Deferral and the Dissident

Paul Alan Levy
Public Citizen Litigation Group

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Resolving unfair labor practice claims fairly and efficiently is one of the most important functions of national labor relations policy. Providing effective redress for these claims is significant not only for individual employees but also for the health of union democracy. Unfortunately, the process of resolving these claims has become highly politicized and in many cases has been used to squelch union dissident movements. As a result, entrenched union officials can and often do ignore the interests of their members.

Employees are protected under the National Labor Relations Act\(^1\) (NLRA or the Act) from certain forms of discrimination by employers. Section 8(a)(3) of the NLRA\(^2\) forbids employers from engaging in any discriminatory conduct used to discourage union membership. Section 8(a)(1)\(^3\) forbids employers from interfering with, restraining, or coercing employees in the exercise of their right to engage in concerted activity for mutual aid and protection. If an employee believes that her employer has violated one of these sections, she can initiate unfair labor practice (ULP) proceedings under the NLRA.\(^4\) Where the employee's union and employer have entered into a collective-bargaining agreement (CBA) under which the employee's claim could arguably be brought, however, the employer may assert the employee's failure to exhaust her remedies under the CBA as a defense to her ULP claim. Under current law, the General Counsel of the National Labor Relations...
Relations Board (NLRB) has the discretion to honor this defense and refuse to process a ULP claim until the employee exhausts her remedies—usually arbitration—under the CBA.\(^5\) Furthermore, if an employee does take her claim to arbitration and loses, the NLRB can defer to the arbitrator's decision if certain conditions are met.\(^6\)

Deferral to the internal remedial processes of CBAs, however, in certain circumstances undermines union democracy by allowing employers and entrenched union officials to discriminate against union dissidents. To illustrate this argument, I discuss two examples involving a dissident group, Teamsters for a Democratic Union (TDU), that vividly illustrate the problems with NLRB deferral. I then examine the development and evolution of the NLRB’s policies concerning deferral to arbitration. Next, I review the statutory- and policy-based arguments advanced for and against deferral. I attempt to assess the best reasons given for the deferral doctrine, while showing why, at least in its current incarnation, NLRB deferral doctrine is contrary to the requirements of the NLRA. More specifically, I show that, to the extent that deferral has some legitimate basis, it is founded on assumptions that cannot readily be applied to some grievance procedures, particularly the Teamster joint committee process.\(^7\) Finally, I examine the joint committees in detail and explain why the NLRB has erred in extending deferral doctrine to the proceedings and decisions of these bodies.

I. INTRODUCTION: TWO PARADIGMATIC CASES

Rod Howard is an employee of United Parcel Service (UPS) at its terminal in Knoxville, Tennessee. He is a shop steward for Teamsters Local 519, which represents UPS’s Knoxville employees in collective bargaining\(^8\) (as the Teamsters union represents UPS employees generally throughout the country).

\(^6\) See infra Part II.
\(^7\) See infra Part IV.
\(^8\) Transcript at 50-51, United Parcel Serv., Inc., 304 N.L.R.B. No. 87 (No. 10-CA-23981) (Aug. 27, 1991).
Howard is also an active member of TDU, a national organization of Teamster members who seek both to reform and democratize their union and to increase its militancy and effectiveness in representing members' interests vis-à-vis employers such as UPS. 9

TDU members who work for UPS often criticize the union for its handling of grievances and other problems that arise during the term of the CBA with UPS. 10 Moreover, each time the CBA has come up for renegotiation, TDU members employed by UPS have pointed out deficiencies in the proposals negotiated by the Teamster leadership with UPS and have urged the rejection of such proposals until certain improvements are incorporated. 11 In addition to directing campaigns at the negotiation and administration of particular CBAs, TDU also has played a major role—the major role—in fostering intraunion debate over the character of union finances and union leadership by publishing exposes of fiscal scandals within the union and supporting insurgent candidates for election to union offices at both the local and national levels. 12 Needless to say, TDU and its members are not beloved among the hierarchy of either UPS or the Teamsters union. 13

Because Howard and many other UPS employees spend their days driving trucks, either from one urban center to another or picking up and delivering customers' packages, they find it inconvenient to communicate with each other

9. Id.
10. TDU's monthly publication, the Convoy Dispatch, often carries at least one tabloid sized page of news related to UPS. See, e.g., We Are the Majority, CONVOY DISPATCH, Oct. 1987, at 1; UPS Contract Ignores Concerns, Represents Broken Promises, CONVOY DISPATCH, Aug. 1987, at 9; Selkman, UPSers: Take Honest Look at Givebacks, CONVOY DISPATCH, June/July 1987, at 9.
about work-related issues during the work day. To communicate with the membership about union issues that he and TDU sought to raise, Howard customarily posted TDU leaflets on a bulletin board at UPS's Knoxville terminal. According to Howard, UPS has made numerous efforts to prevent Howard from using this inexpensive but effective means of communication, first by tearing down TDU literature whenever it was posted on the bulletin board, and later by "coincidentally" removing the bulletin board in the course of moving and reorganizing the UPS facility.

The NLRA forbids employers from discriminating against union members who seek to communicate with each other about work or union issues. Such communications are deemed a form of union membership activity under section 8(a)(3) of the NLRA, which expressly proscribes discriminatory conduct used to discourage union membership, including membership activities. Section 8(a)(1) of the NLRA also protects employees in this circumstance: it forbids employers from interfering with, restraining, or coercing employees in the exercise of their right to engage in concerted activity for mutual aid and protection. Intermember communications are an obvious form of such concerted activity.

The NLRB has developed an intricate set of rules concerning the extent to which employees' and nonemployees' attempts to communicate with each other at the workplace are protected by these two subsections of the statute, balancing employees' rights under these provisions against employers' property rights and interest in conducting efficient operations.
Briefly stated, these provisions do not give employers any independent obligation to provide a bulletin board for dissidents to post literature where it will be seen easily by the employees and will not be removed with the daily trash. If, however, an employer does allow employees to post communications on a bulletin board (such as "for sale" signs and notices of picnics), then it becomes a "general purpose" bulletin board and the employer may not discriminate against messages reflecting concerted activity by taking down only the political items. Moreover, an employer may not remove an existing bulletin board to make it more difficult for protected communications to be disseminated to its employees.

Howard thus had a claim that UPS had committed a ULP by trying to prevent him from disseminating TDU literature through the censorship, and then the removal, of the general purpose bulletin board at the Knoxville terminal. But when he filed a charge to that effect with the NLRB, UPS raised as a defense that Howard had another way to pursue any legitimate claim about the bulletin board—by asserting his rights under the CBA between the Teamsters and UPS. In theory, that avenue would indeed be promising, for two reasons. First, if UPS had established a past practice of making a bulletin board available for employee postings, Howard could argue that the past practice had become part of the CBA and that UPS violated the past practice by removing the bulletin board in the process of its reorganization. Arguably, the removal would violate the CBA even if UPS's motives were entirely pure. Theoretically, the contractual claim was stronger than the NLRB charge which depended on a finding of improper motivation. Second, the CBA generally

22. See Union Carbide Corp. v. NLRB, 714 F.2d 657, 660 (6th Cir. 1983).
23. See NLRB v. Honeywell, Inc., 722 F.2d 405, 406-07 (8th Cir. 1983). The courts of appeals have carved out an exception that allows employers to give space to the United Way without making the bulletin board a general purpose one. See Serv-Air, Inc. v. NLRB, 395 F.2d 557, 560-61 (10th Cir. 1968).
25. See generally F. Elkouri & E. Elkouri, HOW ARBITRATION WORKS 389-411 (3d ed. 1973) (discussing how custom and past practice may be found to create enforceable rights). The contract between the Teamsters and UPS generally maintains the standards concerning the conditions of employment as they exist at the time of the signing of the agreement, unless they are contradicted by the agreement. See UNITED PARCEL SERV., SOUTHERN CONFERENCE SUPPLEMENTAL AGREEMENT art. 47 (Aug. 1, 1987-July 31, 1990) [hereinafter SOUTHERN SUPPLEMENT]; NATIONAL MASTER FREIGHT AGREEMENT art. 6, § 1 (Apr. 1, 1985-Mar. 31, 1988) [hereinafter NMFA].
forbids discrimination prohibited by law, and specifically forbids discrimination based on union activities. In short, UPS argued that Howard had powerful weapons in his contractual arsenal, if he would but use them, and that the NLRB should not concern itself with Howard's complaints until he had first tried to enforce his contractual rights.

Although employees sometimes may sue to enforce their rights under a CBA, Howard could not sue to force UPS to comply with those contractual rights that were parallel to his rights under the NLRA. Rather, one who seeks to enforce a CBA must first exhaust the enforcement procedures specified by the CBA. Typically, this procedure begins with a series of "grievance meetings" between representatives of the employer and the union and, in most unions, culminates in a hearing before an impartial arbitrator selected by the parties to interpret and apply the CBA when the parties are unable to agree about how to resolve a particular dispute under the CBA. Indeed, once those procedures are exhausted, the outcome of the grievance procedure is, with a small group of exceptions, final and binding on the parties to the agreement. These strictures apply equally to employees, employers, and unions. Employees also may seek to enforce the CBA directly against the employer if they can prove that, because the union breached its duty of fair representation (DFR), they should be excused from either the duty to exhaust their remedies under a CBA or from the final and binding character of a disposition of their grievance.

To exhaust his contractual remedies as UPS demanded, Howard would have been required to persuade his union to

29. See F. ELKOURI & E. ELKOURI, supra note 25, at 120-22.
exercise its authority under the CBA to file a grievance and to advocate his position before the arbitral body provided by the CBA. Howard was reluctant to do this for several reasons. First, he would have had to persuade the head of his local union to file the grievance, an individual who was hostile to TDU and who stated that he did not want to take the grievance to the panel because it was a "TDU grievance." Second, and far more important, for reasons that will be discussed in more detail later, the UPS agreement, like most major Teamster contracts, creates a decisional body called a "joint grievance panel" or "joint grievance committee," that consists of an equal number of union and UPS representatives, and authorizes it to make final and binding decisions on grievances. Given this structure, even if Howard could have persuaded his union leader to file the grievance, and even if the leader had presented it fairly to the joint committee, the ultimate decision on the grievance would rest with union appointees who also were likely to be hostile to TDU.

Thus, Howard regarded deferral of his charge pending its presentation to a grievance panel as at best a futile act delaying the enforcement of his free speech rights under the NLRA. But even worse, he was concerned that once the grievance committee had been given a chance to rule on his claim, UPS would argue, and the NLRB might agree, that the NLRB should accept the grievance panel's judgment as conclusive.

Howard, however, had no choice but to submit his contractual claim to the union grievance procedure. The General Counsel of the NLRB decided to honor UPS's deferral defense by refusing to process his charge further until Howard had

34. Telephone interview with Ellen Hampton, NLRB attorney (Mar. 1990). The union president made this comment to Ms. Hampton. The evidence was not introduced at trial, however, to avoid putting her on the stand.
35. Southern Supplement, supra note 25, art. 43(c).
36. One can assume that UPS's committee representatives would have voted to uphold their colleague who had removed the bulletin board.
37. 29 U.S.C. § 157 (1988). The section 7 right to engage in concerted activities for mutual protection includes the right to communicate with other employees about matters of collective concern, such as introunion affairs. See, e.g., Helton v. NLRB, 656 F.2d 883, 887 & n.31 (D.C. Cir. 1981). Although the union may waive section 7 rights in collective bargaining if the waiver is "clear and unmistakable," Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983), the union generally may not waive the right to communicate about union affairs. See General Motors Corp. v. NLRB, 512 F.2d 447, 448 (6th Cir. 1975); Universal Fuels, Inc., 298 N.L.R.B. No. 31, slip op. at 8-9, 134 L.R.R.M. (BNA) 1060, 1062-63 (Apr. 19, 1990).
38. See, e.g., Olin Corp., 268 N.L.R.B. 573, 574 (1984). This decision is discussed in greater depth infra notes 112-27 and accompanying text.
given the grievance panel a chance to consider his contention. Because the General Counsel has virtually unreviewable discretion to decide whether or not to file a ULP complaint and bring the case to trial, \(^{39}\) Howard was faced with a Hobson's choice: either allow the grievance to be heard by his union adversaries or face the NLRB's refusal to consider his claim.\(^ {40}\)

The joint grievance panel heard Howard's case, and not surprisingly, the panel decided that the CBA had not been violated.\(^ {41}\) Again, as expected, UPS argued that the Board should defer to arbitration, and now argued that the grievance committee's decision should be accepted as a final decision on the ULP issue. The General Counsel, however, rejected this deferral argument for two reasons. First, the local union had argued the grievance solely on the basis of UPS's past practice, but had not made the argument, which was central to the ULP claim, that the reason for removing the bulletin board was UPS's desire to suppress Howard's activity.\(^ {42}\) Second, the General Counsel was persuaded that the members of the grievance panel had an interest adverse to Howard's grievance because he was seeking the right to disseminate literature that the company and the union would have preferred to

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39. Generally, review in the courts of appeals may be sought only of Board decisions on unfair labor practice charges, not of decisions of its agents. See 29 U.S.C. § 160(f) (1988). In Leedom v. Kyne, 358 U.S. 184 (1958), the Court discusses situations in which judicial review is inappropriate and states that a district court may review an order by the Board when the Board clearly has violated a statutory right and the party has no alternative way to force the issue, such as by violating the Board's interpretation of the statute and then resisting a consequent unfair labor practice charge. Id. at 187-91.

40. Arguably, the Board's decision to defer might amount to a refusal to exercise jurisdiction plainly conferred by the statute. If it were first plainly established that the statute forbade such deferral, the General Counsel's construction of the statute in a way that disclaimed jurisdiction would be reviewable under the Administrative Procedure Act, 5 U.S.C. §§ 702, 704 (1988), and a remand to the General Counsel for reconsideration of its nonenforcement decision in light of a correct interpretation of the Act would be warranted. Id. § 706(1); cf. Montana Air Chapter No. 29, Ass'n of Civilian Technicians, Inc. v. Federal Labor Relations Auth., 898 F.2d 753, 757-58 (9th Cir. 1990).


42. Ironically, the employer did not raise the argument that the failure to present the ULP issue amounted to a failure to invoke arbitration that warranted a remand to arbitration to consider the ULP issue. See Consolidated Freightways Corp., 288 N.L.R.B. 1252 (1988), enforced en banc sub nom. Hammontree v. NLRB, 925 F.2d 1486, 1499-1500 (D.C. Cir. 1991).
suppress. Accordingly, the panel's decision was infected by a conflict of interest and would not be a sound basis for refusing to consider Howard's ULP charge. The Board ultimately upheld the ALJ's finding of violation.

The second case in which the Board insisted on deferral involved the discharge of Adolph ("Skip") Hoffman, another longtime dissident and TDU activist. Hoffman had run for office against the leader of his union local on three separate occasions, and had openly supported opposition candidates on two other occasions. He had long been an organizer in his area for TDU and its predecessor organization, PROD, he had worn TDU paraphernalia and had openly distributed TDU literature. In short, he was the prototypical open union oppositionist. After losing his original trucking job because of dislocations in the industry, he began working as a "casual" employee—that is, an employee without seniority rights and without substantial protection through the grievance procedure—for Consolidated Freightways (Consolidated). Although casuals are supposed to be placed on the seniority list if they work a minimum number of days, Hoffman never

44. United Parcel Serv., Inc., 304 N.L.R.B. No. 87 (Aug. 27, 1991). UPS dropped the deferral defense after I entered an appearance on behalf of Howard and subpoenaed documents for the announced purpose of making arguments comparable to those contained in this article concerning the impropriety of deferring to a Teamster joint committee decision as a matter of law. Amended Answer of Respondent at 1.
45. Consolidated Freightways Corp. (N.L.R.B. 1988) (No. 4-CA-17221).
46. The Professional Drivers Council for Safety and Health, whose name was later shortened to fit its acronym, PROD, was founded at the behest of Ralph Nader in 1972 by Arthur L. Fox II as a Washington, D.C.-based public interest group whose attention was focused on truck safety issues. Over time, its emphasis shifted to intraunion affairs, and its governance was assumed by an elected board of rank-and-file members. S. Brill, The Teamsters 312-20 (1978); D. La Botz, Rank-And-File Rebellion 42-49 (1990). In 1979, PROD merged with TDU. Id. at 179-80.
47. NMFA, supra note 25, art. 3, § 2(B). TDU has argued repeatedly that, by permitting employers to employ workers on a part-time or casual basis without bringing them under the seniority protections of the CBA, the union was allowing trucking companies to undercut the working conditions of the long-term employees and actually encouraging companies to try to fire permanent employees and to replace them with casual employees who receive lower pay and lesser protections. See, e.g., Plaintiffs' Proposed Findings of Fact ¶ 40, Bauman v. Presser, 117 L.R.R.M. (BNA) 2393 (D.D.C. 1984) (No. 84-2699), appeal dismissed, 119 L.R.R.M. (BNA) 2247 (D.C. Cir. 1985); D. La Botz, supra note 46, at 203, 245-46.
48. See NMFA, supra note 25, art. 3, § 2; CENTRAL PENNSYLVANIA OVER-THE-ROAD AND LOCAL CARTAGE SUPPLEMENTAL AGREEMENT, art. 42, § 1.
achieved that status because, he asserts, Consolidated would stop calling him just long enough to maintain his status as a casual. 49 When another casual employee, Barry Dantrick, who had spent less time with the company, was added to the seniority list, 50 Hoffman filed a grievance alleging that the reason for this promotion was Dantrick's friendship with local union president Burns and Burns's urging of Consolidated to give his friend a job. 51 Hoffman also contended that Consolidated had violated the agreement by failing to add casual employees to the seniority list after they had worked the proper number of days. 52 Almost immediately after this grievance was filed, the company stopped calling him to work as a casual. 53

Hoffman then filed a ULP charge contending that Consolidated had stopped calling him in retaliation for his filing of a grievance. 54 Initially, Consolidated did not raise a deferral defense, and after equivocating about whether Hoffman had a meritorious case, the General Counsel ultimately filed a complaint. 55 At that point, however, the union indicated that it was willing to handle Hoffman's grievance and submit his ULP claim to the joint committee. Both the union and the company asserted that the Board therefore should defer to the joint committee procedure. Hoffman argued against deferral on two grounds. First, he had a conflict with the union officials who would represent him as advocates and as members of the joint committee. 56 Second, he argued his claim was not the type of grievance by casuals that could be

49. Affidavit of Adolph Hoffman at 4, 8, Consolidated Freightways Corp., No. 4-CA-17221 (N.L.R.B.) (Mar. 11, 1988).
50. Id. at 3.
51. Id.
52. Id.
53. Id.
55. The NLRB Regional Director dismissed the complaint on the merits, but Hoffman persuaded the General Counsel's Office of Appeals in Washington that his case had sufficient merit to warrant a complaint. Letter from Mary M. Shanklin to Adolph Hoffman (Dec. 20, 1988). It is not clear why Consolidated did not argue deferral initially. It may have had indications from the Region that the case was going to be dismissed on the merits, and it preferred a clean resolution in that fashion. On the other hand, Consolidated might have preferred to avoid arguing that grievances by casuals like Hoffman could be heard by the joint committee to avoid setting a precedent that might be used by the union to protect casuals in the future.
56. P. Levy, Oral argument preparation notes at 5 Consolidated Freightways, No. 4-CA-17221.
heard by joint committees. In sum, Hoffman contended that the very circumstances—in which deferral had been raised suddenly, a few days before the hearing, with the union and the employer uniting to urge deferral to avoid a hearing on his ULP claim—strongly suggested that the union was not trying to help him get his job restored but rather to stab him in the back in the guise of a joint committee “arbitration.”

Yet the Regional Director deferred. He first decided that in light of the union’s and the company’s professed willingness to take the case through their grievance procedure, it would be appropriate to defer to their construction of the CBA to the extent that this type of grievance was within the grievance committee’s jurisdiction. As for the conflict of interest, the Regional Director decided that the union should be presumed to have an interest in supporting its members’ right to file grievances, and accordingly there was no facial conflict between the position that the union would be urging before the joint committee and the interests of the union or its leadership. The fact that the political differences between Hoffman and the union leadership would necessarily have been evident from a full and fair presentation of the ULP issue before the joint committee apparently did not faze the Board at all.

Hoffman presented arguments similar to those accepted by the General Counsel in Howard’s case for refusing to defer his
ULP claim to the joint grievance committee's decision. The members of the joint committee had equal institutional hostility to TDU and would derive similar institutional benefits from having Hoffman's grievance denied. They could rid themselves of a pesky dissident like Hoffman and discourage other workers from complaining about political favoritism and from supporting TDU in their own locals. Arguably the difference in result could be explained by the fact that different Board regions, and thus different decision makers, were involved. I am inclined to doubt those explanations, however, because the pattern of deferring ULP cases involving the discharge of TDU activists appears in various parts of the country and continues to this date.  

Rather, the result in Hoffman's case is best explained by the Board's position that no conflict of interest arises in a grievance concerning the discharge of a TDU member because the union is presumed to have an interest in avoiding the unjust discharges of all of its constituents. Thus, the Board assumes that the union has an interest in protecting Hoffman from discharge even though seeking to have the joint committee directly order the company to allow the distribution of TDU literature may give rise to a conflict of interest.

Consider, however, the effect that Board deferral to joint grievance committees has on the prospects for democratic opposition within the union. Stated simply, it has an unnerving impact on TDU's ability to recruit and retain adherents. First, there is the actual impact that deferral has on the Board's willingness to hear particular cases in which dissidents claim that their employers have committed a ULP either by prohibiting them from engaging in a certain activity or by disciplining them for their TDU activity. Deferral in these cases gives the employers a chance either to excise troublesome elements from the work force or to neutralize them by preventing them from communicating effectively with their colleagues.

63. The Regional Office based in Atlanta, which handled Howard's case, might have a slightly different orientation toward deferral because the Eleventh Circuit, in which it is located, has rejected decisively the NLRB's standard for deferral, set forth in Olin Corp., 268 N.L.R.B. 573 (1984), especially in the joint committee context. Taylor v. NLRB, 786 F.2d 1516, 1521-22 (11th Cir. 1986), cert. denied, 493 U.S. 891 (1989). My discussions with counsel in the Atlanta region, however, suggest that Taylor played no role in their decision to pursue Howard's case, which arose in the Sixth Circuit.
But even more important is the chilling effect of the Board's deferral policies. Despite current fashion among labor side attorneys to talk about how useless the Board has become in light of the promanagement appointments and antilabor decisions that began with the chairmanship of Donald Dotson in the early 1980s, workers still take comfort from the assumption that, if an employer tries to punish them for dissident activity, the government will be there to protect them. They know better than to think that they can expect help from union officials against whom they speak, but they assume that the Board will prevent arrant discrimination. The most insidious effect of Board deferral to joint grievance committee decisions is that it tells Teamsters that only the union can bail them out of trouble when the employer comes after them. Because workers assume—with good reason, I believe—that open union dissidents cannot count on union officials to support them, and indeed that joint grievance committees are established in part for the precise purpose of killing their grievances, their knowledge of the Board's deferral policies discourages them from becoming open dissidents in the first place.

The Board's exception to its deferral policy, pursuant to which TDU literature distribution cases are not deferred but most other cases involving TDU members are, does not eliminate this chilling effect, but rather accentuates it. It means that where all that is at stake is an employer's instructions not to disseminate literature, the Board may hear the case, but if a member's job is at stake, the case is likely to be deferred.


65. See infra note 451, and accompanying text, discussing a UPS management manual that ascribes such a purpose to the joint committees.

66. My discussions with lawyers who represent rank-and-file insurgents suggest that some Board regions follow a less stringent deferral policy than this one. They recognize that deferral is inappropriate, especially in the prearbitration context, whenever the charging party is an overt dissident and the grievance would be handled or decided by political opponents. See Carolina Freight Carriers Corp., 295 N.L.R.B. No. 124, slip. op. at 2-3 (July 31, 1989) (ALJ decision); see also Roadway
It should be clear from the way I state this distinction that I regard it as irrational; indeed, I believe the Board should abandon it. But I also wish to argue that the Board is making a serious mistake in deferring any grievance to Teamster joint committees, because, as I argue below, the entire enterprise is illegitimate considering the Board's reasons for having a doctrine of deferral to arbitration in the first place. Although the Board addressed the applicability of its postarbitral doctrine to joint committee decisions in the early cases of Denver-Chicago Trucking Co., Inc. and Terminal Transport Co., Inc., and although the Board has relied upon these cases routinely in applying both postarbitral and prearbitral deferral doctrines in the twenty years since, it has never stopped to reexamine the question. I argue below that, in light of the rationale for the current deferral doctrine and given the understanding that has developed concerning how joint committees actually operate, it makes no sense to defer cases to joint committees. In particular, it makes no sense to defer a ULP charge presented by a union dissident.

II. DEVELOPMENT OF THE BOARD'S POLICY REGARDING DEFERRAL TO ARBITRATION

Section 10(a) of the NLRA specifically empowers the NLRB to prevent ULPs and states, "[t]his power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or other-

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Express, Inc., 145 N.L.R.B. 513, 515 (1963) (declining to defer where the grievant's "vigorous opposition to the Teamsters Union ... strongly supports the conclusion that the arbitration tribunal was constituted with members whose common interests were adverse to the grievant"). In other cases, however, the Board seems to take pains to avoid seeing conflicts between a union and a grievant. See, e.g., Browne, 278 N.L.R.B. 103, 105-06 (1986), vacated and remanded sub nom. Nevins v. NLRB, 796 F.2d 14 (2d Cir. 1986).


wise."\[71\] Despite this clear command, there is also a strong national labor policy favoring the use of arbitration to resolve private, contractual disputes between labor and management. For instance, section 301 of the Labor Management Relations Act\[72\] (LMRA) authorizes the federal courts to enforce CBAs and to develop a federal common law for their construction and application.\[73\] In the *Steelworkers Trilogy*\[74\] the Supreme Court spelled out the role of the courts in relation to voluntary arbitration of contractual disputes. The Court relied on section 203(d) of the LMRA,\[75\] where, in the course of establishing the Federal Mediation and Conciliation Service to help labor and management resolve disputes without strikes, Congress declared that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."\[76\]

Thus, in the *Steelworkers Trilogy* the Court held that although courts should decide whether the contract required arbitration of a certain dispute,\[77\] they should refrain from second-guessing an arbitrator's interpretation of the contract or its application to particular facts.\[78\] This preference for arbitration, however, is limited to disputes about CBAs. When disputes arise over the application of public law to the workplace, the courts remain available, and arbitral determinations receive the weight that the court deems appropriate.\[79\]

As should be clear from the opening paradigm cases, many disputes giving rise to ULP charges also may implicate contractual rights that could be submitted for arbitral determination. When an employee is fired for exercising rights protected by the NLRA, for example, a contract provision requiring "just cause" for discipline also may be violated. Or if an employer makes a unilateral change in the terms and

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71. *Id.*
72. *Id.* § 185.
76. *Id.* (emphasis added).
77. Warrior & Gulf, 363 U.S. at 582-83 & n.7; American Mfg., 363 U.S. at 567-68.
conditions of employment, in violation of NLRA sections 8(a)(5) and 8(d), the change also may violate a term of the contract. In such cases, the issues may be resolved appropriately either by the Board, through arbitration, or both.

The Board’s deferral policy attempts to accommodate its own responsibilities to the substantial role played by arbitration in the resolution of industry disputes. The policy actually consists of two separate but related doctrines governing (1) the way the Board will treat cases presented to it after an arbitrator has considered issues arising out of the same dispute (the Spielberg doctrine), and (2) the way the Board will treat cases in which the issues have not been presented to an arbitrator, though they could have been (the Collyer doctrine). I now examine these two branches of deferral doctrine.

A. NLRB Consideration of a Case After Arbitration

The Board set forth the standards for deferring to arbitration decisions in the seminal Spielberg Manufacturing Co. In Spielberg, a union settled a strike by agreeing, among other matters, to arbitrate the question whether four of the strikers would be denied reinstatement for picket line misconduct. With the employees actively participating in the arbitral proceeding, the arbitration panel ruled by majority vote that the strikers need not be reinstated. The NLRB decided that “recognition” of the arbitration award was appropriate because “[1] the proceedings appear to have been fair and regular, [2] all parties had agreed to be bound, and [3] the

81. See infra Part II.A.
82. See infra Part II.B.
83. In Hammontree v. NLRB, 925 F.2d 1486 (D.C. Cir. 1991) (en banc), the majority invented, “for clarity’s sake,” the separate term “deferment” to describe pre-arbitral deferral, leaving “deference” to describe post-arbitral deferral. Id. at 1490. This article follows the traditional use of the same term for both prongs of the deferral doctrine.
84. 112 N.L.R.B. 1080 (1955). For an earlier Board decision to defer to an arbitrator’s decision regarding an employer’s refusal to bargain about certain issues during the term of a contract, see Timken Roller Bearing Co., 70 N.L.R.B. 500, 501 (1946), enforcement denied on other grounds, 161 F.2d 949 (6th Cir. 1947).
85. Spielberg, 112 N.L.R.B. at 1081.
86. Id.
decision of the arbitration panel is not clearly repugnant to the purposes and policies of the [NLRA].” Accordingly, the Board found that there had been no violation of the NLRA, and dismissed the complaint.

The Spielberg doctrine came to be applied not only to strike settlement agreements but also to ULP charges that arose during the term of a CBA. During the doctrine’s development the Board recognized that there was no guarantee that ULP issues would be resolved by the arbitrator merely because a particular dispute had been submitted to both arbitration and the NLRB. In Monsanto Chemical Co., an arbitrator considering whether an employee was discharged for union activities decided that “because the NLRB has exclusive jurisdiction in the event of a conflict [between his own view of a possible ULP and that of the Board], I have chosen to ignore for purposes of decision the allegations . . . that Till’s Union activities played a part in his discharge.” The Board went on to hold that such an arbitration award could not be given binding effect in a subsequent ULP proceeding.

Similarly, where a ULP was not presented to or decided by the arbitrator, the Board has held that it is inappropriate to allow an arbitration proceeding to determine that issue. In Raytheon Co., the union took the discharge of certain strikers to arbitration, arguing that they, in fact, had not violated

87. Id. at 1082. The Board distinguished an earlier case, Wertheimer Stores Corp., 107 N.L.R.B. 1434 (1954), in which it refused to recognize an award because the discharged employee had announced from the outset his desire to secure a hearing by the Board and had opposed the arbitration proceedings. Id.

88. Spielberg, 112 N.L.R.B. at 1082. The Board did not explain why, given its refusal to consider the merits in light of the arbitral award, it concluded that there had been no violation of the Act. Later developments have made it clear that deferral to arbitration constitutes a form of res judicata or collateral estoppel. See, e.g., McDonald v. City of West Branch, 466 U.S. 284, 287-88 (1984). The Board thus may have concluded that there was no violation because it had precluded the charging parties from disputing a crucial fact, and then held, in light of this fact, that there had been no ULP. In any event, the result was the same: the Board did not consider the case on the merits.

89. See Electronic Reproduction Serv. Corp., 213 N.L.R.B. 758, 762 (1974); see also infra notes 103-05 and accompanying text.

90. See, e.g., Raytheon Co., 140 N.L.R.B. 883, 886 (1963), enforcement denied on other grounds, 326 F.2d 471, 473 & n.2 (1st Cir. 1964) (agreeing in dictum with the Board’s decision regarding deferral); Monsanto Chem. Co., 130 N.L.R.B. 1097, 1098-99 (1961).


92. Id. at 1099.

93. Id.

94. 140 N.L.R.B. 883 (1963), enforcement denied on other grounds, 326 F.2d 471 (1st Cir. 1964).
the no-strike clause in the contract. The Board refused to be bound by the arbitrator’s award in deciding whether, as charged in the ULP proceeding, the employer had used the clause as a pretext to punish the employees for other protected activity. The Board explained that at the arbitration the union had not introduced evidence to establish this alternate theory, and that it was inappropriate to allow an arbitration proceeding to resolve whether a ULP occurred where the ULP issue was not presented to or decided by the arbitrator: “We cannot, in giving effect to arbitration agreements, neglect our function of protecting the rights of employees granted by [the NLRA].” Accordingly, the Board ruled that it is bound by arbitral findings only when the ULP issue has been “fully and fairly litigated” before the arbitrator.

The Board followed this ruling with Airco Industrial Gases Pacific, Division of Air Reduction Co., Inc., where it refused to be bound by an arbitral award that did not indicate on its face that the arbitrator had ruled on the ULP issue. Then in Yourga Trucking, Inc., the Board ruled that the party asserting a deferral defense bears the burden of proving that the ULP issues had been presented adequately in arbitration.

The Raytheon rule remained the Board’s standard until Electronic Reproduction Service Corp. In that case, the Board held that arbitral awards in discipline and discharge cases would be given preclusive effect, even if the ULP issue was not litigated or decided, absent “bona fide reasons, other than a mere desire on the part of one party to try the same set of facts before two forums, which caused the failure to introduce [ULP] evidence at the arbitration proceeding.” Rather than actually finding that there had been no ULP, as in Spielberg, the Board simply dismissed the complaint to fully
“honor” the arbitral award, and indicated that it would do so in other cases unless “special circumstances have precluded the complaining party from having had that full and fair opportunity to present such [ULP] evidence.”

The Board’s refusal to decide ULP cases absent special circumstances, however, encountered severe criticism in the courts of appeals, which held, in effect, that the Spielberg doctrine, as modified by Raytheon, meant that additional criteria—namely, actual litigation of the ULP issue and arbitral expertise in the issue on which preclusion was sought—were necessary components of a lawful postarbitral deferral policy. Accordingly, in Suburban Motor Freight, Inc., the Board, by then ruled by a majority of Carter Administration appointees, overruled Electronic Reproduction and reinstated Raytheon, Airco, and Yourga.\footnote{107} The Board reasoned that even if Electronic Reproduction promoted arbitration, the interests of the union, which controls the arbitration proceeding, may well differ from those of the individual employee, and that to allow statutory rights to be lost without any adjudication would be a “‘shocking sacrifice of individual rights on the altar of institutionalism.’”\footnote{110}

The return to a strictly limited deferral policy was short-lived, however. By 1984, the Board had swung back to the control of antilabor members appointed by President Reagan.\footnote{111} In Olin Corp.,\footnote{112} the NLRB adopted a still different approach to deferral. The Board expressly foreswore a wholesale return to the rule and rationale in Electronic Reproduction.\footnote{113} Rather, in an apparent effort to avoid the objections of the courts in such cases as Stephenson and

\footnotesize{\begin{itemize}
  \item \textit{Id.} at 764.
  \item See Stephenson v. NLRB, 550 F.2d 535, 539 (9th Cir. 1977); see also NLRB v. Magnetics Int’l, Inc., 699 F.2d 806, 811 & n.2 (6th Cir. 1983); NLRB v. General Warehouse Corp., 643 F.2d 965, 968-70 (3d Cir. 1981); Banyard v. NLRB, 505 F.2d 342, 348-49 (D.C. Cir. 1974).
  \item See Stephenson, 550 F.2d at 538; Banyard, 505 F.2d at 347.
  \item 247 N.L.R.B. 146 (1980).
  \item \textit{Id.} at 146 & n.7.
  \item \textit{Id.} at 146 (quoting Schatzki, \textit{Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?}, 123 U. PA. L. REV. 897, 909 n.32 (1975)).
  \item \textit{Id.} at 575 n.10.
\end{itemize}}
Banyard, it ruled that it would not defer simply because there was an “opportunity” to present the ULP issue in arbitration.114 To the contrary, the Board agreed that deferral was appropriate only if the ULP issue was litigated and decided.115

Instead of overruling Raytheon, the Board in Olin adopted a procedural rule for applying it. Relying on the dissent of Board Member Hunter in Propoco,116 the Board said that it would find adequate consideration of the ULP issue if “(1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.”117 I emphasize that Olin does not require an ultimate finding that the ULP issue was actually considered; indeed, as Board Member Hunter explained in his dissent in Propoco, such a requirement is “anomalous, because arbitrators do not have the authority to decide unfair labor practices.”118 Rather, the Board established a conclusive presumption that if the two Olin factors are met, the ULP issue was adequately considered, and the complaint will be dismissed.119

The Board adopted two further deferral rules in Olin which underscore the sweeping nature of the new presumption. First, the Board stated that an award will not be found “clearly repugnant” under Spielberg simply because the arbitrator’s reasoning is on its face inconsistent with the NLRA: “Unless the award is ‘palpably wrong,’ i.e., unless the arbitrator’s decision is not susceptible to an interpretation consistent with the Act, we will defer.”120 Moreover, the Board now excuses the proponent of deferral from proving that an arbitral award is not palpably wrong; rather, the opponent of deferral must “affirmatively demonstrat[e]” that the bases for deferral do not exist.121

114. Id.
115. Id. at 574, 576.
117. 268 N.L.R.B. at 574 (emphasis added). The Board later emphasized that only a general presentation of facts related to the ULP issue was required. Browne, 278 N.L.R.B. 103, 105 (“The operative phrase governing our review is ‘generally presented.’”), vacated on other grounds sub nom. Nevins v. NLRB, 796 F.2d 14 (2d Cir. 1986).
118. Propoco, 263 N.L.R.B. at 145 (Hunter, dissenting).
119. See Olin, 268 N.L.R.B. at 574.
120. Id. (footnote omitted).
121. Id.
This burden of showing the defects in the arbitration is placed on the General Counsel even when he seeks to enforce the statutory rights of an individual employee as the charging party. Ironically, it is the parties to the CBA, the potential respondents in Board proceedings who may wish to invoke the deferral defense, who, by having participated in the arbitration, are in the best position to say what actually was litigated and decided. Similarly, the employer and the union are able to structure the arbitration procedures to facilitate or to hinder the consideration of statutory issues by framing the issues to be arbitrated, formulating rules of procedure and evidence, and selecting arbitrators who have expertise in Board law. The employer and the union also control the record that indicates whether the statutory issues were litigated and decided through such mechanisms as requiring transcripts and written opinions. Under these circumstances, by placing the burden of proof on the General Counsel and the individual employee as the charging party, Olin impedes access to NLRB protections by the very persons who are least able to protect themselves. The great increase in the rate of deferral reflected in Board decisions since Olin shows the impact that the change in doctrine has had.

122. Professor Sharpe reports that the rate of deferral in "the three decades after Spielberg" (i.e., August 17, 1956 through January 21, 1986) was 34%, but that after Olin the rate of deferral increased to 67%. Sharpe, NLRB Deferral to Grievance-Arbitration: A General Theory, 48 OHIO ST. L.J. 595, 635-36 (1987). Professor Sharpe's calculations are both incorrect and misleading. First, he lists 30 of the 47 post-Olin cases as involving deferral. Id. app. II. Thirty cases out of 47 is 64%, not 67%. Including Olin itself, which Sharpe does not, would produce a total deferral rate of 65% (31 out of 48 cases). Moreover, in analyzing the effect of Olin on the deferral rate, Sharpe does not explain why he includes in his figures cases following the January 19, 1984 issuance of Olin. See Olin, 268 N.L.R.B. at 573. Sharpe advised me in a letter that the actual benchmark period in his study was January 21, 1984. Letter from Calvin William Sharpe to Paul Alan Levy (Oct. 30, 1990). Thus, the true pre-Olin deferral rate, obtained by excluding the 38 cases (including Olin) from the date of Olin through January 21, 1986, was 21% (43 out of 202 cases). In any event, the impact of Olin, therefore, has been to increase the deferral rate from 21% to 65%. Even these figures, of course, understate the true rate of deferral because they do not take into account the many cases that are deferred by the General Counsel—i.e., cases in which no complaint is issued because the General Counsel concludes that deferral is appropriate under Olin. A study of Board deferral policies at the General Counsel level also showed a substantial increase in deferral following Olin. Greenfield, The NLRB's Deferral to Arbitration Before and After Olin: An Empirical Analysis, 42 INDUS. & LAB. REL. REV. 34, 44 (1988) (in two regional offices, refusals to defer decreased from 19% of all cases in which deferral issues were raised to 4% of such cases).
The Olin opinion is remarkably short on explanation for such a dramatic turnabout in Board deferral doctrine. It states generally that deferral is desirable to encourage arbitration, that deferral was too infrequent under Suburban Motor Freight, and that the Board’s application of the “clearly repugnant” standard has frequently caused the Board to decide the ULP issue de novo before deciding whether to defer. The Board attempted to counter the argument that individual employees’ statutory rights will be lost under its policy, by pointing to its “commitment to determine in each case whether the arbitrator has adequately considered the facts which would constitute unfair labor practices.” Of course, the “adequately considered” determination is limited to determining whether the General Counsel has succeeded in showing the absence of the two Olin factors (the “factually parallel” and “generally presented” standard). Like the Board’s Electronic Reproduction rule, the approach to postarbitral deferral adopted in Olin has encountered rough sledding in the courts of appeals, having been directly repudiated in one case and remanded for lack of a sufficient explanation in another; I am aware of no appellate court that has upheld the validity of Olin against challenge by a charging party. Before I consider why the courts have repudiated Olin so roundly, however, I will examine the prearbitral deferral cases.

B. Board Consideration of a Case Before Arbitration

The Board’s prearbitral deferral policy similarly has taken several twists and turns since it was first enunciated by the Board in Collyer Insulated Wire, Gulf Western Systems Co.
in 1971. The CBA at issue in Collyer not only provided for payment of wages at certain rates, but also established a procedure for adjusting those rates to account for changes in duties or production methods. 129 The contract also contained a provision stating that “[a]ll questions, disputes or controversies under this Agreement shall be settled and determined solely and exclusively by the conciliation and arbitration procedures provided in this Agreement.” 130 The union claimed that the employer had improperly changed the rates of pay for several job classifications, but instead of filing a grievance and pursuing the matter to arbitration, it filed a charge with the Board alleging that this conduct was an unlawful, unilateral change in the terms and conditions of employment, which violated section 8(a)(5) of the NLRA. 131

The Board declared that the question of whether the employer had committed a ULP was, for all practical purposes, the same as the question whether it had violated the contractual requirements with respect to pay rates. 132 In these circumstances, if the Board were to hear the purely contractual claim before arbitration, it would improperly permit the union to evade its promise to arbitrate contractual disputes. 133 Moreover, the Board said that after the arbitration was completed, it still would have to review the award under the Spielberg standards to “guarantee that there will be no sacrifice of [the parties’] statutory rights if the parties’ own processes fail to function in a manner consistent with the dictates of our law.” 134

785 (9th Cir. 1944), the Board occasionally declined to exercise its jurisdiction because of the failure of a union to pursue the grievance procedure, but it never adopted a consistent policy in that regard. Compare Collyer, 192 N.L.R.B. at 841 & n.12 (plurality opinion) (stating that the policy adopted in Consolidated Aircraft was followed, “although not consistently”) with id. at 850 n.32 (Jenkins, dissenting) (listing cases in which there was no prearbitral deferral, distinguishing the cases cited by the plurality, and saying that Consolidated Aircraft “has been overruled by disregard, if not by name”); see also Dunau, Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems, 57 COLUM. L. REV. 52, 62-63 (1957) (noting that Consolidated Aircraft was a dead letter by the 1950s, especially in section 8(a)(3) cases).

130. id. at 839.
131. Id. at 837.
132. Id. at 842.
133. See id.
134. Id. at 843.
The Board began to refine and extend *Collyer* the following year in *National Radio Co., Inc.*\(^{135}\) There, a union had filed a grievance over the discipline and eventual discharge of its president, William O'Connell, for actions as a union in-plant representative which, according to the employer, violated plant rules.\(^{136}\) The union took this grievance to arbitration and also filed a ULP charge, alleging not only a unilateral change of conditions, in violation of the duty to bargain under section 8(a)(5), but also a discharge based on antiunion animus in violation of section 8(a)(3).\(^{137}\) After the Board's General Counsel issued a complaint and the Administrative Law Judge (ALJ) decided in favor of the union, the union asked the arbitrator, who had held a hearing on the grievance but had not yet ruled, to continue the proceeding pending completion of the Board's processes, and the arbitrator complied.\(^{138}\)

The Board, applying *Collyer*, decided to defer to arbitration the basic question of whether the employer had the authority to promulgate the rules at issue.\(^{139}\) The Board decided to defer even though the discharge also might have been held unlawful if, notwithstanding the employer's authority to promulgate the rule, the reason for the rule was the employer's antiunion animus.\(^{140}\) Despite the fact that the remaining discrimination charges raised no question of the employer's authority under the contract, the Board deferred because it believed that if it were to decide cases that could have been disposed of by arbitrators under a just cause provision of the contract, it would discourage the invocation and indeed the creation of voluntary arbitration procedures under CBAs.\(^{141}\)

The majority rejected criticism by Members Fanning and Jenkins in their dissent that the decision would sacrifice the rights of individual employees who could not control arbitrations prosecuted on their behalf by the union leadership.\(^{142}\) The Board responded that it was unlikely that a union official disciplined for acting on the union's behalf would receive

\(^{135}\) 198 N.L.R.B. 527 (1972).

\(^{136}\) *Id.* at 528-29.

\(^{137}\) *Id.* at 529.

\(^{138}\) *Id.*

\(^{139}\) *Id.* at 530.

\(^{140}\) *Id.*

\(^{141}\) *Id.* at 531-32.

\(^{142}\) *Id.* at 533 (Fanning & Jenkins, dissenting).
insufficient protection of his interests in arbitration.\(^{143}\) The Board stated that the interests of the employee and his representative are “in substantial harmony” in virtually every case,\(^{144}\) apparently ignoring the fact that in many cases involving rank-and-file members this assumption will not be true.

Only five years later, in *General American Transportation Corp.*,\(^{145}\) and *Roy Robinson, Inc.*,\(^{146}\) the Board decided to retain *Collyer* itself but to overrule *National Radio*, thus refusing to defer in prearbitration cases involving either employer discrimination or coercion under sections 8(a)(1) and 8(a)(3),\(^{147}\) or union discrimination or coercion under sections 8(b)(1)(A) and 8(b)(2).\(^{148}\) This renewal of the parameters of the *Collyer* doctrine was approved by the courts of appeals that considered it.\(^{149}\)

Despite this universal judicial acceptance of the rule of *General American Transportation*,\(^{150}\) a majority of the Board chose to revert to the rule of *National Radio* in *United Technologies Corp.*\(^{151}\) In *United Technologies*, a union had filed a grievance alleging that a foreman had intimidated an employee and one of its stewards by threatening disciplinary action if they did not drop an earlier grievance.\(^{152}\) After the second grievance was denied just short of arbitration, the union refused to proceed to arbitration despite the employer’s request to do so, and instead filed a charge alleging that the

\(^{143}\) *Id.* at 532.

\(^{144}\) *Id.*

\(^{145}\) 228 N.L.R.B. 808 (1977).

\(^{146}\) 228 N.L.R.B. 828 (1977).

\(^{147}\) *General Am. Transp.*, 228 N.L.R.B. at 808, 810 n.7.

\(^{148}\) *Roy Robinson*, 228 N.L.R.B. at 829-30, 831.

\(^{149}\) *See*, e.g., Jack Thompson Oldsmobile, Inc. v. NLRB, 684 F.2d 458, 463 n.5 (7th Cir. 1982); NLRB v. Container Corp., 649 F.2d 1213, 1215 (6th Cir. 1981) (per curiam); NLRB v. Northeast Oklahoma City Mfg. Co., 631 F.2d 669, 674-76 (10th Cir. 1980).

\(^{150}\) *See* *United Technologies Corp.*, 268 N.L.R.B. 557, 562 (1984) (Zimmerman, dissenting).

\(^{151}\) 268 N.L.R.B. 557 (1984). In *United Technologies*, the majority made much of the “universal judicial acceptance of the *Collyer* doctrine” in decrying *General American Transportation*. *Id.* at 559. It ignored the fact that in that case Member Murphy, who cast the deciding vote, had rejected *National Radio* rather than *Collyer* itself, *see* *General Am. Transp.*, 228 N.L.R.B. at 810-13, and that almost all of the cases that went to the courts of appeals concerned *Collyer* and not *National Radio*, *see* *United Technologies*, 268 N.L.R.B. at 559.

\(^{152}\) *United Technologies*, 268 N.L.R.B. at 557.
threat was unlawful coercion under section 8(a)(1). The Board deferred this charge to arbitration, reasoning that it was just the sort of garden-variety dispute between unions and employers for which the arbitration process was best suited. It stated that the arbitration process is ill-served if the parties are permitted "to ignore their agreement and to petition this Board in the first instance for remedial relief." The majority denied the dissent's charge that individual employees' statutory rights would be sacrificed or that such employees would be denied access to the statutory forum (i.e., the Board) to litigate their statutory rights because after the arbitration was completed, the Board could review the award only to ensure that it met the Spielberg standards. The dissent noted that there was no evidence whatsoever that application of the rule in General American Transportation for the past six years had any adverse effect on private grievance-arbitration systems. The dissent also noted that the underlying assumptions of Collyer do not apply when the basic question before the Board is not, as in a section 8(a)(5) unilateral change of conditions case, the application or interpretation of a provision in a CBA. Finally, the dissent concluded that recent Supreme Court decisions indicated that the Board, not private arbitrators whose principal task is to resolve disputes over the meaning of the contract, must protect noncontractual, statutory, individual rights.

The doctrine of prearbitral deferral has been further refined in two significant respects since 1984. First, in United

153. Id.
154. Id. at 560.
155. Id. at 559. Although the term "remedial relief" appears to be redundant, the Board has used it since 1972.
156. Id. at 560 & n.17.
157. Id. at 562 (Zimmerman, dissenting).
158. Id. at 562-63.
159. Id. at 563.
160. The United Technologies majority stated that it would continue not to defer in certain traditional circumstances that have always been exceptions from prearbitral deferral. Id. at 560. By and large, the Board has been faithful to this promise, although the exceptions perhaps have been construed more narrowly. For example, the Board still does not defer where the employer's conduct reveals a complete rejection of the grievance procedure, see United States Postal Serv., 290 N.L.R.B. 120, 121 (1988), enforced, 906 F.2d 482 (10th Cir. 1990); where the employer is charged with violating section 8(a)(5) by refusing to provide the union with information needed for the administration of the contract, see General Dynamics Corp., Quincy Shipbuilding Div., 268 N.L.R.B. 1432, 1432-33 (1984); where the employer is charged under sections 8(a)(1) and 8(a)(4) with interfering with employee
Technologies, the ULP charge had been filed by the union itself, and the union apparently had withdrawn the charge to take advantage of NLRB processes instead. As a result, the Board has had to address the question whether ULP cases should be deferred when the charge was filed by an individual worker and not by the union. Although the practice differs somewhat from region to region, in most instances individuals as well as unions face deferral of their ULP charges, even when the charge is filed by an employee who holds no union position and does not complain about mistreatment based on action as a union officer.

Second, the Board has had to confront the question of whether to defer if the charge is filed by an individual member but the union is unwilling to take the issue to arbitration in the form of a grievance. Obviously, if the union can force the Board to hear the ULP case by the simple expedient of refusing to arbitrate, employees could obtain an easy escape from the Collyerization of their individual ULP claims. On the other hand, if the Board makes the individual suffer the consequences of the union's refusal to arbitrate, then the Board would face the serious charge that it was delegating to the union not only the ability to litigate ULP issues through a non-Board proceeding that is subject to review only for its adequacy, but also the ability to decide which ULP charges deserve to be prosecuted. At first, the Board seemed inclined to refuse to hear a claim when the union has refused to arbitrate it, but ultimately the Board was unwilling to give the union that authority. Instead, it stated that if the union refuses to take the case to arbitration, deferral is just as

access to the Board, see Carborundum Resistant Materials Corp., Div. of Carborundum Co., Inc., 286 N.L.R.B. 1321, 1322 (1987); Ryder/P-I-E Nationwide, Inc., 279 N.L.R.B. 207, 207 (1986); where the grievance has been denied on procedural grounds, see Drummond Coal Co., Inc., 277 N.L.R.B. 1618, 1619 n.5 (1986); or where there are parts of the ULP case whose deferral either has not been requested or is inappropriate, see Heck's, Inc., 293 N.L.R.B. No. 132, slip op. at 16, 131 L.R.R.M. (BNA) 1281, 1285-86 (May 18, 1989). For further discussion of the exception in the case in which there is a conflict of interest between the charging party and the union or its leadership, see supra notes 54-66 and accompanying text.

inappropriate as if it were the employer that had refused to arbitrate. This conclusion follows from the well-settled rule that deferral is appropriate only to a decision of an arbitrator, and not when a union withdraws a grievance over the objection of the employee concerned.

C. Board Deferral Policy Consolidated

Recently, the Board issued a decision that brings the Spielberg and Collyer doctrines together. In Consolidated Freightways Corp., an employee complained that the employer had changed his conditions of employment in retaliation for his having filed certain grievances. The union took his grievance to the joint committee but argued only that the change violated past practices that had been incorporated into the CBA, not that the company's motive in making the changes was to discriminate against the employee for his union activity in filing grievances. The Board refused to defer to the joint committee decision under Spielberg because the statutory issue had not been presented to the committee; but in a novel twist, the Board decided to defer to the grievance procedure under Collyer, on the theory that it would be inappropriate to decide the ULP until the union and the company had made an earnest effort to resolve the dispute through their contractual procedure.

166. Babcock & Wilcox Constr. Co., Inc., 288 N.L.R.B. 620, 637 (1988). Where a union settles a grievance with an employer for partial relief—such as reinstatement without back pay—and obtains the employees' consent, however, the settlement may bar a Board proceeding even if the employees privately intended to pursue their Board charges. Alpha Beta Co., 273 N.L.R.B. 1546, 1547-48 (1985), enforced sub nom. Mahon v. NLRB, 808 F.2d 1342 (9th Cir. 1987). The status of a settlement entered into over an employee's objection seems unsettled. In enforcing Alpha Beta, the court of appeals (approvingly) read the Board decision to support the proposition that such a settlement could be the subject of deferral. 808 F.2d at 1345. Subsequently, in Energy Cooperative, Inc., 290 N.L.R.B. 635 (1988), a case involving a strike settlement agreement, the Board cited that passage with apparent approval. Id. at 637 n.16.
168. Id. at 1254.
169. Id.
170. Id. at 1255.
It is unclear whether the Board will continue to apply this analysis, even though it was upheld on review *en banc* in the court of appeals.\textsuperscript{171} In several recent decisions, some before *Consolidated Freightways*\textsuperscript{172} and some after it,\textsuperscript{173} the Board has refused to defer to arbitration when the statutory issue had not been presented and has sent the case back through the grievance procedure so that it could be.\textsuperscript{174} Nor does *Consolidated Freightways* give any indication that the Board focused on the inconsistency between its refusal to defer under *Spielberg* where the statutory issue had not been presented, and its deferral under *Collyer* to the grievance procedure with the assurance that, if the *Spielberg* standards, including the presentation of the statutory issue, are not met, the Board will not defer.\textsuperscript{175}

The decision in *Consolidated Freightways* has some odd ramifications. If deferral doctrine is founded on notions of

\textsuperscript{171} See Hammontree v. NLRB, 925 F.2d 1486 (D.C. Cir. 1991) (en banc).


\textsuperscript{173} See K-Mechanical Servs., Inc., 299 N.L.R.B. No. 25, slip op. at 2 n.2, 134 L.R.R.M. (BNA) 1246, 1246 n.2 (July 26, 1990); Yellow Freight Sys., Inc., 297 N.L.R.B. No. 50, slip op. at 9-10 (Nov. 21, 1989) (ALJ decision); System 99, 289 N.L.R.B. 723, 723 n.1 (1988); see also National Linen Serv. & Nat'l Dust Control, 293 N.L.R.B. No. 122, slip op. at 7 (May 9, 1989) (ALJ decision). In one very peculiar case, a union respondent in a duty to bargain case sought both *Spielberg* type deferral, based on a decision that had already been rendered, and *Collyer* type deferral, based on a pending motion for reconsideration. Brotherhood of Teamsters, Local No. 70, 295 N.L.R.B. No. 137, slip op. at 3-4, 20-21 (July 31, 1989) (ALJ decision). The Board refused to defer because, in the view of the ALJ, the joint committee had erroneously assumed the truth of a particular fact that had made it unnecessary for it to reach the ULP issues that were before the Board. *Id.* at 21 (ALJ decision). Instead of deferring the case so that the joint committee could reconsider it in light of the facts that the Board deemed correct, the Board proceeded to decide the case. *Id.* at 4.

\textsuperscript{174} I have located only one case in which a result similar to that in *Consolidated Freightways* was reached. *See* Quarto Mining Co., 296 N.L.R.B. No. 138, slip op. at 4-5, 132 L.R.R.M. (BNA) 1253, 1255 (Sept. 29, 1989).

\textsuperscript{175} Instead of discussing this apparent inconsistency, the Board treated the aforementioned cases as if they had been cited solely for the proposition that deferral is appropriate only if the union files the charge, but not if the individual files it. *Consolidated Freightways*, 288 N.L.R.B. at 1255-56. The Board then distinguished them because they had not relied on that distinction to support refusal to defer. *Id.* at 1255 n.13.
abstention, whereby the Board leaves questions of contract construction to the contractual forum while reserving its own processes for deciding statutory questions, then it would make little sense for the Board to defer where the grievance procedure has resolved a contractual question and left a primarily statutory one, whether there was discrimination proscribed by section 8(a)(3), to be decided by the Board. On the other hand, if the deferral doctrine's objective is to substitute the private system of adjudication for the Board's procedures, then the Board might well act as a quasi-appellate court and should send the case back for a new private adjudication if the first adjudication does not meet postarbitral deferral standards. The new private adjudication, one hopes, will meet the Board's standards.

This, then, is where deferral doctrine stands today. I must explore one additional issue before addressing the validity and propriety of the Board's deferral policy. The Board in Olin asserted that its new postarbitration deferral rule would protect statutory rights because deferral would not be granted unless the ULP issue had been presented adequately in arbitration. The Board made this assertion even though adequate presentation is presumed under Olin when the statutory and contractual issues are “factually parallel” and the facts relevant to the statutory issue are “generally presented” to the arbitrator. The Board's assurance that statutory rights will be protected is significant not only for postarbitral but also for prearbitral deferrals. The ULP claimant is assured that the arbitration to which he is being remanded is not necessarily the end of the line: the results

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176. See National Radio Co., Inc., 198 N.L.R.B. 527, 531-32 & n.8 (1972) (stating that Board deferral is analogous to the doctrine of abstention in which federal courts allow state courts to resolve open questions of state law that might make it unnecessary to decide a constitutional question); see also Hammontree v. NLRB, 925 F.2d 1486, 1490 (D.C. Cir. 1991) (en banc).

177. See International Bhd. of Elec. Workers, Local No. 113, 296 N.L.R.B. No. 144, slip op. at 14, 132 L.R.R.M. (BNA) 1297, 1301 (Oct. 4, 1989) (stating that deferral is appropriate “because the underlying controversy is primarily contractual”); American Commercial Lines, 296 N.L.R.B. No. 87, slip op. at 4 n.8, 133 L.R.R.M. (BNA) 1100, 1102 n.8 (Sept. 8, 1989) (noting that it will not defer where resolution of ULP turns on legal questions). A comparable approach is used when a federal court abstains: the party bringing the claim has the option of presenting only the state law issue to the state court, thus reserving the right to have the federal court decide the issue of federal constitutional law. See England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 421 (1964).


179. Id.
will be weighed under the *Olin* analysis. At this point the question arises, how strong is the protection of *Olin*? It is to this question that I now turn.

**D. The Conclusive Presumption Announced in Olin Is Irrational**

The *Olin* presumption is based upon a model of the relationship between ULPs and arbitral proceedings that admittedly is accurate in some cases. For example, section 8(a)(5)'s requirement of bargaining in good faith mandates, *inter alia*, that employers not repudiate provisions of CBAs. In a typical case, an employer refuses to comply with a particular provision of the contract (for example, a union security clause) and the union files a grievance contending that the contract requires the employer to conduct itself in a different manner. If the arbitrator construes the contract in the manner urged by the union, the employer normally will have no defense to a section 8(a)(5) charge if it continues to refuse to apply the clause. Although the arbitrator never specifically finds a ULP, explicit reference to the ULP is unnecessary because the factual issues are identical and the arbitral findings, if followed by the NLRB, would resolve the ULP charge. In the absence of evidence that the arbitrator has not given proper consideration to the issue that otherwise the Board would have decided, the Board may properly defer to the arbitral award, *i.e.*, give it collateral estoppel effect, and issue an order finding a ULP and awarding an appropriate remedy.

Unfortunately, although many cases raising deferral questions resemble this model, many do not. Each variation on this model causes the *Olin* conclusive presumption—that the arbitrator will have given adequate consideration to the ULP issue if the "factually parallel" and "generally presented"

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181. See Dennison Nat'l Co., 296 N.L.R.B. No. 22, slip op. at 6, 132 L.R.R.M. (BNA) 1076, 1077 (Aug. 21, 1989); Bay Shipbuilding Corp., 251 N.L.R.B. 809, 810 (1980) (stating that even though the arbitrator "specifically stated" that he was not deciding the ULP claim, "he made factual findings, in the course of resolving the contractual issue, which resolve the [ULP] issues, which is all that is necessary for deferral"); cf. Litton Microwave Cooking Prods. Div., Litton Sys., Inc., 283 N.L.R.B. 973, 976 n.17 (1987) (stating that in such a case the Board need not defer reflexively to arbitration).
conditions are met—to be inaccurate in a different way. As noted in *Taylor v. NLRB*, this inaccuracy has three sources, which I explain more fully in the three subsections that follow:

1. The facts relevant to establishing a contract violation may differ significantly from those relevant to the ULP violations, although some overlap also may exist.  

2. The standard for deciding whether a contract violation occurred may differ from the standard required by the Board.

3. The union may choose to litigate the arbitration proceeding in a way that, although well-calculated to advance its own interests by securing a desired construction of the contract, is not designed to establish that the employee was the victim of a ULP.

Because the *Olin* standard would collaterally estop employees from asserting their statutory rights in all these circumstances, despite the union’s failure to present the ULP issue and the arbitrator’s failure to consider it, the standard itself is inherently flawed and should be abandoned.

1. **Differing facts**—*Olin’s* presumption is inaccurate in that the facts necessary to sustain a ULP charge and those relevant to the contractual grievance may be different, even though there is enough overlap to satisfy the *Olin* standard. When a worker is discharged on the ground of poor job performance, for example, she may have a claim that the employer lacked just cause as required by the contract, and she also may have a claim that the discharge was based on her performance of a legally protected activity, which would constitute a ULP. The arbitral proceeding will focus on the

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182. 786 F.2d 1516, 1520 & n.5 (11th Cir. 1986). Footnote five of *Taylor* actually lists four situations in which “factual parallelism does not always guarantee legal parallelism.” In addition to the three listed below, the *Olin* test may be inadequate when a grievance committee denies a grievance but does not explain the rationale or the evidentiary basis for its decision. Id.

183. Id.

184. Id.

185. Id.
presence or absence of just cause, and in the ULP proceeding, the employer would no doubt argue that just cause existed for discharge because the employee was unable to do the required work. In that sense the two proceedings are "factually parallel," and the arbitrator is "generally presented" with the facts relevant to the ULP proceeding, i.e., the circumstances surrounding the discharge and the employer's justification for it.

The employer might well be able to prevail in the contractual proceeding by demonstrating that the employee had in fact done that which the employer charged, even if other motives for the discharge existed. Some arbitrators might find the pretext issue to be a basis for reinstatement, but others might not, or the issue might never arise for a variety of reasons. But in the ULP proceeding, the presence of just cause is not a defense for an employer who would have discharged the employee anyway because of the employee's protected activity. In arbitration it would be irrelevant that the employee was discharged in part for engaging in activities protected by the Act, unless the contract also made it clear both that such activities were excluded from "just cause" and that it was not enough for the employer to establish the existence of a just cause. Absent such a contractual standard, the key issues in the Board proceeding would never be litigated, much less decided by the arbitrator. Nevertheless, the Olin standard would be satisfied and presentation of the ULP claim would be barred.

2. Differing standards—The Olin presumption defeats the policies of the Act in that even though the contract and Board law address similar conduct, they may apply different standards to determine whether the employer has violated its obligations. In the examples that follow, each of which is typical of a large class of cases, the ULP and contractual issues are "factually parallel," and the facts relevant to the ULP charge will be "generally presented" to the arbitrator, yet the arbitrator may find no contract violation without ever deciding the ULP issue.

186. See id.
187. See Atleson, supra note 68, at 383.
For example, an arbitration proceeding may address whether the contract allows the employer to impose discipline for admittedly protected conduct, such as concerted protests to a government agency about working conditions. Even if the issue of contractual interpretation is close, the arbitrator may decide that, on balance, the contract should be construed to allow the employer to discipline employees for such conduct. For the Board, of course, the question is not simply what the contract means, but whether the contract represents a "clear and unmistakable" waiver of the statutory rights. Indeed, in Metropolitan Edison, the Court found no waiver despite the fact that arbitration decisions under the previous contract permitted discipline. Nevertheless, the Board's Olin standards would require deferral to such arbitral decisions although the Board would find a violation upon hearing the case de novo.

Another example of differing standards deals with the sensitive question of "insubordination" by union officials or other employees in the course of performing their duties in the workplace. Board law provides a certain measure of protection for union officials or employees when, in the course of arguing with the employer over grievances, they say or do things that might otherwise be deemed contrary to the employee-employer relationship. Recognizing that passions may run high in the course of concerted employee activity, the Board balances the employee's section 7 right to engage in concerted activity against the employer's interest in maintaining order in its business. Thus, harsh language, a refusal to leave or return to work, and the like may be statutorily protected conduct, so

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191. Id. at 708-10.
192. See Oil, Chem. & Atomic Workers Int'l Union, Local 1-547 v. NLRB, 842 F.2d 1141, 1146 (9th Cir. 1988) (criticizing the Olin standards in dictum); Dennison Nat'l Co., 296 N.L.R.B. No. 22, slip op. at 3-6, 132 L.R.R.M. (BNA) 1076, 1076-77 (Aug. 21, 1989) (conflicting issues of contractual meaning and existence of waiver in a unilateral change case so that no repugnance was found, even though arbitrator expressly refused to apply waiver standard). Similarly, in Olin itself, the arbitrator had decided that, as a matter of contractual interpretation, the parties had agreed that officers would be obligated not to participate in strikes, but, as the ALJ noted, "the arbitrator did not explicitly refer to the statutory right and the waiver questions raised by the unfair labor practice charge." Olin Corp., 268 N.L.R.B. 572, 573 (1984). The Board, however, simply noted that the arbitrator might have found a waiver on the record presented to him, id. at 576-77, but did not insist that the arbitrator acknowledge the difference between Board and contractual standards and then go on to find a waiver under Board standards.
long as such acts are not "indefensible" in the context in which they arise.\textsuperscript{193} Yet it is not unusual for an arbitrator, acting as a "labor relations physician,"\textsuperscript{194} to reduce a discharge to a lengthy suspension lest insubordination be encouraged unduly.\textsuperscript{195} In the years immediately following \textit{Olin}, the Board would have interpreted \textit{Olin} to preclude it from considering a ULP claim in such a case, even if the arbitrator had failed to consider or apply Board law.\textsuperscript{196} More recently, the Board has held that, where the arbitrator awards a partial remedy but refuses to apply Board standards in doing so, deferral will be rejected as "repugnant" to the Act.\textsuperscript{197} But where the award leaves open the possibility that the contractual standards are not at variance with the statutory ones, it seems that the Board will continue to defer.\textsuperscript{198}

3. \textit{Differing interests}—The \textit{Olin} presumption also fails to ensure consideration of Board law relating to ULPs in cases where the union litigates the contractual issue in a manner that advances the collective economic interest of its members, although it may well disserve the interest of the employee who


\textsuperscript{195} See O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 285 (1973); M. HILL & A. SINICROPI, REMEDIES IN ARBITRATION 101, 104 (1981).

\textsuperscript{196} See, e.g., Stroh Brewery Co., 273 N.L.R.B. 1604, 1606 (1985) (ALJ decision); Combustion Eng'g, Inc., 272 N.L.R.B. 215, 216 (1984), modified on other grounds, 274 N.L.R.B. 1159 (1985); Louis G. Freeman Co., 270 N.L.R.B. 80, 81-82 (1984); see also Darr v. NLRB, 801 F.2d 1404, 1408-09 (D.C. Cir. 1986) (remanding the case to the Board because it failed to provide a rational explanation for its decision to defer).


\textsuperscript{198} See Sachs Elec. Co., 278 N.L.R.B. 866, 866-67 (1986). In Sachs, the ULP charge alleged that the employee was fired for complaining about contract violations, but the grievance addressed whether he was fired for complaining as a union steward. \textit{Id.} The arbitration panel, a joint committee operating under an International Brotherhood of Electrical Workers contract, rejected the grievance because the employee was not, in fact, a steward when he was dismissed. \textit{Id.} at 866. Nonetheless, the Board deferred because the conduct in which the employee engaged as a steward was the same as the conduct in which he had been engaged as an employee, and that conduct was the issue in the ULP case. \textit{Id.} at 866-67. The relationship between the parallelism of issues and an award's repugnance to the Act is discussed in more detail \textit{infra} at notes 212-21 and accompanying text.
has been the victim of the ULP. Indeed, where there is a conflict between those interests, the union's duty to its collective membership may require it to risk harm to an individual employee.\textsuperscript{199} For example, the union may choose not to press the ULP aspects of the dispute because it hopes to encourage the arbitrator to construe the contract in a way broadly favorable to the union.

That is what happened in \textit{Hilton Hotels Corp.}\textsuperscript{200} In a routine application of the \textit{Olin} presumption, the Board deferred despite the following circumstances: (a) the only facts relevant to the ULP were presented by the employer, who was obviously not trying to show a ULP;\textsuperscript{201} (b) the union argued that Board law was irrelevant to the proceeding;\textsuperscript{202} (c) the union's only claim in the arbitration was one not cognizable by the Board;\textsuperscript{203} and (d) the arbitrator's decision plainly resolved only the contractual dispute and did not address the factual issue that would have been relevant to the Board.\textsuperscript{204} The Board did not focus on the variation between the contractual and statutory issues until the court of appeals remanded for a rational explanation of the decision.\textsuperscript{205} Perhaps the Board's ultimate decision not to defer,\textsuperscript{206} purportedly following \textit{Olin}, should be taken as proof that the standard is defensible. My own inclination is to believe that, at the very least, the standard invites sloppy application like that in \textit{Hilton Hotels}, and that if the Board is willing to undertake a careful evaluation of each arbitral proceeding, the \textit{Olin} presumption ceases to be worth the problems that it creates.

The majority opinion in \textit{Olin} suggested that these three inadequacies are beside the point because by retaining the \textit{Spielberg} "clearly repugnant" standard the Board avoids being collaterally estopped when the arbitrator actually fails to

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\item \textsuperscript{199} See Vaca v. Sipes, 386 U.S. 171, 182 (1967) ("The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.").
\item \textsuperscript{201} Harberson v. NLRB, 810 F.2d 977, 980-81 (10th Cir. 1987).
\item \textsuperscript{202} Id.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id. at 981.
\item \textsuperscript{206} Id. at 563.
\end{itemize}
consider an issue that is equivalent to one arising under Board law. This argument fails, however, because the Board in Olin required only a very rough equivalency and made it almost impossible to establish repugnancy to the Act. Thus, Olin allows deferral unless the award is "'palpably wrong,' i.e., . . . not susceptible to an interpretation consistent with the Act." Member Hunter explained this standard in his Propoco dissent, which essentially was adopted by the majority in Olin, stating that the award need not even be "consistent with the bulk of Board precedent," so long as it does not "fly[] in the face of well-established and clear Board doctrine."

Moreover, because the application of most Board rules requires a balancing of interests and consideration of the facts of each case, it often is impossible to show that an arbitral decision is "palpably wrong" in the sense that the Board could not possibly have come to the same conclusion. In a number of cases the Board has upheld arbitral decisions as not "clearly repugnant" because, whether or not the arbitrator applied the proper standard under Board law, it was conceivable that the Board might have reached the same result by applying the proper standard.

More recent cases suggest that the Board may be rethinking the meaning of the repugnance standard and the relationship between that standard and the parallelism of the statutory and contractual issues. This rethinking, which has resulted in a decreased willingness by the Board to defer to arbitral decisions, may have been spurred by the D.C. Circuit's resounding condemnation of the Board's sloppy analysis in Darr v. NLRB. Certainly the signs of revision became pronounced after the Board's decision on remand.

208. Id. at 574 (footnote omitted).
210. See, e.g., Louis G. Freeman Co., 270 N.L.R.B. 80, 80-81 (1984) (declining to find the arbitrator's conclusion palpably wrong even though he failed to make the necessary findings for resolution under Board law).
212. 801 F.2d 1404 (D.C. Cir. 1986). Many of these analytic problems are discussed supra notes 180-211 and accompanying text.
For example, in both Cone Mills\textsuperscript{213} and United Cable Television Corp.,\textsuperscript{214} the employees had been discharged for protesting in strong language or in an obstreperous manner and were reinstated by an arbitrator because their conduct was protected. They were denied back pay, however, on the theory that some punishment was appropriate for the manner of the protest.\textsuperscript{215} In both cases, the Board found this analysis repugnant to the Act because the NLRA does not recognize the concept of "partially protected" concerted activities.\textsuperscript{216} Similarly in Barton Brands, Ltd.,\textsuperscript{217} a worker who had recently begun to serve as plant chairman was discharged for insubordination that the arbitrator concluded flowed from his assumption that he was entitled to immediate action on a work-related problem.\textsuperscript{218} The arbitrator reinstated him subject to a ban on holding union office for three years to avoid the friction that the arbitrator believed would recur if the worker held union office.\textsuperscript{219} The Board refused to defer because, in attaching this condition, the arbitrator did not expressly consider whether the worker had waived his right to hold union office; consequently, the ULP and contractual issues were not factually parallel.\textsuperscript{220} In reaching this decision, the Board applied an analysis similar to that in Cone Mills and United Cable, holding that, because it was unlawful to condition reinstatement on the relinquishment of a statutory right, the arbitral award was repugnant to the Act.\textsuperscript{221}

It is not clear whether these cases represent a new trend, or whether a few cases involving related deferral problems, all of which were not deferred, happen to have been decided within months of each other. It does appear that, contrary to the

\textsuperscript{215} Cone Mills, slip op. at 9, 134 L.R.R.M. (BNA) at 1108; United Cable, slip op. at 9, 135 L.R.R.M. (BNA) at 1036.
\textsuperscript{216} See United Cable, slip op. at 11, 135 L.R.R.M. (BNA) at 1037; cf. Cone Mills, slip op. at 15, 135 L.R.R.M. (BNA) at 1110.
\textsuperscript{217} 298 N.L.R.B. No. 139, 135 L.R.R.M. (BNA) 1022 (June 29, 1990).
\textsuperscript{218} Slip op. at 3, 135 L.R.R.M. (BNA) at 1022.
\textsuperscript{219} Id., 135 L.R.R.M. (BNA) at 1022-23.
\textsuperscript{220} Id. at 11, 135 L.R.R.M. (BNA) at 1025. But see Quarto Mining Co., 296 N.L.R.B. No. 138, slip op. at 4-5, 132 L.R.R.M. (BNA) 1253, 1255 (Sept. 29, 1989) (refusing to defer under Olin because the arbitrator failed to consider whether the union had waived the statutory right to bargain, but agreeing to defer under United Technologies).
\textsuperscript{221} Barton, slip op. at 14 & n.14, 135 L.R.R.M. (BNA) at 1026 & n.14.
startling change in deferral rates that occurred immediately following the issuance of Olin, the proportion of Board deferrals in decided cases raising the Olin presumption has declined somewhat. It is difficult to be certain whether this change is the product of differences in the thinking of the current Board members or whether it simply reflects more skill on the part of the General Counsel in anticipating the cases in which the Board would defer and thus not bringing the cases to complaint. If the Board is moving toward more careful scrutiny of the relationship between the issues considered by the arbitrator and the issues pending before the Board, that is a welcome development that may affect the validity of the Board's deferral doctrine.

The most fundamental objection to using the clearly repugnant standard to remedy the inadequacies of the Olin presumptions is that it unduly complicates cases in which a deferral defense is raised, without producing any corresponding benefits. The Olin presumption concerning whether the statutory issue has been considered adequately in an arbitral proceeding does not actually establish that fact. Even after applying the presumption, one still must consider the differences between the legal standards involved in the two proceedings. If the standards issue remains to be decided after the presumption is applied, the presumption is pointless because it fails to determine whether the arbitrator actually considered the statutory issue. The Board ends up trying to repair defects in a presumption that does not make sense. Instead, it should recognize forthrightly that the presumption has not proved effective in practice and that it should be abandoned as a way to ensure that the statutory issues are litigated and considered adequately in the particular case.

And yet, if the Board did not apply careful scrutiny to the actual congruence of statutory and contractual issues, but rather treated Olin as a mere formality of ensuring that a ULP issue has been considered and decided by an arbitrator,

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222. See supra note 122 (reinterpreting Sharpe's data).
223. I conducted a LEXIS search (Olin or Spielberg or defer! w/6 arbitra! and date aft January 1, 1986) in the "LABOR" directory, "NLRB" library, on October 15, 1990. Of the most recent 100 cases, dating back to January 29, 1988, 26 involved postarbitral deferral, 6 of which were deferred, 20 of which were not.
224. One study on the application of deferral policy in two Board regions found that, out of 66 cases in which deferral issues were raised during the 17 months after Olin was issued, the regional offices proceeded to consider the merits in only 2.5 cases, or 3.5% of the total. Greenfield, supra note 122, at 40-44.
there would be numerous instances in which the *Olin* rule could be satisfied without the ULP issues being considered in a manner congruent with Board law. In that event, the Board could not invoke *Olin* as a means to ensure that the public law standards provided by the NLRA will not be sacrificed by the doctrine of deferral to arbitration.

III. THE BOARD’S APPLICATION OF ITS DEFERRAL POLICY TO CASES INVOLVING DISCRIMINATION AND INTERFERENCE WITH STATUTORY RIGHTS OF INDIVIDUAL EMPLOYEES IS IMPERMISSIBLE UNDER THE LMRA

Deferral of individual employees’ ULP charges to arbitration is fundamentally improper because it sacrifices the employee’s right to have his statutory rights enforced by the public agency created by Congress for that purpose. There are two reasons why such deferral is impermissible. First, the Act provides that the Board, and not an arbitral body created by private parties in order to resolve contractual disputes, is responsible for enforcing the ULP provisions of the Act.\(^{225}\) The Board’s attempt to force ULP cases into arbitration undercuts Congress’s purposes in providing that forum.\(^{226}\) Second, as reflected in a line of Supreme Court cases,\(^{227}\) when an individual’s statutory claim is at stake, a tribunal charged by Congress with the adjudication of that right may not yield its decisional authority to arbitration.

A. The Board’s Relegation of Employees to Their Arbitral Remedies Under the Contract Is Forbidden by the Act

The starting point in any analysis of Board doctrine is the statutory language. The Act itself, however, provides no support whatsoever for mandatory prearbitration deferral by the Board. To the contrary, section 10(a) provides that the

\(^{225}\) See 29 U.S.C. § 160(a) (1988); see also infra notes 228-34 and accompanying text.

\(^{226}\) See infra Part III.A.

\(^{227}\) See infra Part III.B.
Board’s power to prevent ULPs “shall not be affected by any other means of adjustment,” whether statutory, contractual or otherwise.\(^{228}\) Section 10(c), in turn, requires that if the Board believes that a ULP has been committed, it “shall” state its findings and “shall” require cessation of the ULP and award affirmative relief to effectuate the purposes of the Act.\(^{229}\)

The Act allows the Board to escape these statutory responsibilities in only four narrow situations, none of which applies in the case of deferral to arbitration. First, the Board may decline jurisdiction over disputes involving “any class or category of employers” if the effect of a labor dispute on commerce is too insubstantial to warrant exercise of jurisdiction.\(^{230}\) Second, section 3(b) allows the Board to delegate its powers over certain representational issues under section 9 to its regional directors, and to delegate any of its powers to any group of three or more Board members.\(^{231}\) Similarly, sections 10(b) and 10(c) allow delegation of ULP enforcement power to hearing examiners (now ALJs) whose recommended orders become law unless overturned by the Board after \textit{de novo} review.\(^{232}\) Third, the Board is empowered by section 10(a), subject to certain limitations, to allow state or territorial agencies to enforce their statutes pertaining to certain industries, so long as they are consistent with the corresponding provisions of the NLRA.\(^{233}\) Finally, section 10(k) requires the Board to dismiss secondary boycott charges arising out of interunion jurisdictional disputes if the parties have reached a “voluntary adjustment of the dispute,” and allows the Board to postpone a hearing on such an issue if the parties have “agreed upon methods for the voluntary adjustment” of it.\(^{234}\) None of these provisions comes close to giving the Board \textit{carte blanche} to delegate its responsibility for enforcement of the Act to arbitration. To the contrary, the very fact

\(^{229}\) \textit{Id.} § 160(c). Indeed, the Board would violate section 10(c) if, presented with a properly issued ULP complaint, it failed to decide whether or not the respondent had committed a ULP. \textit{See} Oil, Chem. & Atomic Workers Local Union No. 6-418 \textit{v.} NLRB, 711 F.2d 348, 362 (D.C. Cir. 1983); International Union, United Auto. Workers \textit{v.} NLRB, 427 F.2d 1330, 1331-32 (6th Cir. 1970).
\(^{231}\) \textit{Id.} § 153(b).
\(^{232}\) \textit{Id.} § 160(b), (c).
\(^{233}\) \textit{Id.} § 160(a).
\(^{234}\) \textit{Id.} § 160(k).
that Congress has so closely confined the Board’s delegation authority suggests that the Board is not empowered to surrender its authority in other circumstances.

This interpretation of the NLRA is confirmed by the provisions of the bill introduced by Senator Wagner in March 1935.\textsuperscript{235} During Senate hearings in 1934, witnesses from company unions and employers testified that the provisions in many contracts that barred discrimination against workers and that provided grievance and arbitration procedures for employees to redress instances of discrimination protected workers adequately.\textsuperscript{236} One businessman denounced the bill for superimposing requirements on existing agreements and for subjecting businesses to suits over differences they agreed to settle contractually.\textsuperscript{237} In response, Senator Wagner included in his 1935 bill a proposed section 10(b) that would have given the Board authority to “defer its exercise of jurisdiction” over ULPs where there was another means of protection “provided for by agreement, code, law, or otherwise,” although the Board would have retained its authority to institute proceedings thereafter.\textsuperscript{238}

Senator Wagner explained that he understood that “[t]he practical effect of letting each industry bargain and haggle about what section 7(a) means is that the weakest groups who need its basic protection most receive the least.”\textsuperscript{239} Accord-

\begin{footnotesize}
\begin{enumerate}
\item S. 1958, 74th Cong., 1st Sess. (1935) (original Senate print), \textit{reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935}, at 1301 (1949) [hereinafter \textit{LEGISLATIVE HISTORY NLRA}].
\item To Create a National Labor Board: \textit{Hearings on S. 2926 Before the Senate Comm. on Education and Labor}, 73d Cong., 2d Sess. 725 (1934) [hereinafter \textit{Hearings on S. 2926}], \textit{reprinted in 1 LEGISLATIVE HISTORY NLRA, supra note 235}, at 763 (statement of Arthur H. Young, Vice President, United States Steel Corporation); \textit{id. at 792, reprinted in 1 LEGISLATIVE HISTORY NLRA, supra note 235}, at 830 (statement of Frank Purnell, President, Youngstown Sheet & Tube Co.); \textit{id. at 822, reprinted in 1 LEGISLATIVE HISTORY NLRA, supra note 235}, at 860 (statement of Paul D. Berry, Chairman, Employee Group of the General Offices of the American Rolling Mill); \textit{id. at 831, reprinted in 1 LEGISLATIVE HISTORY NLRA, supra note 235}, at 869 (statement of Robert F. Colley, Employee Representative, Wheel Works Division of the American Rolling Mill).
\item \textit{Hearings on S. 2926, supra note 236}, at 712, \textit{reprinted in 1 LEGISLATIVE HISTORY NLRA, supra note 235}, at 750 (statement of Hal H. Smith, National Automobile Chamber of Commerce).
\item S. 1958, 74th Cong., 1st Sess. § 10(b) (1935) (original Senate print), \textit{reprinted in 1 LEGISLATIVE HISTORY NLRA, supra note 235}, at 1301.
\end{enumerate}
\end{footnotesize}
ingly, he proposed to allow the NLRB to defer the exercise of its jurisdiction to permit such tribunals to prove their effectiveness, while reserving the right to intervene afterward if the private tribunal did not do an adequate job. This seems, in essence, to be the NLRB's current position on deferral to arbitration. However, the deletion of section 10(b) from the bill, on the recommendation of the Committee on Education and Labor, undercuts any notion that the Congress that passed the NLRA intended to permit deferral in cases such as this.

A review of the legislative history does not reveal any explicit explanation for the elimination of proposed section 10(b). The best explanation seems to be that the Senate Committee encountered a blizzard of criticism from many unions and scholars about the impact of arbitration on workers' rights. Most of these objections were based on a belief that arbitration was inadequate to protect workers against discrimination, and was generally contrary to the interests of workers. Others argued that the mediators and arbitrators should deal only with rules established by agreement, while the Board should be concerned with the administration dissenting from denial of certiorari) (stating that the failure to defer contradicts "our entire national labor policy, which recognizes that the societal rewards of private negotiations outweigh any need for uniformity of result or adjudicative resolution of every labor dispute").


242. 74 CONG. REC. 7651 (1935), reprinted in 2 LEGISLATIVE HISTORY NLRA, supra note 235, at 2351.

243. See, e.g., Hearings on S. 1958, supra note 239, at 716-17, reprinted in 2 LEGISLATIVE HISTORY NLRA, supra note 235, at 2102-03 (statement of William H. Davis, Chairman, Twentieth Century Fund Inc.'s Committee to Investigate Controversial Subjects of Public Interest); id. at 745-46, reprinted in 2 LEGISLATIVE HISTORY NLRA, supra note 235, at 2131-32 (brief of the Brotherhood of Railroad Shop Crafts); id. at 811-15, reprinted in 2 LEGISLATIVE HISTORY NLRA, supra note 235, at 2197-201 (speech of Louis Weinstock, National Secretary of the American Federation of Labor Trade Union Committee for Unemployment Insurance and Relief); see also Hearings on S. 2926, supra note 236, at 485-89, reprinted in 1 LEGISLATIVE HISTORY NLRA, supra note 235, at 519-23 (statement of George H. Powers, Representative of steel worker delegation from Bethlehem Steel Co., Sparrows Point, Maryland); id. at 489, 492, reprinted in 1 LEGISLATIVE HISTORY NLRA, supra note 235, at 523, 526 (statement of E.P. Cush, National President, Steel and Metal Workers Industrial Union).

244. Cf. S. REP. NO. 573, 74th Cong., 1st Sess. 8 (1935), reprinted in 2 LEGISLATIVE HISTORY NLRA, supra note 235, at 2307 (stating that unfair labor practices would not be subjects for mediation).
of the rules enacted by Congress. This opposition to the use of arbitration as a means of enforcing the public law norms of the NLRA, to which Congress ultimately acceded by deleting the proposed language concerning deferral, belies the Board’s contention that section 10(a) was intended to foster Board deferral to arbitration.

Another indication of the reason for the elimination of the provision is the apparent adoption of a criticism of the deferral approach advanced by Harry A. Millis, a member of the NLRB while it functioned under a joint resolution, before passage of the Wagner Act. Millis thought it important that the Board have “the final say in the interpretation of the law,” and saw two ways of accomplishing this: either “by a right of appeal” to the NLRB from another adjudicator’s decision, or by placing “exclusive jurisdiction” of ULP cases in the Board. “If practicable, the latter arrangement appeal[ed to him] as the better of the two,” because it would minimize the delay in resolving disputes and lead to a more effective use of private dispute resolution mechanisms. The Senate Committee seems to have agreed with this recommendation. Thus, the Committee explained its revised version of the bill by stating, inter alia, that the old Board had no appellate jurisdiction over arbitrators’ decisions; that the Act must be “enforced . . . rather than broken by compromise; and its enforcement must reside with governmental rather than with quasi-private agencies;” and that consequently the Board now would have “exclusive jurisdiction” over ULP redress and prevention. These statements, in the very report that accompanied the deletion of the deferral language that the Board


246. President Roosevelt established the National Labor Relations Board on June 29, 1934, through an Executive Order authorized by Public Resolution 44. Exec. Order No. 6763 (1934), reprinted in 3 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 322 (S. Rosenman ed. 1938). From 1940 to 1945, Millis was the Chairman of the NLRB. See H. MILLIS & E. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 236 (1950).


248. Id.

249. S. REP. NO. 573, supra note 244, at 4, reprinted in 2 LEGISLATIVE HISTORY NLRA, supra note 235, at 2304.

250. Id.

251. Id. at 15, reprinted in 2 LEGISLATIVE HISTORY NLRA, supra note 235, at 2315.
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has described accurately as creating a form of "appellate jurisdiction," do not simply represent a wringing of hands over a possible problem that the Board has now been ingenious enough to solve. To the contrary, it is apparent that the Senate Committee chose to follow Millis's recommendation by rejecting the deferral-appellate jurisdiction approach, and choosing instead to vest exclusive jurisdiction over ULPs in the Board. As a result, the Board lacks the authority to proceed down a road that Congress has considered and rejected.

If the NLRA were the only statute at issue in this case, that would be the end of the matter; however, the Labor Management Relations Act (LMRA) must be considered also. Section 203(d) of the LMRA states that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." In addition, the conference committee in 1947 specified that it did not intend the Board to use its ULP

252. NLRB Petition for Rehearing at 12, Hammontree v. NLRB, 925 F.2d 1486 (D.C. Cir. 1991) (No. 89-1137).

253. In its Petition for Rehearing in Hammontree, the NLRB speculated that the reason the deferral language was deleted was that Secretary Perkins had criticized proposed section 10(b) because it might discourage arbitral bodies from acting unless the Board formally deferred to them. Id. at 10 n.20; see also NLRB In Banc Brief at 27, Hammontree v. NLRB, 925 F.2d 1486 (D.C. Cir. 1991) (No. 89-1137). But her criticism was not directed to the deferral language; she just proposed a reordering of the language of sections 10(a) and 10(b) because she was afraid that, as worded, the sections would not permit industrial boards to consider a particular ULP case unless the NLRB had first asked it to take the case up. Hearings on H.R. 6288, supra note 245, at 184, reprinted in 2 LEGISLATIVE HISTORY NLRA, supra note 235, at 2758 (statement of Frances Perkins). Because the Senate deleted the provision altogether, rather than simply rewording it, her arguments do not provide a reasonable explanation for the Senate's action. Indeed, as passed, the Act retained a provision similar to the language to which Secretary Perkins had objected: section 10(b) provides for a hearing "before the Board or a member thereof, or before a designated agent or agency." 29 U.S.C. § 160(b) (1988). Discussing this provision, Senator Wagner made clear his view that it permitted the Board to designate industrial boards as well as regional agencies to make findings and recommendations, which "[i]n all cases . . . will be transferred to the [NLRB] for final action." 79 CONG. REC. 7569 (1935), reprinted in 2 LEGISLATIVE HISTORY NLRA, supra note 235, at 2332 (statement of Senator Wagner). If the Board used industrial boards as Senator Wagner contemplated, it would both assign and review cases de novo as it does with ALJs today. This aspect of the legislative history shows that Congress rejected Secretary Perkins's analysis, rather than accepting it by deleting the proposed section 10(b), as the Board would have it.


255. Id. § 173(d) (emphasis added).
authority to take over the job of enforcing CBAs. But these authorities cannot justify an attempt to abdicate the Board's power to decide ULP cases because the highlighted language makes it clear that section 203(d) is limited to contractual disputes and does not extend to statutory claims. Moreover, unless a ULP claim hinges on a con-

256. H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 43 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 545-46 (1947) [hereinafter LEGISLATIVE HISTORY LMRA]. In Collyer Insulated Wire, Gulf Western Systems Co., 192 N.L.R.B. 837 (1971), the Board relied on a comparable passage in the Senate Committee report that indicated the Committee's intent that the Board would develop a policy of "'entertaining under these provisions only such cases . . . as cannot be settled by resort to the machinery established by the contract itself, voluntary arbitration.'" 192 N.L.R.B. at 840-41 & n.8 (quoting S. REP. NO. 105, 80th Cong., 1st Sess. 23 (1947), reprinted in 1 LEGISLATIVE HISTORY LMRA, supra, at 429). But this passage appears in a discussion of provisions that would have made it a ULP for an employer or a union to violate the terms of a CBA, and the Committee's reference to "these provisions" makes clear that the deferral doctrine desired by the Committee was limited to ULP charges involving that sort of violation. Far from supporting the extension of Collyer beyond the sort of unilateral modification charge that was at issue there, the fact that even the proponents of a procedure comparable to deferral limited their proposal to ULPs of that kind strongly supports the proposition that Congress never intended the Board to defer discrimination charges and other charges that are not founded on contract enforcement.

257. In its early cases, the Board relied on the contrast between the policy of the LMRA strongly favoring arbitration of contract disputes, and the policy of the NLRA strongly favoring the Board as the expositor of national labor policy and enforcer of statutory rights, to support deferral in ULP cases that depended on contractual questions. See, e.g., International Harvester Co., 138 N.L.R.B. 923, 925-28 (1962). The Board reasoned that the Supreme Court had warned it not to "effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." Id. at 927 (quoting Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942)). Because the Board saw its power to defer as flowing from the limitations placed on section 10(a) by the subsequent enactment of the LMRA, it limited deferral to circumstances in which the LMRA's proarbitration policy applied—i.e., to cases involving "application or interpretation" of the CBA. See 29 U.S.C. § 173(d) (1988). Where the ULP charge does not depend on a question of contract interpretation, the LMRA policy would not apply; thus, the Board would lack the authority to defer.

In early Board cases like International Harvester, the Board focused on the countervailing policies of the NLRA and the LMRA. It was in those cases and thus on that rationale that the Supreme Court approved of deferral where the deferral policy was tangentially relevant to the question of whether the Board would permit suits to enforce the CBA to proceed despite the fact that Board law also was implicated. See Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 270-72 (1964); see also infra note 272. In defending the current deferral doctrine, however, the General Counsel has sought to jettison the old rationale, insisting instead that section 10(a) imposes no limits on the Board's power to defer; rather, the question of when and how to defer is said to be "committed [solely] to the Board's sound discretion." NLRB In Banc Brief at 16, Hammontree v. NLRB, 925 F.2d 1486 (D.C. Cir. 1991) (No. 89-1137). The court of appeals, en banc, apparently agreed with this interpretation as applied to prearbitral deferral. See Hammontree v. NLRB, 925 F.2d 1486, 1491 (D.C.
struction or application of the CBA, the litigation of ULP charges does not amount to the enforcement of the CBA; thus, the enactment of the LMRA and Congress's express desire not to involve the Board in contract enforcement does not support a deferral to arbitration in most cases. 258

Furthermore, the version of the LMRA that passed the House did not contain the sentence in section 10(a) which provides that the Board's power to remedy violations of the NLRA is not affected by contractual or other means of adjustment. 259 The Conference Committee, however, retained the sentence, explaining that it intended that Board remedies be available in addition to remedies under statutory provisions allowing suits in federal courts, such as sections 301 and 303 of the LMRA, 260 rather than that one remedy be supplanted by the other. 261 Congress's repeated refusal to permit Board remedies to be supplanted by other means of adjustment, coupled with the Act's express language preserving NLRB authority, compels one to conclude that Congress intended the Board to make its processes available to individual employees claiming a statutory violation whether or not protection also might be available under grievance procedures fostered by the law of section 301 of the LMRA.

The Board has suggested that permitting an employee to invoke the Board's jurisdiction would allow the union to evade its promise to arbitrate contractual disputes. 262 But that argument lacks merit. A union does not promise by any means, either that it will take to arbitration all disputes about the meaning of the contract, or that in the cases which it does arbitrate, it will make all conceivable arguments under the

258. Cf. supra note 176 and accompanying text (discussing how deferral is analogous to federal abstention).
259. See H.R. 3020, 80th Cong., 1st Sess. § 10(a) (1947), reprinted in 1 LEGISLATIVE HISTORY LMRA, supra note 256, at 193.
262. Hammontree v. NLRB, 925 F.2d 1486, 1494 n.15 (D.C. Cir. 1991) (en banc); United Technologies Corp., 268 N.L.R.B. 557, 559-60 (1984); Of course, the employer (or other respondent) is permitted to involve the Board in the dispute simply by not raising the deferral defense. If the Board truly were concerned about preventing the parties from evading the promise to arbitrate, it would refuse to consider ULP claims even when the employer did not raise that defense; rather, it would order the respondent to arbitrate the dispute and refuse to consider the ULP unless the charging party cooperated in processing the dispute through the grievance procedure.
contract and the NLRA. Indeed, the stability of the grievance-arbitration system rests on an implicit union commitment to screen employee complaints and to prosecute grievances up through arbitration only if it believes that they are both meritorious and important enough to the collective interest to warrant such treatment. Thus, the fact that a union has chosen not to advance a particular claim or argument does not mean that there may not be a worthy and important claim that statutory rights have been violated. It does no violence to the promise to arbitrate contractual disputes to allow such statutory claims to be resolved by the NLRB.

As the Board contends, though, in some limited circumstances, allowing a union to invoke the NLRB's processes for a ULP claim may amount to an evasion of the promise to arbitrate contractual disputes. For example, when a union claims that the employer has violated sections 8(a)(5) and 8(d) of the Act by unilaterally modifying a term of the contract, the ULP claim is entirely dependent on the meaning of the contract, and the union may be obliged to resort to its own grievance machinery before coming to the Board. In that kind of case, if a union could come to the Board whenever it could make out a claim of unilateral modification, it could substitute the Board for the arbitrator in defining the meaning of its contract. The language and legislative history of the LMRA support the application of Collyer and Spielberg to those sorts of cases.

Accordingly, in such cases the Board may properly insist upon waiting until the grievance procedure has come to an end. It may refuse to decide the merits if the union withdraws the grievance because the union's own conduct has short-circuited the grievance procedure. But where the claim is

264. The en banc majority made a similar error in Hammontree when it insisted that section 203(d) supports the Board's prearbitral deferral policy because the contractual claim and the statutory claim are independent ones, and the employee "cannot nullify his contractual claim simply by choosing to pursue his statutory claim." 925 F.2d at 1494. This analysis would be sound only if employees (and unions) had a legal duty to pursue all possible contractual claims, and if the existence of parallel contractual claims was a sufficient basis under section 203(d) to force the case into the grievance procedure. But the Supreme Court's teaching in Lingle v. Norge, Division of Magic Chef, Inc., 486 U.S. 399 (1988) is precisely to the contrary: it is precisely because the two claims are independent that both may be pursued independently, or one may be pursued but not the other. See id. at 410-12.
266. See supra notes 254-56 and accompanying text.
simply one that arises under a statutory provision, which happens to be parallel to a claim that could be advanced under the contract, the national policy favoring arbitration is scarcely disserved by the coexistence of two different forums for enforcing two parallel, but independent, rights.267

This distinction could explain virtually all of the decisions in the courts of appeals and the Supreme Court in which the Board’s deferral doctrines have either been approved or disapproved. Cases in which the courts have invalidated Board deferrals because its deferral doctrine failed to ensure sufficient protection for statutory rights have been individual discrimination cases under section 8(a)(3),268 or interference cases under section 8(a)(1) in which the statutory claim was independent of the meaning of the CBA.269 Moreover, in almost all of the Collyer cases where the Board’s deferral doctrine has been approved, the union and the employer were the real parties in interest; both had ready access to arbitration, and both could use that forum to vindicate their positions. Almost all of these cases involved ULP charges where the issue was whether one party to the contract had violated an agreement whose meaning was subject to arbitration. Sometimes the issue was the “checkoff” agreement,270 sometimes the charge involved an alleged modification of the CBA,271 and sometimes the question pertained to contractual jurisdictional provisions.272

268. See, e.g., Harberson v. NLRB, 810 F.2d 977, 983-84 (10th Cir. 1987) (involving discipline for a sympathy strike); Garcia v. NLRB, 785 F.2d 807, 809, 811 (9th Cir. 1986) (involving discharge for refusing to honk a horn in violation of an antinoise ordinance); Taylor v. NLRB, 786 F.2d 1516, 1522 (11th Cir. 1986) (involving discharge for refusing to drive a truck in disrepair).
269. See, e.g., Banyard v. NLRB, 505 F.2d 342, 348 (D.C. Cir. 1974) (involving discharge for refusal to drive unsafe vehicles). But see NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 838-39 (1984) (involving a discharge for refusing work in reasonable reliance on an alleged contractual right to do so; dictum that Board “may defer” to the extent that the same factual issues are involved in the contractual and statutory proceedings).
270. See Associated Press v. NLRB, 492 F.2d 662 (D.C. Cir. 1974); see also Enterprise Publishing Co. v. NLRB, 493 F.2d 1024 (1st Cir. 1974) (involving maintenance of membership agreements). In these cases, it is the employer, not the union, whose interests are aligned with those of the employee.
271. See Local Union No. 2188, Int’l Bhd. of Elec. Workers v. NLRB, 494 F.2d 1087 (D.C. Cir. 1974); Nabisco, Inc. v. NLRB, 479 F.2d 770 (2d Cir. 1973); American Fire Apparatus Co. v. NLRB, 380 F.2d 1005 (8th Cir. 1967).
The argument based on the union's promise to arbitrate contract disputes does not apply where the issue is whether the employer has discharged or otherwise adversely treated an individual for a reason which, whatever its status under the CBA, is forbidden by the Act. Thus, the argument fails in the typical union discrimination case under section 8(a)(3) or section 8(a)(1) where the employee's conduct was admittedly concerted or protected, and the issue is whether the conduct caused the adverse treatment by the employer.\textsuperscript{273} Nor does the argument apply in the other type of section 8(a)(1) case in which the employer admits interference with an employee's efforts to communicate and the issue is whether the employer's assertion of its property rights or its interests in effective operation, regardless of how well-founded the contractual claim, is outweighed by the employee's statutory right to engage in concerted activity.\textsuperscript{274}

preferred means of settlement. See 417 U.S. at 14, 17-18. The Court refused to allow the union to invoke the mere possibility of Board proceedings as a defense to the company's state court action to enforce the contractual obligation to arbitrate and not to strike. \textit{Id.} at 20. The Court noted, quoting the Board in Collyer Insulated Wire, 192 N.L.R.B. 837, 842-43 (1971), that in such situations the Board itself might defer to the contractual procedure. 417 U.S. at 16. In Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964), which also involved a jurisdictional dispute, the Court refused to allow the parties to evade their promise to arbitrate on the ground that the same dispute might later come before the Board, stating that "we see no barrier to use of the arbitration procedure." \textit{Id.} at 272.

\textsuperscript{273} Deferral was, however, approved in Lodge 700, Int'l Ass'n of Machinists v. NLRB, 525 F.2d 237 (2d Cir. 1975), where, in addition to making a number of claims that the company had unilaterally modified the contract, the union also charged that the company had harassed and discriminated against its stewards in an effort to suppress the union. \textit{Id.} at 243, 245.

\textsuperscript{274} The argument was squarely rejected, at least in the context of prearbitral deferral, by the \textit{en banc} majority in Hammontree v. NLRB, 925 F.2d 1486 (D.C. Cir. 1991). This court, however, repeatedly limited its holding to the prearbitral deferral, \textit{see, e.g., id.} at 1493 (arguing that Congress had no "clear intent to preclude the Board from deferring . . . until the claimant has exhausted grievance remedies"); \textit{id.} at 1494 (holding that "§ 203(d) does not preclude Board deferment of that claim"); \textit{id.} at 1499 (concluding that the "Board's deferment policy constitutes a permissible and reasonable construction of the NLRA and the LMRA"). The majority even went to the extent of inventing a new term, "deferment," to clarify the difference, \textit{id.} at 1490, and thus limit its holding. The court also recognized that in the case before it there was no evidence of union hostility to the employee; imposition of an exhaustion requirement in such cases "might indeed 'constitute[ ] not deference, but abdication.'" \textit{Id.} at 1498 (quoting Local Union No. 2188, Int'l Bhd. of Elec. Workers v. NLRB, 494 F.2d 1087, 1091 (D.C. Cir.), cert. denied, 419 U.S. 835 (1974)). Deferral of an individual's charge of retaliation for the exercise of section 7 rights also was upheld in Lewis v. NLRB, 800 F.2d 818 (8th Cir. 1986). The case was remanded, however, to ensure that jurisdiction was retained on a broad enough basis to permit reconsideration in the event that the union failed to go forward with the grievance. \textit{Id.} at 821. When that failure occurred, the Board ultimately refused to defer and
Moreover, CBAs rarely require that the parties submit all disputes to the grievance procedures for resolving contract disputes between the union and the employer. Rather, most contracts limit the grievance procedure, particularly the authority of an arbitrator when the parties are unable to agree on the resolution of a grievance, to grievances or questions of interpretation "arising under" the CBA.\footnote{275} Accordingly, if the NLRB were to refuse to hear individual employees' statutory claims simply because of the existence of a voluntary procedure to hear contractual claims, that would be precisely the sort of abdication of authority that Congress sought to prevent in 1935 and 1947.\footnote{276}

Deferral of ULP claims pending submission to arbitration is contrary to another provision of the NLRA. Section 10(m)\footnote{277} provides that discrimination charges under sections 8(a)(3) and 8(b)(2) must be given priority treatment and decided ahead of all other kinds of cases, except secondary boycott cases. The legislative history makes it clear that Congress wanted decisions to be made in such cases as soon as possible because it recognized that the victims of discrimination often face a threat to their livelihoods and those of their dependents.\footnote{278} This objective is scarcely advanced if, instead of deciding cases quickly, the NLRB postpones its decision by requiring the employee to resort to arbitration. Nor is it advanced if, under the \textit{Consolidated Freightways} decision,\footnote{279} the NLRB sends the employee back to arbitration after the Board concludes that his union should have made different arguments the first time the case was before the arbitrator.\footnote{280}

\footnote{275. \textit{E.g.}, NMFA, \textit{supra} note 25, art. 8, §§ 1, 5(b).}
\footnote{276. \textit{See supra} notes 235-61 and accompanying text.}
\footnote{277. 29 U.S.C. § 160(m) (1988).}
\footnote{278. \textit{H. REP. No. 741, 86th Cong., 1st Sess. 27 (1959), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 785 (1959).}}
Some have argued that, even if individual cases are delayed, the processing of discrimination charges as a class is expedited by requiring all such claims to be submitted to the grievance procedure first, because the grievance procedure may eliminate the need to consider some statutory claims. Judge Mikva's dissenting opinion in Hammontree has the better of this argument when he points out that the courts, too, "could do some docket clearing by deferring anytime the defendant wanted to go to an arbitrator of his or her choosing. But administrative efficiency was certainly not the goal expressed by Congress in § 10(m)." To the extent that Congress has expressed a view about which cases should be cleared off the docket by deferring them to some other procedure, then, if section 10(m) means anything, it must mean that it is the nondiscrimination cases that are to be cleared off the docket to make room for the litigation of discrimination cases. To quote the Supreme Court in another context, "If the [union] member becomes exhausted, instead of the remedies, the issues of public policy are never reached and an airing of the grievance never had."

Deferral does violence to the national labor policy with respect to arbitration in yet another important respect. The crucial feature of the American labor relations system—one which stands out from almost every other system in the world—is that although it requires the parties to bargain with each other and regulates their bargaining procedures in various ways, the parties are free to choose the terms and conditions of their bargain. Both the Board and the courts are strictly forbidden to dictate the terms of the agreement, and no party is required to accept any particular contract provision. Yet the Board's prearbitral deferral policy means that if a union and employer bargain for an arbitration clause, that clause must be construed—no matter what its contents or

adequate under the Olin standards, then under the theory of Consolidated Freightways it presumably will send the employee back to arbitration yet a third time, until the arguments are presented by the union in a way that the Board regards as sufficient. And, if the arguments are presented in a sufficient manner, then, applying Olin, the Board would necessarily defer to the decision of the arbitrator.

281. Hammontree, 925 F.2d at 1495.
282. Id. at 1511 (Mikva, J., dissenting).
the intent of the parties—as if it included a promise that all
claims asserting that the NLRA has been violated will be sub-
mitted to arbitration. Even if that policy does not discourage
unions that want to preserve their access to the Board from
agreeing to arbitration clauses in the first place, it certainly
will have the effect of depriving the bargaining parties of the
right to choose freely their own terms and conditions relating
to when and how arbitration will occur.

When an employee seeks Board consideration of her ULP
claim following an arbitration decision, a different set of
policies is invoked to support deferral. Thus, one might argue
that when an employee has voluntarily submitted her claim to
an arbitration proceeding, it is unfair to give her a second bite
at the apple by submitting the same dispute to a public
tribunal. This argument has two principal flaws. First, given
the current state of the Board’s prearbitral deferral doctrine,
it hardly is fair to treat the submission to arbitration of a
dispute raising ULP issues as voluntary on the employee’s
part because if the dispute is even conceivably arbitrable, the
Board will refuse to consider it until the employee has tried
arbitration.

Second, and more fundamentally, one may ask what is
wrong with an employee invoking the powers of two separate
tribunals, each specializing in the resolution of two different
kinds of questions, each having distinct advantages in
resolving some questions and disadvantages in resolving
others? That is, the contract may give the employee one set
of rights, including, for example, placing of the burden of proof
on the employer to show a good reason for a discharge, that
may be more advantageous to the employee than the rights
she has under the NLRA that require her to prove that the
employer had a bad motive for the discharge that the NLRA
condemns. The NLRA, on the other hand, may afford the
employee certain advantages, such as the right not to be
discharged for certain illegitimate reasons, even if she per-
forms poorly or even if the union chooses for whatever reason
to accept the employer’s reasons for her discharge in a
particular instance. If the public has decided, through the
enactment of the ULP provisions in section 8(a) of the Act,
that certain reasons for discharge are impermissible, why
should a worker not be able to take advantage of that judg-
ment while also seeking to take advantage of the particular
protections provided by a contractual forum?
The standard response to this contention is that the Board's Olin doctrine takes care of this problem by committing the Board to "determine in each case whether the arbitrator has adequately considered the facts which would constitute [ULPs]." Of course, the "adequately considered" determination is limited to determining whether the General Counsel has succeeded in showing the absence of the two Olin factors (the "factually parallel" and "generally presented" standard). Accordingly, the persuasiveness of this response depends on the validity of the conclusive presumption, and, as we have already seen, the conclusive presumption simply does not stand up under scrutiny.

Finally, it is occasionally said, albeit without empirical support, that the NLRB's new deferral rules are needed to encourage the use of arbitration. In fact, the available evidence suggests that the proportion of all CBAs that provide for arbitration has remained essentially constant since the early 1960s and has not been affected by the various changes in Board prearbitral or postarbitral deferral doctrines.

286. See supra notes 116-19 and accompanying text.
287. See United Scenic Artists, Local 829 v. NLRB, 762 F.2d 1027, 1033-35 (D.C. Cir. 1985) (rejecting the Board's presumption because the conclusion does not follow from its premise).

The Bureau of National Affairs' Basic Patterns in Union Contracts series shows a similar pattern. BUREAU OF NAT'L AFFAIRS, INC., BASIC PATTERNS IN UNION CONTRACTS 15:130 (3d ed. 1954) (89%); BUREAU OF NAT'L AFFAIRS, INC., BASIC
This graph should permanently lay to rest the proposition that the percentage of CBAs containing arbitration clauses has any meaningful relationship to the changes in Board deferral doctrine.


290. This graph is derived from data provided by the BLS and BNA reports cited supra note 289.
B. The NLRB May Not Refuse to Hear an Individual Worker's Claims of Statutory Violation Simply Because His Union Could Make Such Arguments in Arbitration

Many of the objections to deferral discussed above apply to every kind of statutory right. But they have less force when, as in Collyer, the right at stake in the ULP proceeding is one enjoyed by the collective-bargaining unit as a whole or by the union as an institution. In such cases, it is reasonable to assume that the union's interest in enforcing the contract will be fully congruent with its interest in obtaining a favorable ULP ruling. This assumption, however, does not apply when the statutory rights at stake are those of an individual employee. Accordingly, the Board's refusal to decide ULP issues that could have been submitted to arbitration, but were not, is particularly inappropriate with respect to individual rights cases.

Individual employees need access to the Board for the protection of their statutory rights because those rights often can be lost in the shuffle of clashing collective interests between union and employer. A union may have reasons for not pressing a particular claim to arbitration that do not violate its duty of fair representation under Vaca v. Sipes. For example, it may legitimately make decisions favoring one group of employees over another or decide that a given claim is not a violation of the contract. Or the union may decide that, although it would like to see the claim prevail, some other case would be a better vehicle to establish a desired construction of the contract. So, too, the costs of arbitration may force the union to forego some meritorious grievances and to select among them by a nondiscriminatory means. Such means may include the claim's importance

291. 386 U.S. 171 (1967). "[A] union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion," id. at 191, and it "must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances," id. at 194.
to the bargaining unit or the employer's willingness to provide partial but not complete relief required by the contract, or by Board law. Indeed, even if the union goes to arbitration, it may lawfully decide to litigate the grievance in a way that protects the collective interest but is not the most effective way to serve the interest of the individual grievant. 295

Even if it is appropriate to require a union that wishes to protect its interests *vis-à-vis* an employer to submit a claim to an arbitrator first, it is unfair to impose that requirement on an employee who cannot control the decisions whether to invoke arbitration or what arguments should be made in arbitration. The practical effect of a deferral policy that ignores this crucial distinction is that it substitutes the union for the NLRB's General Counsel as the party who decides whether individual employees' statutory rights will be enforced. Such a policy also substitutes the union's institutional interest for the public interest as the basis on which such enforcement decisions will be made. 296

To guard against similar dangers, the Supreme Court has held in a series of cases that individual statutory rights cannot be sacrificed on the altar of arbitration. First, in *Alexander v. Gardner-Denver Co.*, 297 the Court ruled that arbitration of employee discrimination claims simply provided an alternate means of enforcement which did not preclude the employee from invoking statutory remedies under Title VII of the Civil


295. See, e.g., Harberson v. NLRB, 810 F.2d 977, 980-81 (10th Cir. 1987) (union presented no evidence as to whether particular employees had been fired or permanently replaced, in hopes that the arbitration would find both acts forbidden and thereby benefit all union members).

296. Judge Gibbons argues that although the General Counsel has virtually unreviewable discretion to initiate a ULP complaint, the Board is obligated to decide cases once the General Counsel has prosecuted them. NLRB v. Pincus Bros., Inc.-Maxwell, 620 F.2d 367, 385-86 (3d Cir. 1980) (Gibbons, J., dissenting). Therefore the Board's deferral doctrine is an impermissible intrusion upon this prosecutorial discretion. *Id.* at 387-88; cf. *NLRB v. United Food & Commercial Workers Union Local 23, 484 U.S. 112, 124-28 (1987)* (stating that the statutory reference to the General Counsel's authority to decide whether to press a ULP claim or, *inter alia*, accept a settlement, does not authorize the Board to second-guess the General Counsel's decision to accept a settlement). If, however, deferral occurred only at the complaint-issuing stage, there would be no opportunity for Board review, and thus no opportunity for judicial review of the standards for deferral or of the application of those standards to particular cases. *See id.*

Rights Act of 1964. The Court extended the principle to other federally protected rights in Barrentine v. Arkansas-Best Freight System, Inc. and McDonald v. City of West Branch. Although each of these cases involved employees who were permitted to pursue statutory claims after they lost in arbitration, the grievance-arbitration procedure need not be exhausted before the statutory proceeding may be initiated.

In McDonald, the Supreme Court elaborated the reasons underlying this line of cases, which apply equally to claims under the NLRA. The Court found that Congress intended each cause of action to be enforceable by the federal courts, and as we have seen, Congress similarly made clear its intention that the NLRA be enforced by the NLRB. Indeed, in an NLRA case the argument against deferral is even stronger than in Gardner-Denver, Barrentine, and McDonald because NLRA section 10(a), unlike the statutes construed in those three cases, expressly refuses to permit "any other means of adjustment" to affect this enforcement power.

298. Id. at 49.
302. McDonald, 466 U.S. at 289.
303. Unlike those sections of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e(4)(g) (1988), and the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1988), that use the word "shall," section 10(a) provides that the Board is "empowered" to prevent ULPs; it is not directed to prevent them. 29 U.S.C. § 160(a) (1988). Some early cases focused on this distinction in suggesting that, in an appropriate case, faced with an acceptable disposition under the procedures provided by a CBA, the Board might choose not to take jurisdiction to decide whether there had been unlawful discrimination. See, e.g., NLRB v. Newark Morning Ledger Co., 120 F.2d 262, 268 (3d Cir.) (en banc), cert. denied, 314 U.S. 693 (1941) ("[T]he mere fact that a private right of an employee has been infringed by the act of an employer is not of itself sufficient to bring the Board's powers into play."). Although the use of the term "may" versus "shall" might affect the reviewability of an exercise of prosecutorial discretion, the reviewability of Board decisions is established by section 10(f) of the Act, and the question is whether the Board has discretion to refuse to exercise
Deferral and the Dissident

At oral argument before the panel in Hammontree v. NLRB, the question was raised whether the recent string of Supreme Court decisions applying the United States Arbitration Act (USAA), requiring arbitration of statutory claims under both federal and state law, are inconsistent with the Barrentine line of cases, and whether they thus support the deferral doctrine. There are, however, two reasons why these cases do not support the Board's current position. First, the USAA expressly excludes employment contracts, and although there was some early equivocation on this point, it now seems clear that CBAs come within this exclusionary clause. Second, the USAA cases all
involve individual contracts. In such cases the individual party to the litigation typically decides whether to enter the contract in the first place (although it may well be a contract of adhesion), and, if the dispute is arbitrated, both parties participate equally in the selection of the arbitrator and control the litigation of the case in arbitration. As one court noted in distinguishing the Barrentine line of cases from an age discrimination claim brought by a company manager, in cases involving individual employment contracts, "concern about the divergent interests of employee and union simply does not exist."

Supporters of deferral frequently seek to avoid the Barrentine line of cases by quoting a passage in which the Barrentine court distinguished between the right to a minimum wage protected by the Fair Labor Standards Act (FLSA) and "the rights established through th[e] system of majority rule" which are not protected for their own sake, but rather which "may have to be subordinated to the collective interests of a majority of their co-workers." But this argument misstates what "rights" the Supreme Court is comparing with the FLSA in this passage because the rights set forth in the NLRA are not established by a system of majority rule among employees; they are established by an act of Congress. The "rights established through a system of majority rule" to which the Barrentine Court referred are the rights negotiated by the union and incorporated into the CBA. Indeed, it is those rights, and those rights only, which the system of industrial


312. Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 202 (4th Cir. 1990), aff'd, 111 S. Ct. 1647 (1991). The Court did not address the scope of the section 1 exclusion because, although it was briefed by an amicus curiae, the petitioner never raised it and because the clause involved was not contained in an employment contract. 111 S. Ct. at 1651 n.2. The Court noted:

In any event, it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. The FAA requires that the arbitration clause being enforced be in writing. The record before us does not show . . . that Gilmer's employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in Gilmer's securities registration application . . . .

Id. (citation omitted). Thus the Court held that the section 1 exclusion did not apply to Gilmer's arbitration agreement. Id.

313. 450 U.S. at 735.

314. Id.
arbitration is designed to enforce.\textsuperscript{315} Thus, when the Court cited authority for the importance of arbitration and of court deference to arbitral awards, it mentioned no cases involving the NLRA, but only cases that involved suits under the LMRA to enforce CBAs.\textsuperscript{316} Thus, when an individual's discrimination or interference claim does not rest upon a construction of the CBA, that claim should not be relegated to resolution by the majoritarian forum of arbitration simply because the union has agreed to use that forum for contract disputes.

Supporters of arbitration also have tried to distinguish the \textit{Barrentine} line of cases by arguing that the \textit{Barrentine} Court relied on the fact that the FLSA gives specific minimum protections to individual workers "[i]n contrast to the [LMRA], which was designed to minimize strife and to improve working conditions by encouraging employees to promote their interests collectively."\textsuperscript{317} The distinction does not, however, bar the application of \textit{Barrentine}'s rationale to individual rights cases under the NLRA, both because the Court has not limited this line of cases to purely individual rights, and because some of the rights provided by the NLRA are individual, even if their purpose is to advance the collective weal.

First, although the FLSA scarcely promotes collective activity, the Court also has extended \textit{Barrentine} and \textit{Gardner-Denver} to areas of the law that protect collective as well as individual action, such as the first amendment.\textsuperscript{318} Political

\textsuperscript{315} See Delaney v. Union Carbide Corp., 749 F.2d 17, 19 (8th Cir. 1984).


\textsuperscript{317} Sharpe, \textit{supra} note 122, at 621 (quoting \textit{Barrentine}, 450 U.S. at 739 (emphasis in original)).

\textsuperscript{318} Although individual self-expression has long been considered one of the values promoted by the first amendment, promoting democratic decision making and achieving social stability while permitting change also are important. T. EMERSON, \textsc{TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT} 3-15 (1966). Some argue that individual fulfillment pales beside the promotion of political activity as a source of the first amendment's importance and as a reason for its adoption. Bork, \textsc{Neutral Principles and Some First Amendment Problems}, 47 IND. L.J. 1, 26 (1971).
speech, for example, is usually directed at persuading other people to join with the speaker in achieving some common objective, and the first amendment protects the right to join an organization\(^{319}\) (such as a union) as well as the right to advocate common activity.\(^{320}\) Indeed, it was the exercise of the first amendment right to engage in union activity that led to McDonald's discharge by the City of West Branch,\(^{321}\) and it was the exercise of the first amendment right not to join a union that gave rise to the dues payment controversy with the Chicago Teachers Union.\(^{322}\) Yet the Supreme Court had no difficulty in extending the rationale of *Barrentine* and *Gardner-Denver* to such cases.\(^{323}\)

Second, Congress designed the NLRA, like the LMRA, to preserve industrial peace by encouraging collective action and collective bargaining.\(^{324}\) However, with the NLRA, unlike the LMRA, this goal was achieved by conferring individual as well as collective rights.\(^{325}\) It is evident, therefore, that Congress concluded that protecting employees' individual rights as well as collective rights was essential to achieving the ultimate objectives of the Act. Indeed, Congress recognized the problem of the union that acts, either as a pawn of management or otherwise, against the interests of a minority in the workforce.\(^{326}\) The Wagner Act and its amendments were tailored to ensure that the anti-discrimination provisions

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323. Another difference between the FLSA and the NLRA is that, although FLSA rights are not waivable, *Barrentine*, 450 U.S. at 740, many NLRA rights are. Similarly, many constitutional rights may be waived, although careful scrutiny is applied to ensure that the waiver is clear and knowing. *See* Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983); Johnson v. Zerbst, 304 U.S. 458, 464 (1938). For a discussion of the application of waiver analysis to deferral doctrine, see *infra* notes 337-39 and accompanying text.
325. *See* General Am. Transp., 228 N.L.R.B. 808, 810-13 (1977) (Murphy, Chairman, concurring) (distinguishing between individuals' statutorily granted public rights and the collectively bargained-for private rights of unions).
of the Act continue to work even after a majority representative has been chosen\textsuperscript{327} to "make the worker a free man."\textsuperscript{328}

Nor is there any reason to believe that the Board intends to use its deferral doctrine as a means of substituting the law of the agreement for the public law enforced by the Board during the term of a contract, although the arguments in support of deferral often allude to such a substitution of authority.\textsuperscript{329} The Court has asserted that the purpose of the Act is to encourage collective bargaining and that collective bargaining is supposed to advance the economic interests of all the individual workers in the bargaining unit.\textsuperscript{330} Some commentators have used this proposition as the basis for arguing that, inasmuch as the majority of employees have supported the union as their representative, it is entirely appropriate for the system of collective bargaining to be permitted to handle issues of individual rights.\textsuperscript{331} In effect, once the parties enter the agreement they are governed solely by the contract, and, with very few exceptions, the Board's law no longer governs at all.\textsuperscript{332} Indeed, commentators postulate that this formulation of the objectives of the deferral doctrine even predicts the reasonable exceptions to the deferral doctrine, so that, for example, charges raising matters that involve the integrity of the system of majority rule, such as representation questions, cannot be deferred to arbitration.\textsuperscript{333}

The principal difficulty with the argument that bases deferral on the desirability of allowing the parties to resolve disputes through collective bargaining is that it goes too far. If an arbitral decision about a contractual grievance were to be treated as the equivalent of a negotiated settlement of a Board charge, there would be no need to review the settlement

\textsuperscript{328} 79 CONG. REC. 7574 (1935) (statement of Sen. Wagner), reprinted in 2 LEGISLATIVE HISTORY NLRA, supra note 235, at 2343.
\textsuperscript{331} See Sharpe, supra note 122, at 623.
\textsuperscript{333} See, e.g., Edwards, supra note 332, at 30-32.
documents either to determine that the ULP and contractual issues were comparable, or to ensure that the substance of the settlement was not repugnant to the purposes and policies of the Act. Instead, review would only be for the purpose of ensuring that the parties intended to resolve any possible Board charges as well as the economic and contractual disputes that were pending between them.

After all, that is how the Board reviews negotiated strike settlements where no grievance procedure is invoked, and, indeed, negotiated settlements of a grievance providing for partial relief. In such cases, the Board asks simply whether the parties agreed to include the statutory as well as the contractual claim in their settlement. In making that determination, the Board has traditionally applied the "clear and unmistakable waiver" standard and allowed the union to waive the employees' claims without their consent, but it has not applied the Spielberg repugnance standard.

Yet even the most stalwart defenders of the Board's current deferral doctrine, who rely on the "private negotiation" argument for deferral, concede that it is only by carefully following its standards for substantive postarbitral review that the Board can vindicate its deferral policies and fend off the

336. See, e.g., Airport Parking Management v. NLRB, 720 F.2d 610, 615-17 (9th Cir. 1983).
337. E.g., Energy Coop., 290 N.L.R.B. at 636-37.
338. Mahon v. NLRB, 808 F.2d 1342, 1345 (9th Cir. 1987).
339. In Alpha Beta, the Board stated that the Collyer and Spielberg standards applied to grievance settlements as well as arbitration awards. 273 N.L.R.B. at 1547. But when the court addressed the issue of repugnance, it concluded the settlement was not "palpably wrong" simply because the union had the authority to waive its members' statutory rights during the settlement negotiations. Id. The Board thus substituted the clear and unmistakable waiver standard for the more substantive repugnance test. In a recent case, however, a divided Board panel applied the Olin standard, rather than the "clear and unmistakable waiver" standard, in deciding to defer to a grievance settlement in which the union withdrew the grievance, without the grievant's consent, in return for a week's pay. See United States Postal Serv., 300 N.L.R.B. No. 23, slip op. at 5-7, 135 L.R.R.M. (BNA) 1209, 1210 (Sept. 28, 1990); see also Catalytic, Inc., 301 N.L.R.B. No. 44, slip op. at 7-12, 137 L.R.R.M. (BNA) 113, 115-16 (Jan. 28, 1991).

If a settlement between the union and the employer is reached during the pendency of the Board proceedings, the Board will give effect to the settlement only where the ULP has been "substantially remedied," although, in assessing the degree of remedy, the Board will take into account the usual risks of litigation. Independent Stave Co., 287 N.L.R.B. 740, 752 (1987).
charge that, by deferring, the Board is abdicating its statutory responsibilities. In short, although there is undoubtedly some truth to the perception that the grievance procedure is a bargaining process, the view of the arbitration process as adjudication is so deeply embedded in Board law that deference simply cannot be justified on the theory that the outcome of an arbitration can be accepted as a negotiated settlement.

Proponents of deferral, in furtherance of private dispute negotiation, argue that the union's duty of fair representation (DFR), and its democratic obligations under the Landrum-Griffin Act, coupled with employee ratification of CBAs, adequately prevent union abuses in the handling of employee disputes. But the DFR provides protection against only the most egregious violations of employee rights, and employees have rarely been able to obtain substantial relief in cases brought to enforce the DFR. The very forgiving standards that most courts apply to union conduct in DFR cases may be appropriate where the union has created the contract rights that it has failed to enforce, but they hardly seem appropriate with respect to the enforcement of public legal rights created by the NLRA. If the union is going to have a duty to prosecute Board law as well as its own contract, perhaps it is appropriate to create an elevated standard for union failings in that regard.

340. See, e.g., Sharpe, supra note 122, at 643-44.
341. See generally J. KUHN, BARGAINING IN GRIEVANCE SETTLEMENT (1961).
342. See Communications Workers (C & P Tel.), 280 N.L.R.B. 78, 80-81 (1986) (stating that because arbitration is an adjudication rather than a negotiation, transcription of arbitration sessions is mandatory).
344. Id. at 614.
346. Sharpe, supra note 122, at 625.
347. Id.
348. See Goldberg, The Duty of Fair Representation: What the Courts Do in Fact, 34 BUFFALO L. REV. 89, 157-58 (1985). Indeed, one senses that such commentators as Professor Sharpe, who invoke the DFR as a protection against union abuses in the grievance procedure, have little experience with the practicalities of DFR litigation.
349. If the union's DFR applies to Board charges—and surely it would if the union grievance procedure became the primary means of enforcing the NLRA during the term of a contract, see Karahalios v. National Fed'n of Fed. Employees Local 1263, 489 U.S. 527, 534 (1989) (discussing basing the DFR on the exclusivity of the union's power to represent employee interests)—one also would face the question of whether unions should share the employer's liability when they breach their DFR in the handling of a ULP charge through the grievance procedure, as they do in connection
Nor is deferral supportable on the theory that "the reality is that individual employees ... vote on the ratification of contractual provisions, including grievance-arbitration procedures [and so] the individual has a voice in selecting ... the programs that will bind all members of the unit." The "membership ratification" argument lends little support to the Board's deferral doctrine for several reasons. First, although many and perhaps most unions provide for membership ratification, such procedures are by no means universal. Second, although in recent years courts have begun to develop rules to govern the fairness of contract ratification votes, many contracts are still passed employing shockingly unfair procedures which go unremedied either because the employees do not find counsel or because the courts and the Board are with their handling of contractual rights, cf. Bowen v. United States Postal Serv., 459 U.S. 212, 226-27 (1983) (requiring the union to share in the employer's liability for wrongful discharge when it breached its DFR by declining to take the grievance to arbitration). However unfortunate it may be that unions have been saddled with a share of the responsibility for lost wages and other damages caused by employer breaches of the CBA in the traditional DFR context, see id. at 237-44 (White, J., concurring in part and dissenting in part), it seems particularly inappropriate to make unions responsible for the financial harms caused by the Board's delegation of its own ULP enforcement authority.

Litigators attempting to pursue this analysis would have to face the question of how to subject the employer to liability once a union has been found to have violated its DFR by failing to represent adequately an employee in an arbitration over NLRA rights. The claim against the employer would seem to be a ULP claim that is within the exclusive province of the Board. See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959); Garner v. Teamsters Local No. 776, 346 U.S. 485, 489-91 (1953). Yet the Supreme Court has cautioned against construing DFR law in such a way as to encourage the presentation of the claims against employer and union in two separate proceedings. See DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 164-65, 167-70 (1983). A possible solution, where the union's misconduct consists of failing to press a ULP claim in arbitration, is suggested by a recent Second Circuit decision: a court might invoke the All-Writs Act, 28 U.S.C. § 1651 (1988), to bring the employer into the DFR suits against the union where it is necessary to provide complete relief. See United States v. International Bhd. of Teamsters, No. 91-6096, 1991 U.S. App. LEXIS 25524, 1991 WL 222298 (2d Cir. Oct. 29, 1991) (allowing a district court to enjoin an employer for violating the NLRA right of access of nonemployee union candidates in a union election ordered by consent decree between the federal government and the union because it is consistent with the spirit behind Garmon).

350. Sharpe, supra note 122, at 625.
352. See, e.g., Bauman v. Presser, 117 L.R.R.M. (BNA) 2393, 2399-401 (D.D.C.1984) (finding that by being provided with only limited notice and information on a contract proposal, the membership was denied a meaningful right to vote). I have been deeply involved in this area both as a litigator and a commentator. See Levy, Membership Rights, supra note 11.
unreceptive to their complaints. Indeed, the Board recently stated that a union may violate its duty to bargain under section 8(b)(3) by refusing to sign a CBA because of the lack of a proper membership ratification, where a union leader mistakenly tells the company that the CBA was properly approved but was later overruled by intraunion authorities.

Third, contracts are voted up or down in their entirety so members do not have a chance to vote on the grievance-arbitration procedures themselves, nor are they able to vote those procedures down because the procedures might be construed to be a substitute for the right to file a ULP charge. Indeed, as I will discuss in more detail shortly, it is the rare agreement that contains an express waiver of the right to seek relief from the Board.

Related to the proposition that Board deferral policy furthers private settlements is the argument, most closely associated with an article by Circuit Judge Harry Edwards, that deferral should be accepted on the theory that the union implicitly waives the statutory rights of the employees it represents by agreeing to an arbitration clause. Judge Edwards has advanced that argument to support the propriety of deferral of unilateral change claims under section 8(a)(5). He also argues, on a similar rationale, that deferral may be defended as it is applied to discrimination and interference claims. But, at least as applied to individual

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353. *E.g.*, Kozera v. Westchester-Fairfield Chapter of Nat'l Elec. Contractors Ass'n, Inc., 909 F.2d 48, 53-54 (2d Cir. 1990) (upholding a CBA addendum that was never approved by the membership).

354. Teamsters Local 251 (McLaughlin & Moran), 299 N.L.R.B. No. 7, slip op. at 8-10, 134 L.R.R.M. (BNA) 1217, 1218-19 (July 13, 1990); *see also* Kozera, 909 F.2d at 54; Levy, *Membership Rights*, supra note 11, at 260-63.


356. Edwards, *supra* note 332, at 28; *see also* Hammontree v. NLRB, 925 F.2d 1486, 1502-04 (D.C. Cir. 1991) (Edwards, J. concurring). This argument, like the deferral-as-negotiation argument, also might be said to go too far, in that, if employees' statutory rights have been waived, there is no need to review the arbitral determination for repugnance to the Act. One might avoid this difficulty by supposing that the right to have the Board review arbitration decisions for repugnance is not waived, but the very squirming that is required to address this problem shows how very hypothetical is the "waiver" on which the argument is based, and thus how far removed it is from the "clear and unmistakable" waiver that is required under settled Board law.


358. *Id.* at 28-30. Professor Harper has argued that waiver doctrine provides the limiting principle for the Board's authority to defer, *i.e.*, that the Board may not defer in any case where the asserted ULP cannot be waived by the union in collective bargaining, whereas it may (but need not) defer in cases where the asserted union
rights claims, Judge Edwards's argument founders on the rule that a waiver of employee rights may not be found unless it is "established clearly and unmistakably."\textsuperscript{359}

There are two kinds of rights whose waiver might support the doctrine of deferral. First, the agreement might be said to waive the parties' right to have the Board consider ULP charges. Yet there are few cases in which the parties to a CBA intend the grievance procedure to supplant the Board's role in the adjudication of ULP claims. The parties may well bargain for arbitral construction and application of their contract without necessarily bargaining for arbitral construction or application of the NLRA. Indeed, applying this analysis to particular cases would require inspecting the agreement and the bargaining history of the contract. It seems unlikely that one could find a "clear and unmistakable" agreement by the union to foreswear resorting to the Board during the life of the contract. Moreover, the Board traditionally has been quite wary of employer interference with the rights of employees or unions seeking the Board's protection,\textsuperscript{360} and employer insistence on such a waiver would likely be treated as bad faith bargaining.\textsuperscript{361} Accordingly, a hypothetical waiver of the right to resort to the Board hardly seems useful as a basis for a doctrine that the Board applies on such a regular basis as deferral to arbitration.

The other possible basis for finding a waiver that supports deferral is that the union may have waived substantive employee rights, such as the right not to be subjected to discrimination or interference, that are at issue in the ULP proceedings in which deferral is invoked. The principal difficulty here is that CBAs normally do not waive employees' statutory rights other than the right to strike; their principal

\textsuperscript{359} Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708-09 (1983).

\textsuperscript{360} Thus, employees may not be disciplined for filing Board charges, NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418, 423-25, 428 (1968), and charges implicating denial of access to the Board have always been exempted from deferral. See supra note 160 and accompanying text.

\textsuperscript{361} See Consumers Asphalt & Concrete Co., 295 N.L.R.B. No. 77, slip op. at 7-10, 132 L.R.R.M. (BNA) 1392, 1395-96 (June 15, 1989) (stating that an employer may not condition agreement to a CBA on union willingness to drop ULP charges).
function is to expand employee rights beyond those which they would have without a contract.\textsuperscript{362} Moreover, the Board has specifically rejected the proposition that, simply by agreeing to arbitrate a discharge, the union waives the underlying rights that are to be adjudicated in the discharge.\textsuperscript{363} Again, although such a waiver is theoretically possible, it seems to be an exceptionally tenuous basis on which to build a deferral doctrine that the Board hopes to be able to invoke whenever a ULP charge is filed during the term of a CBA.

Judge Edwards proposes another way in which waiver analysis may be applied to support the deferral doctrine. He suggests that the Board should routinely conclude that because an arbitrator’s decision “becomes a part of the written contract,” that contract, as newly construed, constitutes a waiver of any applicable statutory rights.\textsuperscript{364} Judge Edwards reaches this conclusion by relying upon footnote thirteen of Metropolitan Edison Co. v. NLRB,\textsuperscript{365} where the Court stated that an arbitral construction of the contract “may be relevant to establishing waiver of [a] statutory right when the arbitrator has stated that the bargaining agreement itself clearly and unmistakably imposes an explicit duty on union officials.”\textsuperscript{366} From this proposition Judge Edwards reasons that it may be enough to find a waiver if the arbitrator gives an “explicit construction of the contract,” subject only to extremely deferential review under the Steelworkers Trilogy\textsuperscript{367} standard to decide whether the decision draws its essence from the agreement.\textsuperscript{368}

The error here is that mere interpretation of the contract, whether by an arbitrator, by the Board, or by a court, does not establish that a waiver was “clear and unmistakable.” Judge Edwards’s analysis reduces the clear and unmistakable waiver standard to a mere formality and substitutes for it the

\textsuperscript{362} See Sharpe, supra note 122, at 629.
\textsuperscript{363} See Barton Brands, 298 N.L.R.B. No. 139, slip op. at 13, 135 L.R.R.M. (BNA) 1022, 1026 (June 29, 1990); see also Northside Elec. Co., 151 N.L.R.B. 34, 35 n.1 (1965) (distinguishing deferral from the parties’ efforts to bargain away statutory rights).
\textsuperscript{364} Edwards, supra note 332, at 38.
\textsuperscript{365} Id. (citing Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 709 n.13 (1983)).
\textsuperscript{366} 460 U.S. at 709 n.13.
\textsuperscript{368} Edwards, supra note 332, at 38-39.
Steelworkers Trilogy standard which almost always requires that the arbitrator be upheld. After all, (at least theoretically) arbitrators always purport to construe the contract, and thus could always be said to have found a contractual waiver. This would have made it unnecessary for the Court in Metropolitan Edison to describe a limited set of circumstances in which arbitral decisions "may be relevant" to establish a waiver; instead, arbitral decisions would always effect a waiver. Therefore, the waiver basis for deferral is inconsistent with governing precedent and should not be adopted.\textsuperscript{369}

Another argument in favor of deferral that may, at least in some contexts, be more forceful than the "bargaining" and "waiver" theories, is one that concedes that arbitration may be substituted for the Board's own enforcement processes only insofar as the quality of the adjudication that the arbitration provides is comparable to the quality that the charging party would receive in a Board proceeding. Professor Sharpe argues that the quality of arbitration has improved sufficiently such that, coupled with careful postarbitral review under the Spielberg standards as augmented in Raytheon, some arbitrations may fairly be treated as surrogates for litigation before the Board.\textsuperscript{370}

Professor Sharpe asserts that most arbitrators have law degrees\textsuperscript{371} and that counsel also often represent the grievants in many arbitrations.\textsuperscript{372} Moreover, the proceedings are conducted with increasing formality that "approaches the formality of a Board proceeding."\textsuperscript{373} for example, both include well-defined burdens of proof, subpoenas that are enforceable by the courts or through Board proceedings under
section 8(a)(5), and the like.\textsuperscript{374} Because these proceedings are coupled with Board review to ensure that the statutory and contractual issues are "properly coextensive, the arbitrator need concentrate only on resolving the contractual issues fairly. This is precisely the extent of the arbitrator's authority and responsibility under the contract."\textsuperscript{375}

One might take that argument a step further by pointing out that even under \textit{Barrentine} and \textit{Gardner-Denver}, courts are not precluded from giving weight to an arbitral award in deciding a subsequent statutory proceeding. Rather, the weight accorded to arbitral awards depends on such factors as the degree to which the statutory and contractual issues are in conformity, procedural fairness in the arbitral forum, adequacy of the record on the statutory issue, and the special competence of the particular arbitrator.\textsuperscript{376} Indeed, the Court went so far as to say that "[w]here an arbitral determination gives full consideration to an employee's [statutory] rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record."\textsuperscript{377} Why could one not argue that, if strictly applied to ensure that the arbitrator \textit{did} truly apply contractual standards that are coextensive with the requirements of the statute, the Board's deferral doctrine amounts to a glorified version of giving "great weight" in appropriate circumstances to an arbitral determination? Additionally, one might contend that giving such weight is appropriate where, borrowing a distinction from the pre-\textit{Spielberg} decision in

\textsuperscript{374} Id.
\textsuperscript{375} Id. at 626-27. Sharpe also argues that "the community of arbitrators is aware of the special statutory implications of arbitral decisions," implying that arbitrators can be expected to apply the standards of Board law. \textit{Id.} at 626. This argument is less forceful, both because cases continue to occur in which arbitrators choose not to apply Board doctrine, \textit{e.g.}, Darr v. NLRB, 801 F.2d 1404 (D.C. Cir. 1986), and because an arbitrator who goes beyond the terms of the contract to apply Board law will have his award vacated because it does not draw its essence from the contract. Indeed, in Roadmaster Corp. v. Production & Maintenance Employees' Local 504, 851 F.2d 886 (7th Cir. 1988), the court overturned an award that had been based on the NLRA, despite the arbitrator's reference to \textit{Collyer} as condoning arbitral consideration of the statute in making decisions. \textit{Id.} at 889. The court noted that \textit{Collyer} was decided before \textit{Gardner-Denver}, and concluded: "Resolution of NLRA disputes must be left to the NLRB and not to an arbitrator." \textit{Id.} at 889 & n.3.
\textsuperscript{377} Id. (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.21 (1974)).
Wertheimer Stores, the employee voluntarily submits the statutory claim to arbitration rather than insisting on a hearing before the Board. This assertion is the most troubling of all the arguments that are advanced to support the doctrine of deferral to arbitration. Nevertheless, though there may well be many arbitral determinations that are worthy of substantial respect in deciding ULP cases, many others are not. Furthermore, as discussed above, there is substantial reason to doubt that the Board’s post-Olin decisions do, in fact, apply sufficient scrutiny to arbitral proceedings and awards to ensure that the ULP issues receive sufficient consideration, according to standards comparable to those that the Board would apply, and to warrant giving the arbitral decisions “great weight” that is tantamount to a collateral estoppel effect. There is also reason to question whether, by adding to the formality of the arbitration process to ensure that arbitral determinations gain respect in subsequent Board or court proceedings, the parties are not depriving themselves of one of the greatest advantages of arbitration: its informality and lack of expense. But, if the Board continues the trend that some recent decisions suggest and closely scrutinizes arbitrations to be certain that the contractual and statutory issues are indeed the same, that the union did in fact forcefully argue the surrogate issue and obtain and present the relevant facts, and that the arbitrator did in fact apply Board standards, it may be able to return to a defensible deferral doctrine. The Board

379. Id. at 1435. Such a partial or contingent election of remedies must be distinguished from the involuntary character of an employee’s submission to arbitration only because she is compelled to do so by the Board’s prearbitral deferral doctrine. Nor should an employee be considered to have elected to allow an arbitrator to resolve ULP claims simply because, at the urging of a union steward and without careful consideration or advice from an independent counsel or a Board agent, she files a grievance within the two- or five-day limitations period allowed by most CBAs, and then is swept along to arbitration while Board proceedings are stayed pursuant to the rule set forth in Dubo Mfg. Corp., 142 N.L.R.B. 431, 433 (1963), supplemented, 148 N.L.R.B. 1114 (1964), enforced on other grounds, 353 F.2d 157 (6th Cir. 1965).
380. See supra Part II.D; see also Kremer v. Chemical Constr. Corp., 456 U.S. 461, 480-85 (1982) (holding that due process permits res judicata and collateral estoppel to be applied only to issues and claims that the claimant has previously had a “full and fair opportunity to litigate”).
381. See Sharpe, supra note 122, at 627 (stating that informality is being lost); FEDERAL MEDIATION AND CONCILIATION SERV., supra note 294, at 21 (showing the increased cost of arbitrators’ services).
IV. APPLICATION OF DEFERRAL DOCTRINE IN THE CONTEXT OF THE TEAMSTER JOINT COMMITTEE

Having teased out the strongest arguments in support of the Board's deferral policy, and having sought to separate the valid ones from those that do not stand up to examination, I now consider whether these valid arguments can support deferral to the Teamster joint committees. To accomplish this, first I examine the actual operation of the Teamster joint committee and compare that procedure with normal union grievance and arbitration procedure. Then I address the question of whether the rationale for deferral can properly be applied to the joint committees in light of the crucial differences between the two means of resolving contract disputes. In fact, as this analysis reveals, a joint committee decision rejecting an employee's claim is no more, and no less, than a decision by a Teamster member's own leadership to abandon his grievance at an early stage in the grievance process, short of the type of arbitration contemplated by the deferral doctrine. Moreover, even to the extent that such committee decisions are regarded as adjudications, the quality of the adjudicatory process is so low that deferral is not warranted.

382. As I have indicated, however, I have grave doubts about whether even these arguments can justify deferral in the individual rights case where the charging party's claim does not depend on a construction of the CBA.

383. At this juncture I would like to acknowledge the pioneering scholarship of Professor Clyde Summers whose article on the subject of Teamster joint committees, "Teamster Joint Grievance Committees: Grievance Disposal Without Adjudication," breathed new life into the legal attack on the equivalence between joint committees and more traditional forms of arbitration that many courts had been content to presume.

A. Operation of the Teamster Joint Committee Contrasted with the Regular Union Grievance and Arbitration Procedure

In most unions, a worker who believes that her rights under the CBA have been violated consults a union representative who advises her whether she has a viable claim under the agreement. In some contracts, the very filing of a grievance form requires the approval of a union representative, such as a steward or a business agent; in others, the member may file a grievance on her own. In either case, the union then assumes responsibility for discussing the grievance with the employer who may grant or deny the relief requested. If the grievance is denied, then a union representative with greater authority decides whether to take up the grievance with higher management representatives who again have the capability of denying, granting, or reaching a compromise on the grievance. The grievance proceeds through this process until, finally, the grievance is discussed at the highest levels available under the grievance procedure (for example, between the local union president or grievance committee and the plant manager, or, in a multiplant company with a national contract, between the representatives of an international union and the corporation's national labor relations staff).

At each "step" of the grievance procedure, both the union and the company have the power under the contract to concur in the position of the other. The company could decide to grant the grievance, the union could decide to abandon the grievance, or the two sides could settle the grievance through compromise. If the parties reach an agreement, the decision becomes final and binding under the contract and cannot be

385. H. Erickson, The Steward's Role in the Union 30-31 (1971). Stewards often will spot violations themselves and will encourage members to file grievances. Id. at 29-30; R. Schwartz, The Legal Rights of Union Stewards 38 (1988).
387. Id. at 120.
389. See F. Elkouri & E. Elkouri, supra note 25, at 113; Feller, supra note 388, at 752-53.
390. F. Elkouri & E. Elkouri, supra note 25, at 120-23.
set aside unless it is determined in a "hybrid" DFR action\textsuperscript{391} that the union has breached its DFR by declining to seek any relief, by accepting less than complete relief, or by not taking the grievance to the next higher step (or to arbitration).\textsuperscript{392} But if the two sides find themselves in disagreement at any step, and neither side is willing to yield, the grievance proceeds to the next step of the procedure, until ultimately the union invokes impartial arbitration.\textsuperscript{393}

The same sort of process takes place under the Teamsters' national contracts, but the succession of meetings to consider grievances and to decide whether and how to settle them are described by the parties as "joint grievance committees."\textsuperscript{394} So, for example, under the Carolina Supplement to the National Master Freight Agreement, the first meeting will be between representatives of the local union and the employer at the local level.\textsuperscript{395} If these representatives cannot settle the grievance, because neither side is willing to compromise or abandon its position, the grievance is next considered by a joint committee for the states of North and South Carolina.\textsuperscript{396} This committee consists of an equal number of union and employer representatives,\textsuperscript{397} who may "settle" a grievance by majority vote.\textsuperscript{398} Assuming the parties do not settle

\begin{itemize}
\item \textsuperscript{391} The "hybrid" case consists of two closely related lawsuits: one against the union for breaching its DFR, and one against the employer for violating the CBA. DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 164-65 (1983). In DelCostello, the Court did not reach the question of whether there was a violation of the CBA unless there was a breach of the DFR. Some people assert that there can be no recovery against the union absent a violation of the CBA. Id. at 165. But that statement is too strong, because the union may be sued under the DFR even if no contract breach is at issue such as when the union is alleged to have unfairly negotiated a contract, or denied hiring hall referrals. See, e.g., Breininger v. Sheet Metal Workers, 493 U.S. 67, 75-84 (1989). Some parties also argue that, even in a hybrid case, a union may be held liable for damages notwithstanding the ultimate conclusion that the employer did not violate the CBA. See White v. Anchor Motor Freight, Inc., 899 F.2d 555, 563 (6th Cir. 1990) (Wellford, J., concurring in part and dissenting in part).
\item \textsuperscript{392} See DelCostello, 462 U.S. at 166 n.16.
\item \textsuperscript{393} E.g., Vaca v. Sipes, 386 U.S. 171, 175 & n.3 (1967).
\item \textsuperscript{394} See Summers, supra note 383, at 133-35.
\item \textsuperscript{395} CAROLINA FREIGHT COUNCIL OVER-THE-ROAD SUPPLEMENTAL AGREEMENT (Apr. 1, 1985-Mar. 31, 1988) art. 44, § 1 [hereinafter CAROLINA SUPPLEMENT]. Other supplements to the freight agreement have different article numbers, but their content of comparable clauses is virtually the same nationwide. See, e.g., SOUTHERN SUPPLEMENT, supra note 25, art. 43, § 2.
\item \textsuperscript{396} CAROLINA SUPPLEMENT, supra note 395, art. 43, § 1.
\item \textsuperscript{397} Id.
\item \textsuperscript{398} Id. art. 44, § 1.
\end{itemize}
at this level, the grievance may then proceed to the Eastern Conference Joint Area Committee,\(^3\) and then to the National Grievance Committee.\(^4\) If the joint committees deadlock all the way to the top of the grievance procedure, the parties are entitled to use economic self-help (i.e., a strike or lockout) to win the grievance.\(^5\)

Each committee consists of an equal number of union and employer representatives, with no neutrals or tie breakers.\(^6\) A majority vote is required in order to “decide” a grievance. Therefore, whenever an employee’s grievance is “granted” by a joint committee, one or more of the company representatives must have voted to sustain the union’s position; similarly, when a committee “denies” a grievance, one or more union representatives voted to sustain the employer conduct which precipitated the grievance. As Professor David Feller has observed, “A decision by a joint committee that a grievance lacks merit . . . is thus simply an agreement by the union that management did not violate the agreement.”\(^7\)

The joint committee procedure also differs from the traditional union procedure in that, under some Teamster agreements such as the National Master Freight Agreement, there is no mandatory arbitration at the end of the process. Rather, if there is a deadlock at the National Grievance Committee, each side is entitled to economic self-help, or the parties may refer the grievance to an impartial arbitrator.\(^8\) But arbitration, too, must be done by majority vote\(^9\) and thus cannot be accomplished without the consent of both sides.

Joint committees under other Teamster contracts have a similar pattern of pyramiding joint committees to which

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399. Id.
400. Id. art. 43, § 7.
401. See Miller, Teamster Joint Committees: The Legal Equivalent of Arbitration, 37 ANN. NAT’L ACAD. OF ARB. PROC., supra note 383, at 121.
402. See generally NMFA, supra note 25, art. 8; CAROLINA SUPPLEMENT, supra note 395, arts. 43, 44.
403. Feller, supra note 388, at 837; see also Humphrey v. Moore, 375 U.S. 335, 352 (1964) (Goldberg, J., concurring) (characterizing the decision of the Teamster joint committee as tantamount to a “mutually acceptable grievance settlement between an employer and a union”). Such a decision does not, of course, necessarily mean that the employer has not violated the Act, nor does it constitute a waiver of statutory rights that may be analogous to the contractual rights that are at issue in the grievance.
404. NMFA, supra note 25, art. 8, § 1.
405. Id.
grievances may be referred in the event of deadlock, culminating in the right to use economic self-help, with one very significant exception. Under the United Parcel Service agreement, which covers the second largest Teamster bargaining unit, the parties do not have the option of economic recourse once the grievance procedure has been exhausted; rather, either party may invoke binding arbitration. Thus, the similarities between the roles of the multiple steps of other unions' grievance procedures and the Teamster's joint committee procedure as precursors to binding arbitration are shown most clearly in the case of the UPS agreement.

There is another reason why the assumption that grievance committees are simply another form of arbitration is seriously misplaced. The joint committee system was originally formed by Farrell Dobbs, an early Teamster leader in the trucking industry, because he distrusted arbitrators based on his view that their interests would inevitably be aligned with capital and against the working class. Rather than giving the right to decide the meaning of contracts (and thus, potentially, to eviscerate their protections) to arbitrators, the union preferred to be able to wield the strike threat to maintain the contractual benefits that it had won at the bargaining table. Jimmy Hoffa expanded the joint committee system to the entire trucking industry, although more for manipulative than ideological reasons. As the Professors James showed in their detailed study of Hoffa's leadership, he used the joint committees not only to keep contractual application out of the hands of arbitrators, but also to maximize the leverage that he could bring to bear on operators, local union officials, or insurgents who contested his control. It is not surprising,

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406. See Miller, supra note 401, at 118 (discussing many different joint committee arrangements under different Teamster agreements); Azoff, Joint Committees as an Alternative Form of Arbitration Under the NLRA, 47 Tul. L. Rev. 325, 326-29 (1973).
407. See Barr v. United Parcel Serv., Inc., 868 F.2d 36, 39 (2d Cir. 1989) (noting that arbitration is the final step in the UPS grievance process); Thomas v. United Parcel Serv., Inc., 890 F.2d 909, 920 (7th Cir. 1989) (discussing how, if a vote by the UPS committee were split along partisan lines, the case would go to arbitration).
408. See R. JAMES & E. JAMES, HOFFA AND THE TEAMSTERS 168 (1965); Summers, supra note 383, at 130.
409. R. JAMES & E. JAMES, supra note 408, at 167-68.
410. Id. at 171-174; see id. at 31-33, 135, 167-70, 175-85, 202. Control over the grievance procedure translates into control over the leaders of subordinate bodies for the simple reason that a local leader would recognize that he cannot serve his constituents by winning grievances (and thus cannot expect to be reelected) unless he has the support of the members of the Teamster hierarchy who appoint the union
in light of the James' candid reports of their observations, that they are the last outsiders who have been permitted to sit in on joint committee hearings. 411

Another major difference between grievance procedures that conclude with arbitration and the joint committee process is that Teamster officials do not exercise the screening function that officials of other unions do in deciding which cases should be taken to the joint committee. 412 If every grievance culminated in a hearing before an arbitrator, the parties would be swamped in arbitrations. Thus, in Vaca v. Sipes, 413 the Court indicated that one of the reasons why it would impose liability on union officials only if they arbitrarily failed to take a case or processed it in a perfunctory manner, was that a stricter standard would encourage unions to arbitrate meritless grievances. 414

In the Teamsters union, however, this sifting does not occur among union officials before arbitration, but rather during the deliberations of the joint committees in which union officials participate along with their coequals representing the employers. Although elected local union officials may attempt to

representatives who sit on the grievance committees. See Professional Drivers Council, Inc., Teamster Democracy and Financial Responsibility 27 n.80 (1976); Summers, supra note 383, at 142-43. For evidence that Teamster employers recognize and welcome the significance of the joint committees for intraunion politics, see infra note 451.

411. Elliot Azoff and Gerry Miller gathered their (favorable) impressions of the joint committee from their work as Teamster lawyers. Professor Summers, by contrast, was forced to obtain material for his critical study by interviewing unionists and lawyers and reviewing court decisions and whatever documents his sources had obtained in discovery or otherwise. Summers, supra note 383, at 133.

Insiders, in turn, often fear retaliation from the powers that be in the union if they come forward with descriptions of misconduct in the joint committee process. For example, in Zimmers v. Preston Trucking Co., 90 Cv. 70091-DT (E.D. Mich.), the lawyer for a dissident union candidate was able to secure an affidavit from a local union official who served as a sergeant-at-arms for a particular joint committee hearing. In the affidavit, the official recounted how, both at a union "screening" session before the hearing, see infra notes 427-28 and accompanying text, and during the executive session following the hearing, an officer of the grievant's local, who was not assigned to hear the case, advocated the discharge of the grievant and was reported to have threatened the union members of the panel. Affidavit of Gary E. Proctor at 1-2. The affiant averred that he was afraid of retaliation if he testified to what he had seen. Id. This case was settled based on this explosive affidavit, but the affiant's union hall was burned down shortly thereafter. See Affidavit of Barbara Harvey at 7, United States v. Teamsters (S.D.N.Y.) (No. 88 Civ-4486) (Sept. 30, 1991).

412. See Azoff, supra note 406, at 365.
413. 386 U.S. 171 (1967).
414. Id. at 191-92.
persuade a grievant to accept a compromise, absent the consent of the grievant, practically every grievance is submitted to a joint committee. Then, grievances with little or no merit are compromised or abandoned by the union officials who sit on the joint committees,\textsuperscript{415} some meritorious grievances, particularly those filed by union insurgents, also may be summarily dropped.\textsuperscript{416} And the harder and more important cases are passed up the union hierarchy to the regional and national committees.

Joint committees are able to do the sifting that most other unions do before arbitration because the committees use very different procedures from those used in true arbitration. In arbitration, the two sides normally present witnesses\textsuperscript{417} and documents,\textsuperscript{418} and cross-examine each other’s witnesses.\textsuperscript{419} According to the most recent data from the Federal Mediation and Conciliation Service, the average labor arbitration hearing lasts one day, and on average the arbitrator spends another two days studying the briefs and preparing a decision.\textsuperscript{420} By contrast, a panel of the joint committee typically hears between fifteen and thirty grievances in a single day,\textsuperscript{421} with each grievance consisting of brief oral presentations by local union and company officials, along with the submission of some documents and perhaps written statements by witnesses, but usually there is no “testimony.”\textsuperscript{422} The joint committee decides the cases in executive session on the day that they are heard, and immediate rulings are issued without any explanation beyond “denied,” “granted,” or “deadlocked.”\textsuperscript{423} On average, a panel spends fifteen minutes hearing from the two sides and five minutes deciding the grievance.\textsuperscript{424}

Yet another difference between arbitration and the joint committee process is displayed in their attitudes toward ex

\textsuperscript{415} Cf. Miller, supra note 401, at 124-25 & n.13 (defending the joint committee process by analogizing the decision process of staff member of postal union to drop grievance to the sifting process that occurs within joint committees).
\textsuperscript{416} See Summers, supra note 383, at 142.
\textsuperscript{417} O. Fairweather, supra note 195, at 151.
\textsuperscript{418} Id. at 224-26.
\textsuperscript{419} Id. at 159 (asserting that cross-examination is “essential to a fair hearing”).
\textsuperscript{420} Federal Mediation & Conciliation Serv., supra note 294, at 21.
\textsuperscript{421} Summers, supra note 383, at 134.
\textsuperscript{422} Miller, supra note 401, at 119.
\textsuperscript{423} Summers, supra note 383, at 134.
\textsuperscript{424} Id.; see also Jeffers v. Convoy Co., 636 F. Supp. 1337, 1340 (D. Minn. 1986) (showing that the Wisconsin Joint Auto Transport Committee heard 11 cases in a single day).
parte communications. The rules of arbitration strictly forbid ex parte contacts between the parties and the arbitrators, but such contacts between interested union and employer officials and their counterparts on the joint committees are not only proper, but the "expected norm." Indeed, before the joint committees meet, the two sides commonly conduct their own screening sessions among both the advocates and the joint committee members on that side. Each side uses such sessions to discuss the cases that are about to be heard, determine which cases are the most important, and consider the best way to present the important cases to persuade the other side to concur in a particular settlement of those grievances.

Arbitration and the joint committee system differ in still another way. Although an arbitrator adjudicates each individual case on its own merits, the joint committees resolve grievances by the job lot and necessarily become involved in disposing of grievances that are deemed less important to


426. See, e.g., Azoff, supra note 406, at 360-61. In one DFR case, Pendleton v. UPS, 113 L.R.R.M. (BNA) 2680 (W.D. Tenn. 1981), aff'd without opinion, 709 F.2d 1506 (6th Cir.), cert. denied, 464 U.S. 817 (1983), the employee plaintiff introduced evidence of this practice and argued that the breach of the DFR occurred when his union representatives failed to take advantage of the opportunity to undertake ex parte communications. Id. at 2682. The court rejected this argument, reasoning that a union scarcely has the duty to act improperly on behalf of its members. Id. Although ex parte communications might seem improper if joint committees are seen as a form of adjudication, they are not improper if the committees are viewed, more accurately, as a political process. This case is a prime example of the courts' effort to squeeze the joint committees into a pigeonhole where they do not belong, instead of taking a step back, considering them as political bodies, and then inquiring whether standard legal doctrines that govern other unions' grievance procedures may properly be applied in this context.


428. Summers, supra note 383, at 138-39. Indeed, the local union officials who act as "advocates" in one case will sit as members of the joint committee in other cases during the same two or three day session of the joint committee, thus heightening the political atmosphere of the process and making the horsetrading of grievances inevitable. Id. at 141. See also Affidavit of Martin W. Linskey ¶ 12, quoted in Olsen v. United Parcel Serv., 892 F.2d 1290, 1297 (7th Cir. 1990) ("Everything is predetermined between the Union and management."); Deposition of Chuck Mack at 11-12, Voloshen v. McLean Trucking Co., No. C83-0761 (N.D. Cal.) (May 21, 1984) (discussing how prescreening meetings are used to hammer out the union's position on discharge grievances).
obtain concessions on the more important grievances. Both sides know that, if they rigidly refuse to vote for the other side on every grievance, every case would be deadlocked and there would be a dramatic increase in the potential for strikes. Thus, the parties have a strong incentive to engage in the trading of grievances. Elliot Azoff, a Teamster lawyer who defends the joint committee system as a means of resolving labor disputes, argues that “the joint committee is structured so as to insure maximization and exploitation of opportunities for wheeling and dealing.” Azoff believes that, although these problems occur with all union processes, “[t]he difficulties . . . are accentuated in the committee system.”

Azoff nonetheless praises the committees for their ability, in effect, to amend the CBA to carry out the wishes of the parties in resolving a particular collective-bargaining dispute, regardless of what the parties may have intended when the contract was originally negotiated: “While an arbitrator would be bound to apply the existing contract, no similar limitation would restrict the actions of the joint committee that could modify, amend or supplement the original agreement . . . .” Teamster contracts commonly do have a clause forbidding the modification or alteration of the CBA in the course of resolving a grievance. However, they apply that restriction only to the decisions of impartial arbitrators when they are called in the event of a deadlock; the limitation does not apply to the decisions of the joint committees. Justice Goldberg recognized this difference in his concurring opinion in Humphrey v. Moore, where he distinguished the powers

429. Summers, supra note 383, at 140-41. In his defense of the joint committee process, Teamster lawyer Miller relies primarily on the absence of any “reported case” sustaining this contention, Miller, supra note 401, at 124, ignoring the fact that the inability of outsiders to gain access to the grievance committees’ deliberations makes such proofs difficult, to say the least, in any fair representation case. The admission by Elliot Azoff, another defender of the process, that horsetrading is one of the purposes of the joint committee, see Azoff, supra note 406, at 328-29, coupled with the observations of neutral parties, the Professors James, see R. JAMES & E. JAMES, supra note 408, at 182, should be a sufficient basis for predicking a legal standard to govern the treatment of joint committee decisions on the proposition that grievance committees trade grievances.

430. Azoff, supra note 406, at 328-29.

431. Id. at 330.

432. Id. at 348; see also United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

433. E.g., CAROLINA SUPPLEMENT, supra note 395, art. 44, § 1.

434. 375 U.S. 335 (1964).
of an arbitrator under most labor contracts from the power of the union and the employer, operating through the mechanism of the joint committee, to amend the contract if it suits their needs.\textsuperscript{435}

To recognize the difference between joint committees and arbitration is not to deny Teamster employers the ability to agree with their unions that joint committees should be the mechanism for achieving final and binding resolution adjustment of grievance disputes between them, just as the resolution of a grievance through the grievance and arbitration procedure is final and binding.\textsuperscript{436} But it does allow us to proceed to the final stage of our argument here: whether the joint committee system, given its peculiarities, is well suited to meet the objectives that the Board's deferral policy is designed to serve.

\textbf{B. Deferral Doctrine Should Not Be Applied to Teamster Joint Committees}

The first and most fundamental point is that a decision by a Teamster joint committee to drop a grievance is comparable to a union's decision to drop a grievance short of arbitration. The Board's \textit{Spielberg} doctrine provides for deferral to arbitration, and the \textit{Collyer} doctrine provides for deferral to grievance procedures that culminate in an arbitration award that can satisfy the \textit{Spielberg} criteria (as modified in \textit{Olin}). On the

\textsuperscript{435} Id. at 353 (Goldberg, J., concurring).
\textsuperscript{436} \textit{See} Humphrey v. Moore, 375 U.S. 335, 351 (1964) (binding on employees); General Drivers, Local Union No. 89 v. Riss & Co., Inc., 372 U.S. 517, 519 (1963) (binding on union and employer). Nor does recognition of the difference necessarily bear on the standard that should be applied to decide whether there has been a breach of the DFR. In that regard, a joint committee's decision to drop or compromise a grievance is as "final and binding" as the results of another union's grievance procedure. It should be recognized, however, that a joint committee decision to deny a grievance necessarily represents the union's decision to drop that grievance, similar to another union's decision not to arbitrate. Dropping or compromising grievances is not inherently unlawful; compromise is, after all, the essence of negotiation. But I would argue that the decision of the union, acting through the joint committee, to drop the grievance should be examined through the prism of the DFR, rather than by focusing exclusively on the performance of the union "advocate" before the grievance committee. Otherwise, the ability of the union to mask its rejection of the grievance behind a joint committee, whose reasons are never given, effectively places the Court's "bulwark to prevent arbitrary union conduct," \textit{Vaca} v. \textit{Sipes}, 386 U.S. 171, 182 (1967), out of the reach of most Teamsters.
other hand, the Board has not held that it is appropriate to defer to a union's decision to drop a grievance,\textsuperscript{437} or a union's decision to settle a grievance short of arbitration (at least where the employee has objected to the settlement).\textsuperscript{438} In light of the similarity between a Teamster joint committee decision to reject a grievance and a decision by other unions to drop a grievance short of arbitration, the Board has every reason to refuse to defer to the joint committee.

The principal argument against this contention seems to be that the parties to contracts in the trucking industry have agreed on the joint committee system as a way of reaching final and binding decisions about grievances. Therefore, the Board should be as bound to respect the outcome of that decision making method as it is bound to respect the outcome of arbitration.\textsuperscript{439} This argument misses the point. The parties to most other CBAs have agreed that, when the union drops or settles a grievance short of arbitration, for any of a number of reasons, that resolution is final and binding under the agreement.\textsuperscript{440} Yet the Board has refused to defer to that prearbitral resolution by treating it as tantamount to a decision on the merits of the ULP claim.\textsuperscript{441} In other words, the argument based on the parties' choice of grievance procedures would apply equally to Teamster committees and most other unions' decisions. Thus, that argument goes too far.

Perhaps in a further rebuttal, one could argue that all I have really done is offer a persuasive argument for the Board to reconsider its refusal to defer to a union's decision to withdraw a grievance. But the alternative of extending deferral doctrine generally, rather than paring it back in the

\textsuperscript{437} See supra notes 164-65 and accompanying text.
\textsuperscript{438} See supra note 166 and accompanying text. But one should note the case of United States Postal Serv., 300 N.L.R.B. No. 23, 135 L.R.R.M. (BNA) 1209 (Sept. 28, 1990), where the Board applied \textit{Olin} standards to a union's express settlement of a grievance that the Board held amounted to a waiver of the employee's underlying statutory rights. Slip op. at 7, 135 L.R.R.M. (BNA) at 1211. If that decision stands, and is held to apply even where the union did not expressly extend the waiver to statutory rights, however, my argument here would be severely undercut in the case of joint committee decisions that awarded partial relief to the grievant. Because \textit{Postal Service} does not apply where the union simply withdraws the grievance, my argument here would continue to be fully applicable to the far more common instance in which the joint committee simply denies a grievance.
\textsuperscript{439} This is the argument that the Board found persuasive in Denver-Chicago Trucking Co., 132 N.L.R.B. 1416, 1421 (1961).
\textsuperscript{441} See supra notes 164-66 and accompanying text.
joint committee context, seems unattractive given the other objectives of deferral. When the Board defers to an arbitrator's resolution of a contractual grievance, it is assured that a neutral party, after hearing testimony and considering the arguments of the parties, has reached a reasoned decision about a contractual issue and has based the result solely on an analysis of the contractual issue. In theory, by comparing the contractual issue with the statutory issue, the Board can then ascertain whether the hearing before the neutral party is a rough substitute for the hearing that would be obtained before the Board. Admittedly, the equivalence will not be exact; presumably the Board hearing would be more thorough and more legalistic, and the Board agent, an experienced trial attorney, would no doubt provide more professional representation than a union business agent. But the similarities will be sufficient to permit the Board to presume that the arbitral determination should be accepted as a fair resolution of the Board charge, unless something suggests that the hearing was particularly unfair or that the reasons given by the arbitrator for ruling against the grievance are inconsistent with Board law.

To be sure, particular arbitration proceedings may lack one or another characteristic of the model I have just described, and one could argue that the Board should properly defer to those arbitrations notwithstanding the absence of that characteristic. But the joint committee, like a prearbitral step of the grievance procedure, lacks so many of the attributes of an arbitral hearing that the Board would not be warranted in applying a comparable presumption of regularity to its outcomes.

Three important differences between joint committees and arbitral hearings justify differential treatment. First, joint committees lack the characteristics of a trial. They lack documents, testimony, and cross-examination.442 The committee also takes and decides cases very quickly, spending a few minutes on each case and deciding up to thirty or more in a day.443 Such circumstances hardly ensure that the disputed facts have been fairly determined.

Second, the joint committee does not explain the reasons underlying its decisions.444 When an arbitrator rules, the Board can look to the reasons in his decision to determine

442. See supra notes 421-23 and accompanying text.
443. See supra notes 421, 424 and accompanying text.
444. See supra note 423 and accompanying text.
whether the decision may be at odds with the principles of the Act. The Board simply cannot make that determination with respect to a joint committee decision, especially because under Olin, the burden rests with the General Counsel to show defects in the award, and because the doctrine of arbitral immunity may forbid the Board from asking the members of the joint committee to explain their decision after the fact. Moreover, the discipline of having to provide an explanation for the decision has some impact in confining the arbitrator to legitimate rather than illegitimate considerations. That force, however, is lacking in the case of either the joint committee or the prearbitral steps of the grievance procedure.

One response to this argument might be that jury decisions similarly contain no guarantee of reliability, and yet the courts have never hesitated to give them collateral estoppel effect in other cases raising common factual issues. But in those cases, courts can look to the jury instructions and the record of evidence presented at trial to determine whether the jury's verdict should be given preclusive effect. Similarly, some people argue that the Board can examine the contract and the arguments presented by the parties, as reflected in the tape recording of the hearing.

That argument brings me to the third and final important difference between the two forums: the lack of assurance that the joint committee (or a similar prearbitral step of the grievance procedure) has followed the contract or confined its deliberations to the matters of record. These assurances are

446. See Lewis v. NLRB, 779 F.2d 12, 13 (6th Cir. 1985). Even if such testimony were admissible, an after-the-fact explanation advanced for the sole purpose of protecting the company against liability, and after the panel member has been apprised of the member's theory of liability under the NLRA, would be far less reliable than a contemporaneous explanation. Such an explanation also would lack reliability because the panel member could explain only why the particular case was decided the way it was, but not why the decision was consistent with the other 30 decisions of the same date which would, of course, have been decided without any explanation.
447. Because joint committees do not give reasons for their decisions, it also cannot be determined whether, in resolving the grievance, the union representatives on the panel considered the statutory rights at issue and "clearly and unmistakably" chose to waive them. Thus, even if the joint committee decision is treated as a negotiated settlement rather than as an adjudication, it cannot be treated as a waiver of the relevant statutory rights that warrants application of a doctrine comparable to deferral. Cf. supra notes 329-42 and accompanying text.
absent for several reasons. First, *ex parte* discussions between the parties and their representatives on the joint committee are part of the normal operation of the process.\textsuperscript{449} Second, unlike a jury whose composition is established by a procedure that screens out the most prominent cases of suspected partiality, the joint committee, like the participants in the prearbitral steps of the grievance procedure, consists of representatives of the two sides who are, if anything, screened to ensure vigilance in representing the institutional interests of their side.\textsuperscript{450} Indeed, evidence suggests that the highly political nature of the joint committees and their significance for defeating union reformers in intraunion struggles is both known to and welcomed by management.\textsuperscript{451} And third, unlike the jury, which is at least theoretically bound to follow the law as presented by the instructions, Teamster joint committees are not bound to follow the contract; they are free to modify, alter, or disregard it if they consider it appropriate to do so in the interests of their respective sides in a particular case.\textsuperscript{452}

For all of these reasons, the Board should not apply a presumption of regularity to assume that a joint grievance committee's decision is based on the contract or on the overt arguments of the parties. At best, the Board can review a transcription of a tape recording of the parties' presentations, and determine whether the contractual issues appear to have

\textsuperscript{449} See supra notes 425-28 and accompanying text.

\textsuperscript{450} See Chicago Cartage Co. v. International Bhd. of Teamsters, Local 710, 659 F.2d 825, 828 (7th Cir. 1981). The union-side members of the grievance committees are selected, directly or indirectly, by the ranking union officials for the relevant jurisdiction. See Deposition of George Rohrer at 14-18, Torbet v. Delta Cal. Indus., No. C-84-0632 TEH (N.D. Cal.) (June 14, 1984). Thus, for example, when dissident candidates are elected to local union posts, they do not thereby accede to the joint committee appointments that their incumbent predecessors held.

\textsuperscript{451} See supra notes 426-31 and accompanying text. For example, a UPS management document, used as a training manual for managers who present cases to the joint committees, explains the use of joint committees rather than the more traditional forms of arbitration by stating that they permit management to "[d]evelop a relationship with union officials. Slow down dissidents!" United Parcel Serv., Labor Relations Workshop Handout at 5 (on file with the University of Michigan Journal of Law Reform).

\textsuperscript{452} This freedom distinguishes the joint committees even from the meetings at the prearbitral steps of the grievance procedure, at which it would be theoretically inappropriate for the parties to decide on a resolution of a dispute in complete disregard of the actual requirements of the contract.
been put before the joint committee;\textsuperscript{453} it cannot be sure precisely how the committee members evaluated these presentations or, indeed, what role, if any, they played in the final outcome. Consequently, even if the contractual and statutory issues are closely congruent and even if the presentation before the joint committee closely resembles the presentation before the Board, the Board cannot assume that the joint committee has resolved the grievance in a way that is roughly consistent with the proper manner for resolving the ULP issue.

One final objection might be raised to my thesis: that the joint committee process has been accepted as the equivalent of arbitration far too long to reopen the debate now. True, the Supreme Court has expressly held that the outcome of a joint committee hearing is just as final and binding as the outcome of another union's arbitration procedure.\textsuperscript{454} And there have been a number of other decisions in which the Court has simply assumed, normally because the parties made no argument to the contrary, that a joint committee decision is an arbitration.\textsuperscript{455} So, too, the Board expressly held in 1961, in Denver-Chicago Trucking,\textsuperscript{456} that grievance committee decisions would be considered equivalent to arbitration awards for the purposes of applying Spielberg. Since then, the Board has cited Denver-Chicago in numerous cases,\textsuperscript{457} assuming its

\textsuperscript{453} Sometimes these presentations permit the Board to determine that the statutory issues were not adequately considered, see, e.g., Consolidated Freightways Corp., 288 N.L.R.B. 1252, 1255 (1988), \textit{enforced en banc}, 925 F.2d 1486 (D.C. Cir. 1991), but the opposite is not true: the Board cannot be sure that the statutory issues were in fact considered. The reason that one can be sure in some circumstances that the statutory issues have \textit{not} been considered is that, if those issues do not appear in the transcript, the Board at least knows that one of the parties to the ULP proceeding has the wherewithal to produce evidence of such consideration: the employer who appoints representatives to the joint committee. If the evidence were available, the Board could be confident that it would be produced. But the charging party, particularly a union dissident, does not have access to information to contradict the appearance created by a hearing transcript. The Board cannot assume from the fact that the transcript shows some reference to an issue that is parallel to the ULP issue that all possible evidence bearing on whether that issue was in fact considered has been produced for the ULP hearing.

\textsuperscript{454} \textit{See} Humphrey v. Moore, 375 U.S. 335, 351 (1964) (binding employees); General Drivers, Local Union No. 89 v. Riss & Co., Inc., 372 U.S. 517, 519 (1963) (binding union and employer).


\textsuperscript{456} 132 N.L.R.B. 1416, 1418-21 (1961).

\textsuperscript{457} \textit{See} 1 SHEPARD'S \textit{FEDERAL LABOR LAW CITATOR} (pt. 1), 879 (1987 ed.).
correctness but never actually considering whether it was correctly decided. There are, I think, some reasons to believe that the time is right to reopen the question.

The first reason is that, because of the various scholarly studies that have been conducted since 1961, and because of the facts that have come to light, piece by piece, in the course of discovery in DFR cases and Board litigation, we know a great deal more about the joint committee process than the Supreme Court or the Board knew in the early 1960s, and much of that new data is unfavorable to the joint committee process.

Second, deferral doctrine has evolved substantially since 1961. In light of the development of detailed common law rules to decide when deferral is and is not appropriate, and in light of the elaborate rationales offered in defense of deferral, one can compare this new learning about joint committees with the new understanding of deferral and its basis and ask anew whether the decision-making procedure fits the doctrine.

A third reason for reopening the question is that courts are finally becoming willing to ask hard questions about joint committee decisions, after years in which lawyers representing Teamster dissidents kept "beating their heads against a brick wall" asking courts to look past the label to the reality of joint committee decisions. This has become apparent in some of the cases in which courts of appeals have reviewed Board deferral decisions. It has even begun to crop up in DFR cases. The Seventh Circuit, for example, has now held that Teamster members of joint committees owe a DFR to the

458. E.g., R. James & E. James, supra note 408; Azoff, supra note 406; Summers, supra note 383.
459. See Part IV.A.
460. See supra Part II.
461. E.g., Sharpe, supra note 122. As a seasoned litigator against the Board, I would like to take credit for some of the rationales offered in defense of deferral.
462. During the dry years, lawyers arguing against joint committee decisions had to be content with occasional questions from the bench about the differences between joint committees and arbitration. See, e.g., Transcript at 6, United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56 (1981) (No. 80-169); Transcript at 25, Clayton v. United Auto., Aerospace & Agric. Implement Workers, 451 U.S. 679 (1981) (No. 80-5049). The lone voice protesting the inadequacies of joint committees belonged to Eighth Circuit Judge Gerald Heaney. See Irvin H. Whitehouse & Sons Co. v. Local Union 214, Bhd. of Painters & Allied Trades, 621 F.2d 294, 299 (8th Cir. 1980).
463. Hammontree v. NLRB, 894 F.2d 438 (D.C. Cir. 1990), rev'd en banc, 925 F.2d 1486 (D.C. Cir. 1991); Taylor v. NLRB, 786 F.2d 1516 (11th Cir. 1986).
employees whose grievances are being heard, and two federal district courts have held that union representatives on a joint grievance committee could breach the DFR by improperly modifying an agreement, rather than simply interpreting it. In one state law case, a federal district court held that although arbitration awards may be given collateral estoppel effect, the joint committee proceeding in that case did not provide "a full and fair opportunity to litigate the question at hand," and so did not merit the application of collateral estoppel.

I do not want to be understood as suggesting that the courts will ultimately hold that joint committee decisions are not entitled to final and binding effect with respect to the parties' rights under the CBA, comparable to arbitration decisions. The Supreme Court has squarely held that joint committee decisions are to have such an effect. These holdings are likely to stand; in my judgment, they are correct as a matter of law and should stand. Thus, the parties who create contractual rights, as the union and employer do by negotiating a CBA, are entitled to decide that they would rather have a quick and dirty way of deciding how those rights ought to be applied (or ignored), even at the expense of increasing the risk of error in finding the correct facts and decreasing fairness to the employees.

On the other hand, the parties are not entitled to insist that their quick and dirty way of resolving questions about contractual rights that they have created should also be given binding or even presumptive effect in decisions about the application of rights created by Congress to advance the public interest. Even assuming that such effect is properly given to the

464. *E.g.*, Thomas v. United Parcel Serv., 890 F.2d 909, 923 (7th Cir. 1989). That court held, consistent with its view of the duty of fair representation in other contexts, that the duty is not breached absent intentional discrimination against a member. *Id.* at 922-23.


decisions of arbitrators, deference is something to be earned by a decision-making procedure, not to be claimed as a matter of right.

It might be argued that, by refusing to defer to joint committee decisions because of their differences from full-fledged hearings before neutral arbitrators, the Board would make it impossible for Teamster-UPS joint committees to function as they have in the past. Similar arguments are made each time workers seek legal guarantees of fairness from their employers and unions, yet the Supreme Court has consistently rejected this argument. Such speculative warnings deserve no more credence here.

But even if Teamster-UPS joint committees could not function as in the past, the resulting changes in the joint committee process would be desirable ones. The perception of unfairness caused by the peculiarities of the system has helped make Teamster joint committees responsible for 56% of all postarbitration hybrid DFR suits, and has made the Teamsters union responsible for nearly one-third of all DFR cases—percentages wholly out of proportion to the 9% of the unionized workforce represented by the Teamsters union.

No process that is producing this much litigation can be working fairly and effectively.

The Teamsters and some employers evidently find the joint committee process convenient, and they undoubtedly have their reasons for wanting to continue it. Some of those reasons may be legitimate, but a union desire to hide political retribution under a patina of arbitral respectability is not a legitimate reason for joint committees. If the joint committee process cannot survive the creation of an effective remedy for union reformers' grievances that are rejected because of the political animus of union officials on those committees, and if joint committees have saddled the courts with numerous DFR


469. Goldberg, supra note 348, at 122-24, 128-29. The figures, if anything, are too low. The 56% figure is derived by multiplying the fraction of postarbitration cases involving the Teamsters (66.2%) by the fraction of such cases that involved the joint committee (84.9%). Id. But because less than half of all Teamster contracts provide for joint grievance committees, the disproportionate contribution of the Teamster joint committee process to the judicial burden created by DFR suits is even more striking.
suits even without such a remedy, then the process simply does not deserve to survive.

Given that deference to joint committees has a negative impact on the prospects for union reform because it allows dissidents to be picked off and chilled in the exercise of their statutory rights, and given the reasons to believe that joint committees’ decisions do not deserve the same respect as the decisions of neutral arbitrators, the Board would do well to discard its blind deference to joint committee decisions.