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The NLRB and Deferral to Awards of Arbitration Panels

THE NLRB AND DEFERRAL TO AWARDS OF ARBITRATION PANELS

Section 10(a) of the National Labor Relations Act (NLRA) authorizes the National Labor Relations Board (NLRB or Board)[1] to prohibit employers, employees and labor organizations from engaging in unfair labor practices. An unfair labor practice is a violation of workers' or employers' NLRA rights. The most frequently encountered unfair labor practices are interference with the right of employees to engage in or refrain from engaging in union activity,[2] discriminatory employment practices designed to encourage or discourage union activity,[3] and refusals on the part of employers and employees to bargain collectively.[4]

To augment their statutory protection, employers, employees and labor unions enter into collective bargaining agreements[5] to protect

[1] The National Labor Relations Board (NLRB) consists of five members appointed by the President who serve staggered terms of five years each. 29 U.S.C. § 153 (1976).

[2] *Id.* at §§ 157, 158(a)(1).

[3] *Id.* at § 158(a)(2).

[4] *Id.* at § 158(a)(5), (b)(3). Section 7 of the National Labor Relations Act (NLRA) gives employees the right to engage in or refrain from union and other self-organizational activity. *Id.* § 157. The NLRA proscribes the unfair labor practices enumerated in section 8. Section 8(a)(1) of the NLRA prohibits employer actions designed to coerce or restrain employees in the exercise of the rights guaranteed by § 7 of the NLRA. *Id.* § 158(a)(1). Section 8(a)(2) prohibits employers from dominating, or interfering with the management of, a union. *Id.* § 158(a)(2). Sections 8(a)(1) and 8(a)(2) are intended to insure the absolute independence of employee representatives in collective bargaining and to prevent the formation of company unions. *See* C. GREGORY & H. KATZ, LABOR AND THE LAW 231 (1979) [hereinafter cited as GREGORY]. Section 8(a)(3) proscribes discriminatory practices designed to encourage or discourage union membership. This section prevents employers from refusing to hire, or from refusing to retain in employment any job applicant or employee because of his existing membership in any labor organization, his desire to join a labor organization or his refusal to join a particular union approved by the employer. 29 U.S.C. § 158(a)(3) (1976). Section 8(a)(4) insures immunity from discriminatory treatment to employees who invoke the provisions of the NLRA against employers. The section proscribes the discharge of employees who give testimony concerning or who file, unfair labor practice charges. *Id.* at § 158(a)(4). Section 8(a)(5) requires employers to bargain collectively with employee representatives. The section is not intended to compel an employer to enter into an agreement with a union but merely requires an employer to meet and negotiate with the representatives of his employees. *Id.* at § 158(a)(b)(5); *see* GREGORY, *supra* at 231-33. *See generally* F. BARTOSIC & R. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 33-71 (1977) [herinafter cited as BARTOSIC]. Section 8(b) of the NLRA proscribes unfair labor practices on the part of unions which violate employees Section 7 rights. 29 U.S.C. § 158(b) (1976). Examples of § 8(b) violations include causing employers to discriminate against employees in violation of § 8(a)(3), refusing to bargain collectively with employers, or levying excessive membership dues. §§ 158(b)(2), (b)(3), (b)(5) (1976). *See also* GREGORY, *supra* at 231-33.

[5] Collective bargaining is defined in the NLRA as

> . . . the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the ex-

their respective interests. The subject matter of such agreements may include union representation and recognition, management prerogatives, compensation, working conditions, enforcement of the agreement, procedures for processing alleged violations of the agreement and duration and termination clauses.[6] The same conduct may often violate both the collective bargaining agreement and be a violation of section 7 of the NLRA. For example, unilateral modification of a contract may be a violation of section 8(a)(5) or 8(b)(3) of the NLRB and constitute a breach of the labor contract.[7] Also, a discriminatory discharge may violate both section 8(a)(3) and a contract provision providing that an employee may be discharged only for just cause.[8] Most collective bargaining agreements provide for some type of grievance resolution mechanism to settle disputes arising under the labor contract.[9] The aggrieved party can obtain redress either by invoking the grievance arbitration process or by filing an unfair labor practice charge[10] with the NLRB.[11]

The preferred method of resolving disputes arising over the application or interpretation of a collective bargaining agreement is the dispute

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ecution of a written contract incorporating any agreement reached if requested by either party. . . .

29 U.S.C. § 158(d) (1976).

[6] *See generally* M. WORTMAN & C. RANDLE, COLLECTIVE BARGAINING PRINCIPLES AND PRACTICES 68-90 (1966) [hereinafter cited as WORTMAN].

[7] BARTOSIC, *supra* note 4, at 212-13.

[8] *Id.* at 213.

[9] Where there is a long history of collective bargaining and an atmosphere of mutual respect between company and union, any discontent or disatisfaction on the part of an employee arising out of the employment relationship is likely to be subject to resolution through the grievance settlement mechanism. For recently organized companies, however, the collective bargaining agreements are usually very specific in regard to the types of grievances which can be resolved through the dispute resolution process. Often this category of grievances is limited to violations of specific terms of the collective bargaining agreement. *See* WORTMAN, *supra* note 6, at 70.

[10] Aggrieved parties initiate unfair labor practice charges by filing a written complaint in the NLRB regional office located in the region where the alleged violation occurred. Unfair labor practice charges must be filed within six months of the alleged illegal act. If a preliminary investigation discloses sufficient evidence to substantiate the charge, the regional office first attempts a voluntary settlement of the dispute. If the dispute is not settled, the Regional Director issues a notice of hearing and a complaint. A hearing concerning the unfair labor practice charge takes place before an administrative law judge (formerly known as a trial examiner). An NLRB attorney prosecutes the complaint against the alleged offender. The proceeding before the administrative law judge is formal and the Federal Rules of Evidence generally apply to the proceedings. At the conclusion of the hearing the administrative law judge issues a written decision and opinion. The parties have twenty days from the issuance of the administrative law judge's decision to file exceptions to the decision with the Board. If no exceptions are filed, the Board adopts the decision. If exceptions are filed, the parties file supporting briefs, and the Board then issues a decision based on the entire record. The Board seldom permits oral argument. NLRB decisions may be appealed to federal courts of appeal in the same manner as final decisions of most other administrative agencies. BARTOSIC, *supra* note 4, at 15-17.

[11] *Id.* at 213.

settlement mechanism mutually agreed to by the parties, most notably arbitration.[12] When an arbitration panel is used to settle a labor dispute, the union and employer often appoint an equal number of panel members who in turn choose the final members.[13] The finality of arbitral awards is vital to the viability of the arbitral process as a means of dispute settlement.[14] Thus, parties who appeal arbitral awards to the NLRB, on the basis of relevant contract violations that are also alleged violations of the NLRA detract from the efficiency of the arbitral process. To protect the efficacy of arbitration, the Board will often defer to an arbitral award to resolve a statutory charge.[15] In establishing the content of the Board's policy of deferring to arbitration awards, however, the Board must balance the tension between its duty to prevent unfair labor practices and the Board's desire to uphold the integrity of the arbitral process.[16]

The maintenance of arbitration as a desirable and final means of dispute settlement necessitates a Board policy of maximum deference to arbitration awards.[17] Most employers and employees prefer arbitration as a means of dispute settlement.[18] The NLRA specifically provides that arbitration is the preferred method of labor dispute settlement.[19] The arbitral process is considerably less formal and less time consuming that the Board's process for deciding unfair labor practice charges.[20] The efficacy of the arbitration process will be preserved only if the parties view the arbitration proceeding as final. The main disadvantage to a Board policy of absolute deference to arbitration is that deference occasionally forces the Board to defer to grossly unfair arbitral awards.[21]

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[12] *See* 29 U.S.C. § 173(d) (1976).

[13] *See* F. ELKHOURI & E. ELKHOURI, HOW ARBITRATION WORKS 68-69, 204 (1973) [hereinafter cited as ELKHOURI]; M. BERNSTEIN, PRIVATE DISPUTE SETTLEMENT 19-24 (1968).

[14] *See* Atleson, *Disciplinary Discharges, Arbitration and NLRB Deference*, 20 BUFFALO L. REV. 355, 358 (1971) [hereinafter cited as Atleson].

[15] Section 10(a) of the NLRA empowers the NLRB to prevent the unfair labor practices listed in § 8 of the NLRA which affect commerce. 29 U.S.C. § 160(a) (1976). This statute, however, is written in permissive language and imposes no absolute duty or obligation on the NLRB to remedy unfair labor practices. Section 10(a) in effect gives the Board power to delegate its authority to decide unfair labor practices to arbitrators where appropriate. *See* GREGORY, *supra* note 4, at 440-41. Delegation of authority is now an accepted practice on the part of federal administrative agencies and is seldom challenged in the courts. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, §§ 9.01-.05-1 (1976).

[16] *See* International Harvester Co., 138 N.L.R.B. 923, 925-26, 51 L.R.R.M. 1155, 1156 (1962), *enf'd sub nom.* Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), *cert. denied* 377 U.S. 1003 (1964).

[17] *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) (federal policy of settling labor disputes by arbitration would be undermined if courts could always review the merits of arbitral awards).

[18] *See* BARTOSIC, *supra* note 4, at 195.

[19] 29 U.S.C. § 173(d) (1976).

[20] *See* GREGORY, *supra* note 4, at 513.

[21] *See* text accompanying notes 54-68 *infra*.

On the other hand, to protect statutory rights to the maximum extend possible, the Board should defer to arbitration proceedings only where the arbitrator considered the statutory rights issue and decided the issues the same as the Board would have decided them.[22] In all other cases, the Board should conduct hearings concerning the alleged unfair labor practice charges. Even though the probability of the NLRB reversing the arbitrator's award in a particular case may be slim, the losing part might nevertheless appeal the arbitrator's award, especially if the rights at stake are valuable or the monetary amount at risk in the case is high.[23] Under the limited deferral policy, arbitration might become a vestigal and unnecessary step which parties would bypass in favor of immediate filing of unfair labor practice charges with the NLRB.[24] Since neither a policy of limited deference nor a policy of absolute deference to arbitral awards is optimal, the NLRB and the courts have struggled with selecting the appropriate standard that balances the two extremes. In *Suburban Motor Freight*,[25] the Board announced recently that it would no longer defer to arbitration awards unless the parties had presented the alleged statutory unfair labor practices to the arbitrator and the arbitrator had expressly considered the charges.[26]

The Board articulated its first clear standard for deferral to arbitral awards[27] in *Spielberg Manufacturing Company*.[28] The employer, Spielberg Manufacturing Company (Spielberg), signed a contract with the Luggage and Leather Workers Union after recognitional strike by that union.[29] Spielberg refused to reinstate four members of the union due to their alleged misconduct on the picket line.[30] As a part of the strike settlement agreement, the parties agreed to submit the determination of the four employees' status to arbitration.[31] The arbitration panel found that the four employees were not entitled to reinstatement.[32] Dissatisfied with the arbitrator's decision, the union filed

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[22] *See* Atleson, *supra* note 14 at 367.

[23] *See* Truesdale, *Impact of the NLRB on Labor-Management Relations: The Tie that Binds*, 1980 LAB. L. DEV. 153, 170-71 (1980) (NLRB refusal to defer to arbitral awards undermines overall integrity of arbitral process).

[24] In recent years, the number of cases appealed to both higher courts and to higher echelons of administrative agencies has increased dramatically. Cases in which a large monetary amount is at stake are the most likely candidates for appeal. However, the number of appeals brought without regard to monetary considerations is increasing. Often litigants are more concerned with winning than with net economic advantage. *See* Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576, 579-80 (1974).

[25] 247 N.L.R.B. No. 2, 103 L.R.R.M. 1113 (1980).

[26] *Id.* at ____, 103 L.R.R.M. at 1114.

[27] 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).

[28] *Id.* at 1082, 36 L.R.R.M. at 1154.

[29] *Id.* at 1081, 36 L.R.R.M. at 1153.

[30] *Id.* at 1084, 1087.

[31] *Id.* at 1087.

[32] *Id.* at 1081, 1088, 36 L.R.R.M. at 1153.

unfair labor practice charges against Spielberg, alleging that the company's failure to reinstate the four strikers violated section 8(a)(1) and 8(a)(3) of the National Labor Relations Act.[33] The trial examiner found that the four were entitled to reinstatement.[34] The Board agreed with the trial examiner's holding that as a matter of law, an arbitration award does not bind the Board.[35] The Board ruled, however, that deference to the arbitral award would best serve the policy of encouraging voluntary settlement of labor disputes. The Board found that the proceedings were fair and regular,[36] all parties had agreed to be bound by the award, and the decision of the arbitration panel was not clearly repugnant to the purposes and policies of the NLRA.[37] These three requirements for NLRB deference to arbitral awards became known as the "*Spielberg* doctrine."

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[33] *See* note 4 *supra.*

[34] 112 N.L.R.B. at 1081, 1092, 36 L.R.R.M. at 1153.

[35] *Id.* at 1081, 36 L.R.R.M. at 1153.

[36] The Intermediate Report contains some evidence that the arbitral proceeding in *Spielberg* were not "fair and regular." For instance, one of the arbitrators stated that before the arbitral proceedings began, a union representative told him that the proceedings would be "more or less of a formality." 112 N.L.R.B. at 1087. After the proceeding ended, a union representative told the four discharged employees that the sacrifice of their jobs had been necessary to obtain recognition for the union. *Id.* at 1088.

[37] *Id.* at 1081, 36 L.R.R.M. at 1153. A corollary to *Spielberg* doctrine is the *Collyer* doctrine. In *Collyer Insulated Wire*, 192 N.L.R.B. 837, 77 L.R.R.M. 1931, (1971), the Board held that where a dispute involving unfair labor practice issues centers around the meaning and terms of a collective bargaining contract, the Board will defer the entire dispute to arbitration prior to making a finding on the unfair labor practice charges. *Id.* at 842, 77 L.R.R.M. at 1937. Although the *Collyer* and *Spielberg* doctrines are similar, they are applicable to distinctly different fact situations. *Spielberg* concerns deference after arbitration while *Collyer* concerns deference before arbitration. *See* Kansas City Star Co., 236 N.L.R.B. 866, 869, n.10, 98 L.R.R.M. 1320, 1323 n.10 (1978) (Truesdale, Member, concurring). When a breach of a collective bargaining agreement is committed, the aggrieved party can file a grievance and if necessary submit the dispute to arbitration. He can also file an unfair labor practice charge with the NLRB, unless the adjudication of such a charge is precluded by the *Collyer* doctrine. *See* text accompanying notes 5-15 *supra* for a discussion of arbitration. After an unfair labor practice issue is resolved in arbitration, an aggrieved party can file an unfair labor practice charge with the Board unless prohibited by either the *Spielberg* deference doctrine, applicable to cases not involving discipline and discharge, or the *Suburban Motor Freight* deference doctrine applicable to discipline and discharge cases. *See* text accompanying notes 86-88 *infra.* An aggrieved party can also file an unfair labor practice charge after initiation of arbitration but before the arbitrator has reached a decision, provided the prosecution of such a charge is not proscribed by the *Collyer* deferral doctrine. *See* GREGORY, *supra* note 4, at 440-42.

Shortly after the *Spielberg* decision, the Supreme Court and NLRB greatly expanded the scope of the *Spielberg* deferral doctrine. In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), the Court stated that agreements to arbitrate are specifically enforceable in federal courts. *Id.* at 453. Recognizing that an arbitrator's expertise is superior to that of "the ablest judge," the Court subsequently narrowed the scope of judicial review of arbitral awards. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). In apparent reaction to these decisions, the Board stated that it would not adjudicate unfair labor practice claims arising from the same facts as arbitrated contract disputes unless the arbitration proceedings were tained by fraud, collusion, unfairness, or serious procedural ir-

In *Electronic Reproduction Services Corp.*,[38] the Board greatly extended the *Spielberg* doctrine.[39] In *Electronic Reproduction*, the dispute centered around the company's layoff of three employees for reasons regarded by the union as a pretext for anti-union discrimination.[40] The company first maintained that the layoffs were part of a plan to go out of business.[41] Subsequently, the company maintained that the layoffs were the result of the company's attempt to economize.[42] The arbitrator found that two of the three employees had been offered and declined work in categories in which they had been previously employed, and therefore, were not entitled to relief. The arbitrator found that the third employee, whom the company had reemployed, had been laid off in violation of his seniority rights, and therefore, was entitled to backpay for the period of his layoff.[43] The arbitrator did not rule on the issue of pretextual discharge and his award did not state whether the issue of pretext was raised or litigated during the arbitral proceeding.[44] The Board nevertheless sustained the arbitrator's award. The Board announced that in discipline and discharge cases[45] it would defer to arbitral awards where the complainant did not present available evidence concerning the unfair labor practices.[46] The Board stated, however, that it would make exceptions to the policy of absolute deferral where the complainant demonstrated the existence of unusual circumstances or bona fide reasons for the failure to introduce evidence of alleged unfair labor practices during

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regularities. *International Harvester Co.*, 138 N.L.R.B. 927, 51 L.R.R.M. at 1156. The Board also indicated that arbitration proceedings are reviewable where the arbitration award was clearly repugnant to the purposes and policies of the National Labor Relations Act. *Id.* at 927, 51 L.R.R.M. at 1157. In later decisions, the Board refused to hear unfair labor practice claims which were subject to an arbitration clause, regardless of whether the parties had resorted to arbitration. Flintkote Co., 149 N.L.R.B. 1561, 1562-63, 57 L.R.R.M. 1477, 1477 (1964); Dubo Mfg. Corp., 142 N.L.R.B. 431, 432, 53 L.R.R.M. 1070, 1070 (1963). Between 1960 and 1964, however, the Board deferred to arbitral awards in only a minority of cases involving unfair labor practice issues. *See, e.g.*, Armco Drainage & Metal Prods. Co., 137 N.L.R.B. 1753, 1757-58, 50 L.R.R.M. 1502, 1503 (1962) (all parties subject to jurisdiction of arbitrator, therefore, must use arbitration process to settle dispute); Denver-Chicago Trucking Co., 132 N.L.R.B. 1416, 1419-21, 48 L.R.R.M. 1524, 1526 (1961) (NLRB deferred to arbitral award in employer discriminatory practice case despite allegations of procedural irregularities at hearing).

[38] 213 N.L.R.B. 758, 87 L.R.R.M. 1211 (1974).

[39] *See* text accompanying notes 45-47 *infra*.

[40] 213 N.L.R.B. at 759, 87 L.R.R.M. at 1213-14. A layoff or discharge is pretextual when a seemingly plausible and justifiable reason is given for the action, but the real reason underlying the employer's action is anti-union bias. BARTOSIC, *supra* note 4, at 61-62.

[41] 213 N.L.R.B. at 778-79, 87 L.R.R.M. at 1215.

[42] *Id.* N.L.R.B. at 775, 87 L.R.R.M. at 1213.

[43] *Id.* at 758, 87 L.R.R.M. at 1212.

[44] *Id.* at 759, 87 L.R.R.M. at 1213-14.

[45] In *Electronic Reproduction*, the Board stated that in unfair labor practice cases other than those involving employee discipline and discharge, it would continue to apply the *Spielberg* deferral standard. *Id.* at 760-62, 87 L.R.R.M. at 1214-16.

[46] *Id.* at 762, 87 L.R.R.M. at 1216.

arbitration proceedings.[47] The Board reasoned that a complainant would undermine the arbitration process by filing a charge with the Board alleging an unfair labor practice that could have been settled in the arbitration proceeding.[48] According to the Board, complainants who fear an adverse ruling at arbitration could deliberately withhold evidence at arbitration proceedings with the intent of obtaining a more favorable decision from the NLRB in the event of an unfavorable arbitration award.[49] Disputants could also withhold information at arbitraton in hope of inducing the opposing party to make a favorable settlement of the dispute before the case reached the hearing stage at the NLRB.[50] Such practices would damage the efficacy of the arbitral process.[51] In *Electronic Reproduction* the dissenting members of the Board maintained that *Spielberg* permitted the NLRB to defer to arbitration awards only when the arbitrator actually decided the statutory rights at issue.[52] The dissent argued that the NLRB's vindication of the individual rights guaranteed by the NLRA should be the NLRB's paramount concern and should take precedence over the Board's concern with the viability of arbitration as a quick and efficient means of settling labor disputes.[53]

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[47] 213 N.L.R.B. at 762, 87 L.R.R.M. at 1216. As examples of "unusual circumstances" which would justify a refusal to defer to an arbitration award, the Board cited instances where an arbitration award applied to alleged unfair labor practices occurring after the award, and instances where the arbitrator has specifically refused to rule on certain issues because he considers them statutory as opposed to contractual issues. Deference is also improper where both parties had specifically agreed that certain issued should not be submitted to arbitration. *Id.*

[48] *Id.* at 761, 87 L.R.R.M. at 1215.

[49] *Id.* at 761, 87 L.R.R.M. at 1215.

[50] *See id.* at 761-62, 87 L.R.R.M. at 1217-18.

[51] *Id.* at 752, 87 L.R.R.M. at 1218. In *Electronic Reproduction*, the Board reiterated that it retained jurisdiction in cases to which it deferred to insure that arbitration fulfilled the fundamental purposes of the NLRA. *Id.* at 764, 87 L.R.R.M. at 1218.

[52] *Id.* at 765; 87 L.R.R.M. at 1219 (Fanning and Jenkins, Members, dissenting). Adoption of the dissent's position that the Board should defer to arbitral awards only where the arbitrator actually decided the statutory issues involved in the dispute would insure that all alleged unfair labor practices are given full and fair consideration at either the Board or arbitral level. *See* text accompanying notes 97-98 *infra*. The dissent implied that the *Suburban Motor Freight* deferral doctrine the Board adopted later is an integral part of the *Spielberg* deferral doctrine. *See* text accompanying notes 82-88 *infra*.

[53] The *Electronic Reproduction* dissent relied primarily on Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), and William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12 (1973). *Gardner-Denver* involved the discharge of the plaintiff from employment with the defendant for allegedly racially discriminatory reasons. 415 U.S. at 38-39. Although the union contract contained an anti-racial discrimination clause, the plaintiff did not allege that racial discrimination was the basis for his firing until his complaint had entered the final pre-arbitration stage. *Id* at 39, 42-43. The arbitrator ruled that Alexander had been discharged for just cause, but did not directly rule on Alexander's charge of racial discrimination. *Id.* at 42-43.

Prior to the arbitration hearing, Alexander filed a complaint on the racial discrimination charge with the Equal Employment Opportunity Commission. Following the arbitration award, the Commission concluded that there was not reasonable cause to believe that Alex-

Less than four years after the *Electronic Reproduction* decision, the Board, in *Mason and Dixon Lines, Inc.*,[54] began the gradual movement away from the *Electronic Reproduction* doctrine.[55] *Mason and Dixon*

ander had been fired for racially discriminatory reasons and issued a right to sue letter which is a jurisdictional prerequisite to a private suit. *Id.*

Alexander then sued Gardner-Denver in federal district court. *Id.* at 43. His suit was dismissed on grounds that his claim had previously been submitted to arbitration. Alexander v. Gardner-Denver Co., 346 F. Supp. 1012, 1019 (D. Colo. 1971), *aff'd* 466 F.2d 1209 (10th Cir. 1972). 466 F.2d 1209, 1210 (10th Cir., 1972). The Supreme Court reversed, holding that rights guaranteed by Title VII of the Civil Rights Act are individual rights, which individuals enforce chiefly in lawsuits in federal courts. 415 U.S. at 47-49. Arbitration, with its considerable informality and lack of procedural safeguards, is not well suited to vindicate important individual rights such as those guaranteed by Title VII of the Civil Rights Act. *Id.* at 156-58. In dicta, the Court stated that arbitral decisions concerning NLRB rights not subject to contractual abrogation do not preclude NLRB consideration of claims based on the alleged violations of the same rights. *Id.* at 50. *See* 213 N.L.R.B. at 755, 87 L.R.R.M. at 1219.

Gardner-Denver, as interpreted by the dissent, stands for the proposition that statutory rights should never be deferred to arbitration, even where there are congruent arbitrable contractual issues. *See* 213 N.L.R.B. at 755, 87 L.R.R.M. at 1219. Statutory violations and violations of collective bargaining agreements are congruent if the same action is a violation of both the collective bargaining agreement and the party's statutory rights under the NLRA. *See* BARTOSIC, *supra* note 4, at 212-13. The dissent's interpretation of Gardner-Denver, however, certainly goes beyond the Board's recent holdings as to the deference given to arbitral awards when congruent statutory rights and contractual issues are at stake. *See* text accompanying notes 83-88 *infra*.

William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12 (1973), arose out of a jurisdictional dispute between rival unions. The strike arose over a work assignment dispute. 417 U.S. at 14-15. The Florida Supreme Court lifted an injunction against the strike on grounds that the court had no jurisdiction over the matter because the strike was arguably an unfair labor practice under 29 U.S.C. § 154(b)(4)(i)(D) and thus subject to the exclusive jurisdiction of the NLRB. *Id.* at 13-14, *see* San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959). The Court remanded, and held that in jurisdictional disputes, the statutory prohibition of strikes does not preempt suits to enforce no-strike provisions. 417 U.S. at 20. Since *Arnold* involved only a jurisdictional dispute and arguably did not involve public rights, the *Electronic Reproduction* dissent felt that *Arnold* supported its position that the Board is not pre-empted from exercising its jurisdiction under circumstances where public rights guaranteed by NLRA are at stake. 213 N.L.R.B. at 768, 87 L.R.R.M. at 1219.

[54] 237 N.L.R.B. 6, 98 L.R.R.M. 1540 (1978).

[55] An important precursor of the Board's move away from the *Electronic Reproduction* decision was Kansas City Star Co., 236 N.L.R.B. 866, 98 L.R.R.M. 1320 (1978). The Board considered the propriety of Kansas City Star's recission of a collective bargaining agreement in response to a strike of disputed origin. The dispute arose out of the transfer of a union member to a lower paying job. Shortly after the transfer, the workers on the night shift reported for work but refused to perform any work. *Id.* at 866, 98 L.R.R.M. at 1321. The union maintained it was a wildcat strike. Since union leadership had not instigated the strike, there was no violation of the no-strike clause contained in the union's collective bargaining agreement. Therefore, the union felt Kansas City Star had no grounds for recission of the collective bargaining agreement. *Id.* at 870, 98 L.R.R.M. at 1325 (Fanning and Jenkins, Members, concurring and dissenting). Management, on the other hand, contended that the union leadership was primarily responsible for the strike, and therefore it had just cause to rescind the collective bargaining agreement. *Id.* at 869, 98 L.R.R.M. at 1324. The arbitrator did not specifically rule on the legality of the contract recission in finding for Kan-

arguably presented an opportunity for the Board to apply the "unusual circumstances" exception to the *Electronic Reproduction* doctrine.[56] Instead, the Board relied solely on the *Spielberg* doctrine.[57] Mason and Dixon discharged a member of the Teamster's union, Harold Baer, ostensibly because a substantial number of garnishments were filed against him.[58] Baer also filed many grievances in the course of his employment with Mason and Dixon[59] and was a member of a dissident Teamster's group, Teamsters for a Democratic Union. During the hearing before the administrative law judge,[60] the parties' testimony provided strong evidence that Baer was actually dismissed because he had filed the substantial number of grievances. Although neither Baer nor his union contested the dismissal on statutory grounds, evidence was available that could have established that the union violated section 8(a)(3) of the NLRA.[61] Because of the union's hostility toward the dissident movement with which Baer was affiliated, both the union and Mason and Dixon desired his dismissal.[62] Despite Baer's failure to raise the unfair labor

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sas City Star, *Id.* at 871, 98 L.R.R.M. at 1324. He did, however, find that the union was primarily responsible for the work stoppage. *Id.* at 866-67, 98 L.R.R.M. at 1320-21. The administrative law judge upheld the arbitrator's decision in favor of Kansas City Star on the basis of the *Electronic Reproduction* deferral doctrine. *Id.* at 866 & n.2., 98 L.R.R.M. at 1321-22 & n.2. Although the Board affirmed the administrative law judge's decision, the Board held that the administrative law judge's reliance on *Electronic Reproduction* was unwarranted because deference to the arbitral award met the *Spielberg* standards. *Id.* at 867 & n.3, 98 L.R.R.M. at 1321-22 & n.3; *see* text accompanying notes 27-37 *supra*. The Board stated that the arbitrator's finding that the union was primarily responsible for the strike precluded a contrary result. *Id.* at 864 & n.3, 98 L.R.R.M. at 1321-22 & n.3. The dissent maintained that the evidence showed that the union was not responsible for the strike. Since the arbitrator had not passed on the legality of the contract recission, deferral to the award was inappropriate. *Id.* at 871, 98 L.R.R.M. at 1326-27 (Fanning and Jenkins, Members, dissenting).

[56] *See* text accompanying notes 45-47 *supra*.

[57] *See* text accompanying notes 27-38 *supra*.

[58] Mason and Dixon Lines, Inc., 237 N.L.R.B. 6, 8. Baer contended that at the time of the first garnishment, the Mason and Dixon terminal manager had said nothing to him concerning possible disciplinary action. 237 N.L.R.B. at 12. Although further garnishments had been filed against his salary, the terminal manager said nothing about them until after Baer filed several grievances and became heavily involved in the activities of Teamsters for a Democratic Union, a dissident Teamster's group. *Id.*

[59] *Id.* at 7. Baer filed thirteen grievances during the first nine months of 1976, more than any other employee at Mason and Dixon's Cleveland terminal. *Id.* at 78. The terminal manager admitted that the filing of the grievances "bothered" him. *Id.* Baer was also a leader of the opposition to proposed operational changes at Mason and Dixon's Cleveland terminal which, if implemented, might have resulted in the loss of some union jobs at the facility. 237 N.L.R.B. at 7, 11. The dismissal of employees in retaliation for their filing of grievances violates § 8(a)(1) and § 8(a)(3) of the NLRA because the employer's action is a violation of the employee's right to engage in concerted activity for purposes of "collective bargaining or other mutual aid or protection." 29 U.S.C. § 158 (1976); *see* note 4 *supra*.

[60] *See* note 10 *supra*.

[61] *See* note 4 *supra*.

[62] *See* 237 N.L.R.B. at 11. Two days after Baer filed his final two grievances (both were filed on the same day) a hearing was held in the terminal manager's office. In attendance

practice issue during arbitraton, the administrative law judge found that the application of *Electronic Reproduction* to the case would lead to an unjust result.[63] Therefore, the judge applied the *Spielberg* doctrine and found that the proceeding was not "fair and regular" and therefore refused to defer to the arbitration proceeding.[64] The NLRB adopted the administrative law judge's decision.[65] The facts in *Mason and Dixon* demonstrate the unjust results which could flow from indiscriminate application of the *Electronic Reproduction* doctrine.

Mason and Dixon is significant because the decision clearly indicated that the Board did not consider *Electronic Reproduction* to be as significant and pervasive a deferral doctrine as the *Spielberg* doctrine. The arbitration proceeding in *Mason and Dixon* was clearly not "fair and regular," and therefore, the Board applied the *Spielberg* doctrine correctly and did not defer to the arbitration award.[66] Under *Electronic Reproduction*, however, the Board would have been required to defer to the arbitrator's award in the absence of unusual circumstances.[67] The hostility of the union and the employer toward Baer clearly constituted unusual circumstances within the meaning of the *Electronic Reproduction* doctrine. The Board's failure to follow *Electronic Reproduction* indicates that at the time of the *Mason and Dixon* decision, the Board no longer considered *Electronic Reproduction* strong or controlling precedent.[68]

Although the NLRB has not often adhered to the doctrine of stare decisis in regard to federal court labor law decisions, a Ninth Circuit decision may have provided some of the impetus for the Board's movement away from the *Electronic Reproduction* deferral doctrine in *Mason and Dixon* and later decisions. In *Stephenson v. NLRB*,[69] the Ninth Cir-

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were Baer, the terminal manager, a union steward and a union business agent. The grievances filed by Baer and the garnishment against him were discussed. The terminal manager then announced that he was terminating Baer's employment. The two other union members present apparently acquiesced. Baer believed that his replacement was already present at the terminal when the hearing took place. *Id.*

[63] *Id.* See at 12 n.33. Mason and Dixon's counsel strongly urged application of the *Electronic Reproduction* doctrine in *Mason and Dixon*, but the administrative law judge declined to apply the doctrine. *See id.* at 13 n.37.

[64] 237 N.L.R.B. at 12-13.

[65] *Id.* at 6. The Board specifically stated that the arbitration award did not meet the *Spielberg* standards deferral, and did not mention the *Electronic Reproduction* doctrine in its order affirming the administrative law judge's decision. *Id.* at 6 n.2.

[66] *See* text accompanying notes 35-37 *supra.*

[67] *See* text accompanying notes 28-35 *supra.*

[68] In a note to the Mason and Dixon decision, the NLRB implied that the administrative law judge should not have mentioned *Electronic Reproduction* in his decision because *Spielberg* afforded complete grounds for disposition of the case. 237 N.L.R.B. at 6 n.2.

[69] 550 F.2d 535 (9th Cir. 1977). In *Stephenson*, the complainant took a job with an employer who was a party to a union collective bargaining agreement covering Stephenson's job. Fikse Bros., Inc., 220 N.L.R.B. 1301, 1303, 90 L.R.R.M. 1354, 1355 (1975), *rev'd*, 550 F.2d 535 (9th Cir. 1977). Stephenson did not become aware of the agreement until

cuit stated that *Electronic Reproduction* represents an unwarranted extension of the NLRB's deferral policy.[70] The court maintained that the Board had abdicated its duty to consider unfair labor practices where the Board deferred to the arbitration proceeding even though the arbitrator did not consider the unfair labor practice charge.[71] The court articulated a five-pronged test for determining the circumstances under which the Board should defer to arbitral awards. Part one of the *Stephenson* test requires the Board to consider the original three *Speilberg* criteria: whether the arbitral proceedings were fair and regular, whether the parties agreed to be bound by the award, and whether the arbitral award was not clearly repugnant to the purposes of the NLRA.[72] In addition, the *Stephenson* test inquires whether the arbitral panel had clearly decided the unfair labor practice issue to which the party seeks the NLRB's deference and whether the arbitral tribunal decided only issues within its competence.[73] The *Stephenson* court stated that the competence requirement is fulfilled if the arbitration panel

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three months after he began working for the respondent. Upon becoming aware of the agreement, he immediately joined the union. He was later refused time off from work to visit a union business agent and prohibited from drinking coffee on the job. Also, the company no longer provided Stephenson with free coveralls. *Id.* at 1303-04, 90 L.R.R.M. at 1355. He was eventually dismissed for no apparent legitimate cause. The arbitration panel subsequently offered Stephenson reinstatement and awarded him $250 as compensation for lost wages for the two months between the date of his dismissal and the effective date of the arbitration award. *Id.* at 1304, 90 L.R.R.M. at 1354. During the first month of his original employment with Fikse Bros., however, Stephenson was paid only $3.50 an hour instead of the union rate of $5.07 per hour. Stephenson's NLRB complaint was founded on his claim for $1,800 as compensation for the difference union and non-union wages during this period. He also alleged that the changes in the respondent's attitude toward him following his joining the union constituted discriminatory anti-union activity. *Id.*

The Board maintained that the sole claim involved was the adequacy of the lump sum arbitral award. The Board stated that the policies of the NLRA would not be furthered by the Board's adjudicating a dispute as to the amount of such an award. *Id.* at 1301, 90 L.R.R.M. at 1354-55. The Board maintained that it need not rely on the *Electronic Reproduction* doctrine since the controversy focused solely on the adequacy of the cash award in the arbitral proceedings and not on the panel's failure to consider any statutory unfair labor practice issues. *Id.* 90 L.R.R.M. at 1354. Member Fanning, in his dissent, maintained that the Board had indeed relied on *Electronic Reproduction* in reaching its decision. *Id.*, 90 L.R.R.M. at 1355 (Fanning, Member, dissenting). The *Stephenson* court agreed that the Board had indeed relied on *Electronic Reproduction* in its decision. Stephenson v. NLRB, 550 F.2d 535, 541 (4th Cir. 1977).

[70] 550 F.2d at 541. Although the Board did not expressly rely on *Electronic Reproduction* in *Fikse*, the court apparently felt that *Electronic Reproduction* provided the basis for the Board's decision. *Id.* Thus, the *Stephenson* court's discussion of *Electronic Reproduction* is an integral part of the decision and not dicta.

[71] 550 F.2d at 539-40.

[72] *Id* at 537-38; *see* text accompanying notes 32-34 *supra.*

[73] 550 F.2d at 538; Banyard v. NLRB, 505 F.2d 342, 347 (D.C. Cir. 1974). In *Banyard*, the D.C. Circuit first appended the requirements that the arbitrator must have decided clearly the unfair labor issue and that the arbitrator must have decided only issues within his competence to the *Spielberg* deferral doctrine. *Id.*

decided issues which are within its presumed expertise.[74] In establishing a competency requirement, the court probably sought to differentiate between instances where the arbitrator's presumed knowledge of the "common law of the shop" is crucial to the decision and instances where the Board's expertise in the interpretation of the provisions of the NLRA is of primary importance to the decision.[75]

Max Factor and Company[76] accorded the Board its first post-*Stephenson* opportunity to apply the *Electronic Reproduction* deferral doctrine. All unfair labor practice issues had apparently been presented to arbitration.[77] The arbitrator, however, did not rule on the unfair labor practice aspects of the complainant's suspension and discharge.[78] In refusing to defer to the arbitrator's award, the Board stated that failure of the arbitrator to consider unfair labor practice charges resulted in an arbitration award which is repugnant to the purposes and policies of the NLRA within the meaning of the *Spielberg* deferral doctrine.[79] The Board did not mention the *Electronic Reproduction* decision in the text of its opinion, but instead cited *Stephenson* for the proposition that the Board should not defer where the arbitrator has not considered the statutory issues.[80] Thus, in *Max Factor* the Board incorporated into the "clearly repugnant" portion of the *Spielberg* deferral doctrine the criteria of the *Stephenson* test which requires that the Board not defer to the arbitral awards where the statutory issues involved have not been clearly considered. Although *Max Factor* implicitly overruled *Electronic Reproduction*,[81] the Board did not expressly overrule *Electronic Reproduction* until almost a year and a half later, when it issued the *Suburban Motor Freight*[82] decision.

Suburban Motor Freight involved the reprimand and discharge in April and June of 1978 of the complainant, Ralph Singleton, a truck-driver and dockman for Suburban.[83] He was reinstated with reduced punishment pursuant to the local joint grievance committee's arbitral awards. Subsequently, Singleton filed a complaint with the NLRB alleging that he had been disciplined for discriminatory, anti-union reasons, in

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[74] 550 F.2d at 540.

[75] Arbitrators are presumably chosen because their knowledge of the "common law of the shop"—the customs and practices of a particular plant or industry—is usually far superior to that of an individual who has had no significant contact with the plant or industry in question. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579-80 (1960).

[76] 239 N.L.R.B. 804, 100 L.R.R.M. 1023 (1978).

[77] *Id.* at 804, 100 L.R.R.M. at 1023.

[78] *Id.*

[79] *Id.*; *see* text accompanying notes 36-38 *supra*.

[80] 239 N.L.R.B. at 804 n.3, 100 L.R.R.M. at 1023 n.3.

[81] *See* text accompanying notes 44-47 *supra*.

[82] 247 N.L.R.B. No. 2, 103 L.R.R.M. 1113 (1980).

[83] *Id.* at ____, 103 L.R.R.M. at 1114.

[84] 247 N.L.R.B. at ____, 103 L.R.R.M. at 1114; *see* note 4 *supra*. Section 8(a)(1) of the

violation of sections 8(a)(1) and 8(a)(3) of the NLRA.[84] Neither Singleton nor his union raised the discriminatory discharge issue during the two arbitration proceedings.[85] The Board held that Singleton's failure to raise the discriminatory discharge issue during arbitration was not a bar to his filing an 8(a)(3) unfair labor practice charge.[86] In overruling *Electronic Reproduction*, the Board announced that it would no longer defer to an award which does not contain an indication that the arbitrator ruled on the unfair labor practices.[87] The party seeking the Board's deferral to an arbitration award now has the burden of proving the litigation of the unfair labor practice issue before the arbitrator.[88]

Member Penello entered a strong dissent and maintained that the Board should, in discipline and discharge cases, adhere to the deferral standard of *Electronic Reproduction*.[89] He stated that permitting the avoidance of unfavorable arbitration awards through relitigation of the same facts at the Board will impede the Board's policy of encouraging the peaceful resolution of industrial disputes.[90] Penello maintained that the "unusual circumstances" exception[91] of *Electronic Reproduction* would permit complainants to present any legitimate reasons for failure to introduce evidence of unfair labor practices at arbitral proceedings, thus mitigating the seemingly harsh results of *Electronic Reproduction*.[92] The dissent predicted that the majority decision would ultimately result in greatly decreased reliance on arbitration proceedings.[93] Victims of alleged discriminatory actions proscribed by section 8(a)(3) would have no choice but to file a complaint with the Board.[94] The dissent also argued that the majority's decision would greatly in-

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NLRA is a catch-all section which proscribes any activity which interferes with the rights of employees to complete freedom of self-organization guaranteed by § 7. Section 8(a)(3) is a more specific provision, dealing with discriminatory hiring and discharges which are designed to encourage or discourage union membership. Most employer actions which are proscribed by § 8(a)(3) are also proscribed by § 8(a)(1). *See* BARTOSIC, *supra* note 4, at 59-60.

[85] 247 N.L.R.B. at ____, 103 L.R.R.M. at 1114.

[86] *Id.*

[87] *Id. See* Airco Industrial Gases, 195 N.L.R.B. 676, 79 L.R.R.M. 1467, 1972. The Board originally articulated the doctrine that it will not defer to arbitration awards where the arbitrator has not specifically ruled on the unfair labor practice charges in *Airco*. *Id.* at 677, 79 L.R.R.M. at 1468.

[88] 247 N.L.R.B. at ____, 103 L.R.R.M. at 1114. *See* Yourga Trucking, Inc., 197 N.L.R.B. 928, 80 L.R.R.M. 1498 (1972). In *Yourga*, the Board first stated that the party seeking deference to an arbitration award has the burden of proving that the unfair labor practice issue was litigated before the arbitrator. *Id.* at 928, 80 L.R.R.M. at 1498.

[89] 247 N.L.R.B. at ____, 103 L.R.R.M. at 114-16 (Penello, Member, dissenting).

[90] *Id.* at 1115.

[91] *See* text accompanying notes 45-47 *supra*.

[92] 47 N.L.R.B. at ____, 103 L.R.R.M. at 1115-16; *see* text accompanying notes 28-35 *supra*.

[93] 247 N.L.R.B. at ____, 103 L.R.R.M. at 1115-16. *See* text accompanying notes 17-21 *supra*.

[94] 247 N.L.R.B. at ____, 103 L.R.R.M. at 1115-16.

crease the Board's caseload, making the resolution of unfair labor practice charges more time-consuming than at present.[95]

Despite the arguments of the dissent, *Suburban Motor Freight* represents a proper accommodation between the conflicting goals of insuring both that the NLRB protect the statutory rights of workers and employers[96] and that the NLRB preserve the efficacy of arbitration as a means of settling labor disputes.[97] The requirement that the Board defer only to arbitral awards containing explicit rulings on statutory rights issues will insure that all issues involving such rights are fully and fairly considered at either the arbitral or NLRB level. Furthermore, individuals that have just cause for failing to present contractual grievances involving statutory rights to arbitration will now be able to file unfair labor practice charges with the Board. Thus, the *Suburban Motor Freight* doctrine guarantees that individuals who through no fault of their own fail to submit statutory rights issues to arbitral panels will not be unjustly penalized for their failure to do so.[98] The efficacy of the arbitral process will be preserved under the *Suburban Motor Freight* test because in many disputes both sides will undoubtedly continue to submit all issues to arbitration, especially in the more routine types of cases where the monetary amount involved is small and the case establishes no important precedent in regard to intra-plant labor relations.[99] In minor cases, both parties have strong incentives to settle the dispute in an arbitration proceeding because both the time and money expended in having the case resolved by the NLRB will not be justified.[100]

The Board can deal with abuse of the *Suburban Motor Freight* doctrine[101] through use of the power of administrative law judges to grant motions for summary judgment. The administrative law judge, upon request of a party to the proceeding or upon his own motion, could summarily dismiss an unfair labor practice charge where abuse of the

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[95] *Id.* at ____, 103 L.R.R.M. at 1115-16. Member Penello specifically stated that the Board should retain the *Electronic Reproduction* deferral doctrine. *Id.* at ____, 103 L.R.R.M. at 1116 (Penello, Member, dissenting). Penello's assertion that the *Suburban Motor Freight* doctrine will make arbitration more time consuming than at present is questionable. *See* text accompanying notes 102-03 *infra*.

[96] *See* text accompanying notes 1-4 *supra*.

[97] *See* text accompanying notes 6-11 *supra*.

[98] *See* text accompanying notes 55-60 *supra*.

[99] Although the number of court and administrative decisions appealed has increased dramatically in recent years, the majority of decisions still are not appealed. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 51, 56 (1973).

[100] Complainants do not incur any expense in the prosecution of unfair labor practice charges before the N.L.R.B. Respondents, however, must bear the cost of their defense. *See* BARTOSIC, *supra* note 4, at 15-16. In arbitration, the matter is settled at a single formal proceeding, while pursuing an unfair labor practice charge through the various formal and informal levels of NLRB adjudication is obviously more time consuming. *See id.* at 193-95.

[101] *See* text accompanying notes 25-26 *supra*.

Board's deferral policy is apparent.[102] A common example of abuse of the *Suburban Motor Freight* doctrine is where one party deliberately withholds information at the arbitral level in hope of obtaining a more favorable award in NLRB proceedings. If the party failing to submit the unfair labor practice charge to arbitration had no plausible reason for his failure to do so and the unfair labor practice charge was congruent with an arbitrable grievance arising under a collective bargaining agreement, the administrative law judge could summarily dismiss the unfair labor practice charge. Whether a particular course of conduct constituted an abuse of the Board's restricted deferral policy would be a question of fact to be determined by the NLRB in the same manner as other factual issues. The deferral test which the NLRB articulated in *Suburban Motor Freight*, coupled with a judicious use of the Board's power to dismiss unfair labor practices charges[103] to prevent abuse of the deferral doctrine, will establish a fair and feasible standard for NLRB deferral to arbitral awards based on violations of statutory rights of workers and employers.

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[102] All courts and administrative tribunals have the prerogative of dismissing cases summarily for just cause without constitutionally violating the parties' right to be heard. *See* Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612, 613-15 (1971) [hereinafter cited as Gellhorn]. The N.L.R.B. regulations provide specifically for summary judgment in NLRB proceedings. 29 C.F.R. § 102.24 (1980). Summary judgment may be entered in order to penalize a party for violation of an agency policy, even though the party making the motion for summary judgment is not entitled to summary judgment as a matter of law. Gellhorn, *supra* at 630. Apparently the only case specifically dealing with the exercise of summary judgment by the NLRB is Liquid Carbonic Corp., 116 N.L.R.B. 795, 795, 38 L.R.R.M. 1361, 1362 (1956), holding that summary judgments by the NLRB do not violate the fifth amendment right to be heard.

[103] The Board's power to dismiss unfair labor practice charges is sometimes referred to as the Board's power to decline the exercise of jurisdiction in a particular case. *See* Stephenson v. N.L.R.B., 550 F.2d 535, 541 n.8 (9th Cir. 1977).