UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BABCOCK & WILCOX CONSTRUCTION CO., INC.,	)	
	)	
Respondent;	)	
	)	
and	)	**Case No. 28-CA-022625**
	)	
COLETTA KIM BENELI, an Individual,	)	
	)	
Charging Party.	)	

BRIEF OF *AMICUS CURIAE*
NATIONAL ELEVATOR BARGAINING ASSOCIATION

Respectfully submitted,

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STATEMENT OF INTEREST

The National Elevator Bargaining Association ("NEBA") hereby responds to the National Labor Relation Board's (the "Board") Invitation to File Briefs regarding the arbitral deferral standard by filing this *amicus* brief in support of the current standard.

NEBA is a multi-employer association that currently represents the largest elevator companies in the world in their collective-bargaining with the International Union of Elevator Constructors ("IUEC"). NEBA's employer-members include KONE, Inc. ("KONE"), Otis Elevator Co. ("Otis"), Schindler Elevator Corp. ("Schindler"), ThyssenKrupp Elevator Corp. ("ThyssenKrupp"), Fujitec America, Inc. ("Fujitec"), Mitsubishi Electric and Electronics USA, Inc. ("Mitsubishi") and North American Elevator Services ("NAES"). KONE, Otis, Schindler and ThyssenKrupp represent over 70% of all work done by the elevator industry in the United States – together they are known as the "Big Four." The IUEC is the exclusive representative of field employees including the Elevator Constructor Mechanics, Assistant Mechanics, Apprentices and Helpers employed by the NEBA employer-members. The IUEC has stated that it was formed more than 100 years ago. It currently has 65 affiliated local unions and over 25,000 members. See http://www.iuec.org/. The collective-bargaining relationship between the companies and their predecessors and the IUEC dates back to the early 20th Century – well before the passage of the National Labor Relations Act (the "Act").

The IUEC has maintained a collective-bargaining relationship with the elevator companies since the early 1900s, whether directly with the companies or through multi-employer associations, beginning with the National Elevator Manufacturers Association ("NEMA") which later changed its name to the National Elevator Industry, Inc. ("NEII"), and now NEBA.[1] Every

[1] This long-term collective-bargaining relationship has benefitted the IUEC, the employers and the employees. In fact, the IUEC has presented evidence at arbitration hearings that the elevator trade offers employees

collective-bargaining agreement in NEBA's records, beginning with the 1922-1923 Chicago Elevator Manufacturers' Association and IUEC, Local 2 of Chicago agreement, has provided for impartial arbitration of disputes. The provision for impartial arbitration has changed over time, with the parties at times using the United States Federal Mediation and Conciliation Service ("FMCS"), the American Arbitration Association ("AAA"), a panel of four designated arbitrators who were identified in the contract, and the parties' current selection of an impartial arbitrator or panel of arbitrators without the assistance of a third party. In addition to arbitration, the parties have also entered into agreements, arrangements and settlements during the terms of the contracts. Thus, the elevator industry has a long and rich history of resolving disputes by arbitration through agreement of the parties. As might be expected given this mature collective-bargaining relationship, there are many arbitration decisions; and the IUEC and the companies frequently refer to, and rely on, arbitral precedent in their dealings with each other, whether formal or informal.

ANSWERS TO THE BOARD'S QUESTIONS

NEBA's short answers to the Board's questions follow, with more detailed explanations offered under Argument.

1. The Board should adhere to its existing standard for post-arbitral deferral under Spielberg Mfg. Co., 112 NLRB 1080 (1955) and Olin Corp., 268 NLRB 573 (1984) as a practical standard that has worked for decades and is consistent with the purposes of the Act in "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives

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outstanding opportunities and the highest wages for blue-collar employees in the country. See America's Best-Paying Blue-Collar Jobs (Forbes June 5, 2012), http://www.forbes.com/sites/jacquelynsmith/2012/06/05/americas-best-paying-blue-collar-jobs-2/; see also http://www.bls.gov/ooh/construction-and-extraction/print/home.htm. In addition, according to the Bureau of Labor Statistics, the median pay for Elevator Constructors is $76,650 as of May 2012, and employment is projected to grow 25% from 2012 to 2022. See http://www.bls.gov/ooh/construction-and-extraction/print/elevator-installers-and-repairers.htm.

of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151.

2. The Board should not adopt the standard outlined by the former Acting General Counsel in GC Memorandum 11-05 (Jan. 20, 2011), because it is not consistent with the purposes of the Act and will result in increased litigation and a waste of valuable, indeed scarce, resources of the parties and the government.

3. Modifications to the standard for post-arbitral deferral should have no impact on the determination to defer in the first instance. Rather, placing limitations on pre-arbitral deferral would be inconsistent with the purpose of the Act to foster industrial peace through collective bargaining and would undermine the grievance and arbitration procedure which has been at the core of the parties' peaceful resolution of disputes for nearly 100 years.

4. Resolution of disputes through settlement is most consistent with the purposes of the Act, as it encourages employers and unions to bargain, and does not require the intervention of a third party. Accordingly, even if the Board modifies the existing standards for pre-arbitral and/or post-arbitral deferral, it should honor any *bona fide* voluntary settlement reached by employers and unions through bargaining.

ARGUMENT

I. THE EXISTING STANDARD FOR POST-ARBITRAL DEFERRAL FOSTERS INDUSTRIAL PEACE THROUGH COLLECTIVE BARGAINING, THEREBY FURTHERING THE PURPOSES OF THE ACT

Congress, the Board and the courts have long recognized arbitration as a cornerstone of federal labor policy. Indeed, in Section 1 of the Act, Congress "declared … to be the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining . . . ." 29 U.S.C. § 151. The Board and the courts have consistently endorsed this policy and have recognized the importance of a negotiated provision for the resolution of labor disputes to a

successful collective-bargaining relationship. See Olin Corp., 268 NLRB 573, 574 (1984) (stressing "[t]he importance of arbitration in the overall scheme of Federal labor law"); International Harvester Co., 138 NLRB 923, 925-26 (1962) (recognizing that "[e]xperience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of grievance and disputes arising thereunder, 'as a substitute for industrial strife,' contribute significantly to the attainment of th[e] statutory objective" of "promot[ing] industrial peace and stability by encouraging the practice and procedure of collective-bargaining"); Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 252 (1970) (recognizing the importance of "voluntary settlement of labor disputes without resort to self-help and more particularly to arbitration as a means to this end" and suggesting that arbitration is the "central institution in the administration of collective bargaining contracts").

Consistent with this broad policy of favoring settlement of disputes through an agreed-upon process, the Board has declined to exercise its jurisdiction on numerous occasions and has consistently deferred to arbitration awards. Under the current, and decades-old, standard the Board will defer to an arbitration award if:

1. The arbitration proceedings appear to have been fair and regular;
2. All parties agreed to be bound;
3. The arbitrator's decision is not "clearly repugnant" to the purposes of the Act; and
4. The arbitrator must have considered the unfair labor practice issue.

Spielberg Mfg. Co., 112 NLRB 1080, 1082 (1955); Olin Corp., 268 NLRB 573, 574 (1984); see also Roadway Express, Inc., 355 NLRB No. 23, p. 15 (May 21, 2010). The burden of proof is on the party opposing deferral. Olin Corp., 268 NLRB at 574; see also Roadway Express, Inc., 355

NLRB No. 23, p. 15 (adding that the "burden is a heavy one"); Aramark Services, Inc., 344 NLRB 549, 550 (2005) (same).

Over many decades, the Board has elaborated on the four factors recited above for deferral to an arbitration award, as follows:

A. Fair And Regular Arbitration Proceedings

The "fair and regular" factor refers to the "grievance *proceedings* rather than to the result." Roadway Express, Inc., 355 NLRB No. 23, p. 15. The proceedings will generally be found to be "fair and regular" unless "it clearly appears [they] were tainted by fraud, collusion, unfairness, or serious procedural irregularities." International Harvester Co., 138 NLRB at 927 and 935.

B. Agreement To Be Bound By The Award

Typically, the agreement to be bound is embodied in the parties' collective-bargaining agreement, and this is rarely an issue. See Roadway Express, Inc., 355 NLRB No. 23, p. 15; Spielberg Mfg. Co., 112 NLRB 1080.

C. "Clearly Repugnant" To The Act

The standard for determining whether an arbitrator's decision is "clearly repugnant" is whether it is "susceptible" to an interpretation consistent with the Act. Olin Corp., 268 NLRB at 574; see also Roadway Express, Inc., 355 NLRB No. 23, p. 15; Smurfit-Stone Container Corp., 344 NLRB 658, 659-60 (2005). Thus, if any Board precedent supports the decision, it is not "palpably wrong" and is not repugnant to the Act, even if other Board precedent could be viewed as contrary. Roadway Express, Inc., 355 NLRB No. 23, p. 15 (citing Kvaerner Philadelphia Shipyard, 346 NLRB 390, 391 (2006)); Smurfit-Stone Container Corp., 344 NLRB at 659-60. In addition, "consistent with the Act" does not mean that the arbitrator reached the same result as the Board, and the Board's disagreement with the arbitrator's decision is not a sufficient basis to

decline to defer to the decision. Id.; see also Andersen Sand and Gravel Co., 277 NLRB 1204, 1205 (1985) (clarifying that the Board's standard of review for post-arbitral deferral "does not contemplate that the Board will substitute its judgment for that of the arbitrator in resolving contractual issues"); Aramark Services, Inc., 344 NLRB at 550 (same). The same holds true with respect to remedies, and an arbitrator's remedy that is less than, or different from, a remedy the Board might provide is not by itself enough to refuse to defer to the award.[2] Shands Jacksonville, 359 NLRB No. 104, pp. 1-2 (Apr. 26, 2013).

D. Consideration Of The Unfair Labor Practice Issue

In Olin Corp., the Board held that "an arbitrator has adequately considered the unfair labor practice issue if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. Olin Corp., 268 NLRB at 574; see also Sodexo, Inc., 359 NLRB No. 166, p. 3 (July 16, 2013); Shands Jacksonville, 359 NLRB No. 104, pp. 1-2: Roadway Express, Inc., 355 NLRB No. 23, p. 15. As long as these two criteria are satisfied, it is not necessary for the arbitrator to mention the unfair labor practice or consider the law related to the unfair labor practice. Heartland Health Care Ctr., 359 NLRB No. 155, p. 7 (July 15, 2013); Roadway Express, Inc., 355 NLRB No. 23, p. 15.

As early as 1943, the Board recognized that "policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act," would not

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[2] The Board has not required, and cannot require, that every arbitrator's award provide the same remedy the then-current Board might provide, as the Board's remedies are not always the same, or even consistent. Indeed the Act itself does not specify remedies. See Serv. Garage, Inc., 256 NLRB 931 (1981) (unlawfully discharged employee who lied about his age at NLRB hearing is entitled to back pay); Precoat Metals, 341 NLRB 434 (2004) (denying back pay to employee who lied at NLRB hearing to discourage employees from making false representations under oath to the Board).

further the purposes of the Act but would instead "encourage[ ] [parties] to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through the settlement procedures mutually agreed upon by them." Consolidated Aircraft Corp., 47 NLRB 694, 706 (1943). During the intervening seven decades, the Board has expounded on the concept of encouraging parties to resolve disputes through their negotiated dispute resolution processes and has developed a well-honed policy of deferring to post-arbitral awards as long as the criteria described above are satisfied. During this time, the Board has seen many members come and go, with little change to the deferral policy, and the reason is clear – the existing standard not only protects employees', labor organizations' and employers' rights, but also furthers the purposes of the Act by encouraging collective bargaining. This is especially true in mature collective-bargaining relationships such as the IUEC's and NEBA's, where the parties' relationship is older than the Act. However, these principles should also be applied to newer relationships as well to allow them to resolve their own disputes and grow into mature and successful relationships similar to the IUEC's and NEBA's. Thus, despite the former Acting General Counsel's proposed modification in the case currently under review – without justification other than his disagreement with the subcommittee's decision – the existing standard should not be disturbed.

II. THE BOARD SHOULD NOT ADOPT THE STANDARD OUTLINED BY THE FORMER ACTING GENERAL COUNSEL IN MEMORANDUM GC 11-05

The proposed standard as outlined in Memorandum GC 11-05 places all burdens on the party urging (not opposing) deferral and requires that party to demonstrate that "(1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue; and (3) the arbitral award is not clearly repugnant to the Act." Memorandum GC 11-05, p. 10 (Jan. 20, 2011).

Unlike the existing standard for post-arbitral deferral, the standard proposed by the former Acting General Counsel in Memorandum GC 11-05 is inconsistent with the purpose of the Act to promote resolution through collective bargaining. To the contrary, it would encourage employees and labor organizations to seek the proverbial two bites of the apple, by pursuing claims through the agreed-upon contractual grievance process and litigation before the Board – a waste of valuable resources for all involved. Moreover, employees and labor organizations would likely withhold evidence of the unfair labor practice issue at arbitration and present it only later to the Board, thereby increasing the risk of inconsistent results.[3] Indeed, it is the certainty of duplication of effort and conflicting results that precludes use of the former Acting General Counsel's novel theory.

A. The Proposed Standard Would Not Provide Greater Protection To Employees' Section 7 Rights

The former Acting General Counsel's stated purpose for seeking modification of the existing standard is to provide greater protection to employees' Section 7 rights. Memorandum GC 11-05, p. 1. However, the Act wisely assigns the primary role of protecting employees' rights in a collective-bargaining relationship to the employees' chosen representative – the union, not the Board, and requires the union and the employer to bargain collectively. As a result of collective bargaining, most labor contracts provide for the resolution of disputes though a grievance process typically culminating in arbitration. In conjunction with the contractual grievance process, the parties often include a no-strike provision. Indeed, even when a no-strike provision is absent from a collective-bargaining agreement, it may be implied into that agreement under the NLRA's strong policy favoring arbitral resolution of disputes. See

[3] This tactic would undermine the effectiveness of the arbitration process – the very process the NLRA favors – because parties may be tempted, especially where there is no transcript or official recording of the arbitration, to litigate new or previously undisclosed issues and evidence before the Board.

Teamsters v. Lucas Flour Co., 369 U.S. 95, 105-06 (1962) (a no-strike clause may be implied from an arbitration process because "a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare."); Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 380-81 (1974) (explaining that the strong federal policy favoring arbitration supports finding an implied no-strike provision); Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 408 (1976) ("Even in the absence of an express no-strike clause, an undertaking not to strike would be implied where the strike was over an otherwise arbitrable dispute"). And, of course, through the give-and-take of bargaining, many compromises are made by the labor organization and the employer. Once final agreement is reached, the employees – whose rights are clearly affected by the labor contract – must approve it before it goes into effect. This is the process that has worked for decades and which the Act has tasked the Board with protecting – not usurping the role of the union to act on behalf of employees. Moreover, it must be noted that the existing standard and the proposed standard require Board review of an arbitration award to ensure it is not "clearly repugnant" to the Act, thereby rendering any modification to the other factors for post-arbitral deferral unnecessary.

B. Non-NLRA Precedent Is Entirely Irrelevant

The former Acting General Counsel's attempt to impose precedent from Title VII of the Civil Rights Act of 1964 ("Title VII") and Age Discrimination in Employment Act ("ADEA") cases is misplaced. The purpose behind both Title VII and the ADEA is to protect individuals from discrimination in the workplace. See 42 U.S.C. § 2000e-2; 29 U.S.C. § 621(b). Both Title VII and the ADEA are enforced by the Equal Employment Opportunity Commission ("EEOC"). See 42 U.S.C. § 2000e-5; 29 U.S.C. § 626. While most EEOC investigations are initiated by the filing of a charge of discrimination, the EEOC is authorized to initiate its own investigation

based on information from any source. 29 C.F.R. §§ 1626.4 and 1626.13. More important, the substantive rights afforded individuals under both Title VII and the ADEA cannot be prospectively waived. See 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 265 (2009) (agreeing that "federal antidiscrimination rights may not be prospectively waived") (citing 29 U.S.C. § 626(f)(1)(C)).

Unlike Title VII and the ADEA, the purpose of the Act is to promote collective bargaining, not individual rights. Unlike the EEOC, the Board is authorized to investigate allegations of a violation of the Act only upon the filing of a charge. Compare 29 C.F.R. § 101.2 ("The investigation of an alleged violation of the National Labor Relations Act is initiated by the filing of a charge . . . .") with 29 U.S.C. § 626(a) (The EEOC "shall have the power to make investigations" regarding compliance with ADEA); 42 U.S.C. § 2000e-5(b) (allowing the EEOC to initiate its own investigation through a charge brought by the EEOC Commissioner). Unlike Title VII and the ADEA, individual substantive as well as procedural rights under the Act can be, and are, waived by labor organizations on a regular basis. See Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 705 (1983). Indeed, almost every collective-bargaining agreement prohibits the core right to strike and instead requires arbitration of disputes, while others prohibit picketing, prohibit individuals from filing grievances, restrict union access, and/or place various limits on employees' rights to engage in Section 7-protected activities during working hours. Finally, unlike the EEOC, the Board retains jurisdiction and reviews arbitration awards to ensure they are not clearly repugnant to the Act. Thus, the framework established by the courts for waiving procedural rights under Title VII and the ADEA is entirely irrelevant to the Board's deferral to arbitration awards.

C. The Board Should Not Usurp The Roles Of Unions And Employers By Dictating The Terms Of Collective-Bargaining Agreements

The former Acting General Counsel's proposal that a collective-bargaining agreement must incorporate employees' Section 7 rights before the Board will defer to an arbitration award not only directly contravenes the purposes of the Act but shows that he simply does not understand how arbitration works in today's world. For example, the NEBA Agreement on its face does not contain a "just cause" requirement for supporting a discharge for cause. However, the just cause standard has become the accepted standard for examining an employer's discipline of employees, and arbitrators have consistently applied the just cause standard when hearing and deciding discipline and discharge cases. E.g., Atwater Mfg. Co., 13 LA 747, 749 (1949) (Donnelly). Clearly, just cause will not exist where the arbitrator finds the employee was discharged because of some activity protected by law. If the arbitrator did find that the employee was validly discharged due to activity protected by the Act, the Board would not defer to that award under the Olin standard anyway.

Moreover, for the Board to take on a "wider and fuller" role and require that all collective-bargaining agreements specifically address individuals' Section 7 rights denies the parties to the agreement their freedom to bargain collectively in direct contravention of the purpose of the Act. As stated above, once a collective-bargaining relationship has been established, the Act in the first instance, places the responsibility for the protection of employees' rights and interests on the union, not the Board; and unions frequently waive their members' Section 7 rights through the give-and-take of bargaining. The Act does not contemplate that the Board has a role in contract negotiations or "policing collective contracts" – that is the unions' role. See Consolidated Aircraft, 47 NLRB at 706. The Board has never inserted itself into the collective-bargaining relationship by dictating the terms of labor contracts,

and it should not start now. The former Acting General Counsel's proposed standard does just that and should not be adopted.

D. The Board's "Clearly Repugnant" Standard Provides Employees With Sufficient Protection Of Their Section 7 Rights

The former Acting General Counsel's expressed dissatisfaction with unidentified arbitrators' decisions that "differ significantly from those that the Board itself would reach" surely reflects ignorance of the arbitration process. Employers and labor organizations, especially in long-term bargaining relationships, often develop a body of arbitral precedent, past practices and industry standards that arbitrators are experienced in, astute at, and use in applying to contract terms to ensure a correct interpretation and remedy, if warranted. This is especially true when the labor contract provides for a designated panel of arbitrators, who are able to fully understand the parties' relationship and history, and render a truly informed decision. Thus, it is not unusual for an arbitrator to interpret a contract term, or fashion a remedy that might differ from that which the Board might render after its own hearing. The Board long ago addressed the possibility of potentially different results by stating:

> By adopting a broadly based deferral policy, as enunciated in Olin, the Board endorses the national labor policy favoring arbitration and achieves one of the primary objectives of the Act – to encourage collective bargaining. Deferral recognizes that the parties have accepted the possibility that an arbitrator might decide a particular set of facts differently than would the Board. This possibility, however, is one which the parties have voluntarily assumed through collective bargaining.

Andersen Sand & Gravel Co., 277 NLRB at 1205, n.6. Because the arbitrator's decision is more fully informed, and possibly different than the Board would decide on the same facts, does not make it wrong or deny employees' Section 7 rights, as long as it is not "clearly repugnant" to the Act. Similarly, an arbitrator's remedy that may be different than the remedy the Board would fashion on the same facts is not sufficient reason to refuse to defer to the award. Moreover, by

choosing arbitration over other forms of dispute resolution like strikes or lockouts, the parties themselves recognize that an arbitrator will not always reach the same conclusion, or the same remedy, that they would. Indeed, the parties take great care in selecting arbitrators because arbitrators themselves often reach different results on similar facts and contract language. Just as unions and employers decide wage rates for employees, an agreed-upon arbitrator authorized by the union and employer, may decide the appropriate remedy when a grievance is sustained, and that remedy should stand absent unlawful collusion under Olin. In fact, the former Acting General Counsel's distrust of arbitrators stands in stark contrast to the Board's repeated, and successful, requests that the courts defer to its expertise in interpreting the Act, *see e.g.,* NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 829-30 (1984); NLRB v. Iron Workers, Local 103, 434 U.S. 335, 350 (1978), and the Board's own willingness to defer to the credibility findings of its own administrative law judges. Standard Dry Wall Products, 91 NLRB 544 (1950) (enforced in 188 F.2d 362 (3d Cir. 1951)).

One of the fatal flaws underlying the former Acting General Counsel's proposal is an assumption that employers somehow benefit more from arbitration decisions than Board decisions. That is not NEBA's experience and is not reflected in published arbitration awards which include remedies against employers that can cost in the millions of dollars. Thus, it is just as likely that an arbitrator would find activity protected under the Act where the Board majority would not, especially where there has been a revolving door of Board members. Reversing an arbitration award in favor of the employee would also destabilize the collective-bargaining relationship. In any case, the standard proposed by the former Acting General Counsel would require full review of every arbitration award and eviscerate the Board's deferral policy. Finally,

the Board would be in the position of rejecting the firmly established just cause arbitral standard which in itself should be enough to reject the former Acting General Counsel's opinion.

In addition, a full review would surely delay the final resolution of both the grievance and the unfair labor practice charge. Should an arbitrator find an employee was discharged for his/her protected concerted activities, which is never considered to be just cause, sustain the grievance but fail to order full reinstatement or complete back pay, employers would certainly not partially reinstate or pay any amount while the Region and the Board conduct a full review. And, if the Region issues a complaint, thereby giving the employer and Union another "bite," and the parties proceed to hearing, it could be years (or never, depending on the Board's decision) before the grievant/charging party is returned to work or paid any amount. Of course, if either party appeals to a court, the entire process could take even longer. Doubtless, the former Acting General Counsel's proposed standard with the Region's and the Board's continued oversight of, or interference with, contractual grievance proceedings, arbitration hearings, awards and remedies, will not serve to protect employees' Section 7 rights, but will unduly delay any finality and certainly any remedy.[4] The "clearly repugnant" standard has sufficiently protected employees' Section 7 rights for decades, and nothing more is necessary.

E. Placing The Burden On The Party Urging Deferral Would Result In Duplicative Processes and Inconsistent Results

The proposed shifting of the burden from the party opposing deferral to the party urging deferral will result in either every unfair labor practice charge that implicates a contract term (a) being heard by an arbitrator and the Board, resulting in unnecessary expense and the risk of inconsistent (or even contrary) results and/or remedies, or (b) the parties refusing to arbitrate altogether. Indeed, unions and employers may agree to deny access to the grievance process for

[4] It would be even worse to foist the delays in securing a quorum of valid Board Members on the grievance-arbitration process.

discipline and discharge cases where an unfair labor practice has been filed; or entirely deny access where an unfair labor practice charge could be filed. We suspect the Board is not prepared for the influx of charges that would be filed should parties choose judicial economy to avoid inconsistent (or contrary) decisions, especially in today's economy with tight budgets and scarce resources. Neither of the possible outcomes is desirable or consistent with the purpose of the Act to promote industrial peace.

It is beyond question that most grievances and unfair labor practice charges are filed by unions, and even under current deferral standards, it is not unusual for a union to file both at the same time to increase the chances of getting at least one favorable decision. Clearly, the union would not seek deferral[5] and would have little incentive to present any evidence of the alleged unfair labor practice to an arbitrator, which is a primary reason for the Olin standard itself. Under Olin, the employer is still in the anomalous situation of having to make sure the issue was raised against itself. The former Acting General Counsel's proposal would move anomaly to absurdity by requiring the employer to raise the union's argument and present all the evidence the union would have presented. The employer would then have to argue successfully that the union's evidence it just presented was not sufficient to undercut a just cause finding.[6] That would effectively place the burden on employers to present the union's case, including the union's witnesses, to the arbitrator; and then rebut the very evidence it presented! See IAP World Services, 358 NLRB No. 10, p. 4 (2012).[7] This is surely an impossible (and potentially unethical) dilemma for employers' attorneys, and it turns the traditional adversarial system on its head. Of course, if the Board does adopt this standard, it would also have to allow employers

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5 In fact, it could be argued that a union may breach its duty of fair representation or some ethical requirements if it does not pursue every avenue for proceeding in multiple forums.

6 Woe unto the employer that omits a significant piece of evidence the union could have put on.

7 This would likely require a new training course on how to examine a grievant and require the employer's advocate to move from prescient to omni-prescient – an impossible task.

full access to the union's and the Region's evidence to ensure employers could meet the requirement that all relevant facts be presented to the arbitrator.

Furthermore, the increase in cases being heard by both an arbitrator and the Board would increase the potential for different results and/or remedies, both of which can be appealed to court, and both of which can be upheld by a court – not only an unworkable dilemma, but far from encouraging the parties to resolve their own disputes through collective bargaining. The burden should remain at all times on the party opposing deferral, because that is consistent with the purpose of the Act and preserves judicial resources and economy.

F. The Former Acting General Counsel's One-Year Time Limit For Grievances To Be Submitted To Arbitration Encourages Delay

By directing the Regions to require, as a condition of deferral, that grievances be submitted to arbitration within one year, the former Acting General Counsel has encouraged unions to delay the grievance process in the hope that the Region will revoke the deferral, investigate and give the Union two bites at the apple.[8] Again, the vast majority of grievances and unfair labor practice charges are filed by unions looking to "roll the dice" in two forums hoping for the desired result in at least one. Once a Region defers a charge to the parties' contractual grievance process, employers have incentive to complete the arbitration, as potential back pay increases and memories fade. However, it takes agreement by both parties to have the case heard. Creating an arbitrary deadline of one year only encourages the party that is resisting deferral to delay in hope that the year will pass.

Moreover, forcing the parties to arbitrate ULP-related cases can interfere with collective-bargaining itself. There are good reasons why both parties would want to delay the arbitration proceeding - dealing with more important issues like master collective-bargaining negotiations,

[8] It is ironic the former Acting General Counsel imposed the one-year deadline in 2011, while the case currently under review was being egregiously delayed by the unfair labor practice proceedings.

further investigation, combining similar cases or just letting emotions calm down to name a few that have occurred in recent years. Again this is an example of unwarranted interference with the Act's core philosophy of encouraging the parties to resolve workplace issues themselves. At most, the party seeking deferral must be willing to arbitrate in a reasonable time which can only be determined on a case-by-case basis. Where delay by the party that sought arbitration is found, the remedy should be to set a clear and reasonable deadline for compliance; and if the deadline is not met, to revoke deferral or dismiss. Finally, in NEBA's experience, since imposition of the one-year requirement, the IUEC has argued (incorrectly) that it is impossible for a grievance to reach arbitration in less than a year and has delayed processing grievances and submitting grievances to arbitration, hoping the deferral is revoked and the charge investigated by the Region. Thus, while the former Acting General Counsel imposed the one-year time limit to encourage prompt resolution of disputes, the result has been the opposite.[9]

III. THE EXISTING PRE-ARBITRAL AND POST-ARBITRAL STANDARDS WORK WELL IN TANDEM, AND NEITHER SHOULD BE MODIFIED

The current standard for determining whether to defer an unfair labor practice charge to arbitration under Collyer Insulated Wire, 192 NLRB 837 (1971) and United Technologies Corp., 268 NLRB 557 (1984) is:

1. The employer and union have a contract currently in effect that provides for final and binding arbitration.

2. The dispute at the center of the unfair labor practice charge is encompassed by the terms of the labor contract.

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9 The case of Babcock & Wilcox Constr. Co., Inc., Case No. 28-CA-22625 currently under review, is an example of the delay caused by the Board's uninvited and unnecessary interference with unions' and employer's agreements. In Babcock & Wilcox Constr. Co., Inc., the grievant/charging party was discharged on March 11, 2009 and the matter was heard by the union's and employer's contractually agreed-upon subcommittee and a decision rendered on October 8, 2009. Now, four and one-half years later, the unfair labor practice charge remains pending – far from the "prompt resolution" promised by the former Acting General Counsel!

3. The employer agrees to waive contractual timelines and process a grievance concerning the issues in the charge and will arbitrate the grievance if necessary.

4. A grievance concerning the dispute has been filed, and there is no impediment to processing the grievance to arbitration.

Of course, the Region retains jurisdiction to later ensure the procedures have been fair and regular and the result is not clearly repugnant to the Act. Collyer Insulated Wire, 192 NLRB at 843.

Without knowing what modifications may be made to the post-arbitral standard, it is impossible to state with any confidence what modifications, if any, should be made to the standards under Collyer Insulated Wire, *supra*; United Technologies Corp., *supra*; and Dubo Mfg. Corp., 142 NLRB 431 (1963). However, any standard should be fair and reasonable and should not place an undue burden on either the union or the employer, or cause increased litigation, as does the former Acting General Counsel's proposed standard for post-arbitral deferral. Instead, the Board should ensure that any standard adopted, whether for pre-arbitral or post-arbitral deferral, encourages collective bargaining and is consistent with the purpose of the Act.

IV. THE BOARD SHOULD ALWAYS DEFER TO VOLUNTARY RESOLUTION OF DISPUTES AS THE METHOD MOST CONDUCIVE TO FOSTERING INDUSTRIAL PEACE AND ENCOURAGING COLLECTIVE BARGAINING

Resolution of disputes through settlement is arguably most consistent with the purposes of the Act, as it encourages employers and unions to bargain, and does not require the intervention of a third party. Accordingly, even if the Board modifies the existing standards for pre-arbitral and/or post-arbitral deferral, it should honor any voluntary settlement reached by employers and unions through bargaining. The current standard should be left intact, including those settlements made over the protests of the individual whose Section 7 rights are allegedly

implicated. See U.S. Postal Serv., 300 NLRB 196, 197 (1990) (deferring to settlement over individual's objection because the union, "as his collective-bargaining agent was . . . empowered to bind him 'wholly apart from [his] own separate consent'").

V. THE CASE CURRENTLY BEFORE THE BOARD DOES NOT PRESENT ANY REASON FOR MODIFYING THE EXISTING STANDARD FOR POST-ARBITRAL DEFERRAL

Applying the principles discussed above, it is clear that the General Counsel has presented no reason to overturn the subcommittee's decision in Babcock & Wilcox Constr. Co., Inc., Case No. 28-CA-22625. The General Counsel did not except to any facts, only the Administrative Law Judge's legal conclusion (after two days of hearing) that the subcommittee's denial of the underlying grievance was not repugnant to the Act and deferring to that decision.

The dispute currently before the Board began on March 11, 2009 when Babcock & Wilcox Constr. Co., Inc. ("Babcock & Wilcox") discharged short-term employee Coletta Kim Beneli ("Beneli").[10] See Babcock & Wilcox Constr. Co., Inc., Case No. 28-CA-22625, Decision of the Administrative Law Judge, p. 3 (Apr. 9, 2012). On March 19, 2009, the International Union of Operating Engineers and its Local 428 (collectively the "Union") filed a grievance alleging that Beneli's discharge violated the collective-bargaining agreement, Section 7 of the Act and Board decisions. Id., p. 4. On July 30, 2009, Beneli filed an unfair labor practice charge against Babcock & Wilcox alleging that her discharge violated Sections 8(a)(1) and (3) of the Act. Id., p. 1. On September 29, 2009 Beneli amended the Charge, and on September 30, 2009 Region 28 deferred the charge to Babcock & Wilcox's and the Union's contractual grievance process. Id., pp. 1, 5. The grievance was processed to Step 4, "which calls for a hearing before the grievance review subcommittee." Id., p. 4. The hearing before the subcommittee was held

[10] Beneli was employed by Babcock & Wilcox from January 12, 2009 through March 11, 2009 – just shy of two months. Babcock & Wilcox Constr. Co., Inc., Case No. 28-CA-22625, Decision of the Administrative Law Judge, pp. 2-3.

on October 8, 2009, at which Babcock & Wilcox and the Union presented position statements and evidence. Id., p. 4. That same day,

> The subcommittee noted the "issue was the Union's contention the [Babcock & Wilcox] violated Article XXIII Management Clause of the National Maintenance Agreement by terminating the grievant, without just cause, for the grievant's use of profanity" and that the subcommittee "reviewed all the information submitted both written and oral" and determined that "no violation of the National Maintenance Agreement occurred and therefore, the grievance was denied."

Id., p. 5.

Almost two years later, on August 29, 2011, after receiving Beneli's objection to the grievance decision, the Region 28 Regional Director decided the decision was repugnant to the Act and issued a complaint. Id., p. 1. On September 7, 2011, Babcock & Wilcox filed an answer to the complaint denying all allegations, and the parties went to hearing before Administrative Law Judge Jay R. Pollack on January 17-18, 2012. Id., p. 1. On April 9, 2012, Administrative Law Judge Pollack issued his decision concluding that by finding Beneli was "discharged for the use of profanity and insubordination upon receipt of her discipline," the subcommittee "rejected the assertion that Beneli was discharged because of her duties as steward." Id., p. 5. Administrative Law Judge Pollack found the subcommittee's "factual decision" was not repugnant to the Act and recommended that the Board defer to the subcommittee's decision. Id., p. 6.

On May 11, 2012, Counsel for the former Acting General Counsel excepted to *inter alia*

> The ALJ's failure to adopt a new framework in Section 8(a)(1) and (3) post-arbitral deferral cases and require the party urging deferral to demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and also applied them in deciding the issue. If the party urging deferral makes that showing, only then should deferral be appropriate, unless the award is clearly repugnant to the Act.

Babcock & Wilcox Constr. Co., Inc., Case No. 28-CA-022625, Acting General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge, pp. 1-2 (May 11, 2012). The General Counsel's only reason for seeking a "new framework" for post-arbitral deferral is his disagreement with the subcommittee's decision after hearing evidence of Beneli's alleged protected concerted activities and Babcock & Wilcox's alleged reason for her termination. Clearly, the statutory issue was presented to the subcommittee, and the subcommittee – after hearing all the evidence – decided her discharge was not due to those activities but due to her profanity and insubordination when informed of a three-day suspension. Although the subcommittee's entire decision is not available on the Board's website, those documents that are available to the public show no evidence that the subcommittee did not apply the correct contractual or statutory standards in reaching its conclusion. Moreover, the decision is not repugnant to the Act, because it is susceptible to an interpretation consistent with the Act. See Aramark Services, Inc., 344 NLRB 549, 551 (2005) ("Even if the Board were to conclude that the [employee's] conduct was protected [concerted activity], the arbitrator was acting reasonably and rationally to come out the other way."). The Board has never required arbitrators to specifically recite and apply the statutory issues in writing, as long as it clear that the underlying facts were presented, and the General Counsel has presented no reason for so requiring it now – other than his disagreement with the subcommittee's fact-based conclusion. Starbucks Corp., 354 NLRB No. 99, pp.3-4 (Oct. 30, 2009) (shouting profane comments while following supervisor home was not protected activity); PPG Indus., Inc., 337 NLRB 1247 (2002) (affirming factual finding that profane comment was not protected concerted activity);

Nonetheless, the General Counsel claims the evidence presented to Administrative Law Judge Pollack on January 17-18, 2012 proves the subcommittee was wrong and, therefore, its

decision was repugnant to the Act. To this point, it is important to note that the subcommittee heard the parties' evidence seven months after Beneli's discharge, during which time the parties were actively processing the grievance and memories were fresh. To the contrary, Administrative Law Judge Pollack heard the evidence, which may have included evidence not presented to the subcommittee, almost three full years after the discharge – surely, witnesses' memories had faded, and the evidence was necessarily different. Thus, any conclusions reached by the General Counsel based on evidence presented to Administrative Law Judge Pollack cannot be fairly compared to conclusions reached by the subcommittee shortly after the discharge.[11] Moreover, it is axiomatic that the parties to the collective-bargaining agreement – the unions and employers – decide what is acceptable behavior in the workplace generally through collective bargaining, but also through past practice and arbitral precedent. Of course, because unions and employers cannot anticipate every possible form of behavior that may need to be addressed, they typically leave the determination to an arbitrator, or as in the current case under review, a subcommittee. Babcock & Wilcox and the Union had agreed that the subcommittee – not the Board or any other third party – would decide whether Beneli's conduct was protected or unprotected profanity and insubordination. There is no publicly available evidence of either Babcock & Wilcox or the Union objecting to, or disagreeing with, the subcommittee's decision or appealing it to court, and therefore, there is no reason for the General Counsel or the Board to interfere with the collective-bargaining relationship by refusing to defer to the decision.

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11 Perhaps the General Counsel is actually seeking a modification to the Board's definition of protected concerted activity to protect all workplace profanity, which would necessarily dictate changes to the thousands of collective-bargaining agreements negotiated between unions and employers during the 59 years since Spielberg. Surely, such a sea change and interference with unions' and employer's collective-bargaining relationships are not consistent with the purpose of the Act. More important, to declare swearing under all circumstances to be protected concerted activity would be clearly repugnant to the Act under Olin Corp. Moreover, later Boards may disagree with such a declaration and reverse it, leaving unions, employers and employees perplexed as to their rights and the limits of those rights under their collective-bargaining agreements and the Act.

Furthermore, the General Counsel was, and is, not the fact finder and should not attempt to usurp the role of the fact finder. The former Acting General Counsel's disagreement with the subcommittee's decision and Administrative Law Judge Pollack's legal conclusion and deferral is far from sufficient to either (a) modify the existing post-arbitral deferral standard, or (b) refuse to defer to the subcommittee's October 8, 2009 decision. Finally, the General Counsel has not presented any evidence that the existing standard for post-arbitral deferral is contrary to the purposes of the Act, or otherwise allows individual rights to be trampled upon. To the contrary, the existing standard has furthered the purposes of the Act by encouraging unions and employers to bargain collectively and to resolve their disputes through agreed-upon processes. The existing standard should not be modified.

CONCLUSION

The existing standard for post-arbitral deferral furthers the purposes of the Act by encouraging employers and unions to resolve disputes through the collectively-bargained contractual grievance process. The Board's deferral policy has been in place for seven decades with little change despite the number of changes to the composition of the Board during that time. Since the Spielberg decision in 1955, unions and employers have negotiated thousands of collective-bargaining agreements understanding that the standard enunciated therein applies to their agreements – the IUEC and NEBA negotiated a total of twelve five-year collective-bargaining agreements since then. Understanding the applicable standard, unions and employers, knowing they cannot possibly address every possible circumstance that may arise over the term of the contract typically leave some areas and situations open for interpretation and include a contractual grievance process culminating in binding arbitration to fill in the blanks as the need arises. The balance achieved by unions and employers over more than 70 years should not be upset because the former Acting General Counsel believes another decision-maker could reach a

different result. That has never been the accepted standard, and the General Counsel has presented no evidence that such a standard is necessary or desirable. The existing standard not only protects employees', labor organizations' and employers' rights and furthers the purposes of the Act by encouraging collective bargaining, but it also saves resources. The existing standard should not be disturbed.

Dated at Brattleboro, Vermont
March 25, 2014

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CERTIFICATE OF SERVICE

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