



1 charge involved an interpretation of the present (1977-78) Con-  
2 tract between the Laurel City Employees Local #316 and the City  
3 of Laurel which calls for such dispute to go to a grievance pro-  
4 cedure and arbitration. That contract, which defines a grievance  
5 as "any condition that exists which causes any City employee to  
6 feel that his/her rights have been violated," contains a grievance  
7 procedure which culminates in final and binding arbitration.  
8 (1977-78 Contract, Article XIX.)

9 The National Labor Relations Board administers the National  
10 Labor Relations Act, an act very similar to Montana's Collective  
11 Bargaining Act for Public Employees. Because of this similarity  
12 and the NLRB's considerable experience in labor relations, it is  
13 helpful to refer to NLRB precedent when considering a matter which  
14 has not yet been addressed by the Board of Personnel Appeals. The  
15 following discussion describes the NLRB's view of the relationship  
16 of an unfair labor practice charge to a contract's grievance/  
17 arbitration machinery.

18 In 1971, the National Labor Relations Board issued its land-  
19 mark Collyer Insulated Wire decision which enunciated the NLRB's  
20 policy to refrain from exercising jurisdiction in respect to  
21 disputed conduct which is arguably both an unfair labor practice  
22 and a contract violation when the parties have voluntarily  
23 established by contract a binding settlement procedure. In that  
24 decision, the NLRB stated, in part, that:

25 The courts have long recognized that an industrial rela-  
26 tions dispute may involve conduct which, at least  
27 arguably, may contravene both the collective agreement  
28 and our statute. When the parties have contractually  
29 committed themselves to mutually agreeable procedures  
30 for resolving their disputes during the period of the  
31 contract, we are of the view that those procedures should  
32 be afforded full opportunity to function.<sup>1</sup>

Since 1971, the determination as to whether to defer alleged  
violations of Section 8(a)(5)<sup>2</sup> to arbitration has revolved around

<sup>1</sup>Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1971).

<sup>2</sup>"It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

1 the factors which were relied upon by the NLRB majority to justify  
2 deferral in the Collyer case itself.

3 The dispute must arise within the confines of a stable  
4 collective bargaining relationship, without any assertion of  
5 enmity by the respondent toward the charging party. The NLRB  
6 applies its "usual deferral policies" if:

7 ... there is effective dispute-solving machinery avail-  
8 able, and if the combination of past and presently  
9 alleged misconduct does not appear to be of such char-  
acter as to render the use of that machinery unpromising  
or futile...

10 Using this criteria, the NLRB has declined to defer to arbi-  
11 tration when such circumstances as these have existed: (1) the  
12 unfair labor practice charge alleged that there was no stable  
13 collective bargaining relationship, (2) the respondent's conduct  
14 constituted a rejection of the principles of collective bargaining  
15 or the organizational rights of employees, (3) the unfair labor  
16 practice charge alleged that the employer's conduct was in re-  
17 taliation or reprisal for an employee's resort to the grievance  
18 procedure or otherwise struck at the foundation of the grievance  
19 and arbitration mechanism, (4) the employer had interfered with  
20 the use of the grievance-arbitration procedure.<sup>4</sup>

21 The respondent must be willing to arbitrate the issue which  
22 is arbitrable. Criteria related to this factor are: (1) the  
23 respondent must be willing to arbitrate and/or willing to waive  
24 the procedural defense that the grievance is not timely filed,  
25 (2) the dispute must be clearly arbitrable or at least arguably  
26 covered by the contract and its arbitration provision, (3) a

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28 <sup>3</sup>United Aircraft Corp., 204 NLRB 879, 83 LRRM 1411 (1972).

29 <sup>4</sup>American Bar Association, The Developing Labor Law,  
30 Cumulative Supplement 1971-78 (Washington, D.C.: Bureau of National  
31 Affairs, Inc., 1976), p. 275-77.  
32 1976 Supplement (Washington, D.C.: Bureau of National Affairs, Inc.,  
1977), p. 136-37.  
1977 Supplement (Washington, D.C.: Bureau of National Affairs, Inc.,  
1978), p. 161-62.

final and binding procedure must exist.<sup>5</sup>

1           The dispute must center on the labor contract. The Collyer  
2 decision emphasized that the prearbitral deferral process was  
3 appropriate where the underlying dispute centered on the inter-  
4 pretation or application of the collective bargaining contract.  
5 This doctrine was clearly stated in the NLRB's 1972 Teamsters,  
6 Local 70 decision:

7           In the Collyer case, we set forth the general considera-  
8 tions which led us to the conclusion that arbitration is  
9 the preferred procedure for resolving a dispute which  
10 could be submitted to arbitration concerning the  
11 meaning of the parties' agreement; we adhere to those  
views and we see no need to reiterate them here. Our  
concern, rather, is the application of the Collyer  
principles to the facts of this case.

12           ... the resolution of this dispute necessarily de-  
13 pends upon a determination of the correct interpretation  
of a contract; and as we said in Collyer, it is this  
precise type of dispute which can better be resolved by  
an arbitrator than by the Board.

14           ... It is thus our considered judgment that when,  
15 as here, the alleged unfair labor practices are so  
intimately entwined with matters of contractual inter-  
16 pretation, it would best effectuate the policies of the  
act to remit the parties in the first instance to the  
17 procedures which they have devised for determining the  
meaning of their agreement. (Emphasis added.)

18           In practical application, the factor requires that: (1) the  
19 contract contain language expressly governing the subject of the  
20 allegation, (2) the issue be deemed appropriate for resolution by  
21 an arbitrator, (3) the center of the dispute be interpretation of  
22 a contract clause rather than interpretation of a provision of the  
23 Act.

24           Even where there has been language in the contract upon which  
25 the dispute has been centered, the nature of the language has  
26 affected whether or not the NLRB has deferred an unfair labor  
27 practice complaint to arbitration. The NLRB has not deferred in  
28 cases where: (1) the contract language on its face was illegal  
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30           <sup>5</sup>Ibid. 1971-75 Supplement, p. 277-79; 1976 Supplement, p. 137; 1977  
31 Supplement, p. 162-163.

32           <sup>6</sup>Teamsters, Local 70 (National Biscuit Company), 198 NLRB 552, 80 LRRM  
1727 (1972).

1 or may have compelled the arbitrator to reach a result incon-  
2 sistent with the policy of the Act, (2) the respondent's argu-  
3 ment construing the contract language to justify its conduct was  
4 "patently erroneous," (3) the contract language was unambiguous  
5 (and therefore the special competence of an arbitrator was not  
6 necessary to interpret the contract).<sup>7</sup>

7 The above-cited criteria indicate that the NLRB's Collyer  
8 doctrine would appropriately be applied to the unfair labor  
9 practice allegation now under consideration.

10 1. There is no evidence that this dispute does not arise  
11 within the confines of a stable collective bargaining  
12 relationship.

13 2. There is no evidence that the parties' past or present  
14 relationship would render the use of the grievance-arbitration  
15 process futile.

16 3. Because the respondent cited the availability and appro-  
17 priateness of the contractually agreed upon grievance-  
18 arbitration procedure as an affirmative defense to this unfair  
19 labor practice charge, it is assumed that the respondent is  
20 willing to arbitrate this issue and to waive the procedural  
21 defense that the grievance is not timely filed.

22 4. The issue in dispute is covered by the collective bar-  
23 gaining agreement between the parties to this matter (1977-  
24 78 Contract, Article XXIII, No. 6). That collective bar-  
25 gaining agreement contains a grievance procedure which  
26 culminates in final and binding arbitration (1977-78 Contract,  
27 Article XIX). Therefore, the dispute is clearly arbitrable.

28 5. The dispute clearly centers on the interpretation or  
29 application of Article XXIII, No. 6 of the 1977-78 collective  
30 bargaining agreement.

31 6. The dispute is eminently suited to the arbitral process,  
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<sup>7</sup>Op. Cit, American Bar Association, 1971-78 Supplement, p. 279-282;  
1976 Supplement, p. 137-138; 1977 Supplement, p. 163-164

1 and resolution of the contract issue by an arbitrator will  
2 probably dispose of the unfair labor practice issue.

3 This Board clearly has the authority to hear this complaint  
4 under the provisions of Section 59-1607, R.C.M. 1947. However,  
5 it is determined that the policies and provisions of the Act<sup>8</sup>  
6 would best be effectuated if this Board were to remand this  
7 complaint to the grievance-arbitration procedure specified by  
8 the collective bargaining agreement of the parties.

9 IT IS THEREFORE ORDERED that this Complaint be remanded to  
10 the grievance-arbitration procedure outlined in the collective  
11 bargaining agreement between the parties to this matter.

12 The respondent will, within ten days of receipt of this Order,  
13 file a written statement with this Board indicating that it is  
14 willing to arbitrate this issue and to waive the procedural  
15 defense that this grievance is not timely filed.

16 The parties will then process this grievance in accordance  
17 with the procedures outlined in Article XIX of the 1977-78  
18 Contract.

19 This Board retains jurisdiction for the purpose of hearing  
20 this complaint as an unfair labor practice charge if:

- 21 1. the respondent does not, within ten days of receipt of  
22 this Order, file a written statement with this Board  
23 indicating that it is willing to arbitrate this issue  
24 and to waive the procedural defense that this grievance  
25 is not timely filed;
- 26 2. an appropriate and timely motion adequately demonstrates  
27 that this dispute has not, with reasonable promptness

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29 <sup>8</sup>Specifically, Section 59-1610, R.C.M. 1947, which states:

30 (2) An agreement may contain a grievance procedure culminating in final  
31 and binding arbitration of unresolved grievances and disputed inter-  
pretations of agreements.

32 (3) An agreement between the public employer and a labor organization  
shall be valid and enforced under its terms when entered into in accordance with the provisions of this act and signed....

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after the issuance of this Order, been resolved in the grievance procedure or by arbitration; or

3. an appropriate and timely motion adequately demonstrates that the grievance or arbitration procedures were not conducted fairly.

DATED this 20<sup>th</sup> day of October, 1978.

BOARD OF PERSONNEL APPEALS

BY Kathryn Walker  
Kathryn Walker  
Hearing Examiner

NOTICE

Exceptions may be filed to this Order within twenty days service thereof. Exceptions shall be addressed to the Board of Personnel Appeals, Box 202, Capitol Station, Helena, Montana 59601.

\* \* \* \* \*

CERTIFICATE OF MAILING

I, Elaine Schillinger, hereby certify and state that on the 20<sup>th</sup> day of October, 1978, a true and correct copy of the above captioned ORDER was sent to the following:

Mayor Larry D. Herman  
City of Laurel  
P.O. Box 6  
Laurel, MT 59044

Mr. Donald R. Judge  
AFSCME  
600 North Cooke  
Helena, MT 59601

Elaine Schillinger  
Elaine Schillinger