UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

No. 28-CA-22625

BABCOCK & WILCOX CONSTRUCTION COMPANY, INC.

and

COLLETA KIM BENELI

AMICUS CURIAE BRIEF OF THE ASSOCIATION FOR UNION DEMOCRACY

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AMICUS CURIAE BRIEF OF
THE ASSOCIATION FOR UNION DEMOCRACY

I. The Interest of the *Amicus* Association for Union Democracy

The Association for Union Democracy (AUD) is a nonprofit corporation founded in 1969 which seeks to further democratic principles and practices in American labor organizations, both by encouraging union members to participate actively in the internal life of their unions and by protecting the exercise of their democratic rights within their unions. No other organization devotes itself primarily to the cause of union democracy.

The sponsors of the Association include former leaders of major labor unions, religious leaders, lawyers, prominent educators in labor studies and labor law, and many union members. Despite divergent backgrounds, all share the view that the labor movement is one of the great forces that helps sustain democracy in our national life and that, if it is to serve this purpose, union leaders must be responsive to their members, and unions must be democratic and just in their internal operations.

The AUD's activities include publishing a newsletter and educational materials for union members about their rights; holding educational conferences and training sessions; and responding to requests from individual union members for information, assistance, and referrals. On many occasions, the AUD has filed *amicus* briefs in the courts, and petitioned for, or commented on, Department of Labor rulemaking proposals, in cases or proceedings related to internal union democracy. The AUD does not take sides in internal union disputes. Its mission

is simply to help assure that all union members' rights to participate in the affairs of their unions, without fear of retaliation, are fully protected.

II. NLRB Deferral and Union Democracy

The NLRB's standards for deferring to arbitration decisions are traditionally seen as attempting to strike a balance between national labor policies "protecting individual rights and encouraging private dispute resolution within collective bargaining." Office of the General Counsel, Memorandum GC 11-05 at 1 (Jan. 20, 2011). In its varying approaches to striking that balance, however, the Board has tended to overlook a particular species of "individual rights" that is every bit as central to national labor policy as an individual's right to support or oppose union representation in the workplace. That is the national policy, embodied primarily in the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 401-531, promoting internal union democracy by protecting the rights of union members to freedom of speech and assembly, equal treatment, due process in union disciplinary proceedings, and periodic, fairly conducted, elections of union officers in which all members have a right to nominate and campaign for candidates, or run for office themselves, "subject to reasonable qualifications uniformly imposed." *Id*. § 481(e). *See generally* WILLIAM W. OSBORNE, JR., ED., LABOR UNION LAW AND REGULATION 1-106, 219-76 (2003).

There are a variety of reasons why promoting and protecting union democracy is a major feature of federal labor law, but as explained by the late Professor Clyde Summers, a leading architect of union democracy law in general and the LMRDA in particular, the "public purpose of collective bargaining is the cornerstone of the public interest in union democracy." Clyde W.

Summers, *The Public Interest in Union Democracy*, 53 NW. U. L. REV. 610, 615 (1958). He had previously elaborated on this point:

> With a union acting as their representative in collective bargaining, workers . . . become participants with a voice in determining the terms and conditions of their employment, and to at least this extent have a share in controlling the economic system within which they live and work. . . . Once it is clearly recognized that unions are economic legislatures engaged in determining the laws by which men work . . . the importance of guaranteeing workers the right to share in making those laws is self-evident.

Clyde W. Summers, *The Right to Join a Union*, 47 COLUM. L. REV. 33, 73-74 (1947).

The LMRDA for the most part is enforced through litigation in the federal courts, but the NLRB has recognized that some violations of union democracy principles also fall within its purview. For many years, the Board adhered to an expansive view of that overlap, holding, for example, that discipline imposed by a union on a member in retaliation for the member's dissident activities within the union constituted a violation of § 8(b)(1)(A). *E.g.*, *Carpenters Local 22 (Graziano Constr. Co.)*, 195 NLRB 1 (1972). The Board has since narrowed that overlap considerably, *see Office & Prof'l Employees Local 251 (Sandia Nat'l Lab.)*, 331 NLRB 1417 (2000), but it has not eliminated it completely. Where union retaliation against members for dissident activities has "some nexis with the employer-employee relationship" it is squarely within the NLRB's jurisdiction to protect the member from those consequences. *CC1Limited Partnership d/b/a Coca Cola Puerto Rico Bottlers (Carlos Rivera)*, 358 NLRB No. 129 at 5 (2012), *quoting Electrical Workers Local 2321 (Verizon)*, 350 NLRB 258, 262 (2007).

The circumstances under which the Board will, or will not, defer to the results of contractual grievance procedures in handling unfair labor practice cases under §§ 8(a)(1) and 8(a)(3) can most definitely have an "impact on the members' relationship with their employer."

Therefore, it is incumbent upon the Board when determining its deferral policies to include in the balance more than just individual rights generally versus encouraging private dispute resolution within collective bargaining. When striking that balance, the Board should also be sensitive to the very real dangers to the national labor policy favoring union democracy that can result when its approach results in deferral in unfair labor practice cases where the charging parties are outspoken critics, or political opponents, of the union officials handling the member's contractual grievance.

The dangers to union democracy from Board policies too deferential to contractual grievance procedures flow from the fact that the union officials who process the grievances on behalf of the members may be the very same officials (or their close allies) who are the targets of the dissident members' criticism, and possibly their attempts to defeat them in union officer elections. Moreover, it is common in such cases for the interests of the union – or at least the union officials handling the grievance – to be more closely aligned with the interests of the employer than they are with those of the member. After all, dissident complaints about a union's leadership often focus on the alleged failures of union representatives to negotiate better contracts, or to effectively enforce the contracts they have. In these situations, the dissident is a thorn in the sides of both the union and management. "This 'troublemaker' [may be] upsetting a very comfortable relationship between the employer and the union. Both parties want to get rid of this person, and they are exactly the same parties that control the grievance procedure." Susan Jennik, *Toward More Perfect Unions: Public Policy and Union Democracy*, in UNIONS AND PUBLIC POLICY 113, 118 (Lawrence G. Flood, ed. 1995).

An all too common example of this phenomenon is described in an academic study of

union politics and rank-and-file reform efforts in Teamsters Local 705, which represents UPS workers in Chicago:

> [C]ompanies like UPS took a keen interest in union politics. Nothing, of course, was more political or a more certain determinant of the tenor of labor relations than a union election. . . . UPS employee Robert Maziarka . . . ran unsuccessfully in the 1976 local election against the [union old guard]. Taking a whipping at the polls was only the beginning of his mistreatment at the hands of UPS and the union. . . . Once back on the job, he was shadowed by UPS management. It became common for a supervisor to ride along with Maziarka on his daily routes. Soon he was being disciplined for a host of trumped-up minor violations. . . . Finally, . . . [he] was fired. The charge, "over staying the lunch hour," was supported by the union business agent, who accused Maziarka of "stealing time." Despite having multiple witnesses to counter the company's claim, Maziarka was never reinstated. His brief political experience taught him what every rank-and-filer tired of abuse eventually learned: "Attempting to try any kind of reform would lead to getting buried."

ROBERT BRUNO, REFORMING THE CHICAGO TEAMSTERS: THE STORY OF LOCAL 705 at 35-36 (2003).

While that incident did not become the subject of an unfair labor practice charge, numerous examples of similar incidents that did end up before the NLRB are collected in Paul Alan Levy, *Deferral and the Dissident,* 24 U. MICH. J. L. REFORM 479 (1991). The NLRB deferred in some and not in others; some arose before the Board adopted the current *Olin* standard for deferral and some after; and in some a court of appeals rejected the Board's approach, and in others the courts agreed with it. Nevertheless, there is one thing all these examples make clear: when the charging party is a visible and vocal critic or political opponent of the union's incumbent leadership, there are countless subtle and not-so-subtle ways by which union officials can undermine a grievant's chances for success at arbitration.

Unfortunately, the LMRDA does not provide a remedy for this type of union misconduct, and union officials inclined to behave that way are usually too smart to provide the smoking gun

a charging party, or a plaintiff in hybrid § 301/fair representation litigation, needs to prove a breach of the union's duty of fair representation. Indeed, one empirical study found that plaintiffs prevailed on the merits, or obtained favorable settlements, in less than 5 percent of the DFR cases litigated in the courts.[1] Michael J. Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 BUFF. L. REV. 89, 135-37 (1985). While the presence of a DFR violation "plainly warrants a refusal to defer," *Roadway Express, Inc. (Amadeo Bianchi)*, 355 NLRB 197, 203-04 (2010), a union member in these situations should not have to prove a DFR violation to have an 8(a)(1) or 8(a)(3) charge heard by the NLRB. In these cases, unlike the typical hybrid §301/DFR case, the union member is not trying to reopen a purely contractual dispute that has already been resolved through the collective bargaining agreement's grievance procedure. Too lenient a standard for proving a DFR violation in that setting could expose unions to substantial costs – both in liability and in the likelihood that unions, to preempt such suits, would take more cases to arbitration than they otherwise would. And it could undermine the clear national labor policy favoring resolution of *contract* disputes through collectively bargained grievance procedures.

However, a more lenient deferral policy on the part of the Board would not expose the union to any added liability or costs, and it would not divert from collectively bargained grievance procedures purely contractual disputes. Nor would it expose employers to extra liability for alleged contract violations. At most, it would increase the chances of employers being found liable for *statutory* violations that might overlap somewhat with contractual rights

[1] Although those findings are nearly 30 years old, there have been no significant changes in the law governing DFR litigation in the intervening years that would lead one to expect major changes in the outcomes of these cases.

but that nevertheless remain independent of them. But that is a good thing. If the employer has committed an unfair labor practice, it should be held liable for doing so. It is the NLRB, not contractual grievance procedures, that Congress made responsible for enforcing employees' § 7 rights. Where a charging party's political situation within the union is such that an objective observer would infer an adverse relationship, or a conflict of interest between that member and the union or its officials who would process the grievance, combined with sufficient evidence of the alleged unfair labor practice to issue a complaint, the charging party has presented a sufficient showing of need for a neutral and independent NLRB investigation, and deferral is not appropriate.

III. At a Minimum, The Board Should Adopt the Changes in Post-Arbitration Deferral Standards Recommended by the General Counsel

If the Board is unwilling to adopt the standard just articulated, the AUD urges it to adopt, at a minimum, the changes in post-arbitration deferral standards recommended by the General Counsel in Memorandum GC 11-05. First, the burden should be shifted to the party seeking deferral – the union or the employer, not an individual charging party or the General Counsel – to demonstrate that the arbitration decision is deferral worthy. They are the parties who, by participating in the arbitration are in the best position to say what was actually presented and decided at the hearing, and they are best able to structure the proceedings to facilitate or hinder the consideration of the statutory issues by framing the issues. To carry that burden, the employer and/or union should also be required to demonstrate that the statutory issue was *actually* presented to the arbitrator, and that the arbitrator *actually* decided it. The *Olin*

standard's assumption that statutory issues are adequately presented simply by virtue of those issues being "factually parallel" to the contractual issue just not sufficient to protect charging parties where there is any evidence before the Board that there is an adverse relationship or conflict of interest between the charging party and the union or its officials.

The AUD would also like to suggest a modification to the sample Collyer deferral letter included with the General Counsel's memo. On page two of the letter, in the paragraph dealing with "*union/employer conduct,*" the reference to a conflict developing between the union and the charging party should be expanded to recognize the equally negative consequences that might result from a conflict between the a union *official* and the charging party. A union official's interests – for example, his or her interest in discrediting a political rival or critic within among the membership – may not necessarily be the same as the union's institutional interest, but that conflict between the union official and the charging party can be just as destructive to the integrity of the arbitration process.

IV. In 8(a)(1) and 8(a)(3) Cases, the NLRB Should Not Defer to Joint Grievance Committees Lacking an Impartial Member Able to Break Ties Between Union and Management Committee Members

Although the present case does not appear to involve "arbitration" by a joint grievance committee lacking an impartial tie-breaker,[2] the Board's consideration of the General Counsel's proposed changes to its deferral policies provides an ideal opportunity for the Board to revisit its

[2] The grievance committee here was comprised of two union representatives, two company representatives, "and one NAMPC staff representative." Decision of the Administrative Law Judge at 4. According to its website, representatives of the National Maintenance Agreements Policy Committee serve as "impartial administrators" of National Maintenance Agreements. *See* http://www.nmapc.org/about/.

earlier decisions that treat decisions by joint grievance committees *lacking* an impartial tie-breaker in exactly the same fashion, for deferral purposes, as it treats decisions made by impartial arbitrators. *E.g.*, *Denver Chicago Trucking* Co., 132 NLRB 1416 (1961); *Terminal Transport Co., Inc.*, 185 NLRB 672 (1970). Although sometimes found in construction industry collective bargaining agreements, *see, e.g., Sachs Elec. Co. (Joseph T. Verlin)*, 278 NLRB 866 (1986), grievance procedures using the type of joint committees discussed here are most commonly found in contracts involving the trucking industry.

Over occasional dissents in the beginning from Member Jenkins, *see, e.g., Terminal Transport Co., supra* at 674; *Chemical Leaman Tank Lines, Inc. (Ricky Stauffer),* 251 NLRB 1058 (1980), the Board has consistently followed its *Terminal Transport* approach to what has been called "arbitration without neutrals." *See* David E. Feller, *Arbitration Without Neutrals: Joint Committees and Boards*, 37 PROCEEDINGS OF THE ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 106 (1984). Basing its arguments largely on two important examinations of this form of grievance resolution, Levy, *supra*, 24 U. MICH. J. L. REFORM at 551-69, and Clyde W. Summers, *Teamster Joint Grievance Committees: Grievance Disposal Without Adjudication*, 37 PROCEEDINGS OF THE ANNUAL MEETING, NAT'L ACADEMY OF ARBITRATORS 130 (1984), as well as the observations and experience of a number of lawyers associated with the AUD who have represented charging parties whose grievances were handled through this type of joint grievance committee, the AUD's position is that the NLRB should never treat this process like arbitration for purposes of deferral, at least in 8(a)(1) and 8(a)(3) cases. This is not to say that these joint committees may not be a reasonable and appropriate way for the parties to the agreements creating them to resolve their contract disputes. But they are

simply not dispute resolution mechanisms worthy of NLRB deference when it comes to enforcing employees' § 7 rights.

Summers and Levy have identified many differences between joint committees lacking a neutral tie-breaker and traditional arbitration that warrant different treatment when it comes to NLRB deferral. For example, the typical Teamster grievance panel hears as many 15 to 30 cases a day; spending little more than 15 or 20 minutes on average, for each; committee members are often exposed to ex parte evidence outside the hearing; the system encourages "horse-trading" of grievances, rather than individual consideration of each grievance on its merits; and is highly susceptible to political manipulation in a variety of ways. As Summers summarized his findings:

> The point here is not simply that the system is vulnerable to abuse and may occasionally go astray. The point . . . is that the number of cases, the pressures of time, the unavailability of evidence, and the speed with which cases are disposed makes it impossible for the panel in many cases to hear all the relevant facts, or even to make a considered judgment on the basis of limited facts and arguments presented at the hearing. This, in turn, creates a climate and practice of inadequate preparation, summary presentation, incomplete inquiry, and decisions based on a partial or imaginary shadow of the facts.

Summers, *supra* at 138.

Thus, even if the Board decides not to adopt the General Counsel's recommendations for other types of cases, it should apply them to joint grievance committees that lack a neutral tie-breaker as part of the panel.

Conclusion

For all the foregoing reasons, the Board should abandon its *Olin* standard for post-arbitration deferral and at a minimum, adopt the proposal of the General Counsel.

Respectfully submitted,

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Certificate of Service

I, Michael Goldberg, certify that I caused a copy of the foregoing brief to be served by email on the following by email on this 25th day of March, 2014, and that I will serve them by postal mail on the 26th of March, 2014::

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