Avery Dennison *and* Graphic Communications Union, District Council No. 2, AFL–CIO. Cases 31–CA–22125, 31–CA–22131, 31–CA–22261, and 31–CA–22393

December 30, 1999

DECISION AND ORDER REMANDING PROCEEDING

BY MEMBERS FOX, LIEBMAN, AND BRAME

On April 10, 1998, Administrative Law Judge James M. Kennedy issued the attached Order Deferring Case to Arbitration. The General Counsel and the Charging Party filed requests for review of the judge's order, the Respondent filed an opposition to these requests, and the Charging Party filed a brief in reply to the opposition.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the order and the record in light of the requests for review and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent unlawfully transferred unit work from its Monrovia, California facility, withdrew recognition from the Union, and unilaterally implemented changes in terms and conditions of employment. The General Counsel and the Charging Party except to the judge's conclusion that these issues are appropriate for deferral to arbitration under the parties' negotiated grievance/arbitration procedure, in accordance with *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp*., 268 NLRB 557 (1984). For the reasons discussed below, we find merit in these exceptions, and we conclude that deferral is not warranted in the circumstances of this proceeding.

A. Facts

According to the stipulated facts, the Union was recognized by the Respondent as the exclusive representative of unit employees at its Monrovia facility since at least the late 1950s.[2] The parties' most recent collective-bargaining agreement was effective by its terms from October 1, 1993, through September 30, 1995, and was extended by the parties until September 5, 1996, when the Respondent withdrew recognition from the Union and terminated the agreement. Unit work consisted of coating (manufacturing), slitting (finishing), and shipping various label products. Monrovia historically operated two manufacturing machines, the C-20, which primarily converted paper materials, and the C-30, which made film materials.

In about April 1994, the Respondent unilaterally transferred some of the C-30 work from Monrovia to its facility in Fort Wayne, Indiana, but the work was returned to Monrovia approximately 1 month later. In a process beginning about August 1995 and concluding in September 1996, the Respondent again unilaterally transferred the same C-30 work to Fort Wayne. Thus, the coating work previously performed by unit employees at Monrovia for certain customers is currently performed by nonunit employees at Fort Wayne for the same customers. The Respondent continues to perform some coating work on C-30 machines at Monrovia for other customers, but the unit employees' slitting and shipping of the work coated at Monrovia is now performed by nonunit employees at other facilities.

From about July 1996 until about February 1997, the Respondent also transferred a large portion of the unit work on C-20 machines from Monrovia to its facility in Painesville, Ohio, where, using nonunit employees, it continues to perform the work for the same customers. Since then, the Respondent has performed no work on the C-20 machines remaining at Monrovia.

About March 22, 1996, seven unit employees who had been performing coating and slitting work at Monrovia began working at the Respondent's Rancho Cucamonga, California facility. In view of continuing concerns over long-term employment, the employees had bid on, been offered, and accepted positions at Rancho Cucamonga. About July 1996, as part of the transfer of the C-20 work, the Respondent laid off approximately 11 employees, who have not been reinstated to their former positions. The Respondent maintained that it was permitted to make the work transfers unilaterally by virtue of Section 12.01 of the collective-bargaining agreement, a management-rights clause with nondiscrimination provisions and a provision that any employee aggrieved by action taken under the clause would have recourse through the grievance procedure.

About September 5, 1996, the Respondent, citing an alleged loss of majority support, withdrew its recognition of the Union as the collective-bargaining representative of its employees and announced the termination of the parties' agreement. Since then, the Respondent has not recognized the Union or abided by the terms of the agreement.

Shortly after August 26, 1996, the Respondent granted the remaining unit employees at Monrovia a wage increase retroactive to October 1, 1995, and a second wage increase effective October 1, 1996, terminated the health benefits provided in the agreement, and implemented a different health plan, all without prior notice to or bargaining with the Union.

B. The Judge's Decision

In ruling on the Respondent's submission that the case should be deferred to arbitration, the judge reviewed the

[1] The Charging Party has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] This is the Respondent's only unionized facility.

principles of *Collyer Insulated Wire*, supra. In *Collyer*, the Board identified the factors it would consider in determining whether a dispute is appropriate for deferral to arbitration. The Board there held that it would defer where the "dispute arises within the confines of a long and productive collective-bargaining relationship," where "no claim is made of enmity by [the respondent] to employees' exercise of protected rights," and the respondent "has credibly asserted its willingness to resort to arbitration under a clause providing for arbitration in a broad range of disputes and unquestionably broad enough to embrace [the present] dispute." In addition, the dispute must be "eminently well suited to resolution by arbitration." The meaning of the contract must be at the heart of the dispute, so that the Act is implicated only upon a finding that the respondent's conduct was not sanctioned by the parties' agreement, and the arbitrator is able to fashion an appropriate remedy, if one is necessary.[3]

In determining that the present dispute should be submitted to arbitration, the judge concluded that these criteria were satisfied. He noted that the parties had a long and mature collective-bargaining relationship, and that their agreement was in effect at the time the Respondent transferred the C-20 and C-30 work. He further found that the management-rights provision of the agreement arguably authorized the Respondent's action,[4] that such action was subject to the grievance/arbitration process established by the contract, and that the Respondent had waived any procedural objections to resolving the issues through arbitration.

Moreover, the judge found that the pivotal question was whether the transfer of work was privileged under the contract, and that, if so, the Respondent's subsequent withdrawal of recognition and changes in terms and conditions of employment would be permissible under the Act. The judge also concluded that if an arbitrator found the transfer of work *not* privileged under the contract, he or she could fully remedy the breach by ordering the restoration of the work at Monrovia and the recall, with backpay, of employees forced to leave their jobs. Thereafter, the judge reasoned, the arbitrator or the Board could determine whether, with the restored work force, the Respondent could have lawfully withdrawn recognition and, if not, order the Respondent to recognize the Union and rescind the unilateral changes in health benefits.

The General Counsel and the Charging Party assert that the Respondent's withdrawal of recognition of the Union constituted a rejection of the principles of collective bargaining that form the foundation for arbitration. The General Counsel and the Charging Party also argue that deferral is not appropriate because the arbitrator could not fully remedy the alleged statutory violations, including the Respondent's failure to bargain and withdrawal of recognition. The judge rejected these arguments. Relying on *McDonnell Douglas Corp*., 324 NLRB 1202 (1997), the judge found that arbitration may be appropriate even for a statutory issue, when a contract issue must be decided first.

C. Analysis

Contrary to the judge, we find merit in the position of the General Counsel and the Charging Party. We agree with the judge insofar as he found that the meaning of the management-rights clause of the parties' collective-bargaining agreement is the threshold issue in this proceeding and a matter well suited for arbitration. The General Counsel has conceded that, if the clause is found to permit the Respondent's transfer of unit work, the Respondent's subsequent actions are lawful, so that the arbitrator would not need to reach the statutory issues. In these circumstances, arbitration would provide a satisfactory and efficient means of resolving the issues. We cannot ignore, however, the possibility that the arbitrator may instead find that the management-rights clause did not privilege the Respondent's unilateral transfers of unit work, in which case the purely statutory issues of the legality of the Respondent's actions subsequent to the work transfers will need to be decided—issues that are not appropriate for deferral.

The Board's policy against deferral in matters of statutory interpretation is well established.[5] Moreover, established Board policy also disfavors bifurcation of proceedings that entail related contractual and statutory questions, in view of the inefficiency and overlap that may occur from the consideration of certain issues by an arbitrator and others by the Board. See, e.g., *Sheet Metal Workers Local 17 (George Koch Sons)*, 199 NLRB 166, 168 (1972) (declining to defer contractual issue of legality of strike where the statutory issue of legality of a union fine, dependent on the status of the strike, is not properly deferrable). Compare *Clarkson Industries*, 312

[3] *Collyer*, supra at 842.

[4] Sec. 12.01 of the agreement states in relevant part:

> The management of the Company and the direction of the working force, including the right to plan, direct and control plant operations; to schedule and assign work to employees, to determine the means, methods, processes, and schedules of production, to determine the products to be manufactured, to introduce new methods, techniques or equipment as well as expand, diminish or decrease operations, the location of its plants and the continuance of its operating departments . . . are the sole rights of the Company.
>
> If any employee feels aggrieved by any action in respect to any of the foregoing, he shall have recourse through the grievance procedure herein.

[5] See, e.g., *Marion Power Shovel Co*., 230 NLRB 576 (1977). Although on remand in *McDonnell Douglas*, supra, relied on by the judge, the Board deferred to arbitration the newly transferred employees' unit placement both under the contract and under statutory community- of-interest principles, the Board emphasized that it did so only as an exception to longstanding policy based on the unique circumstances of the case, including the court's remand. 324 NLRB at 1205.

NLRB 349, 352–353 & fn. 19 (1993) (deferring contractual issues entirely unrelated to allegations of an unlawful threat and discriminatory disciplinary warning).[6] The statutory issues in this case, including the lawfulness of the Respondent's withdrawal of recognition and subsequent changes in working conditions, are particularly poor subjects for deferral because they involve the very existence of a collective-bargaining relationship between the parties, a matter within the exclusive jurisdiction of the Board. Thus, we find that the subject of the present dispute is not "eminently well suited to resolution by arbitration" in accordance with the *Collyer* criteria.

We further find this case does not meet the additional *Collyer* factor that requires that the dispute arise "within the confines of a long and productive collective-bargaining relationship." Before the events giving rise to this proceeding, the parties had a long-established relationship, and the initial transfer of work occurred while that relationship was ongoing. The remainder of the dispute, however, involves the Respondent's action to *end* the relationship by terminating the parties' contract and withdrawing recognition from the Union. The principle underlying deferral, that bargaining relationships are enhanced by resolving contractual issues through the process agreed on by the parties, loses its force when the relationship has been terminated. In finding that the Board should defer in this case, the judge cited no Board precedent for doing so in the absence of a current collective-bargaining relationship between the parties.

Finally, the changes in wages and benefits alleged in the complaint occurred *after* the Respondent terminated the parties' agreement. Unlike the transfer of work, the Respondent does not contend that it was privileged under the contract to make these unilateral changes.[7] Therefore, if the contractual claim fails, then what remains are strictly statutory issues within the exclusive purview of the Board, namely, the lawfulness of the withdrawal, termination, and unilateral changes.

[6] Contrary to our dissenting colleague, and in the interest of efficiency and economy in case processing, we see no need to disturb the Board's traditional policy against bifurcation of related issues. Generally, in cases involving prearbitral deferral, the Board retains jurisdiction for possible postarbitral review under *Spielberg Mfg. Co*., 112 NLRB 1080 (1955), and, if deferral is found inappropriate at that time, for resolution of the issues by the Board. The bifurcated approach urged by our dissenting colleague would further complicate these cases by requiring the Board to coordinate two separate decisionmaking processes involving related contractual and statutory issues, and by increasing the potential for overlapping or conflicting findings and remedies.

[7] See *NLRB v. Katz*, 369 U.S. 736 (1962) (employer's unilateral implementation of changes in terms and conditions of employment violates statutory duty to bargain collectively); and *Hen House Market No. 3*, 175 NLRB 596, 602 (1969), enfd. 428 F.2d 133 (1970) (unilateral change in contractually provided health benefits plan after contract expiration violates Sec. 8(a)(5)).

For these reasons, we decline to defer in this proceeding to the grievance/arbitration provisions of the parties' agreement. Accordingly, we shall remand the proceeding to the judge for a hearing on the merits of the complaint allegations.

ORDER

It is ordered that the above-captioned proceeding is remanded to Administrative Law Judge James M. Kennedy for the purpose of reopening the record to receive evidence, and thereafter preparing and serving on the parties a supplemental decision containing findings of fact, credibility resolutions, conclusions of law, and recommendations consistent with this Order.

MEMBER BRAME, dissenting in part.

I agree with my colleagues that the question whether the Respondent's transfer of unit work away from the Monrovia facility was privileged by the management-rights clause of the parties' agreement is a contractual matter that would normally be resolved through the parties' contractual grievance/arbitration process. I further agree that the remaining issues are statutory matters most appropriately handled by the Board through unfair labor practice proceedings. Unlike my colleagues, however, I would bifurcate this proceeding, deferring to arbitration on the threshold contractual issue and retaining jurisdiction over the statutory questions for subsequent consideration, if necessary, by the Board.

In deferring to arbitration for matters of contract interpretation, the Board has long recognized that such disputes "can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute."[1] As the Board noted in *Collyer*, this principle was also expressed as Congressional policy in Section 203(d) of the Labor Management Relations Act, which states in relevant part:

> 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.

Employers and unions that enter into collective-bargaining agreements with provisions for binding arbitration thus are entitled to expect that disputes within the coverage of those provisions will be adjudicated by the method they voluntarily selected. Win or lose, they have agreed, and must be prepared, to abide by the arbitrator's ruling as the final determination of the dispute.[2] Denying

[1] *Collyer Insulated Wire*, 192 NLRB 837, 839 (1971).

[2] The parties' lack of a continuing bargaining relationship in this case does not preclude arbitration of issues that arose under the expired

them their agreed-upon procedure by imposing an altogether different process for handling contractual disputes, based on a rigid all-or-nothing deferral policy, deprives both parties of both the benefit of their bargain and control over the administration of their agreement. This is especially true where, as here, that dispute resolution procedure has served throughout a stable relationship. In my view, the benefits, both in terms of policy and practicality, of resolving such disputes in accordance with the procedures negotiated by the parties compel the Board to adopt a more flexible approach favoring deferral to arbitration whenever possible. When, as here, statutory issues are also raised, deferral to arbitration on those issues that depend on the contract and are arbitrable under the parties' agreement would, in my view, produce positive results far outweighing any potential administrative inefficiencies envisioned by the Board in disfavoring such a bifurcated approach.

The Federal courts provide substantial precedent and guidance for the bifurcated processing of cases, and, in my view, the Board would be wise to draw on the courts' experience. Rule 42(b) of the Federal Rules of Civil Procedure permits a Federal judge to separate for trial any claim or issue in a cause of action. Courts have relied on the broad discretion granted by the Rule not only to separate issues of liability from issues of damages in civil trials, but also to separate unlike claims and counterclaims, and threshold issues.[3] Judges in each instance balance considerations of fairness, efficiency, and economy of resources,[4] and apply the basic principle enunciated by the Supreme Court that the issue to be considered separately must be "so distinct and separable from the others that a trial of it alone may be had without injustice."[5]

Moreover, the Federal courts have considerable experience in separating from lawsuits issues that are subject to arbitration in accordance with the Federal Arbitration Act (FAA), which requires the courts to grant motions to compel arbitration of arbitrable claims.[6] Although the Act, unlike the FAA, clearly affords the Board discretion in deferring to arbitration, in my view, the Board should follow the lead of the Federal courts in bifurcating proceedings in order to abide by the parties' voluntarily agreed-upon arbitration procedures whenever a separable contractual issue is presented.

The instant case excellently demonstrates the significant advantages of bifurcation. The contractual and statutory issues presented may be separated for adjudication with little risk of significant overlap or confusion. As the judge found, and the General Counsel conceded, the contractual question, concerning the Respondent's authority under the management-rights clause to unilaterally transfer unit work, is the threshold issue in the overall dispute. Thus, if the arbitrator finds the Respondent's action privileged under the contract, the General Counsel agrees that the Respondent's termination of the contract, withdrawal of recognition from the Union, and changes in wages and health benefits were lawful under the Act. Under such circumstances, the statutory issues would be moot and would not require consideration by the Board. On the other hand, if the arbitrator finds the work transfer not authorized by the contract, he or she would remedy only that breach of the contract, presumably by restoring the work and the employees to the Monrovia facility. At that point, if called upon to do so, the Board could review the arbitration proceeding in accordance with the *Spielberg* postarbitral deferral criteria,[7] and then resolve the remaining statutory issues.

In my view, applying this procedure in the present case, and in other cases as appropriate at the discretion of the Board, would promote goals that are important to the Act and its administration. As a practical matter, it would avoid the diversion of agency resources to decide contractual matters that can frequently be decided more economically and expeditiously by an arbitrator. Even more significantly, however, this approach would enforce the parties' agreement through the mechanism that they negotiated for that purpose, without relinquishing the Board's exclusive authority to determine statutory disputes. In my view, these benefits are too valuable to be sacrificed for the relative administrative ease of maintaining the Board's rigid current policy.

ORDER DEFERRING CASE TO ARBITRATION

The Regional Director for Region 31 of the National Labor Relations Board issued a consolidated complaint in the above matter on June 27, 1997. The underlying charges had been filed

contract. *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977).

[3] Regarding the separation of unlike claims, see, e.g., *Lindsey v. Prive Corp.*, 161 F.3d 886 (5th Cir. 1998) (proceeding bifurcated to separate liability issue under Age Discrimination in Employment Act from successorship issue); and *Hartford-Empire Co. v. Glenshaw Glass Co.*, 3 F.R.D. 50 (W.D.Pa. 1943) (trial bifurcated where one count of counterclaim required jury trial and other count invoked equity power of court); regarding bifurcation to separate threshold issues, see, e.g., *Amato v. City of Saratoga Springs*, 170 F.3d 311 (2d. Cir. 1999) (trial bifurcated where trial against city and police department in case brought under 42 U.S.C. § 1983 for excessive force would not be necessary if individual officers found not liable); and *In re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982) (bifurcation for separate trial of causation issue where that issue may be dispositive).

[4] See, e.g., id. at 216–217.

[5] *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931). Although this case predates Rule 42(b), the policy remains as articulated by the Court.

[6] *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 219 (1985). See Buzbee, *When Arbitrable Claims Are Mixed With Nonarbitrable Ones: What's a Court To Do?*, 3 S. Tex. L. Rev. 663, 681–683 (1998).

[7] *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955). The *Spielberg* criteria generally favor deferral to the arbitrator's decision but also provide a means of identifying for review by the Board cases in which the process may not have sufficiently protected employee rights under the Act.

on April 15, July 12, September 13, and November 27, 1996. On October 15, 1996, the Regional Director deferred to arbitration the first two filed charges to arbitration in accordance with the Board's policy announced in *Collyer lnsulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp*., 268 NLRB 557 (1984). On January 15, 1997, he revoked that deferral, investigated the charges, and eventually issued the consolidated complaint.

Respondent's answer to the consolidated complaint asserted, as its first affirmative defense, that the entire matter remained in a posture appropriate for deferral under *Collyer* and that the entire case should be deferred. During the prehearing conference call Respondent's counsel advised that the matter would be pursued by oral motion at the hearing. When the hearing opened on March 25, 1998, Respondent moved to defer. After allowing the parties to brief the question, I took the matter under advisement, adjourning sine die.

There is no dispute that Respondent has met the requirements which would normally trigger a *Collyer* deferral. At the time of the dispute in question there was a long, mature collective-bargaining relationship; there is an arbitration clause in the applicable collective-bargaining contract providing for final and binding arbitration and Respondent has waived any procedural objections to having the matter go to arbitration. Respondent had met these requirements at the time of the initial deferral in October 1996 and continues to do so today.

There has been only one significant change in circumstances since that time. At the hearing the parties stipulated that on September 5, 1996, when the collective-bargaining contract expired,[1] Respondent withdrew recognition. It appears from the statements of counsel that a decertification petition had been timely filed. The complaint does not attack the withdrawal of recognition based on any theory of employer misconduct, although it does assert that the withdrawal of recognition and fringe benefit plan changes were unprivileged, having occurred after Respondent made the alleged unlawful unilateral changes described in the following paragraphs. See *Douglas-Randall, Inc*., 320 NLRB 431 (1995); *Big Three Industries*, 201 NLRB 197 (1973).

The stipulation best describes the situation. Respondent (and its Fasson Division) is a manufacturer of adhesive labels with plants located in various places around the nation. Its only unionized facility is the one involved here, located in Monrovia, California. It also has a plant in Rancho Cucamonga, California. Both are located in the San Gabriel Valley east of Los Angeles; they are about 30 miles from one another. It also has plants in Fort Wayne, Indiana, and Painesville, Ohio. At Monrovia, Respondent manufactured two lines of large adhesive rolls and cut them to size. One roll is paper and the other, film. The paper rolls were manufactured on machines called a C-30; the film rolls on machines called C-20.

The complaint asserts that Respondent unilaterally, and without notice to the Union, transferred much of the work to other locations, particularly Fort Wayne and Painesville. The work transfer began in 1994 for the C-30 work, was halted temporarily, and resumed in earnest in August 1995 ending in September 1996. The transfer of C-20 work began in July 1996 and was completed in February 1997.

The transfer of this work resulted in the layoff of 11 unit employees in July 1996 and the voluntary transfer of 7 "slitters" to Rancho Cucamonga, where they continue to perform that work. "Slitting" is the process by which the large rolls of adhesive label material are cut to the customer's specifications. Approximately 107 employees continue to work at Monrovia.

Finally, the complaint asserts that after the withdrawal of recognition, Respondent changed the health insurance and retirement plans of the remaining Monrovia employees from the plans set forth in the collective-bargaining agreement to plans which the Company had established for its unrepresented employees and granted some wage increases.

The complaint alleges that these actions were taken in derogation of the collective-bargaining obligation. It does not claim that they are based on antiunion considerations. Respondent counters that its decisions and transfers were all based on the plain language of the collective-bargaining contract, and that the contract specifically entitled it to take the action it did.

Section 12.01 of the contract is a combination management-rights clause, just-cause clause, and nondiscrimination clause.[2] By its own terms it gives employees the right to grieve any action perceived to be contrary to its terms through the grievance-arbitration provision elsewhere in the contract. Respondent argues that the clause on its face permits it to transfer the work as it did; but, if it did not, the appropriate way to determine its meaning is arbitration, as provided by Section 12.01.

Analysis

It is apparent, from a review of both the facts and the law, that deferral under the *Collyer* doctrine remains appropriate. The contract was in effect at the time the transfer of work began and the transfer is arguably authorized by the contract itself. Furthermore, as discussed below, an arbitrator would have the authority under the terms of the contract to fashion a full remedy for the breach if one was found. That would include what the General Counsel seeks here, reestablishment of the C-

[1] The Union has been the recognized bargaining agent of the affected employees since the 1950s and the parties over that period have signed a series of collective-bargaining contracts. The last such contract, by its terms was effective from October 1, 1993, through September 30, 1995. It was, according to the stipulation, extended by the parties until September 5, 1996, the date recognition was withdrawn.

[2] Sec. 12.01 reads:

> The management of the Company and the direction of the working force, including the right to plan, direct and control plant operations; to schedule and assign work to employees, to determine the means, methods, processes and schedules of production, to determine the products to be manufactured, to introduce new methods, techniques or equipment as well as *expand, diminish or decrease operations, the locations of its plants and the continuance of its operating departments*; to establish and require employees to observe Company rules and regulations; *to hire; layoff or relieve employees from duties*; and to maintain order and to suspend, demote, discipline, and discharge employees for just cause, are the sole rights of the Company.
>
> Foregoing enumeration of Management's rights shall not be deemed to exclude other rights of Management not specifically set forth, the Company therefore retaining all rights not otherwise specifically covered by this Agreement.
>
> The exercise by the Company of any of the foregoing rules shall not alter any of the specific provisions of this Agreement *nor shall they be used to discriminate against any member of the Union.*
>
> *If any employee feels aggrieved by any action in respect to any of the foregoing, he shall have recourse through the grievance procedure herein*. [Emphasis added.]

20 and C-30 work at Monrovia at the same levels as before, recall of all the employees forced to leave, and backpay. If that were to occur, then whatever objective considerations the Employer may have had in September 1996 justifying its withdrawal of recognition would no longer be extant and either the arbitrator or the Board could issue an order requiring recognition and reversal of the health plan and pension plan changes. If the arbitrator found that the contract authorized Respondent to transfer the work as it did, then there would be no claim that the transfer was an unfair labor practice and no claim that Respondent's subsequent conduct was unprivileged.

All parties briefed the issue before I adjourned the hearing on March 26, 1998. The General Counsel and the Union argue that in cases of this nature, deferral is inappropriate. Both of them assert that deferral is unwarranted where the Employer has withdrawn recognition, as arbitration cannot remedy such a fundamental matter. Furthermore, according to them, withdrawal of recognition constitutes a "rejection of the principles of collective bargaining," citing *United Technologies*. I am unable to accept that argument. Respondent has recognized the Union since the 1950s and, until the decertification petition was filed, had done nothing to demonstrate that it was opposed to the concept of collective bargaining with the majority representative of its employees. That petition was halted only because of the filing of the unfair labor practice charges here, which triggered the "blocking charge" rule.

The analysis is pretty basic: Absent the work transfers Respondent, at least based on colloquy with counsel, seems to have had an objective basis for believing the Union no longer held majority status. Absent the unfair labor practice charges, Respondent would have been free to withdraw recognition or at least have allowed the Union's majority status to have been tested by an election pursuant to the decertification petition. If that is so, then the only principle with which Respondent was concerned was whether the Union retained majority status, not with whether it rejected collective bargaining in the face of the Union's majority status. Thus the *United Technologies* logic does not apply. This employer, when obligated to recognize the Union has done so. It has not rejected collective bargaining.

Closer to the mark is the Board's decision in *Seng Co*., 205 NLRB 200 (1973). That was an 8(a)(3) and (1) case involving discipline of employees for violating an unlawful no-solicitation rule during the last portion of a contract where the union had been decertified. The Board declined to defer the case on *Collyer* grounds principally, I think, because there was no assurance that the decertified union would carry the arbitration forward. It had no incentive to do so, for it did not have a future bargaining relationship at stake. The Board did reference the decertification problem in strong terms saying at 201: "where, as here, the Union involved has been decertified, our primary motivation in deferring to arbitration, namely, that of facilitating and fostering an *existing* collective-bargaining relationship cannot by definition be achieved." (Emphasis in original.) Even so, the Board concluded its analysis with the disincentive observation, saying that if the union chose not to go forward with the arbitration there would be no one to champion the employees' interests.

Yet taking the Board at its word, that the primary motivation of deferral is to foster and facilitate an existing collective-bargaining relationship, *Seng's* logic is not contextually consistent with the facts here. The employer in that case had only signed a 1-year contract with the Union and that after a bitter strike. The bargaining relationship was certainly not mature and there was evidence of significant antiunion animosity as based on the rule in question as well as its uneven enforcement. Nothing of that nature is alleged here. Instead, a reasonable view of the stipulation is that Respondent, due to its interpretation of the contract, reduced the number of individuals in the bargaining unit for nondiscriminatory and business based reasons and thereafter the employees, independently, chose to file a decertification petition. When the petition could not proceed, Respondent withdrew recognition. That is nowhere near the antiunion evidence manifest in *Seng*.

In the same vein, and applying the *Seng* logic, the Board deferred to arbitration in *Southern California Edison*, 310 NLRB 1229 (1993). In that case the company argued that the safety clause in the collective-bargaining contract permitted it to establish unilaterally a drug-testing program. The safety clause was unclear on the question, but the Board observed the long-standing, mature nature of the bargaining relationship and deferred the matter under *Collyer*.

The Supreme Court held in *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977), that the duty to arbitrate a dispute which arose under the term of a collective-bargaining contract continues even after that contract has expired. Here, Respondent has recognized its obligation under *Nolde*, and there is no reason not to permit that process to go forward. Therefore, in my opinion the *Seng* logic does not bar an order of deferral on the ground that the bargaining relationship has ended where that termination is not the result of any discriminatory act. Accordingly, I do not believe that *Seng* controls the question of deferral.

Had this matter been submitted to arbitration before the charges had been filed and the blocking charge rule not been invoked, the Board clearly would have deferred to an arbitrator's decision had the arbitrator interpreted the clause to permit Respondent's reduction of work. Clearly, the processing of a breach of contract claim would not have blocked the representation proceeding. The Board has said: "if an arbitrator upholds an employer's argument that its actions were justified by a contractual management-rights clause, we would defer to the award, [under the *Spielberg/Olin*[3] doctrine] even if neither the award nor the clause read in terms of the statutory clear and unmistakable waiver test." *Motor Convoy*, 303 NLRB 135, 136 (1991). See also *Hoover Co*., 307 NLRB 524 (1992), where an arbitrator approved a plantwide no-smoking ban based on broad contract language (employer had "the right to establish and from time to time amend rules and regulations"). In fact, in a case involving another division of this Employer, *Dennison National Co*., 296 NLRB 169 (1989), and which involved the unilateral elimination of unit job classifications, the Board upheld an arbitrator's finding that the employer had the unilateral right to do so based on contract language.

Indeed, the Board has gone so far as to hold that *Collyer* prearbitral deferral of unfair labor practice charges challenging unilateral changes is appropriate even where no specific contractual provision's meaning is in dispute. *Inland Container*, 298 NLRB 715 (1990). (Unilateral imposition of drug-testing program.)

[3] *Spielberg Mfg. Co*., 112 NLRB 1080 (1955); also *Olin Corp*., 260 NLRB 573 (1984).

Nonetheless, both the General Counsel and the Union assert that the matter must be dealt with by the Board because of the statutory question posed by the withdrawal of recognition. They contend first that such a matter must not be placed in a bifurcated posture, awaiting the result of the arbitrator's decision, and second, that the question relating to a withdrawal of recognition is the statutory responsibility of the Board, not an arbitrator.

In a sense, that argument puts the cart before the horse. The contract's meaning is at the heart of the entire matter. It is only if the arbitrator declines to accept Respondent's interpretation that the withdrawal of recognition becomes important. The contract issue must be decided first, whether by the Board or in another forum.

It is true that the Board has the authority to determine the meaning of contract clauses, *C & C Plywood Corp*., 148 NLRB 414 (1964), enf. denied 351 F.2d 224 (9th Cir. 1965), revd. and remanded 385 U.S. 421 (1967), but in general, that power is limited in the sense that it may determine only whether the clause was the union's agreement to give up statutory rights. It is not a plenary power. Plenary contract interpretation authority is the sole bailiwick of the bodies charged with that task. The Board is charged to enforce the Act, not the contract. Contract interpretation is left to the courts under Section 301 of the Act or left to the arbitral process if that process has been created by the contract. Those forums are the first authority to determine the meaning of a contract, particularly where, as here, a party is asserting that the contract gives it the affirmative authority to take a certain course of action. In that sense waiver of a statutory right as an issue is subordinate to the affirmative claim of contract right.

Therefore, before the Board can act here with respect to the withdrawal of recognition and subsequent changes (the health plan and pension plan substitutions) it needs to know if the collective-bargaining contract permitted the employer to transfer the work from Monrovia to the other locations. If it did, then the Employer has not breached the bargaining obligation by failing to first bargain with the Union. It already would have done so. As the parties have specially put into place a procedure to analyze that claim, the Board should await the results of that procedure to determine if anything further needs to be done. The Board can, of course, maintain jurisdiction over the case while awaiting those results.

Beyond that, however, there is nothing stopping the parties from putting the remaining 8(a)(5) issues (withdrawal of recognition and change of the fringe benefit plans) to the arbitrator. Indeed, it would seem that if the arbitrator determined that the Employer did not have the right to transfer the work, then his remedy would be to order the status quo ante by restoring the work to Monrovia, order the recall (and transfer back) of the employees who had lost their jobs, together with backpay. That would be the same remedy which the Board would order for the work transfer portion of the case. Such an order would be only a logical first step insofar as the remainder is concerned. The next step in restoring the status quo would be to address what happened while the laid-off employees were gone. That would include a determination whether, with the restored work force having been restored, the employer ever had any justification for withdrawing recognition and if not, order a nunc pro tunc recognition.

It seems almost self-evident that if the reduced work force which resulted after the layoffs/transfers made a decision to seek decertification, the full prereduction work force would not have. Among other things, a full complement would have changed the numbers so significantly that the showing of interest supporting the decertification petition may not have been met, but might also lead to the conclusion that the Union's majority support had never been lost.

It is true that the Board is the primary body to deal with that statutory issue and the General Counsel and the Charging Party may have a valid point. Yet, the Board recently ordered an arbitrator in circumstances very similar to this to reach a similar statutory issue where a contract issue needed to be decided first. See *McDonnell Douglas Corp*., 324 NLRB 1202 (1997). The fact pattern there closely parallels this one and it seems to me that its holding scotches the opposition to deferral posed by the General Counsel and the Charging Party here. Moreover, the Board imposed noncontract, statutory duties on the arbitral process. The parties, though they could have, did not need to agree on submitting that issue to arbitration.

In *McDonnell Douglas*, the employer had "reclassified," seemingly on a unilateral basis, certain employees out of the bargaining unit. The reclassification was based on certain contract language. As here, the contract gave the Union the right to grieve that action through the final and binding grievance-arbitration procedure. The Board characterized the "reclassification" as a "representation" issue and refused to defer the matter to arbitration as recommended by the administrative law judge, saying, initially at least, that representation matters were "never" deferred to arbitration. A court of appeals remanded the matter directing the Board to explain why it had departed from its general policy of deferring to agreed-upon grievance-arbitration procedures.

On the remand, still continuing to characterize the dispute as representational,[4] the Board agreed with the court that it had "infrequently" deferred to arbitration disputes of that nature. Furthermore, although such deferrals were rare, it agreed that the case was appropriate for deferral and issued the appropriate order. The Board was well aware that the dispute might be remedied only on a bifurcated basis. It observed: "The entire dispute in this case could be resolved through arbitration if an arbitrator were to conclude that the union had agreed to permit the respondent unilaterally to remove the [affected] unit employees from the unit. If the arbitrator so found, there would be no need to resolve the representational statutory policy issue. If, on the other hand, the arbitrator were to find that the union had not agreed to permit the respondent unilaterally to remove the [affected] unit employees from the unit, then it would be necessary to reach the second issue, a question that under *St. Mary's* [*Medical Center*, 322 NLRB 954 (1997)] can normally only be decided by the Board."

But the bifurcation concerns did not stop the Board from deferring. It deferred all the remaining issues, which were statu-

[4] The dispute could also have been characterized as an 8(a)(5) unilateral reconfiguration of the bargaining unit; a matter which is generally considered more serious as the bargaining unit scope is a nonmandatory subject of bargaining. It may not be changed absent an agreement to do so. *NLRB v. Southland Cork Co*., 342 F.2d 702, 706 (5th Cir. 1965); *Hess Oil & Chemical Corp. v. NLRB*, 415 F.2d 440, 445 (5th Cir. 1969), cert. denied 397 U.S. 916 (1970); *National Fresh Fruit & Vegetable Co. v. NLRB*, 565 F.2d 1331, 1334 (5th Cir. 1978); *Newport News Shipbuilding v. NLRB*, 602 F.2d 73 (4th Cir. 1979); *Bozzato's, Inc*., 277 NLRB 977 (1985).

tory in nature, to the arbitrator. It said: "We defer the [representational] contractual issue of whether the union had agreed to permit the respondent, unilaterally: (a) to apply the [collective-bargaining contract] to the then recently transferred [ ] unit employees, (b) to determine that they were no longer in the unit, and (c) to remove them from the unit. [Footnote omitted.] If the arbitrator finds that the union did not so agree, *then we defer to the arbitrator also the resultant representational statutory policy issue* of whether, even absent the union's agreement, the job duties and functions, and terms and conditions of employment, of the then recently transferred [ ] unit employees had become sufficiently dissimilar from those of the remaining unit employees so as to warrant the respondent's unilateral removal of the [affected unit] employees from the unit upon their change of assignment to [a sister company]." (Emphasis added.)

Thus, the order of deferral directed the arbitrator to decide a statutory issue, the question of whether the employer had breached Section 8(a)(5) when making that change in the event the Union had not authorized the change according to the language of the collective-bargaining contract.

We are faced with that exact type of bifurcation here. Yet the presumption favoring arbitration is even stronger because the statutory question is not intertwined with or at the heart of the contract interpretation question as it was in *McDonnell Douglas*. There is no question that an arbitrator could interpret the contract language to be the Union's permission to allow Respondent to make the changes it did on a unilateral basis. If the Union did grant permission, then the remainder of the case falls. If the Union did not agree to allow Respondent to transfer the work on a unilateral basis, then the remaining issues are left: (1) Did the breach of the contract also constitute a statutory violation, an 8(a)(5) unilateral change? (2) If it did constitute a statutory violation, is the remedy the same as for the contract breach, i.e., restoring the work to Monrovia, recalling the affected employees to their jobs and ordering backpay?[5] (3) Did the unlawful conduct preclude Respondent from withdrawing recognition of the Union when the contract expired under a preelection "taint" theory? (4) If so, can the arbitrator remedy the change in the health and pension plans and wage matters which followed?

I conclude, based on the Board's decisions in *McDonnell Douglas* and *Motor Convoy*, supra, that the arbitrator can, and must, reach all these issues. Clearly he is in the position to best decide the threshold question of whether or not the contract permitted Respondent to transfer the work. Everything thereafter is a linked chain welded to the transfer of the work. If the first was unlawful, then the arbitrator can find the remainder to be part of the remedy.

Therefore, I find that this matter should be submitted to an arbitrator under the terms of the collective-bargaining contract. Furthermore, the Board will retain jurisdiction over the matter and the arbitral decision will remain subject to postarbitral review by the Board on assertion by either party that the arbitral proceedings or the decision—on either the contractual or statutory issues—fail to satisfy the Board's longstanding requirements for postarbitral deferral. See *Spielberg* and *Olin*, both supra.

[Recommended Order omitted from publication.]

[5] In this regard, the parties have advised on the record that the C-20 and C-30 equipment remains at Monrovia and restoration is possible.