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NLRB and Private Arbitration: Should Collyer Be Extended to Employee Disciple Cases?

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COMMENT

NLRB AND PRIVATE ARBITRATION: SHOULD *COLLYER* BE EXTENDED TO EMPLOYEE DISCIPLINE CASES?

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In a recent decision, *Collyer Insulated Wire*,[1] the National Labor Relations Board (NLRB or Board) announced a major policy determination concerning the respective responsibilities of private arbitration procedures and the NLRB's own enforcement procedures when, in certain situations, those procedures can be brought to bear upon the same subject matter. Significantly, the Board elected to emphasize the role of private arbitration by requiring the parties to utilize their agreed-upon grievance-arbitration procedures in the first instance and by retaining only the limited responsibility of reviewing those proceedings to assure that they have been "fair and regular" and have not produced a result which is "repugnant to the Act." The Board has thus recognized that private settlements should be encouraged[2] and has demonstrated a strong commitment to the "processes of voluntarism"[3] which have produced a system of industrial jurisprudence through which most labor disputes can be resolved by the parties themselves.[4]

As significant as the *Collyer* decision is, it only partially solves the problem of unnecessary NLRB interference in disputes which readily lend themselves to private settlement. The facts in *Collyer* limit its holding to situations in which an employer's unilateral action is alleged to violate Section 8(a)(5) of the National Labor Relations Act[5] and where the employer defends on the ground that he was not required to bargain over the action because it was specifically permitted by his labor agreement.[6] This is not, however, the only area where the

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1 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1936 (1971).

2 Section 203(d) of the National Labor Relations Act provides: "Final 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." 29 U.S.C. § 173(d) (1970).

3 See generally, "A Case Story" Remarks by NLRB Chairman Edward B. Miller at the Conference of Western States Employer Association Executives, 167 D.L.R. D-1 (1971).

4 See generally, 30 N.L.R.B. Ann. Rep. 1–2 (1966).

5 29 U.S.C. §§ 141 et seq. (1970) (hereinafter referred to as NLRA). Section 8(a)(5) provides: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees. . . ." 29 U.S.C. § 158(a)(5) (1970).

6 The General Counsel of the NLRB has directed Regional Offices of the Board to

authority of a private arbitrator and the NLRB may overlap. There exists a large class of employee discipline cases which present an analogous problem. This article will discuss the interaction of the statutory and contractual standards applicable to these discipline cases and will ascertain whether, in that area, the "processes of voluntarism" embraced by *Collyer* will produce results consistent with the applicable national labor policy.

I. NLRB Deference to Grievance and Arbitration—A History

Where a collective bargaining relationship has been established and a labor agreement negotiated, it is quite possible for a labor dispute to be based on an alleged violation of both the existing labor agreement and the NLRA. Since disputes involving these two substantive areas are resolved in separate forums—private grievance-arbitration procedures[7] in the case of alleged contract violations, and the National Labor Relations Board[8] in the case of alleged NLRA violations—this substantive overlap naturally leads to competing jurisdictional claims on behalf of the two enforcement procedures.

As collective bargaining relationships developed and matured under the Act, the potential conflict arising out of this concurrent jurisdiction became apparent and required resolution. In dealing with this problem, the NLRB evolved, over a considerable period of time, a seemingly neutral policy of dealing with each case on the basis of that case's particular posture vis-à-vis the grievance-arbitration procedure. That

limit application of the *Collyer* policy to the facts of *Collyer*. Memorandum; Arbitration Deferral Policy under Collyer, Peter G. Nash, General Counsel of NLRB (Feb. 28, 1972). For a brief description of the Nash Memorandum, see Annual Survey of Labor Relations Law, supra at 1380.

[7] A typical collective bargaining agreement usually includes a grievance procedure through which the parties presumably intend to resolve disputes concerning the administration of their agreement. Although these procedures vary, they generally provide for progressively higher steps of union-management meetings. These steps correspond roughly to the union and company hierarchies. Typically, the first step will involve a meeting between the employee and his immediate supervisor. If the dispute is not resolved at that step, the employee usually may appeal his case to a higher level of management—either a department head or the plant superintendent, depending upon the number of steps provided in the contract. If the dispute remains unresolved after these meetings, the case may be appealed to the final step prior to arbitration. In large corporations this step would involve a representative from the company's headquarters staff and a representative from the international union. Thus, it is hoped that solution of all but the most compelling issues will be accomplished by the parties themselves. For those few issues which cannot be resolved by them, the typical contract provides for final and binding arbitration. See generally, U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1425-1, Major Collective Bargaining Agreements: Grievance Procedures (1964) U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1425-6, Major Collective Bargaining Agreements: Arbitration Procedures (1966).

[8] Section 10 of the NLRA confers jurisdiction upon the NLRB to process unfair labor practice complaints alleging violations of Section 8 of the Act. 29 U.S.C. § 160 (1970).

is, the Board would defer to *existing* arbitration awards provided they met certain minimum standards. On the other hand, where the parties had not submitted their dispute to arbitration the Board would proceed to decide the merits of the case without requiring the parties to exhaust their contractual remedies.

The Board's long-standing policy of deferring to existing arbitration awards was most clearly articulated in *Spielberg Manufacturing Co.*[9]—*an employee discipline case.* There, the Board stated:

> [T]he proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award.[10]

Thus, recognizing the benefits of voluntary solutions and acknowledging that national labor policy can be effectuated by these private settlements, the Board will hold the parties to settlements in which they themselves have participated.[11]

Unfortunately, prior to *Collyer*, the Board's enthusiasm for existing arbitration awards did not carry over to cases which could have been—but were not—decided by a neutral. Where no award had been rendered, the Board made no distinction between cases which were pending before an arbitrator[12] and those which were dropped or never processed.[13] It was equally disposed to intervene in each type of situation. As this particular policy developed, certain problems which

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[9] 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955). *Spielberg* was recently reaffirmed in an employee discipline case. National Tea Co., 198 N.L.R.B. No. 62, 80 L.R.R.M. 1736 (1972).

[10] Id. at 1082, 36 L.R.R.M. at 1153.

[11] In two recent cases, Air Reduction Co., 195 N.L.R.B. No. 120, 79 L.R.R.M. 1467 (1972) and Yourga Trucking, Inc. 197 N.L.R.B. No. 130, 80 L.R.R.M. 1498 (1972), four members of the Board have indicated that, in employee discipline cases, the party seeking to have the Board defer to an arbitration award must adduce proof that the issue of asserted discriminatory motive was "presented to the arbitral forum which considered whether the discipline of an employee was imposed for just cause." Yourga Trucking, Inc., 80 L.R.R.M. at 1499. This issue is discussed at some length in Anderson, Concurrent Jurisdiction—NLRB and Private Arbitration: A Pragmatic Analysis, 12 B.C. Ind. & Com. L. Rev. 179, 190-92 (1970). There it is concluded that:

> There is no reason to believe that the parties and their arbitrators will not see the real issues in a particular case, nor is there any reason to believe that they will not explore all of the facts . . . . The remote possibility of arbitral non-involvement is simply not a persuasive argument against deference.

[12] Eastern Illinois Gas & Securities Co., 175 N.L.R.B. 639, 71 L.R.R.M. 1035 (1969).

[13] Producers Grain Corp., 169 N.L.R.B. 466, 67 L.R.R.M. 1247 (1968).

militated against its application became apparent.[14] In addition, this policy produced the anomalous result of acknowledging on one hand that the national labor policy can be effectuated by private settlements, but on the other hand, not actively promoting the use of these private forums in the first instance.

This inconsistency was apparently recognized in *Collyer* where, at least as far as unilateral action cases are concerned, the Board reversed its prior policy. In *Collyer* the employer had unilaterally initiated changes in an existing incentive plan, increased the wage rate for certain skilled occupations and modified maintenance assignments.[15] Although the company had sought the union's agreement to these changes during contract negotiations, it nevertheless believed these changes to be permissible under the provisions of the existing labor agreement. The union disagreed, but instead of initiating a grievance, it filed an unfair labor practice charge, claiming a violation of Section 8(a)(5) of the Act. Responding to this charge, the employer maintained that the disputes should be resolved in the grievance and arbitration procedure established in their labor agreement.

Addressing itself to that specific issue, the NLRB reviewed the history of the Board's reaction to overlapping jurisdiction and concluded that it would be "consistent with the fundamental objectives of Federal law to require the parties . . . to honor their contractual obligations rather than, by casting [the] dispute in statutory terms, to ignore their agreed-upon procedures."[16] In reaching this conclusion, the Board observed that its policy would, in most cases, satisfactorily resolve the underlying dispute and would thus eliminate the necessity of the parties utilizing the costly and time-consuming NLRB procedures. Further, it made clear that, by reserving jurisdiction for the limited purpose of reviewing the fairness of the arbitration proceeding, it had effectively safeguarded the statutory rights of the parties.[17]

Having reversed its prior policy by requiring the parties to exhaust their contractual remedies prior to invoking NLRB procedures, the Board proceeded to define the limits of its new policy. Quoting approvingly from the *Joseph Schlitz* decision,[18] the Board stated:

[14] Since, in deciding *Collyer*, the Board apparently recognized this fact, the specific problems associated with failing to defer are not discussed in the text of this article. For a thorough discussion of these problems, see Anderson, Concurrent Jurisdiction —NLRB and Private Arbitration: A Pragmatic Analysis, 12 B.C. Ind. & Com. L. Rev. 179, 188–90 (1970).

[15] Since this article is addressed to the future application of *Collyer*, the facts of the case are not discussed in great length. For a more thorough discussion of the facts, see Annual Survey of Labor Relations Law, supra at 1376-81.

[16] 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1937-38 (1971).

[17] Id., 77 L.R.R.M. at 1937.

[18] Joseph Schlitz Brewing Co., 175 N.L.R.B. 141, 70 L.R.R.M. 1472 (1968).

> [W]here, as here, the contract clearly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the Union and is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties.[19]

However, as a condition precedent to applying this test, the Board held, as it had in *Schlitz*, that "the circumstances of [the] case" must be such that resort to arbitration would not be futile.[20] Board Member Brown, in his concurring opinion, explained this requirement by stating that the Board should not defer to arbitration

> where there has been a repudiation of the collective-bargaining process. In such a situation the desirability of encouraging resort to arbitration must yield to the Board's duty to protect the bargaining process. Deferral, of course, would not encourage bargaining where the very process of bargaining, including grievance arbitration, has been repudiated and is, in effect, nonexistent.[21]

It is important to note, however, that a breakdown in the system cannot be inferred from the mere fact that one of the parties has elected to ignore his agreed-upon forum and has instead invoked the jurisdiction of the NLRB. The Board's affirmative holdings on the state of the parties' relationship in both *Schlitz* and *Collyer* clearly demonstrate that the charging party's selection of the Board's procedures may be motivated by reasons other than the collapse of the bargaining relationship.

Before determining whether the *Collyer* test—applied in the above context—lends itself to employee discipline cases, it is necessary to

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[19] 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1936 (1971).

[20] Specifically, the Board in *Collyer* stated:

> The circumstances of this case, no less than those in *Schlitz*, weigh heavily in favor of deferral. Here, as in *Schlitz*, this dispute arises within the confines of a long and productive collective-bargaining relationship. The parties before us have, for 35 years, mutually and voluntarily resolved the conflicts which inhere in collective bargaining. Here, as there, no claim is made of enmity by Respondent to employees' exercise of protected rights. Respondent here has credibly asserted its willingness to resort to arbitration under a clause providing for arbitration in a very broad range of disputes and unquestionably broad enough to embrace this dispute.

Id., 77 L.R.R.M. at 1936.

[21] Id., 77 L.R.R.M. at 1940 (1971).

review the status of employee discipline under collective bargaining agreements and under Section 8(a)(3) of the Act.

II. Employee Discipline Under Section 8(a)(3) of the Act and Under Collective Bargaining Agreements

Under the terms of the NLRA, the National Labor Relations Board has been granted jurisdiction over a limited area of employee discipline. Section 8(a)(3) of the Act provides that

> [i]t shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .[22]

Naturally, it is quite possible for such discrimination to take the form of disciplinary retaliation against an employee's union activities. In such a situation, the discipline is subject to NLRB review.

On the other hand, review of a far broader area of employee discipline is normally granted to the parties' arbitrator by the terms of their collective bargaining agreement. The issue of unrestricted authority in the area of employee discipline has spawned many organizing campaigns and is inevitably a high priority subject at the bargaining table following a successful campaign.[23] It is therefore not surprising that most modern labor agreements provide some limitation on management's right to discipline its employees.[24] In the few instances where no express limitation exists, some arbitrators have implied a "just cause" standard, reasoning that a company's unrestricted right to terminate the employment relationship could be used to negate all substantive provisions of the labor agreement.[25] Consequently, in the vast majority of contractual

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[22] 29 U.S.C. § 158(a)(3) (1970).

[23] S. Slichter, J. Healy and E. Livernash, The Impact of Collective Bargaining on Management 624 (1960).

> Even where there was little evidence of . . . irresponsible behavior on the part of management, the union seeking to organize employees often impressed upon employees the protection offered by collective bargaining against unfair disciplinary treatment. It is a mistake to feel that a union's contribution is limited to periodic contract improvements; it has a great influence on disciplinary policies and actions. This is felt on almost a daily basis during the life of an agreement, either because of the silent presence of the union or because the union has been quick to prosecute grievances relating to allegedly unfair discipline.

Id.

[24] In a recent study of 1,697 major collective bargaining agreements in which a grievance procedure exists, no contracts were found to exclude discharge cases. Out of 1,609 contracts which provided for arbitration, only 34 contracts limited the scope of the arbitrator's authority in the area of discipline. Of that number, only four excluded all disciplinary matters. The 30 remaining contracts excluded specific issues such as the degree of discipline and discipline given to probationary employees. See U.S. Bureau of Labor Statistics, Dep't of Labor, Bulls. No. 1425-1, 1425-6, supra note 7.

[25] See F. Elkouri and E. Elkouri, How Arbitration Works 410-13 (1960).

relationships management's right to discipline has been restricted either by the express terms of the contract or by implication to those situations where "just cause" exists.

Whether the results achieved by this broad, voluntarily-accepted standard are consistent with the purposes of the Act—and thus warrant Board deference to the private forum in the first instance—will be determined in the analysis that follows.

III. Statutory Compatibility of Solutions Arrived At in the Private Forum

Two general arguments are frequently advanced in support of the proposition that—in employee discipline cases—the private forum will not produce results which are consistent with the purposes of the Act. The first deals with the procedural due process afforded employees in private arbitration proceedings. The second concerns the scope of private arbitration proceedings in that it is claimed that resolution of the contractual "just cause" issue will not necessarily dispose of the statutory issue.

A. *Procedural Due Process and Private Arbitration*

In support of the position that the NLRB should not defer to private grievance-arbitration procedures, it has been asserted that, in discipline cases, it is possible that an employee will not receive a fair hearing in the private system. This indictment of private arbitration is based either on a general apprehension over the arbitral system or on the specific premise that, in certain situations, there may be no real conflict between the company and the union. For instance, both the union and the company may consider an employee to be particularly obnoxious and may be happy to see him go.[26] Similarly, the lack of conflict may come about by reason of the employee's union politics. That is, a member of a dissident political faction may feel concerned about the vigor with which his personal grievance is being processed by members of the incumbent opposition.[27]

This "interest identity" between the company and the union, coupled with the fact that arbitrators are selected by and thus beholden to these parties, leads, we are told, to the conclusion that private arbitration suffers from an institutional bias against the employee and in favor of the union-company establishment. This bias is reported by

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[26] See generally, Local 485, IUE (Automative Plating), 170 N.L.R.B. 1234, 67 L.R.R.M. 1609 (1968), modified, 183 N.L.R.B. No. 31, 74 L.R.R.M. 1396, enf. in pertinent part, 454 F.2d 17, 79 L.R.R.M. 2278 (2d Cir. Jan. 12, 1972).

[27] See generally, Maxam Dayton, Inc., 142 N.L.R.B. 396, 53 L.R.R.M. 1035 (1963).

some to be prevalent and severe enough to justify a policy of nondeference in the area of employee discipline.[28]

These allegations are serious and cannot be lightly dismissed. However, upon close examination, the number of incidents involving procedural irregularities in general appears to be few. As noted earlier, the NLRB—as part of its review function under *Spielberg*—verifies the procedural integrity of disputed arbitration awards.[29] Commenting on its overall experience in reviewing these cases, the Board stated in *Collyer*:

> It is true, manifestly, that we cannot judge the regularity or statutory acceptablity of the result in an arbitration proceeding which has not occurred. However, we are unwilling to adopt the presumption that such a proceeding will be invalid under *Spielberg* and to exercise our decisional authority at this juncture on the basis of a mere possibility that such a proceeding might be unacceptable under *Spielberg* standards. That risk is far better accommodated, we believe, by the result reached here of retaining jurisdiction *against an event which years of experience with labor arbitration have now made clear is a remote hazard.*[30]

Thus, the concern about procedural irregularity in private arbitration appears to be overstated. Certainly, this problem is not so prevalent as to warrant a complete rejection of the private forum.

Indeed, even if abuses were more prevalent, a blanket disavowal of private arbitration procedures would not be the appropriate remedy. Instead, the fundamental problem which permits such occurrences—unfair representation by an employee representative—should be dealt with directly and resolved on its own merits.

Employees are provided a number of independent remedies for violations of their right to be fairly represented. First, the courts, since 1944, have imposed a duty on a labor organization to fairly and impartially represent all of its members.[31] Similarly, the NLRB, in 1962, held that

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[28] Atleson, Arbitration and NLRB Deference, 20 Buffalo L. Rev. 355 (1971); Comment, The NLRB and Deference to Arbitration, 77 Yale L.J. 1191 (1968).

[29] See p. 1462 supra.

[30] 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1937 (1971) (emphasis added).

[31] In 1944, the Supreme Court construed the Railway Labor Act, 45 U.S.C. §§ 151 et seq. (1970), as imposing "upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates." Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 202 (1944). This duty was subsequently imposed upon bargaining agents who are certified under the National Labor Relations Act. See, e.g., Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944); Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953).

> Section 8(b)(1)(A) of the Act . . . prohibits labor organizations, when acting in a statutory representative capacity, from taking action against an employee upon considerations or classifications which are irrelevant, invidious or unfair.[82]

Thus, in addition to private court action, each employee possesses a right, enforceable by the NLRB, to be fairly represented by his union. Since the establishment of this fair representation cause of action, the Board has effectively dealt with this problem and has been able to fashion remedies where necessary.[83] Therefore, since the rights of individual employees can be protected directly, the remote possibility that a labor organization will abuse its statutory privilege in no way justifies a blanket disavowal of private arbitration.

B. *Will the Arbitration Proceedings Resolve the Unfair Labor Practice Issue?*

The second argument frequently advanced against deferring to private arbitration in discipline cases concerns the alleged functional dissimilarity of the two forums. Proponents of this position believe that the contractual standard of "just cause" may not produce a result which is compatible with the national labor policy as expressed in Section 8(a)(3) of the Act, because " 'just cause' might exist even though the true reason for the firing was union activity, which insofar as it is protected by the Act, cannot be limited by contract."[84] The issue then is whether, in the area of employee discipline, there is a sufficiently strong possibility that results achieved in the private forum will be at odds with the statutory standard so as to overcome the positive value found to exist in requiring the parties to utilize that forum. The answer to this question depends in part on the particular disciplinary issue presented.

Employee discipline cases can be generally grouped into two categories. As will become apparent, different considerations apply to these two groups of cases. First, the employee may claim that the plant rule under which he was disciplined is in and of itself violative of the Act. Secondly, he may assert that his discharge—although phrased as a violation of a valid company rule—was actually motivated by his union activities.

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[82] Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962), enf. denied, 326 F.2d 172 (2d Cir. 1963). The *Miranda Fuel* doctrine was upheld by the Fifth Circuit in Local 12, United Rubber Workers v. NLRB, 368 F.2d 12, 19-20 (5th Cir. 1966). The Supreme Court has left the question open. Vaca v. Sipes, 386 U.S. 171, 192-93 (1967).

[83] See Port Drum Co., 180 N.L.R.B. 590, 73 L.R.R.M. 1068 (1970); Local 485, IUE, supra note 26. In both cases the respective unions refused to process grievances on behalf of the affected employees.

[84] See Member Jenkins' dissent in *Collyer*, 192 N.L.R.B. No. 150, 77 L.R.R.M. at 1950 n.47.

Cases in the first category are typified by disputes over "no solicitation" or "no union insignia" rules. Here, the issue concerns the right of an employer to make such a rule—not whether it was broken.[35] This question is exclusively one of national labor policy. Therefore, except insofar as an arbitrator's decision on a factual question may tend to make the unfair labor practice question moot, the Board's exercise of its jurisdiction in this area is not improper.[36] However, legitimate concerns in this limited area should not be allowed to cloud the issues in the distinguishable "mixed motive" discipline cases.

These "mixed motive" cases come to the Board on a claim that the alleged plant rule violation is merely a pretext upon which the employer acted. It is claimed that, in reality, the employee was discharged because of his union activities. Unlike the invalid rule situation described above, the dispositive issue here is factual—not statutory. The point at issue is the employer's subjective intent in discharging the employee. As will became apparent, the Board applies many techniques common to private arbitration in deciding that issue.

An arbitrator's decision on the "just cause" issue normally includes a determination of whether the disciplined employee is being treated on the same basis as other employees. Clearly, this is also the overriding consideration in NLRB "mixed motive" cases because, unless section 8(a)(3) grants disciplinary immunity to employees—an effect which it clearly does not have[37]—an employee who claims to have been discriminated against on the basis of his union activities, must by

[35] See, e.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793, 16 L.R.R.M. 620 (1945); Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 51 L.R.R.M. 1110 (1962).

[36] See generally, Anderson, supra note 14 at 194-95.

[37] Section 10(c) of the Act provides, in part, that:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . .

29 U.S.C. § 160(c)(1970).

The Supreme Court has interpreted section 10(c) as follows: "The legislative history of that provision indicates that it was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct." Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 217, 57 L.R.R.M. 2609, 2614 (1964). The Court further noted that:

> The House Report states that the provision was "intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." H.R. Rep. No. 245, 80th Cong., 1st Sess., 42 (1947). The Conference Report notes that under § 10(c) "employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause [interfering with war production] . . . will not be entitled to reinstatement." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 55 (1947).

Id. at 217 n. 11, 57 L.R.R.M. 2609.

implication believe that other less vocal proponents of the union would not have been disciplined under the same circumstances. Hence, an examination of the Board's treatment of "mixed motive" cases reveals factual determinations similar to those made by an arbitrator dealing with "just cause." In finding discriminatory motivation, the Board has relied on such factors as: 1) the employee, and employees generally, had no knowledge of the rule;[38] 2) the employee was not told specifically why he was being disciplined;[39] 3) the rule was discriminatorily applied in that it was seldom enforced or was normally not applied in so severe a fashion;[40] 4) the employee had never been warned in what would be considered a continuing infraction, for example, inefficiency;[41] 5) a minor infraction resulting in severe discipline;[42] and 6) a waiver by the company of its disciplinary authority by reason of prior condonation of the particular employee's conduct.[43] Even a cursory examination of these factors reveals that they are "the very stuff of labor contract arbitration"[44] in general and of "just cause" in particular.

The similarity of approaches employed by private arbitrators and the NLRB in the area of employee discipline militates against the argument that these two forums will arrive at incompatible results. Thus, it would appear that, in the area of "mixed motivation," no significant difference exists between the national labor policy and the parties' own interests as expressed in their labor agreements. That is, application of the collective bargaining standard of "just cause" will produce results that are consistent with the country's labor policy. Therefore, a major consideration expressed in *Collyer*—that the arbitrator's decision ". . . resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act. . . ,"[45]—is satisfied in the largest group of employee discipline cases. The possibility of inconsistent results is sufficiently remote so as not to warrant a presumption against the private forum.

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[38] See, e.g., Lincoln Bearing Co., 155 N.L.R.B. 1141, 1145, 60 L.R.R.M. 1502, 1503 (1965).

[39] See, e.g., Hendrie & Bolthoff Co., 138 N.L.R.B. 1196, 1199, 51 L.R.R.M. 1247, 1248 (1962).

[40] See, e.g., Hawthorn Co., 166 N.L.R.B. 251, 258, 65 L.R.R.M. 1609, 1611 (1967).

[41] See, e.g., Great Atlantic & Pacific Tea Co., 133 N.L.R.B. 658, 663, 48 L.R.R.M. 1721 (1961); Collins & Aikman Corp., 55 N.L.R.B. 735, 742, 15 L.R.R.M. 826, 828, enf., 146 F.2d 454 (4th Cir. 1944).

[42] See, e.g., Lenz Co., 153 N.L.R.B. 1399, 1407, 59 L.R.R.M. 1638, 1639 (1965).

[43] Id.

[44] Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1936-37 (1971).

[45] Id., 77 L.R.R.M. at 1936; see generally, Miller, supra note 2 at D-3.

CONCLUSION

In *Spielberg*, the leading case dealing with deference to *existing* arbitration awards, the Board held that private settlements could effectively implement the national labor policy in the area of employee discipline. In *Collyer*, the landmark case dealing with deference to an *unutilized* grievance-arbitration procedure, the NLRB found that the national policy could be served by requiring the parties to utilize their agreed-upon dispute-settling procedures in the first instance. Although *Collyer* was a unilateral action case, its rationale has been shown to be equally applicable to "mixed motive" employee discipline cases. An examination of objections to such an extension of *Collyer* proved them to be more illusory than real. No factors have been shown which warrant a presumption against private arbitration in the area of employee discipline.

By extending *Collyer* to employee discipline cases, the Board would acknowledge the respective responsibilities incumbent upon each forum. On the other hand, by continuing its present policy of intervention in this area, the Board undermines the foundation of the private forum. This was perhaps best expressed by Board Chairman Miller when he stated:

> I think that when parties have voluntarily agreed upon a mechanism for the adjustment of their disputes, then to the widest extent possible we ought to permit that machinery to operate and not complicate the situation by permitting either party to side-step those processes and instead look to government in the form of this Board to decide the merits of their disputes. . . .
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> If we make clear to the parties that we are not going to rescue them from the imperfections of their own system, we will encourage rather than discourage them in taking necessary action to improve the processes which they will now be obliged to follow without our serving as an easily available alternative.[40]

By directing the parties to their agreed-upon forum in the first instance, the Board would promote industrial stability through the realization that collective bargaining can be made to work only if the parties understand that they must resolve their problems themselves.*

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[40] Miller, supra note 3 at D-4.

* Since submission of this article, the NLRB has deferred to an arbitration proceeding which was already underway in an employee discipline case. National Radio Co., 198 N.L.R.B. No. 1, 80 L.R.R.M. 1718 (1972).

BOSTON COLLEGE
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