UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BABCOCK & WILCOX CONSTRUCTION CO., INC. and COLETTA KIM BENELI	Case 28-CA-022625

BRIEF *AMICI CURIAE* OF REALTY ADVISORY BOARD ON LABOR RELATIONS, INCORPORATED AND THE LEAGUE OF VOLUNTARY HOSPITALS AND NURSING HOMES

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Reality Advisory Board on Labor Relations, Incorporated ("RAB") was formed in 1933. The RAB represents employers in the real estate industry in collective bargaining and grievance and arbitration proceedings with a variety of unions representing approximately 90,000 building workers in the greater New York City area. The RAB has bargained to create the Office of the Contract Arbitrator ("OCA"), which conducts several hundred arbitrations each year. The OCA is a key to fostering and maintaining positive labor relations in the industry, and RAB is vitally interested that the grievance and arbitration processes of the OCA are given a very high degree of deference by the National Labor Relations Board.

The League of Voluntary Hospitals and Nursing Homes ("LVH") is the collective bargaining agent of 89 hospitals and nursing homes in the greater New York metropolitan region employing over 70,000 employees under a collective bargaining agreement between the League and Local Union 1199/SEIU United Healthcare Workers East. Since its founding in 1968, the League has successfully negotiated multiple collective bargaining agreements with Local Union1199/SEIU. Each of the collective bargaining agreements has contained a grievance arbitration clause, and over these many years the parties have successfully arbitrated numerous disputes. In that spirit, the parties have bargained for an expeditious and final resolution of disputes arising under the collective bargaining agreement, and have long followed the well-established National Labor Relations Board policy of deferral to arbitration. For that reason, the League fully supports the submission of a brief on behalf of employers to oppose the changes proposed by the General Counsel in current National Labor Relations Board deferral law, and to propose instead the more workable deferral standards discussed in this brief.

ARGUMENT

I. OVERVIEW OF POST-ARBITRAL DEFERRAL AND ISSUE PRESENTED

The National Labor Relations Act (the "NLRA") was enacted to address the obstruction to commerce associated with employers' refusal to recognize employees' right to organize, engage in collective bargaining, and participate in strikes or other forms of concerted protest. 29 U.S.C. § 151. In the NLRA Congress took note of the inequality of bargaining power between individual employees and their employer and declared that it is a national public policy to "encourage[] the practice and procedure of collective bargaining" and to protect employees' "freedom of association, self- organization, and designation of *representatives 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 (emphasis added).

Twelve years later, in the Labor Management Relations Act (the "LMRA"), Congress further declared that industrial peace and the best interests of employers and employees "can *most satisfactorily* be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees." 29 U.S.C. § 171(a) (emphasis added).[1]

An important by-product of collective bargaining, which has resulted in unprecedented labor peace, is the grievance and arbitration process. The establishment of effective grievance-arbitration procedures under the NLRA and LMRA (collectively, the "Act"), has been recognized as "part and parcel of the collective bargaining process itself," *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578, 581 (1960); *see also Airline Pilots*

[1] The LMRA also amended Section 7 of the NLRA to protect the rights of employees to refrain from engaging in protected activities, 29 U.S.C. § 157. Notwithstanding a decision to refrain, however, an employee in a bargaining unit represented by a union is still entitled to all of the benefits of collective bargaining and is still protected by the union's duty of fair representation.

Ass'n, Intern. v. U.S. Airways Group, Inc., 609 F.3d 338, 343 (4th Cir. 2010) (quoting *United Steelworkers*); *Utility Workers Union of America, Local 246, AFL-CIO v. NLRB*, 39 F.3d 1210, 1216 (D.C. Cir. 1994) (same), and has been repeatedly hailed as a "major factor in promoting and achieving industrial stability and peace," *Alpha Beta Co.*, 273 NLRB 1546, 1548 (1985). *See also Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964) ("'The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience 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 this statutory objective.'") (quoting *Int'l Harvester Co.*, 138 NLRB 923 (1962)).[2]

Accordingly, "[t]he Board has a strong policy of encouraging the use of the arbitration procedures contained in collective-bargaining agreements." *Carpenters 46 Conf. Bd.*, 278 NLRB 122, 123 (1986). And, indeed, for the past fifty-eight years the Board has recognized that "the desirable objective of encouraging the voluntary settlement of labor disputes" is *best served* by deferring to an arbitrator's award. *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955).

It was in that seminal *Spielberg* decision that the Board first articulated its current deferral standard. In *Spielberg*, the Board stated that it will defer to the arbitrator's award if (1) the arbitration proceedings were fair and regular, (2) all parties had agreed to be bound, and (3) the arbitrator's decision is not clearly repugnant to the purposes and policies of the Act. 112 NLRB at 1082. Eight years after *Spielberg* was decided, the Board in *Raytheon Co.*, 140 NLRB

[2] Indeed, even the National Labor Relations Board's (the "NLRB" or the "Board") Office of the General Counsel (the "General Counsel" or "OGC") has acknowledged that the Act "favor[s] collective bargaining and the private resolution of labor disputes through the processes agreed upon by the employer and the employees' exclusive representative." Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in section 8(a)(1) and (3) Cases, Memorandum GC 11-05 ("GC Memo 11-05"), at 2 (Jan. 20, 2011).

883, 884 (1963), added the additional requirement that the arbitrator must have considered the unfair labor practice issue.

For the next twenty years application of the *Raytheon* element was inconsistent and, as the Board explained in *Olin Corp.*, 268 NLRB 573 (1984), arguably narrowed the deferral doctrine. Troubled by this development, the Board in *Olin* explained that application of a deferral standard that turns on whether the arbitrator's award specifically disposes of the unfair labor practice issue "just as the Board would have" significantly diminishes the role of private dispute resolution and "frustrate[s] the declared purpose of *Spielberg* to recognize the arbitration process as an important aspect of the national labor policy favoring private resolution of labor disputes." 268 NLRB at 574.

Accordingly, in *Olin*, the Board re-expanded the deferral doctrine and held that *Raytheon's* "adequately considered" element is met 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." 268 NLRB at 574. This approach does "not require an arbitrator's award to be totally consistent with Board precedent." Indeed, in *Olin*, the Board explained that under its "clearly repugnant" standard, it would defer unless the arbitrator's award is "palpably wrong" – meaning "the arbitrator's decision is not susceptible to an interpretation consistent with the Act." *Id.* The burden of persuasion rests with the party seeking to have the Board *decline* to defer. *Id.* This allocation of the burden also demonstrates the approbation with which the Board views arbitral awards under *Spielberg/Olin*.

As explained below, however, in the three decades since *Olin*, the clearly repugnant element of the *Spielberg/Olin* standard has, from time to time, proved challenging to apply. *See infra* Pt. III.B. This, in turn, has led to some disputes between the Board and the courts over

what constitutes an award (or grievance settlement) that is clearly repugnant. Nevertheless, the fundamental principles upon which the Board's historical deferral doctrine was founded hold true today, and we submit that those principles should continue to guide the development of the Board's jurisprudence in this important area.

In this case, however, the General Counsel seeks to jettison the *Spielberg/Olin* standard in favor of an essentially *de novo* standard of review, purportedly "to give greater weight to safeguarding employees' statutory rights in Section 8(a)(1) and (3) cases." General Counsel's Brief in Support of Exceptions ("GC Brief"), at 19. The General Counsel's proposed standard shifts the burden of persuasion to "the party *urging* deferral to demonstrate that: (1) [either] 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." GC Brief at p. 20 (emphasis added).

The General Counsel's proposed standard raises exactly the same problems the Board sought to avoid in *Olin* and for the reasons described more fully below, the Board should not adopt the General Counsel's proposed standard. The Board should, however, modify its current deferral standard to address the problems associated with the "clearly repugnant" element and to more fully comport with the spirit and purpose of the federal labor laws.

To that end we propose the following test. The Board should defer to an arbitral award or grievance settlement if (1) the proceedings were fair and regular, (2) the parties agreed to be bound, (3) the arbitrator's award (or settlement) addresses the same basic facts as the alleged unfair labor practice, (4) the union did not breach its duty of fair representation, and (5) the award is not *per se* illegal. For all of the reasons explained below, our proposed test avoids the weaknesses of the General Counsel's proposed test, accords the necessary respect for the

collective-bargaining process that is at the heart of the Federal labor law and policy, and provides for a practical, predictable and workable standard that has eluded the Board.

Just as importantly, our proposed test honors the employees' free choice of a union to collectively bargain on their behalf in a bargaining unit. That choice is given meaning only if their exclusive bargaining agent is imbued with the authority to engage in bargaining and its associated functions, such as grievance resolution, with the objective of furthering the overall and long-term best interests of the bargaining unit as a whole, and not any given individual or sub-group.

II. THE BOARD SHOULD NOT ADOPT THE DEFERRAL STANDARD PROPOSED BY THE GENERAL COUNSEL.

A. The General Counsel's Proposed Standard Is Inconsistent with the Fundamental Purposes of the Act.

"It hardly needs repeating that national policy strongly favors the voluntary arbitration of disputes. The importance of arbitration in the overall scheme of Federal labor law has been stressed in innumerable contexts and forums." *Olin*, 268 NLRB at 574 & n. 5 (citing Section 203 of the LMRA and the "Steelworkers Trilogy"). As described above, a central premise of U.S. labor relations is achieving industrial stability and peace by encouraging the practice of collective bargaining and dispute resolution procedures agreed to by the parties in collective bargaining. *See supra* Pt. I. Healthy labor relations depend upon an effective, expeditious, and *binding* dispute resolution mechanism. In fact, arbitration is so fundamental to the nation's labor policy that the inclusion of an arbitration provision in a collective bargaining agreement is sufficient both to waive the right to strike over arbitrable issues, *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962), and to create a corresponding exception to the anti-injunction provisions of the Norris-LaGuardia Act

permitting courts to enjoin such strikes, *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 242-43 (1970).

The General Counsel's proposed deferral standard raises the very same concerns that the Board sought to remedy thirty years ago in *Olin.* In that case, as noted above, the Board criticized the development of an essentially *de novo* standard of review of arbitration awards following *Raytheon*. Specifically, the *Olin* Board decried the practice of "determining the merits *before* considering the appropriateness of deferral," which, it asserted, "predictably [resulted in] a decision not to defer." 268 NLRB at 574 (emphasis in original). That approach, the Board declared, "serves only to frustrate the declared purpose of *Spielberg* to recognize the arbitration process as an important aspect of the national labor policy favoring private resolution of labor disputes." *Id.*

Accordingly, in *Olin*, the Board modified its approach to arbitral deferral in order to halt the "overzealous dissection of [arbitrators'] opinions by the NLRB," which had "resulted in such infrequent deferral by the Board that its occasional exercise has had little substantive relationship to a mechanism which daily settles uncounted labor disputes to the satisfaction of the labor relations community." *Id.* (quoting *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352, 355 (9th Cir. 1979) (internal quotations omitted)).

Today, the General Counsel would have the Board return to a pre-*Olin*, virtually *de novo* standard of review for arbitration awards. The primary problem with this proposed "deferral" standard is that it is ultimately one of "*non-deferral*," because the Board would defer to an arbitrator's award only once the Board agreed with the conclusion and reasoning of the arbitrator. *See* GC Memo 11-05 at 10. Under this so-called "deferral" policy, the Board would evaluate an alleged unfair labor practice in the same way as if there had been no grievance, no

proceedings, no arbitration hearing, and no arbitration award. It is difficult to comprehend how this test would serve the national policies favoring arbitration and voluntary dispute resolution, much less how such a so-called "deferral" policy could possibly comport with principles enunciated in the Board's long-standing *Spielberg/Olin* precedent.

Moreover, while we believe, as described more fully below, that there are aspects of the Board's current deferral policy that merit reconsideration, the General Counsel's approach would obliterate that policy by substituting the Board's judgment for that of arbitrators or the parties themselves. As the Court of Appeals for the District of Columbia Circuit explained in *Titanium Metals* (quoting its earlier decision in *American Freight Systems, Inc. v. NLRB*, 722 F.2d 828, 833 (D.C. Cir. 1983)):

> Allowing the Board to disregard its own deference policy, which has been reinforced by long-standing and consistent case precedent, would undermine the careful development of the *Spielberg* standards of deference, discourage parties from relying on their own bargaining agreements and procedures, and "significantly undermin[e] the value and efficacy of arbitration as an alternative to the judicial or administrative resolution of labor disputes."

392 F.3d at 449 (citations omitted). The General Counsel's proposal would not only rob collective-bargaining parties of the benefit of their bargain, but would in any deferral case reduce the arbitration process to, at best, a first step in the Board's dispute-resolution machinery or, at worst, an empty and meaningless exercise.

B. The General Counsel's Proposed Approach to Deferral Does Not Achieve Its Purported and Misplaced Goal of "Safeguarding Employees' Statutory Rights."

The OGC positions its new approach to deferral as a means of "safeguarding employees' statutory rights." *See* GC Memo 11-05 at 1. But as explained below, this superficially appealing argument fails because it disregards the centrality of *collective* and *concerted* rights to the

purposes of the Act (including a union's ability to lawfully waive certain rights of bargaining-unit employees) and relies on a strained parallel to employees' *individual* rights under other statutes.

1. Unions May Lawfully Waive Employee Rights under the NLRA.

The Supreme Court "long has recognized that a union may waive a member's statutorily protected rights . . . ," *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 704 (1983), and it is undisputed that many of the bargaining-unit employee statutory rights under the Act may be waived through the collective-bargaining process. *See* Harry T. Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L.J. 23, 40 (1985) ("When parties negotiate their respective rights and obligations and provide for binding arbitration of any disputes between them, they effectively waive many of their statutory rights."). Unions may waive such rights because, as a matter of federal labor law and policy, *collective* labor action has been adjudged a superior method of securing employee gains (where they choose to be so represented), even if at the expense of certain individual employee rights. *See Titanium Metals Corp v. NLRB*, 392 F.3d 439, 447 (D.C. Cir. 2004) ("Fostering the integrity of the collective bargaining process clearly advances the purposes of the NLRA, and the [LMRA], because these laws 'are designed to protect *both individual and collective rights, and have as their paramount goal the promotion of labor peace through the collective efforts of labor and management*.'" (emphasis added)). Safeguarding the waivable rights of represented employees, therefore, cannot logically serve as the linchpin for the Board's modification to its long-standing deferral policy, where doing so undermines the Act's preference for and protection of freely chosen collective rights.

2. NLRA Rights Are Fundamentally Different from Rights under Employment Statutes Such As Title VII or the ADEA.

In its 2011 Memo advocating for the same modified deferral standard it is proposing in this case, the OGC drew a parallel between employee rights under the Act and employee rights under employment statutes, such as Title VII of the Civil Rights Act of 1964 ("Title VII") or the Age Discrimination in Employment Act, and argued that the Board should apply a similar deferral standard as the courts do with respect to those statutes. GC Memo 11-05 at 3-6. However, the nature of the employee rights protected under the Act is not the same as the individual rights protected under Title VII or other employment statutes.[3]

The purpose of employment related statutes such as Title VII is to "protect[] individuals against employment discrimination." 29 C.F.R. § 1606.2.[4] As such, the focus of those laws is on protecting the *individual*. *Alexander v. Gardner-Denver Co*., 415 U.S. 36, 44 (1974) ("Congress gave private individuals a significant role in the enforcement process of Title VII."). By contrast, as explained above, the Act protects *collective* and *concerted* action, with the encouragement of *collective* bargaining as one of its fundamental purposes. 29 U.S.C. § 151 ("Findings and Declarations of Policy"); *Carey v. Westinghouse Elec. Corp*., 375 U.S. 261, 265 (1964) ("The underlying objective of the national labor laws is to promote collective bargaining agreement and to help give substance to such agreements through the arbitration process." (internal quotation marks omitted)); Janelle M. Diller, Note, *Title VII of the Civil Rights Act of*

[3] Notably, even the OGC acknowledged that the employment discrimination cases to which it analogized – *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247 (2009) – do "not directly control the parameters of the Board's deferral policy." GC Memo 11-05 at 4.

[4] "Title VII was enacted to further two primary goals: to end discrimination on the basis of race, color, religion, sex or national origin, thereby guaranteeing equal opportunity in the workplace, and to remedy the segregation and underrepresentation of minorities that discrimination has caused in our Nation's work force." *Taxman v. Board of Educ. of Tp. Of Piscataway*, 91 F.3d 1547, 1557 (3rd Cir. 1996); *see also Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 349 (1977) ("The primary purpose of Title VII was 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)).

1964 and the Multinational Enterprise, 73 GEO. L.J. 1465, 1480 (1985) ("Unlike these statutes regulating collective interests in labor-management relations, Title VII exhibits legislative concern for the protection of *individual* interests.") (emphasis in original).

In contrast, Section 7 of the NLRA protects the rights of employees to choose whether to "bargain collectively" or engage in "concerted activities."[5] 29 U.S.C. § 157. As the Supreme Court has recognized, the Act focuses on protecting the power of employees to act collectively or concertedly, and the rights accorded to individuals under the Act are granted for the purpose of advancing collective or concerted action. *See NLRB v. Allis-Chalmers Mfg. Co*., 388 U.S. 175, 180 (1967); *see also* Diller, *supra* 73 GEO. L.J. at 1480 ("[T]he [Act] . . . represents a legislative balance between the competing collective interests of labor and management based on a policy valuing minimal government intrusion in the United States employment environment."). *As we noted above, once employees have exercised their right to choose a union to collectively bargain on their behalf, that choice can only have meaning if their exclusive bargaining agent is imbued with the authority to engage in bargaining and its associated functions, such as grievance resolution, with the objective of furthering the overall and long-term best interests of the group – the bargaining unit as a whole – and not any given individual or sub-group*.

In an eloquent concurrence in *Hammontree v. NLRB*, 925 F.2d 1486, 1501-02 (D.C. Cir. 1991), Judge Edwards explained:

> [W]hile rights protected by Title VII, the FLSA and section 1983 are individual in nature, the NLRA and the LMRA are designed to protect both individual and collective rights, and have as their paramount goal the promotion of labor peace through the collective efforts of labor and management. Thus, while courts have the undivided responsibility to adjudicate claims of individual discrimination under Title VII and section 1983, the Board is charged with fostering the overall well-being of labor-management

[5] *See also supra*, n.1.

> relations, which may be best accomplished by requiring the parties to seek to resolve their disputes through contractual dispute resolution mechanisms.

See also Laura J. Cooper and Catherine Fisk, *The Enduring Power of Collective Rights*, in LABOR LAW STORIES, 1 (Foundation Press 2005) ("[T]he [NLRB process is] not one in which workers, as individuals, [can], for the most part, assert their rights. Instead it [is] a process in which workers . . . channel their efforts into a collective voice in order to advance their interests. . . . Individual employees were granted some rights—the rights to join unions and to engage in other concerted activity for mutual aid and protection—but the individual rights were granted to facilitate group activity.").

3. The Board's Overarching Duty Is to Promote and Protect Collective Bargaining, Including Giving Due Deference to Arbitration Processes.

Again drawing a parallel to the Board's role in review of arbitration awards under the Act to the courts' role in evaluating employment-related claims under other statutes, the General Counsel has asserted that the Board – as an administrative agency – operates "'on a wider and fuller scale'"[6] than the courts and, consequently, has a duty to "more zealously" protect statutory rights. GC Memo 11-05 at 4-5. The General Counsel's position, however, misperceives the Board's role, at least insofar as it relates to employees who are represented in a collective bargaining unit by a freely chosen union.

Unlike the courts, whose decisions on deferral matters depend upon jurisdiction, the Board's deferral policy is founded upon the agency's discretion to achieve its overall goal of fulfilling the Act's purpose. As the Board observed in *International Harvester*, *supra*, and many times since, it is "well established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices *if to do*

[6] *Kentucky River Medical Center*, 356 NLRB No. 8, slip op. at 2-3 (2010) (internal citation omitted).

so will serve the fundamental aims of the Act."[7] 138 NLRB at 925-26 (emphasis added). The General Counsel has even acknowledged this discretion vested in the Board. GC Memo 11-05 at 2 & n.2.[8]

The Board is not charged with responsibility to ferret out every potential technical violation of the Act, but, instead, to responsibly oversee and further the Act's fundamental purpose. "[T]he Board should not take a narrow, legalistic view of the Act and seek to rule on every dispute that may fall within the letter of the Act, but should instead take a broad view of the Act and seek to further the spirit and purpose of the Act. The Board should encourage employees and unions to negotiate their differences arising during the term of their bargaining agreement, to discuss and settle grievances, and, if necessary, to arbitrate their differences." *Alpha Beta Co.*, 273 NLRB 1546, 1547 (1985) (quoting and agreeing with Member Penello's dissent in *Roadway Express*, 246 NLRB 174, 177 (1979)). A responsible exercise of the Board's administrative discretion includes deferral.

Indeed, the Court of Appeals for the District of Columbia Circuit has "long recognized that the Board 'does not abdicate its responsibilities to implement the National Labor Relations Act by respecting peaceful resolution of disputes through voluntarily agreed upon administrative techniques.'" *Plumbers & Pipefitters Local Union No. 520 v. NLRB*, 955 F.2d 744, 752 (D.C. Cir. 1992) (quoting *Associated Press v. NLRB*, 492 F.2d 662, 667 (D.C. Cir. 1974)). *Cf.*

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[7] "[T]he Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process . . . ." *Int'l Harvester*, 138 NLRB at 927. *See also Carey v. Westinghouse Elec. Corp*., 375 U.S. 261, 271 (1964) (quoting *Int'l Harvester*); *NLRB v. Roswil, Inc*., 55 F.3d 382, 386 (8th Cir. 1995) (noting that the Supreme Court in *Carey* quoted relevant portions of *International Harvester* "approvingly"); *Airco Indus. Gases*, 195 NLRB 676, 678 (1972) (reiterating that the Board has "considerable discretion" to decline to exercise its authority if it serves the purposes of the Act).

[8] In reality, given the General Counsel's exclusive prosecutorial authority under Section 3(d) of the Act, 29 U.S.C. § 153(d), the decision whether to defer or not defer initially belongs to the General Counsel. The General Counsel is bound to apply and interpret the Board's decisions, however, including those related to when and when not to defer to arbitration awards.

Hammontree, 925 F.2d at 1497 ("Deferral is not akin to abdication. It is merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed.").

"By recognizing the validity and finality of [grievance] settlements, the Board promotes the integrity of the collective bargaining process, thereby effectuating a primary goal of the national labor policy." *Plumbers & Pipefitters Local Union No. 520*, 955 F.2d at 752. "[W]ithout the doctrine of deferral, 'the parties would be encouraged to circumvent grievance and arbitration procedures for which they had contracted whenever they felt they had a better chance for favorable resolution by quickly filing an unfair [labor] practice charge before the Board.'" *Lewis v. NLRB*, 800 F. 2d 818, 821 (8th Cir. 1986) (quoting *Associated Press*, 492 F.2d at 668).

C. The General Counsel's Proposed Deferral Standard Would Lead to Multiple Unintended and Undesirable Consequences.

The more stringent deferral test urged by the General Counsel here would lead the Board to take up matters that have already been considered and resolved by an arbitrator in an award or by the representatives of the parties themselves in a settlement. Thus, litigation before an arbitrator and then the Board could yield opposite results and conflicting remedies (*i.e.*, arbitrator upholds termination, but then months later the NLRB orders reinstatement with backpay, etc.), even where the matter turns on the same operative facts.[9] The General Counsel's proposal therefore creates an incentive for unions and/or grievants to pursue a second (potentially inconsistent) proceeding before the NLRB, and perhaps even to more narrowly present the issue

[9] Indeed, under the General Counsel's test even findings of fact are subject to discrepancies between the forums. Because factual conclusions depend upon the evidence presented to the fact finder and his or her assessment of the credibility of that evidence, an Administrative Law Judge for the NLRB could make different findings of fact than found by the arbitrator even where the arbitration proceedings were fair and regular.

to the arbitrator than they otherwise would have. *IAP World Servs., Inc.* 358 NLRB No. 10, slip op. at 4 (2012).

Even worse, the increased likelihood of duplicative litigation before the Board under the General Counsel's proposal actually creates a disincentive for parties to arbitrate. The grievance and arbitration process costs the parties time and money; however, in the usual case, the grievance process is faster and less costly than a full Board proceeding. Indeed, part of the reason parties negotiate a grievance and arbitration process is for the speed and cost savings it provides. Because, as noted above, under the General Counsel's proposed test deferral would be limited to only exceptional circumstances, the test would "significantly undermin[e] the value and efficacy of arbitration as an alternative to the judicial or administrative resolution of labor disputes," and, consequently, deter arbitration. *Titanium Metals*, 392 F.3d at 449 (quotations and citations omitted). *See also NLRB v. Motor Convoy, Inc.*, 673 F.2d 734, 736-37 (D.C. Cir. 1982) ("Arbitration would become nothing more than a costly extra step in the march to federal court rather than the cost efficient and rapid resolution of disputes it is designed to be. As a consequence, it is certain that arbitration machinery would be included in fewer collective bargaining agreements inevitably expanding unnecessarily the caseloads of the federal courts and the National Labor Relations Board."); *Cook Paint and Varnish Co. v. NLRB*, 648 F.2d 712, 721 (D.C. Cir. 1981) ("The Supreme Court has stated that it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution.") (internal quotation marks omitted). Further, the General Counsel's proposed policy would increase the Board's already heavy burden without any justifiable benefit. *See* Harry T. Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L.J. 23, 30-31 (1985) (describing how *Olin*

sought to remedy the Board's "'overzealous dissection' of arbitration decisions and wasteful duplication of efforts in the adjudication of contract grievance disputes"); *cf. United Technologies Corp.*, 268 NLRB 557, 559-60 (1984) (reaffirming *Collyer* pre-arbitral deferral policy due in large part to Board's limited resources and the fact that the parties were in a better position to resolve their disputes).

A liberal deferral policy would therefore serve to make arbitration and the Board more efficient, as Judge Harry T. Edwards has explained:

> [A robust deferral policy] comports fully with the strong national labor policy of promoting industrial peace through arbitration, and is grounded on the equally strong policy of freedom of contract. It has the additional advantages of *eliminating uncertainty and wasteful duplication of adjudication efforts*. Moreover, *arbitration resolves disputes much more quickly than does litigation before the Board, and arbitrators are far more familiar with contract interpretation and the "common law of the shop" than are members of the Board*.

Edwards, *supra*, 46 OHIO ST. L.J. at 30 (emphasis added).

The General Counsel's proposed test also would defeat the purpose of pre-arbitration deferral under *Collyer/United Technologies*. If the Board's pre-arbitration deferral practices remain unchanged, unfair labor practice investigations will be held in limbo while the companion grievance is processed through arbitration only to be accorded no deference by the NLRB unless it squarely addresses the alleged statutory issue. *IAP World Servs., Inc.* 358 NLRB No. 10, at *4 (2012). This outcome will create bizarre and wasteful results. Alternatively, if the Board's pre-arbitration deferral practices are modified to limit *Collyer* deferral for all or a significant segment of 8(a)(1) and (3) cases, the Board and grievance processes will proceed in tandem causing potentially significant disruptions to operations, by forcing the parties and witnesses to expend duplicative efforts in preparing for and adjudicating both arbitral and NLRB cases. The General Counsel's proposal thus seriously undermines the attraction and utility of the arbitration process.

This is particularly true because the successful party will not only face greater scrutiny from the Board but will – under the General Counsel's proposal – do so carrying the burden of demonstrating the legitimacy and adequacy of the arbitrator's award in the ensuing NLRB administrative process. Parties will be reluctant to expend their resources in arbitration if they are to be subjected, in any event, to further review by the Board.

It is beyond question that arbitration and the grievance process leading up to it play a central role in collective bargaining that stands at the heart of national labor policy, *see supra* pt.II.A. The test proposed by the General Counsel diminishes deference to the arbitral process, essentially creating a policy of "non-deferral." The arbitration process will no longer lead to the final and binding resolution of disputes, but instead become merely another element of the Board's case handling. This lack of adjudicative efficiency and economy will undermine the utility of labor arbitration. It will waste the limited resources of the parties who would be required to undergo dual proceedings in order to bring finality to labor disputes. The palliative effect of arbitration will be lost and the incentives for parties to agree to arbitration will be reduced. The implied waiver of the right to strike over arbitrable issues will be undermined as arbitration as an institution is undermined. Labor peace will be diminished as a result, which is contrary to the purposes and policies of the NLRA and the practice and procedure of free collective bargaining. In sum, the General Counsel's proposal will undermine the very policies and processes that the Board is charged with promoting and protecting.

III. THE BOARD SHOULD MODIFY ITS *SPIELBERG/OLIN* DEFERRAL STANDARD.

In addition to the foregoing problems, the General Counsel's proposed standard also fails to address one of the greatest reasons for revisiting the *Speilberg/Olin* decisions in the first place -- the difficulty the Board has had in consistently applying the "clearly repugnant" test. The

General Counsel's proposed standard retains the "clearly repugnant" element of the *Spielberg/Olin* standard which, as explained more fully below, is theoretically flawed and difficult to apply consistently. This inconsistency has caused friction to arise between the Board and the federal courts in review of Board decisions. The Board should therefore take this opportunity to modify the "clearly repugnant" aspect of the *Spielberg/Olin* standard, as discussed below.

A. The Theoretical Basis for the *Spielberg/Olin* Test, and Most of Its Elements, Remain Sound and Should Be Retained.

As described above, there is a strong federal policy favoring collective bargaining and, by extension, the resolution of disputes by the parties themselves under their negotiated grievance-arbitration procedures, which fosters and promotes labor peace. By encouraging parties' private dispute resolution procedures and respecting their outcomes, deferral actually *furthers* that policy. *See Plumbers and Pipefitters Local Union No. 520 v. NLRB*, 955 F.2d 744, 752 (D.C. Cir. 1992) ("[T]he Board 'does not abdicate its responsibilities to implement the National Labor Relations Act by respecting peaceful resolution of disputes through voluntarily agreed upon administrative techniques.'") (quoting *Associated Press v. NLRB*, 160 App. D.C. 396 (D.C. Cir. 1974)).

A hallmark of the Act is that it does not require any bargaining outcome. Instead, the Act requires that parties "meet at reasonable times and confer in good faith . . . ." 29 U.S.C. § 158(d). The obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." *Id.* This regulation of the *means*– but not the *ends* – of collective bargaining is a fundamental element of American labor relations as overseen by the Board, and by design reserves substantial autonomy to the parties to craft agreements that best suit their constituencies. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) ("[T]he

fundamental premise on which the Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) ("The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace, and may bring about the adjustments and agreements which the Act, in itself, does not attempt to compel."); *Piggly Wiggly Midwest, LLC*, 357 NLRB No. 191, at 21 (Jan. 3, 2012) (recognizing the "fundamental principle that the Board regulates and enforces the process collective bargaining, not its outcome"); Laura J. Cooper and Catherine Fisk, *The Enduring Power of Collective Rights*, in LABOR LAW STORIES, 1 (Foundation Press 2005) ("Workers could gain substantive rights under the NLRA only by joining together in labor organizations and using their collective economic power to persuade employers to grant employees' rights in collective bargaining agreements . . . . *The government would police the process, but it would not define the terms of employment*.") (emphasis added).

It stands to reason, therefore, that the same precept should inform the Board's treatment of grievance-arbitration processes established by collective-bargaining parties. Arbitration awards and grievance settlements are, after all, an outgrowth and continuation of the collective-bargaining relationships that the Board regulates and protects. *See United Technologies Corp.*, 268 NLRB 557, 559 (1984) ("[D]ispute resolution under the grievance-arbitration process is as much a part of collective bargaining as the act of negotiating the contract."). As such, the Board's oversight of such arbitral processes should extend – as it does with collective bargaining – to the process but not the content. This approach would not only dovetail with the Board's responsibilities with respect to collective bargaining more generally, but would honor the private agreements made among parties that the Act seeks to foster and protect. *See Olin*, 268 NLRB at

576 ("An arbitrator's interpretation of the contract is what the parties here have bargained for and, we might add, what national labor policy promotes.").

The Board's existing *Spielberg/Olin* deferral policy, for the most part, fulfills these principles. The first element – that the proceedings appear to be fair and regular – establishes a procedural baseline akin to the statutory obligation to bargain in good faith. The second element – that all parties have agreed to be bound – ensures that there is in fact a collectively-bargained (rather than a unilaterally-imposed) process or settlement to which the Board would defer. Not surprisingly, neither of these elements has ever seriously been challenged, and neither is presently in dispute.

Moreover, under *Olin* "an arbitrator has adequately considered the unfair labor practice 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." Those criteria have been, and continue to be, workable and ensure that there is an appropriate connection between the grievance and the unfair labor practice issue, while at the same time promoting, rather than "frustrat[ing] the declared purpose of *Spielberg* to recognize the arbitration process as an important aspect of the national labor policy favoring private resolution of labor disputes." 268 NLRB at 574.

As we explain further below, however, the "clearly repugnant" element of both the Board's current test and the General Counsel's proposed standard has proven incoherent and unworkable, calling for an alternative approach.

B. The "Clearly Repugnant" Prong Should Be Replaced by a More Reasoned and Administratively Feasible Test.

The General Counsel's proposed approach to deferral retains one troubling aspect of the Board's current *Spielberg/Olin* standard, whereby the Board will not defer where an award (or

grievance settlement) is "clearly repugnant to the purposes and policies of the Act." This element has caused friction between the Board and the courts because, the courts have said, it lacks a coherent theoretical foundation and has been inconsistently applied. *See Plumbers & Pipefitters Local Union No. 520*, 955 F.2d at 756-57.

First, the Board has, in certain cases, seemingly applied this element in a manner contrary to its statement in *Olin* that an arbitrator need not dispose of an unfair labor practice issue "just as the Board would have." 268 NLRB at 574. For example, in *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352 (9th Cir. 1979), the Ninth Circuit denied enforcement of the Board's refusal to defer to an arbitrator's award of reinstatement without back pay. While the Board found that the arbitrator's reasoning for denying back pay was, among other things, ambiguous and "prejudicial," the court held that the arbitrator had offered an independent and permissible reason for such denial. *Id.* at 354. The court emphasized that "[o]verzealous dissection of opinions by the NLRB, as well as by courts, can deter the writing of full opinions, and it should not be assumed that an arbitrator has snubbed the Act any more than that he has exceeded his authority." *Id.* at 355.

In *Richmond Tank Car Co. v. NLRB*, 721 F.2d 499, 501-03 (5th Cir. 1983), the Fifth Circuit concluded that the Board abused its discretion when it refused to defer to an arbitrator's decision that an employer was entitled to discharge an employee who had walked out without union approval. The Board had found that the arbitrator had failed to consider whether the grievant's language, which supported the employer's decision to terminate him, was "indefensible in the context of his protected activity," and thus found that the arbitrator's decision was clearly repugnant to the Act. *Id.* at 502. The court disagreed, finding that the arbitrator had clearly considered this issue, and that the Board had failed to take the arbitrator's

entire decision into account in deciding this issue. *Id.* at 502-03. *Richmond Tank* illustrates how the "clearly repugnant" test is prone to selective interpretation and can lead the Board to ignore the careful analyses of arbitrators, causing unnecessary confusion in the law.

Second, in cases involving grievance settlements, the Board has employed a version of the "clearly repugnant" test that – although it seems to appreciate the realities of agreed-to settlements and the dynamics of the process of bargaining between the parties that leads to them – logically has nothing to do with whether the result is repugnant to the Act or "palpably wrong." *See Alpha Beta Co.*, 273 NLRB 1546, 1547 (1985) (finding that a grievance settlement was not palpably wrong "because it resulted from negotiations between the Respondents and the Unions within the context of the agreed-upon grievance/arbitration procedures" and that both parties "made concessions in order to settle the grievances without going to arbitration"). While the Board's application of the "clearly repugnant" test in the settlement context is commendable in that it seems to appreciate what we believe the Act requires the Board to appreciate: that the Board should respect settlement agreements between employers and unions because they are products of collective bargaining that the Board is generally bound to foster and protect, it is inconsistent with Board precedent concerning arbitration decisions.

For this reason, the D.C. Circuit fairly criticized the Board's methods in *Plumbers & Pipefitters Local Union No. 520*, suggesting that the "clearly repugnant" test has no place in the context of grievance settlements, and noting:

> [W]here the statutory right implicated by a grievance settlement is within the category of "waiveable" rights . . . then it is unclear why the Board would ever have any choice but to give deference, at least so long as the grievance procedures through which the settlement is reached are fair and regular and the union has not breached its duty of fair representation. In other words, since a union has broad discretion to alter or modify employees' "waiveable" rights through collective bargaining, we see no basis

> upon which the Board legitimately could intervene merely because the settlement reached by the union and the employer was not to the Board's liking . . . .

955 F.2d at 756 (emphasis omitted). *See infra* discussion of non-waivable rights at Pt. III.C.2.a. Thus, as applied, the "clearly repugnant" criterion "seems designed to permit the Board to give deference when it approves of the result . . . but to intervene when it does not, with no apparent standards for judgment," suggesting "a veritable recipe for arbitrary action." *Id.* at 756-57. It is this sort of apparently standard-less, arbitrary and unpredictable test and result that has caused friction to arise between the Board and its reviewing circuit courts.

The General Counsel's argument in the present case typifies the inherently subjective nature of the "clearly repugnant" inquiry. Here, the General Counsel contends – under the *current* deferral standard (as opposed to the new standard the General Counsel espouses) – that the arbitral decision upholding the grievant's termination was clearly repugnant to the purposes of the Act because the termination "was a pretext for retaliation against [the grievant] for engaging in protected activity as union steward." (*See* GC Brief at 18.) This argument conflates the General Counsel's application of the existing *Spielberg/Olin* standard with its proposal of a new test that would call for the Board to evaluate whether the arbitrator correctly articulated and applied statutory law. The problem, of course, is that *either* approach would enable the Board to substitute its judgment for the arbitrator's. Thus, while the General Counsel purports to resolve the continued criticism of the Board's deferral policy, its approach in fact fails to meaningfully modify the principle culprit – the "clearly repugnant" test – and instead, as described above, further undermines the arbitral process and the broader collective-bargaining framework from which that process originates.

C. By Replacing the "Clearly Repugnant" Test with a Focus on Whether the Union Breached Its Duty of Fair Representation and Whether an Arbitral Award or Grievance Settlement Is *Per Se* Illegal, the Board Would Appropriately Serve the Purposes of the Act and Achieve Greater Analytical Clarity.

As demonstrated above, the General Counsel's proposed modification to the *Spielberg/Olin* test does not comport with the purposes of the Act because it: (i) undermines the collective bargaining process that the Board is bound to foster and protect; (ii) fails to follow our national policy promoting the voluntary settlement of disputes by arbitration or agreement; and (iii) is inefficient and wasteful of the limited resources of the parties and the Board. In addition, the General Counsel's proposal retains the "clearly repugnant" test under *Spielberg/Olin*, the very aspect that has generated friction between the Board and the courts and resulted in confusion under the law.

We therefore propose the following test, which avoids the weaknesses of the test proposed by the General Counsel, accords the necessary respect for the collective-bargaining process that is the heart of the Federal labor law and policy, and provides for a practical, predictable and workable standard that has eluded the Board:

> The Board should defer to an arbitral award or grievance settlement if (1) the proceedings were fair and regular, (2) the parties agreed to be bound, (3) the arbitrator's award (or settlement) addresses the same basic facts as the alleged unfair labor practice, (4) the union did not breach its duty of fair representation, and (5) the award is not *per se* illegal.

The first three elements of this test are imported wholesale from *Spielberg* (for the first two elements) and *Olin* (for the third) and, as described above, rest on sound theory and policy. As described above, there is no dispute that the first two elements are both necessary and appropriate, while the third element rests on strong policy considerations. *See supra* Pt. III.A. The final two elements (four and five), however, represent an explication of the current standard

that more faithfully comports with the intent and purpose of the Act and the original purpose for the deferral doctrine propounded by *Spielberg*. Together, these two elements – no breach of the union's duty of fair representation and no *per se* illegality – appropriately respect unions' well-established authority to bargain and make decisions on behalf of their members, while preserving the Board's function to ensure that the outer limits to that authority are not exceeded. Further, they provide bright lines for determining when the Board should not defer to an arbitration award or settlement agreement, replacing the difficult to apply and frequently misunderstood "clearly repugnant" prong of the *Speilberg/Olin* standard.

1. Explicit, Narrowly Tailored Limits on Union Power and Authority – Including the Duty of Fair Representation – Further the Fundamental Purposes of the Act of Promoting Collective Bargaining and Private Dispute Resolution.

Our proposed fourth element – that the union has not breached its duty of fair representation – respects unions' authority to act as the employees' elected representative while recognizing the existing statutory and judicial limitations on such authority. The effectiveness of the collective-bargaining process requires both parties to have sufficient power and authority necessary to engage in meaningful bargaining. To bargain effectively, unions – as the exclusive representative of bargaining-unit employees – must have broad discretion in acting on behalf of the employees' collective interests. *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 739 (1988) (citing *Humphrey v. Moore*, 375 U.S. 335, 342 (1964)).

It is the union's role to determine what is in the best interests of the bargaining-unit employees as a whole.

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore

> extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. Congress has seen fit to clothe the bargaining representative with power comparable to those possessed by the legislative body both to create and restrict the rights of those whom it represents . . . . The employee may disagree with many of the union decisions but is bound by them. The majority-rule concept is today unquestionably at the center of our federal labor policy. The complete satisfaction of all who are represented is hardly to be expected.

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) (internal quotations and citations omitted).

While unions must be strong enough and imbued with sufficient authority to protect the collective interests of bargaining-unit employees, their power is not and need not be unlimited. *See Emporium Capwell Co. v. Western Addition Cmty. Org.*, 420 U.S. 50, 64 (1975) ("In vesting the representatives of the majority with this broad power Congress did not, of course, authorize a tyranny of the majority over minority interests."). However, Congress has recognized that any limitations on union power to represent unit members should be explicit and tailored to address specific problems, lest they impede a union's ability (and the ability of the parties) to engage in effective collective bargaining. A number of such limitations apply to unions.

"First, [Congress] confined the exercise of these powers to . . . 'a unit appropriate for the purposes of collective bargaining' . . . . Second, it undertook in the 1959 Landrum-Griffin amendments to assure that minority voices are heard . . . . Third, . . . by the very nature of the exclusive bargaining representative's status as representative of *all* unit employees, Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit." *Emporium Capwell*, 420 U.S. at 64.

The principal check on a union overreaching its authority to the detriment of an individual member is the union's duty of fair representation. *See Vaca v. Sipes*, 386 U.S. 171,

190 (1967) ("A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of collective bargaining unit is arbitrary, discriminatory, or in bad faith."). The duty of fair representation itself recognizes that a union must have the power to act in the collective interests of the bargaining unit, and that in doing so the interests of the whole may be elevated over the interests of some individual unit members. But the duty of fair representation requires that in making such choices, a union may not act unfairly, *i.e.*, must not be arbitrary, discriminatory or act in bad faith. Simply put, the duty of fair representation does not mandate that all unit members be treated equally; it mandates that they all be treated fairly.

In the context of arbitration, the Supreme Court recognized in *Pyett* that the duty of fair representation is one explicit limit on union authority by which "Congress has accounted for [the] conflict of interest [between collective and individual rights]." 556 U.S. at 271-72. The Court thereby disavowed the "antiarbitration dicta of [*Alexander v.*] *Gardner-Denver* and its progeny," *id*. at 267 n.9, and distanced itself from the concern raised in that case regarding "the union's exclusive control over the manner and extent to which an individual grievance is presented." *Id*. at 269-71 (quoting *Gardner-Denver*, 415 U.S. at 58 n.19). Instead, the Court explained that while "[l]abor unions certainly balance the economic interests of some employees against the needs of the larger work force . . ., this attribute of organized labor does not justify singling out an arbitration provision for disfavored treatment." *Pyett*, 556 U.S. at 270. Rather:

> This "principle of majority rule" . . . is in fact *the central premise of the NLRA*. In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that *the superior strength of some individuals or groups might be subordinated to the interest of the majority*.

Id. at 270-71 (quoting *Emporium Capwell*, 420 U.S. at 62) (emphasis added).

The Supreme Court has thus determined that Congress intended unions to have broad authority in collective bargaining and in its attendant arbitral processes, subject to unions' fulfillment of their duties of fair representation. We submit that the duty of fair representation serves as a well-established and appropriate check on union authority. It strikes the appropriate balance between individual and collective rights in union representation of bargaining unit members generally, and particularly in the grievance and arbitration context. The Board should not defer to an award or settlement procured or reached through a breach of the union's duty of fair representation.

2. Assuming All of the Other Criteria Are Present, the Board Should Defer to an Arbitral Award or Grievance Settlement Unless It Interferes with or Restricts Non-Waivable Rights under the Act, or Violates Some Other Requirement or Prohibition of Positive Law, and Is Thus Illegal *Per Se*.

In order to provide further standards to replace the "clearly repugnant" prong of the *Spielberg/Olin* standard, we also submit that the Board should not defer to an award or settlement that is "*per se* illegal." By this, we mean any award or settlement that (1) results from or in the union's waiver of an employee's rights under the Act which have been deemed "non-waivable" by the Supreme Court; or (2) constitutes or requires a violation of any law.

a. *Non-Waivable Employee Rights under the Act*.

"An employee's section 7 rights to engage in concerted activities . . . are neither qualified nor absolute . . . . [C]ertain rights granted by section 7 may be waived pursuant to collective bargaining." *Fournelle v. NLRB*, 670 F.2d 331, 335 (D.C. Cir. 1982). Thus, a union may waive its members' or officials' rights to strike or engage in other concerted activity during the term of a collective-bargaining agreement, typically in exchange for some other gains. Such a bargain, according to the Supreme Court, "promotes labor peace and clearly falls within the range of

reasonableness accorded bargaining representatives." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 707 (1983).

By contrast, "[c]ertain statutory rights may not be waived through collective bargaining. These include, *inter alia*, the free choice of bargaining representative, the Act's prohibitions on 'hot cargo' agreements and secondary boycotts, the statutory bar against 'closed shops,' and hiring hall practices that give preference to union members." *Plumbers & Pipefitters Local 520*, 955 F.2d at 751 n.5 (citing Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L.J. 23, 30-31 (1985), and CHARLES J. MORRIS, THE DEVELOPING LABOR LAW 865 (2d ed. 1983)). *See also NLRB v. Magnavox Co. of Tenn.*, 415 U.S. 322, 325 (1974) (distinguishing waivable rights such as the right to strike with "the rights of the employees to exercise their choice of a bargaining representative . . .").

Plainly, an arbitral award or grievance settlement that purports to restrict, interfere with, or waive the latter category of "non-waivable" rights would be *per se* illegal under the Act. On the other hand, the Board should – consistent with *Olin* and the strong policy favoring collective bargaining and arbitration – defer to an award or settlement impacting a "waivable" right, even if the Board would have reached a different result. By focusing on whether an arbitrator's award (or a grievance settlement) is *per se* illegal, the Board would avoid the inherently subjective inquiry into whether the award is "clearly repugnant" to the Act with which the Board has struggled.[10] Thus, this test would replace "a veritable recipe for arbitrary action," *Plumbers & Pipefitters Local Union No. 520*, 955 F.2d at 757, with an easily-applied, bright-line rule.

[10] The Board need not assess whether such an award (or settlement) reflects a clear and unmistakable waiver of the right(s) it addresses, because "where the parties provide for final and binding arbitration . . . [they] manifest their unmistakable intent to live with the arbitrator's interpretation of their contract . . . ." Edwards, *supra*, 46 Ohio St. L.J. at 38. As noted above at Part II.A., so powerful is the parties' binding agreement to arbitrate that it waives the

b. *Violation of a Positive Legal Requirement or Prohibition.*

It is well-established that an arbitration award that violates the law will not be enforced by the courts. *W.R. Grace and Co. v. Local Union 759, Int'l Union of United Rubber Workers,* 461 U.S. 757 (1983); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987). In those cases, the Court held that "the question of public policy is ultimately one for resolution by the courts," and that a labor arbitrator's award would not be enforced where it would violate "a well-defined and dominant" public policy. 461 U.S. at 766.

However, public policy is something more than an individual judge's evaluation of what is and is not in the public's interest. Rather, public policy is virtually always to be ascertained from positive law and legal precedents. 484 U.S. at 43. *See Eastern Associate Coal Corp. v. Mine Workers,* 531 U.S. 57, 63 (2000) ("We agree, in principle, that courts' authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law. Nevertheless, the public policy exception is narrow and must satisfy the principles set forth in *W. R. Grace* and *Misco*."); *cf. Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982) (finding that federal courts may consider whether an agreement violates the NLRA in declining to enforce the agreement on public policy grounds); *Elevator Constructors (Long Elevator)*, 289 NLRB 1095, 1095-96 (1988) (holding that the union committed an unfair labor practice by using the grievance procedure to indirectly require the employer to acquiesce to unlawful picketing).

Thus, if an arbitration award or a settlement agreement itself violates a provision of positive law (*e.g.*, constitutes a "hot cargo" agreement illegal under Section 8(e) of the Act), the

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right to strike over an arbitrable issue, *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962), and creates a corresponding exception to the anti-injunction provisions of the Norris-LaGuardia Act, *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 242-43 (1970).

Board should not defer. *See Marrowbone Dev. Co. v. Dist. 17, UMWA*, 147 F.3d 296, 304 (4th Cir. 1998) (declining to enforce arbitration award that effectively read a "hot cargo" provision into the parties' collective-bargaining agreement). This proviso would apply to awards or agreements that violate positive law requirements or prohibitions under laws other than the Act as well, consistent with the discussion above regarding rights under the Act that may be waived by a union that represents bargaining-unit employees.

* * *

We submit that a test that concentrates on whether the arbitral outcome is *per se* unlawful – either because it rests on the waiver of a non-waivable right by the union, or constitutes or requires the violation of positive law – is a bright-line, easily-applied test that is highly preferable to the subjective "clearly repugnant" test that has proven difficult to apply consistently and has been the source of friction between the Board and the courts. This bright-line "*per se* illegal" test preserves the Board's authority to discard unlawful outcomes while maintaining the integrity and significance of labor arbitration. In other words, the Board would achieve the objective it announced in *Olin* to establish "a policy of full, consistent, and evenhanded deference to a significant process within our national labor policy where it meets . . . appropriate safeguards for statutory rights." 268 NLRB at 575-56.

At the same time, our proposed standard would provide

> a complete answer to those who argue that the Board is abdicating its responsibilities when it defers consideration of a dispute to arbitration: the Board is not shirking its duties; rather the parties have relieved it of its responsibilities by deciding among themselves what their rights are and providing that any disputes over those rights should be submitted to arbitration.

Edwards, *supra*, 46 OHIO ST. L.J. at 37. Thus, consistent with the Supreme Court's decision in *Metropolitan Edison*, our proposed standard would accord deference where an arbitration award is faithful to the premise that:

> the parties to a collective bargaining relationship enter negotiations against a backdrop of certain statutory rights that they are free to modify or alter as they see fit, subject always to the duty of fair representation, the requirement that the union in no way impair the employees' right to choose their own bargaining agent, and the obligation of the parties to adhere to certain mandatory provisions of the Act.

Edwards, *supra*, 46 OHIO ST. L.J. at 37.[11]

IV. UNDER OUR PROPOSED DEFERRAL STANDARD, THE BOARD SHOULD AFFIRM THE ADMINISTRATIVE LAW JUDGE'S DECISION TO DEFER TO THE GRIEVANCE REVIEW SUBCOMMITTEE'S DETERMINATION IN THIS CASE.

In this case, a grievance review subcommittee (the "Subcommittee") with final and binding authority to determine grievances found that the Charging Party, a union steward, was discharged for the use of profanity and insubordination upon receipt of her discipline. *Babcock & Wilcox Constr. Co.*, Case 28-CA-22625, JD(SF)-15-12, *slip op.*, at *4-5 (Apr. 9, 2012). The Charging Party filed an unfair labor practice charge alleging a violation of Section 8(a)(3) and (1) of the Act with respect to her discharge. *Id.* at *1. After the Subcommittee issued its decision, the Charging Party informed Region 28 of the Board that she was not satisfied with the

[11] If the Board adopts the standard we propose, there will be no need to modify the Board's deferral standards under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and its progeny. On the other hand, the General Counsel's proposed policy would eviscerate *Collyer* deferral. This is because, as described above, the policy proposed by the General Counsel would be, in practice, a policy of "non-deferral," where the grievance arbitration system essentially becomes the first step in the NLRB process. *See supra* Pt. II.C. What would then be the function and utility of arbitration, or indeed, of any deferral policy?

Similarly, as discussed above, the test proposed herein is equally applicable to arbitration awards and to settlements. There would be no need for the Board to change its current policy under *Alpha Beta*, 273 NLRB 1546 (1985), and its progeny. On the other hand, if the Board adopts the General Counsel's proposed policy, the functionality of settlements will be reduced.

grievance decision and asked that the Region not defer to it. *Id.* at *5. The Region declined to defer to the Subcommittee's decision, finding it repugnant to the Act, and issued complaint. *Id.*

In the proceeding below, the Administrative Law Judge ("ALJ") noted that the General Counsel "concedes that the proceedings were fair and regular and that all parties had agreed to be bound by the decision. In addition, the contractual issue presented was factually parallel to the unfair labor practice issue and the [S]ubcommittee was generally presented with the facts relevant to resolving the unfair labor practice." *Id*. Thus, the only issue below was whether the General Counsel's contention that the Subcommittee's decision was "repugnant to the Act" was sustainable. *Id.* The ALJ found otherwise, concluding that the Charging Party "was discharged for the use of profanity and insubordination . . . ," and further that "[a]lthough not stated in its decision, the [S]ubcommittee rejected the assertion that the [Charging Party] was discharged because of her duties as steward." *Id.*

As described above, the General Counsel's position in this case – which amounts to second-guessing the Subcommittee's determination – illustrates the subjectivity of the "clearly repugnant" test. *See supra* Pt. III.B. By contrast, given the OGC's concessions in the proceedings below, under our proposed standard, the Board need only address two straightforward questions: (1) whether the union breached its duty of fair representation; and (2) whether the Subcommittees' determination is illegal *per se*. There is neither any evidence in the record, nor any claim, that the union breached its duty of fair representation. Moreover, the Subcommittee's determination does not implicate any non-waivable statutory rights or result in a violation of positive law; rather, the determination concerns and conclusively adjudicates the Charging Party's waivable rights as a union steward, as manifested in the union's agreement to

arbitrate the dispute. Accordingly, the Board should affirm the ALJ's decision to defer to the Subcommittee's determination.

CONCLUSION

We submit that the Board should adopt the five-pronged test enunciated herein for the reasons so stated. Under that test, the Board should defer to the underlying award in this case.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 25th day of March, 2014, the foregoing Brief of *Amici Curiae* Realty Advisory Board on Labor Relations, Incorporated and The League of Voluntary Hospitals and Nursing Homes was filed using the National Labor Relations Board's E-Filing Program. The foregoing brief was also served by email upon the following:

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