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DISCIPLINARY DISCHARGES,
ARBITRATION AND NLRB DEFERENCE

JAMES B. ATLESON*

The National Labor Relations Act (NLRA) was primarily aimed at protecting employee rights through the medium of collective action. Since organization was to be the device whereby fair treatment would be secured for employees, the Act had to provide protection for collective and institutional rights. In addition, since individual employee action might sometimes thwart group endeavors, some individual interests necessarily had to be submerged for the common good.

Judicial and administrative interpretation of the NLRA has placed further restrictions on the expression of individual interests. Thus, as in wildcat or unauthorized strike situations, the very presence of a union will render otherwise protected conduct unprotected. Choosing collective action as the vehicle for the protection of individual interests, whether statutory or contractual, has had an effect on the scope of permissible individual action. The medium of protection chosen is, therefore, part of the message.

Irrespective of the merits of the particular balance chosen between individual and institutional or collective concerns, these developments often tend toward an institutional bias in decision-making which unduly defers to corporate interests and unnecessarily sacrifices individual rights and expectations. This bias is encouraged by the traditional stress on other interests; thus, industrial stability and efficiency have been used to compromise individual interests. A union, for instance, receives a "certification year" in which to bargain with an employer despite changes in employee sentiment. "Contract bar" rules forestall representa-

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1. Although the problem of accommodating individual interests to institutional concerns is important in all areas of the law, it has a special immediacy in labor law. Since this article will no doubt be read, however, if at all, primarily by knowledgeable people in the labor area, an attempt was made to exclude unnecessary background information in text and footnotes. Footnotes which would not aid further research have been omitted.


3. Id. at 683-84.
tion elections during the life of an agreement, and a rival's economic pressure is prohibited as long as the incumbent is certified, lawfully recognized, or an election has been held within the previous year. Moreover, the NLRB's severance and decertification rules make it extremely difficult for groups of employees to break out of a previously established bargaining unit.

These comments should not be taken as criticisms of the balance chosen in particular situations. Blind enforcement of individual interests would drastically alter labor-management relations and would not ultimately be in the best interests of all employees. Those who have defended the basic principles of federal labor policy are justifiably suspicious of those who broadly criticize the protection of group rather than individual interests. Nevertheless, due consideration of individual interests may often be foreclosed unconsciously by the fear that the industrial relations system is too weak to afford greater protection to individual interests. For example, the Supreme Court recently considered the scope of union disciplinary power under the NLRA. Although section 8 (b) (1) (A) protects individual acts of disobedience, the Court did not consider the individual interests involved. Similar treatment is found in cases dealing with arbitration systems. Thus, the Court has broadly accepted the arbitral process and minimized the extent of judicial review in the Steelworkers' Trilogy, given the formal parties almost complete control of the process, and provided obstacles to an employee's claim that he has been unfairly represented by his union. Finally, when faced with an employee's claim that he was discriminatorily discharged, the NLRB will often defer to an arbitral award upholding his discharge. Should the NLRB find that minimal procedural due process was afforded in the arbitration proceeding, and the decision was not grossly at variance with federal labor policy, the NLRB will not review the merits of the alleged statutory violation.

The focus of this article is the NLRB's policy of deference to arbitral awards in discharge cases. Although there has been little

4. See Atleson, supra note 2, at 681 et seq.
published concern, the area is critically important to the employees involved. Moreover, the rule of law is ill served by policies which delegate the resolution of public rights to private parties who may be indifferent or even hostile to the individual rights involved.

The theme of this article is that the federal interest in preventing discriminatory discharges receives insufficient protection under the NLRB's deference policies. The most serious cases are those in which individual interests may conflict with the mutual concerns of the employer and the union. In these cases, the NLRB's guidelines for invoking its policy of deference to arbitral awards are too porous to guarantee that the employee was fairly represented before the arbitrator or that the arbitrator was sensitive to the individual interests involved. Importantly, a policy of non-deference would neither undermine nor interfere with the private settlement of labor disputes. The NLRB and arbitrators have different roles, and consequently they are concerned with different questions. Action by the NLRB does not attack the integrity of arbitration, for the NLRB's focus is statutory, not contractual. Nor is it foreseeable that employees will be encouraged to file charges with the Board after unsuccessful arbitration proceedings. Encouragement of meritorious charges, of course, could not be challenged, and it is simply not clear that a reversal of the NLRB's deference policy would encourage the filing of non-meritorious charges. Employees may not be informed of the NLRB's policies in this regard, and, in any event, the Board's informal settlement procedures are more than sufficient to screen out frivolous charges.

Finally, the Board's policy of deferring to arbitral awards in discharge cases is inconsistent with its common refusal to defer in refusal to bargain cases, despite the resultant interference with the grievance-arbitration system involved and the lack of an independent statutory interest.

DEFERENCE TO ARBITRAL AWARDS: STATED AND SUSPECTED ADMINISTRATIVE JUSTIFICATIONS

When an employee alleges that his discharge was in violation of the NLRA, the NLRB may refuse to inquire into the merits of
the charge and defer to an arbitral award upholding the employer's action. The NLRB's position is that barring gross violations of procedural due process or an arbitral decision clearly at variance with federal law, the Board need not consider the merits of the unfair labor practice charge.  

The NLRB's delegation to a private arbitrator has been justified on two grounds. First, the NLRB understandably desires to conform its procedures to the federal policy encouraging the private settlement of labor disputes. Arbitration procedures might be undermined, and their popularity lessened, if a losing grievant could, in effect, relitigate his grievance before the NLRB. Under the NLRB's deference standards, however, some investigation will be made since the NLRB recognizes that undue deference may jeopardize public rights protected by the NLRA. Therefore, the relevant question is whether the NLRB's policy unduly sacrifices public rights and, indeed, whether the inability of employees to have the NLRB consider the merits of their claims actually aids the policy in favor of private settlement.

The NLRA does not clearly define the NLRB's responsibility in relation to arbitration procedures. Section 10(a) provides that the Board's power over 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." The NLRB...
has interpreted this language to mean that deference to arbitration can only be a matter of discretion or comity. Since contract breaches, and unfair labor practices often overlap, parallel or concurrent avenues of relief are necessary to avoid weakening either grievance procedures or NLRB authority. Thus, section 301 actions for breaches of collective bargaining contracts may be brought despite the presence of conduct that falls within the statutory competence of the NLRB, and the NLRB may proceed despite the contention that the alleged statutory violations are also contract breaches.

Section 10(a), however, expressly refers only to settlement procedures aimed at resolving unfair labor practices. Thus, it does not expressly refer to the arbitration of contract disputes. Taft-Hartley declared that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for the settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." This section refers expressly to the settlement of contract issues only, and, thus, it does not command a policy of deference to arbitration procedures. The thrust of the latter provision, however, along with the development of section 301, may indicate that a liberal accommodation by the NLRB is necessary. The provisions of the NLRA, however, do not materially assist in drawing a demarcation line between private and public settlement procedures, nor do they provide guidelines for an NLRB policy of deference.

The contours of the NLRB's deference policy, then, are not dictated by express provisions of the NLRA. More responsible, perhaps, is the NLRB's understanding of the developing federal law of arbitration. With the increased importance of arbitration after the Steelworkers' Trilogy, there is understandable pressure on the Board to recognize and encourage the arbitral process. Furthermore, recent judicial pronouncements suggest that deference, in some cases at least, may be more than a matter of discretion. Although the Supreme Court has indicated that the

Board may interpret an agreement to enforce a statutory right, it has more recently noted that there may be limits to administrative authority. Thus, in *NLRB v. C & C Plywood Corp.*, the Court stressed that the Board had not "exceeded" its statutory jurisdiction in interpreting provisions of an agreement, and it also noted that no arbitration clause had been agreed to by the parties. Thus, the Board's "action was in no way inconsistent with its previous recognition of arbitration as 'an instrument for composing contractual differences.'"

*C & C Plywood* involved a claim that the employer's action was unilateral, and, hence, violated section 8(a)(5). As will be argued subsequently, this kind of case presents the strongest situation for a policy of deferral to arbitration since the statutory question—the alleged "unilateral" nature of the conduct—is inextricably bound up with the contractual issue and no independent federal interest is served by NLRB scrutiny. In discharge cases, on the other hand, "discrimination" or "interference" need not be coterminus with a contractual "just cause" provision, and the employee's interest may conflict with the interests of the "parties" to the agreement.

Given the lack of clear limitations on the NLRB's responsibility in these areas, it is understandable that the NLRB will attempt to carefully avoid undue interference with private settlement machinery. The proposition presented herein is that interference has been purchased at an unnecessarily high price.

The second commonly mentioned justification for NLRB deference is the need to decrease the NLRB's admittedly staggering case load. In fiscal 1968, the NLRB received 30,705 cases of which 17,816 (58%) were unfair labor practice cases. During this year the agency closed 30,750 cases—about 13,000 relating to

15. Id. at 426. See also id. at 429.
16. The NLRB has generally refused to defer in unilateral act cases like *C & C Plywood* even where arbitration procedures were present. See, e.g., Clover Leaf Division of Adams Dairy Co., 147 N.R.L.B. 1410 (1964) [hereinafter referred to as *Adams Dairy*]. Although the precise effect of *C & C Plywood* on these cases is unclear, the Board actions demonstrate that something more than a policy of encouraging private settlement must be involved in discharge cases.
representation issues and over 17,000 involving unfair labor practice issues.

Given the annual increase in the Board's caseload and the normal failure of government to match workload with necessary appropriations, it is understandable that the NLRB should attempt to reduce its caseload whenever possible. The primary structural device for effecting such a reduction is the Board's informal settlement procedure. Under this procedure charges are screened, dropped or relief attempted on a voluntary basis. These procedures are extremely effective, accounting for approximately ninety percent of all charges closed.

The effectiveness of the informal procedures can be seen from the following figures. In fiscal 1968 more than 91.9 percent of the 17,000 unfair labor practice cases were closed by regional offices without formal decision. Twenty-six percent were settled or voluntarily compromised by the parties, thirty-five percent were withdrawn by the charging party, and thirty percent were dismissed by the regional office. Thus, only 5.6 percent of all cases closed went to the NLRB for formal adjudication. The General Counsel issued only 2,004 formal complaints, although this represents an all-time high.

The success of the Board's informal procedures indicates that decided cases represent only a rough guide to labor law in action. In addition, the NLRB's formal policy of deference in discharge cases will have a great effect on the administration of the NLRA at the regional levels, operations which will not be reflected in published records. Traditional research, then, will not reveal the actual incidence of arbitral deference by the NLRB.

The very efficiency of informal procedures, however, suggests that deference is not required to ease the Board's case load. Adequate screening devices are available to weed out nonmeritorious claims. Indeed, the NLRB's deference policy requires an investigation into matters not strictly relevant to the merits of unfair labor practice charges. Thus, in discharge cases in which an arbitrator has upheld the employer's action, the NLRB will inquire into the procedure as well as the substance of the arbitral proceeding. Since this investigation is required only by the

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18. *Id.*

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NLRB's own policies, the usefulness of these policies in lessening the Board's case load is dubious, especially given the informal procedures available to the NLRB. One possible hypothesis, examined subsequently, is that deference may assist the NLRB to avoid meritorious charges, indicating that these cases do not rank high on the Board's list of priorities.

Observation suggests that a number of other factors, unrelated to the merits of the complaint, may lead to dismissals of charges at the regional level. First, the discharged employee may charge his union as well as his employer with wrongdoing, such as a failure to represent him fairly, and perhaps focusing on the arbitration proceeding itself. The allegation that the union has unfairly represented the grievant before the arbitrator, one of the NLRB's considerations under its deference policy, is also a claim upon which an action can be initiated in court. Given this judicial "alternative," regional offices may be motivated to dismiss any case which is not blindingly clear. Despite the NLRB's recent entrance into the fair representation area after years of judicial development, local offices often seem reluctant to get involved.

The ability of the employee to challenge the union's action in court is, however, often illusory. Court challenges take time and money; the employee usually does not have the latter and will often not spend the former. As in other areas of labor law, the result is that fair representation cases are often brought where a number of fortuitous circumstances exist: (1) an employee feels very strongly about the union's alleged unfairness, (2) he overcomes his normal aversion or ignorance of the law and lawyers, as well as social fears over suing his union, and (3) he finds an attorney willing to take his case in an area where the law is vague.


20. Professor Summers found in 1960 that "more than ¾ of the reported cases in which individuals have sought legal protection of their rights under a collective agreement have arisen out of disciplinary discharges." Summers, Individual Rights in Collective Agreements: A Preliminary Analysis, 9 BUFFALO L. REV. 239, 252 (1960).
and recovery remote, or an attorney who is willing to voluntarily donate his time out of altruistic motives.21

Another "alternative" avenue of relief is a contractual grievance procedure which has not yet been employed. Although the Board once deferred to an arbitration procedure which could resolve the dispute,22 the Board has recently been reluctant to defer to potential arbitration involving discharges allegedly made for union activities.23 In practice, however, regional offices will defer action pending arbitral resolution if the private procedure is being "actively pursued" and there is a substantial likelihood that utilization of the procedure will resolve the dispute.24

The two sets of standards do not mesh, for grievance procedures may be "actively pursued," satisfying regional offices, even though the discharge concerned protected activities. In fact, however, the standards need not mesh, for if the General Counsel refuses to act, the particular case is at an end. One possible explanation is that the NLRB will refuse to defer, in agreement with the General Counsel, when it feels that arbitration will not resolve the dispute adequately. Perhaps the General Counsel is more likely to come to that conclusion when the protected nature of the employee's conduct is clear. In these cases, perhaps, federal policy may not be served by the delays inherent in a policy of deference.

It is important to note that a refusal by the NLRB to defer to an existing arbitration system means that the Board agrees with the General Counsel that the merits should be reached. In cases where the NLRB defers, it specifically rejects the General Counsel's charge and refuses to consider the merits, even though the trial examiner may have upheld the charge. In fair representation cases, and cases allegedly subject to arbitration, then, another forum exists to vindicate the employee's interest, and the NLRB

21. This problem applies to other areas of labor law where litigation is the chosen vehicle for the enforcement of employee rights. See Atleson, A Union Member's Right of Free Speech and Assembly: Institutional Interests and Individual Rights, 51 MINN. L. REV. 403, 483-89 (1967); Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 YALE L.J. 175, 221 (1960).


often decides to forego intervention despite the presence of critical interests within the NLRB's domain.\textsuperscript{25}

Another factor possibly present here, although one hesitates to raise it, involves an irony of NLRB operation. The conflict between unions and employers, it is thought, makes it impossible for the NLRB to become captured by the economic forces it seeks to regulate. That formulation, however, overlooks the fact that an employee may represent an interest different from and, perhaps, in conflict with, the interests of union and management. When union and managerial interest coincide and the interest of the employee is in conflict, the NLRB might well decide to favor the representatives of the "system."

The reasons for such an approach are not difficult to list. First, many employee complaints undoubtedly lack merit, and an employee's insistence and pugnaciousness may be inversely proportional to his articulateness and knowledge of the NLRA. The percentage of nonmeritorious and even frivolous charges may well be high. Staff members may exhibit understandable, although nevertheless regrettable, impatience with the charges of individual employees, and employees are often told to abide by arbitral awards or seek union assistance. Employees may view their treatment as based upon indifference or even hostility. Even if informal procedures are involved, the employee is often distressed at the seeming casualness of the investigation as well as its duration.

Second, an employee who challenges a grievance settlement is often considered a "troublemaker" by both labor and management. It is not hard to believe that NLRB staff members often share that view. The staff is often in contact with local union officers, employers, and their counsel,\textsuperscript{26} and may begin to view some

\textsuperscript{25} The Board's great faith in arbitration is demonstrated by recent cases in which the Board has ordered arbitration where the union had illegally refused to process an employee's grievance. Although the Board retained jurisdiction should arbitration not effectively resolve the dispute, such extraordinary deference is unnecessary and unwise given the union's past behavior and the amount of NLRB time already invested in the case. I.U.E. Local 485, 170 N.L.R.B. No. 121, 67 L.R.R.M. 1609 (1968); Port Drum Co., 170 N.L.R.B. No. 51, 67 L.R.R.M. 1506 (1968). Yet the Board does not require resort to arbitration as a matter of deference where the employer refused to proceed to arbitration. Omaha Neon Sign Co., 170 N.L.R.B. No. 150, 68 L.R.R.M. 1585 (1968); Flasco Mfg. Co., 162 N.L.R.B. 611 (1967).

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situations from similar perspectives. In addition, the NLRB's public acceptance may not be materially advanced by protecting an employee whose discharge is of little concern to his own union.

Moreover, if a union and employer can agree, even through a neutral arbitrator, that "just cause" exists, the NLRB might easily believe that its time could be better allocated elsewhere. The weight given to concerns for industrial harmony and efficiency in other areas\(^{27}\) may support an interest in administrative efficiency.\(^{28}\)

Professor Peck has perhaps stated the primary rationale for Board deference in discharge cases: "[I]f one may set an order of priority for use of the resources of the Board, discharge cases involving employers who have entered into collective bargaining relationships probably should not be given a high ranking."\(^{29}\) Professor Peck felt that these cases do not usually present significant policy issues but instead turn on factual questions upon which the Board may not be superior to an arbitrator. The thesis of this article is that the protection of employees from illegal discharge is a significant policy issue and that, although these cases often involve factual questions, only the NLRB can properly place these facts in the context of federal labor law.

The problem is not solely one of abstract justice. Deference to awards considered suspect by employees has a devastating effect on employee morale and respect for law. Although an employee may be unaccustomed to using the law, he often has a high respect for it, and especially for the protection afforded his economic rights under federal law. To find that he must now contend with the NLRB as well as his employer, and perhaps the union as well, is a bitter pill indeed. The political ramifications of this disaffection from respect for legal processes should also not be ignored.\(^{30}\) The practical problems of the Board's deference policy are illustrated in the next section.

\(^{27}\) See Atleson, supra note 2, at 682-85.
\(^{28}\) The NLRB's rejection of individual concern is sometimes startling as well as frank: "[T]he parties have found that machinery which they have created . . . has adequately served its purpose." Denver-Chicago Trucking Co., 132 N.L.R.B. 1416, 1421 (1961).
A series of hypothetical situations will aid in understanding the weaknesses in current NLRB policies. The NLRB's policies neither guarantee that federal interests are accorded protection nor can they adequately uncover procedural unfairness in arbitral proceedings.

**Case I.** The employee has been discharged for sloppy work or for disobeying a plant rule. The union carried the grievance to arbitration, but the arbitrator upheld the discharge. The employee files a charge with the NLRB alleging discrimination within section 8(a)(3).

**Case II.** The employee has been discharged for leading a wildcat walkout which the agreement expressly lists as a ground for discipline. Again, the union has grieved, but the discharge has been upheld. Claiming discrimination for participating in a protected activity, the employee files a charge with the NLRB.

**Case III.** The employee has been discharged for failure to tender dues required under a union security agreement. The union secured the discharge, and the employer represented the employee's interests before the arbitrator. The discharge was upheld.

The NLRB has refused to reach the merits of 8(a)(1) and 8(a)(3) claims in cases similar to those sketched above by deferring to arbitration awards upholding the employer's disciplinary measures. If the Board finds that its standards are met, the employee's charge is dismissed. Each case raises problems, however, and even Case I may contain hidden problems.

**Case I: The NLRB and Arbitrators: Differing Roles, Responsibilities, and Decisional Contexts**

Admittedly, Case I presents the least disturbing situation for the NLRB's exercise of discretion. The facts present no conflict of interest between the employee and his union, and nothing may suggest that the interests of the employee were not firmly advocated by his union. Moreover, the arbitrator may have faced and resolved the relevant federal questions. Although this is rarely
expressed as a major consideration by the NLRB, it does explain some cases, and it certainly should be a primary consideration. Nevertheless, "just cause" for discharge under an agreement does not necessarily mean that prohibited discrimination under sections 8(a)(1) and 8(a)(3) has not occurred, and this may be true even if contractual language parallels the statute.

Although most arbitrators will no doubt attempt to interpret contractual provisions to comply with federal law, there is a wide difference of opinion as to the arbitrator's role when no such coincidental interpretation can be made. Many arbitrators feel they are creatures of the parties, and thus, bound by the agreement despite federal law and despite the delegation of federal authority to arbitrators inherent in the Supreme Court's Trilogy. Thus, the arbitrator may uphold the contractual validity of the disciplinary action even though the NLRB might find discrimination on the basis of protected activities. The NLRB's deference policy, however, often forecloses review of the employee's federal claim. The significant point here is that the NLRB will not permit discrimination even though grounds for discharge might ordinarily exist, but the arbitrator's balancing of interests and burden of proof might not be the same. In addition, the NLRB's investigating ability far exceeds that of an arbitrator.

It is important to note that NLRB review does not derogate the integrity of arbitration procedures. Its investigation into the merits of the unfair labor practice charge merely recognizes the different role each tribunal plays as well as the structural limitations on the arbitrator's ability to discover facts. A broad policy of deference, however, may exclude meritorious federal claims from consideration as well as claims in which the federal interest in employee protection has been satisfied.

31. The NLRB's task is considerably simplified if the arbitrator acknowledges that he has ignored relevant statutory principles. See, e.g., Monsanto Chemical Co., 130 N.L.R.B. 1097 (1961).


33. See, e.g., Steve's Sash and Door, Inc., 74 L.R.R.M. 2765 (5th Cir. 1970); NLRB v. The Princeton Inn Co., 424 F.2d 264, 265 (3rd Cir. 1970) ("A discharge that is partially motivated by the employee's protected activity violates the Act despite the concurrent existence of an otherwise valid reason."); Budd Mfg. Co. v. NLRB, 138 F.2d 86 (3d Cir. 1943).
Case II: The Undiscoverability of Unfairness in Arbitral Proceedings

Case II raises additional problems because of the possibility that fairness may not have been accorded in the arbitral proceeding. As will be seen, the NLRB due process standards are too porous to guarantee fairness. Although these problems are primarily subjective rather than structural, the context of arbitration proceedings may unintentionally hinder the consideration of grievances of particular employees.

In *Eazor Express Corp.*, for instance, the employee, a union steward, was informed while at home that supervisors and clerical employees were loading freight. This performance of unit work by non-unit employees was a clear violation of the agreement, and an arbitrator subsequently awarded overtime pay to unit employees.

The steward, however, was not as fortunate. He claimed, supported by other employees, that he arrived at the freight dock and asked for an explanation, but was ordered off the dock. The steward refused to leave, was discharged, and all unit employees on duty walked out to protest the discharge. The terminal manager and director of operations, however, claimed that the steward instructed on-duty employees to punch out and leave the premises, causing a work stoppage. The agreement allegedly sanctioned stewards who took strike actions without official union authorization.

At this point, it could be argued that since the dispute is one of fact, rather than law, arbitration is adequate to resolve the dispute. Again, however, an arbitrator upholding the discharge might not address himself to the federal questions involved.

The role of stewards in investigating and processing grievances and insuring fidelity to collective agreements has been recognized by the NLRB and arbitrators as essential to industrial democracy as well as critical to the proper functioning of private contract administration. A union steward may engage in conduct

which might normally be considered insubordination.\textsuperscript{36} Thus, stewards may refuse to obey an order regarding his investigation of an alleged breach of the contract with impunity where the order interferes with the steward’s rights under the agreement.\textsuperscript{37} Moreover, although the reasonableness of the steward’s behavior is relevant, the reasonableness of particular conduct does not necessarily depend upon express provisions of work rules and collective agreements.\textsuperscript{38}

More significantly, the interests of the steward and his union may not be perfectly meshed. Subrosa “amendments” to collective agreements are not unknown and, assuming the union felt that the employee did lead a walkout, the union may not be highly motivated to protect the employee. In a case involving a work stoppage, where discipline is focused on the unauthorized nature of the walkout, the union’s first instinct might be to protect its treasury and stress the unauthorized nature of the steward’s action. Collusion or indifference is almost impossible to prove and, if the NLRB will not consider the merits of the employee’s charge, the employee’s other avenues of redress will normally prove illusory. The facts of \textit{Eazor} demonstrate that these suspicions are not without some foundation.

Under many teamster agreements, grievances are adjudicated by joint union-employer panels rather than by neutral arbitrators. Thus, the problems of collusion and “horse trading” are greatly magnified. As NLRB member Jenkins has recently stated, albeit in dissent,

\begin{quote}
Whatever result such a Committee of the protagonists might reach, it is in part the product of economic power, adjustment with an eye to other disputes or differences between them or on their future bargaining positions, and other considerations unrelated to the merits of the particular claim before the Committee.\textsuperscript{39}
\end{quote}

The NLRB has not been totally unaware of this problem, and has been reluctant to defer in cases where the impartiality of the

\textsuperscript{36} Jaffe, \textit{supra} note 35, at 483.


\textsuperscript{38} \textit{See} Metal Blast, Inc. \textit{v.} NLRB, 324 F.2d 602 (6th Cir. 1963).

\textsuperscript{39} Terminal Transport Co., 185 N.L.R.B. No. 96, 75 L.R.R.M. 1130 (1970).
tribunal was clearly in doubt. Thus, a joint area committee's decision was not accorded deference where the employee had been a vigorous opponent of the Teamsters' Union and an outspoken critic of the trucking industry. The Board felt that the members of the joint board might well have represented common interests adverse to the grievant. The case suggests, however, that evidence of bias rather than the possibility of unfairness is required to overcome the NLRB's deference policy.

The grievance in Eazor was first heard by a joint panel in Cincinnati at which the steward appeared. The committee deadlocked, and the grievance then progressed to the Ohio Joint Grievance Committee. The employee did not appear because he had been erroneously informed of the date of this hearing. Nevertheless, the Ohio Committee also deadlocked, and the grievance was referred pursuant to the agreement to the Central State Joint Area Committee which met in Chicago. The grievant did not appear, claiming that he could not afford the trip, a not unlikely explanation.

The discharge was upheld, indicating that at least some union representatives agreed with the employer's version of the event. Such statesmanship may well be applauded, although cynical observers may have some doubts about the result. Admittedly, however, the two prior bipartite parties had deadlocked. The meaning of the prior deadlocks is not necessarily apparent, however, and one would need more data to determine the significance of these events. Deadlocks at lower levels may simply be caused by a desire to have higher levels, not directly involved in the dispute, accept responsibility for the decision.

Before the Central Committee the employer and the union repeated their version of the facts. The employer presented two employee witnesses who substantiated its version of the facts; the union, however, presented no witnesses despite the existence of employees who were willing to testify about the steward's conduct.


Although a complaint was indeed issued by the General Counsel, the NLRB decided to defer to the Central Committee's award. The NLRB found no evidence that the award had been "tainted by fraud, collusion, unfairness or serious procedural irregularities," nor was the award "clearly repugnant to the purposes and policies of the Act." The trial examiner, upheld by the NLRB without opinion, found no reason to believe that the result would have been different had the steward been present since he would only have repeated his statements before the Cincinnati panel, and the Central Committee was aware of the prior proceedings. It is obviously impossible for the trial examiner, however, to know that an "oral answer to an oral question would [not] have swayed the panel."

Whether or not the grievant is present before the arbitral tribunal, the NLRB's primary concern is whether his interests have been "adequately and honestly represented."42 The union apparently did present the steward's contention. The examiner noted that the steward never complained that the union had unfairly or inadequately represented him, although it is difficult to see how he could have done so since he was not present. Moreover, the record of the proceeding will usually not reveal the extent of "adequate and honest" representation, nor will any unfairness necessarily surface during the trial examiner's hearing. Minutes of joint committee hearings are generally too terse and unilluminating to be considered an adequate record of the proceedings. Testimony, cross examination, motions and other critical components of a trial record usually go unrecorded.

Although the employer in Eazor presented two witnesses43 the union presented none. Given this state of the evidence, even a neutral arbitrator would have had difficulty in deciding for the grievant as the union's claims were only claims after all, not evidence. And yet, this evidentiary imbalance was used by the trial examiner to uphold the award:

Expertise takes many forms, and men familiar with the trucking industry may be as well qualified to judge whether the dock employees walked out without Ball first giving them the nod,

43. An unidentified witness' testimony was read into the record by the employer but the trial examiner deemed this evidence "merely cumulative." 69 L.R.R.M. at 1083.
even without looking Ball in the eye, as myself who had the benefit of observing his demeanor.\textsuperscript{44}

The statement leaves one breathless. Expertise is indeed useful, but its usefulness in the absence of facts is doubtful. The trial examiner permitted the private tribunal to infer that the grievant led the walkout, apparently without any physical sign or oral command, despite the protected nature of the steward’s inquiry.

The primary problem raised in cases like \textit{Eazor} is that the union and management interests might well coincide. Cases in which union-member conflicts may exist involve problems of fairness that cannot be satisfactorily resolved simply by paying scrupulous attention to the extent of procedural due process afforded in the arbitration proceeding, even assuming NLRB review could adequately gauge the extent of actual unfairness.

Indeed, the Board’s due process standards, which set limits to administrative deference to arbitration, are not exceedingly high. The NLRB’s deference standards were originally set forth in \textit{Spielberg Mfg. Co.:}\textsuperscript{45} In order to encourage the voluntary settlement of labor disputes the NLRB would defer if (1) arbitration proceedings “appear to have been fair and regular, (2) all parties had agreed to be bound, and (3) the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act.”

The first and third standards indicate that an investigation of the record is required—otherwise the Board would be unable to determine whether appropriate fairness was accorded and whether the result was “clearly repugnant” to federal policies. But the policy favoring “voluntary settlement” is such that no thoroughgoing inquiry is necessary or perhaps even possible. The proceeding must only “appear” to be fair, and the employee faces an almost insurmountable task in demonstrating that the quality of representation was below acceptable standards. This is certainly true when he is not present, and the NLRB does not make his presence mandatory.\textsuperscript{46} Even if a thorough review was deemed ap-

\textsuperscript{44} Id.
\textsuperscript{45} 112 N.L.R.B. 1080, 1082 (1955).
\textsuperscript{46} Although neither law nor contract may grant the right of intervention, there is evidence that arbitrators often attempt to “work something out,” e.g., to satisfy an interventionary demand in a mutually agreeable manner. \textit{See} Fleming, \textit{Some Problems of Due Process and Fair Procedure in Labor Arbitration}, 13 \textit{Stan. L. Rev.} 235, 241-42 (1961).
propriate, the object of such an inquiry is often inadequate. Minutes of teamster panels, for instance, are often too terse to make any meaningful inquiry into the fairness of the proceeding. The reasons for the determination are rarely disclosed, sometimes even when requested.47 Even in the more normal situation where a neutral arbitrator is employed, records are rarely made, and written opinions rarely reflect the quality of representation afforded.

Ironically, an adequate investigation into the fairness of the arbitration proceeding would unnecessarily divert the NLRB’s resources as this question is unrelated to the merits of the unfair labor practice charge before it. The more generalized Spielberg standards, then, make administrative sense to the NLRB. The Board will defer to private resolution if those procedures were fair, but, since fairness is not directly related to the substance of the employee’s charge, only a cursory investigation comports with administrative efficiency and doctrinal wisdom.

The trial examiner in Eazor found no reason to believe that the proceeding was not fair despite the fact that the result was “announced without explanation or rationale.” The proceeding may have been fair, but the shoe is on the wrong foot. The possibility of unfairness was present, and there is little reason to place the risk on the employee. The possibility of discrimination or unfairness cannot be discounted; surely this is so from a simple reading of the record.

The Spielberg standards were aimed at foreclosing the possibility that encouragement of private settlement machinery would sacrifice rights under the NLRA. Given the phrasing and application of these standards, however, the problem would have to be rephrased—does this encouragement “unduly” sacrifice federal interests, for arbitral decisions must be “clearly repugnant” to federal policies to avoid deference. The burden is on the employee in the first instance, and if a charge is issued, on the General Counsel.

47. See Denver-Chicago Trucking Co., 132 N.L.R.B. 1416 (1961). In this case the panel heard and decided thirty cases in two days although the trial examiner’s hearing in one case took five days. See also Terminal Transport Co., 185 N.L.R.B. No. 96, 75 L.R.R.M. 1130 (1970).
Clearly, when the Spielberg standards are not met, deference would not aid the policy of recognizing private settlements. Gross procedural irregularities should not lead to deference since a court challenge and perhaps a new arbitration proceeding will involve much delay. No federal policy encourages resort to private settlement procedures which do not accord minimal due process protection. Where irregularities are present, but not gross, however, the NLRB’s policy of deference represents dubious delegation of federal authority to private arbitrators.

The basic problem is that the Board’s procedural standards are too porous to guarantee that federal rights have been protected in the private proceeding. Eazor is perhaps an outstanding case, but others could be found. In International Harvester, one of the most well known cases in this area, the employee did not even receive notice of the arbitration proceeding. Nevertheless, the NLRB found that “procedural regularity [is] not . . . an end in itself, but [is] . . . a means of defending substantive interests.” But that, of course, is precisely the question. The records of arbitration proceedings are simply too bare to determine if federally protected interests received their due despite irregularities in procedures. Procedural defaults, as in International Harvester and Eazor, at least suggest the possibility of unfairness and, what is of possibly more concern to the NLRB, may reflect a lack of respect for federal statutory interests. The burden should not be placed on the employee, even if he were present at the hearing, since actual unfairness or a lack of concern over federal rights is often undemonstrable in a subsequent administrative proceeding.

49. But see Gateway Transportation Co., 137 N.L.R.B. 1763 (1962), where the Board refused to defer when, under protest, an employee was forced to participate in a proceeding with only 48 hours notice, union counsel was present but refused to represent him, and his reasonable request for a continuance was rejected. See also Woodlawn Farm Dairy Co., 162 N.L.R.B. 48 (1966). Since deference is considered to be a matter of discretion, the appellate courts are reluctant to overturn the Board's actions. Thus, in affirming deference in International Harvester, the Seventh Circuit upheld the NLRB, since no evidence of fraud or collusion was presented. Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), rehearing denied, 379 U.S. 874 (1964).

The applicability of the fair representation doctrine to the quality of the union's presentation and its duty to investigate the facts surrounding the grievance has not yet been clearly established although such obligations seem clearly necessary.
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Case III: Some Problems of Resolving Federal Interests in Private Proceedings

International Harvester represents the third category presented above. The union had pursued a grievance to arbitration in an attempt to discharge an employee for failing to pay his dues under a union-security arrangement. The NLRB found that the employee's interests had been satisfactorily represented by the employer. Although there was evidence that the employer “stubbornly resisted the union’s efforts to secure his removal from his job,” there is no guarantee that federal rights were protected. The Board may have felt, however, that the union security clause was legal, and the employee apparently admitted his default in dues payment. The General Counsel, however, was not convinced.

The Board in International Harvester verbally toughened its standards, perhaps in response to the recent acceptance of arbitration in the Trilogy. Thus, the Spielberg standards were revised: the Board will defer in discharge cases “unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the act.” These standards will hardly encourage employees to file unfair labor practice charges in the context of arbitral awards, nor will regional offices be motivated to act on the charges that are filed.

One year after International Harvester, the Board applied its deference standards to a representation proceeding, holding that a petition was barred by the contract between the employer and another union since the arbitrator had interpreted that agreement to support the other union’s claim. The Board did not consider significant the fact that the petitioning union had not been a party to the arbitration proceeding. As in Harvester, the Board felt that the absent party’s case had been adequately presented by the employer. Despite the Supreme Court’s apparent support of bilateral arbitration in essentially trilateral situa-

50. Interestingly, a quite important question of federal law was inextricably involved in the dispute, i.e., the relationship of Indiana’s right-to-work law and section 14(b) of the NLRA, 29 U.S.C. § 164(b) (1964).
tions, the Board has recently refused to defer in representation proceedings because, *inter alia*, not all parties had participated in the proceeding. This development is sound for, among other reasons, nonparticipating unions will not consider themselves bound by bilateral awards, representation by an employer is a relatively unsatisfying situation, and the arbitrator agreeable to two of the parties may not be acceptable to the third. In *International Harvester* the employee did not participate in the arbitration proceeding, nor did he participate in the selection of the arbitrator. Since federal law provides explicit protection for individual employee interests, the NLRB should not have deferred.

In other tripartite situations, the NLRB has similarly been solicitous of the "missing" party. The NLRA, for instance, directs the Board to "hear and determine" work assignment disputes which are encompassed by section 8(b)(4)(d). The filing of a charge, however, does not lead to the normal section 10 unfair labor practice hearing but, rather, to a section 10(k) proceeding. This section 10(k) proceeding, basically an arbitration proceeding to determine which group of employees should be assigned the disputed work, will not be held if the "parties to such a dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute." The NLRB has consistently interpreted "parties" to include the employer as well as the two unions. The result is to bypass industrial arbitration panels, such as the National Joint Board in the construction industry, as well as inter-union arbitration procedures, where the employer has not agreed

55. See Peck, *supra* note 29, at 144.
to be bound. Similarly, the NLRB has generally refused to defer to bilateral arbitral award, Joint Board determinations, or inter-union agreements when it has reached the merits of the work assignment dispute.\textsuperscript{61}

The author has argued elsewhere that these policies do not follow from the underlying policies of section 10(k), namely, the settlement of jurisdictional disputes and the encouragement of private settlement machinery.\textsuperscript{62} It is significant to note here, however, that the NLRB has steadfastly stressed the value of participation of all interested parties in arbitration proceedings before deference can be accorded. Admittedly, the arbitral discharge situation is not strictly analogous, but there are sufficient similarities to suggest that the NLRB should be more sensitive to the unsuccessful grievant’s unfair labor practice charge. Indeed, the interest is not so much that the “dispute” be “settled,” and preferably privately, but that public rights be protected. Sections 8(a)(1) and (3) grant rights to employees which are independent of arbitral settlements, and the NLRB should clearly be wary of deferring in cases in which the employee was not even present at the arbitral hearing. Thus, a serious objection to a broad policy of deference is the potential unfairness in the arbitration procedure itself.\textsuperscript{63}

Even though the employee is present, however, his federal rights may not have been protected due to the structure and the context of arbitration proceedings. This is, perhaps, the core problem with the NLRB’s deference policy. In some discharge cases, the interests of the parties who have chosen the arbitrator and from whom he receives his remuneration may be mutual and in conflict with the interests of the grievant, and this configuration of interests may not be revealed by the Spielberg standards.

\textsuperscript{61} Atleson, \textit{supra} note 60 at 129-39.

\textsuperscript{62} Id. at 110-12, 129-39.

\textsuperscript{63} The institutional deficiencies of arbitration in protecting non-contractual federal rights has been thoughtfully stated by Professor Gould. \textit{See Gould, Labor Arbitration of Grievances Involving Racial Discrimination}, 118 U. Pa. L. Rev. 40, 46-52 (1969). He notes that arbitration provides a less than satisfactory settlement procedure when those who are alleged to have discriminated have control of the grievance system. The arbitrator, although impartial as far as the parties are concerned, may be expected to be at least psychologically affected by the interests of the parties who have retained him. The problem is no different when the grievant is white, but he claims union discrimination under the NLRA or his complaint indicates that his interest might be in conflict with the institutional interests of the contractual parties.
Where the grievant is considered a "troublemaker" by both parties, or a dissenter by the union, the arbitrator may not be unduly solicitous of the employee's claim. In referring to the arbitrator's role, Justice Douglas stated in *Warrior and Gulf*:

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 agreement permits, such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished.

Such criteria may not substantially undercut the adjudicatory nature of arbitration, but they do stress the interests of the formal parties to the collective agreement.

The *Spielberg* requirement that the arbitration procedure be fair was designed to avoid this possibility. In practice, however, subtle unfairness is difficult to prove, and the Board in fact requires gross irregularity. In addition, especially since the grievant need not be present for deference purposes, challenges to the *quality* of presentation are well nigh impossible. Even if the grievant is present, the union generally controls the presentation of his case.

As Professor Fleming has pointed out, due process standards are applied with greater informality in arbitration proceedings. Thus, most arbitrators readily admit hearsay, some arbitrators may not permit employees to confront or cross-examine wit-

64. See P. HAYs, LABOR ARBITRATION 37-75 (1966); Comment, The NLRB and Deference to Arbitration, 77 YALE L.J. 1191, 1195 (1968).
66. Id. at 582.
68. Although the grievant need not be present at the arbitration proceeding, the NLRB will not defer if the grievant's counsel is present but denied the right of participation. Honolulu-Star Bulletin, Ltd., 123 N.L.R.B. 395 (1959). See also Star Expansion Ind. Corp., 164 N.L.R.B. 563 (1967); International Harvester Co., 16 Lab. Arb. 307 (1957).
70. Id. at 179. See also Fleming, supra note 46, at 246-48.
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nesses, may take into consideration a refusal to testify, may accept evidence unlawfully obtained, and may treat evidence of prior misconduct as relevant to the question of guilt. It is insufficient to recognize that these practices are accepted or condoned by the parties. This degree of informality may well be practical and efficient, but the NLRB need not bow to efficient, but doubtful, procedures when federal rights are at stake. The "flexibility" of arbitration proceedings is disturbing when the interests of the parties who have created the procedure have interests which potentially conflict with those of the grievant.

Even the satisfaction of procedural due process does not guarantee that fairness was accorded, that the employee was adequately represented or that federal rights were adequately protected by the arbitrator. The settlement may be based upon factors which do not relate to the merits. Thus, the possibility that grievances may be bargained or "horse-traded" cannot be discounted.

Cases in which the parties act in collusion are not unknown. The common denominator in "rigged" cases, or "informed" awards, is that those affected by the award will not know that the arbitrator has been apprised of the result which the parties prefer. Moreover, it is unlikely that this knowledge will be communicated to the NLRB.

Of course, other, non-substantive pressures may be at work on the arbitral process. Settlements may represent sympathetic surrenders because the representative of one party realizes that the system will not work unless each side has some victories. Indeed, the fact that a union takes a case to arbitration may only demonstrate the political recognition that it is better to blame the arbitrator for a loss than to screen out the grievance initially.

71. R. Fleming, supra note 69, at 175-81.
72. Id. at 181-86.
73. Id. at 186-97.
74. Id. at 166-70. Many arbitrators will admit this type of evidence and give it weight when the charged offense has a "functional relationship" to the past offense. See generally Wirtz, Due Process of Arbitration, in THE ARBITRATORS AND THE PARTIES 1, 18 (McKelvey ed. 1958).
76. Fleming, supra note 46, at 248-49.
77. R. Fleming, supra note 69, at 20-21.
The basic concern here is not that arbitrators will intentionally reject individual interests in favor of collective or institutional interests, but, rather, that the arbitrator's perceived role will inherently and even unconsciously bias his decision. Willard Wirtz has testified to the recognition of this process while serving as an arbitrator:

I realized that I wasn't listening to what the grievant was saying because it had already become obvious that an award of reinstatement without back pay would be "acceptable" to both the company and the union.

Since the parties make the rules, the arbitrator is interested in reaching an "acceptable" result. Professor Wirtz's paper raises questions about the protection of individual rights in arbitration proceedings and notes the extent to which arbitrators' attitudes may have "been too strongly influenced by the comparative safety and easiness of going along with the parties." Some arbitrators feel that arbitrators should "avert [their] eyes from such shameful, but occasionally highly utilitarian, performances." The rigged case is not merely a settlement of the grievance, for the parties


79. In the absence of a clear plant rule requiring a suspected employee to disclose the contents of his pickets, a discharge for refusing such an order was held unauthorized. Scott Paper Co., 52 Lab. Arb. 57 (1969).


wish the arbitrator to issue as his award the agreement reached by the parties. Most seriously, "[s]ince the negotiators insist that their agreement be kept a secret from their principals, there is no guarantee that the agreement was not improperly arrived at." 84

Whether "rigged" or not, it should be clear that the possibility of unfairness is always present but may be impossible to prove. This problem is most serious in discharge cases where the union may take a case to arbitration for political reasons, although they feel the grievance is without merit, the grievant is unworthy of protection, or on balance other collective or institutional interests outweigh the recognized merit of the grievance.

The union's conduct during the proceeding, that is, the quality or absence of its presentation, may indicate to the arbitrator its indifference to the grievance. When the union makes a presentation, however, and it is inadequate, it is difficult for an arbitrator to alter the hearing even if he suspects that the union is "pulling its punches." The arbitrator, after all, is a creature of the parties, and severe limitations exist on his ability to exceed the expectations of his creators. NLRB review, however, will normally not reveal these problems.

Professor Wirtz' reaction to the most extreme variety of "rigged" cases—the arbitrator promises in advance to uphold a discharge after a sham arbitral proceeding—indicates a partial theme of this article:

It may be pure prudishness. I would like to think it rather a concern that even if justice—blindfolded here in the very image of the statute—is served in every one of these individual cases, they nevertheless will have weakened the structure of confidence on which the whole institution of arbitration essentially is based. 85

Thus, in sum, one basic objection to a broad policy of deference is that the Board's deference standards are too loose to uncover unfairness or inadequate representation in the arbitration proceeding. Arbitrators, whether consciously or not, are understandably affected by the interests of the parties and interested in reaching an "acceptable" solution. In addition, their freedom to maneuver is limited by the parties, and their decision will normally be based on the presentations made at the hearing.

84. Epstein, supra note 81, at 44.
85. Wirtz, supra note 74, at 27.
The second basic objection to NLRB deference in discharge cases is the possibility that federal policy will not be satisfied. Two of the NLRB’s deference standards, the absence of fraud or collusion and the requirement that all parties be bound by the private settlement, are generally required to uphold the arbitrator’s award on appeal. The unique requirement, then, is that the award not be at variance with federal law. Since a full scale review would be required to decide this question, and the NLRB uses deference in part to reduce its workload, the probable meaning is that the Board is concerned only with awards grossly inconsistent with federal law where such a variance can be determined without a full scale investigation.

The protection of employees from unlawful discharges is a critical policy of federal labor law. Unlike 8(a)(5) cases where the federal policies of free collective bargaining under the NLRA and section 301 can mesh, an independent employee interest is at stake in discharge cases. Arbitration in this kind of case is not an appropriate forum for the resolution of federal rights. First, the arbitrator’s role is to ascertain the intent of the parties—an intent which may not coincide with the NLRA. Moreover, although many arbitrators will interpret an agreement to comply with federal law, many arbitrators will only use federal law as an interpretive tool, feeling that the NLRB is the appropriate forum for the satisfaction of federal wrongs. Arbitrators have long been divided as to the extent to which it is proper to consider statutory policies in interpreting agreements. In any event, since many arbitrators are not attorneys, their industrial expertise does not necessarily assist their statutory interpretation.

The possibility that federal interests will be sacrificed can be demonstrated by two recent cases. In one case an arbitrator did consider federal law and found that the employee had been discharged for engaging in protected activities. The arbitrator awarded back pay but not reinstatement since the agreement provided that the employer could not be coerced to reinstate the

86. See generally The Arbitrator, the NLRB and the Courts, 47-228 (Jones ed. 1967).

87. See Fleming, Survey of Arbitration in 1962, in Labor Arbitration: Perspectives and Problems 304 (Kahn ed. 1964). A 1962 study found that only 87 of the 175 arbitrators responding had a law degree.
employee. The Board deferred. Thus, an award clearly based
upon a violation of the NLRA was not reviewed despite the fact
that the arbitrator could not contractually provide the normal
remedy for such a violation. The arbitrator had indeed faced and
decided the federal question, and the Board may even have ap-
proved his interpretation of federal law, yet delegation in this
case denied the employee the critical right of reinstatement.

In *Terminal Transport Co.*, a joint teamster-employer com-
mittee was presented with an employee’s claim that he was dis-
charged for protected activity. The employer claimed the employee
was unqualified to perform his assigned work. The employee had
filed a grievance on September 11 alleging that a supervisor had
performed unit work. Previously, on September 2, a supervisor
had urged him to withdraw the grievance. Subsequent to the filing
of the grievance, on September 12 and 13, the employee received
warning notices and on September 16 he was discharged. The
supervisor’s request and the timing of the notices indicate at least
a prima facie case of discrimination, convincing both the General
Counsel and the trial examiner. Indeed, the grievance was settled,
and the grievant was paid for the lost work on September 21.

The joint committee gave no indication that the discrimina-
tion issue was considered or settled. Instead, the committee decided
that the employee should take a performance test, the outcome of
the test to determine the ultimate resolution of the grievance.

The NLRB rejected the trial examiner’s finding that the act
was violated, holding that the agency should defer to the arbitral
award. The decision is simply outrageous. The problem here is
not the lack of a neutral arbitrator but that the federal question
was either not decided or decided inconsistently with existing law.
Whether or not the employee can pass a performance test does
not determine the federal issue. The question is not whether the
employee can pass the performance test nor is it whether the em-
ployer had a good reason to discharge the employee. The question
is one of discrimination, which may exist simultaneously with a
“good” reason to discharge. With no arbitral “award” the NLRB
would have considered whether the employer’s justification for the
discharge was a mere pretext.

89. 185 N.L.R.B. No. 96, 75 L.R.R.M. 1130 (1970).
Both cases demonstrate that the Board’s deference guidelines do not guarantee protection of federal interests. To the contrary both decisions permit results which may be inconsistent with federal law.

The Employee’s Alternative Avenues of Relief: Deference in Perspective

The union’s failure to forcefully and fairly represent the grievant at the arbitration hearing could also be the subject of a fair representation action in court. Yet, if the employee cannot demonstrate a lack of diligence on the union’s part to the NLRB’s satisfaction, he will definitely have no more success before the judicial tribunal. Both Spielberg and fair representation doctrines defer to the institutional interests in arbitration procedures and it is difficult for an employee to challenge an award under section 301, under fair representation, or to try to avoid the award in an unfair labor practice proceeding. Thus, the NLRB’s policy of deference in discharge cases may foreclose any meaningful and impartial review of the merits.

A brief consideration of the evolving law of fair representation and contract administration will reveal the great weight placed upon institutional concerns. These restrictions on protection of individual claims places the NLRB’s policy of deference in perspective. A convenient beginning point involves a possible area of overlap—the right of the employee-grievant to be present at the arbitration proceeding.

The employee in Eazor did not play a role in the choice of the arbitrator, and he may not have been present at the hearing. The NLRB’s deference standards, however, do not require the grievant to be present and the relevant federal law of contract administration fair representation is at least unclear.

In Humphrey v. Moore, involving breach of contract and fair representation claims, the Supreme Court considered the plaintiff-grievant’s claim that an arbitration proceeding should be held invalid because they had not been granted the right to participate in the proceeding. The Court faced the issue squarely, finding that the employees had notice of the proceedings and, indeed, three stewards representing them were present. The Court’s handling of the issue suggests that intervention may be protected under the doctrine of fair representation.

91. 375 U.S. 335 (1964).
92. Id. at 349.
The Fifth Circuit, however, in *Acuff v. United Paperworkers*, has recently held that absent evidence of bad faith by the union, wildcat strikers have no right to separate representation in the arbitration process. The *Acuff* decision may be inconsistent with *Humphrey v. Moore*, and it is not compelled by *Vaca v. Sipes*.

The latter case gave the union wide discretion in determining which grievances go to arbitration, but it did not discuss the scope of procedural due process involved in an actual arbitration proceeding.

The unwillingness of some courts to permit employees to intervene in arbitration proceedings, even when the subject of the proceeding is their own grievance, is based on the same concerns which underlie arbitral deference by the NLRB. The fear is that intervention or NLRB action would weaken the arbitration system, perhaps increase costs, and destroy "the employer's confidence in the union's authority." The resultant indifference to the plight of employees is nowhere made clearer than in cases like *Acuff* and *Eazor*. Assuming that an unauthorized stoppage of work occurred, the union's primary concern is to protect its treasury from damages for breach of a no-strike clause and attempt to mitigate any embarrassment it might have suffered. Although a union may defend the employee and seek mitigation of any penalty, its support will no doubt be lukewarm. In addition, as Professor Gould has stated, "a perusal of the hearing transcript (if one is kept) can rarely inform a court on the enthusiasm with which the union presented the case...." Moreover, if unfairness occurred, the employee's chance of raising this in a judicial tribunal is fraught with difficulty. Employees may accept the award, but perhaps only because they are aware of the difficulties and the cost of litigation. Finally, the law's vagueness will not motivate employees' attorneys to attempt such challenges.

Unions and employers view collective bargaining and arbitration as desirable devices for the settlement of labor disputes. Private resolution is desired, and the parties to an agreement normally

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94. 386 U.S. 171 (1967).


control the arbitration procedure. Such control extends beyond the fact that arbitration is the creature of the parties, for the law has further enhanced the parties' control as well as the importance of the arbitrator vis-a-vis the courts. Exhaustion of the grievance procedure, for example, had become a precondition to judicial action under section 301.98

Control over the grievance machinery was further enhanced by Vaca v. Sipes99 in which individual employee interests were unduly curtailed because of institutional concerns.100 Faced with an employee's state court suit protesting the union's decision not to take the grievance to ultimate arbitration, the Court was confronted with the question of possible NLRB preemption and a definition of the scope of fair representation. In an opinion the prime importance of which lies in its gratuitous dicta, the Court ruled that neither NLRA section 9(a) nor section 301 gave the employee an absolute right to invoke the grievance arbitration procedure.101 Such a right, therefore, could only be found in the collective agreement.102 Moreover, if the union refused to process the grievance, a breach of contract action may lie against the employer, but only if the union's refusal to employ contractual remedies was wrongful.103 Thus, the employee must prove a breach of the union's obligation to fairly represent him by its refusal to arbitrate his grievance in order to reach the merits of the contractual claim against the employer. Why an attempt by the employee to exhaust his contractual remedies was not sufficient was not explained, but presumably the Court's policy of deference to institutional arrangements explains this step in its reasoning. The fair representation issue may often be more difficult to establish than the employer's breach of contract although the latter is the real object of the employee's action. The union, for instance, could not satisfy an employee's interest in reinstatement. The successful hurling of the fair representation barrier does permit the court

102. Although data is not available it may be safe to presume that few agreements give individual employees the right to invoke the arbitration process.
to face the contract issue, but that is all. The Supreme Court has made it clear that although the union's arbitrary action is a prerequisite to the contract claim, the union can only be liable for damages in excess of those caused by the employer.\textsuperscript{104} Ironically, then, proof of a statutory violation is required to prove a contract breach, but no damages will normally flow from the violation.

In addition, \textit{Vaca} defined the scope of unfair representation to cover only arbitrary or bad faith conduct on the part of the union. It was insufficient that a state court had found the employee's discharge wrongful, for the proper test was not the merit of the grievance, but, rather, the union's good faith belief in its lack of merit.

Thus, federal law gives the employee no right to invoke the grievance procedure and, if the union refused to employ this procedure, the employee's contractual claim receives judicial scrutiny only if the union's refusal to act was wrongful. The employee's good faith attempt to urge his union to act, as well as the actual merit of his claim, is irrelevant. Moreover, if the case does proceed to arbitration and is decided on the merits, the developing law of section 301 makes it extremely difficult to overturn the arbitrator's decision,\textsuperscript{105} and the NLRB is likely to defer to the arbitrator's resolution of the dispute. The entire structure is ideal

\textsuperscript{104} \textit{Id.} at 196-98. This holding, of course, relates only to cases in which the union did not induce the employer to act. Joint liability would be proper if collusion could be demonstrated in relation to either the contract breach or the breach of the fair representation obligation.

\textsuperscript{105} Courts must enforce arbitral awards so long as the award "draws its essence from the collective bargaining agreement..." or does not "manifest an infidelity to this obligation." United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597 (1960). The burden placed on the challenger is sufficiently great to deter many challenges, or if not, to predict failure. For discussions on the appropriate scope of judicial review, see Meltzer, \textit{Ruminations About Ideology, Law and Labor Arbitration}, 34 U. CHI. L. REV. 545 (1967); Christensen, \textit{Labor Arbitration and Judicial Oversight}, 19 STAN. L. REV. 671 (1967); Aaron, \textit{Judicial Intervention in Labor Arbitration}, 20 STAN. L. REV. 41 (1967).

The difficulty of overturning awards argues for a revision of the NLRB's deference policy. An award, although seemingly proper and paying due obeisance to contractual language, is virtually impregnable.

Working in this area is particularly frustrating. What does one say to the long-service employee whose discharge has been upheld in arbitration over a matter that would be considered minor by most arbitrators? Counsel may suspect that the employee's recent expulsion from the union was relevant (and the "acceptability" of the discharge may have ironically been communicated to the arbitrator by the grievant's use of independent counsel), but what can be done?
from the standpoint of institutional interests, but the result may well be the employee's inability to have his claim determined by an entirely neutral tribunal or, indeed, any tribunal at all.

Ironically, one of the reasons why NLRB preemption of fair representation cases was rejected in \textit{Vaca} was the recognition that the General Counsel has "unreviewable discretion to refuse to institute an unfair labor practice complaint."\textsuperscript{106} The employee, therefore, "could no longer be assured of impartial review of his complaint..."\textsuperscript{107} As Justice Black perceptively noted: "[T]he Court today opens slightly the courthouse door to an employee's incidental claim against his union for breach of its duty of fair representation, only to shut it in his face when he seeks direct judicial relief for his underlying and more valuable breach-of-contract claim against his employer."\textsuperscript{108} Since it is extremely difficult to challenge arbitral awards when the grievance system is exhausted, the NLRB should reevaluate its policy of deferring these awards.

The relationship of the NLRB to arbitration is different than that of the courts, and the deference given to arbitral awards under section 301 does not necessarily apply to the protection of statutory rights. Section 10(a), for instance, expressly provides that NLRB jurisdiction is not affected by private settlement procedures, and the Supreme Court has recognized the NLRB's special role when charges relate to conduct which could violate both the NLRA and the contract.\textsuperscript{109} The NLRB's voluntary deference to arbitral decisions, however, at least in so far as discharge cases are concerned, places the Board in a position roughly analogous to the courts. Such an approach unduly sacrifices federal rights to private settlement machinery. Judicial deference in arbitral matters, after all, does not involve the surrender of independent, substantive rights. Although the \textit{Spielberg} standards are helpful, their generality and applicability to only gross irregularities provide little solace to the injured employer. Similarly, the employee's opportunity to challenge the employer's actions under

\textsuperscript{107.} \textit{Id.}
\textsuperscript{108.} \textit{Id.} at 203 (Justice Black, dissenting).
section 301 involves the doctrine of fair representation which can be criticized on similar grounds. The inability of an employee to challenge an arbitral award or his union’s representation of his grievance makes the NLRB’s policy of deference even more critical.

**Unilateral Action and Discharge Cases:**

*The Board’s Contrasting Policies*

The Board’s action in discharge cases is to be contrasted with the common refusal to defer in cases involving unilateral action by employers during the life of an agreement. In these cases, the scope of the employer’s obligation to bargain under 8(a)(5) is narrowed by the terms of the agreement, for there is no duty to bargain over a “modification” of an existing agreement under NLRA section 8(d). A unilateral change in working conditions, however, violates the obligation to bargain in good faith, but the right to alter working conditions can be granted in the agreement. The statutory issue, therefore, is whether the employer has unilaterally altered a term of employment in violation of the act or merely acted in accordance with the parties’ agreement. Thus, the statutory question is inextricably intertwined with the agreement’s construction. The Board’s refusal to defer in these cases is clearly related to the merits as the result is to ignore the award and, normally, to find a statutory violation. The result is a serious invasion of the policy of encouraging the voluntary settlement of disputes, and this is especially so since no independent federal concern may be involved.

The basic problem stems from the differing perspectives of arbitrators and the Board. NLRB doctrine states that the duty to bargain continues unless the matter is expressly encompassed within the agreement or has been clearly and unmistakably waived. Thus, the Board will find an employer’s action “unilateral” and, hence, violative of section 8(a)(5), unless his power to act is expressly set forth in the collective agreement. The Board’s search for the “intent of the parties” is undertaken with blinders, and the result is to expand the duty to bargain at the expense of

the actual "bargain." It follows, then, that an arbitral award which upholds the employer's act upon an implied understanding does not answer the question posed by the NLRB.

The Board's approach has been justly criticized as portraying an unrealistic view of the bargaining process. The "bargain" reached includes more than the written accord, either because of strategic or tactical reasons or simply because the parties assume that existing terms and conditions of employment will continue.112 In addition, the NLRB's approach ignores the extent to which past practice and implied obligations restrict managerial freedom,113 and the Supreme Court's Trilogy recognized that implied obligations and unwritten contract terms were within the scope of proper arbitral jurisdiction. The Board's approach, however, may give a party what he has been denied in practice and negotiation. Although there is admittedly a difference between discovering contractual limits on managerial authority and obliging the employer to bargain before he acts, the obligation to bargain is far preferable to a union than an arbitral ruling that the employer has the contractual authority to act without negotiation at all.

Obviously the roles of the two tribunals are not the same. The arbitrator is concerned with the intent of the parties. Federal law is relevant as an interpretive tool, although arbitrators are no doubt concerned that their discovery of intent not violate statutory restrictions.114 The Board, however, is primarily concerned with expanding collective bargaining and less with the construction of the agreement reached by the parties. Yet, the Board need not review the merits of an arbitrator's award that the union waived or traded its right to bargain over a specific mandatory term. Board review merely undercuts the private settlement machinery by encouraging resort to the Board when an arbitral award is unsatisfactory. Such forum shopping is a serious threat in this context since the doctrinal basis for the intent of the parties is so different. Presumably, statutory violations will

114. Jones, supra note 112, at 888.
generally be resolved by arbitration in refusal to bargain cases, and there is little need for the Board to intervene in those cases in which they are not. Unlike employee discharges, no independent and substantial federal concern is present, for arbitration is part of the collective bargaining process recognized in section 8(a)(5) and section 8(b)(3).

The Supreme Court’s approach in *Fibreboard*\(^{115}\) could be turned on its head—since arbitrators routinely decide cases of alleged unilateral action, and often imply limitations on managerial authority, industrial practice demonstrates that private procedures can resolve these disputes. If an implied limitation is found, of course, the issue is settled. If no such limitation is found, and the arbitrator finds that the employer has contractual authority to act, there is no need for the Board to enforce the obligation to bargain *in spite of* the parties’ intent.

The Board’s policy can only be explained by an over-whelming desire to encourage bargaining under section 8(a)(5), as distinct from grievance arbitration. This can hardly explain, however, the Board’s relative lack of concern over 8(a)(1) and 8(a)(3) rights in discharge cases. The explanation, therefore, must lie elsewhere than the common refrain that the Act aims at “encouraging the practice and procedure of collective bargaining,” that “approval of the arbitral technique . . . [is an] effective and expeditious means of resolving labor disputes,” that the Board should give “hospitable acceptance to the arbitral process,” and that the “parties [should not be permitted] to bypass their specially devised grievance—arbitration machinery.” Since union security clauses, restrictions on the employer’s power to fire, and implied or express limitations on the employer’s power to alter terms and conditions of employment are all parts of the agreement, the Board cannot distinguish these cases on the ground that the parties had agreed to settle only some of these disputes by arbitration.

The NLRB’s concern that its view of the obligation to bargain in good faith not be undercut by arbitration should, therefore, be contrasted with the extent to which the NLRB will permit more serious interferences with federal policy in discharge cases. The Board not only “delegates” the resolution of federal rights

\(^{115}\) 379 U.S. 203 (1964)
to an arbitrator, but, viewing itself as a court reviewing the award, refuses to "substitute its judgment for the arbitrator's." Unlike cases in which courts review the arbitrator's interpretation of the private agreement, the NLRB's function is to protect federal interests rather than to "review" the award. A recent case demonstrates the Board's approach, raising many of the objections raised earlier.

In *McLean Trucking Co.*, like *Eazor Express*, employees allegedly engaged in an unauthorized walkout. The Central States Joint Area Committee upheld the discharges of some of the strikers. The General Counsel argued that the discharges had refused to cross a picket line, although the picket line might be unprotected by federal law, and the joint committee had failed to consider the employee's alleged statutory and contractual right to refuse to cross a picket line.

In addition, the General Counsel alleged that the proceedings failed to meet the Board's procedural standards in that (1) there was no written decision stating reasons for the Committee's actions, (2) there was no sworn testimony, (3) the employer's case was presented by its attorney but this right was denied the individual grievants, and (4) both the union and the employer officially took the position that the walkout was unauthorized. In this situation, the General Counsel argued, the impartiality of the panel must be doubted.

The trial examiner, whose opinion was generally upheld by the NLRB, brushed aside these arguments, noting that the procedure followed was traditional and no variations from past practice occurred. In other words, the examiner refused to meet the General Counsel's arguments head on. Institutional efficiency and the observance of traditional procedure is, apparently, sufficient proof that procedural due process was accorded to employees whose interests might conflict with those of both of the parties. The examiner was convinced, however, that the union had represented the grievants adequately. The sincerity of the union's

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118. He did find, however, that no request for independent counsel was made.
representation was found in the fact that the grievances were "deadlocked" in the lower steps of the grievance structure. Surely, however, there may be structural or other reasons for the failure to resolve these issues on lower levels.

The allegation that federally protected activity was not considered was also rejected because the union had presented the section 7 argument before the joint tribunal. Unaccountably, mere presentation of these issues was sufficient to protect federal interests although since no opinion was written and no reasons for decision given, we can only surmise that the reliance on federal law was found misguided. Why presentation alone should be sufficient to foreclose further inquiry into these issues by the agency established to interpret and enforce federal law is unclear unless the examiner was convinced that no federal rights were indeed infringed. If the latter is the case, then veracity would be the better part of discretion, for the policy of deferring to private settlements would have been a mere facade. The examiner stated that his decision could not be read to indicate that he would decide the merits the same way, but he could not "substitute" his judgment for that of the joint committee.

The NLRB upheld the examiner except as to one employee whose case had not yet been fully arbitrated. Following its normal practice, the Board refused to defer to the existence of settlement machinery in relation to this employee.\(^\text{119}\) On the merits, the NLRB found that the employees' refusal to cross an unauthorized picket line was unprotected and, thus, discharge was appropriate.\(^\text{120}\)

Given the interests asserted for the Board's deference policy, the justification for the refusal to defer when arbitration procedures are available is not clear.\(^\text{121}\) The Board often states that when the

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120. The general counsel argued that since the contract had terminated, the "no-strike" clause was no longer in effect. The employees may have acted out of a good faith belief that the contract did not bar their actions and that federal law protected their strike activity. The NLRB, however, found that the contract remained in effect until modifications were agreed upon. Thus, the employees acted at their peril.

employee is discharged for engaging in protected activity it will not defer because that federal issue is not within the special competency of the arbitrator. If serious, this approach would submerge the Board's deference policies in discharge cases because an employee's unfair labor practice charge always alleges that he has been punished for engaging in a protected activity. Protected activity is a condition to all violations of section 8(a)(1) and (3). If he is in error, even employer discrimination will not violate the act and the charge will be dismissed. If his conduct was indeed protected, then the employer's action constitutes a violation of section 8(a)(1) and, perhaps, section 8(a)(3). The NLRB cannot determine the merits, however, without a full scale review of the record. But, if this is done, what operational significance would a policy of deference have?

The Board on occasion has refused to defer to an arbitral award on the ground that the arbitrator failed to consider whether the employees were engaged in protected concerted activity. The implication is that the Board might have deferred had these issues been considered or, at least, been presented to the arbitrator. In all cases of actual deference the employee has alleged that his conduct was protected but the Board permitted the arbitrator, in effect, to decide the federal question. Apparently, matters of federal law are within the competence of the arbitrator for deference purposes after he decides the grievance but not before. Since this conclusion cannot be taken at face value, another rationale will have to be found. The key may simply be that since arbitration has not yet occurred, there is no reason to delay reaching the merits of the employee's case.

The Board sometimes states that it is deferring to an arbitration award and not passing on the merits of the charge. Indeed, that is what "deference" must operationally mean—a review sufficient to satisfy the Board that the Spielberg standards have been met, but short of deciding the unfair labor practice charge. It is

unclear how much time is involved, that is, the extra time which would be required to decide the case on its merits. If the case clearly fails on the merits, presumably the General Counsel would not have issued a charge. Indeed, the Board's efficient, informal devices would have screened out this case. A policy of deference is not generally needed since informal devices screen out over ninety per cent of charges before formal proceedings are begun.

Arbitral Deference: An Overview

There are, then, two possible operational reasons for the Board's policy. First, the policy might guarantee the Board's non-intervention in areas better left for private resolution. As pointed out above, that balance is not so one-sided in discharge cases. On balance, the harm to federally protected interests seems to outweigh possible interferences with arbitration procedures. The Board must review the record to determine if the arbitrator raised the appropriate questions and to discover whether the proceedings were fair. Thus, some degree of intervention is necessary even under the Board's approach. NLRB review of the federal charge would not be a review of the arbitrator's decision but a vindication of federal rights. The relevant questions are different, and, similarly, the roles of the two tribunals are different. Determinations under a contractual arbitration process will involve rights and remedies which are separate and distinct from those involved in NLRB proceedings. NLRB involvement is based upon public interests, and rights and remedies are designed to vindicate public policies, not to afford private relief to the grievant. The arbitrator's role, on the other hand, is to advance the aims of the collective agreement that he has been chosen to interpret, and this role defines his authority.

124. In Honolulu-Star Bulletin, Ltd., 123 N.L.R.B. 395 (1959), the Board refused to defer because it found that dischargee's counsel was not permitted to participate in the arbitration proceedings. The case is little different when the employee is not even notified of the proceedings, at least as far as due process is concerned. The distinguishing factor may be the Board's belief that the dischargee in Honolulu was engaged in protected conduct, whereas the Board was convinced that the employee in Harvester properly lost before the arbitrator. The cases suggest that the review may go beyond procedural matters, and involve the circumstances of the case. See Hershey Chocolate Corp., 129 N.L.R.B. 1052 (1960). If this is so, then a policy of deference does not totally avoid intervention into private settlement machinery, nor does it substantially affect the NLRB's work load.
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Second, the Board's deference policy might be seen as a reasonable method to reduce the NLRB's workload. Many of the above-mentioned statements, are relevant here. The Spielberg standards require some modest inquiry into the case in any event; indeed, NLRB time is actually diverted from the merits of a statutory violation charged against an employer to questions involving the procedures and result of an arbitration.\textsuperscript{125} Deference is unnecessary to weed out frivolous charges for the Board's informal screening devices are extremely effective for this purpose. And, again, the concern for workload does not explain the stated policy of non-deferral in pre-arbitration or refusal to bargain cases.

A consideration which relates to both of the asserted justifications for deferral is the impact of a reversal of NLRB policy on the NLRB's workload and arbitration systems. The impact, admittedly, cannot be precisely determined, but it may well be slight. First, it is doubtful that employees filing charges with the Board are even aware of the NLRB's present deference policies. Thus, it is unclear that a non-deference policy will encourage more unfair labor practice charges. True, more time will have to be spent on meritorious claims, but this is hardly disturbing given the importance of these claims. The critical question is basically one of priorities, and the theme of this article has been that individual interests have received, at least in discharge-deferral cases, too low a position in the Board's hierarchy of values.

Nor will the possibility of NLRB action interfere with arbitration systems. The employee is seeking the protection of a federal right, not the review of a contractual issue. Thus, an NLRB finding of a statutory violation does not necessarily impugn the integrity of the arbitrator or the arbitration system. The fear of interference with arbitration procedures is based primarily upon an erroneous equation of the role and functions of arbitration with that of the NLRB.

Assuming the Board finds its standards for deference satisfied despite the General Counsel's issuance of a charge, deference forecloses further inquiry into the merits. Following from the above discussion, a nonfrivolous charge, persuasive enough to convince

\textsuperscript{125} Of course, the statutory violation may directly relate to the arbitration proceeding, \textit{e.g.}, the employee charges that the representation he received violates § 8 (b) (1) (A), and the employer's collusion or other actions violate §§ 8 (a) (1) or (3).
the General Counsel, is rejected because of an arbitrator's opinion upholding the employer's action. Even if no charge is ever issued, deference by regional offices suggests also that meritorious charges are rejected since otherwise normal screening devices would serve adequately without a policy of deference.

Thus, whether deference is looked upon as a device to promote and encourage private settlement or a device to screen out meritorious charges thought unworthy of the NLRB's time, the harm done in individual cases seems excessive.

**CONCLUSION**

The concern for the protection of individual interests and the enforcement of federal law will no doubt be considered naive by many informed persons in the area. One urging more sensitivity to the rights of individual employees is often tempted to drag out his credentials to prove that he does indeed sympathize with the aspirations of labor and is not a mouthpiece for hostile forces. I have resisted the strong tendency to demonstrate that, although perhaps misguided, I am basically a good fellow. Although I do not expect any system to be just in the pure sense, I believe our systems and institutions are strong enough to become more just.

Arbitration awards which "overprotect" employees may well exceed cases of underprotection, but "perfection rather than adequacy is the only worthwhile standard, especially in a system of adjudication dependent solely on confidence in the judges." That goal applies to the NLRB as well as to arbitrators. Employees will trust the results reached only if they perceive that the means used were fair and reasonable. In the final result, the real interests of the parties will be best served by a sensitivity to individual rights which in a particular case might conflict with short-run institutional interests.

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127. *Id.*