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THE *HAMMONDTREE* CHALLENGE TO THE NLRB'S DEFERRAL POLICY

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I. INTRODUCTION

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 agreement, and the arbitrator is generally confined to answering questions concerning whether or not particular actions were in violation of the collective bargaining agreement and if so what should be the remedy. The arbitrator is concerned then with private rights under a private agreement between private parties. In contrast the National Labor Relations Board ("NLRB" or "the Board") has the statutory obligation to resolve unfair labor practice charges under the amended National Labor Relations Act.[1] The Board's powers are statutory; it is concerned with public rights rather than private rights. Can a union and an employer take away an individual's statutory right to have his or her unfair labor practice (ULP) claim heard before the NLRB by agreeing to language in the contract which provides parallel contract protection and parallel procedures for resolving the claim? The Board believes it can require an individual employee who files an unfair labor practice charge with

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[1] Section 10(a) of the National Labor Relations Act, 29 U.S.C. §160, provides in pertinent part:

> The Board is empowered to prevent ... any person from engaging in any unfair labor practice (listed in Section 8) 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....

the NLRB against an employer to present his or her grievance relating to the charge to an arbitration committee pursuant to his or her union's collective bargaining agreement, even though the employee desires to have the matter adjudicated by the Board. In January of 1990 the United States Court of Appeals for the District of Columbia disagreed with the Board in its *Hammondtree v. NLRB* decision.[2] This paper will present: (1) the Board's policy on deferral to existing arbitration awards; (2) the Board's policy on required prearbitrable deferral; (3) discussion of the *Hammondtree* decision and; (4) conclusions concerning the impact and application of the decision.

II. 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 results were not "clearly repugnant to the purposes and policies of the Act."[3] Thus, if a party was not allowed to be present at an arbitration proceeding or to present witnesses or to cross-examine 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" has received significant Board focus. The Board had required a showing that the statutory unfair labor practice issue was in fact brought to the arbitrator's attention,[4] and, the statutory unfair labor practice issue was actually discussed in the arbitrator's decision.[5] In *Suburban Motor Freight, Inc.*,[6] 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

[2] 894 F.2d 438 (D.C. Cir. 1990).

[3] *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955).

[4] *Max Factor & Co.*, 239 N.L.R.B. 99 (1978).

[5] *Clara Barton Terrace Convalescent Center*, 225 N.L.R.B. 1028 (1976).

[6] 247 N.L.R.B. 2 (1980). *See also* N.L.R.B. v. Designcraft Jewel Industries, 675 F.2d 493 (2nd Cir. 1982).

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*[7] the Board overruled *Suburban Motor Freight*. The Board in *Olin* restated its commitment to follow the basic *Spielberg* standards, and added the following analysis be applied 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.[8] 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.

III. Required Prearbitrable Deferral

A changing Board policy existed in the last two decades on the matter of whether and in what type of cases grievants are 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*[9] 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 that it would dismiss charges where grievance arbitration machinery was

[7] 268 N.L.R.B. 573 (1984).

[8] *Anderson Sand & Gravel Co.*, 277 N.L.R.B. 1204 (1985). *But see* Harberson and Talley v. NLRB 810 F.2d 977 (10th Cir. 1987).

[9] 192 N.L.R.B. 837 (1971).

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 *Speilberg* 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.*,[10] 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)*[11] decision. In *GATC* the Board majority held that it would no longer defer to arbitration in cases of alleged employer discrimination violative of Section 8(a)(3), cases of interference with protected rights violative of Section 8(a)(1), or cases involving Union coercion violative of Section 8(b)(1). However, in *Roy Robinson Chevrolet*,[12] 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 8(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*[13] 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

[10] 198 N.L.R.B. 527 (1972).
[11] 198 N.L.R.B. 808 (1977).
[12] 228 N.L.R.B. 102 (1977).
[13] 268 N.L.R.B. 557 (1984). *See* Lewis v. NLRB 800 F.2d 818 (8th Cir. 1986).

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."[14] The Board held that it would defer its involvement and instead allow the parties to resolve disputes through contractually-agreed arbitration procedures, where an employer and a Union have voluntarily elected to create a dispute resolution machinery culminating in final and binding arbitration.

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 believed that the public rights of employees should be adjudicated by the Board.[15]

Under *United Technologies* then the Board defers in cases involving alleged violations of individual rights under Sections 8(a)(1), 8(a)(3), 8(b)(1)(A) and 8(b)(2).

IV. THE *Hammondtree v. NLRB*[16] DECISION

After Paul Hammondtree, a senior truck driver for Consolidated Freightways, Inc. filed two grievances against his employer under the collective bargaining agreement between Teamsters Local Union 667 and the employer, he was assigned by his employer to several undesirable runs, including trips to closed terminals in the middle of the night. He subsequently filed an unfair labor practice charge with the NLRB alleging that he had been retaliated against for exercising his Union rights in violation of the NLRA. An administrative law judge found that the employer had violated Sections 8(a)(1) and (3) of the NLRA. Because Article 21 of the collective bargaining agreement between Consolidated Freightways and the Teamsters prohibited discrimination against employees for Union activities, the Board held that Hammondtree's ULP claims were parallel to existing contractual claims which could be brought before an arbitration committee; and the Board referred the case back to that committee, thus depriving Hammondtree of the right to have his case heard before the NLRB *de novo*.[17]

[14] *United Technologies*, 268 N.L.R.B. at 560.
[15] *Id.*
[16] 894 F.2d 438 (D.C. Cir. 1990).
[17] *Id.* at 440.

Section 8(a)(3) of the NLRA protects employees from discrimination by their employers because of their Union activity. The parties to a collective bargaining agreement, the employer and the Union, may also stipulate in their agreement that the employer will not discriminate against employees because of their Union activities. In this context, the *Hammondtree* majority decided that an employee may not be forced to give up the right to have his/her ULP claim adjudicated by the Board simply because the employer and Union have agreed to parallel contractual protections and parallel procedures for resolving the claim.[18] The Court stated that only where the employee in question waives his/her ULP rights, or his/her ULP claim rests upon otherwise arbitrable matters, may the Board defer to arbitration.[19]

The dissent argued that as long as a contractual provision adequately addressed the situation giving rise to the ULP claim, and the Board retains appellate jurisdiction, the Board has satisfied its statutory obligation.

V. Conclusion

The Board has not yet abandoned its policy of broad-scale deferral to arbitration contained in the *United Technologies* decision, or its limited review standards under the *Olin Corporation* decision.[20]

These deferral and review policies have led to a reduction in the Board's workload and a corresponding savings in the Board's salaries and expenses. In the meantime labor arbitrators, who may or may not have competence in federal labor law and statutory construction, are doing the work formerly performed by the Board.

The potential for abuse of the individual's rights is especially acute when the arbitration is before a Teamster Joint Arbitration Committee. Under the Teamster method, a panel consisting of an equal number of representatives from the Union and the employer, instead

[18] *Id.* at 443.

[19] *Id.*

[20] The Board has petitioned the District of Columbia Circuit Court of Appeals to rehear the *Hammondtree* case *en banc*. If unsuccessful the Board will most likely appeal the decision to the United States Supreme Court. Should the District of Columbia Circuit refuse to rehear the case and should the Supreme Court deny *certiorari*, the Board may well still refuse to follow *Hammondtree*. However, the D.C. Circuit handles many appeals from the NLRB and this Court would be expected to follow the *Hammondtree* precedent in future cases. Moreover, since Section 10(a) provides rights for employees subject to the NLRA, individuals may seek Leedom v. Kyne review of contrary Board decisions on this issue. Leedom v. Kyne, 358 U.S. 184 (1958), allows for judicial review if the Board ignores a "clear and mandatory" statutory provision creating rights for those subject to the NLRA.

of a neutral third party, hears the employee's grievance. After hearing the individual's claim, the joint committee meets in private and issues either a flat denial or a grant of the grievance without offering any explanation for its decision. There is no way of knowing that the individual's claim was fairly decided, let alone the grounds for such decision. Such a scenario is particularly troubling if the individual employee is at odds with his/her Union leadership, as would appear to be the case of *Hammondtree*. Hammondtree's first grievance against his employer wherein he insisted on being allowed to exercise his seniority privileges, which had been waived by a local oral agreement between the local Union and local management, led to the abrogation of that local agreement.[21]

As there is no way to ensure that the employee will be adequately represented or that the arbitrator will properly interpret the governing statute, deferring an individual discrimination case to arbitration denies the employee the legal protection that he/she would receive if the case were heard by the Board *de novo*.[22]

[21] *Hammondtree*, 894 F.2d at 440.

[22] *See generally* Summers *The Teamster Grievance Committees: Grievance Disposal Without Adjudication*, 37 PRO. OF THE NAT. ACADEMY OF ARB. 130 (1984).