

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

\*\*\*\*\*

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 43-81

WILLIAM M. CONVERSE, affiliated )  
with the INTERNATIONAL ASSOCIATION )  
OF FIREFIGHTERS, Local No. 436, )  
Complainant, )  
vs. )  
ANACONDA-DEER LODGE COUNTY, )  
Defendant. )

\*\*\*\*\*

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 44-81:

JAMES F. FORSMAN, affiliated with )  
the INTERNATIONAL ASSOCIATION OF )  
FIREFIGHTERS, Local No. 436, )  
Complainant, )  
vs. )  
ANACONDA-DEER LODGE COUNTY, )  
Defendant. )

ORDER

\*\*\*\*\*

On December 2, 1981, the above-captioned complainants filed unfair labor practice charges with the Board of Personnel Appeals against the above-captioned defendant. On December 16, 1981, the defendant filed an answer to the charges. The answer denied the charges and among other affirmative defenses alleged that the contractual grievance procedure had not been followed and alleged that it "is therefore presumed [that the complainants] have abandoned [their] position[s]."

On February 22, 1982, the defendant filed a motion to dismiss the charges. As authority for the motion to dismiss, the defendant cited "Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1971) and ULP 13-78 designated AFSCME v. The City of Laurel."

On March 12, 1982, the complainants filed a memorandum in

1 opposition to motion to dismiss. In this memorandum, the complainants  
2 assert the following: (1) The Board of Personnel Appeals  
3 does not have authority to implement the Collyer policy to Montana  
4 public sector labor relations. (2) Even if the Board of Personnel  
5 Appeals does have authority to implement Collyer, Collyer is  
6 inapplicable to the facts of this case.

7 Before we address the complainants two problems, we should  
8 first point out that if the Board of Personnel Appeals defers to  
9 arbitration pursuant to a contract, the Board of Personnel Appeals  
10 would not dismiss the unfair labor practice charges but instead  
11 would retain jurisdiction of the charges for purposes of insuring  
12 that arbitration in fact takes place and to determine whether the  
13 arbitration procedures were conducted fairly. Thus the defendant's  
14 motion to dismiss will not be granted even if the Board of Personnel  
15 Appeals does defer to arbitration.

16 THE BOARD OF PERSONNEL APPEALS DOES HAVE AUTHORITY TO IMPLEMENT  
17 THE COLLYER DEFERRAL POLICY.

18 While this order will not minutely detail the Board of Personnel  
19 Appeals' authority to implement the Collyer policy for Montana  
20 public sector labor relations, we note the following three points.

21 First the Montana Supreme Court, when called upon to interpret  
22 the Collective Bargaining for Public Employees Act, 39-31-101  
23 through 39-31-409, MCA, has consistently turned to National Labor  
24 Relations Board (NLRB) precedent for guidance. State Department of  
25 Highways v. Public Employees Craft Council, 165 Mont. 349, 529  
26 P.2d 785 (1974); AFSCME local 2390 v. City of Billings, \_\_\_\_\_  
27 Mont. \_\_\_\_\_, 555 P.2d 507, 93 LRRM 2753 (1976); The State of  
28 Montana, ex. rel., The Board of Personnel Appeals v. The District  
29 Court of the Eleventh Judicial District, \_\_\_\_\_ Mont. \_\_\_\_\_, 598  
30 P.2d 1117, 36 St. Rpt. 1531 (1979)). Teamsters Local #45 v. Board  
31 of Personnel Appeals and Stuart Thomas McCarvel, \_\_\_\_\_ MT \_\_\_\_\_,  
32

2 Second, the National Labor Relations Board, in its Collyer  
3 decision, stated the following authority for adopting its deferral-  
4 to-arbitration policy.

5 "The Board's authority, in its discretion, to defer to  
6 the arbitration process has never been questioned by the  
7 courts of appeals or by the Supreme Court. [Citations omitted.]  
8 Although Section 10(a) of the Act clearly vests the Board  
9 with jurisdiction over conduct which constitutes a violation  
10 of the provisions of Section 8, notwithstanding the existence  
11 of methods of 'adjustment or prevention that might be established  
12 by agreement,' nothing in the Act intimates that the Board  
13 must exercise jurisdiction where such methods exist. On the  
14 contrary in Carey v. Westinghouse Electric Corporation, 375  
15 U.S. 261, 271, 55 LRRM 2042 (1964), the Court indicated that  
16 it favors our deference to such agreed methods by quoting at  
17 length with obvious approval the following language from the  
18 Board's decision in International Harvester Co.

19 'There is no question that the Board is not precluded  
20 from adjudicating unfair labor practice charges even though  
21 they might have been the subject of an arbitration proceeding  
22 and award. Section 10(a) of the Act expressly makes this  
23 plain, and the courts have uniformly so held. However, it is  
24 equally well established that the Board has considerable  
25 discretion [to] respect an arbitration award and decline to  
26 exercise its authority over alleged unfair labor practices if  
27 to do so will serve the fundamental aims of the Act.

28 'The Act, as has repeatedly been stated, is primarily  
29 designed to promote industrial peace and stability by encoura-  
30 ging the practice and procedure of collective bargaining.  
31 Experience has demonstrated that collective-bargaining agree-  
32 ments that provide for final and binding arbitration of

1 grievance and disputes arising thereunder, "as a substitute  
2 for industrial strife," contribute significantly to the  
3 attainment of this statutory objective." [emphasis supplied.]

4 Collyer, supra, 77 LRRM at  
5 1934 - 1935.

6 Third, the courts of appeals have upheld the Board's Collyer  
7 doctrine each time the issue has been presented. Electrical  
8 Workers (IBEW) Local 2188 v. NLRB (Western Elec. Co.) 494 F 2d  
9 1087, 85 LRRM 2576 (CA DC), cert. denied, 419 US 835, 87 LRRM 2398  
10 (1974); Associated Press v. NLRB, 492 F 2d 662, 85 LRRM 2440 (CA  
11 DC. (1974) (listing in its Footnote 6 courts which have given  
12 "apparent approval" to Collyer without directly passing on it);  
13 Provision House Workers v. NLRB (Urban Patman, Inc.), 493 F 2d  
14 1249, 85 LRRM 2863 (CA9), cert. denied, 419 US 828, 87 LRRM 2397  
15 (1974) (deferral appropriate even though "characterization of the  
16 dispute as one involving interpretation of a contract rather than  
17 existence of a contract, is not wholly free from doubt."); Nabisco,  
18 Inc. v. NLRB, 479 F 2d 770, 83 LRRM 2612 (CA 2, 1973). The Second  
19 Circuit has declared that "[t]he validity of the Collyer doctrine  
20 is no longer seriously in doubt." Machinists Lodge 700 v. NLRB,  
21 525 F 2d 237, 239, 90 LRRM 2922 (CA 2, 1975).

22 As the Second Circuit Court of Appeals also stated in the  
23 Machinists Lodge case, supra,

24 As mentioned at the outset, this Court has held that the  
25 Board has wide discretion to "decline to exercise its authority  
26 if to do so will serve the fundamental aims of the [National  
27 Labor Relations] Act." Nabisco, Inc. v. N.L.R.B. at 2614;  
28 quoting International Harvester Co., Indianapolis Works, 138  
29 NLRB 923, 925-26, 51 LRRM 1155 (1962); See Carey v. Westing-  
30 house Corp., 375 U.S. 261, 55 LRRM 2042 (1964), which also  
31 quoted favorably from the same passage in International  
32

1 Harvester. Our task is thus to determine whether or not it  
2 was an abuse of the Board's discretion to determine that  
3 deferral to arbitration here furthured the fundamental aims  
4 of the NLRA.

5 It is, of course, well settled that there is strong  
6 Congressional policy encouraging arbitration of labor disputes.  
7 It has also been said that "the fostering of one policy may  
8 be detrimental to another policy, viz.: that expressed by the  
9 Congress in granting the Board power to remedy unfair labor  
10 practices." Local Union No. 2188, Int. Bro. of Elec. Wkrs.,  
11 v. N.L.R.B., 494 F.2d 1087, 1090, 85 LRRM 2576, 2578-2579  
12 (D.C. Cir., 1974). We must remember, however, that both of  
13 these policies are merely means toward the end of promoting  
14 labor peace.

15 Machinists Lodge, supra, 90 LRRM  
16 at 2927. (Citations omitted.)

17 COLLYER IS APPLICABLE TO THE FACTS OF THIS CASE.

18 In support of their contentions that Collyer is not appropri-  
19 ate for this case, the complainants cite General American Trans. Corp.  
20 NLRB, 94 LRRM 1483 (1977) and Roy Robinson Chevrolet, NLRB, 94  
21 LRRM 1474 (1977).

22 In General American Trans. Corp., supra, the NLRB held that  
23 they would not defer to arbitration in cases involving an alleged  
24 violation of 8(a)(1) & 8(a)(3) of the NLRA. In Roy Robinson,  
25 supra, the NLRB found that no independent violation of 8(a)(1) or  
26 8(a)(3) of the Act was alleged in the complaint or found by the  
27 Administrative Law Judge. 94 LRRM at 1477.

28 The charges filed by the complainants allege certain facts  
29 and at the end of the complaint allege a general violation by the  
30 defendant of subsections 1, 2, 3 & 5 of 39-31-401, MCA. The facts  
31 alleged in the charges would indicate a possible violation of  
32

1 Section 11 of the collective bargaining agreement, which incorporates  
2 by reference 7-33-4125, MCA. This is a possible violation of  
3 39-31-401(5).

4 The alleged facts do not, however, indicate an independent  
5 violation of 39-31-401(1) or (3). Absent specific allegations of  
6 fact supporting a violation of sections 39-31-401(1) or (3), MCA,  
7 the Board of Personnel Appeals can defer under the Collyer policy.

8 Since 1971, the determination as to whether to defer alleged  
9 violations of Section 8(a)(5)<sup>1</sup> to arbitration has revolved around  
10 the factors which were relied upon by the NLRB majority to justify  
11 deferral in the Collyer case itself.

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

16 . . . there is effective dispute-solving machinery available,  
17 and if the combination of past and presently alleged misconduct  
18 does not appear to be of such character as to render the use  
of that machinery unpromising or futile. . . .<sup>2</sup>

19 Using this criteria, the NLRB has declined to defer to arbi-  
20 tration when such circumstances as these have existed: (1) the  
21 unfair labor practice charge alleged that there was no stable  
22 collective bargaining relationship, (2) the respondent's conduct  
23 constituted a rejection of the principles of collective bargaining  
24 or the organizational rights of employees, (3) the unfair labor  
25 practice charge alleged that the employer's conduct was in retali-  
26 ation or reprisal for an employee's resort to the grievance proce-  
27 dure or otherwise struck at the foundation of the grievance and

28  
29 1. "It shall be an unfair labor practice for an employer to refuse to bargain  
30 collectively with the representatives of his employees, subject to the provisions  
of Section 9(a)."

31 2. United Aircraft Corp., 204 NLRB 879, 83 LRRM 1411 (1972).

1 arbitration mechanism, (4) the employer had interfered with the  
2 use of the grievance-arbitration procedure.<sup>3</sup>

3 The respondent must be willing to arbitrate the issue which  
4 is arbitrable. Criteria related to this factor are: (1) the  
5 respondent must be willing to arbitrate and/or willing to waive  
6 the procedural defense that the grievance is not timely filed, (2)  
7 the dispute must be clearly arbitrable or at least arguably covered  
8 by the contract and its arbitration provision, (3) a final and  
9 binding procedure must exist.<sup>4</sup>

10 The dispute must center on the labor contract. The Collyer  
11 decision emphasized that the prearbitral deferral process was  
12 appropriate where the underlying dispute centered on the interpreta-  
13 tion or application of the collective bargaining contract. This  
14 doctrine was clearly stated in the NLRB's 1972 Teamsters, Local 70  
15 decision:

16 In the Collyer case, we set forth the general considerations  
17 which led us to the conclusion that arbitration is the preferred  
18 procedure for resolving a dispute which could be submitted to  
19 arbitration concerning the meaning of the parties' agreement;  
20 we adhere to those views and we see no need to reiterate them  
21 here. Our concern, rather, is the application of the Collyer  
22 principles to the facts of this case.

23 . . .the resolution of this dispute necessarily depends  
24 upon a determination of the correct interpretation of a  
25 contract; and as said in Collyer, it is this precise type of  
26 dispute which can better be resolved by an arbitrator than by  
27 the Board.

28 . . .It is thus our considered judgment that when, as here,  
29 the alleged unfair labor practices are so intimately entwined  
30 with matters of contractual interpretation, it would best  
31 effectuate the policies of the act to remit the parties in the  
32 first instance to the procedures which they have devised for  
determining the meaning of their agreement. (Emphasis  
added.)

3. American Bar Association, The Developing Labor Law,  
34 Cumulative Supplement 1971-78 (Washington, D.C.: Bureau of National Affairs,  
35 Inc., 1976), p.275-77.  
36 1976 Supplement (Washington, D.C.: Bureau of National Affairs, Inc.,  
37 1977), p. 136-37.  
38 1977 Supplement (Washington, D.C.: Bureau of National Affairs, Inc.,  
39 1978), p. 161-62.  
40 <sup>4</sup> Ibid. 1971-75 Supplement, p. 277-79; 1976 Supplement, p. 137; 1977 Supplement,  
41 p. 162-163.  
42 <sup>5</sup> Teamsters, Local 70 (National Biscuit Company), 198 NLRB 552, 80 LRRM 1727  
(1972).

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

7 Even where there has been language in the contract upon which  
8 the dispute has been centered, the nature of the language has  
9 affected whether or not the NLRB has deferred an unfair labor  
10 practice complaint to arbitration. The NLRB has not deferred in  
11 cases where: (1) the contract language on its face was illegal or  
12 may have compelled the arbitrator to reach a result inconsistent  
13 with the policy of the Act, (2) the respondent's argument constru-  
14 ing the contract language to justify its conduct was "patently  
15 erroneous," (3) the contract language was unambiguous (and there-  
16 fore the special competence of an arbitrator was not necessary to  
17 interpret the contract.)<sup>6</sup>

18 The above-cited criteria indicate that the NLRB's Collyer  
19 doctrine would appropriately be applied to the unfair labor practice  
20 allegations now under consideration.

- 21 1. There is no evidence that this dispute does not arise  
22 within the confines of a stable collective bargaining  
23 relationship.
- 24 2. There is no evidence that the parties' past or present  
25 relationship would render the use of the grievance-arbi-  
26 tration process futile.
- 27 3. Because the respondent cited the availability and appropri-  
28 ateness of the contractually agreed upon grievance-arbitra-  
29 tion procedure as an affirmative defense to this unfair  
30

31  
32 <sup>6</sup> Op. Cit., American Bar Association, 1971-78 Supplement, p. 279-282; 1976 Supple-  
ment, p. 137-138, 1977 Supplement, p. 163-164.

1 labor practice charge, and has moved to defer to arbitra-  
2 tion pursuant to Collyer, it is assumed that the respondent  
3 is willing to arbitrate this issue and to waive the  
4 procedural defense that the grievance is not timely  
5 filed.

6 4. The issue in dispute is covered by the collective bargain-  
7 ing agreement between the parties to this matter (1980-81  
8 contract, section 11). That collective bargaining  
9 agreement contains a grievance procedure which culminates  
10 in final and binding arbitration (1980-82 contract,  
11 Section 24). Therefore the dispute is clearly arbitrable.

12 5. The dispute clearly centers on the interpretation or  
13 application of Section 11 of the 1980-82 collective  
14 bargaining agreement.

15 6. The dispute is eminently suited to the arbitral process,  
16 and resolution of the contract issue by an arbitrator  
17 will probably dispose of the unfair labor practice  
18 issue.

19 The Board clearly has the authority to hear this complaint  
20 under the provisions of 39-31-403, MCA. However, it is determined  
21 that the policies and provisions of the Act<sup>7</sup> would best be effectuated  
22 if this Board were to remand this complaint to the grievance-  
23

24  
25 <sup>7</sup> Specifically, 39-31-101 and 39-31-306, MCA. Section 39-31-101, MCA, provides  
26 as follows:

27 Policy. In order to promote public business by removing certain recognized  
28 sources of strife and unrest, it is the policy of the state of Montana to  
29 encourage the practice and procedure of collective bargaining to arrive at  
30 friendly adjustment of all disputes between public employers and their employees.

31 Section 39-31-306, MCA, provides in pertinent part as follows:

32 (2) An agreement may contain a grievance procedure culminating in final and  
binding arbitration of unresolved grievances and disputed interpretations of  
agreements.

(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. . .

1 arbitration procedure specified by the collective bargaining  
2 agreement of the parties.

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

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

10 The parties will then process this grievance in accordance  
11 with the procedures outlined in Section 24 of the 1980-2 contract.

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

- 14
- 15 1. the respondent does not, within ten days of receipt of  
16 this Order, file a written statement with this Board  
17 indicating that it is willing to arbitrate this issue  
18 and to waive the procedural defense that this grievance  
19 is not timely filed;
- 20 2. an appropriate and timely motion adequately demonstrates  
21 that this dispute has not, with reasonable promptness  
22 after the issuance of this order, been resolved in the  
23 grievance procedure or by arbitration; or
- 24 3. an appropriate and timely motion adequately demonstrates  
25 that the grievance or arbitration procedures were not  
26 conducted fairly.
- 27

28 DATED this \_\_\_\_\_ day of April, 1982.

29

30 BOARD OF PERSONNEL APPEALS

31

32 By Robert R. Jensen  
Administrator

NOTICE

Exceptions may be filed to this Order within twenty days after service thereof. Exceptions shall be addressed to the Board of Personnel Appeals, Capitol Station, Helena, Montana 59620.

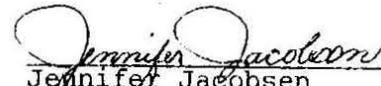
\* \* \* \* \*

CERTIFICATE OF MAILING

I, Jennifer Jacobsen, hereby certify and state that on the 20 day of April, 1982, a true and correct copy of the above captioned ORDER was sent to the following:

Greg J. Skakles  
Law Offices of  
JOHNSON, SKAKLES & KEBE  
117 Main Street  
Anaconda, MT 59711

John N. Radonich  
Anaconda-Deer Lodge County  
Attorney  
108 East Park  
Anaconda, MT 59711

  
Jennifer Jacobsen

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Complainant, )  
- vs - )  
ANACONDA-DEER LODGE COUNTY, )  
Defendant. )

ORDER OF DEFERRAL  
AND  
CONTINUING JURISDICTION

\* \* \* \* \*

On April 20, 1982, the Board Administrator issued an Order in the above-captioned case ordering the parties to take the grievances to arbitration. On May 3, 1982, the defendant filed a statement indicating its willingness to arbitrate the issue involved in the unfair labor practice charges and further waiving the defendant's right to assert any timeliness procedural defenses.

On May 11, 1982, the charging parties filed exceptions to the April 20, 1982, Order. Thereafter, both sides to this action filed briefs in support of their respective positions. On July 9, 1982, oral argument was had before the full Board of Personnel Appeals.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1 IT IS ORDERED that the charging parties' Exceptions to  
2 Order are hereby denied.

3 IT IS FURTHER ORDERED that the April 20, 1982, Order of  
4 this Board in the above-captioned case is hereby affirmed  
5 with the following qualifications:

6 1. After the arbitrator makes his award in this case,  
7 the employer-defendant shall transmit a copy of the arbitrator's  
8 decision to this Board by registered mail within ten (10)  
9 days after the employer receives its copy of the decision.

10 2. This Board retains jurisdiction of this case for  
11 the purposes stated in the April 20, 1982, Order and also  
12 for the purposes of: 1) determining whether the award is  
13 consistent with the purposes and policies of the Act; and 2)  
14 reviewing the arbitrator's decision to determine whether  
15 that decision addresses and answers all the complaints  
16 alleged in the unfair labor practice charges.

17 DATED this 13th day of August, 1982.

18  
19 BOARD OF PERSONNEL APPEALS

20  
21 BY John Kelly Addy  
22 John Kelly Addy  
23 Chairman

24 \* \* \* \* \*

25 CERTIFICATE OF MAILING

26 The undersigned does certify that a true and correct  
27 copy of this document was mailed to the following on the  
28 16<sup>th</sup> day of August, 1982:

29 Greg J. Skakles  
30 JOHNSON, SKAKLES, & KEBE  
31 Attorneys At Law  
32 117 Main Street  
Anaconda, MT 59711

D. Patrick McKittrick  
Attorney At Law  
315 Davidson Building  
P.O. Box 1184  
Great Falls, MT 59403

John N. Radonich  
County Attorney  
Anaconda-Deer Lodge County  
108 East Park Avenue  
Anaconda, MT 59711

FAD6:C/1

Jennifer Jacobson