

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 12-01

January 20, 2012

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Guideline Memorandum Concerning *Collyer* Deferral Where
Grievance-Resolution Process is Subject to Serious Delay

I. Introduction

In GC Memorandum 11-11, the Regions were directed to submit to Advice any cases where employees were being deprived of their statutory rights because of a lengthy period of *Collyer* deferral.¹ Based on our consideration of those cases, and consistent with the policy articulated in GC Memorandum 11-05 of giving greater weight to safeguarding employees' statutory rights,² we will be seeking to have the Board change existing policy and no longer routinely defer Section 8(a)(1) and (3) cases where arbitration will not be completed within a year. This memorandum explains the reasons for seeking this change in deferral policy and provides guidance on implementing new deferral procedures.

II. Current Board Law Regarding Delays in the Contractual Grievance-Resolution Procedure

The Board's doctrine of pre-arbitral deferral is principally derived from the twin policy goals of promoting collective bargaining and of promoting the private resolution of disputes.³ Under this doctrine, so long as an alleged violation of the Act is covered by the parties' grievance-arbitration agreement, the Board will defer the dispute to that process if certain conditions are met.⁴ Specifically, the Board

¹ *Mandatory Submissions to Advice*, GC Memorandum 11-11 dated April 12, 2011 at 2.

² *Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases*, GC Memorandum 11-05 dated Jan. 20, 2011.

³ See *United Technologies Corp.*, 268 NLRB 557, 558–59 (1984); *Collyer Insulated Wire*, 192 NLRB 837, 840, 842–43 (1971).

⁴ *Id.*

will defer a meritorious ULP charge to the parties' contractual grievance-arbitration procedure where the conflict arises out of a long and productive bargaining relationship, there is no claim of employer enmity towards employees' exercise of protected rights, the arbitration clause covers the dispute at issue, the employer manifests a willingness to arbitrate the dispute, and the alleged unfair labor practice lies at the center of the dispute.⁵

The Board reasons that since it is fundamental to the concept of collective bargaining that the parties to a contract be bound by the terms of their agreement, it would be detrimental to "jump into the fray" and preempt that agreement.⁶ As the Board wrote in *United Technologies Corp.*, "dispute resolution under the grievance-arbitration process is as much a part of collective bargaining as the act of negotiating the contract."⁷ Thus, adjuring the parties to seek resolution by means of their own making fosters "both the collective relationship and the Federal policy favoring voluntary arbitration and dispute settlement."⁸

There are additional rationales for deferring Section 8(a)(5) charges in particular. First, in many Section 8(a)(5) cases the issue is whether the employer had a contractual right to take the action contested, and any violation of the Act in such cases turns entirely on contract interpretation.⁹ Therefore, unlike Section 8(a)(1) and (3) cases, which require the decision maker to interpret the Act, these Section 8(a)(5) cases do not require the Board's expertise.¹⁰ Indeed, the Board has recognized that matters of contract interpretation "can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute."¹¹ Furthermore, it would be particularly

⁵ *United Technologies Corp.*, 268 NLRB at 558; *Collyer Insulated Wire*, 192 NLRB at 843.

⁶ *United Technologies Corp.*, 268 NLRB at 559.

⁷ *Id.*

⁸ *Id.* (quoting *National Radio Co.*, 198 NLRB 527, 531 (1972)).

⁹ See *Roy Robinson Chevrolet*, 228 NLRB 828, 832 (1977) (Murphy, C. concurring) (agreeing that since the dispute centered on a matter of contract interpretation, deferral was preferable).

¹⁰ See *General American Transportation Corp.*, 228 NLRB 808, 810–11 (1977) (Murphy, C. concurring) (arguing deferral is not appropriate when it would require the arbitrator to interpret the statute), *overruled by United Technologies Corp.*, 268 NLRB at 557.

¹¹ *Collyer Insulated Wire*, 192 NLRB at 839.

detrimental to the goal of promoting stable labor-management relationships through collective bargaining if the Board were to interpose itself in a matter of contract interpretation. Resolution of disputes arising out of contractual provisions are best left to the parties through the steps of the agreed-upon grievance procedure, as well as by the arbitrator specially chosen to interpret the contract.¹²

That arbitration is often faster and more efficient than “sometimes lengthy” Board processes was of little importance in the formulation of the pre-arbitral deferral doctrine.¹³ In *United Technologies Corp.* the Board majority did not even mention the efficiency and speed of arbitration as a reason to defer Section 8(a)(1) and (3) cases.¹⁴ And in *Croatian Fraternal Union of America*, the Board adopted an ALJ’s decision rejecting the notion that deferral is predicated on arbitration functioning as a “quick and fair” means of dispute resolution.¹⁵ *Collyer* deferral is bottomed instead on a policy of holding the parties to their contractual obligations.¹⁶

Generally, the Board will defer to the parties’ contractual dispute-resolution process so long as the arbitration mechanism is “workable and freely resorted to.”¹⁷ Even in cases where the employer has interfered with the contractual dispute-resolution process, the Board will defer so long as that process can still resolve disputes.¹⁸ Similarly, some “unwarranted foot-dragging” by the employer in complying with the grievance-arbitration mechanism will not foreclose deferral if

¹² *Id.* at 840.

¹³ See *Collyer Insulated Wire*, 192 NLRB at 843 (implying in passing that arbitration can be faster than the NLRA administrative and judicial processes).

¹⁴ 268 NLRB 557 (1984).

¹⁵ 232 NLRB 1010, 1016 (1977).

¹⁶ *Id.* at 1015 n.9, 1016 (rejecting General Counsel’s argument that deferral was not appropriate where the union, due to its financial difficulties, could not in the foreseeable future afford to bring a complex Section 8(a)(5) dispute to arbitration).

¹⁷ See *United Technologies Corp.*, 268 NLRB at 560 n.21.

¹⁸ *United Aircraft Corp.*, 204 NBLRB 879, 879–80 (1972) (ruling that isolated threats against and harassment of shop stewards, primarily by first-line supervisors, did not render the arbitration procedure “unpromising or futile,” and deferral was still appropriate), *enforced sub nom. Lodges 700, 743, 1746, Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 525 F.2d 237 (2d Cir. 1975).

the arbitration “procedure has not broken down and is still available to the parties.”¹⁹

On the other hand, the Board will consider an arbitration procedure to be unworkable if an employer, through prohibited means, precludes access to it.²⁰ For instance, the Board has held that where an employer discharges or threatens reprisals against employees who attempt to file grievances, the grievance-resolution procedure is not actually open for use by disputants.²¹ Deferral is not appropriate for an alleged violation that “strikes at the foundation of the grievance and arbitration mechanism upon which we have relied in the formulation of our *Collyer* doctrine.”²² And in *Community Convalescent Hospital*, the Board subsequently revoked deferral where additional delay and the employer’s imposition of preconditions evidenced bad faith and an unwillingness to arbitrate the dispute.²³

Thus, under existing Board law a delay in the process will not in itself render deferral inappropriate so long as the arbitration procedure remains available and is functioning regularly, and there is no evidence of serious employer misconduct.

III. A Significant Delay Can Frustrate the Board’s Ability to Enforce the Act

While deferral serves the policy goal of promoting collective bargaining by holding the parties to their own agreement, the Board’s deferral policy has not given appropriate consideration to the practical effect a serious delay can have on

¹⁹ *Community Convalescent Hospital*, 199 NLRB 840, 841 (1972) (deferring even though employer had delayed and the union had to obtain a court order to force the employer to proceed to arbitration).

²⁰ See *U.S. Postal Service*, 228 NLRB 1235, 1235–36 (1977) (rejecting deferral where employees had been threatened and retaliated against for filing grievances); *North Shore Publishing Co.*, 206 NLRB 42, 43 (1973) (ruling that a charge alleging discharge of employee for filing a grievance should not be deferred).

²¹ *Jos. T. Ryerson & Sons, Inc.*, 199 NLRB 461, 462 (1972). See also *U.S. Postal Service*, 228 NLRB at 1235–36; *North Shore Publishing Co.*, 206 NLRB at 43.

²² *Jos. T. Ryerson & Sons, Inc.*, 199 NLRB at 462.

²³ *Community Convalescent Hospital*, 206 NLRB 962, 962 (1973) (refusing to continue to defer when employer had invented a precondition to arbitration and had not yet named an arbitrator eight months after the initial deferral), *supplementing* 199 NLRB 840 (1973). See also *Columbia Typographical Union No. 101 (Byron S. Adams Printing)*, 219 NLRB 88, 88 (1975) (ending deferral where the charged party had repeatedly postponed or cancelled scheduled arbitration times), *enforced*, 546 F.2d 1042 (D.C. Cir. 1976).

another primary policy goal of the Act: to protect employees' Section 7 rights.²⁴ For this reason, we are asking the Board to revise the *Collyer* deferral policy to ensure that the Board's statutory duty to prevent and remedy unfair labor practices is not thwarted by cases bogged down by a significant arbitration backlog.²⁵

Determining when deferral to a backlogged arbitration process is no longer appropriate requires a balancing of the Federal labor policies promoting collective bargaining and private dispute resolution, on the one hand, with the Board's statutory duty to enforce the Act, on the other. As the D.C. Circuit has noted, "the fostering of one policy may be detrimental to another policy, *viz*: that expressed by the Congress in granting the Board power to remedy unfair labor practices."²⁶ Normally, *Collyer* deferral of a dispute will not compromise this statutory responsibility.²⁷ However, pre-arbitral deferral might in some circumstances effectively deny any remedy, even if all of the *Collyer* conditions are otherwise met.²⁸

Thus, in the event that the resulting award does not meet the *Olin/Spielberg* standards, by the time that the arbitral process and the Board's own time-consuming process are completed, the Charging Party may be left without effective relief. Excessive delays can render enforcement of a Board order "pointless and obsolete."²⁹ The circumstances may have changed so much at the job site that by

²⁴ See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 284 (1956) (finding a ULP strike lawful even though the union did not satisfy the § 8(d) notice requirements, since the dual purposes of the Act required an exception to § 8(d)).

²⁵ See *United Technologies Corp.*, 268 NLRB at 559 (quoting *National Radio Co.*, 198 NLRB 527 (1972) ("We may not abdicate our statutory duty to prevent and remedy unfair labor practices."). See also GC Memorandum 11-05 at 2 (arguing that the Board has a statutory mandate under Section 10(a) to protect individual Section 7 rights, and that this mandate cannot be waived by private agreement or dispute resolution agreement).

²⁶ *Local Union No. 2188, IBEW v. NLRB*, 494 F.2d at 1090.

²⁷ See *United Technologies Corp.*, 268 NLRB at 560 n.17 (finding that pre-arbitral deferral in no way diminishes an employee's right to statutory relief).

²⁸ See *Local Union No. 2188, IBEW v. NLRB*, 494 F.2d at 1091 (enforcing application of the Board's *Collyer* rule in the case before it but noting that the Board's pre-arbitral and post-arbitral deferral standards do not guarantee that deferral is consistent with the Act).

²⁹ See, e.g., *NLRB v. Mountain Country Food Stores, Inc.*, 931 F.2d 21, 23-24 (8th Cir. 1991) (finding that the Board's "inexcusable" six-year delay made enforcement of the Board order in a handbilling dispute futile), *denying enforcement of* 292 NLRB 967 (1989). See also *Regal Recycling, Inc.*, 329 NLRB 355, 357 (1999)

the time a Board order issues it would be impossible to effect meaningful compliance, and the Charging Party would be left without a remedy.³⁰ This lack of a remedy can erode public respect and confidence in the law.³¹ Indeed, Congress granted the Board authority to seek preliminary injunctive relief precisely because the passage of time inherent in the Board's administrative process can result in the frustration or nullification of the Board's remedial authority.³² These enforcement problems are even more likely to occur when the usual delay in the Board's process is coupled with the delay caused by a backlogged arbitration procedure.

Another problem with a significant arbitral delay where the resulting award does not meet the *Olin/Spielberg* standards is that the opportunity to conduct an effective trial of the alleged unfair labor practice at the end of the process will be lost. As the Board has recognized in other contexts, as time passes memories fade, evidence is lost, and witnesses become harder to locate.³³ It has been noted that in

(declining to issue a remedial *Gissel* bargaining order given that an unjustified delay of over five years at the Board had likely rendered such an order unenforceable in the courts).

³⁰ *NLRB v. Mountain Country Food Stores, Inc.*, 931 F.2d at 22 (finding compliance impossible since the union no longer existed, no longer represented the affected employees, and no longer had a legal interest in the handbilling dispute). Not only can a significant delay totally frustrate a remedy, but it can also be unfair to the respondent; it is possible that the negative effects of the violation will have dissipated to the point where any Board order would be punitive, not remedial. *Id.*

³¹ John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 Lab. Law. 1, 2 (2000).

³² See S. Rep. No. 80-105, at 8, 27 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 414, 433 (1959). See also *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1133 (10th Cir. 2000), citing *Angle v. Sacks*, 382 F.2d 655, 659 (10th Cir. 1967) ("The concern of Congress was rather that the purposes of the National Labor Relations Act could be defeated in particular cases by the passage of time"); *Kobell v. United Paperworkers International Union*, 965 F.2d 1401, 1406 (6th Cir. 1992) (noting that the Board may lose remedial power due to the slow nature of administrative review).

³³ See *Crown Bolt, Inc.*, 343 NLRB 776, 779–80 (2004) (refusing to retroactively apply new evidentiary rule requiring evidence of dissemination of plant closure threat where four years had passed since the hearing); *Chambersburg County Market*, 293 NLRB 654, 655 (1989) (finding that a refusal to execute a negotiated collective-bargaining agreement is not a continuing violation and a charge must be filed six months after the first refusal). As the Board noted in *Chambersburg*, these are the reasons Congress adopted a six-month statute of limitations: "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.'" *Id.* (quoting H.R. Rep. No. 80-245, at 40 (1947)).

a year's time, "memories had begun to fade (notwithstanding the existence of pretrial affidavits), and the fading was noticeable."³⁴ Accordingly, if a deferred case languishes for years because of a stalled arbitration procedure, the risk of evidentiary diminution increases until at some point the Board loses the ability to remedy the statutory violation altogether.

Moreover, since the General Counsel has the initial burden of proof, evidentiary problems at the hearing are likely to prejudice the Charging Party, as will problems in the enforcement stage. These outcomes are inconsistent with well-established Board policy that the consequences of agency delay should not be borne by the wronged party to the benefit of those who have wronged them.³⁵ This policy is doubly important when the victim of a violation is not a party to the arbitration agreement, as in cases where the Charging Party is an individual and not a union.³⁶

Accordingly, in order to ensure that an unreasonable delay in the grievance-arbitration procedure will not undermine the Board's ability to protect the rights guaranteed by the Act, we are altering the procedure for processing cases eligible for *Collyer* deferral.

IV. New Casehandling Guidelines for Cases on *Collyer* Deferral

Under the current procedure outlined in Section 10118 of the Casehandling Manual, the Regions generally defer a charge to the parties' contractual grievance procedure upon a determination of arguable merit.³⁷ In Section 8(a)(1) and (3)

³⁴ *Hankins Lumber Co.*, 316 NLRB 837, 853 (1995) (finding that while the General Counsel's witnesses were sincere, their recollections had faded to the point that the ALJ had to give greater credence to the Employer's witnesses). *See also Local No. 1168, UAW (Chrysler Corp.)*, 193 NLRB 898, 908 n.14 (1971) (dismissing General Counsel's attack upon credibility of employer witnesses based on their faded and conflicting accounts, finding it was "only natural" that witnesses totally lacked memory of an incident that occurred only seven months earlier).

³⁵ *Cf. F.M. Transport*, 302 NLRB 241, 241 (1991) (ruling that the doctrine of laches is generally inapplicable to Board proceedings since this would make the charging party bear the cost of the NLRB's delay).

³⁶ *See General American Transportation Corp.*, 228 NLRB 808, 810–11 (1977) (Murphy, C. concurring) (arguing deferral is not appropriate when the aggrieved party is not a party to the contract), *overruled by United Technologies Corp.*, 268 NLRB at 557.

³⁷ NLRB, *Casehandling Manual Part One: Unfair Labor Practice Proceedings* § 10118.1 (2011).

cases, the Region must take affidavits from the Charging Party and from all witnesses within his or her control before making an arguable-merit determination.³⁸ Once a case is deferred, every ninety days the Region ascertains from the parties the status of the arbitral proceedings, and determines whether the parties are meeting their obligation to process the case and what action, if any, should be taken.³⁹ If there is no response from the parties, the Region will dismiss the charge.

Under this system there is no safeguard against a case being held in deferral status indefinitely, even for years, so long as the arbitration procedure remains functional. The current system does not adequately ensure preservation of the evidence necessary to properly prosecute the charge or mitigate the enforcement problems that often arise after a prolonged delay. Consequently, the current *Collyer* deferral procedure does not ensure that statutory rights are effectively protected.

Given the evidentiary and enforcement problems that can arise in as little as a year after a charge is filed, we have concluded that casehandling procedures need to be modified for cases that have been or are likely to be deferred for over a year.

Section 8(a)(1) and (3) Cases

In Section 8(a)(1) and (3) cases, as part of its investigation of the Charging Party's evidence, the Region should discover whether the grievance arbitration will be completed in less than a year. If this appears likely, then the charge should be deferred. If, however, the issue will not complete arbitration in under a year, the Regional Director should determine whether deferral is appropriate, especially considering the problems occasioned by such a delay, outlined above. In making this determination, the Region should consult with all of the parties, including any individual discriminatees.

If the Regional Director determines that the deferral would unduly disadvantage the Charging Party or otherwise frustrate the Board's ability to enforce the Act, then the Region should proceed with a full investigation and reach a merit determination. If the charge is found meritorious, then the Region should submit the case to Advice. If the Regional Director determines that there is a good reason to defer the charge despite the significant delay, for instance if all the parties involved would still prefer arbitration, the Region should contact Advice before placing the charge in deferral status.

³⁸ GC Memorandum 11-05 at 10.

³⁹ NLRB, *supra* note 37, § 10118.5.

The Region should continue to conduct quarterly reviews of Section 8(a)(1) and (3) cases deferred under this new policy, as well as those already deferred as of the date of this memorandum. However, at the fourth ninety-day review, i.e. after the charge has been deferred for one year, the Region should send a “show cause” letter to all parties, including the Union, any individual Charging Party, and the Employer, seeking an explanation of why, given the length of the deferral period, deferral should not be revoked and a full investigation made.⁴⁰ Unless the Regional Director is satisfied that there is a good reason to continue deferral, for instance if arbitration is imminent, the Region should make a full investigation of the charge, arrive at a merit determination, and submit the charge, if meritorious, to Advice. If the charge is nonmeritorious, the Region should dismiss it, absent withdrawal. If the Charging Party does not respond to the show-cause letter, the Region should not dismiss for failure to prosecute without contacting the Charging Party and any individual discriminatees to ensure they understand that the case is subject to dismissal absent some response.

Section 8(a)(5) Cases

Because Section 8(a)(5) charges usually turn on a matter of contract interpretation often better left to an arbitrator’s skill and expertise,⁴¹ the Region should continue to defer these cases as before. However, some Section 8(a)(5) charges can implicate individual Section 7 rights or have as serious an economic impact on the Charging Parties as a Section 8(a)(1) and (3) charge. Thus, after such a charge has been in deferral status for over a year, or if such a charge is very likely to be deferred for over a year, and the Regional Director, at his or her discretion, determines that to defer such a charge would frustrate the Board’s remedial authority, then the Region may conduct a full investigation and submit the case to Advice.

V. Conclusion

To summarize, we will now argue that in order to prevent remedial failure resulting from a deferral of over one year, Section 8(a)(1) and (3) charges forecast to be or actually deferred for over a year should not be deferred to arbitration. And in more limited circumstances, we may also take the position that deferral of Section

⁴⁰ See Collyer and Dubo *Deferral Survey*, OM Memorandum 09-06 dated Oct. 7, 2008 (instructing the Regions to send “show cause” letters in all deferred cases pending more than twelve months). If a case has been deferred for over a year or undergone more than four quarterly reviews as of the date of this memorandum, the show cause letters should be issued at the next quarterly review of that case.

⁴¹ See *supra* text accompanying notes 9–12.

8(a)(5) cases for more than a year is inappropriate. The Regions should take the following steps to implement this new policy.

Section 8(a)(1) and (3) Cases

- Conduct Charging Party investigation, make arguable-merit determination, and determine whether arbitration is likely to be completed in less than a year.
- If arbitration is likely to be completed in less than a year:
 - Defer and conduct quarterly reviews.
 - At the fourth quarterly review (in new and currently pending cases in deferral status), send “show cause” letters to all parties seeking an explanation of why deferral should not be revoked.
 - If the Charging Party does not respond, contact the Charging Party and any individual discriminatees before dismissing for failure to prosecute.
 - If there is insufficient reason to continue deferral, conduct a full investigation; if the charge is meritorious, submit the case to Advice; if the charge is nonmeritorious, dismiss absent withdrawal.
 - If there is good reason to continue deferral, contact Advice.
- If arbitration is not likely to be completed in less than a year:
 - Determine, in consultation with all parties, including any individual discriminatees, whether deferral is inappropriate because the delay is likely to frustrate the Board’s remedial ability or unduly disadvantage the Charging Party.
 - If deferral is deemed inappropriate, conduct a full investigation and, if the charge is meritorious, submit the case to Advice.
 - If deferral is considered appropriate despite the delay, contact Advice.

Section 8(a)(5) Cases

- Make deferral decisions and conduct quarterly reviews, as under existing policy.
- If arbitration is not likely to be or has not been completed within a year, and the case implicates individuals’ statutory rights or involves serious economic harm to the Charging Party, the Region may at its discretion conduct a full investigation and submit the case to Advice in the same manner as Section 8(a)(1) and (3) cases.

Any questions regarding implementation of this memorandum should be directed to the Division of Advice.

/s/
L.S.

cc: NLRBU
Release to the Public

MEMORANDUM GC 12-01