Labor Relations Bulletin
FROM THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION
April 26, 2024

Deferral Under the Collyer Doctrine

The intricacies of the labor management relationship in the United States are punctuated by landmark doctrines that shape the landscape for unions and employers.

One such influential principle is the concept of deferral. When an Unfair Labor Practice (ULP) charge is filed, the National Labor Relations Board (NLRB) reviews the case and makes a ruling for the case, like a legal proceeding.

In some cases, the NLRB may defer a case, which is a policy that encourages the use of dispute resolution mechanisms outlined in collective bargaining agreements, such as those between NECA and the IBEW, namely the Labor-Management process culminating in the usage of the Council on Industrial Relations (CIR) if necessary.

The Evolution of Deferral

While deferral is a widely recognized policy today, it wasn't established through a single court case. The concept emerged gradually through a series of NLRB decisions with three landmark cases, setting the stage for deferral known as “Spielberg Deferral”, *Spielberg Manufacturing Co., 112 N.L.R.B 1080 (1955)* “Dubo Deferral”, *Dubo Manufacturing Corp., 142 N.L.R.B 431 (1963)*, , and “Collyer Deferral”, *Collyer Insulated Wire Co., 192 N.L.R.B. (1971)*.

These decisions acknowledged the effectiveness of established grievance and arbitration procedures outlined in collective bargaining agreements crafted through negotiation between unions and employers. Arbitration procedures are seen as possessing a unique understanding of specific agreements and workplace dynamics.

A Breakdown of Deferrals

- **Spielberg Deferral** – The first instance of the NLRB deciding on deferral, this case defers to an arbitrator’s award and dismisses the Unfair Labor Practice charge. This deferral is based on arbitration, “proceedings appear[ing] to have been fair and regular, all parties had agreed to be bound [by arbitration], and the decision of the arbitration panel is not clearly repugnant.”

- **Dubo Deferral** – This deferral procedure refers to the Board’s policy to, “effectuate, wherever possible… “Final adjustment by a method agreed upon by the parties.”” This type of deferral remands that grievance proceedings are finalized when a ULP and grievance are filed at the same time and the grievance has not been fully resolved. The Board still reserves the right to examine the case after the final arbitration decision.

- **Collyer Deferral** – When no grievance has been filed and a ULP Charge has been filed, the Board has determined that disputes over collective bargaining agreements, “should properly

[be] remedied by grievance and arbitration proceeding, as provided" in the collective bargaining agreement. This deferral policy sends the charge back to the parties to follow their outlined and agreed upon arbitration procedures before filing ULP charges.

A Matter of Choice, Not Lacking Authority

These policies are not an admission that the NLRB lacks authority to handle charges when an alternative dispute resolution clause exists. Rather, it is a conscious choice by the Board not to exercise that authority.

The policies themselves justify this restraint by arguing that they respect the contractual terms of a CBA, like arbitration clauses, that were bargained for and exchanged by the parties involved. In essence, the NLRB defers to the expertise established within the framework of the collective bargaining agreement.

A Doctrine in Flux: The NLRB's Changing Landscape

In 2011, the NLRB General Counsel issued "GC Memorandum 11-05" stating that the standards for Collyer Deferral, "do not adequately protect employee's statutory rights" and looked to rescind the standard post-arbitral deferral procedures. The General Counsel's guidance to rescind the Collyer Deferral policy was affirmed in December 2014 with the *Babcock & Wilcox Construction Company, 361 N.L.R.B 1127 (2014)* decision where the Board agreed, "that the burden of providing that deferral is appropriate is properly placed on the party urging deferral."

Eventually, in December 2019, the NLRB reversed that decision with *United Parcel Service, Inc. (UPS) 369 N.L.R.B No. 1 (2019),* stating that, "*Babcock* disrupted the labor relations stability that the Board helps to encourage."

Procedural Nuances of Deferral

The inner workings of deferral involve specific procedures that need to be followed.

- **Raising Deferral as a Defense:** Deferral is considered an affirmative defense that must be raised promptly in response to the complaint or at trial. Delaying this assertion can waive the right to deferral.

- **Burden of Proof:** The party seeking deferral (usually the employer) has the burden of proving pre-arbitral deferral is warranted. This involves demonstrating a history of productive bargaining, a broad arbitration clause encompassing the dispute, and a willingness to arbitrate the issue by both parties.

- **Standards for Deferral:** The Board considers several factors when evaluating deferral, including fairness of the arbitration process, relevance of the issue to the contract, and whether the arbitral award conflicts with the National Labor Relations Act (NLRA).

Since the NLRB has ultimate discretion on whether to hear cases of deferral, the Board developed a test for determining whether pretrial deferral is appropriate. The NLRB considers six factors in their determination, *San Juan Bautista Medical Center, 356, N.L.R.B 736, 737 (2011)*:

1. Whether the dispute "arose within the confines of a long and productive collective-bargaining relationship";
2. Whether there is a "claim of employer animosity to the employee's exercise of protected rights";
3. Whether the agreement provides for arbitration "in a very broad range of disputes";
4. Whether the arbitration clause "clearly encompasses the dispute [at] issue";
5. Whether the employer asserts its willingness to resort to arbitration for the dispute; and
6. Whether the dispute is "eminently well suited to resolution by arbitration".

While the Board's policy on deferral has shown repeatedly that it respects the collective bargaining process, as well as arbitrators' decisions, it is important to remember that things can change. Regardless of direction, deferral remains a key element in the complex relationship between unions, employers, and the NLRB.