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DEFERRAL TO THE INTRAUNION APPELLATE PROCESS: A RESPONSE

Paul Alan Levy*

In their recent Article on the deferral policy of the National Labor Relations Board (Board or NLRB), two attorneys for the United Auto Workers (UAW), Leonard Page and Daniel W. Sherrick, argue that the Board has adopted "an indefensible double standard" by applying its policy of "deferral to arbitration" only to contractual dispute resolution processes but not to intraunion review procedures. By deferring to intraunion procedures, they contend, the Board would further many of the same policy objectives it now achieves by deferring to arbitration, with the added benefit of advancing the interest in democratic union self-government. Moreover, by drawing analogies to exhaustion rules developed for judicial proceedings to enforce the Landrum-Griffin Act and the duty of fair representation (DFR), Page and Sherrick contend that such deferral would appropriately prevent unions from being charged until the highest levels of the union have had the opportunity to decide whether to correct the wrongdoing. However, the reasons they present for their proposal are not persuasive.

First, it is not clear whether Page and Sherrick propose to extend only the Collyer doctrine of pre-arbitral deferral to section 8(b)(1)(A) charges, or whether they would apply the

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2. Id. at 687.
3. Id. at 682–87.
4. Id. at 684.
5. Id. at 684, 687.
6. Id. at 685–86.
Spielberg\textsuperscript{8} doctrine of post-arbitral deferral as well.\textsuperscript{9} On the one hand, much of the Page and Sherrick discussion pertains to “exhaustion,”\textsuperscript{10} a term that connotes only deferral to a procedure from which the employee may return to the Board for a \textit{de novo} hearing once the procedure is completed. Moreover, in support of their argument, they invoke section 411(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959\textsuperscript{11} (LMRDA) and \textit{Clayton v. International Union, UAW},\textsuperscript{12} both of which provide only for a delay in the litigation of claims without according any preclusive effect to the outcome of intraunion appeals.\textsuperscript{13} On the other hand, however, the Article invokes “the Board’s Spielberg-Collyer rationale,”\textsuperscript{14} implying that Spielberg deference is also desired.

The question of whether the Board should defer to the outcome of the appeal is significant because the Board has consistently justified the Collyer doctrine by pointing out that it does not exist in isolation, but instead channels unfair labor practice (ULP) claims into a procedure that will normally resolve them, subject to limited review for compliance with the Spielberg standards.\textsuperscript{15} Where, by contrast,
a collective-bargaining agreement (CBA) fails to provide for final and binding arbitration that either party can invoke, the *Collyer* doctrine does not apply. In other words, *Collyer* generally does not require that a case be submitted to a specified procedure when the only effect will be "exhaustion," that is, a delay in the submission of the case to the Board.

As further explicated in their Response to my original Article, Page and Sherrick ask that "weight" be given to the results of an intraunion appeal—not a presumption of preclusive effect, as under *Spielberg*, but a greater or lesser degree of evidentiary weight, much as federal courts sometimes weigh arbitral awards in resolving a Title VII or a Fair Labor Standards Act suit. But it seems highly unlikely that the Board would or could accord such weight to the outcome of an intraunion appeal, not to mention giving it any preclusive or presumptive effect. Unlike arbitration procedures, intraunion appeals do not produce a decision either by neutrals or by persons appointed by an entity whose interests are aligned with those of the employee. Even where the "arbitration" procedure takes place before a joint committee, as with the Teamsters, the employee enjoys the theoretical protection that the interest of the union, which appoints half of the members of the committee, is aligned with the interest of the employee on the statutory issue (or the parallel contractual issue) being remitted to arbitration. Intraunion

resolve the dispute in a manner consistent with the criteria of *Spielberg*" (quoting General Am. Transp. Corp., 228 N.L.R.B. 808, 817 (1977) (Members Penello and Walther, dissenting)).


21. See generally Levy, supra note 9, at 552-60.

22. Page and Sherrick take me to task for my criticisms of the joint committee, suggesting that I necessarily favor a UAW-style bureaucratic "contractualism" over a wholly power-based grievance procedure, a policy choice that they say should be left to the union. Page & Sherrick, supra note 17, at 937-38. For additional discussion of contractualism, see STAUGHTON LYND, SOLIDARITY UNIONISM (1992). My experience as a lawyer for Teamster reformers, my reading of the literature, and my experience of seeing clients and friends severely mistreated by the Teamster grievance procedure have made me deeply suspicious of it. Whatever theoretical attractions the notion of
appeals, on the other hand, are conducted before officials of the union (i.e., the very "interested" party being charged with a ULP), who presumably will be inclined to uphold the union's conduct to avoid any back-pay liability that the union might otherwise incur. The Board does not even apply Collyer when the final decision in the grievance procedure is left to the party against whom the ULP charge has been filed.

The UAW's Public Review Board (PRB) arguably puts that union in a stronger position to seek post-appeal deference because PRB decisions are rendered by a group of distinguished individuals who work neither for the union nor for any employer with which it bargains. But even the PRB's

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a "power-based" approach to grievance adjustment may have, the fact remains that the Teamsters virtually never strike over grievances. It remains to be seen whether the Teamsters' internal reform slate will sufficiently change the grievance procedure so as to ameliorate these problems.

In my original Article, supra note 9, I argue against deferral of statutory rights to joint committee decisions. Contrary to what Page and Sherrick seem to think, see Page & Sherrick, supra note 17, at 937, my original Article does not argue against deference to joint committee decisions in the case where the rights at stake were created by the labor agreement itself. How the joint committee decisions should be analyzed when contractual rights are at stake presents a somewhat different question. Although my Article paid little attention to this question, much of Page and Sherrick's refutation of my thesis seems to be based on the false assumption that the Article is about "deferral" in the context of enforcing contractual rights. As my Article states, the DFR is the only protection that employees have when their contractual rights are at stake. It is important that the DFR be applied to the actions of the union officials who make decisions on grievances—i.e., the union representatives on the grievance panels—rather than just to the union advocates who appear before those panels. As I indicate in my Article, the courts are just beginning to recognize the need for such an extension of the DFR to both groups of union representatives. Levy, supra note 9, at 566-67.

23. Under the Letters of Agreement that allow the UAW to reinstate cases in the grievance procedure if its appellate process, including the Public Review Board (PRB), finds that the grievance was properly withdrawn, see Page & Sherrick, supra note 1, at 683, the employer is exempted from any back-pay liability for the period of time between the dropping of the grievance and its reinstatement, see, e.g., AGREEMENT BETWEEN GENERAL MOTORS CORPORATION AND THE UAW 383 (Sept. 21, 1984). The union's decision to reinstate the grievance is tantamount to an admission that there was a breach of the DFR, and thus, given both the union's agreement not to hold the employer liable for this period of time and the division of responsibility for damages set forth in Bowen v. United States Postal Serv., 459 U.S. 212, 222-30 (1983), the union becomes liable for the back pay during this period of time.


25. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, CONST. art. 32, § 1 (1989) (on file with the University of Michigan Journal of Law Reform); see Page & Sherrick, supra note 1, at 683 & n.162.
members are appointed by the union, and its decisions reflect extreme deference to the union's elected officials. Indeed, although I do not have a statistical breakdown, I subscribe to the PRB’s decisions and rarely see PRB decisions overturning the union’s actions. Although this is arguably because the UAW’s behavior is normally above reproach, it hardly seems likely that a union would select an arbitrator who almost always rules in favor of employers. Hence, even the PRB’s “neutrality” is open to question.

And yet, unless the NLRB were willing to defer to a decision of the union’s highest appellate body that the union did no wrong, in most cases extending Collyer to intraunion appeals would not lead to the resolution of duty of fair representation claims, but would only delay their resolution by the Board. After all, an intraunion appellate body has at least two reasons for rejecting the argument that the union breached the DFR: (1) it may decide that the union did not breach the agreement; or (2) it may decide that, regardless of whether the agreement was breached, the lower union body

Many courts and commentators have expressed their respect for the PRB. See, e.g., Monroe v. International Union, UAW, 723 F.2d 22, 24 n.3 (6th Cir. 1983) (noting the membership of a former judge of that court on the PRB); Public Review Board and UAW Democracy, UNION DEMOCRACY IN ACTION 5-7 (1964).


27. A few years ago, I should not have hesitated to embrace the common assumption that the UAW, if not perfect, was at least far more democratic and tolerant of dissent than most other national unions. The reactions of the Administration Caucus over the past few years, however, as it has been faced with a substantial and enduring insurgent movement for the first time in a generation, make me wonder whether the union is indeed more democratic, or simply more lucky and better at co-opting dissent. Page and Sherrick disagree with my perceptions in this regard. See Page & Sherrick, supra note 17, at 928 & n.15. However, we have agreed that, rather than divert attention from the topic at hand with a lengthy debate about the state of democracy in the UAW and disagreements about how to characterize various events and the authority that reports them, we will simply note our disagreement in this regard.

Page and Sherrick also take me to task for my use of the phrase “better at co-opting dissent” in the first paragraph of this footnote. Id. at 928 n.15. They miss my point. There is, of course, nothing wrong with responding to intraunion dissent by co-opting dissenters and compromising on issues that motivate dissatisfaction. I agree with Page and Sherrick that this is a healthy response by union leaders. If, however, the leaders’ failure to compromise with a particular group of dissenters, or the dissenters’ unwillingness to be co-opted, produces undemocratic responses—if, as Justice Harlan said in another context, the leadership responds to persistent dissent by displaying the “fist inside the velvet glove,” NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964)—then observers may be justified in wondering whether the union is able to function democratically only in times of relative consensus.
did not behave improperly. Because the NLRB gives no deference to either of these decisions, applying Collyer merely would cause delay.

Only when the intraunion procedure upholds the position of the employee and leads to the reinstatement of the grievance can Collyer deferral produce results that resolve the DFR claim. This may be because the grievance procedure then continues and culminates in a binding arbitration. If the arbitrator rules that the employer did not breach the CBA, the appeals process would have produced a construction or application of the CBA to which the Board presumably would defer, thus defeating the DFR claim.\(^{28}\) If, on the other hand, the arbitrator decides that the CBA was violated, the decision presumably eliminates the first of the employee's two legal hurdles noted above. If the basis for reinstating the grievance was that the DFR had been violated, that may well eliminate the second hurdle, thus giving the Board a basis for proceeding directly to the question of relief for the employee.

But, if I am correct in my observation that, even when a "neutral" body like the PRB makes the decisions, most appeals would uphold the decision of the union below, then it follows that in most cases, months or even years later the parties would be left almost exactly where they were before the appeal. Thus, unless there was a good reason for the Board to apply a naked exhaustion requirement, a matter which I discuss below,\(^{29}\) the rationale underlying Collyer simply does not extend to intraunion appeals.

Nor do I accept Page and Sherrick's contention that adoption of an exhaustion requirement is needed to further the public interest in union democracy.\(^ {30}\) I agree with Page

\(^{28}\) If, however, after the grievance is reinstated, the union later drops the grievance, there is nothing to which the Board can defer.

\(^{29}\) See infra notes 30–50 and accompanying text.

\(^{30}\) See Page & Sherrick, supra note 1, at 684, 687. I join Page and Sherrick in wishing that the Board would be more attentive to union democracy concerns, rather than sloughing them off in the interest of stability in relations between corporate managers and union officials. In a number of areas the Board has been overly concerned with protecting union institutions at the expense of dissident members. For example, the NLRB traditionally has held that an intraunion requirement that contracts be ratified by the membership may be ignored unless the union and employer expressly agree during the negotiations that the requirement be observed, see Alan Hyde, Democracy in Collective Bargaining, 93 YALE L.J. 793, 801–04 (1984), although several lengthy concurrences by Board Chairman Stephens suggest that this rule may be in flux. See, e.g., Beatrice/Hunt-Wesson, Inc., 302 N.L.R.B. No. 30, 137 L.R.R.M.
and Sherrick that intraunion appeals can promote some democratic values. But there are ways that an exhaustion requirement can hinder these values as well. First, an exhaustion requirement inevitably imposes costs on the affected union member. Not only is she forced to wait for relief against an alleged violation of her rights, but there is always the danger, as the Supreme Court has noted, that "the member [will] become exhausted, instead of the remedies."31 Because the consequent burden on DFR claimants undermines the DFR as a "bulwark to prevent arbitrary union conduct,"32 an exhaustion requirement, by its very nature, imposes costs on union democracy. These costs must be weighed against the benefits when deciding whether to require exhaustion in a particular context.

Second, when members are forced to submit their contentions that a local union has wrongly failed to pursue a grievance under the CBA to a higher union body, the power to decide what the CBA means passes, in effect, from the local union to the higher body. Some unions, such as the UAW, may value the creation of a highly bureaucratic system for deciding the precise meaning of each clause in a CBA and may want to give international representatives the final decision-making power. While this certainly has been the historic trend in the labor movement,33 other unions may come to different conclusions.34

(BNA) 1075, 1076–79 (1991); Sierra Publishing Co., 296 N.L.R.B. 477, 477–82 (1989), 132 L.R.R.M. (BNA) 1189, 1189–94 (1989). Similarly, the Board has consistently refused to extend the reach of section 8(b)(1)(A) to forbid union restrictions of the right to post reform literature at the workplace as it has forbidden employers under section 8(a)(1). But see Helton v. NLRB, 656 F.2d 883 (D.C. Cir. 1981) (holding that the union committed an unfair labor practice when it refused to allow an employee to post materials critical of the union on the union bulletin board). The Board has not acquiesced in the D.C. Circuit's rejection of its position, and consequently the General Counsel refuses to issue complaints in these cases, effectively rendering the Helton opinion a nullity. Indeed, the Board's failure to reexamine the Teamster joint committees, as well as its narrow approach to finding conflicts between the union grievance advocate and the dissenting employee, see Levy, supra note 9, at 489, 493–94 & n.66, 560–69, reflect the insufficient attention it gives to the impact of its rulings on union democracy.

34. For example, shortly after the Supreme Court's decision in Clayton v. International Union, UAW, 451 U.S. 679 (1981), the Teamsters amended the
Third, intraunion appeal mechanisms may have the paradoxical effect of facilitating unfair treatment of members by union officials. After all, one of the most important purposes of the DFR is to encourage local union officials to handle grievances carefully. Intraunion appeal mechanisms may weaken that incentive by allowing the initial grievance handlers to believe that they need not be so careful; if they behave improperly, they can count on being corrected by the appeals process without subjecting the union to any liability. Moreover, the appeals process may give union lawyers (who, after all, tend to write the decisions of union appellate bodies) the opportunity to craft viable explanations for an action of lower level union officials whose actual motives were improper. The Board generally holds that explanations developed after a decision do not provide a sufficient defense to a charged unfair labor practice; the issue is not whether a respondent could have acted for lawful reasons, but whether it did act for lawful reasons. By the same token, the Board should not allow the union to substitute the appellate "decision" for the actual reasons (or lack of reasons) of the union official who decided not to pursue the grievance. If Page and Sherrick are correct in stating that the union’s breach of the DFR is not final until its appellate bodies have had the opportunity to address the alleged violation, then the exhaustion requirement would become a way for the union to substitute a lawyer’s rationalization for the union official’s true reasons for dropping a member’s grievance.

Fourth, the most effective appeal mechanism may well involve an independent body, as the UAW’s PRB is supposed to be, whose members are truly neutral and whose decisions, like the awards of many arbitrators, often include sophisticated reasoning. Such a body admittedly is less likely to be

constituent to require intraunion exhaustion in collective-bargaining matters. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PROPOSED CONSTITUTION AND BY-LAWS 102-03 (1981). Five years later, the old rule, which excluded collective-bargaining matters from this requirement, was reinstated. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CONST. OF 1986 art. XIX, § 12(c).

35. See Hamilton Plastics, 291 N.L.R.B. 529, 532 (1988) (refusing to consider "afterthoughts" that were not originally given as reasons for discharge); Wright Line, 251 N.L.R.B. 1083, 1091 & n.20 (1980) (finding that work record discrepancies discovered after the decision to eliminate an employee suggested a predetermined plan rather than a lawful reason for discharging the employee), enforced, 662 F.2d 899 (1st Cir. 1981).

36. See Page & Sherrick, supra note 1, at 684–85.
influenced either by intraunion political considerations or by the possibility of union financial liability if it were to decide that a particular grievance should have been pursued. Moreover, if the union has decided to entrust to such an independent body the power to second-guess the performance of its disciplinary and grievance adjusting functions to ensure that its members are not abused for political reasons, that decision may genuinely promote union democracy.

On the other hand, unless the independent body is empowered to review grievance decisions on some basis broader than the DFR itself, it is hard to see what democratic gains are achieved by substituting an unelected, self-perpetuating body of outsiders for the NLRB, whose members are, after all, appointed by the President with the advice and consent of the Senate. The PRB, for example, may have even less authority than the Board over alleged mishandling of grievances because it may intervene only if the reason for dropping the grievance was based on fraud, discrimination, or collusion with management, or was utterly devoid of a rational basis. Nor, indeed, does it claim to have authority to provide interpretations of the CBA itself. Thus, balancing

37. 29 U.S.C. § 153(a) (1988). Arguably, the very presence of the PRB may induce the elected union tribunals to extend better protections to members on their own. For example, an early study found that, based on a small number of cases, the proportion of intraunion appeals in which the UAW's executive board reversed local union discipline increased dramatically in the year following the establishment of the PRB. J. Stieber, Governing the UAW 82-83 (1962). However, the availability of judicial or administrative mechanisms of redress may have the same effect. If the PRB's power to intervene is no greater, it is not clear that its existence would, in fact, increase the protection afforded members in grievance handling.

38. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, Const. art. 33, § 4(d) (1989). Before Clayton v. International Union, UAW, 451 U.S. 679 (1981), the PRB did not even have authority over rational basis claims. Arthur L. Fox & Robert B. Sonenthal, Section 301 and Exhaustion of Intra-Union Appeals: A Misbegotten Marriage, 128 U. Pa. L. Rev. 959, 1008-09 (1980). It was, presumably, in response to the Supreme Court's criticism of this narrow focus, which excluded even some claims that were plainly covered by the DFR as enunciated in Vaca v. Sipes, 386 U.S. 171 (1967), see Clayton, 451 U.S. at 694 n.24, that the PRB's jurisdiction was expanded slightly to include rational basis claims. This approach, however, represents the most cautious union-side interpretation of the reach of the DFR and certainly does not give the PRB any authority beyond that which already is accorded to the Board and the courts under the DFR.

39. Rather, the PRB takes the position that this task belongs to the elected bodies of the union. See, e.g., Morris v. Local 549, PRB Case No. 922, at 8 (1991); Hayden v. UAW Agricultural Implement Dept', PRB Case No. 913, at 4 (1990); Hein v. Local 653, PRB Case No. 746, at 5 (1986); Robinson v. Local 92, 4 PRB Decisions 364, 366 (1985) Guncsaga v. Local 846, 3 PRB Decisions 315, 318 (1982). However reasonable this may be as a matter of democratic theory, it is hard to understand how Page and Sherrick can argue that the PRB's decisions may provide a construction of CBA that may help resolve the ULP charge against the union.
the pluses and minuses for union democracy caused by an NLRB rule requiring exhaustion of intraunion remedies, and considering the delay that such an exhaustion requirement entails, I am not persuaded that the interests of union democracy favor the Page and Sherrick proposal.

This brings me to a curious aspect of their proposal. Although their proposal is limited, by its terms, to ULP charges involving the DFR,\(^{40}\) most of their arguments would apply equally to other kinds of charges that members might bring against their unions; yet Page and Sherrick never explain why they limit their proposal to DFR cases. For example, if the possibility of reversal of the union position deprives the union's breach of the DFR of some requisite "ripeness,"\(^ {41}\) the same could be said about other forms of union discrimination against reformers that are actionable under section 8(b)(1)(A) or, indeed, section 8(b)(2).\(^ {42}\) So, too, does the analogy with the exhaustion proviso of section 101(a)(4) of the LMRDA\(^ {43}\) apply to other kinds of ULP charges. The only argument that may not extend beyond DFR cases is that the appeal process may produce a conclusive interpretation of the CBA that resolves the DFR claim. That argument is the key to the contention that unions are being deprived unfairly of the benefits that the Collyer deferral doctrine provides to employers. But, as we have seen, that argument provides little support even for the exhaustion of DFR charges.

Indeed, the exhaustion argument actually may extend to all deferrable ULP claims against employers as well as unions. After all, the theory is that if the charging party pursued an intraunion appeal of the denial of a grievance, the grievance might be reinstated and an arbitral resolution of its claim, including an authoritative construction of the CBA to which the Board would then defer under Olin,\(^ {44}\) might be obtained. But employers charged with ULPs under section 8(a)(3), for example, also could benefit from such an interpretation, and so, although Page and Sherrick do not

\(^{40}\) Page & Sherrick, supra note 17, at 951.

\(^{41}\) Page & Sherrick, supra note 1, at 685.


\(^{44}\) Olin Corp., 268 N.L.R.B. 573, 574 (1984) (holding that the Board will defer unless the arbitrator's award is "palpably wrong").
mention it, their proposal could be invoked by employers to avoid the current rule that if the union refuses the individual employee's request to pursue the grievance, Collyer deferral is no longer appropriate. And the Clayton doctrine, on which they rely to support their exhaustion proposal, is equally available to employers and unions.

In their haste to avoid Professor St. Antoine's charge that their proposal is an example of "special pleading," their Response acknowledges that the principles could extend "to any process of private dispute resolution." This standard, which would be just as applicable to a dispute resolution procedure established unilaterally by an unorganized employer as it would to an intraunion appeals mechanism, takes Page and Sherrick far beyond the Collyer/Spielberg doctrine that was the original basis for both their proposal and their charge of a "double standard" between employers and unions. In summary, then, the "exhaustion" analogy does not support their proposal, both because the reasons they give for it are insufficient and because the argument proves too much.

45. Levy, supra note 9, at 505-06.
48. Page & Sherrick, supra note 17, at 943.
49. A number of nonunion employers have established such systems. See, e.g., Suburban Hosp., Inc. v. Dwiggins, 596 A.2d 1069, 1071-72, 1076-77 (Md. 1991) (concerning charges an employee brought before a hospital's unilaterally created grievance committee). Indeed, in a state that has adopted the Uniform Employment Termination Act, which provides for arbitration of dismissals from employment, MODEL EMPLOYMENT TERMINATION ACT §§ 5-6, 7A U.L.A. 67 (Supp. 1992), the Page and Sherrick proposal arguably would require exhaustion of that alternate means of adjustment as well before the employee could resort to Board processes. Because the UAW has been so supportive of employer programs to co-opt employees into "co-operating" with management, see generally Mike Parker & Jane Slaughter, Choosing Sides: Unions and the Team Concept 3-4, 6 (1988), it is perhaps not surprising that UAW lawyers would be willing to extend Collyer and Spielberg beyond collectively bargained grievance procedures.
50. Page and Sherrick ask why I do not regard the DFR as a sufficient protection against the effect that improper grievance handling might have on ULP matters that are deferred to arbitration. Page & Sherrick, supra note 17, at 940. They err in stating that I did not address this issue; I argued that the DFR provides unions with protection against liability when they fail to process grievances for a variety of reasons that the law deems legitimate. These reasons not to process grievances, although sensible for a collective representative in apportioning the contractual rights that it has negotiated, are not a sufficient justification for the sacrifice of statutory rights. Levy, supra note 9, at 534-35, 543. But there is also another reason to object to application in the ULP context of the two-tier system that already applies to the enforcement of contractual
In an attempt to distinguish intraunion appeals from unorganized employers' unilaterally adopted grievance procedures, Page and Sherrick argue that intraunion appeals are worthy of deference because democratically elected officials have an incentive to be fair to intraunion appellants because a failure to be fair could cause them to be voted out of office. This argument suffers from a number of flaws. First, just as Page and Sherrick agree that the extent of deference must depend on the quality of the particular appellate procedure, so, under this argument, would the Board presumably be compelled to review the extent to which the union operates in a democratic fashion: it would need to evaluate whether there is a realistic prospect of a rank-and-file rebellion forcing the incumbents from office. It is hard to imagine a factual question to whose resolution the NLRB is less suited. Second, because the purpose of the DFR is to protect the politically unpopular and minorities within the union against mistreatment in the grievance procedure, the democratic process cannot be invoked as a basis for subjecting those who allege that they were the victims of mistreatment to an intraunion appeal. And third, it is doubtful that the quality of intraunion appeals in DFR or other cases is an issue that is any more likely to spur rank-and-file efforts to seek new union leaders than the quality of administrative or judicial treatment of the victims of civil rights or civil liberties violations is likely to spur efforts to replace public officials. Thus, just as there is no general requirement that administrative or judicial appeals be exhausted before a complaint may be filed against a public official, the democratic check on union government is no reason to require intraunion appeals before a claim may be pursued against the union.

rights in a hybrid suit, whereby the employee must establish a breach of the DFR before she is entitled to proceed for breach of contract against the employer. If that regime comes to apply to ULP charges, then to seek redress against an employer's ULP the employee must show that the union breached its DFR in presenting (or failing to present) the grievance to arbitration. In that case, one wonders whether, as I argued in Deferral and the Dissident, see id. at 543–44 n.349, the remedial aspects of hybrid litigation might also be applied, whereby the union bears a portion of the employer's back-pay liability, see infra notes 55–58 and accompanying text. Page and Sherrick ignore this possible consequence of the establishment of such a regime for ULP charges.

51. Page & Sherrick, supra note 17, at 951.
52. Id. at 942.
53. Ellis v. Dyson, 421 U.S. 426, 432–33 (1975) (noting that § 1983 actions are not required to demonstrate the exhaustion of state remedies).
In the final analysis, both public and private entities have a variety of incentives to redress their own wrongdoing. We may assume, as Page and Sherrick do, that business entities will be more influenced by the possible impact of a perception of unfairness on their profitability, while union leaders, like public officials, may be more influenced by a possible impact on their electability. One may well debate whether “voice” or “exit” is the more potent incentive in a particular context, but the mere prospect that incentives other than the outcome of litigation may avoid the need for litigation is not a sound reason for affording certain defendants the protection either of an exhaustion requirement or of deference to the outcome of a unilateral system of appeals.

Nor are the ripeness and section 101(a)(4) arguments sound. First, although some decisions hold, as Page and Sherrick point out, that the hybrid DFR cause of action does not “accrue” for statute of limitations purposes until the member has exhausted his intraunion remedies, that is simply the consequence of a general rule requiring exhaustion in such cases. The Page and Sherrick argument

55. If the political incentives operated in addition to the same financial incentives that operate on businesses, then it could be argued, as Page and Sherrick seem to, that leaders subject to removal in elections are necessarily more likely to have fair appeal procedures. See Page & Sherrick, supra note 17, at 946. Unfortunately, union leaders are frequently oblivious to the financial consequences for the union of their mistreatment of dissidents and of the litigation that ensues, and so the political incentive, if it is a realistic incentive at all, replaces rather than supplements the financial incentive.
57. Indeed, the more common analysis, which seems to me to be the better one, is to accord a tolling effect to intraunion appeals. See, e.g., Trent v. International Union of Operating Eng'rs, 818 F.2d 1537, 1546-48 (11th Cir. 1987), vacated on other grounds, 488 U.S. 1025 (1989); Hester v. Bolgor, 837 F.2d 657, 669 (4th Cir. 1988); Frandsen v. BRAC, 782 F.2d 674, 681 (7th Cir. 1986).

Treatment of the issue as one of ripeness or finality also leads to absurd results. Using that premise, one could argue that the discharge is not “final” so long as an unorganized employer has the option to reverse its own decision to fire somebody, because, for example, the employer ultimately is persuaded that its managers made a mistake. Yet that proposition was rejected in Delaware State College v. Ricks, 449 U.S. 250, 260-61 (1980). The finality argument was advanced by the AFL-CIO, as amicus curiae in Clayton, as a reason to require exhaustion. 451 U.S. at 697 & n.*. Although the Court did not squarely address the issue, the majority opinion proceeded on the assumption that exhaustion was a means to obtain "relief" from the employer's and
depends on the desirability of extending the judicial exhaustion requirement to the NLRB context; the invocation of terms like "ripeness" and "finality" do not aid their analysis.

Second, there are significant differences between the judicial process and the NLRB administrative process that make it neither necessary nor desirable to extend section 101(a)(4)'s exhaustion rule to the NLRB. Perhaps the most important difference is that, unlike a lawsuit in federal court where the formal proceedings begin immediately upon the filing of a complaint, an NLRB charge is really no more than a request to the NLRB's Regional Director that he investigate and consider filing a complaint. The Regional Director then contacts the party that is charged with a violation and elicits its side of the story; normally, the respondent also is given an opportunity to admit that it made a mistake and correct the error. Only if the Regional Director concludes, after investigation, that the charging party has a valid claim and informed adjustment is unsuccessful, is a complaint issued and an adjudicatory proceeding initiated.

As a union democracy litigator, I routinely insist that my clients at least try to exhaust intraunion remedies, partly to avoid unnecessary litigation and partly to induce the union to tell me its factual and legal positions. I also consider the prospective plaintiff's need for immediate relief in determining how long to wait before suing. Because the Board has its own way of conducting this screening function when its Regional Director decides whether to prosecute a ULP complaint, it needs the exhaustion doctrine far less than the federal courts do. This difference, in turn, helps explain why the Board has not erred in refusing to apply to its own proceedings the exhaustion doctrine recognized by the first proviso to section 101(a)(4) of the LMRDA.

union's breaches of their obligations, id. at 692, or to force the union to "rectify the . . . wrong of which the employee complains," id. at 692 n.21; the finality argument attracted the votes of only two dissenters, Justice Powell and Chief Justice Burger, id. at 696-98 (Powell, J., dissenting).

58. For an excellent discussion of the costs and benefits of exhaustion in the judicial context, see Fox & Sonenthal, supra note 38.


61. See id. § 101.7.

62. Id. § 101.8.

Because I have qualms about the underlying DFR as enforced by the NLRB, I might not find the Page and Sherrick proposal so troubling if it could reasonably be limited to DFR charges against unions. In a "hybrid" DFR action, the employee can prevail by showing that the union breached its DFR and that the employer violated the CBA, a violation that is actionable under section 301 of the Labor-Management Relations Act (LMRA). The union and the employer then share liability for the employee's monetary loss, according to their respective responsibilities. The NLRB, by contrast, generally lacks authority to enforce CBAs, and thus has no mechanism for holding the employer liable for contract violations or for remedying the section 301 "half" of the employee's hybrid suit. Instead, it subjects the union to full liability for the employee's lost back pay, at least if the grievance was meritorious. Of course, the Board remedy provides certain advantages to the employee, at least theoretically, because the employee need not find his own lawyer to prosecute the case. In addition, once the DFR breach is established, the General Counsel need show only that the grievance was not clearly frivolous; at that point, the burden shifts to the union to prove that the grievance would have been denied. To the extent that NLRB enforcement of a deferral doctrine would encourage employees to pursue their DFR/301 claims in court instead of before the Board, it would have the desirable effect of shifting back-pay liability toward employers and away from unions. On the other hand, it seems unlikely that the Board

64. In my view, the union should not be held liable for back pay that should be paid by the employer.


67. Levy, supra note 9, at 523–24.


69. This advantage is largely theoretical. Recent experience reveals that, in light of the budget cuts of the 1980s, a charging party often needs to have a lawyer to prompt the General Counsel's lawyers to take action. In addition, when potential hybrid cases seem meritorious, lawyers will be attracted by the availability of attorney fees as part of the remedy. See, e.g., Self v. Teamsters Local 61, 620 F.2d 439, 444 (4th Cir. 1980).

would be willing to acknowledge the disfavored status of DFR claims as a reason for deferral: Page and Sherrick certainly do not do so openly, and so are compelled to rely on a variety of other reasons which cannot be confined to the DFR context.

In their Response, Page and Sherrick divide the world of Board charges into two classes, those involving contractual rights and those involving statutory rights, and suggest that only the former should be deferred. They go on to argue that, although DFR claims are a sort of statutory right, DFR claims belong to a lesser class of statutory rights that only regulate the processes of relationships, and so ought to be subject to at least some level of deference. Perhaps they are trying to articulate a reason for limiting the scope of their deferral proposal to DFR claims.

But this argument simply does not work. First, it rests on a distinction between contractual and statutory rights for which both they and I have argued, but which the Board simply does not accept, and which thus can hardly provide a basis for the Board to adopt their proposal. Second, even they concede that the DFR is a statutory right, and that there is no basis for according statutory rights greater or lesser importance depending on whether they affect procedural or substantive rights. Indeed, the distinction between process-based rights and substantive rights that they draw in their Article is reminiscent of the very distinction drawn between NLRA rights and Title VII and Fair Labor Standards Act rights, which Page and Sherrick do not embrace. Nevertheless, proponents of deferral invoke this distinction as a reason to allow deferral of NLRA rights—even though Title VII and FLSA rights may be pursued independent of contractual grievance procedures. If there is any distinction to be

71. Page & Sherrick, supra note 17, at 930–35.
72. Id. at 946–49.
73. Page and Sherrick complain that I distinguish between individual and collective rights, id. at 932, instead of using the contract-statutory distinction which they favor. This completely ignores the extent to which my original Article is based on the contract-statutory distinction. See, e.g., Levy, supra note 9, at 526 (distinction affects argument based on statutory language and legislative history); id. at 534–51 (distinction affects argument based on policies of federal labor law).
74. Page & Sherrick, supra note 17, at 935.
75. Id. at 948.
drawn among statutory rights, other than those rights which depend on a CBA, it is between waivable and non-waivable rights.\textsuperscript{77} Page and Sherrick's acknowledgement that the union cannot waive the DFR in collective bargaining\textsuperscript{78} precludes them from basing the extension of the deferral doctrine to DFR claims on distinctions within the hierarchy of statutory claims.

Finally, the DFR cannot be distinguished from other statutory duties on the ground that it merely demands good faith or rationality in process. That may be a fair characterization of the aspect of the DFR standard that forbids arbitrary or perfunctory processing of grievances, but it does not apply to the portion of the DFR that forbids discrimination on an impermissible basis. Thus, at best, the Page and Sherrick proposal would allow deferral of only those DFR claims that were limited to "arbitrariness." However, DFR claims do not come neatly packaged as "arbitrary" versus "discriminatory"; the determination of which sort of claim is strongest often can be made only once the case has been in litigation. Yet an employee needs to know at the outset whether exhaustion will be required. In these circumstances, it is not clear that such a limited exhaustion doctrine is worth the effort that would be required to divide DFR charges according to the type of DFR violation involved.

In summary, the reasons Page and Sherrick give for their proposal do not carry the day. Thus, the Board's failure to extend the Collyer rule to require that DFR charges against unions be submitted first to an intraunion appeal is not based on an "indefensible double standard,"\textsuperscript{79} but instead recognizes the differences between the two kinds of charges and the two kinds of procedures.

\textsuperscript{77} See Hammontree, 925 F.2d at 1501-02 (Edwards, J., concurring); Plumbers Local 520 v. NLRB, 955 F.2d 744, 750-51 (D.C. Cir. 1992); Michael C. Harper, Union Waiver of Employee Rights Under the NLRA: Part II, A Fresh Approach to Board Deferral to Arbitration, 4 INDUS. REL. LJ. 680, 685-87 (1981).

\textsuperscript{78} Page & Sherrick, supra note 17, at 942.

\textsuperscript{79} See Page & Sherrick, supra note 1, at 687.