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Distinguishing Arbitration and Private Settlement in NLRB Deferral Policy

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COMMENTS

Distinguishing Arbitration and Private Settlement in NLRB Deferral Policy

I. INTRODUCTION

Federal labor law is marked by a tension within the National Labor Relations Act ("NLRA" or "Act").[1] Its general policy favors private adjustment of labor disputes while specific provisions of the Act mandate governmental involvement in resolving these disputes. On the one hand, employers and employees are encouraged to collectively bargain to establish private contractual rules that will govern their relationship,[2] rules that include a system of private settlement procedures for resolving disputes during the term of an agreement.[3]

1. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982 & Supp. IV 1986)) ("NLRA" or "Act"). The original act was amended by the Labor Management Relations (Taft-Hartley) Act, 1947, ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-200 (1982 & Supp. IV 1986)) (LMRA).

2. *See* NLRA § 1, 29 U.S.C. § 151 ("It is . . . the policy of the United States to eliminate . . . obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of . . . employment . . . .").

3. *See* LMRA § 203(d), 29 U.S.C. § 173(d). Section 203(d) provides, in part, that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement

On the other hand, the Act provides specific statutory protections to employees,[4] proscribes certain practices on the part of employers and unions,[5] establishes the National Labor Relations Board ("NLRB" or "Board") as an independent federal agency to administer the Act,[6] and authorizes a cause of action in federal district court for violations of a collective bargaining agreement.[7]

NLRB deferral issues arise when alleged wrongful conduct contravenes both the private contractual "law" of the collective bargaining agreement[8] and the specific statutory proscriptions of the Act.[9] Such concurrent violations can thus be remedied in either the contractual[10] or statutory forums,[11] both of which exist by virtue of the Act. Normally, the charging party emphasizes the statutory nature of the violation and requests that the NLRB exercise its power to investigate and remedy the infraction. The charged party, however, stresses the contractual nature of the allegation and argues that negotiated contractual procedures should be relied on for adjustment of the dispute.[12] In response to this overlap of private contractual rights and public statutory rights, the NLRB has fashioned a multifaceted deferral policy that delineates the circumstances under which the Board will withhold its jurisdiction and leave the charging party to its remedy under the contract.[13] Basically, the Board's deferral policy has three dimensions that reflect the differing procedural contexts in which the overlap between contractual and statutory forums may arise: (1) the dispute falls under the scope of the grievance arbitration clause in the parties' contract, but has not been submitted to those

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of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

4. *See* NLRA § 7, 29 U.S.C. § 157 (guaranteeing employees the right to organize, bargain collectively, and "engage in [other] concerted activities, for the purpose of collective bargaining or other mutual aid or protection").

5. *See* NLRA § 8, 29 U.S.C. § 158; *infra* note 61 (summarizing the unfair labor practices proscribed by Section 8).

6. *See* NLRA §§ 3, 10, 29 U.S.C. §§ 153, 160.

7. *See* LMRA § 301(a), 29 U.S.C. § 185(a).

8. *See infra* notes 18-19 and accompanying text.

9. *See* NLRA § 8, 29 U.S.C. § 158; *infra* note 61 (summarizing the unfair labor practices proscribed by Section 8).

10. *See infra* notes 18-21 and accompanying text (discussing contractual grievance resolution procedures).

11. *See* NLRA § 10(b), (c), 29 U.S.C. § 160(b), (c). The NLRB is not authorized to act on its own motion; instead, it must rely on aggrieved employers, unions, or employees to file charges with one of the Board's regional field offices within six months of a violation. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 156 (1975). The Board investigates charges and, as necessary, issues formal complaints, conducts hearings, and issues remedial orders. *Id.*

12. *See infra* notes 18-21 and accompanying text.

13. *See infra* notes 92-169 and accompanying text.

procedures or has not proceeded to a resolution through those procedures;[14] (2) the dispute was submitted to grievance arbitration procedures and was settled by the parties or their contractual representatives during the grievance steps prior to arbitration;[15] or (3) the dispute was heard and resolved in a private arbitration proceeding.[16]

This Comment critically examines the manner in which current Board deferral doctrine accommodates the tension between the Act's general policy favoring private adjustment of labor disputes and the Act's specific provisions defining certain labor practices as unfair and charging the Board with policing those practices. To sketch the institutional setting and rational underpinnings of federal labor policy, Section II reviews judicial deferral—a policy fashioned by the Supreme Court to accommodate a similar tension between the Act's general policy favoring private resolution and its specific authorization of a cause of action in federal court for violations of collective bargaining agreements.[17] Section III explores the nature and scope of NLRA unfair labor practice protections and NLRB power as they are set forth by the United States Supreme Court. Section IV then surveys the evolution of the Board's deferral policies, and Section V recommends that the Board distinguish between arbitral adjudications and non-arbitral grievance settlements. Specifically, this Comment concludes that the Board should retreat from its current practice of routinely deferring to arbitration awards but should continue according broad deference to private settlements.

II. JUDICIAL DEFERRAL

A. *Overview*

The NLRA provides for private-sector employees to organize, create unions, and collectively bargain with their employers over the terms and conditions of their employment.[18] This process, whereby representatives of management and labor negotiate to establish specific rights and duties of the parties, has been described as a private legislative process; the final agreed-upon rules—the collective bargaining agreement—have been likened to a private statutory "law" that governs the workplace.[19] Most collective bargaining agreements

14. *See infra* notes 111-31 and accompanying text.
15. *See infra* notes 132-69 and accompanying text.
16. *See infra* notes 95-110 and accompanying text.
17. *See infra* notes 35-52 and accompanying text.
18. *See* NLRA §§ 1, 7, 29 U.S.C. §§ 151, 157.
19. *See* Steele v. Louisville & N. R.R. Co., 323 U.S. 192, 202 (1944) ("Congress has seen

set out a mandatory system of in-house grievance procedures for resolving disputes that will inevitably arise over the meaning and application of specific terms in an agreement.[20] Typically, the parties provide that, should they be unable to reach agreement during the grievance steps, either party may invoke a final step: submission of the dispute to a neutral arbitrator who, like a judge, will hear the dispute, take evidence, and issue a final and binding order in conformity with the controlling "private law" of the parties' collective bargaining agreement.[21]

Because the collective bargaining agreement is a contract that is worked out between the parties under the aegis of public law, issues arise concerning the legal effect of this private law in the public courts. For example, is the collective bargaining agreement a contract between the employer and the union, between the employer and each employee, or both? Which courts have jurisdiction and what substantive law governs? What effect should be given to a provision for private adjudication? Should such a provision be recognized as a contractual waiver of the statutory right to seek enforcement in a public forum? The United States Supreme Court resolved many of these substantive and jurisdictional issues in the late 1950's and early 1960's.[22] These principal Court opinions reveal the federal labor policy that underlies both judicial deferral and NLRB deferral to private enforcement procedures.

B. *Nature and Scope of Section 301 Jurisdiction*

In Section 301 of the Labor Management Relations Act of 1947 (LMRA),[23] Congress provided that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."[24] Ten years later, in *Textile Workers Union v. Lincoln Mills*,[25] the Supreme Court interpreted this language as not merely jurisdictional—authorizing federal courts to hear state law controversies—but as empowering the federal courts to fashion a

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fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . .").

20. *See, e.g.*, F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 106-09 (3d ed. 1973) (describing the important role of a grievance procedure in the collective bargaining process).

21. *Id.* at 107.

22. *See infra* notes 23-59 and accompanying text.

23. LMRA § 301(a), 29 U.S.C. § 185(a).

24. *Id.*

25. 353 U.S. 448 (1957).

substantive federal common law applicable to labor relations controversies.[26] Subsequent Court opinions made clear that federal jurisdiction under Section 301 did not oust state court jurisdiction, but state courts were required to apply substantive federal law.[27] The broad interpretation of Section 301 was grounded in the Court's concern that the congressional purpose in enacting federal labor statutes—encouraging industrial peace by preventing strikes and lockouts[28]—would be jeopardized by relying on differing local procedural and substantive laws for the enforcement of collective bargaining agreements.[29] The Court reasoned that an all-embracing federal substantive law would encourage faithful performance by both parties,[30] whereas conflicting substantive interpretations of contract terms under state and federal law would inevitably stimulate and prolong disputes in both the negotiation and administration of collective agreements.[31] The Court further held that collective agreements give rise to individual rights recognized by public law[32] and that claims to vindicate such rights may be brought either by the individual whose rights have allegedly been infringed or by the union acting as the individual's representative.[33]

C. *Section 301 Deferral*

The *Lincoln Mills* decision created apprehension that judicial interference would undermine the "private self-government in the work place" that Congress had intended federal labor law to foster.[34] Three years later, however, the Court dispelled this fear by formulating a policy of judicial deference to the self-governmental processes set out in collective bargaining agreements. In a series of three cases commonly referred to as the *Steelworkers Trilogy*,[35] the Court held that courts are not free to review the merits of a workplace dispute if

26. *Id.* at 456-57. This interpretation was in line with a majority of opinions in the lower federal courts. *Id.* at 450 n.2.

27. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 101-04 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 506-13 (1962).

28. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-80 (1960).

29. *Lucas Flour*, 369 U.S. at 103.

30. *Id.* at 103-04.

31. *Id.*

32. Humphrey v. Moore, 375 U.S. 335, 344 (1964); Smith v. Evening News Ass'n, 371 U.S. 195, 198-201 (1962).

33. UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 699-700 (1966).

34. *See* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 688-89 (1973).

35. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

the parties to the dispute have voluntarily provided that such a dispute be resolved through final and binding arbitration.[36] A court's role in this situation is limited to determining whether a dispute, on its face, is one that the parties have agreed to submit to arbitration.[37] Nor, the Court stated, may a court engage in de novo review of the final decision reached by an arbitrator; a court is simply to determine whether the arbitrator's decision is premised on either a reasonable construction of the collective bargaining agreement[38] or a reasonable interpretation of shop "common law" that is not at odds with the agreement.[39] The Supreme Court admonished that "courts have no business" substituting their own adjudicative process or judgment for that which the parties agreed to resort to and accept as final.[40]

In *Republic Steel Corp. v. Maddox*,[41] the Court expressly extended its deferral doctrine to actions pressing individual rights arising under a collective bargaining agreement.[42] The Court noted that union prosecution of grievances "complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract" and that "if a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement."[43]

This policy of judicial deference is adequately supported by a vision of the collective bargaining agreement as contract; when called upon to enforce a contract, a court should enforce not only the substantive terms, but also those provisions that delineate the manner in which the contract is to be administered and disputes are to be

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36. *American Mfg.*, 363 U.S. at 567-68.

37. *Warrior & Gulf*, 363 U.S. at 582.

38. *Enterprise*, 363 U.S. at 597-99.

39. Although the *Enterprise* decision speaks only about the arbitrator's reliance on the terms of the collective bargaining agreement, the Court's discussion in its companion case, *Warrior & Gulf*, makes clear that an arbitrator's source of law includes the common law of the shop as well as the express provisions of the contract. An arbitral decision anchored in a reasonable interpretation of the common law of the shop will be recognized as legitimate as long as it is not at odds with a specific provision of the collective bargaining agreement. *See Warrior & Gulf*, 363 U.S. at 578-82.

There is, however, a public policy exception: Courts will not enforce an award that violates a well-defined public policy, especially if it requires or condones a violation of law. *See* Comment, *Judicial Deference to Grievance Arbitration in the Private Sector: Saving* Grace *in the Search for a Well-Defined Public Policy Exception*, 42 U. MIAMI L. REV. 767 (1988).

40. *Enterprise*, 363 U.S. at 599.

41. 379 U.S. 650 (1965).

42. *Id.* at 652 ("As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress.").

43. *Id.* at 653.

resolved. The *Steelworkers Trilogy* holdings, however, are based on the much broader vision of collective bargaining as a self-governmental process.[44] The Court noted that the periodic drafting of a collective agreement expressly setting out a limited number of rights and obligations is just one aspect of collective bargaining's larger ongoing role of preventing and resolving conflicts that give rise to strikes and lockouts.[45] Because "[t]here are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties,"[46] the specific agreement is merely a "generalized code"[47] that "calls into being . . . the common law of a particular industry or of a particular plant."[48] The essence of the "contract" between the parties to a collective agreement is their promise to resort to agreed-upon procedures for settling disputes within the framework of their particular agreement and the larger "common law" that has developed around their relationship under the agreement.[49] Therefore, "the judicial inquiry under § 301 [authorizing court enforcement of the 'contract'] must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made."[50] Further, the promise to resort to internal procedures would be quickly undermined if public law did not give "full play" to the agreed-upon private procedures[51] or "if courts had the final say on the merits of the [decisions reached through these procedures]."[52]

D. *Scope of Deferral Under Section 301*

The *Steelworkers Trilogy* cases arose in the context of traditional

44. *See, e.g.*, United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960).

45. *Id.* at 578-80.

46. *Id.* at 579 (quoting Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498-99 (1959)).

47. *Id.* at 578.

48. *Id.* at 579-80.

49. *Id.* at 580. The Court observed that the parties are compelled to have a relationship. *Id.* Consequently, the choice to be negotiated is whether their relationship will be "governed by an agreed-upon rule of law" or whether "each and every matter [will be left] subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces." *Id.*

50. *Id.* at 582. Further, the court must expansively construe provisions that provide for grievance arbitration. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.* at 582-83.

51. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960).

52. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).

grievance arbitration procedures, and courts have generally read the decisions as specifically endorsing arbitration. There is nothing expressly stated in the opinions or implicit in their rationale, however, that limits these holdings exclusively to arbitration. Section 203(d) of the LMRA,[53] cited by the *Steelworkers Trilogy* Court,[54] speaks only of "a method agreed upon by the parties."[55] In particular, the Court said nothing concerning either the arbitrator's neutral status or the court-like adjudicatory processes used by the arbitrator. The essence of the Court's deferral rationale is built around a distinction between federal judges, who are far removed from the life of the shop, and arbitrators, whose judgment is informed by the needs of the shop and by the relevant "common law" of the industry.[56] Because the parties to a collective bargaining agreement presumably would not provide for other non-arbitral "insiders" to make binding adjudications unless those insiders were believed to possess equally informed judgment, the Court's deferral rationale logically extends to any form of agreed-upon procedures for dispute resolution. In accordance with this reasoning, three years after the *Steelworkers Trilogy* opinions, the Supreme Court expressly extended its deferral policy to non-arbitral awards reached in accordance with procedures set out as final and binding under a collective agreement.[57] This rationale also supports deferral to non-arbitral settlements reached during the pre-arbitration stages of the grievance process,[58] and courts have held that these set-

53. LMRA § 203(d), 29 U.S.C. § 173(d).

54. *American Mfg.*, 363 U.S. at 566.

55. LMRA § 203(d), 29 U.S.C. § 173(d).

56. The Supreme Court has explained:

> The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

57. General Drivers v. Riss & Co., 372 U.S. 517, 519 (1963) ("It is not enough that the word 'arbitration' does not appear in the collective bargaining agreement . . . .").

58. Litigation arises in this context only when one party attempts to renege on the grievance settlement or when an individual employee whose rights are affected is unhappy with the settlement worked out between the union, as his representative, and the employer. The courts have fashioned a duty of fair representation that requires the union to represent all

tlements also bar judicial adjudication.[59]

III. NLRA RIGHTS AND NLRB POWER

Section 8 of the National Labor Relations Act[60] sets forth certain employer and union conduct as "unfair labor practices,"[61] and Section 10[62] empowers the NLRB to prevent and remedy such practices. Deferral issues arise when the party charged with an unfair labor practice—a statutory violation—defends its actions as conduct authorized by the private law of the parties' collective bargaining agreement and the agreement provides for arbitration of disputes arising under the contract. There are three sets of allegations that most frequently create deferral situations. First, the union may charge that the employer violated Section 8(a)(1) by disciplining employees in retaliation for legitimate union activities; meanwhile, the employer contends that the discipline was for "just cause" under the contract. Second, the union may allege that the employer violated Section 8(a)(3) by discriminating against union officers in conditions of employment, and the employer defends on the basis that its discriminatory treatment was authorized by the agreement. Third, the union

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employees fairly. Under this doctrine, if an employee shows that the union breached its duty to fairly represent his interests, the court will withhold deferral and scrutinize the employee's rights under the contract. *See* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Vaca v. Sipes, 386 U.S. 171, 190 (1967); *see also* Tidwell, *Major Issues in the Duty of Fair Representation Cases Since 1977*, 62 U. DET. L. REV. 383 (1985) (development of the judicially-created duty of fair representation).

59. *See, e.g.*, Haynes v. United States Pipe & Foundry Co., 362 F.2d 414 (5th Cir. 1966); Simmons v. Union News Co., 341 F.2d 531 (6th Cir.), *cert. denied*, 382 U.S. 884 (1965); Hildreth v. Union News Co., 315 F.2d 548 (6th Cir.), *cert. denied*, 375 U.S. 826 (1963).

60. NLRA § 8, 29 U.S.C. § 158.

61. Practices specifically proscribed by Section 8(a) are: (1) interfering with employees' exercise of their Section 7 rights to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection," NLRA § 7, 29 U.S.C. § 157; (2) dominating or interfering with the formation or administration of a union, or contributing financial or other support; (3) discriminating with regard to hire or conditions of employment based on membership in the union; (4) discharging or discriminating against an employee in retaliation for exercising rights related to unfair labor practices; and (5) refusing to bargain collectively with employee representatives. *See* NLRA § 8(a), 29 U.S.C. § 158(a).

Similarly, Section 8(b) prohibits the following union conduct: (1) interfering with employees' exercise of their Section 7 rights; (2) causing or attempting to cause an employer to discriminate with regard to hire or conditions of employment based on membership in the union; (3) refusing to bargain collectively with the employer; (4) engaging in or inducing an unlawful strike; (5) forcing an employee to join a union; (6) requiring an employer to bargain with a union that has not been certified; (7) requiring an employer to bargain where another union has already been certified; (8) forcing an employer to assign work to employees in a particular union; (9) requiring excessive or discriminatory membership dues; and (10) requiring an employer to pay for services not performed. *See* NLRA § 8(b), 29 U.S.C. § 158(b).

62. NLRA § 10, 29 U.S.C. § 160.

might accuse the employer of violating Section 8(a)(5) by refusing to bargain prior to making unilateral changes in operating practices, wage rates, or other terms and conditions of employment, and the employer maintains that its actions were authorized under the management rights clause of the collective agreement.

A. *Preemptive Public Rights*

In two 1940 opinions, *Amalgamated Utility Workers v. Consolidated Edison Co.*[63] and *National Licorice Co. v. NLRB*,[64] the Supreme Court declared that the NLRA unfair labor practice protections created public rights to protect the public interest in the prevention of labor disputes, rather than private rights to protect individual employees through private remedies.[65] Moreover, interpreting Section 10(a)'s provision that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise,"[66] the Court found that Congress entrusted the Board with exclusive jurisdiction to vindicate the public rights of Section 8.[67] Thus, with respect to unfair labor practices, the Act does not confer upon private parties a cause of action in federal court, state court, or any tribunal other than the NLRB.[68]

In a subsequent series of opinions represented by *San Diego Building Trades Council v. Garmon*,[69] the Court not only proclaimed that the NLRB has exclusive jurisdiction over the public rights of

63. 309 U.S. 261 (1940). In *Amalgamated Utility Workers*, the Court dismissed an action brought by a union seeking to enforce an NLRB remedial order against the employer. The Court reasoned that because the Board acts on behalf of the public interest in order to vindicate "public" rather than "private" rights, the Board's orders issue on behalf of the public rather than on behalf of the charging parties. *Id.* at 269. Enforcement therefore falls within the Board's exclusive jurisdiction to prosecute unfair labor practice charges. *Id.* at 269-70.

64. 309 U.S. 350 (1940). In *National Licorice*, the Court upheld a Board order that prohibitted an employer from enforcing individual employment contracts which employees had been pressured into entering in violation of the Act. *Id.* at 355-56, 369. In response to the employer's contention that the Board was without power to nullify private contractual rights of employees who were not parties to the proceedings, the Court explained that Board proceedings do not adjudicate private rights. *Id.* at 362. Thus, the Board's order was directed to, and effective against, only the employer; the order did not invalidate or otherwise interfere with the employees' rights under the contracts. *Id.* at 364-66.

65. *Id.* at 362; *Amalgamated Util. Workers*, 309 U.S. at 268-70.

66. NLRA § 10(a), 29 U.S.C. § 160(a).

67. *National Licorice*, 309 U.S. at 365; *Amalgamated Util. Workers*, 309 U.S. at 264-66.

68. *Amalgamated Util. Workers*, 309 U.S. at 265-67. Note, however, that Section 10(f) of the Act provides that any person aggrieved by a final Board order may seek judicial review in a federal court of appeals. NLRA § 10(f), 29 U.S.C. § 160(f).

69. 359 U.S. 236 (1959); *see also* Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955); Garner v. Chauffeurs & Helpers Local Union No. 776, 346 U.S. 485 (1953).

Section 8, but it also added that the rights themselves are exclusive. In fact, they preempt any rights under state law, whether private or public, that act to regulate activities arguably protected by Section 7 or proscribed by Section 8.[70] The Act's broad preemptive scope extends even to remedies, thereby limiting any enforcement of non-labor state laws in a manner that impacts upon labor relations.[71] Moreover, federal preemption is effective even if the NLRB declines to exercise its own jurisdiction.[72]

B. *Accommodation with Section 301 Jurisdiction*

In *Local 174, Teamsters v. Lucas Flour Co.*,[73] a case decided three years after *Garmon*, the defendant-employer in a Section 301 action attempted to apply the preemption doctrine to private contractual regulation. The employer argued that when conduct allegedly breaching a contract arguably constitutes a breach of the Act as well, the preemptive force of Section 10 ousts court jurisdiction under Section 301 and requires that the controversy be presented to the NLRB.[74] The Supreme Court summarily dismissed this argument, holding that the preemption doctrine of *Garmon* was "not relevant" in a Section 301 dispute.[75] The Court noted, however, that:

> conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and [the conclusion that violations of the agreement are within the purview of Section 301 rather than under the jurisdiction of the Board] is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the NLRB to remedy the unfair labor practices, as such.[76]

Later that same year, the Court in *Smith v. Evening News Association*[77] further elaborated upon the relationship between NLRB jurisdiction under Section 10 and court jurisdiction under Section 301. The Court reaffirmed its holding that a Section 301 action on the col-

70. *Garmon*, 359 U.S. at 244-47; *Weber*, 348 U.S. at 481; *Garner*, 346 U.S. at 500-01.

71. *Garmon*, 359 U.S. at 244, 247; *Weber*, 348 U.S. at 480.

72. San Diego Bldg. Trades Council v. Garmon, 353 U.S. 26 (1957); Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957); Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957).

73. 369 U.S. 95 (1962).

74. *Id.* at 97.

75. *Id.* at 101 n.9.

76. *Id.* In Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), the Court noted that Congress had rejected a Senate proposal that would have made all contract violations unfair labor practices. *Id.* at 510-11. Due to the congressional creation of Section 301 jurisdiction, the Court reasoned that Congress had intentionally denied the Board direct enforcement power over collective bargaining agreements. *Id.* at 513.

77. 371 U.S. 195 (1962).

lective bargaining agreement is not preempted merely because the alleged conduct also makes out an unfair labor practice charge.[78] On the other hand, the Court more forcefully acknowledged that the Board's authority to adjudicate the unfair labor practice is not destroyed merely because the conduct violates the contract or has been the subject matter of an arbitration award.[79] Subsequently, in *NLRB v. C & C Plywood Corp.*,[80] the Court confirmed the Board's authority to interpret a collective agreement to the extent necessary to decide an unfair labor practice charge.[81] The Court grounded its holding in administrative efficiency.[82] If, the Court reasoned, the Board were not empowered to interpret an agreement but instead had to wait for the charging party to institute a Section 301 action so that an authoritative interpretation could then be shuttled back to the NLRB proceeding, years would likely be added to the already lengthy period required to adjudicate unfair labor practice disputes.[83]

These Court pronouncements, setting out the relationship between the NLRB's jurisdiction to remedy unfair labor practices and the courts' Section 301 jurisdiction, followed directly on the heels of the *Steelworkers Trilogy*,[84] the three cases in which the Court enunciated a judicial deferral policy that rendered Section 301 jurisdiction virtually synonymous with grievance arbitration.[85] Presumably, therefore, the Court also intended that *Lucas Flour, Evening News Association*, and *C & C Plywood* set out an accommodation between contractual grievance arbitration procedures and the NLRB. In those instances where alleged wrongful conduct makes out both an unfair labor practice and a violation of a collective bargaining agreement, grievance arbitration procedures do not displace NLRB jurisdiction.

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78. *Id.* at 197.

79. *Id.*

80. 385 U.S. 421 (1967).

81. *Id.* at 429-30. Later, in NLRB v. Strong, 393 U.S. 357 (1969), the Court expressly extended the Board's authority to interpret and enforce collective bargaining agreements to the extent required to design and enforce appropriate make-whole remedial orders. *Id.* at 361.

82. *C & C Plywood*, 385 U.S. at 429-30. Interestingly, the Court relied solely on these practical considerations and failed to cite Section 10(a)'s provision that the Board's power to prevent and remedy unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." NLRA § 10(a), 29 U.S.C. § 160(a).

83. *C & C Plywood*, 385 U.S. at 429-30. In another context, the NLRB had suggested that an arbitral tribunal or court might refer statutory questions to the Board for determination. At least one Justice rejected this idea as impractical and inefficient, "[d]ividing into two what should be a single proceeding" and extending even further the already lengthy delays experienced in resolving unfair labor practice disputes. Smith v. Evening News Ass'n, 371 U.S. 195, 203 n.5 (1962) (Black, J., dissenting).

84. *See supra* note 35.

85. *See supra* notes 35-59 and accompanying text.

Nor, however, does NLRB jurisdiction prevent the parties from taking the dispute to grievance arbitration. As the Court later summarized these holdings, "in some circumstances the authority of the Board and the law of the contract are overlapping, concurrent regimes, neither preempting the other."[86]

IV. NLRB DEFERRAL POLICIES

A. *Early Deferral*

From its inception, the Board determined to exercise its unfair labor practice jurisdiction in a discretionary manner consistent with the Act's basic purpose of encouraging private adjustment of labor disputes through collective bargaining.[87] In *North American Aviation, Inc.*[88]—decided five years prior to the 1947 LMRA amendments which created Section 301 jurisdiction[89] and eighteen years prior to the Supreme Court's *Steelworkers Trilogy*[90] opinions which interpreted those amendments—the Board articulated a similar broad vision of collective bargaining as being virtually synonymous with self-government in the workplace.[91] The following year, in *Consolidated Aircraft Corp.*,[92] the Board announced a policy of deferral to "contractual machinery for the settlement of disputes" under which the Board would refuse to exercise its unfair labor practice jurisdiction "where the parties have not exhausted their rights and remedies

86. NLRB v. Strong, 393 U.S. 357, 360 (1969). It bears noting that these holdings are consistent with the Court's view that engendered the doctrine of NLRB preemption in the first instance: The rights of Section 8 constitute public rights, distinct and separate from any private rights arising under a collective bargaining agreement. *See supra* notes 63-65 and accompanying text.

87. *See* Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955); Consolidated Aircraft Corp., 47 N.L.R.B. 694, 706 (1943); *see also infra* note 178 (major Board decisions citing *Steelworkers Trilogy* opinions for support).

88. 44 N.L.R.B. 604 (1942).

89. *See supra* notes 23-30 and accompanying text.

90. *See supra* note 35 and accompanying text.

91. *North American Aviation*, 44 N.L.R.B. at 612. In rejecting an employer's contention that Section 9(a) of the Act allows individual bargaining over grievances, the Board observed:

> [T]he process of collective bargaining [is not] complete upon the execution of a contract. After a contract has been negotiated and executed, it is continuously modified and supplemented by interpretations and precedents made by employer and employees from day to day in the course of their operations under the contract. This interpretation of the contract, no less than its negotiation, constitutes an integral part of the collective bargaining process.

44 N.L.R.B. at 612 (citing C. DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY 450 (rev. ed. 1948); C. GOLDEN & H. RUTTENBERG, THE DYNAMICS OF INDUSTRIAL DEMOCRACY 43 (1942)).

92. 47 N.L.R.B. 694 (1943).

under the contract."[93]

B. *Post-Arbitral Deferral*

Despite the policy enunciated in *Consolidated Aircraft*, the Board was subsequently presented with several cases in which the circumstances of a prior arbitral ruling rendered deferral inappropriate.[94] In 1955, the Board set forth more precise guidelines for its post-arbitral deferral policy in *Spielberg Manufacturing Co.*,[95] a decision that has since served as the touchstone of NLRB deferral doctrine. The Board announced that it would give binding effect to an arbitration ruling where three conditions were met: "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act."[96] Six years later, in *Monsanto Chemical Co.*,[97] the Board reiterated its intent to promote the Act's general policy of encouraging voluntary adjustment of labor disputes.[98] The Board acknowledged, however, its specific obligations to protect rights that the Act guarantees.[99] In fact, the Board grafted a fourth threshold standard to the *Spielberg* criteria: An arbitration award must "purport to resolve the unfair labor practice issue . . . [that] the Board is called upon to decide."[100]

Since *Monsanto*, most of the debate concerning the NLRB's post-arbitral deferral policy has centered on the threshold criteria: whether the arbitrator adequately considered and resolved the unfair labor practice issue. This, in turn, has varied with the philosophical views of the Board's members. At one pro-deferral extreme, *Electronic Reproduction*,[101] the Board held that it would defer to an arbitrator's ruling whenever the charging party had an opportunity at the arbitration proceeding to present evidence relevant to the unfair labor

93. *Id.* at 705-06. The *Consolidated Aircraft* opinion did not distinguish among deferral to the grievance arbitration process, deferral to an arbitration award, and deferral to voluntary settlements reached in the collective bargaining process prior to arbitration. *See infra* notes 111-14 & 132-35 and accompanying text.

94. Wertheimer Stores Corp., 107 N.L.R.B. 1434 (1954) (arbitration conducted over the opposition of the affected employee); Monsanto Chem. Co., 97 N.L.R.B. 517 (1951) (arbitration award at odds with the Act), *enforced*, 205 F.2d 763 (8th Cir. 1953); Walt Disney Prods., 48 N.L.R.B. 892 (1943) (discriminatory discharge), *enforced*, 146 F.2d 44 (9th Cir. 1944), *cert. denied*, 324 U.S. 877 (1945).

95. 112 N.L.R.B. 1080 (1955).

96. *Id.* at 1082.

97. 130 N.L.R.B. 1097 (1961).

98. *Id.* at 1098.

99. *Id.*

100. *Id.* at 1099.

101. 213 N.L.R.B. 758 (1974).

practice issue, even if no evidence had actually been presented.[102] This standard was grounded in the Board's belief that requiring actual presentation of evidence encouraged union and employee complainants to deliberately withhold evidence as a means of circumventing deferral.[103] At the other extreme, the Board held in *Suburban Motor Freight*[104] that opportunity alone was not sufficient. The Board would not defer to an arbitral ruling unless evidence related to the statutory issue was presented, considered, and ruled on by the arbitrator.[105]

The Board's most recent policy statement on post-arbitral deferral was presented in 1984 in *Olin Corp.*[106] In *Olin*, the Board again affirmed the *Spielberg* criteria,[107] but it adopted as a threshold standard only that: (1) the unfair labor practice issue must be "factually parallel" to the contractual issues decided by the arbitrator, and (2) the arbitrator must be presented "with the facts relevant to resolving the unfair labor practice."[108] "[D]ifferences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination . . . whether an award is 'clearly repugnant' to the Act."[109] Further, rather than requiring that an arbitrator's determination be "totally consistent with Board precedent," the Board stated that it would defer unless a ruling is "palpably wrong" or "not susceptible to an interpretation consistent with the Act."[110]

C. *Pre-Arbitral Deferral*

The Board's pre-arbitral deferral policy has also shifted with the makeup of the Board. The early *Consolidated Aircraft*[111] deferral decision included two alleged Section 8(a)(5) "refusal to bargain" vio-

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102. *Id.* at 762.

103. *Id.* at 760-62.

104. 247 N.L.R.B. 146 (1980).

105. *Id.* at 146-47. The decision expressly overruled *Electronic Reproduction*, stating that experience under that standard "ha[d] led to the conclusion that it promotes the statutory purpose of encouraging collective-bargaining relationships, but derogates the equally important purpose of protecting employees in the exercise of their rights under Section 7 of the Act." *Id.* at 146.

106. 268 N.L.R.B. 573 (1984).

107. *Id.* at 573-74.

108. *Id.* at 574. The dissenting opinion pointed out that because it would be extremely difficult to show that the facts relevant to the contract issue were not presented to the arbitrator, the two-factor test is really a single-step "factually parallel" test. *Id.* at 579 (Zimmerman, Member, dissenting).

109. *Id.* at 574.

110. *Id.*

111. Consolidated Aircraft Corp., 47 N.L.R.B. 694 (1943); *see supra* notes 92-93.

lations that had not yet been submitted to the parties' grievance arbitration procedures. Noting that the unsettled issues were purely matters of contract interpretation and that there was no evidence of employer hostility toward the union with respect to the arbitration of these issues,[112] the Board persuasively defended its deferral decision with an argument much like that used by the Supreme Court to justify judicial deferral of Section 301 jurisdiction.[113] The Board then summarily added two alleged Section 8(a)(3) discriminatory discharge violations into the same deferral decision without in any manner addressing the distinctions that the Section 8(a)(3) charges were not solely contractual issues and that they did suggest employer hostility to the union's statutory rights.[114]

Thereafter, the Board practiced pre-arbitral deferral inconsistently and without clear guidelines[115] until 1971, when it formally reannounced a policy of pre-arbitral deferral in *Collyer Insulated Wire*.[116] Although the reasoning of *Collyer* focused on the particular situation involved—no showing of employer enmity[117] and disputed contractual provisions that were dispositive of the unfair labor practice charges[118]—dicta in *Collyer* suggested that the Board's pre-arbitral deferral policy would extend to any situation in which it was likely that an arbitrator's ruling on the contractual issues would con-

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112. *Consolidated Aircraft*, 47 N.L.R.B. at 705 (contractual interpretations involved shift operations and job classifications).

113. *Id.* at 705-06. The Board explained:

> [I]t will not effectuate the statutory policy of "encouraging the practice and procedure of collective bargaining" for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through the settlement procedures mutually agreed upon by them . . . .

Id. at 706. For a discussion of the Supreme Court's judicial deferral rationale, see *supra* notes 35-52 and accompanying text.

114. *Consolidated Aircraft*, 47 N.L.R.B. at 706-07. The Board did not distinguish between the contractual charges and the statutory allegations, dismissing both due to the union's failure to "utilize . . . [available] contractual machinery for the settlement of the disputes." *Id.* at 705-07. At the time, the Board apparently viewed its jurisdiction as extending to all contract violations on the theory that the unilateral implementation of a disputed contractual interpretation constituted a Section 8(a)(5) refusal to bargain violation. *Id.* Thus, the Board did not disclaim its power to intervene in the administration of contracts, but it instead phrased the decision in terms of a voluntary withholding of jurisdiction as a matter of policy. *Id.*

115. Collyer Insulated Wire, 192 N.L.R.B. 837, 841 (1971).

116. 192 N.L.R.B. 837 (1971).

117. *Id.* at 842.

118. *Id.* at 839 (unilateral changes in certain wages and working conditions).

currently resolve associated statutory issues in a manner compatible with the purposes of the Act.[119]

The following year, in *National Radio Co.*,[120] the Board expressly extended pre-arbitral deferral to Section 8(a)(3) discriminatory discharge complaints. The Board acknowledged that the circumstances of a Section 8(a)(3) violation were distinguishable from *Collyer* because it was possible that the employer's conduct could be sanctioned by the contract, yet motivated by union animus and thus violative of the Act.[121] Nevertheless, noting its obligation to seek a "rational accommodation" between the statutory and contractual forums provided by the Act,[122] the Board held that it would require parties to take such disputes to grievance arbitration.[123] Either party could subsequently seek vindication of its statutory rights if the arbitrator's resolution was not consistent with the *Spielberg* standards.[124] Thereafter, the Board continued to defer in Section 8(a)(1) and Section 8(a)(3) pre-arbitral situations,[125] until it abruptly changed course five years later in *General American Transportation Corp.*[126] There, a majority of the Board argued that deferral of Section 8(a)(1) and 8(a)(3) charges constituted an abdication of the Board's Section 10 duty to investigate and remedy unfair labor practices.[127] Without expressly specifying new standards for a more limited pre-arbitral

119. *Id.* at 841-42. The Board noted that in the case of pre-arbitral deferral, it retained jurisdiction for the limited purpose of entertaining a possible post-arbitral motion for reconsideration on the grounds that the arbitrator's ruling did not satisfy the *Spielberg* criteria for deferral to an arbitral award. *Id.* at 843.

120. 198 N.L.R.B. 527 (1972).

121. *Id.* at 530.

122. *Id.* at 531.

123. *Id.*

124. *Id.*

125. *See, e.g.*, United States Postal Serv., 210 N.L.R.B. 560 (1974); Jemco, 203 N.L.R.B. 305 (1973); United Aircraft Corp., 204 N.L.R.B. 879 (1973), *enforced sub nom.* Lodges 700, 743, 1746, Int'l Ass'n of Machinists v. NLRB, 525 F.2d 237 (2d Cir. 1975).

126. 228 N.L.R.B. 808 (1977).

127. *Id.* at 808. In a concurring opinion, Chairman Murphy explained:

> In cases alleging violations of Section 8(a)(5) . . . , based on conduct assertedly in derogation of the contract, the principal issue is whether the complained-of conduct is permitted by the parties' contract. Such issues are eminently suited to the arbitral process, and resolution of the contract issue by an arbitrator will, as a rule, dispose of the unfair labor practice issue. On the other hand, in cases alleging violations of Section 8(a)(1), [and] (a)(3), . . . although arguably also involving a contract violation, the determinative issue is not whether the conduct is permitted by the contract, but whether the conduct was unlawfully motivated or whether it otherwise interfered with, restrained, or coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act. In these situations, an arbitrator's resolution of the contract issue will not dispose of the unfair labor practice allegation.

Id. at 810-11 (Murphy, Chairman, concurring).

deferral practice, the Board suggested that the original *Collyer* guidelines—requiring a purely contractual issue and no union animus—were appropriate deferral criteria.[128]

The Board's latest statement on pre-arbitral deferral, enunciated in *United Technologies Corp.*,[129] overrules *General American Transportation* and purports to "resurrect" the standards of *Collyer* and *National Radio*.[130] Because the charges deferred in *United Technologies* included allegations that the employer threatened an employee with retaliation if she persisted in processing a grievance,[131] however, the current deferral policy appears to have dropped the *National Radio* exception for disputes that involve a claim of employer animus toward employees' exercise of Section 7 rights.

D. *Deferral to Grievance Settlement*

In *Consolidated Aircraft*,[132] the Board dismissed several Section 8(a)(5) refusal to bargain charges because they had been "amicably settled as a result of . . . collective bargaining between the parties."[133] In addition, the Board noted that a retaliatory discharge claim under Subsections 8(a)(1) and 8(a)(3) "was settled to the mutual satisfaction of the parties through collective bargaining," and the Board saw "no reason under the . . . circumstances for interfering with this [grievance] settlement."[134] The Board's announced rationale for deferral—"encouraging the practice and procedure of collective bargaining"[135]—neither expressly nor impliedly suggested that deferral is appropriate only when settlements involve arbitral adjudication.

When the Board later promulgated more formal deferral criteria in *Spielberg Manufacturing Co.*[136] and *Monsanto Chemical Co.*,[137] it continued to view grievance settlements and arbitration awards as presenting similar deferral considerations.[138] As the general *Spielberg* criteria were fleshed out by application to specific cases, however, a

128. *Id.* at 809.
129. 268 N.L.R.B. 557 (1984).
130. *Id.* at 558-60.
131. *Id.* at 564 (Zimmerman, Member, dissenting).
132. 47 N.L.R.B. 694 (1943); *see supra* notes 92-93.
133. *Consolidated Aircraft*, 47 N.L.R.B. at 705.
134. *Id.* at 707 n.15.
135. *Id.* at 706.
136. 112 N.L.R.B. 1080 (1955); *see supra* notes 95-96 and accompanying text.
137. 130 N.L.R.B. 1097 (1961); *see supra* notes 97-100 and accompanying text.
138. For example, in Wooster Division of Borg-Warner Corp., 121 N.L.R.B. 1492 (1958), the Board refused to defer to a settlement agreement and stated that "as a matter of practice, the Board has exercised its discretion and refused to be bound by any settlement agreement or arbitration award where such settlement agreement or award was at odds with the Act or the Board's policies"; the Board then cited three arbitral opinions. *Id.* at 1495.

substantive distinction emerged between the Board's arbitral deferral policy and its deferral policy for non-arbitral grievance settlements. When reviewing arbitral awards, on the one hand, the Board stressed its desire to effectuate the Act's general policy of encouraging the voluntary adjustment of labor disputes.[139] Accordingly, the Board applied *Spielberg* in a manner that gave minimal scrutiny to arbitral awards. When reviewing non-arbitral grievance settlements, on the other hand, the Board emphasized its specific statutory duty to protect employees' Section 7 rights.[140] Consequently, the Board recast the basic *Spielberg* concepts into a potpourri of requirements that resulted in a close screening of settlements in order to assure proper individual remedies. At the extreme end of this screening, the Board interpreted "fair and regular" as obliging an outright rejection of deferral when a grievance settlement was reached without the aid of an arbitrator or other impartial tribunal.[141] In analyzing whether affected employees had agreed to be bound, the Board looked to such factors as whether the employees had originally agreed to the settlement,[142] whether any present controversy existed concerning the intended terms and application of the agreement,[143] whether employees had made voluntary, clear, and knowing waivers of their rights to process a claim with the Board,[144] and even whether all of the parties remained willing to abide by the agreement.[145] The Board characterized settlement agreements as repugnant to the Act when they failed to provide remedies substantially similar to what the Board would normally award.[146] Finally, in order to be deemed adequately

139. *See supra* notes 95-131 and accompanying text.

140. *See infra* notes 141-52 and accompanying text.

141. *See* United States Postal Serv., 237 N.L.R.B. 117, 120 (1978); Owens Corning Fiberglas Co., 236 N.L.R.B. 479, 479 n.4 (1978); T & T Indus., Inc., 235 N.L.R.B. 517, 517 n.2 (1978); Ford Motor Co. (Rouge Complex), 233 N.L.R.B. 698, 700 n.12 (1977); General Motors Corp., Inland Div., 233 N.L.R.B. 47, 51 (1977); Whirlpool Corp., Evansville Div., 216 N.L.R.B. 183, 186 (1975); Pontiac Motors Div., Gen. Motors Corp., 132 N.L.R.B. 413, 415 (1961).

142. United States Steel Corp., 250 N.L.R.B. 387 (1980); Ford Motor Co. (Rouge Complex), 233 N.L.R.B. 698 (1977).

143. Roadway Express, Inc., 246 N.L.R.B. 174, 175 (1979), *enforcement denied*, 647 F.2d 415 (4th Cir. 1981) (on factual rather than legal grounds); Central Cartage Co., 206 N.L.R.B. 337, 338 (1973).

144. Member Truesdale, concurring in Roadway Express, Inc., 246 N.L.R.B. at 175-76, construed such a requirement from the Board's decision in Coca-Cola Bottling Co., 243 N.L.R.B. 501 (1979). *See also* United States Steel Corp., 250 N.L.R.B. 387, 390 (1980) (distinguishing *Central Cartage* on the grounds that the settlement contained no written provision that the already filed Section 8(a)(3) charge would be withdrawn).

145. *Central Cartage*, 206 N.L.R.B. at 338. This is a relevant criterion when the settlement is reached after charges are filed with the Board and the General Counsel argues against deferral.

146. American Cyanamid Co., 239 N.L.R.B. 440, 442 (1978); Owens Corning Fiberglas

resolved and considered, settlement discussions had to have directly addressed the statutory issues and passed on the legality of the employer's conduct.[147]

The Board's *Airport Parking Management*[148] decision consolidated these diverse case law holdings into three specific criteria for NLRB deferral to grievance settlements: (1) the unfair labor practice issues must be clearly presented and discussed during the settlement discussions;[149] (2) the remedy provided by the settlement must substantially conform with the Board's usual remedy for a similar violation, or constitute a reasonable remedy for disputed claims;[150] and (3) the parties to the agreement must explicitly understand and intend that the agreement include settlement of the statutory claims.[151] The effect of these stringent requirements was that the Board only infrequently deferred to settlements reached through the grievance process, in marked contrast to its almost automatic deferral to arbitral resolutions.[152] By focusing in the former case on the Act's specific provision that the Board protect Section 7 rights, and in the latter situation on the Act's general policy promoting internal adjustment of labor disputes, the Board translated the *Spielberg* concerns into two distinct sets of criteria.

The Board abruptly changed course in 1985 when it chose to defer to a grievance settlement in *Alpha Beta Co.*[153] Noting that the principles and purposes that motivate arbitral deferral—encouraging parties to utilize their contractual dispute-settlement machinery—apply equally to grievance settlements,[154] the Board announced that it would henceforth apply the same deferral tests to grievance settlements that it applies to arbitration awards.[155] Furthermore, consistent with its goal of "evenhanded deference to the deferral

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Co., 236 N.L.R.B. 479, 479 n.4 (1978); Wooster Div. of Borg-Warner Corp., 121 N.L.R.B. 1492, 1495 (1958).

147. *United States Steel*, 250 N.L.R.B. at 390; *Roadway Express*, 246 N.L.R.B. at 175; *Owens Corning Fiberglas*, 236 N.L.R.B. at 479; Sabine Towing & Transp. Co., 224 N.L.R.B. 941 (1976); *Central Cartage*, 206 N.L.R.B. at 338.

148. 264 N.L.R.B. 5 (1982), *enforced*, 720 F.2d 610 (9th Cir. 1983).

149. Airport Parking Management v. NLRB, 720 F.2d 610, 615 (9th Cir. 1983).

150. *Id.* at 616.

151. *Id.* at 617.

152. *See supra* notes 95-131 and accompanying text.

153. 273 N.L.R.B. 1546 (1985), *enforced sub nom.* Mahon v. NLRB, 808 F.2d 1342 (9th Cir. 1987). The decision issued shortly after the Board had similarly extended its deferral practices in Olin Corp., 268 N.L.R.B. 573 (1984), and United Technologies Corp., 268 N.L.R.B. 557 (1984).

154. *Alpha Beta*, 273 N.L.R.B. at 1547.

155. *Id.* The decision was rendered by a three member panel that acknowledged that it was adopting the views expressed earlier by Member Penello in his dissent to Roadway Express, Inc., 246 N.L.R.B. 174, 176-77 (1979) (Penello, Member, dissenting).

process,"[156] the Board applied the *Spielberg* criteria to grievance settlements in the same broad manner as it had earlier applied these criteria to arbitral awards in *Olin*.[157] In doing so, the Board effectively nullified the *Spielberg* criteria as grounds for rejecting a settlement that was reached in the context of agreed-upon grievance procedures. The Board's opinion equated "fair and regular" with having been reached through contractual grievance procedures,[158] held that a collective bargaining representative's acceptance of a settlement constitutes sufficient "agreement to be bound,"[159] and proclaimed it unlikely that settlements reached within contractual grievance arbitration procedures are "palpably wrong."[160]

The Board was less expansive, however, in its application of the threshold "considered and resolved" criterion. Although it seems that the Board could simply have relied on the "factually parallel" test of *Olin*,[161] the Board instead focused on the union officials' waiver of the statutory claims:

> It is clear that the settlement agreement was intended to resolve the parties' contractual dispute over the discharge of employees who failed to report for work in connection with a sympathy strike. To resolve this contractual dispute, the Union could—if they felt it necessary—waive the employees' statutory rights. The terms of this agreement suggest that both the Respondents and the Unions made concessions in order to settle the grievances without going to arbitration . . . .[162]

The kernel of this change in policy—that individual remedial entitlements can be waived by bargaining representatives in the grievance stages of collective bargaining and that employees are bound by such settlements wholly apart from their own separate consent—has since been supported by two court of appeals decisions.[163]

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156. *Alpha Beta*, 273 N.L.R.B. at 1547 (paraphrasing *Olin*, 268 N.L.R.B. at 576).

157. *Olin*, 268 N.L.R.B. at 573-74; *see supra* note 106.

158. *Alpha Beta*, 273 N.L.R.B. at 1547.

159. *Id.* Although the Board noted that in this particular case the affected employees had personally authorized acceptance of the agreement, it held that "the employees were bound by their [own] acts *and* those of their collective-bargaining representative." *Id.* (emphasis added).

160. *Id.*

161. *Olin*, 268 N.L.R.B. at 574.

162. *Alpha Beta*, 273 N.L.R.B. at 1547 (citation omitted).

163. Mahon v. NLRB, 808 F.2d 1342 (9th Cir. 1987); Hotel Holiday Inn de Isla Verde v. NLRB, 723 F.2d 169 (1st Cir. 1983). In *Mahon*, the Ninth Circuit enforced the *Alpha Beta* decision, holding that "the union [is] empowered to conclusively bind . . . employees to the terms of [a] settlement agreement[] [w]holly apart from their own separate consents." *Mahon*, 808 F.2d at 1345. In *Hotel Holiday Inn*, the First Circuit remanded a Board decision, Hotel Holiday Inn de Isla Verde, 265 N.L.R.B. 1513 (1982) (issued prior to *Alpha Beta*), for a reexamination of its ruling not to defer to a strike settlement agreement on the grounds that "[a] Union and an employer may not restrict an individual's right to reinstatement by

The Board's recent *Spann Building Maintenance Co.*[164] decision suggests that the Board will continue to require some substantive discussion and resolution within the channels of the grievance procedures as a threshold criterion for deferral to grievance settlements. In *Spann*, the union entered into grievance discussions in response to a suspension and discharge of an employee, and it initially rejected the employer's settlement offer.[165] When the employer unilaterally reinstated the employee, however, the union refused to proceed to arbitration and wrote the employer that it "consider[ed] the matter as settled."[166] When the employee later filed unfair labor practice charges, the employer argued that the Board should defer pursuant to the policy enunciated in *Alpha Beta*.[167] The Board declined to defer, however, noting that the reinstatement arrangement was neither negotiated by the union nor accepted by the affected employee as a settlement of all contractual and statutory issues arising from the incident.[168] The Board further explained that the mere fact "[t]hat the Union some 4-1/2 years later now states that it considers the matter settled because [the employee] was reinstated does not retroactively change the nature of the . . . arrangement . . . and transform it into a settlement."[169]

V. COMMENT AND RECOMMENDATIONS

In the 1940's, the Supreme Court declared that the rights afforded under Sections 7 and 8 of the NLRA are public rights, enacted to effect the public interest in encouraging and protecting col-

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negotiating more stringent terms of reinstatement for them than those available under existing law." *Hotel Holiday Inn*, 723 F.2d at 172-73. In its subsequent decision on remand, Hotel Holiday Inn de Isla Verde, 278 N.L.R.B. 1027 (1986), the Board reversed its position, agreeing with the First Circuit's view that requiring substantial compliance with a Board remedy presupposes that the Board would have found an unfair labor practice:

> "All of the uncertainties of an adversary hearing, i.e., the competence of counsel, the thoroughness of preparation, the memories of witnesses, the attitudes of the hearing officer, and the availability of witnesses, stood between [the individual employees] and [a board remedy].". . . [T]he union probably perceived a settlement agreement which provided for some remedy as more desirous than the gamble of a more enhanced remedy at the end of the potentially long and costly litigation.

Id. at 1028 (footnote omitted) (quoting *Hotel Holiday Inn*, 723 F.2d at 172-73).

164. 289 N.L.R.B. No. 118, 130 L.R.R.M. (BNA) 1013 (1988).

165. *Id.* at 1014.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 1014-15. The opinion does not address the apparent loophole that the decision opens in the Board's pre-arbitral deferral policy.

lective bargaining.[170] Moreover, the Court stated that these statutory rights are distinct and separate from the private rights of a collective bargaining agreement[171] and that the NLRB is the exclusive tribunal with power to vindicate the statutory rights.[172] In the 1950's, the Court added that the rights themselves are exclusive, preempting state regulation of conduct arguably encompassed by Sections 7 and 8.[173] When the Court later held that the statutory rights did not preempt labor and management from creating and enforcing private rights in this area through collective bargaining,[174] it expressly chose not to retreat from its earlier interpretation that the Board possesses superseding and exclusive power over unfair labor practices.[175] Thus, the Supreme Court accommodated the tension between the Act's general policy of encouraging collective bargaining and its specific provisions entrusting the Board with the prevention of unfair labor practices by suggesting that the exercise of independent contractual power would have little impact on the Board's exercise of its statutorily mandated function to investigate and remedy alleged unfair labor practices.

This Supreme Court accommodation poses a challenge to the accommodation embodied in current NLRB arbitral and pre-arbitral deferral policy. Under the Board's policy, when alleged wrongful conduct makes out both a violation of the Act and a breach of the labor contract, the charging party must initially seek an "adjustment" under the contract.[176] In the absence of unusual circumstances, the Board will review an arbitrator's adjustment only if the charging party can show that the facts relevant to the statutory issue were not presented during the arbitral proceedings.[177] The Board's deferral policy thereby effectively transfers to arbitrators the adjudicative

170. National Licorice Co. v. NLRB, 309 U.S. 350, 362 (1940); Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261, 268-69 (1940); *see supra* note 65 and accompanying text.

171. "The rights asserted in the [unfair labor practice] suit and those arising upon the contract are distinct and separate . . . ." *National Licorice*, 309 U.S. at 363.

172. *Id.* at 365 ("Section 10(a) and (c) of the Act commits to the Board the exclusive power to decide whether unfair labor practices have been committed and to determine the action [a violator] must take to remove or avoid the consequences of his unfair labor practice."); *Amalgamated Util. Workers*, 309 U.S. at 266 ("The vindication of the desired freedom of employees is thus confided by the Act, by reason of the recognized public interest, to the public agency the Act creates.").

173. *See supra* notes 69-72 and accompanying text.

174. *See supra* notes 73-78 and accompanying text.

175. *See supra* notes 76-79 and accompanying text. Note that the relevant "law" applied by the Board *might* be affected by express waivers of the statutory protections. *See infra* notes 195-97 and accompanying text.

176. *See supra* notes 95-110 & 115-31 and accompanying text.

177. *See supra* notes 106-10 and accompanying text.

functions that the Act, and apparently the Court, reserved to the Board.

A. *Contrasts with Section 301 Deferral*

The Board anchors its deferral policy in the same rationale that the Supreme Court articulated to support judicial deferral of Section 301 jurisdiction.[178] A number of clear and important distinctions exist, however, between the context of Section 301 deferral and that of NLRB deferral—distinctions that undermine the soundness of the Section 301 rationale in the NLRB context. The initial legitimizing premise of Section 301 deferral is that courts and arbitrators have concurrent jurisdiction over the private contractual rights of collective bargaining agreements. The Board, however, adjudicates statutory rights that are distinct and separate from contractual rights. Thus, the "concurrence" in jurisdiction between the Board under Section 10 and the arbitrator under the contract is merely over *conduct*, not *rights*. In fact, the Supreme Court has never expressly qualified its early holding that the Board is the exclusive tribunal with power to vindicate the statutory rights.[179]

In addition to this distinction regarding the nature of the jurisdictional overlap, each aspect of the Supreme Court's *Steelworkers Trilogy*[180] rationale either argues against NLRB deferral to arbitration or it does not apply. First, the *Steelworkers Trilogy* rationale not

178. The Board has expressly cited the *Steelworkers Trilogy* opinions as support in its major decisions. Olin Corp., 268 N.L.R.B. 573, 574 (1984); United Technologies Corp., 268 N.L.R.B. 557, 558 (1984); Collyer Insulated Wire, 192 N.L.R.B. 837, 840, 844 (1971). Even without specifically mentioning the Supreme Court opinions, however, the Board has consistently based its policy on the same grounds as the *Steelworkers Trilogy*. For deferral decisions noting the Act's general policy of encouraging voluntary settlement of labor disputes, see *Olin*, 268 N.L.R.B. at 574; *United Technologies*, 268 N.L.R.B. at 558; Electronic Reproduction, 213 N.L.R.B. 758, 760 (1974); United Aircraft Corp., 204 N.L.R.B. 879, 881 (1973); National Radio Co., 198 N.L.R.B. 527, 531 (1972); *Collyer*, 192 N.L.R.B. at 843; Monsanto Chem. Co., 130 N.L.R.B. 1097, 1098 (1961); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955); Consolidated Aircraft Corp., 47 N.L.R.B. 694, 706 (1943). The Board frequently refers to the parties' contractual agreements in order to resolve disputes through grievance arbitration procedures. *See, e.g., United Technologies*, 268 N.L.R.B. at 559; *Electronic Reproduction*, 213 N.L.R.B. at 760-61; *United Aircraft*, 204 N.L.R.B. at 881; *National Radio*, 198 N.L.R.B. at 531; *Collyer*, 192 N.L.R.B. at 842-43. Occasionally, the Board also declares its confidence in the arbitrators' ability to resolve the statutory issues in a manner consistent with the purposes of the Act. *See, e.g., United Aircraft*, 204 N.L.R.B. at 879; *National Radio*, 198 N.L.R.B. at 531; *Collyer*, 192 N.L.R.B. at 839. In addition to relying on these aspects of the *Steelworkers Trilogy* rationale to support its deferral policy, the Board has occasionally cited its case load and limited resources as motivating factors. *See, e.g., Electronic Reproduction*, 213 N.L.R.B. at 761 (the need to avoid dual litigation); *United Aircraft*, 204 N.L.R.B. at 880; *National Radio*, 198 N.L.R.B. at 531-32.

179. *See supra* note 67 and accompanying text.

180. *See supra* notes 35-52 and accompanying text.

only emphasizes the parties' contractual promise to resort to grievance arbitration, but it also requires it.[181] There is generally no clear reason to conclude that the parties' agreement to arbitrate disputes arising under their private contract is also a promise to arbitrate violations of independent statutory law.[182] Second, the *Steelworkers Trilogy* rationale stresses the Act's general policy favoring private, internal adjustment of labor disputes.[183] Yet this policy pertains only to contractual disputes: The LMRA's concrete expression of general policy in Section 203(d)[184] specifically limits that policy to "disputes arising over the application or interpretation of [a] . . . collective bargaining agreement."[185] By defining certain labor practices as unlawful and creating a special tribunal with exclusive authority to remedy such practices, Congress clearly expressed its intention that the parties should not have to rely on internal adjustment processes to remedy these particular unfair labor practices.[186] Third, the *Steelworkers Trilogy* rationale notes the special expertise of arbitrators. An arbitrator's expertise, however, is limited to interpreting the labor contract and the "common law" that has developed around the parties' relationship under the contract.[187] Congress created a special federal

181. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) ("[T]he judicial inquiry under Section 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made.").

182. Although unions generally take unfair labor practice charges to arbitration in response to the Board's pre-arbitral deferral policy, the typical labor contract does not provide that the parties agree to take statutory issues to arbitration. For example, in the *Collyer* opinion, the relevant grievance arbitration clause defined grievance as any controversy involving "the interpretation, application or violation of any provision of this agreement." *Collyer*, 192 N.L.R.B. at 839. The Board acknowledged that the clause "makes clear that the parties intended to make the grievance and arbitration machinery the exclusive forum for resolving *contract* disputes." *Id.* (emphasis added). In fact, although labor and management possess some power to contract around the statutory law, and thereby alter the law that the Board would apply to a dispute, it is not clear that the parties are free to waive their right to seek redress before the Board. *See* Lodge 743, Int'l Ass'n of Machinists v. United Aircraft Corp., 337 F.2d 5 (1964); *see also United Technologies*, 268 N.L.R.B. at 563 (Zimmerman, Member, dissenting) (arguing that although a union may waive some individual statutory rights, the union cannot waive an individual employee's right to litigate an unfair practice issue before the Board).

183. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960).

184. LMRA § 203(d), 29 U.S.C. § 173(d).

185. *Id.* For the language of Section 203(d), see *supra* note 3.

186. Supreme Court has stated: "The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261, 265 (1940).

187. As Member Zimmerman points out in his dissent in United Technologies Corp., 268 N.L.R.B. 557 (1984), the "arbitrator['s] competency is primarily in 'the law of the shop, not

agency to administer unfair labor practice protections precisely because it appreciated the inherent complexity involved in investigating, adjudicating, and remedying alleged violations of these statutory protections. Congress intended the Board to develop and apply a special expertise in this area.[188]

The Board's deferral policy essentially equates "encouragement of collective bargaining" with "required resort to arbitration" and then reflexively deems any result reached through fair and regular arbitration as "consistent with the Act" or "not repugnant." This perspective fails to acknowledge the distinction that Congress recognized between conduct that violates the labor contract and conduct outlawed as unfair by statute. The design of the Act evidences Congress' intent: Congress carved out unfair labor practices for special treatment because it recognized that these practices, unlike run-of-the-mill contract disputes, undermine the parties' ability to invoke the collective bargaining process—the very process that is normally relied upon to resolve the labor dispute. In its entirety, the Act encourages collective bargaining. Within that broad framework, the Act prescribes a specific role for the Board—to intrude when managers, union officials, or employees act in a manner that threatens the collective bargaining relationship established by the Act. If Congress had intended the Board to limit its unfair labor practice jurisdiction to situations in which the parties had no binding internal procedures for

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the law of the land.' " *Id.* at 563 (Zimmerman, Member, dissenting) (quoting Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 743 (1981)). Furthermore, "even if the arbitrator is conversant with the Act, he is limited to determining the dispute in accordance with the parties' intent under the collective-bargaining agreement." *Id.* (citing Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)).

188. In its major decisions finding that the NLRA preempts state law, the Supreme Court strongly emphasized the special expertise and procedure that Congress evidently considered necessary for the enforcement of Section 8. In Garner v. Chauffers & Helpers Local Union No. 776, 346 U.S. 485 (1953), the Court declared:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It [confided] primary interpretation and application of [unfair labor practice protections] to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary . . . .

Id. at 490.

Again, in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), the Court observed that "the unifying consideration of our [preemption] decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *Id.* at 242; *see also Amalgamated Util. Workers*, 309 U.S. at 264-66 (vindication of unfair labor practice freedoms and protections is confided to the Board).

resolving disputes, it almost certainly would have stated such intentions expressly at some point in the legislative history of the Act, if not in the Act itself.[189]

B. *Proposed Deferral Policy for Arbitral Situations*

The Board would achieve a more appropriate accommodation between the Act's general policy of encouraging internal adjustment of labor disputes and its specific protection of the rights deemed fundamental to collective bargaining by limiting its post-arbitral and pre-arbitral deferral to those situations in which contractual issues are dispositive of the statutory charges.[190] With respect to other statutory issues, arbitrators should not purport to resolve them, and in any case, the Board should conduct an independent review and appraisal of evidence related to such statutory charges.[191]

This approach would not necessarily result in wasteful duplicative proceedings. Duplicative proceedings are the product of a current Board deferral policy that forces parties to seek arbitration in the first instance. With the recommended change in NLRB policy, the parties might generally be expected to proceed directly to the Board. More reliable enforcement of the statutory protections might even result in fewer violations. In addition, a deferral policy that recognizes grievance settlements as final[192] and provides for Board review of arbitral decisions might lead to more settlements being reached through grievance procedures, thereby conserving both arbitral and Board resources.[193]

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189. Although Congress did not expressly state an intention that the courts should defer their Section 301 jurisdiction, judicial deferral comports with, rather than opposes, the general design of the Act.

190. Deferral should further be limited to contractual dispositions that do not involve a waiver of Section 7 rights. *See infra* notes 195-97 and accompanying text.

191. If an arbitral ruling has already been issued, the Board, by policy, might properly defer to the arbitrator's findings of fact and to any contract or common law interpretations common to both the contractual and statutory issues. The relationship between the Board and the arbitrator would be roughly analogous to the relationship between judge and jury when a case presents some issues triable to the court and others triable to the jury: The judge is bound by the jury's findings as to any common factual issues. *See* Curtis v. Loether, 415 U.S. 189, 196 n.11 (1974). Note, however, that such deferral would be discretionary. The Supreme Court has already held that the Board is not bound by an arbitrator's findings as a matter of law. Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 272 (1964).

192. *See infra* notes 193-99 and accompanying text.

193. It currently takes as long as three years to prosecute unfair labor practice charges before the Board, a procedural delay that can affect the parties' relative bargaining strength in settlement discussions. *See* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1795-97 (1983). This lengthy delay might force charging parties to pursue their contractual remedies while waiting for a later Board proceeding to adjudicate the statutory issues. If duplicative proceedings result merely

C. *Proposed Deferral Policy for Private Settlements*

The NLRB's current deferral policy makes little distinction between an arbitration award that results from the Board's mandated pre-arbitral deferral practice and a settlement voluntarily arrived at during grievance negotiations that precede arbitration.[194] The two situations are distinguishable, however, in ways that have important implications for deferral. First, while mandatory arbitration thwarts Congress' intent that the Board adjudicate unfair labor practice charges,[195] grievance settlements exemplify precisely the type of voluntary, internal adjustment that Congress was trying to promote. Grievance settlements confirm, rather than interfere with, the collective bargaining process; they sustain, rather than chill, the employees' enthusiasm for engaging in concerted activity. Grievance settlements thus further the public interest considerations that the Board is charged to protect. Second, private settlements contain an element of waiver not present with mandated arbitral resolutions. The Supreme Court has held that the parties' contractual power to regulate labor relations includes a limited power to alter the entitlements and protections of the Act.[196] Because ongoing dispute negotiation is as central to the collective bargaining process as is periodic negotiation of a contract,[197] and because a greater power generally presupposes a lesser power, the Board should recognize a limited authority that permits union officials to compromise statutory protections and entitlements in order to settle a particular dispute.[198] In other words, the rationale

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from such backlogs at the Board, the Board must temporarily increase its resources to remove the delay, alter the procedural dynamics of the settlement discussions, and thereby reduce its future case load.

194. *See supra* notes 153-57 and accompanying text.

195. *See supra* notes 188-89 and accompanying text.

196. *See* Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 705 (1983); NLRB v. Magnavox Co., 415 U.S. 322, 325 (1974); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) (right to strike); Labor Bd. v. Rockaway News Co., 345 U.S. 71 (1953) (right to refuse to cross a lawful picket line).

197. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) ("[T]he grievance machinery . . . is at the very heart of the system of industrial self-government."); *see also supra* note 91 (similar Board vision of the collective bargaining process).

198. In Alpha Beta Co., 273 N.L.R.B. 1546 (1985), *enforced sub nom.* Mahon v. NLRB, 808 F.2d 1342 (9th Cir. 1987), the Board held that the union could waive its members' statutory protections as part of grievance negotiations. This overturns earlier Board rulings that held that "[i]t does not follow [from the Supreme Court's recognition that a union can waive some of its members' statutory rights] . . . that a union may waive an employee's right under the Act to have his employer's unfair labor practice remedied." American Cyanamid Co., 239 N.L.R.B. 440, 441 (1978). Additionally, at least two courts of appeals had held that a private arrangement does not bar the Board's exercise of its jurisdiction over an unfair labor practice violation no matter how happy the parties are with the arrangement. Lodge 743, Int'l

underlying deferral to grievance settlement is not that the parties have adequately adjudicated the statutory issues (a power reserved to the Board), but that the parties have resolved their dispute—the goal that initially motivated Congress to create the Act and its protections.

Given these distinctions between the circumstances that surround arbitration awards and those that surround grievance settlements, the Board's deferral policy should clearly distinguish between the two. Whereas the Board should independently review and appraise the statutory issues associated with an arbitrated dispute, controversies settled during grievance discussions require only a minimal measure of review. The Board need only ascertain that the parties to the settlement are official representatives of the employees affected by the conduct at issue and that these officials intended the settlement as an end to the controversy.[199] The Board's approach to grievance deferral in *Alpha Beta*[200] agrees well with this recommendation.

Much of the critical commentary on NLRB deferral policy has emphasized the protection of individual statutory rights. A change in Board policy that no longer recognizes the remedial rights of individual employees, and thus accords greater deference to non-arbitral settlements, certainly will heighten this concern. Those who advocate the protection of individual rights, however, refuse to allow that unfair labor practice protections—indeed, the entire NLRA—are premised on a notion of collective strength and collective rights.[201] Unlike other federal statutory protections that are aimed at alleviating discrimination or enhancing civil rights, the NLRA recognizes no intrinsic public interest in its protections. The rights of the Act were enacted solely for the instrumental purpose of "encouraging the prac-

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Ass'n of Machinists v. United Aircraft Corp., 337 F.2d 5, 8-9 (2d Cir. 1964); International Union of Elec., Radio and Mach. Workers, Local 613 v. NLRB, 328 F.2d 723, 727 (3d Cir. 1964). Even assuming that a union possesses the power to alter the controlling law, such power should not affect the Board's unrestricted Section 10(a) jurisdiction to adjudicate and remedy an unfair labor practice charge. The Board would simply apply the law as altered by any valid waivers. Therefore, this proposal suggests that the Board effectuate such power through its deferral policy.

199. In addition, the Supreme Court has ruled that a waiver of statutory protections is subject to the duty of good faith representation and limited to rights that do not "impair the employees' choice of their bargaining representative." *Metropolitan Edison*, 460 U.S. at 705-06; *Magnavox*, 415 U.S. at 325. Of course, the Board's policy on deferral to grievance settlement should incorporate these and other express limitations on the parties' power to waive statutory protections.

200. *See supra* notes 153-62 and accompanying text.

201. As the Court has stated, "[t]he [NLRA] . . . extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

tice and procedure of collective bargaining,"[202] a goal that is itself instrumental to the ultimate goal of industrial peace. Accordingly, Congress did not intend that violations of the Act would vest individual victims with a remedial entitlement.[203] Individual protections lodge, instead, in the rights of a collective bargaining agreement and in a bargaining representative's duty of fair representation.[204]

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202. *See supra* note 2.

203. In one of its first explanatory opinions of the Act, the Supreme Court declared that "[n]o private right of action is contemplated." Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261, 267 (1940). The Court went on to contrast the statutory protections of the NLRA with the antidiscrimination protections afforded by the Interstate Commerce Act, noting that the procedure provided by the NLRA is:

> prescribed in the public interest as distinguished from provisions intended to afford remedies to private persons. . . . [I]n their bearing upon private rights they are wholly dissimilar. The Interstate Commerce Act . . . imposes upon the carrier many duties and creates in the individual corresponding rights. . . . The [National Labor Relations Act] . . . contains no such features.

Id. at 268-69.

Shortly thereafter, the Board again stated: "[T]he central purpose of the Act . . . [is directed] toward the achievement and maintenance of workers' self-organization. . . . The Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 193-94 (1941).

The Board's decision in Texaco, Inc., 273 N.L.R.B. 1335 (1985), reveals a proper understanding of unfair labor practice protections as promoting the public interest in peaceful labor relations rather than as providing individual remedial entitlements. In *Texaco*, the Board deferred to a strike settlement agreement in which the union agreed to withdraw Section 8(a)(3) charges resulting from the employer's unlawful withholding of sickness and accident benefits during an authorized strike. *Id.* at 1335-37. In doing so, the Board noted that the general rationale for not deferring—that the Board's Section 10(a) power to act in the public interest is not affected by other means of adjustment—fails to analyze how the public interest is adversely or favorably impacted by a particular strike settlement agreement. *Id.* at 1336. In conducting such an analysis in *Texaco*, the Board explained that if it gave "paramount concern" to the employees' private interests in being compensated for the employer's statutory violations, it would ironically be interfering with the public interest in peaceful resolution of labor disputes that the Act was intended to foster. *Id.*; *accord* Energy Coop., Inc., 290 N.L.R.B. No. 78, 129 L.R.R.M. (BNA) 1256 (1988).

204. *See supra* note 58. Even were unfair labor practice rights intended to protect the individual rather than the institutional process, the Supreme Court has distinguished between NLRA rights and antidiscrimination legislation and expressly held that the Act "contemplates that individual rights may be waived by the union." Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 706 n.11 (1983). Furthermore, the Court has stated that the statutory bargaining representative exercising this power must be allowed "a wide range of reasonableness . . . in serving the unit it represents." Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).