

**United Technologies Corporation and Aeronautical Industrial District 91, International Association of Machinists & Aerospace Workers, AFL-CIO and Local Lodge 1746, International Association of Machinists and Aerospace Workers, AFL-CIO**

**Hamilton Standard Division, United Technologies Corporation and District 91, International Association of Machinists and Aerospace Workers, AFL-CIO.** Cases 39-CA-756, 39-CA-758, and 39-CA-968

19 January 1984

#### DECISION AND ORDER

On 30 September 1982 Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order.

The complaint in Case 39-CA-758 alleges that the Respondent violated Section 8(a)(1) by informing employee Slamon that she was being denied a promotion because she had filed numerous grievances in the past. The judge found, and we agree, that the Respondent did not violate Section 8(a)(1) as alleged. Accordingly, the complaint in Case 39-CA-758 is dismissed in its entirety.

The complaint in Case 39-CA-968 alleges that the Respondent violated Section 8(a)(1) by threatening employee Sherfield with disciplinary action if she persisted in processing a grievance to the second step. At the hearing, the Respondent denied that it had violated Section 8(a)(1) as alleged and argued that, in any event, since the dispute was cognizable under the grievance-arbitration provisions of the parties' collective-bargaining agreement, it should be resolved pursuant to those provisions. Accordingly, the Respondent urged the Board to defer the exercise of its jurisdiction in this matter to the grievance-arbitration machinery. The judge, relying on *General American Transportation Corp.*, 228 NLRB 808 (1977), rejected the Respondent's contention because the conduct complained of constituted an alleged violation of Section 8(a)(1). The judge correctly applied existing

<sup>1</sup> The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Board precedent to the facts of this case. Because we have decided to overrule *General American Transportation*, however, we do not adopt the judge's recommendations.

On 6 November 1981 the Union filed a third-step grievance alleging that the Respondent, through its general foreman, Peterson, intimidated, coerced, and harassed shop steward Wilson and employee Sherfield at a first-step grievance meeting by threatening disciplinary action against Sherfield if she appealed her grievance to the second step.<sup>2</sup> The remedy the Union sought was that "the Company immediately stop these contract violations and General Foreman Roger Peterson be properly disciplined and instructed for his misuse, abuse, and violation of the contract." The Respondent denied the Union's grievance at the third step, and the Union withdrew it on 27 January 1982 "without prejudice." The next day, the Respondent filed its own grievance alleging that "[n]otwithstanding the union's mistake in its allegations concerning General Foreman Peterson, it has refused to withdraw, with prejudice, its grievance." The Union denied the Respondent's grievance, and the Respondent appealed to the fourth step. Following a fourth-step meeting, the Union again denied the Respondent's grievance and refused the Respondent's request that the matter be submitted to arbitration. Thereafter, the Union filed the charge in Case 39-CA-968.

The Respondent and the Union were parties to a collective-bargaining agreement which was effective from 24 April 1978 through 24 April 1983. Article VII of the contract establishes a grievance procedure<sup>3</sup> that includes an oral step, four written steps, and an arbitration provision that calls for final and binding arbitration.<sup>4</sup>

<sup>2</sup> The grievance that was the subject of the first-step meeting alleged that Sherfield had been "repeatedly harassed, intimidated, and discriminated against" by her foreman, Cote, and that Cote had engaged in an "act of aggression" against her. The act of aggression referred to an incident in which Cote had responded to Sherfield's request for certain parts by allegedly tossing a bag of parts weighing approximately one-third of an ounce at her workbench. At some point during the first-step meeting, Cote apologized to Sherfield, whereupon General Foreman Peterson denied the grievance and urged everyone to return to work. Shop steward Wilson and Sherfield indicated that they would appeal the grievance to the second step. Peterson then told Sherfield that the Company had been nice to her and that they had not disciplined her in the past because of her rejects. Wilson stated that Peterson's statement could be construed as a threat. Peterson denied that he was threatening Sherfield; rather, he said he was merely telling Sherfield what could and would happen.

<sup>3</sup> Art. VII, sec. 1, states in pertinent part:

In the event that a difference arises between the company, the union, or any employee concerning the interpretation, application or compliance with the provisions of this agreement, an earnest effort will be made to resolve such difference in accordance with the following procedure which must be followed.

<sup>4</sup> Art. VII, sec. 3(a), states in relevant part:

[T]he following grievances, if not settled at Written Step 4 of Section 1 of this Article, shall be submitted to arbitration upon request

*Continued*

Arbitration as a means of resolving labor disputes has gained widespread acceptance over the years and now occupies a respected and firmly established place in Federal labor policy. The reason for its success is the underlying conviction that the parties to a collective-bargaining agreement are in the best position to resolve, with the help of a neutral third party if necessary, disputes concerning the correct interpretation of their contract. Congressional intent regarding the use of arbitration is abundantly clear:

Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.<sup>5</sup>

It is this congressional mandate on which the Supreme Court has consistently relied in sanctioning arbitration as a preferred instrument for preserving industrial peace.<sup>6</sup>

Similarly, the concept of judicial and administrative deference to the arbitral process and the notion that courts should support, rather than interfere with, this method of dispute resolution have become entrenched in American jurisprudence. Over the years, the Board has played a key role in fostering a climate in which arbitration could flourish. Thus, as early as 1943<sup>7</sup> the Board announced its sympathy with the concept of prospective deference to contractual grievance machinery. In *Consolidated Aircraft* the Board stated:

We are of the opinion . . . that it will not effectuate the statutory policy of "encouraging the practice and procedure of collective bar-

of either party hereto filed in accordance with the provisions of this Article.

1. A grievance alleging violation of Article IV . . . .

3. A grievance alleging violation of Section 1 . . . of Article VII.

Art. VII, sec. 3(d), states:

[T]he decision of the arbitrator shall be supported by substantial evidence on the record as a whole and shall be final and conclusive and binding upon all employees, the company and the union.

Art. IV states in pertinent part:

The company and the union recognize that employees covered by this agreement may not be discriminated against in violation of the provisions of the Labor Management Relations Act, 1947, as amended, Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act of 1967, as amended, and the Vocational Rehabilitation Act of 1973.

<sup>5</sup> Sec. 203(d) of the Act, 29 U.S.C. § 173(d) (1976).

<sup>6</sup> *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (commonly referred to collectively as the Steelworkers Trilogy). See also *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

<sup>7</sup> *Consolidated Aircraft Corp.*, 47 NLRB 694, 706 (1943), *enfd.* in pertinent part 141 F.2d 785 (9th Cir. 1944).

gaining" for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through the settlement procedures mutually agreed upon by them, and to remit the interpretation and administration of their contracts to the Board. We therefore do not deem it wise to exercise our jurisdiction in such a case, where the parties have not exhausted their rights and remedies under the contract as to which the dispute has arisen.

The Board endowed this sound approach with renewed vigor in the seminal case of *Collyer Insulated Wire*,<sup>8</sup> in which the Board dismissed a complaint alleging unilateral changes in wages and working conditions in violation of Section 8(a)(5) in deference to the parties' grievance-arbitration machinery. The *Collyer* majority articulated several factors favoring deferral: The dispute arose within the confines of a long and productive collective-bargaining relationship; there was no claim of employer animosity to the employees' exercise of protected rights; the parties' contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompassed the dispute at issue; the employer had asserted its willingness to utilize arbitration to resolve the dispute; and the dispute was eminently well suited to resolution by arbitration. In these circumstances, deferral to the arbitral process merely gave full effect to the parties' agreement to submit disputes to arbitration. In essence, the *Collyer* majority was holding the parties to their bargain by directing them to avoid substituting the Board's processes for their own mutually agreed-upon method for dispute resolution.

The experience under *Collyer* was extremely positive. The *Collyer* deferral doctrine was endorsed by the courts of appeals<sup>9</sup> and was quoted favorably by the Supreme Court.<sup>10</sup> In the years following the issuance of *Collyer* the Board further refined the deferral doctrine and applied it to other situations. In *National Radio*<sup>11</sup> the Board extended the deferral policy to cases involving 8(a)(3) allegations. In that case the complaint alleged, *inter alia*,

<sup>8</sup> 192 NLRB 837 (1971).

<sup>9</sup> See *Columbus Printing Pressmen Union 252 (R. W. Page Corp.)*, 219 NLRB 268 (1975), for a list of court opinions approving *Collyer*.

<sup>10</sup> *Arnold Co. v. Carpenters*, 417 U.S. 12, 16-17 (1974).

<sup>11</sup> *National Radio Co.*, 198 NLRB 527 (1972).

the disciplinary suspension and discharge of an active union adherent in violation of Section 8(a)(3) as well as various changes in terms and conditions of employment in violation of Section 8(a)(5). Thus, that case presented a situation where the resolution of the unilateral change issues by an arbitrator would not necessarily have resolved the 8(a)(3) issues raised by the complaint. Nevertheless, the Board decided that deferral to the grievance procedure prior to the issuance of the arbitrator's award was warranted. The Board concluded that the same fundamental considerations were present in *National Radio* as in *Collyer*:

Here, as there, an asserted wrong is remediable in both a statutory and a contractual forum. Both jurisdictions exist by virtue of congressional action, and our duty to serve the objectives of Congress requires that we seek a rational accommodation within that duality. We may not abdicate our statutory duty to prevent and remedy unfair labor practices. Yet, once an exclusive agent has been chosen by employees to represent them, we are charged with a duty fully to protect the structure of collective representation and the freedom of the parties to establish and maintain an effective and productive relationship.

In this context, abstention simply cannot be equated with abdication. We are, instead, adjuring the parties to seek resolution of their dispute under the provisions of their own contract and thus fostering both the collective relationship and the Federal policy favoring voluntary arbitration and dispute settlement.<sup>12</sup>

Following *National Radio*, the Board routinely dismissed complaints alleging violations of Section 8(a)(3) and (1) in deference to the arbitral forum.<sup>13</sup> Of particular significance was the application of the *Collyer* deferral doctrine in *United Aircraft*<sup>14</sup> in which the Board overruled the administrative law judge's conclusion that the history of unfair labor practices combined with the violations alleged in that case rendered deferral inappropriate. The Board stated:

Being keenly aware of the limited resources of this Agency, we are not particularly desirous of inviting any labor organization . . . to

bypass their [sic] own procedures and to seek adjudication by this Board of the innumerable individual disputes which are likely to arise in the day-to-day relationship between employees and their immediate supervisors . . . . When a labor organization seeks instead to have us resolve each dispute, we think it proper to require it, before invoking our services, initially to invoke the available voluntary machinery. [204 NLRB at 880.]

Despite the universal judicial acceptance of the *Collyer* doctrine, however, the Board in *General American Transportation*<sup>15</sup> abruptly changed course and adopted a different standard for arbitral deferral, one that we believe ignores the important policy considerations in favor of deferral. Indeed, by deciding to decline to defer cases alleging violations of Sections 8(a)(1) and (3) and 8(b)(1)(A) and (2), the *General American Transportation* majority essentially emasculated the Board's deferral policy, a policy that had favorably withstood the tests of judicial scrutiny and of practical application. And they did so for reasons that are largely unsupportable. Simply stated, *Collyer* worked well because it was premised on sound legal and pragmatic considerations. Accordingly, we believe it deserves to be resurrected and infused with renewed life.

It is fundamental to the concept of collective bargaining that the parties to a collective-bargaining agreement are bound by the terms of their contract. Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery. For dispute resolution under the grievance-arbitration process is as much a part of collective bargaining as the act of negotiating the contract.<sup>16</sup> In our view, the statutory purpose of encouraging the practice and procedure of collective bargaining is ill-served by permitting the parties to ignore their agreement and to petition this Board in the first instance for remedial relief. In his concurring opinion in *Collyer*, former Board Member Brown stated:

Certainly great damage could be done to the entire system of grievance arbitration, and to the process of collective bargaining, if parties believed they could ignore an agreed-upon

<sup>12</sup> Id. at 531.

<sup>13</sup> See, e.g., *Jemco*, 203 NLRB 305 (1973); see also *Postal Service*, 210 NLRB 560 (1974).

<sup>14</sup> *United Aircraft Corp.*, 204 NLRB 879 (1973), enf'd. sub nom. *Lodges 700, 743, 1746, Machinists v. NLRB*, 525 F.2d 237 (2d Cir. 1975). The court of appeals specifically noted that union animus would not be a controlling factor in deciding whether to defer to arbitration unless that animus might prevent successful arbitration of the dispute in question. The court also stated at 239, "The validity of the *Collyer* doctrine is no longer seriously in doubt."

<sup>15</sup> 228 NLRB 808, supra.

<sup>16</sup> The Supreme Court stated in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 578, that "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."

method of settling disputes. Since in most cases deferring to arbitration will encourage collective bargaining, the Board, in carrying out the Act's purpose, should see that full play is given to the arbitral process.<sup>17</sup>

Contrary to the notion of the majority in *General American Transportation*, deferral is not akin to abdication. It is merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed. The Board's processes may always be invoked if the arbitral result is inconsistent with the standards of *Spielberg*.<sup>18</sup> As the Supreme Court noted in *Carey v. Westinghouse Corp.*, 375 U.S. 261, 272 (1964):

By allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent; and those conciliatory measures which Congress deemed vital to "industrial peace" . . . and which may be dispositive of the entire dispute, are encouraged. The superior authority of the Board may be invoked at any time. Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area.

The *Collyer* policy we embrace today is one that has been applied with the rule of reason. In their dissenting opinion in *General American Transportation*, supra, former Members Penello and Walther observed:

The Board has not deferred cases to arbitration in an indiscriminate manner, nor has it been insensitive to the statutory rights of employees in deciding whether to defer and whether to give effect to an arbitration award. The standard it has used is reasonable belief that arbitration procedures would resolve the dispute in a manner consistent with the criteria of *Spielberg*. Thus, it has refused to defer where the interests of the union which might be expected to represent the employee filing the unfair labor practice charge are adverse to those of the employee, or where the respondent's conduct constitutes a rejection of the principles of collective bargaining. And where, after deferral, the respondent has refused to

proceed to arbitration, the Board has rescinded the deferral and decided the case on the merits. Finally, if for any reason the arbitrator's award fails to meet the *Spielberg* standards, as for example, that it is repugnant to the policies of the Act, the Board will not give it effect.<sup>19</sup> [Citation omitted.]

We shall continue to be guided by these principles.

The facts of the instant case make it eminently well suited for deferral. The dispute centers on a statement a single foreman made to a single employee and a shop steward during the course of a routine first-step grievance meeting allegedly concerning possible adverse consequences that might flow from a decision by the employee to process her grievance to the next step. The statement is alleged to be a threat violative of Section 8(a)(1). It is also, however, clearly cognizable under the broad grievance-arbitration provision of section VII of the collective-bargaining agreement.<sup>20</sup> Moreover, the Respondent has expressed its willingness, indeed its eagerness, to arbitrate the dispute.<sup>21</sup>

In view of the foregoing, we believe it would best effectuate the purposes and policies of the Act to defer this case to the arbitral forum. Accordingly, we conclude that the issues raised by the complaint in Case 39-CA-968 should be deferred to the grievance-arbitration provisions of the collective-bargaining agreement under the principles of *Collyer*, supra, and *National Radio*, supra. We shall so order.<sup>22</sup>

## ORDER

The complaint is dismissed, provided that:

<sup>19</sup> *General American Transportation Corp.*, supra at 817.

<sup>20</sup> In this regard, we note that art. IV of the contract states that "the company and the union recognize that employees covered by this agreement may not be discriminated against in violation of the provisions of the Labor Management Relations Act, 1947 as amended . . ." It is manifest, therefore, that the parties contemplated that disputes such as the one here be resolved under the grievance-arbitration machinery.

<sup>21</sup> Although the instant dispute arose in the context of the processing of another grievance, the alleged misconduct "does not appear to be of such character as to render the use of [the grievance-arbitration] machinery unpromising or futile." *United Aircraft Corp.*, 204 NLRB 879, supra. Indeed, both the Respondent and the Union continued to file and process grievances. Thus the record "demonstrates full acceptance by the parties of the grievance and arbitration route to the resolution of disputes." *Community Convalescent Hospital*, 199 NLRB 840, 841 fn. 2 (1972), and "demonstrates the existence of a workable and freely resorted to grievance procedure." *Postal Service*, supra, 210 NLRB at 560 fn. 1. Accordingly, we find that *Ram Construction Co.*, 228 NLRB 769 (1977), cited by the judge, and *Joseph T. Ryerson & Sons*, 199 NLRB 461 (1972), are not controlling.

<sup>22</sup> The Respondent must, of course, waive any timeliness provisions of the grievance-arbitration clauses of the collective-bargaining agreement so that the Union's grievance may be processed in accordance with the following Order.

<sup>17</sup> *Collyer Insulated Wire*, supra, 192 NLRB at 844.

Contrary to our dissenting colleague's assertion, the pre-arbitral deferral policy articulated herein does not constitute a waiver of employees' statutory rights nor does it "force individual employees to litigate statutory rights in a contractual forum." Nothing in this decision diminishes the right of employees to seek statutory relief for alleged unfair labor practices. We simply hold that where contractual grievance-arbitration procedures have been invoked voluntarily we shall stay the exercise of the Board's processes in order to permit the parties to give full effect to those procedures.

<sup>18</sup> *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

Jurisdiction of this proceeding is hereby retained for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision and Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.

MEMBER ZIMMERMAN, dissenting.

My colleagues today have caused a fundamental and unwise change in the relationship between the Board and private collective-bargaining dispute resolution systems. In this case, the majority opinion overrules *General American Transportation Corp.*, 228 NLRB 808 (1977), and returns to the standard of *National Radio Co.*, 198 NLRB 527 (1972), holding that individual employees who allege violations of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the National Labor Relations Act must first litigate their allegations in a private contractual forum, where available. In *Olin Corp.*, 268 NLRB No. 86, issued this date, the majority overrules *Suburban Motor Freight*, 247 NLRB 146 (1980), and considerably expands the range of situations in which the Board will end litigation of an unfair labor practice charge by deferring to an arbitration award.

I readily acknowledge the existence of a salutary Federal labor law policy favoring the resolution of collective-bargaining disputes through grievance and arbitration procedures.<sup>1</sup> I also fully endorse the Board's general policy of accommodating private dispute resolution systems, as that policy has been expressed in three landmark cases: *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955); *Dubo Mfg. Corp.*, 142 NLRB 431 (1963); and *Collyer Insulated Wire*, 192 NLRB 837 (1971). The decisions made today, however, go well beyond those cases, and make changes in deferral policy which transgress proper limits on the Board's discretionary authority to defer.<sup>2</sup> With particular respect to *Collyer*, the determination to "Collyerize" the type of unfair labor practice claims at issue here needlessly sacrifices basic safeguards for individual employee rights under the Act.

Contrary to my colleagues in the majority, I would continue to adhere to the law of deferral to

the arbitral process as that law was represented in the concurring opinion of former Chairman Murphy in *General American Transportation*, supra. In accord with that opinion and with the sense of the original *Collyer* decision, I would not defer from Board decision-making by forcing parties through contractual grievance and arbitration proceedings unless their unfair labor practice disputes essentially involve the interpretation of a collective-bargaining agreement.

The original *Collyer* decision was limited to holding that the Board could best serve the national labor policy favoring grievance and arbitration machinery by withholding its processes and deferring to the arbitral process an essentially contractual dispute about unilateral changes allegedly violating Section 8(a)(5) of the Act. But in doing this, the *Collyer* plurality opinion carefully emphasized the particular circumstances of the case which weighed heavily in favor of that deferral: (1) The dispute arose within the confines of a long and productive collective-bargaining relationship. (2) There was no claim of enmity by the employer to the employees' exercise of protected rights. (3) The dispute was one eminently well suited to resolution by arbitration because the contract and its meaning were at the center of the dispute.<sup>3</sup>

In sum, *Collyer* contemplated a limited deferral doctrine for 8(a)(5) cases involving contract interpretation issues. It was not until the issuance of *National Radio*, supra, that a Board majority abandoned the well-reasoned limitations of *Collyer* and adopted a blanket policy of deferring to grievance-arbitration machinery allegations of 8(a)(1) and (3) and 8(b)(1)(A) and (2) violations, involving interference with employees' Section 7 rights.

In *General American Transportation*, supra, the Board overruled *National Radio* and returned to the original *Collyer* deferral policy. Former Chairman Murphy explained in her determinative concurring opinion the fundamental reasons for a pre-arbitral deferral policy which distinguishes between unfair labor practices involving disputes between contracting parties about their collective-bargaining agreement and unfair labor practices involving disputes about individual employees' statutory rights:

[T]he Board should stay its processes in favor of the parties' grievance arbitration machinery only in those situations where the dispute is essentially between the contracting parties and where there is no alleged interference with individual employees' basic rights under Section 7 of the Act. Complaints alleging violations of Section 8(a)(5) and 8(b)(3) fall squarely into

<sup>1</sup> Sec. 203(d), Title II, of the Act; *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>2</sup> My criticism of changes in *Spielberg* policy is set forth in full in my dissenting opinion in *Olin Corp.*, supra.

<sup>3</sup> See 198 NLRB at 842.

this category, while complaints alleging violations of Section 8(a)(3), (a)(1), (b)(1)(A), and (b)(2) clearly do not. As discussed more fully below, in the former category the dispute is principally between the contracting parties—the employer and the union—while in the latter the dispute is between the employee on the one hand and the employer and/or the union on the other. In cases alleging violations of Section 8(a)(5) and 8(b)(3), based on conduct assertedly in derogation of the contract, the principal issue is whether the complained-of conduct is permitted by the parties' contract. Such issues are eminently suited to the arbitral process, and resolution of the contract issue by an arbitrator will, as a rule, dispose of the unfair labor practice issue. On the other hand, in cases alleging violations of Section 8(a)(1), (a)(3), (b)(1)(A), and (b)(2), although arguably also involving a contract violation, the determinative issue is not whether the conduct is permitted by the contract, but whether the conduct was unlawfully motivated or whether it otherwise interfered with, restrained, or coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act. In these situations, an arbitrator's resolution of the contract issue will not dispose of the unfair labor practice allegation. Nor is the arbitration process suited for resolving employee complaints of discrimination under Section 7.<sup>4</sup>

Now, after 6 years of experience under the deferral policy of *General American Transportation*, without any intervening judicial criticism, the majority has overruled that case and has returned to *National Radio*. The majority cites no specific evidence that *General American Transportation* actually has had any adverse effect on private grievance and arbitration systems. Instead, the majority justifies the Board's return to an overly broad pre-arbitral deferral policy by relying on three articles of faith. First, they refer to "the universal judicial acceptance of the *Collyer* doctrine," acceptance which the majority believes encompassed *National Radio*. Second, they rely on the notion that "it is fundamental to the concept of collective bargaining that the parties to a collective-bargaining agreement are bound by the terms of their contract," a notion which the majority believes includes binding individual employees to grievance and arbitration as the *only* forum of first resort. Finally, the majority believes that deferral under *National Radio* "is merely the prudent exercise of restraint, a post-

<sup>4</sup> 228 NLRB at 810-811.

ponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed. The Board's processes may always be invoked if the arbitral result is inconsistent with the standards of *Spielberg*." I find considerable fault with the majority's reliance on each article.

First, the majority opinion overstates the case for its return to *National Radio* when it attempts to place this action under the umbrella of the "universal judicial acceptance of the *Collyer* doctrine." While there is judicial acceptance for the proposition that the Board has broad discretionary authority to defer cases to the arbitral process, there is, equally, judicial acceptance of the proposition that the Board has broad authority to decline to defer. In this regard, several circuit courts of appeals have approved the Board's determination not to defer under its *General American Transportation* policy.<sup>5</sup>

Furthermore, judicial precedent strongly indicates that the Board's discretion to defer, although broad, is not unlimited. Especially in the area of individual statutory rights, there are signals from the judiciary that the Board will abuse its discretion by deferring unfair labor practice claims involving those rights to arbitration. For instance, the District of Columbia Circuit approved the original *Collyer* rule in *Electrical Workers IBEW Local 2188 v. NLRB*, 494 F.2d 1087 (1974), but emphasized at 1091 that:

This congruence between the contractual dispute and the overlying unfair labor practice charge is significant. If it were not present, the Board's absence might have constituted not deference, but abdication.

While the national labor policy favoring the private resolution of disputes that has evolved in a series of court cases, notably the Steelworkers Trilogy, requires the Federal judiciary to give a broad degree of deference to grievance and arbitration systems in the resolution of contract issues, the Supreme Court has made clear that the same degree of deference does not apply—indeed cannot be applied—to such systems by the Board (and reviewing courts) where statutory issues are at stake. In *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), the Supreme Court clearly stated at 436-437 that the "relationship of the Board to the arbitration

<sup>5</sup> *NLRB v. Container Corp.*, 649 F.2d 1213 (6th Cir. 1981); *Jack Thompson Oldsmobile v. NLRB*, 684 F.2d 458 (7th Cir. 1982); *NLRB v. Northeast Oklahoma City Mfg. Co.*, 631 F.2d 669 (10th Cir. 1980); see also *NLRB v. Brotherhood of Railway, Airline & Steamship Clerks*, 498 F.2d 1105, 1109-10 (5th Cir. 1974), a pre-*General American Transportation* case in which the court approved the Board's refusal to defer 8(b)(2) and (1)(A) charges under *Collyer*.

process is of a quite different order. . . . Thus, to view the *Steelworkers* decisions as automatically requiring the Board in this case to defer to the primary determination of an arbitrator is to overlook important distinctions between those cases and this one."

More recent decisions by the Court indicate that the most important distinction between judicial deferral to arbitration of contract disputes and Board deferral under *Collyer* involves the existence of noncontractual, statutory, individual rights which the Board expressly is required to protect. In *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), the Court found that statutory rights under the Fair Labor Standards Act were not subject to waiver under a contractual grievance-arbitration clause. *Barrentine* in this respect is consonant with *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), in which the Court found that statutory rights arising under Title VII of the Civil Rights Act of 1964 are not deferrable. Although *Barrentine* and *Alexander* did not involve statutory rights arising under the Act, they did involve aspects of national labor policy and the emphasis to be given individual employee rights. Both set forth the proposition that the presumption in favor of arbitration is not, by itself, sufficient to place statutory rights under the arbitration process.<sup>6</sup> As the Court stated in *Barrentine*, supra at 737:

Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedure established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute . . . .

Employees' Section 7 rights are public rights charged to the Board's protection.<sup>7</sup> As the Supreme Court, in *National Licorice Co.*, supra at 364, stated, "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices." Therefore, by forcing employees to pursue the private adjudication of their public rights through the arbitration process rather than through the processes of the Board, my colleagues are actually repudiating, rather than applying, the relevant judicial precedent.

With respect to the putative supremacy of obligations flowing from the grievance and arbitration

provision of a collective-bargaining agreement, my colleagues again overstate their case. Implicit in their reasoning is that an exclusive collective-bargaining representative may waive an individual employee's right to seek initial redress of interference with Section 7 rights before the Board.<sup>8</sup> A union may, of course, agree to waive some individual statutory rights.<sup>9</sup> But in my view a union cannot waive an individual employee's right to choose a statutory forum in which to initiate and litigate an unfair labor practice issue. Even if it could, such a waiver would have to be a "clear and unmistakable" one.<sup>10</sup> Here, however, the majority forces individual employees to litigate statutory rights in a contractual forum and does so without making any determination that there has been a "clear and unmistakable" waiver of the right to resort first and exclusively to the Board. My colleagues simply assume that the mere existence of a contractual grievance and arbitration procedure proves a waiver.

Finally, it is pure conceit that the deferral doctrine announced here is mere "prudent restraint" and that *Spielberg* is a catchall safety net for those individuals whose individual rights are not protected in grievance and arbitration. The arbitration process is not designed to and is not particularly adept at protecting employee statutory or public rights. First, a union, without breaching its duty of fair representation, might not vigorously support an employee's claim in arbitration inasmuch as the union, in balancing individual and collective interests, might trade off an employee's statutory right in favor of some other benefits for employees in the bargaining unit as a whole. Second, because arbitrators' competency is primarily in "the law of the shop, not the law of the land,"<sup>11</sup> they may lack the competency to resolve the statutory issue(s) involved in the dispute. Third, even if the arbitrator is conversant with the Act, he is limited to determining the dispute in accordance with the parties' intent under the collective-bargaining agreement.<sup>12</sup> Finally, because the arbitrator's function is to effectuate the parties' intent rather than to enforce the Act, he may issue a ruling that is inimical to the

<sup>6</sup> See *Robbins v. Prosser's Moving & Storage Co.*, 700 F.2d 433 (8th Cir. 1983).

<sup>7</sup> *Amalgamated Utility Workers v. Edison Co.*, 309 U.S. 261 (1940); *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940).

<sup>8</sup> The majority erroneously states that its expansive application of *Collyer* neither waives nor even diminishes individual statutory rights. At the very least, however, an individual employee's right to elect the statutory forum first will be waived. Moreover, because "Collyerized" cases are subject to only a limited review under *Spielberg*, an individual's right to full de novo consideration of the statutory issue before the Board will also be waived.

<sup>9</sup> *Metropolitan Edison Co. v. NLRB*, 103 S.Ct. 1467 (Apr. 4, 1983).

<sup>10</sup> *Id.*

<sup>11</sup> *Barrentine v. Arkansas-Best Freight System*, supra at 743.

<sup>12</sup> See *Alexander v. Gardner-Denver*, supra.

public policies underlying the Act, thereby depriving an employee of his protected statutory rights.<sup>13</sup>

Although I endorse the *Spielberg* policy, it is not a catchall justification for withholding Board processes until a reviewable arbitration award has been made. In this regard, the District of Columbia Circuit has stated:

Our endorsement of the Collyer rule would be incomplete without one further comment. While the Board's promise to overrule arbitration awards which are irregular or repugnant to the Act is a necessary condition to the legality of pre-arbitral deferrals, it is not a sufficient one. Put another way, the fact that any ultimate award must conform to the policies of the Act does not guarantee that deferral itself is consistent with the Act.<sup>14</sup>

Even the limited guarantee which *Spielberg* has provided for *Collyer* becomes less certain when the Board will no longer require the party seeking deferral to an arbitration award to prove that the unfair labor practice issue has been presented to and considered by the arbitrator. Yet that is exactly what the Board's postarbitral deferral policy will be under the new standard announced today in *Olin Corp.*

For all of the foregoing reasons, I dissent from the majority's overruling of *General American Transportation* and its unwarranted extension of the original *Collyer* doctrine. Assuming, however, the propriety of the majority's overruling of that case, I believe its decision to defer here is unwarranted. The basis for the alleged violation of Section 8(a)(1) in this case is a threat of retaliation against employee Sherfield for participating in the grievance-arbitration procedure. That the Respondent and the Union have continued to utilize the grievance-arbitration procedure has no bearing on the fact that the Respondent is alleged to have unlawfully attempted to coerce Sherfield from pursuing her grievance. Therefore, contrary to the majority, I would find controlling the Board's decisions in *Joseph T. Ryerson & Sons*, 199 NLRB 461 (1972), and *North Shore Publishing Co.*, 206 NLRB 42 (1973), involving similar facts, where even the architects of *National Radio* refused to defer to the grievance-arbitration procedure.

The majority in *Joseph T. Ryerson & Sons*, *supra* at 462, stated:

We are constrained to add that the violation with which this Respondent is charged, if committed, strikes at the foundation of that

grievance and arbitration mechanism upon which we have relied in the formulation of our *Collyer* doctrine. If we are to foster the national policy favoring collective bargaining and arbitration as a primary arena for the resolution of industrial disputes, as we sought to do in *Collyer*, by declining to intervene in disputes best settled elsewhere, we must assure ourselves that those alternative procedures are not only "fair and regular" but that they are or were open, in fact, for use by the disputants. These considerations caution against our abstention on a claim that a respondent has sought, by prohibited means, to inhibit or preclude access to the grievance procedures. It is this consideration which persuades us that the issues of arbitrability and contract coverage, discussed above, should not here be left to resolution by the arbitrator as might be appropriate under other circumstances. [Footnote and citation omitted.]

Accordingly, even were I to join my colleagues in overruling *General American Transportation*, I would not defer.<sup>15</sup>

In sum, I would adhere to the principles of *General American Transportation* and not defer to the grievance-arbitration process where the unfair labor practice issues concern the statutory rights of individual employees, such as in cases alleging violations of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the Act.

<sup>15</sup> In addressing the merits of the complaint, I agree with the judge that the Respondent unlawfully threatened to retaliate against Sherfield because of her desire to pursue the grievance to the second step when it told Sherfield, after she had refused to withdraw her grievance, that, in effect, the Respondent had overlooked certain aspects of her work performance and conduct in the past, but that it could and would discipline her in the future.

## DECISION

### STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge: These consolidated cases were heard by me in Hartford, Connecticut, on June 23, 24, and 30, 1982. The charge in Case 39-CA-756 was filed on July 23, 1981, by District 91 and a complaint in that case was issued by the Officer-in-Charge of Subregion 39 on September 9, 1981. The charge and first amended charge in Case 39-CA-758 were filed by Local Lodge 1746 on July 27, 1981, and September 3, 1981. On September 10, 1981, a complaint was issued in Case 39-CA-758 which was then consolidated with the complaint in Case 39-CA-756 on September 17, 1981. The charge and first amended charge in Case 39-CA-1981, and February 3, 1982. A complaint in that case was issued on February 8, 1982.

<sup>13</sup> *Barrentine v. Arkansas-Best Freight System*, *supra*; and *Alexander v. Gardner-Denver*, *supra*.

<sup>14</sup> *Electrical Workers IBEW Local 2188 v. NLRB*, *supra* at 1091.

Thereafter, on February 8, all three complaints were consolidated for hearing.

During the trial, the parties agreed to settle, on a non-Board basis, the matters involved in Case 39-CA-756, which alleged a unilateral change in the the health insurance coverage for bargaining unit employees at the Respondent's East Hartford facility. As the settlement resolved the problems at issue, the Acting Officer-in-Charge approved the Union's request to withdraw the charge and moved to have the complaint severed and voluntarily dismissed. Having reviewed the terms of the settlement and believing that it would effectuate the purposes and policies of the Act to approve it, I granted the General Counsel's motion to sever and the concomitant motion to dismiss the complaint to Case 39-CA-756.

The remaining cases raise the following issues:

(1) Case 39-CA-758 alleges that on or about February 11, 1981, the Respondent by its foreman, Guy Brennen, at its East Hartford facility, "informed its employee Jacquelyn Slamon that she was being denied a promotion because of her union and other concerted protected activity." It is noted however, that neither the General Counsel nor the Charging Party alleges that Slamon was actually denied a promotion and they do not seek her promotion or backpay as a remedy in the event that this allegation is sustained.<sup>1</sup>

(2) Case 39-CA-968 alleges that on or about November 3, 1981, the Respondent, at its Hamilton Standard Division facility, by Roger Peterson, its general foreman, threatened employees during a first-step grievance meeting, "with warnings, suspensions and other unspecified reprisals if they continued to process grievances and engaged in other protected concerted activities." The employees involved in this alleged transaction were Alice Sherfield and shop steward Mark Wilson.

The Respondent denies the allegations in both cases. In relation to Case 39-CA-968, the Respondent asserts that the Union filed a grievance as to the alleged misconduct by Peterson pursuant to the grievance-arbitration provisions of the collective-bargaining agreement. It further asserts that when the Union, at the fourth step of the contractual grievance procedure withdrew the grievance, the Company sought to have the dispute resolved through arbitration. As such, the Respondent contends that the allegations of Case 39-CA-968 should be deferred to arbitration pursuant to the doctrine enunciated by the Board in *Collyer Insulated Wire*, 192 NLRB 837 (1971). The General Counsel and the Charging Party contend, inter alia, that in view of the allegation involved, which basically asserts that the Respondent's agent interfered with the employees' access to the grievance machinery, the matter is not deferable to arbitration.

Based on the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after reviewing the briefs filed, I make the following

<sup>1</sup> In the charge it was alleged that Slamon was denied a promotion. However, that aspect of her charge was not pursued by the General Counsel.

## FINDINGS OF FACT

### I. JURISDICTION

It is admitted that United Technology Corporation is a Delaware corporation with its principal office in Hartford, Connecticut, and with facilities at other locations in Connecticut. Annually, the Respondent sells and ships products valued of \$50,000 directly to points located outside the State of Connecticut. It therefore is concluded that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. THE LABOR ORGANIZATIONS INVOLVED

The plant involved in Case 32-CA-758 is located in East Hartford, Connecticut, and the production and maintenance employees of this plant are represented by Local Lodge 1746. The plant involved in Case 39-CA-968 is located in Windsor Locks, Connecticut, and its production and maintenance employees are represented by Local Lodge 743. District 91, the Charging Party in Case 39-CA-968 is a council of several local lodges of the International Association of Machinists and Aerospace Workers, AFL-CIO, which are located in Connecticut. Lodge 1746 and Lodge 743 are constituent members of District 91, the latter being, in effect, an intermediate body between the local lodges and the International Union. It is admitted and I find that Lodges 1746 and 743 and District 91 are labor organizations within the meaning of Section 2(5) of the Act.

### III. CASE 39-CA-758

Jacquelyn Slamon commenced her employment at Pratt & Whitney on August 29, 1979, where she has worked until obtaining a leave of absence in September 1981, so that she could work for the Union. When she first came to the Company she was assigned as a labor grade 8,<sup>2</sup> to the toolroom which is department 34. At various times during her employment and since about April 1980, Slamon has occupied, on behalf of the Union, the positions of union steward and shop steward. In this respect, she testified that, when she was first appointed as a union steward, she attended a 10-week course run by a business agent, which was designed to review and analyze the terms and conditions of the collective-bargaining agreement.

On March 17, 1980, Slamon was sent to a company-run school for a course in machining.<sup>3</sup> However, during the first week of the course, Slamon was injured while operating a grinding wheel and she had to drop out of the school. She also was out from work for about 6 weeks due to the injury. Thereafter, on April 14, 1980, she returned to work in the toolroom where she requested to be sent back to the school when it was next in session. This request was denied by her foreman and she filed a grievance relating to the denial. She also filed a

<sup>2</sup> For purposes of earnings, the lower the number of the labor grade, the higher the employee's hourly rate.

<sup>3</sup> To get into this school, an employee needs a favorable recommendation for his or her foreman.

grievance asserting that the department superintendent had verbally harassed her. Both of these grievances were resolved in the grievance procedure and resulted in an apology from the superintendent and a promise that, when the school was resumed, she would be enrolled. However, in September 1980, 2 days before the school was scheduled to start, it was canceled, apparently because of layoffs that were occurring at that time. In addition, it is noted that, while employed in the toolroom, Slamon filed another grievance asserting that she was not being given an opportunity to rotate on the various functions of the department (specifically operating the grinding wheel). This too was settled in her favor.

On October 20, 1980, Slamon was transferred to the second shift of department 1423 as a labor grade 8. The foreman for this shift was Guy Brennen. This is a machine department where all the employees have the same job code and operate verticle turret lathes. According to Brennen, the operation of these lathes is a highly skilled job. He testified that the employees in the department either have labor grade 6 or 8 designations, but that the basic grade is labor grade 6. That is, according to Brennen, the labor grade 8 designation is essentially used for employees when they come into the department and are trainees. He testified that except for such trainees, all of the other employees are at labor grade 6 and that all trainees are expected to make that grade after about a year or be transferred to other departements. He further testified that there need not be any openings for a labor grade 6 as a precondition for a promotion and that, if he see that an employee has learned to do the job, the employee may be promoted to that grade in as short a time as 6 to 7 months. Brennen also testified that an employee's prior experience in the plant, including experience in the tool shop, does not qualify that employee for a promotion within a shorter than normal time, as those functions are dissimilar to the operation of the department's lathes. Thus, Brennen states that a trainee's past work experience is irrelevant to him, and that his decision to promote a person from labor grade 8 to labor grade 6 would depend solely on his observation of the employee's ability to do his or her work.

In October or early November, Slamon requested a transfer to the third shift because of a personal hardship relating to her family. This request was granted and on November 17 she went onto the third shift with the understanding that the transfer was to last for only 3 months. The foreman of the third shift was Shirley Bissom. During her tenure on the third shift, Slamon received a verbal warning for absenteeism and an adverse quality review. As to the quality review, Slamon testified that she filed a grievance which was settled in her favor. During her time on the third shift, Slamon had no contact with Brennen, who, to that point, had supervised her for less than 1 month.

On February 2, 1981, Slamon returned to the second shift of department 1423. On that same day, another employee, Gaylin Saws, was promoted to labor grade 6, after having been employed in the department for about 1 year.

According to Slamon, during the first 2 weeks of her return to the second shift, and after having heard a

rumor that the school was going to be reinstated, she approached Foreman Brennen and asked him what she had to do to get into the school.<sup>4</sup> Slamon testified that he said that she would have to be recommended by him, whereupon she said: "With all my experience and everything, what do I have to do to get upgraded to a labor grade 6?" According to Slamon, Brennen said that this was a matter which was strictly up to his recommendation and that, if she kept her nose clean and continued to do the good work she was doing, he would possibly recommend her.

On the following day (February 11), Slamon asked Brennen if she could see her personnel records, the reason being to see if there was anything in her records which would hold her back either from going to the school or being promoted. She testified that Brennen brought her the records which she inspected at his desk. She states that, after reviewing the records, she told Brennen that she could not see anything in them which was holding her back, either with respect to going to the school or getting a promotion.<sup>5</sup> According to Slamon, Brennen at that point tossed some small packets over to her and said: "This is your problem." She states that when she asked him what he meant, Brennen said: "Right here, what I'm showing you." Slamon testified that when she opened the packets, she found that they contained her previously filed grievances. She asserts that she thereupon became disgusted and left the office, feeling that this was typical of the way a foreman reacts.

Following the above-noted incident, Slamon did not file a grievance about it. In fact, she testified that she did not even mention the incident to anybody until about July 1981 despite her belief that she had been unfairly passed over for promotion by other less senior and qualified employees, such as Gaylin Saws. In this respect, she testified that, during a conversation with the Union's president and legal counsel regarding an allegation by her of sex discrimination, she happened to mention her conversation with Brennen and was told that it was a grievable matter.

Brennen testified that, when Slamon first came into his department, he had a lengthy conversation with her wherein she related her prior work experience in the toolroom and her experience at the school. He in turn told her about the work of the department and indicated that his observation of her work would be the basis on which he would evaluate her performance.

Brennen states that, after Slamon returned to the second shift on February 2, she asked him about going to the school and that she also asked what it would take to obtain a promotion. He asserts that he told her that either a promotion or being sent to school would be based on his evaluation of her work and that he had not, as yet, seen enough of her work to make such an evaluation. With respect to the school, Brennen testified that he

<sup>4</sup> In fact the school was never reinstated, at least up to the time of the hearing.

<sup>5</sup> Based on Slamon's testimony as a whole, including her pretrial affidavit, it seems to me that at the time of her conversation with Brennen she expected to be promoted immediately (if not sooner), despite the fact that she had worked in the department for less than 3 months.

had received no information, nor heard any rumors to the effect that the school was being resumed. (In fact, to the time of the hearing, the school was not reinstated.)

According to Brennen, Slamon asked to see her personnel records on February 11. He states that he thereupon gave her her attendance records, after which he gave her the personnel records maintained in the department, the latter being kept in small packets. Brennen states that, as far as he could recall, he gave Slamon two packets of papers which he had never looked at prior to this occasion.<sup>6</sup> He denied that he tossed any packets to Slamon or that he told her that they were the reason she was not being promoted.

In this case, the bottom line involves a choice between the respective versions of the events as given by Slamon as opposed to the version given by Brennen. Based on the record as a whole, I shall credit the testimony of Brennen, who in my opinion testified in a straightforward and candid manner. Thus, on demeanor grounds, I was impressed with Brennen's testimony than I was with Slamon's testimony. Moreover, it is noted that Slamon's account strains credibility. By her version, despite being familiar with the labor agreement (having been a union steward and shop steward), despite her belief that she had been unfairly passed over for a promotion, and despite her demonstrated lack of inhibition in filing grievances, she nevertheless did not mention her alleged conversations with Brennen to anyone until about 5 months after the fact.

Based on all of the above, it therefore is my opinion that the General Counsel has failed to prove, by a preponderance of the evidence, the allegations in Case 39-CA-758. Accordingly, it is recommended that the complaint in that case be dismissed.

#### IV. CASE 39-CA-968

It is initially noted that I was favorably impressed with the testimony and demeanor of Alice Sherfield and shop steward Mark Wilson. As they each gave their testimony in a candid manner, and as their evidence was mutually corroborative, I shall credit their versions of the events described below.

Sherfield has been employed at the Hamilton-Standard facility for about 4 years. She worked in department 311 where her foreman was Marcel Cote and the General Foreman was Roger Peterson. At the time of these events, Sherfield was not a member of the Union and had never had the occasion to file any prior grievances.

It appears that, for a period of some months before the incident herein, Sherfield had been talked to by Cote concerning rejects in her work. However, no disciplinary action was taken against her for this or any other reason. At the same time, she apparently felt that Cote was singling her out about rejects and that his attitude toward her was marked by a degree of brusqueness when she asked him to explain certain procedures.

On October 20, 1981, Sherfield asked Cote for some parts and he tossed them toward the bench where she

worked. The parts involved were in a plastic bag and weighed, in toto, about a third of an ounce. It was Sherfield's perception that Cote was throwing the parts at her in a state of pique and with this feeling she told him that she wanted to see a shop steward. As the regular shop steward for the department was away, Mark Wilson was called down. He spoke to Sherfield to ascertain her complaint, and she told him that Cote had thrown the parts at her. She also related her belief that Cote had not been treating her fairly for some time. Specifically, she told Wilson that Cote on various occasions had ignored her when she asked him questions. When Wilson spoke to Cote, the latter denied that he had thrown the parts at Sherfield.

On October 22, Sherfield, with Wilson's assistance, filed a formal grievance which stated:

*Statement of Grievance and Facts Involved:* I grieve that I have been repeatedly harassed, intimidated, and discriminated against by foreman Cody [sic], culminating in an act of aggression against me by said foreman on 10-20-81.

*Remedy Requested:* That this practice of harassment by foreman Cody immediately cease and desist, and that foreman Cody be properly instructed as to his attitude in employee-management relations.

On November 2, 1981, a first-step grievance meeting was held and was attended by Wilson, Sherfield, Cote, and Peterson. At the start of the meeting, Peterson read the grievance out loud, and asked Sherfield what she meant in terms of the alleged harassment, intimidation, and discrimination. In response, Peterson was told that Cote had thrown a bag of parts at her, and Cote denied that he had done so. Peterson then went on to tell Sherfield that she had had a lot of rejects. Mark Wilson said that they were not there to talk about rejects and that this had no bearing on the grievance. When Peterson kept on talking about the reject problem, Wilson said, sotto voce, that he would have to wait to talk to someone who was intelligent. Upon hearing this, Peterson called a halt to the meeting and ordered Wilson out of his office.

On the following day, November 3, the same people resumed the first-step grievance meeting. At this meeting, Peterson appeared with Sherfield's reject records and again resumed on that note. He kept on this subject despite Wilson's complaint that the grievance was not about her rejects. Indeed it appears from the testimony of Cote that he and Peterson viewed the meeting as an appropriate forum to improve Sherfield's work performance. At some point during the meeting, Cote explained that he had not intended to throw the parts at her, but on her bench and that, if he did anything to offend her, he apologized. Peterson then said that they should all forget the matter and get back to work. A short recess was held, after which Wilson said that he and Sherfield wanted to process the grievance further. When Peterson asked what they wanted, given Cote's apology, Wilson said that they wanted the remedy requested in the grievance. Peterson denied the grievance and Wilson indicat-

<sup>6</sup> According to Brennen, all of the employees' personnel papers which are maintained in the department are kept in these 5- by 7-inch packets. He testified that the packets would contain, inter alia, an employee's change of status reports and grievances.

ed that they were going to appeal to the second step. As the people involved were getting ready to leave, Peterson turned to Sherfield and told her that the Company had been nice to her, that she had been observed using the phones a lot, and that the Company had not disciplined her for her rejects. Wilson responded that, if anybody walked by, they could misconstrue Peterson's statements as a threat. Peterson said it was not a threat, but that he was telling Sherfield what could and would happen. Foreman Cote conceded that the comment by Peterson could have been interpreted (although not intended) as a threat to the effect that, if Sherfield did not withdraw her grievance, the Company would take disciplinary action against her.

On November 6, 1981, the Union filed, at the third step, a grievance which stated:

*Statement of Grievance and Facts Involved:* The Union grieves that General Foreman Peterson intimidated, coerced and harassed Steward Mark Wilson and Alice Sherfield at the first written step (1) of the grievance procedure by threatening disciplinary action if the grievance was carried further in the procedure.

*Remedy Requested:* That the company immediately stop these contract violations and General Foreman Roger Peterson be properly disciplined and re-instructed for his misuse, abuse and violation of the contract.

After the above-noted grievance was denied at the third step, the Union withdrew it on January 27, 1982, "without prejudice." However, on January 28, the Company filed its own grievance which stated:

*Statement of Grievance and Facts Involved:*

The parties to the labor agreement (Hamilton Standard Division of United Technologies Corporation and Lodge 743 of the I.A.M.A.W.) have a dispute resulting in this grievance.

The union (Local Lodge 743) by its officers and/or agents has alleged that the company's General Foreman, Roger Peterson, intimidated, coerced, and harassed Steward Mark Wilson and Alice Sherfield at a Step 1 grievance meeting by threatening disciplinary action if the grievance was carried further in the grievance procedure.

Notwithstanding the union's mistake in its allegations concerning General Foreman Peterson, it has refused to withdraw, with prejudice, its grievance (submitted on 11/6/81).

*Remedy Requested By the Company:*

That the union, by its officers and agents, immediately apologize in writing to General Foreman Roger Peterson for being mistaken in their oral and written allegations, and that it withdraw the grievance (submitted 11/6/81) with prejudice.

When the Union denied the Company's grievance, the Respondent appealed to the fourth step on February 18,

1982. A fourth-step meeting was held on March 17, where it appears that the Company asked the Union for an apology for the filing of the Union's grievance of November 6, 1981. On March 20, 1982, the Union, by letter, denied the Company's grievance. When the Respondent requested that its grievance be submitted to arbitration, the Union refused and asserted that the Company's grievance was not arbitrable under the collective-bargaining agreement. No further actions on the respective grievances were taken apart from the filing of the instant charge) and, according to Sherfield, her relationship with Cote and Peterson has significantly improved since the incidents noted above.

It is my opinion that the issue involved in Case 39-CA-968 is not one in which I can compel the Union to utilize the contractual grievance-arbitration procedure in lieu of an unfair labor practice proceeding. In *General American Transportation*, 228 NLRB 808 (1977), Chairman Murphy, in the swing vote, stated that although the Board had the authority to defer to arbitration certain unfair labor practice allegations regarding the interpretation or application of a collective-bargaining agreement, she would not compel a charging party to pursue arbitration in cases "which involve unfair labor practice allegations affecting individual rights under Section 7 of the Act."<sup>7</sup> In a companion case issued the same day, *Roy Robinson Chevrolet*, 228 NLRB 828 (1977), the Board, by majority decision, held that it would continue to defer to arbitration, under the *Collyer* doctrine, 8(a)(5) cases which essentially involved contract disputes. Thus, the current state of the law appears to be that the Board will no longer compel a charging party to utilize the contractual arbitration procedure in lieu of the unfair labor practice provisions of the Act in cases involving allegations of sections of the Act other than 8(a)(5).<sup>8</sup> Moreover, in a case such as this, where the allegation involves the alleged interference with the utilization of the grievance procedure itself, it would be inappropriate to compel the Union to utilize the arbitration forum as the means to resolve the issue.<sup>9</sup>

As to the merits of the allegation, I have noted above my conclusion that I have credited the testimony of Mark Wilson and Alice Sherfield. As such, it is evident to me that when Sherfield's grievance was presented at the first step, General Foreman Peterson, instead of respondent to the grievance, took the offensive and sought to utilize the grievance meeting as a forum to criticize her work. Thus, when Wilson repeatedly noted that Sherfield's grievance did not relate to her rejects, the Compa-

<sup>7</sup> In *General American Transportation*, supra, Board Members Fanning and Jenkins argued for the overruling of *Collyer Insulated Wire*, 193 NLRB 837 (1971). Board Members Pennello and Walther dissented.

<sup>8</sup> See for example *Container Corp. of America*, 244 NLRB 318, 321 (1979). The deferral concept involved in *Collyer* should not be confused with those cases where the parties have already arbitrated a dispute and where the winning party seeks to have the Board defer to the arbitrator's award under the standards of *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Thus, in *Roy Robinson Chevrolet*, supra, the Board, in an 8(a)(5) case, concluded that as the issue was one involving contract interpretation, the union must first go through the arbitral process even if it did not so desire.

<sup>9</sup> See for example *Ram Construction Co.*, 228 NLRB 769, 774 at fn. 18 (1977).

ny's representatives continued to harp on this subject, apparently with the notion that a good defense consists of a vigorous offense. At the conclusion of the first-step meeting on November 3, when Wilson and Sherfield refused to withdraw the grievance, the evidence establishes to my satisfaction that Peterson told Sherfield, in effect, that the Company had overlooked certain aspects of her work performance and conduct in the past, but that it could and would discipline her in the future. It is my opinion that this statement made in the context of the grievance meeting, was intended and understood as a threat of retaliation against Sherfield because of her desire to have the grievance heard at the next step. As such, it is concluded that the Respondent violated Section 8(a)(1) of the Act.<sup>10</sup>

<sup>10</sup> See *Laredo Packing Co.*, 254 NLRB 1, 2 (1981); *Morton's IGA Foodliner*, 237 NLRB 667 (1978).

#### CONCLUSIONS OF LAW

1. United Technologies Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions involved herein are labor organizations within the meaning of Section 2(5) of the Act.

3. By threatening employees with discipline if they pursued the processing of their grievances under the collective-bargaining agreement, the Respondent has violated Section 8(a)(1) of the Act.

4. The unfair labor practices described above effect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Except to the extent found above, the Respondent has not violated the Act in any other manner.

[Recommended Order omitted from publication.]