of preventing piecemeal litigation, and to discourage forum shopping, the Board in *Electronic Reproduction* decided to allow an arbitrator's decision "to stand in the absence of procedural irregularity or statutory repugnancy."⁸⁵

The dissent in *Electronic Reproduction* was clearly upset by the broadening of the power of the Board to defer even statutory issues to arbitration.⁸⁶ Cognizant that the broad contours of the deferral doctrine encourages non-review, the dissent in *Electronic Reproduction* warned

82. 197 N.L.R.B. 928, 80 L.R.R.M. 1498 (1972).

83. Specifically, the Board in *Yourga* stated:

We hold that the burden to adduce such proof rests on the party asserting that our statutory jurisdiction to resolve the issue of discrimination should *not* be exercised. That party may be presumed to have the strongest interest in establishing that the issue has been previously litigated, if that is the case.

Id. at 928, 80 L.R.R.M. at 1499 (emphasis added).

84. The majority ruled that "except in unusual circumstances, under which it is not reasonable to expect or require full litigation of these issues in the grievance and arbitration process," the Board would defer to the arbitration award. 213 N.L.R.B. at 761, 87 L.R.R.M. at 1215. See also Simon-Rose, *supra* note 14, at 211.

85. 213 N.L.R.B. at 761, 87 L.R.R.M. at 1215. *Contra*, Gulf States Asphalt Co., 200 N.L.R.B. 938, 82 L.R.R.M. 1008 (1972) (Members Fanning and Jenkins, dissenting). The dissent in *Gulf States Asphalt* reasoned:

[The majority is] willing to presume that the arbitrator must have disposed of the unfair labor practice issue because it was presented to him. The difficulty with this approach is twofold. First, the presumption they apply not only places the burden on the General Counsel to prove that an arbitrator did not dispose of the statutory violation but to do so by proving a negative, an almost impossible task. . . . If a presumption is to be applied, it is one that places the burden upon the alleged violator of the statute to prove that the arbitrator's award did in truth dispose of both the statutory and contract violations

Id. at 941, 82 L.R.R.M. at 1011.

86. 213 N.L.R.B. at 765, 87 L.R.R.M. at 1219-20. In particular the dissenting members in *Electronic Reproduction* felt that the rationale of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) should be extended to labor relations and unfair labor practices cases as well as to Title VII questions. Citing *Gardner-Denver*, the dissent contended that arbitration vindicates only the

"contractual right under a collective-bargaining agreement," and not the "independ-

that the NLRA could be easily circumvented by union-employer "sweetheart" agreements which contracted the parties out of the Act by insertion of arbitration clauses.⁸⁷ In short, to allow arbitrators with little or no expertise in interpreting the Act to vindicate public rights by private methods of resolution is to deny the equal protection and uniform application of the NLRA as mandated by Congress and the courts.⁸⁸ To the dissent, *Spielberg's* delicate balance had been lost.⁸⁹

D. *The Alexander-Banyard Limitation: Competence and Clarity*

The *Stephenson* court relied heavily upon the Supreme Court's narrow guidelines for administrative deferral enunciated in *Alexander v. Gardner-Denver Co.*⁹⁰ and the District of Columbia Circuit's deferral policy

dent statutory rights accorded by Congress." The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

213 N.L.R.B. at 766, 87 L.R.R.M. at 1220 (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-50 (1974)). See also *Joseph T. Ryerson & Sons*, 199 N.L.R.B. 461, 464-66, 81 L.R.R.M. 1261, 1266-67 (1972).

87. 213 N.L.R.B. at 765, 87 L.R.R.M. at 1219. The dissent added that "it also means that the stronger party can compel the weaker to abandon the protection of the Act through insistence on an arbitration clause" *Id.* See also *Tyee Constr. Co.*, 202 N.L.R.B. 307, 82 L.R.R.M. 1548 (1973) (Members Fanning and Jenkins, dissenting). The dissent reasoned:

The result is that the union and employer can escape the Board's and courts' application of the Act to their violations of it by simply including in their contract a provision, as here, which contains language similar to that of the Act and attaching an arbitration clause. Statutory rights are then reduced to contract rights and will disappear

Id. at 310, 82 L.R.R.M. at 1552 (citing *Terminal Transp. Co.*, 185 N.L.R.B. 672, 75 L.R.R.M. 1130 (1970)).

88. 213 N.L.R.B. at 765, 87 L.R.R.M. at 1219.

Arbitration is essentially alien to determination of public rights. Arbitrators have no expertise in the interpretation of the Act. The Board does.

However desirable and fruitful may be the arbitration of private rights, the reasoning is not transferrable [*sic*] to public rights. As we have previously observed, public rights cannot be the "plaything of private treaty."

Id. See also Comment, *Collyer Insulated Wire*, 13 SANTA CLARA LAW. 236, 253 (1972).

89. 213 N.L.R.B. at 765, 87 L.R.R.M. at 1219. The dissent stated: "We continue to think that Congress meant that statutory violations should be found if they exist, and remedied if found, and by this Board to which Congress entrusted the responsibility." In essence, the dissent believed that the Board's jurisdiction is not intended to be merely one means of orderly resolution of industrial disputes, but *the* means of resolution. *Id.* at 763, 87 L.R.R.M. at 1217. The "slippery slope" of broad deferral, predicted Members Fanning and Jenkins, could have "no stopping point short of the bottom." *Id.* at 765, 87 L.R.R.M. at 1219.

90. 415 U.S. 36 (1974). In *Gardner-Denver*, the Supreme Court held that an employee retains his right to a trial de novo under Title VII of the Civil Rights Act of 1964, even though he has previously submitted his claim to final and binding arbitration.

announced in *Banyard v. NLRB*.⁹¹ These cases were decided soon after *Electronic Reproduction* and represent a cautionary stance which many courts have taken in an effort to slow the ever-widening scope of deferral.

The applicability of the limitations to deferral imposed in *Gardner-Denver* to areas other than Title VII questions is a point of contention.⁹² Nevertheless, certain general statements as to the wisdom of broad deferral policies can be analogized to related NLRB questions.⁹³ The Supreme Court stated that in certain areas of competence, it is improper for an administrative board to defer to arbitral decisions without the full de novo review mandated by the governing statute.⁹⁴ The Supreme Court deemed it unwise to use deferral policies to vest decisional power in another body when that power was already expressly given to the Board or court in question.⁹⁵ Referring to the earlier decision of *Rios v. Reynolds Metals Co.*,⁹⁶ the *Gardner-Denver* majority felt that deferral of tough statutory questions to an arbitration procedure makes that method of dispute resolution lengthy, costly, complicated, and legalistic,⁹⁷ precisely what arbitration was intended not to be.⁹⁸

91. 505 F.2d 342 (D.C. Cir. 1974).

92. The dissenting opinion in *Electronic Reproduction Serv. Corp.*, 213 N.L.R.B. 758, 766-69, 87 L.R.R.M. 1211, 1222-23 (1974) forcefully argued that *Gardner-Denver* has application outside the area of Title VII questions. *Accord*, *Amalgamated Ass'n of St. Employees v. Lockridge*, 403 U.S. 274, 286-87 (1971), in which the Supreme Court referred to unfair labor practice issues in the *Gardner-Denver* decision. *But cf.* *Nash, Board Referral to Arbitration and Alexander v. Gardner-Denver*, 25 LAB. L.J. 259, 269 (1974) (taking position that *Gardner-Denver* decision will have little, if any, impact upon *Collyer* and *Spielberg* policies, or their development).

93. Certainly the Supreme Court was aware of the effect that *Gardner-Denver* would have on similar deferral policies outside the scope of Title VII questions. *See Electronic Reproduction Serv. Corp.*, 213 N.L.R.B. 758, 766-67, 87 L.R.R.M. 1211, 1220-21 (1974) (Members Fanning and Jenkins, dissenting).

94. *Alexander v. Gardner-Denver Co.*, 415 U.S. at 48. In effect, the Supreme Court held that the doctrine of election of remedies is not applicable to Title VII claims: "The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. . . . [T]he relationship between the forums is complementary. . . . Thus the rationale behind the election-of-remedies doctrine cannot support the decision. . . ." *Id.* at 50-51.

95. *Id.* at 56.

96. 467 F.2d 54 (5th Cir. 1972). *See also* Hill, *The Effects of Non-Deference on the Arbitral Institution*, 28 LAB. L.J. 230, 232, 237 (1977), for a discussion of the *Rios* criteria.

97. 415 U.S. at 58-59.

98. *See* Newman, *NLRB Deferral to Arbitration in Unfair Labor Practices*, 26 N.Y.U. CONF. ON LAB. 37, 40 (1973) [hereinafter cited as *NLRB Deferral to Arbitration*], in which the author states:

The whole concept of arbitration has become so distorted by this whole thing and by the Board approach of what arbitration is today. Arbitration started out . . . many years ago as an informal, quick, cheap way of settling disputes. It now has become, in

The *Banyard* decision agreed with the basic rationale of *Gardner-Denver*. The *Banyard* court, while approving the three-pronged test derived from *Spielberg*, explicitly rejected *Electronic Reproduction's* allowance of deferral when the unfair labor practices issue had not been clearly decided by the arbitral panel, or when the competency of the arbitral panel to decide such important questions was not proved.⁹⁹ By adding these two additional requirements to the *Spielberg* test, the *Banyard* majority took a sizeable step away from the *Electronic Reproduction* decision towards a more moderate position on the question of deferral, and thereby set the stage for similar moves by the Ninth Circuit.¹⁰⁰

E. *The Ninth Circuit: In Banyard's Wake*

Since 1974 the Ninth Circuit has rendered several opinions dealing with the scope of the Board's deferral policies, culminating with *Stephenson* in 1977.¹⁰¹ In the *Provision House Workers Local 274 v. NLRB*¹⁰² decision, the court reaffirmed the basic right of the Board to defer to an arbitration award, but also added a liberal tone to its decision, possibly affected by the impact of the broad trend set by *Electronic Reproduction*, by allowing deferral even when the initial award was not free from doubt as to the basis for the decision.¹⁰³ Soon thereafter the Ninth Circuit retreated from its liberal position in *NLRB v. International*

general, a very formal, time-consuming, expensive way of settling disputes
Id.

99. 505 F.2d at 348. The administrative law judge in *Banyard* had determined that deferral was not appropriate since the issue raised was not within the arbitrator's special competence. *McLean Trucking Co.*, 202 N.L.R.B. 710, 721 (1973).

As for the clarity requirement, see *Superior Motor Transp. Co.*, 200 N.L.R.B. 892, 896, 82 L.R.R.M. 1083, 1085 (1975). However, it is yet unspecified whether the "clearly decided" test refers to the written decision or matters actually heard. See also *Simon-Rose*, *supra* note 14, at 215.

100. The line of authority initiated by the majority in *McLean Trucking Co.* was followed by the Ninth Circuit less than one year later in *Provision House Workers Union v. NLRB*, 493 F.2d 1249 (9th Cir.), *cert. denied*, 419 U.S. 828 (1974).

101. Four opinions on the deferral issue were handed down in three years. See *Stephenson v. NLRB*, 550 F.2d 535 (9th Cir. 1977); *Hawaiian Hauling Serv., Ltd. v. NLRB*, 545 F.2d 674 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2921 (1977); *NLRB v. International Longshoremen's Local 27*, 514 F.2d 481 (9th Cir. 1975); *Provision House Workers Local 274 v. NLRB*, 493 F.2d 1249 (9th Cir.), *cert. denied*, 419 U.S. 828 (1974).

102. 493 F.2d 1249 (9th Cir.), *cert. denied*, 419 U.S. 828 (1974).

103. *Id.* at 1249. However, with the same breath, the court stated that "of course, the Board cannot abdicate its statutory responsibility by inappropriate deferrals to arbitration." See also *International Ass'n of Machinists v. NLRB*, 530 F.2d 849, 850 (9th Cir. 1976).

*Longshoremen's Local 27*¹⁰⁴ where the court held that it was not an abuse of discretion for the NLRB to decline to defer to an arbitration award that did not clearly resolve issues of the unfair labor charge.¹⁰⁵ Clearly such language was at odds with the "presumption" language of *Electronic Reproduction*. The initial assault upon *Electronic Reproduction's* liberalized deferral policies within the Ninth Circuit had thereby been launched.

The decision in *Stephenson*, therefore, followed logically from the *International Longshoremen* decision and the earlier lead set by *Banyard* in the District of Columbia Circuit. The *Stephenson* majority echoed the previously expressed distaste for the *Electronic Reproduction* decision that had been stated in *Banyard*.¹⁰⁶ While noting the Board's laudable intent,¹⁰⁷ the Ninth Circuit felt that "the Board's method constitutes an unjustifiable extension of its deferral policy."¹⁰⁸ While acknowledging that the function of an arbitrator is to resolve disputes, the court noted that the arbitrator's domain of competence must nonetheless be limited to areas of contractual dispute and should not encroach upon the NLRB's exclusive jurisdiction over unfair labor practices as mandated by section 10 of its enabling legislation.¹⁰⁹ The Board cannot abdicate its duty to consider unfair labor charges by deferring to an arbitration decision when there is no lawful basis for doing so.¹¹⁰ The legislative history of section 10 suggests that arbitration is not intended as a substitute for Board action, since arbitrators are not bound to apply the Board's and the courts' definitions of standards to be enforced under the

104. 514 F.2d 481 (9th Cir. 1975). *Accord*, *Hawaiian Hauling Serv., Ltd. v. NLRB*, 545 F.2d 674, 676 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2921 (1977), in which the Ninth Circuit refused to defer to an arbitration award when the award was not in compliance with Board standards. The court stated that unless the Board clearly departs from its standards, or its standards are themselves invalid, the Board has the right to review arbitration decisions.

105. 514 F.2d at 483.

106. *Stephenson v. NLRB*, 550 F.2d 535, 538-39, 541 (9th Cir. 1977). For other criticism, see Simon-Rose, *supra* note 14, at 209-12.

107. 550 F.2d at 539. See also Johannesen & Smith, *Collyer: Open Sesame to Deferral*, 23 LAB. L.J. 723, 741 (1972).

108. 550 F.2d at 539.

109. *Id.* See note 1 *supra*. The court stated that this encroachment is precisely what the *Electronic Reproduction* decision had fostered. See *Cloverleaf Div. of Adams Dairy Co.*, 147 N.L.R.B. 1410 (1964) (Member Brown, concurring) in which Member Brown stated:

In the United States, the function of the arbitrator rarely exceeds interpretation and application of a particular provision of an existing agreement to a particular dispute. The arbitrator is limited to the enforcement of existing rights, and where the parties have not yet reached agreement the arbitrator ordinarily has no power to act. *Thus, we may characterize arbitration as retrospective in nature, that is, concerned with interpreting existing agreements.*

Id. at 1422 (emphasis added).

110. 550 F.2d at 539.

NLRA.¹¹¹ Rather, arbitrators are expected to serve the immediate needs of the private parties who employ them.¹¹²

Applying the five-pronged¹¹³ *Banyard* test, the *Stephenson* court found the arbitrator's decision inadequate.¹¹⁴ The record was bare as to what was decided in arbitration, thus failing to meet the "clearly decided" criterion of *Banyard*.¹¹⁵ The majority stated that application of the presumption theory of *Electronic Reproduction* would penalize *Stephenson* despite the ambiguity in the record, a result inconsistent with the policies of the Act.¹¹⁶ Deferral is improper when the Board is ignorant of the basis for such deferral.¹¹⁷ Therefore, the Ninth Circuit remanded the case to the Board for consideration of the unfair labor practice issue.¹¹⁸

The dissent by Judge Kunzig argued against restricting the scope of the Board's discretion by incorporating the additional *Banyard* requirements of competence and clarity.¹¹⁹ The judge feared that the decision would allow the parties to hold back key evidence at the arbitration stage in

111. *Id.* at 540. As the Court stated in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974):

[T]he arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties.

Id. at 53.

112. 550 F.2d at 540. See Bloch, *The NLRB and Arbitration: Is the Board's Expanding Jurisdiction Justified?*, 19 LAB. L.J. 640 (1968):

An arbitrator, on the other hand, determines "private rights and private duties stemming from a private contract." He is an employee of the parties and must reach a conclusion satisfactory to both sides, lest (1) industrial strife remain and (2) he find himself unemployed during future disputes. His function is limited. It is generally admitted that he need interpret only the contract itself, and question only whether the terms agreed upon were obeyed. It is not his concern if performance according to the terms would constitute outright unfair labor practices; this is the Board's problem.

Id. at 642-43. See also Casenote, *Banyard v. NLRB*, 88 HARV. L. REV. 804, 808 (1975) for the additional argument that arbitrators are not bound to apply or enforce rights under the NLRA.

113. 550 F.2d at 538. The *Banyard* modification of the *Spielberg* test can be found at 505 F.2d at 347. See note 99 *supra* and accompanying text.

114. 550 F.2d at 538-39.

115. *Id.* at 540-41. For an analysis of the "clearly decided" requirement, see *id.* at 538 n.4.

116. *Id.* at 541.

117. It has been suggested that deference based upon ignorance of what the arbitrator decided will only lead to "contractual chaos." Roy Robinson Chevrolet, 94 L.R.R.M. 1474, 1482 (1977) (Members Fanning and Jenkins, dissenting).

118. 550 F.2d at 541.

119. *Id.* at 542. Judge Kunzig, in dissent, stated: "There is no need to move into the area of *Banyard*. To put more requirements on top of *Spielberg* may well make effective use of the arbitration process extremely difficult. . . . I am seriously concerned with the damage *Banyard* can do to the vitally important arbitration process." *Id.*

order to seek de novo review by the Board in the event they should be dissatisfied with the arbitration award—a variation of the “second bite of the apple” theory.¹²⁰ The dissent predicted the serious crippling effect such dual litigation might have on the effectiveness of arbitration. The majority offered a sharp rebuke to this dual litigation argument so often cited to support the exercise of broad deferral powers.¹²¹

Despite the validity of many points raised by the dissent, it appears that *Stephenson* goes a fair distance in reestablishing the discretionary balance envisaged in *Spielberg* on deferral questions.¹²² Although an argument can be advanced for the general competency of arbitrators to decide tough statutory questions,¹²³ an even stronger case has been set forth by various authors as to the undesirability of requiring arbitrators to be faced with such decisions.¹²⁴ The heavy costs involved when arbitration is complicated by statutory questions is another critical factor sup-

120. *Id.* Judge Kunzig continued: “A plaintiff can hold back some of his material issues, carefully preserve an important argument, and then (if he loses in arbitration) claim the panel failed specifically to pass on this point and start all over again.”

121. The majority in *Stephenson* responded with its own suggestion:

If [the Board] so desires it can utilize the *Collyer* case and its own power to decline jurisdiction and withhold its consideration in cases where it is shown that the party initiating the unfair labor practice proceeding has failed to present the unfair labor practice issue or evidence to the arbitrator where such presentation is deemed necessary. By using *Collyer*, the Board's action is not made pursuant to unfounded presumptions as to the basis of the arbitrator's award, but upon a recognition of the propriety of the arbitration process itself.

Id. at 541 (citations omitted).

122. It certainly retreats from the position taken in *Electronic Reproduction* by making it clear that deferral is not merely a rubber stamp to an arbitrator's decision or a way to reduce the Board's caseload.

123. Dworkin, *How Arbitrators Decide Cases*, 25 LAB. L.J. 200, 201 (1974); Witney, *The Right Conclusion for the Wrong Reasons: A Rejoinder to Belkin*, 25 LAB. L.J. 114, 115 (1974). In the Witney article the author stated: “[T]he lack of formal legal training does not necessarily mean an arbitrator does not understand the law and NLRB precedents.” Continuing, Witney criticizes those who think of arbitrators in “box score terms”:

If Belkin understands the arbitration process, he would know that the fastest way to oblivion is for an arbitrator to do what he [Belkin] says arbitrators do. As a matter of fact, many professional arbitrators have so many cases that they are pleased when cases are withdrawn from arbitration. . . . Clearly, if the parties believed that arbitrators compromise their integrity, they would not refer more and more cases each year to arbitration.

Id. at 115. See Siegel, *NLRB Deferral to Arbitration in Unfair Labor Practices*, 26 N.Y.U. CONF. ON LAB. 19, 24 (1973). See also Samoff, *Arbitration, Not NLRB Intervention*, 18 LAB. L.J. 602, 630 (1967).

124. The various ways in which arbitrators are claimed to be incapable of handling statutory issues have been discussed by the commentators. See, e.g., Belkin, *Are Arbitrators Qualified to Decide Unfair Labor Practice Cases?*, 24 LAB. L.J. 818, 818 (1973); Christensen, *Labor Arbitration and Judicial Oversight*, 19 STAN. L. REV. 671, 676 (1967); Coulson, *Title Seven Arbitration in Action*, 27 LAB. L.J. 141, 147 (1976); Siber, *The Gardner-Denver Decision: Does it Put Arbitration in a Bind?*, 25 LAB. L.J. 708, 711 (1974); Comment, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191, 1194-95 (1968).

porting limited deferral policies.¹²⁵ The primary advantage of arbitration, that it provides a quick resolution of the dispute, may well be lost if arbitration becomes more legalistic and less intuitive.¹²⁶ Finally, the lack of resources available to an arbitrator to enforce the arbitration decision¹²⁷ and the lack of uniformity in arbitrated cases provide persuasive

125. See *National Radio Co.*, 198 N.L.R.B. 527, 80 L.R.R.M. 1718 (1972) (Members Fanning and Jenkins, dissenting):

[T]he cost of arbitration will severely limit the protection of the discriminatees. Each arbitration, as we have pointed out elsewhere, will cost well over \$500 per side, with the likelihood that the figure will exceed \$1,000. Since arbitration settles only the particular case arbitrated, and provides no remedy against future violations, a determined opponent of employee rights can repeat the unlawful conduct and make it almost impossible for even a strong union to continue the arbitration course.

Id. at 535, 80 L.R.R.M. at 1726. Since *National Radio*, the figures have doubled. See Zalusky, *Arbitration: Updating a Vital Process*, AFL-CIO AMERICAN FEDERATIONIST, November, 1976, at 1, pointing out that the estimated cost per party of an arbitrated case is now \$2,290. The article attributes much of this increase to the fact that arbitration "is taking on the appearance of a courtroom procedure." *Accord*, Simon-Rose, *supra* note 14, at 208 ("If costs become an overwhelming factor . . . the employees are necessarily going to be short-changed."). See also *NLRB Deferral to Arbitration*, *supra* note 98, in which the author reasons: "For example . . . an arbitrator is going to want to write a more complete opinion. Well, if you are going to have transcripts and if you are going to have more complete opinions, then the parties have to pay for them. It will put arbitration that much farther out of reach." *Id.* at 46.

126. 550 F.2d at 245. The thought that "arbitration is often a catalyst in labor peace because of its speed" does not seem to be wholly true in light of arbitration practices today. *United Steelworkers v. American Int'l Aluminum Corp.*, 334 F.2d 147, 153 (5th Cir. 1964), *cert. denied*, 379 U.S. 991 (1965). See *NLRB Deferral to Arbitration*, *supra* note 98, where the author states:

Also incredible is the fact that this is a time-saver for the Board. The regional office will spend as much time as it previously did, at least as much time as it previously did in determining whether or not the case should be deferred Therefore the same investigation has to take place.

Id. at 41. He continues: "[A]ny time you have a majority and minority, they take three times as long, at least for the Board to decide. . . . Certainly, up to now there has been no cost saving. And I think anybody who justifies it [broad deferral] on that basis is throwing in a makeweight." *Id.* at 42. Finally the author states: "In terms of speed again, it now takes just about as long to get to an arbitration hearing as it does to get to a trial examiner's decision, at least . . . in effect most Board proceedings are settled more quickly than they are through grievance and arbitration procedure." *Id.* at 46. *But cf.* *General Am. Transp. Corp.*, 94 L.R.R.M. 1483, 1494 (1977) (Members Penello and Walther, dissenting) (citing statistics from unpublished Board study of effect of *Collyer* over two and one-half year period, and concluding that there is 50-50 chance of resolving disputes short of arbitration).

127. 550 F.2d at 539. See Coulson, *Title Seven Arbitration in Action*, 27 LAB. L.J. 141 (1976):

A major problem is the difficulty of insuring real compliance. The arbitrator can order a promotion or reinstate an employee, but he is rarely in the position to determine what happens after the award has been submitted and his explicit instructions have been followed. . . . I have had the feeling . . . that I was sending the employee back into the bear pit.

Id. at 150. *But cf.* *New Orleans S.S. Ass'n v. Longshore Workers Local 1418*, 389 F.2d

justification for unrestricted de novo review by the Board.¹²⁸

V. FUTURE TRENDS, ARGUMENTS, AND CONCLUSIONS

It appears to this author, and others,¹²⁹ that the *Banyard-Stephenson* line of reasoning provides the soundest alternative to present deferral practices.¹³⁰ While the concept of deferral is valuable when that concept includes adequate restraints, the Board's decisions in *Electronic Reproduction* and similar cases were undesirable extensions to the carefully balanced *Spielberg* doctrine. The *Stephenson* decision provides the type of reasoning needed to bring the deferral policy back to a moderate position, and this appears to be the trend in recent months.¹³¹ When the Board defers statutory questions to the arbitral process, the Board has, in effect, indirectly succeeded in making the arbitral forums "courts of lesser jurisdiction" under the NLRA.¹³² Those arbitrators unwilling or

369, 371-72 (5th Cir. 1967), *cert. denied*, 383 U.S. 828 (1968) (allowing judicial enforcement of an arbitration award containing a "cease and desist" order).

128. See *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971) ("A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."); *National Radio Co.*, 198 N.L.R.B. 528, 533, 80 L.R.R.M. 1718, 1725 (1972) (Members Fanning and Jenkins, dissenting) ("Uniformity disappears, the preemption doctrine is frustrated, private tribunals proliferate with no real prospect for review of their actions, and anarchy begins to intrude."); *Radioear Corp.*, 199 N.L.R.B. 1161, 1163, 81 L.R.R.M. 1402, 1404 (1971) (Members Fanning and Jenkins, dissenting) ("The result will open the door to an erratic lack of uniformity in areas in which legal principles rather than contract interpretation are at issue."); Comment, *Deferral to Labor Arbitration*, 27 HASTINGS L.J. 403, 410 (1975) ("Successive awards could produce a variety of ad hoc solutions to the same problem, all consistent with the Act, but no uniform rule. In such circumstances further abstention by the Board might be contrary to Federal labor policy."); see also Davey, *Restructuring Grievance Arbitration Procedures*, 54 IOWA L. REV. 560, 562 (1969) (citing as reason for lack of uniformity fact that no uniform rules have been established among three major arbitration associations).

129. See, e.g., Johannesen & Smith, *Collyer: Open Sesame to Deferral*, 23 LAB. L.J. 723, 741 (1972); Pye, *Collyer's Effect on the Individual Charging Party*, 25 LAB. L.J. 561, 567 (1974); Siber, *The Gardner-Denver Decision: Does it Put Arbitration in a Bind?*, 25 LAB. L.J. 708, 717 (1974); Simon-Rose, *supra* note 14, at 211.

130. See Simon-Rose, *supra* note 14, at 214.

131. See *General Am. Transp. Corp.*, 94 L.R.R.M. 1483 (1977) (*Collyer* doctrine severely curtailed and *National Radio* decision, discussed in text accompanying note 63 *supra*, overruled); *Filmation Assocs. Inc.*, 94 L.R.R.M. 1470, 1470 (1977) (Board refused to extend *Spielberg* doctrine to unfair labor practices issues since those issues "are solely within NLRB's province to decide," and "may not be delegated to the parties or to an arbitrator"). *But cf.* Roy Robinson Chevrolet, 94 L.R.R.M. 1474 (1977) (decided same day as *General Am. Transp. Corp.* and giving continued support to *Collyer* doctrine).

132. Simon-Rose, *supra* note 14, at 212. See generally *National Radio Co.*, 198 N.L.R.B. 528, 531, 80 L.R.R.M. 1718, 1723 (1972), for a discussion of how widespread arbitration has become.

unable to resolve statutory issues are forced to do so nonetheless.¹³³ "The alternative, for the arbitrator, is to cease being an arbitrator."¹³⁴ Therefore, support for *Stephenson* should be found amongst arbitrators as well.¹³⁵

Further support for placing limitations on deferral policies can be found in arguments encountered earlier: the competence of arbitrators to decide statutory problems; the statutory right to a fair determination of an unfair labor practice claim; and the fact that section 203(d) of the Labor Management Relations Act¹³⁶ did not amend the NLRA so as to substitute arbitration as an alternative means for Board resolution of statutory questions, but merely established the desirability of incorporating arbitration into the labor relations environment.¹³⁷ As Board Members Fanning and Jenkins recognized, "The grant of authority from Congress to the NLRB in unfair labor practice cases simply does not give the Board the discretionary authority to subdelegate its power to private parties."¹³⁸

While the influence of the policy justifications of *Electronic Reproduction* appears to be lessening in the reviewing circuit courts, the exact direction the Board will take on the scope of the deferral doctrine is still in doubt. But it is certain, in light of the court's argument in *Stephenson*, that the Board now appreciates the potential penalties that decisions such as *Electronic Reproduction* might impose in persuading the parties to arbitrate and settle their disputes in lieu of Board action.¹³⁹

With the passage of the NLRA in 1935, Congress saw the need to create an administrative body to enforce its labor statutes.¹⁴⁰ After years of experience, the Board has become expert in interpreting and giving meaning to these statutes. By deferring its authority in cases such as *Electronic Reproduction* to an arbitrator not vested with the power to

133. Simon-Rose, *supra* note 14, at 209, 212. See also Pye, *Collyer's Effect on the Individual Charging Party*, 25 LAB. L.J. 561, 567 (1974).

134. Casenote, *Banyard v. NLRB*, 88 HARV. L. REV. 804, 810 (1975).

135. Siegel, *NLRB Deferral to Arbitration*, 26 N.Y.U. CONF. ON LAB. 19, 35 (1973).

136. See note 29 *supra*.

137. See *Raytheon Co.*, 140 N.L.R.B. 883, 886, 52 L.R.R.M. 1129, 1131 (1963). *Accord*, Simon-Rose, *supra* note 14, at 216 ("No construction of Section 203(d) supports the proposition that the Board can employ the arbitration process as an additional forum for the resolution of unfair labor practice charges.").

138. *National Radio Co.*, 198 N.L.R.B. 528, 533, 80 L.R.R.M. 1718, 1725 (1972) (Members Fanning and Jenkins, dissenting).

139. 550 F.2d at 541. Such potential penalties take the form of a presumption that evidence on a statutory issue has been presented to the arbitrator, even when, in fact, the evidence may not have been so presented. See Simon-Rose, *supra* note 14, at 211-12, 215; Comment, *Collyer Insulated Wire*, 13 SANTA CLARA LAW. 236, 254 (1972).

140. *General Am. Transp. Corp.*, 94 L.R.R.M. 1483, 1484 (1977). See also Simon-Rose, *supra* note 14, at 215.

determine public rights, but instead concerned with the private rights of the immediate parties, the Board repudiated the essential purposes and policies underlying the NLRA.¹⁴¹ The *Banyard* decision appears to have reestablished a more circumscribed deferral policy which the Ninth Circuit in *Stephenson* has adopted and refined. Together these cases signal a reassertion of proper Board authority in the area of labor-management relations.

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141. See *National Radio Co.*, 198 N.L.R.B. 528, 535, 80 L.R.R.M. 1718, 1726 (1972) (Members Fanning and Jenkins, dissenting). See also *NLRB v. Marine Workers*, 391 U.S. 418, 424-25 (1968).

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