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Babcock & Wilcox Construction Co., Inc. and Coletta Kim Beneli. Case 28-CA-022625

December 15, 2014

DECISION AND ORDER¹

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA,
HIROZAWA, JOHNSON, AND SCHIFFER

In this case we consider whether to adhere to, modify, or abandon the Board's existing standard for deferring to arbitral decisions in cases involving alleged violations of Section 8(a)(3) and (1) of the National Labor Relations Act. The Board's standard for deferral is solely a matter for the Board's discretion. Section 10(a) of the Act expressly provides that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award, and the courts have uniformly so held. *International Harvester Co.*, 138 NLRB 923, 925926 (1962) (footnotes omitted), *enfd.* 327 F.2d 784 (7th Cir. 1964), *cert. denied* 377 U.S. 1003 (1964), cited with approval in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964).

In its seminal decision in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), the Board held that it would defer, as a matter of discretion, to arbitral decisions in cases in which the proceedings appear to have been fair and regular, all parties agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. *Id.* at 1082. The deferral doctrine announced in *Spielberg* was intended to reconcile the Board's obligation under Section 10(a) of the Act to prevent unfair labor practices with the Federal policy of encouraging the voluntary settlement of labor disputes. Thirty years later, in *Olin Corp.*, 268 NLRB 573 (1984), the Board adopted the current deferral standard, holding that deferral is appropriate where the contractual issue is "factually parallel" to the unfair labor practice issue, the arbitrator was presented generally with the facts relevant to resolving that issue and the award is not "clearly repugnant" to the Act.

¹ On April 9, 2012, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief; the Respondent filed an answering brief; and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The General Counsel contends that the current deferral standards, as explicated in *Olin*, are inadequate to ensure that employees' statutory rights are protected in the arbitral process. He urges the Board to adopt a more demanding standard in 8(a)(3) and (1) cases, specifically those alleging that employers have retaliated against employees for exercising their rights under Section 7 of the Act. Under the General Counsel's proposed standard, the Board would defer only if the statutory right was either incorporated in the collective-bargaining agreement or presented to the arbitrator by the parties, and if the arbitrator "correctly enunciated the applicable statutory principles and applied them in deciding the issue."² Under the General Counsel's proposed standard, the party favoring deferral would have the burden of showing that those criteria were met. On such a showing, if the proceedings appeared to have been fair and regular, and all parties agreed to be bound, the Board would defer unless the award was "clearly repugnant" to the Act, as under the current standard. See GC Memorandum 11-05 at 6-7 (January 20, 2011).

On February 7, 2014, the Board invited the parties and interested amici to file briefs addressing the following questions.

1. Should the Board adhere to, modify, or abandon its existing standard for postarbitral deferral under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984)?
2. If the Board modifies the existing standard, should the Board adopt the standard outlined by the General Counsel in GC Memorandum 11-05 (January 20, 2011) or would some other modification of the existing standard be more appropriate: e.g., shifting the burden of proof, redefining "repugnant to the Act," or reformulating the test for determining whether the arbitrator "adequately considered" the unfair labor practice issue?
3. If the Board modifies its existing post-arbitral deferral standard, would consequent changes need to be made to the Board's standards for determining whether to defer a case to arbitration under *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984); and *Dubo Mfg. Corp.*, 142 NLRB 431 (1963)?
4. If the Board modifies its existing postarbitral deferral standard, would consequent changes need to be made to the Board's standards for determining whether

² The General Counsel does not contend that the standard should be changed for cases involving alleged violations of Sec. 8(a)(5), which address the employer's duty to bargain in good faith. Accordingly, our decision does not address the standard for deferral in 8(a)(5) cases.

to defer to prearbitral grievance settlements under *Alpha Beta*, 273 NLRB 1546 (1985), review denied sub nom. *Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987); and *Postal Service*, 300 NLRB 196 (1990)?

The Board also invited the parties and amici to submit empirical and other evidence bearing on those questions.³

After careful consideration, we agree with the General Counsel that the existing deferral standard does not adequately balance the protection of employees' rights under the Act and the national policy of encouraging arbitration of disputes arising over the application or interpretation of a collective-bargaining agreement. The current standard creates excessive risk that the Board will defer when an arbitrator has not adequately considered the statutory issue,⁴ or when it is impossible to tell whether he or she has done so. The result is that employees are effectively deprived of their Section 7 rights if disciplinary actions that are, in fact, unlawful employer reprisals for union or protected concerted activity are upheld in arbitration.⁵ Accordingly, we have decided to modify our standard for postarbitral deferral in 8(a)(3) and (1) cases, but not precisely along the lines suggested by the General Counsel.

We agree that the burden of proving that deferral is appropriate is properly placed on the party urging deferral. We also agree that deferral is appropriate only when the arbitrator has been explicitly authorized to decide the statutory issue, either in the collective-bargaining agreement or by agreement of the parties in the particular case. We believe, however, that the General Counsel's proposal that deferral is warranted only if the arbitrator "correctly enunciated the applicable statutory principles and applied them in deciding the issue" would set an unrealistically high standard for deferral. Our modified standard, by contrast, will require that the proponent of deferral demonstrate that the parties presented the statutory

issue to the arbitrator, the arbitrator considered the statutory issue or was prevented from doing so by the party opposing deferral, and Board law reasonably permits the award. On such a showing, the Board will defer.⁶ Our reasons follow.

I. DISCUSSION

A. Statutory Background

Before turning to the specific questions presented here, we examine the statutory background of today's case. We begin by recognizing two well-established premises of American labor law, both of which derive from the policy of the Act, set forth in Section 1, to "encourag[e] the practice and procedure of collective bargaining." The first is that this system of free and robust collective bargaining cannot exist if employees who seek to participate in it can be disciplined or discharged for doing so. Recognizing this obvious truth, in Section 1 of the Act, Congress declared it to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred . . . by protecting the exercise by workers of full 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.

To further that policy, Congress enacted Section 7 of the Act, which declares that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. §157. To

³ Briefs were received from the General Counsel, the Respondent, and amici American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), U.S. Chamber of Commerce (Chamber), National Association of Manufacturers (NAM), Council on Labor Law Equality (COLLE), United States Postal Service (USPS), Association for Union Democracy (AUD), United Nurses Associations of California/ Union of Health Care Professionals (UNAC/ UHCP), Realty Advisory Board on Labor Relations (RAB) and League of Voluntary Hospitals and Nursing Homes (LVH), National Elevator Bargaining Association (NEBA), and the law firm Weinberg, Roger & Rosenfeld.

⁴ We use the term "statutory issue" interchangeably with, and as shorthand for, "unfair labor practice issue." In his dissent, Member Miscimarra objects to this usage. For the reasons discussed below, we find no merit in his position.

⁵ We do not suggest that the current standard constitutes an impermissible construction of the Act. We simply conclude, for the reasons discussed below, that our modified standard will more effectively protect employees' exercise of their Sec. 7 rights while continuing to effectuate the national policy favoring the private resolution of workplace disputes through arbitration.

⁶ As Member Johnson observes in his dissent, most reviewing courts have either explicitly or implicitly endorsed the current deferral standard, although as the authors of a leading labor law text have observed, "with varying degrees of enthusiasm." Thus, as the authors point out,

Some courts have expressly endorsed the *Olin* criteria and have held that the Board must be consistent in adhering to them; others have endorsed those criteria, essentially by way of dictum, while upholding the Board's decision not to defer because of noncompliance with those criteria; and some courts of appeals [have] extended the *Olin* reasoning and criteria to apply to grievance settlements between the union and the employer in advance of the arbitration step in the collective agreement. Other courts have expressly reserved judgment on whether the *Olin* doctrine represents a proper exercise of the Board's discretion. [] One court of appeals, the Eleventh Circuit, has flatly rejected the Board's decision in *Olin*."

Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law* 1028 (2d ed. 2004) (citations omitted). To the extent the courts have approved *Olin* as a permissible exercise of the Board's discretion, we do not disagree. But neither the Board nor any court has held that the current standard is compelled by anything in the language or purpose of the Act.

ensure that employees are free to exercise their Section 7 rights without fear of reprisal, Congress enacted Section 8(a)(1), which provides, as relevant here, that it is unlawful for employers to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7,” and Section 8(a)(3), which provides that it is unlawful for employers to discriminate against employees “to encourage or discourage membership in any labor organization.” 29 U.S.C. §§158(a)(1), 158(a)(3).

Congress created the National Labor Relations Board as the sole entity charged with administering the Act and preventing unfair labor practices. Section 10(a) of the Act explicitly provides that

The Board is empowered . . . to prevent any person from engaging in any unfair labor practice [listed in section 8] affecting commerce. *This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.* . . .

29 U.S.C. §160(a) (emphasis added). Thus, Congress explicitly empowered the Board to protect employees’ statutory rights, even if other entities might also be authorized to do so in other proceedings.

Significantly, the Board performs this function in the public interest and not in vindication of private rights. *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957) (footnote omitted), *enfd.* 251 F.2d 639 (6th Cir. 1958). As the Supreme Court observed long ago, “The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the . . . unfair conduct in order to remove obstructions to interstate commerce.” *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265 (1940). A fundamental premise, then, underlying our decision today is that enforcement by the Board of the public rights embodied in the Act is an essential aspect of the statutory scheme designed by Congress to promote industrial peace and stability.

The second premise underlying our decision is the central role of arbitration in promoting industrial peace and stability.⁷ Section 1 of the Act declares it to be “the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they

have occurred by encouraging the practice and procedure of collective bargaining” Through collective bargaining, representatives of employers and employees attempt to reach an agreement that will govern their workplace relationships. Even when the parties are successful in reaching such an agreement, however, they recognize that not every contingency can be anticipated and that disputes may arise over the interpretation of particular aspects of the agreement, including those concerning discipline and discharge. Accordingly, and to avoid having to resolve those disputes by recourse to economic weapons such as strikes and lockouts, the parties typically include in collective-bargaining agreements a grievance procedure through which their representatives attempt to reach a satisfactory resolution. When such attempts fail, the agreement generally provides for a neutral arbitrator or arbitral board to render a final decision that is binding on the parties. Arbitration is a process that has been freely chosen by the parties through collective bargaining as a means for obtaining a final resolution of disputes. Indeed, Congress stated in Section 203(d) of the Labor-Management Relations Act that “[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.” 29 U.S.C. §173(d).

As important as arbitration is to the effective functioning of labor-management relations, however, given Congress’ specific statutory direction in Section 10(a), the Board need not automatically defer to arbitral decisions when the matter has also been alleged as a violation of the Act. Rather, deferral is a matter of discretion. As the Board held long ago,

There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held.

International Harvester Co., 138 NLRB 923, 925–926 (1962) (footnotes omitted), *enfd.* 327 F.2d 784 (7th Cir. 1964), *cert. denied* 377 U.S. 1003 (1964), cited with approval in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964). Recognizing the discretionary nature of the Board’s deferral policy, the D.C. Circuit has remarked, “Sec. 203(d) reads most naturally as a general policy statement in favor of private dispute resolution, not as any kind of limitation on Board authority.” *Hammontree v. NLRB*, 925 F.2d 1486, 1493 (D.C. Cir. 1991). The court also stated that “Sec. 203(d) represents a quintessential delegation to the Board, not this court, to

⁷ *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 fn. 4 (1960) (observing that “[a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement” and “[c]omplete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes”).

formulate a deferment policy that accommodates all of its varying statutory responsibilities.” *Id.* at fn. 12.

In sum, deferral is solely a matter of the Board’s statutory discretion to resolve alleged unfair labor practices where in its judgment its intervention is necessary to protect the public rights defined in the Act. Concomitantly, the Board may withhold its authority to adjudicate alleged unfair labor practices where in its judgment Federal labor policy would be best served by deferring to an arbitral decision involving the same subject matter.⁸ As discussed further below, the discretionary aspect of the Board’s deferral policy is particularly significant in 8(a)(3) and (1) cases such as this, where employees’ contractual rights, implicated in the grievance, are separate from their rights under the Act.

B. A Brief History of Postarbitral Deferral

The Board’s postarbitral deferral policy has traveled a long and winding road.⁹ The Board began almost 60 years ago, as an exercise of discretion, to defer in what it deemed appropriate circumstances to arbitral decisions involving alleged unfair labor practices. In its 1955 *Spielberg* decision, the Board announced that it would defer if the proceedings appeared to have been fair and regular, all parties had agreed to be bound, and the arbitrator’s decision was “not clearly repugnant to the purposes and policies of the Act.” 112 NLRB at 1082. After some years of experience applying *Spielberg*, the Board held it improper to defer when the arbitrator had not considered the unfair labor practice issue, explaining that “[w]e cannot, in giving effect to arbitration agreements, neglect our function of protecting the rights of employees granted by our Act.” *Raytheon Co.*, 140 NLRB 883, 886 (1963), *enf. denied* 326 F.2d 471 (1st Cir. 1964). The *Raytheon* rule was extended in *Airco Industrial Gases*, 195 NLRB 676, 677 (1972), to cases where the arbitration award gave no indication whether the arbitrator ruled on the unfair labor practice issue. *Id.* at 677. Then, in *Yourga Trucking*, the Board held that the party urging deferral bore the burden of showing that the deferral standards were met. 197 NLRB 928, 928 (1972).

⁸ Because of the discretionary character of the Board’s deferral to arbitration, the Supreme Court’s decisions in such cases as *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), are not controlling here. In any event, those cases address whether parties may be contractually required to arbitrate certain statutory claims, not (as here) whether and when an administrative agency exclusively charged with administering a statute should exercise its statutory discretion to defer to an arbitral decision disposing of such claims.

⁹ See Gorman & Finkin, *supra*, *Basic Text on Labor Law* §31.2 (tracing “tortuous history” of Board’s deferral doctrine).

Two years later, however, the Board abruptly reversed course, citing concern that under the existing standard, parties would withhold evidence relevant to the unfair labor practice issue in arbitral proceedings in an attempt to have the Board decide the issue. *Electronic Reproduction Service Corp.*, 213 NLRB 758, 761 (1974). To avoid such piecemeal litigation, the Board held that it would defer to arbitral awards unless the party opposing deferral could show that special circumstances prevented that party from having a full and fair opportunity to present evidence relevant to the statutory issue.

Six years later, the Board overruled *Electronic Reproduction Service*, and returned to the principles laid down in *Raytheon*, *Airco*, and *Yourga Trucking*. *Suburban Motor Freight, Inc.*, 247 NLRB 146, 146–147 (1980). In *Suburban Motor Freight*, the Board ruled that it would “give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue of discrimination in determining the propriety of an employer’s disciplinary actions.” *Id.* The Board also returned to the previous burden of proof allocations, under which the party seeking deferral was required to show that the standards for deferral had been met. *Id.*

Four years later, however, the Board in *Olin* overruled *Suburban Motor Freight* and held that it would find that an arbitrator has adequately considered the unfair labor practice if: (1) the contractual and unfair labor practice issues were factually parallel, and (2) the arbitrator was generally presented with the facts relevant to resolving the unfair labor practice. 268 NLRB at 574, 575. The Board also placed the burden on the party opposing deferral to demonstrate that the standards for deferral had not been met. *Id.*

C. The New Standard for Postarbitral Deferral

Having carefully considered the arguments of the parties and amici, we are persuaded that the existing deferral standard does not adequately protect employees’ exercise of their rights under Section 7. In practice, the standard adopted in *Olin* amounts to a conclusive presumption that the arbitrator “adequately considered” the statutory issue if the arbitrator was merely presented with facts relevant to both an alleged contract violation and an alleged unfair labor practice. The presumption is theoretically rebuttable, but, as indicated above, the burden is on the party opposing deferral to show that the conditions for deferral are not met. In many, if not most arbitral proceedings, the parties do not file written briefs; there is no transcript of proceedings; and decisions often are summarily stated. In such situations, it is virtually impossible to prove that the statutory issue was *not* considered. For example, in *Airborne Freight Corp.*, 343 NLRB 580, 581 (2004), the Board deferred the 8(a)(3)

discharge allegation even though the record did not show what arguments and evidence were presented in the grievance proceeding, because the General Counsel was unable to show that the statutory issues were *not* presented to the grievance panel. In our view, deferral in such circumstances amounts to abdication of the Board's duty to ensure that employees' Section 7 rights are protected.

Accordingly, we have decided to modify our deferral standard as follows. If the arbitration procedures appear to have been fair and regular, and if the parties agreed to be bound,¹⁰ the Board will defer to an arbitral decision if the party urging deferral shows that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award. This modified framework is intended to rectify the deficiencies in the current deferral standard in a way that provides greater protection of employees' statutory rights while, at the same time, furthering the policy of peaceful resolution of labor disputes through collective bargaining. Thus, as discussed below, this approach will enable us to determine whether the arbitrator has actually resolved the unfair labor practice issue in a manner consistent with the Act, without placing an undue burden on unions, employers, arbitrators, or the arbitration system itself.

1. The arbitrator must be explicitly authorized to decide the statutory issue

Arbitration is a consensual matter. The Supreme Court has expressly held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers v. Warrior & Gulf Navigation Co.*, supra, 363 U.S. at 582. See also *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 374 (1974) ("The law compels a party to submit his grievance to arbitration only if he has contracted to do so."). Further, Section 203(d)'s endorsement of arbitration as "the desirable method for settlement of grievance disputes" is confined to disputes "*arising over the application or interpretation of an existing collective-bargaining agreement*"

¹⁰ These traditional requirements, articulated in *Spielberg*, 112 NLRB at 1082, are not in controversy and need no further explanation.

Amicus AUD suggests that in some cases, notably those involving union dissidents, union officials may be more closely aligned with management than with the grievant. In such circumstances, AUD contends that the Board should not defer where the charging party's position vis-à-vis the union is such that an objective observer would infer an adverse relationship. We think that AUD's concern can be effectively addressed when the Board is considering whether arbitral proceedings have been fair and regular.

(emphasis added).¹¹ We agree with the General Counsel, then, that the Board should not defer to an arbitrator's decision unless the arbitrator was specifically authorized to decide the unfair labor practice issue. The proponent of deferral can make this showing by demonstrating that the specific statutory right at issue was incorporated in the collective-bargaining agreement. If the right was not incorporated in the contract, the proponent must show that the parties explicitly authorized the arbitrator to decide the statutory issue.

2. The arbitrator must have been presented with and considered the statutory issue, or have been prevented from doing so by the party opposing deferral

Under the current deferral standard, an arbitrator will be found to have adequately considered the unfair labor practice issue if it and the contractual issue are "factually parallel" and if the arbitrator was "presented generally" with the facts relevant to resolving the statutory issue. *Olin*, 268 NLRB at 574. As discussed above, this amounts to a presumption that if an arbitrator is presented in some fashion with facts relevant to both an alleged contract violation and an alleged unfair labor practice, the arbitrator necessarily was presented with, and decided, the latter allegation in the course of deciding the former. We have repeatedly seen the shortcomings of that presumption, as this case illustrates.

Charging Party Coletta Kim Beneli was a union steward at the Respondent's workplace. She received a 3-day suspension without pay, assertedly for failing to fill out a safety form and for eating a pastry during a safety meeting. On the same day, she was summarily fired, ostensibly for using profanity in response to receiving the suspension. There is evidence to suggest, however, that Beneli's profane outburst was provoked by the Respondent's own wrongful actions and that the Respondent may have seized on Beneli's outburst as a pretext for getting rid of an assertive union steward. In this regard, the record establishes that shortly before her discharge, Beneli challenged several actions by the Respondent as violative of the parties' collective-bargaining agreement. The rec-

¹¹ As explained in the leading treatise on labor arbitration:

Beginning with its *Enterprise Wheel* decision [*United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)], the U.S. Supreme Court limited the arbitrator's role in rights disputes to interpretation and application of the collective bargaining agreement. The Court held that although an arbitrator could look outside the contract for guidance, "he does not sit to dispense his own brand of industrial justice," and the arbitrator's award is therefore legitimate only insofar as it "draws its essence" from the collective bargaining agreement.

Frank Elkouri & Edna Elkouri, *How Arbitration Works*, 143 (5th ed. 1997).

ord further establishes that only a few hours before suspending Beneli, the Respondent's project manager told the Union's assistant business manager that he wanted to discharge Beneli because she was raising contractual issues and trying to tell the Respondent what it was supposed to pay employees.

The Union grieved the discharge, contending that it violated the contractual prohibitions against retaliating against employees for engaging in union activity and against termination except for cause. The case was arbitrated before the contractual Grievance Review Subcommittee. But although the Union specifically argued that Beneli was fired for certain of her steward activities, in violation of the Act and Board decisions, there is nothing in the Subcommittee's decision to indicate whether it gave consideration to any of those matters or to the facts summarized above. The decision states only that Beneli's termination for using profanity did not violate the contractual prohibition against termination without just cause; it fails even to mention the statutory issue or the contractual prohibition against retaliation for union activity. In denying the grievance, the Subcommittee may have considered the statutory issue, or it may not have; there is simply no way to tell.

The Subcommittee's decision would appear to qualify for deferral under the current standard, even though it is impossible to determine whether the Subcommittee considered the statutory issue. As the judge found, it is conceded that the proceedings were fair and regular, and that all parties agreed to be bound by the panel's decision. Further, under *Olin*, the Subcommittee would be deemed to have "adequately considered" the unfair labor practice issue—whether Beneli was discharged for her steward activities—even if it actually did not consider that issue at all, because it was "factually parallel" to the contractual issue—discharging Beneli for the use of profanity—and the Subcommittee was "presented generally" with the facts relevant to resolving the statutory issue. Additionally, the absence of any evidence that the statutory issue was considered presents no impediment to deferral under the current standard because the General Counsel has the burden to show that the statutory issue was *not* considered. See, e.g., *Airborne Freight Corp.*, 343 NLRB at 581. Finally, the decision to deny Beneli's grievance was not found to be repugnant to the Act, because it was susceptible to an interpretation consistent with the Act.

This case is not an isolated example of the uncertainties that exist under the current standard. See, e.g., *Andersen Sand & Gravel Co.*, 277 NLRB 1204 (1985) (deferral appropriate even absent evidence that arbitral panel either considered or resolved unfair labor practice issue);

Airborne Freight Corp., 343 NLRB at 581 (deferral of 8(a)(3) discharge allegation appropriate, even though the record did not show what arguments and evidence were presented in the grievance proceeding, because the General Counsel was unable to show that the statutory issues were *not* presented to the grievance panel). Nor is there any way of knowing how many cases are never brought to the Board because the General Counsel or the party who would challenge deferral correctly assumes that, under our current standard, the Board would defer. Thus, the standards established in *Olin* may impede access to the Board's remedial processes and leave employees without any forum for the vindication of their statutory rights.

We are no longer willing to countenance such results. In our view, the Board does not fulfill its role under Section 10(a) as the only entity statutorily charged with protecting employees' Section 7 rights by deferring to decisions that do not indicate whether the arbitrator has even considered those rights. As the Ninth Circuit put it, "The Board cannot properly exercise its discretion in deferring to an arbitration decision when it is ignorant of the . . . basis for the [arbitral panel's] decision." *Stephenson v. NLRB*, 550 F.2d 535, 541 (9th Cir. 1977). The Board exercises its power to prevent unfair labor practices in the public interest and not simply in vindication of private rights. *Robinson Freight Lines*, 117 NLRB at 1485. Similarly, the Eleventh Circuit has stated: "By presuming, until proven otherwise, that all arbitration proceedings confront and decide every possible unfair labor practice issue, *Olin Corp.* gives away too much of the Board's responsibility under the NLRA." *Taylor v. NLRB*, 786 F.2d 1516, 1521–1522 (11th Cir. 1986). It is the policy of the Act to ensure—that is, for the Board to ensure—that employees may engage in union and other protected concerted activities to improve their lot in the workplace without fear of retribution; otherwise, the Act's policy of encouraging collective bargaining would soon be a dead letter. In our opinion, deferral under circumstances such as those presented here serves neither the public interest in protecting the exercise of employees' Section 7 rights nor, ultimately, the public interest in promoting industrial peace.

Accordingly, we shall defer to arbitral decisions only where the party urging deferral demonstrates that the arbitrator has actually considered the unfair labor practice issue, or that although the statutory issue is incorporated in the collective-bargaining agreement, the party opposing deferral has acted affirmatively to prevent the proponent of deferral from placing the statutory issue

before the arbitrator.¹² We emphasize, however, that we are not returning to the rule of *Electronic Reproduction Services*, wherein the Board held that in the absence of “unusual circumstances” it would defer to arbitral awards dealing with discharge or discipline so long as there was an *opportunity* to present the statutory issue to the arbitrator, even where the record did not disclose whether the arbitrator had considered, or been presented with, the unfair labor practice issue involved.¹³

We shall find that the arbitrator has actually considered the statutory issue when the arbitrator has identified that issue and at least generally explained why he or she finds that the facts presented either do or do not support the unfair labor practice allegation. We stress that an arbitrator will not be required to have engaged in a detailed exegesis of Board law in order to meet this standard. We recognize that many arbitrators, as well as many union and employer representatives who appear in arbitral proceedings, are not attorneys trained in labor law matters. An important and attractive feature of the grievance-arbitration system is that it is less formal, less structured, and in most circumstances less costly than litigation. We do not intend to upset this system by adopting a deferral standard that would be all but impossible for participants lacking legal training to meet. In short, we do not seek to turn arbitrators into administrative law judges, or human resources representatives and shop stewards into labor lawyers. Accordingly, we decline to adopt the General Counsel’s position that deferral is warranted only if the arbitrator “correctly enunciated the applicable statutory principles and applied them in deciding the issue.” We think that meeting the standard announced today will be well within the capabilities of arbitrators and union and management representatives.

The Respondent and several amici oppose any standard that would encourage unions to withhold evidence concerning unfair labor practice issues in arbitration proceedings in order to defeat deferral. The new standard

provides no such encouragement. Under our standard, either party can raise the statutory issue before the arbitrator; thus, an employer normally can ensure that the issue receives the arbitrator’s consideration by raising it even if the union does not.¹⁴ Indeed, both parties will normally be motivated to ensure that the unfair labor practice issue is presented to the arbitrator, in order to avoid unnecessary litigation, increased costs, and unwarranted delay in resolving the dispute.¹⁵ Under the standard announced today, if the unfair labor practice issue is placed before an arbitrator and a party has evidence supporting its statutory claim but fails to introduce it in the arbitral proceeding, the Board will assess whether Board law reasonably permits the arbitrator’s award in light of the evidence that was presented. Thus, a party would gain nothing by withholding evidence supporting its statutory claim. In such circumstances, if the other requirements for deferral are met, the fact that the arbitrator might have reached a different decision on the basis of the withheld evidence will not preclude deferral.

3. Board law must reasonably permit the award

If the previous requirements are met, deferral normally will be appropriate if the party urging deferral shows that Board law reasonably permits the arbitral award. By this, we mean that the arbitrator’s decision must constitute a reasonable application of the statutory principles that would govern the Board’s decision, if the case were presented to it, to the facts of the case. The arbitrator, of course, need not reach the same result the Board would reach, only a result that a decision maker reasonably applying the Act could reach.¹⁶ In deciding whether to defer, the Board will not engage in the equivalent of de novo review of the arbitrator’s decision.

This standard is more closely aligned with the Board’s responsibilities under Section 10(a). Under the current standard, the Board will defer if the party opposing deferral fails to show that the award is “clearly repugnant to

¹² We do not expect to be confronted often with the latter circumstance. As discussed below, the employer will typically be able to present the statutory issue to the arbitrator even if the union fails or refuses to do so. We include this provision in the revised standard to ensure that deferral is not precluded if that is not the case.

¹³ Member Johnson is thus correct in concluding that the Board would not defer under the new standards merely because a union had an opportunity to present the statutory issue to an arbitrator, but failed to do so. However, the new standard is no different from the current standard in this respect. *Olin*, 268 NLRB at 575 fn. 10 (“We do not resurrect that part of *Electronic Reproduction* which required no more than an “opportunity” to present the unfair labor practice issue to the arbitrator to warrant deferral.”). See also *Hendrickson Bros., Inc.*, 272 NLRB 438, 439–440 (1984), enfd. mem. 762 F.2d. 990 (2d Cir. 1985), overruled on other grounds *Don Chavas LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 5 fn. 31 (2014).

¹⁴ Both NEBA and USPS oppose any change in the deferral standard that would require an employer to raise the unfair labor practice if the union failed to do so. However, satisfying the requirement that the statutory issue be placed before the arbitrator should not be especially onerous; in most cases informing the arbitrator of the unfair labor practice allegation in a pending charge would suffice.

¹⁵ It is not apparent why a party would deliberately sabotage its own case before an arbitrator who is likely in a position to afford that party the relief it seeks, simply in order to have its case decided by the Board, perhaps much later and with no guarantee of success.

¹⁶ An arbitrator need not necessarily provide the exact remedy the Board would have imposed. For example, the Board might defer to an award that allowed the respondent to deduct unemployment compensation from backpay, contrary to the Board’s policy. The absence of any effective remedy, however, would preclude deferral. See, e.g., *Joseph Magnin Co.*, 257 NLRB 656, 656 fn. 1, enfd. 704 F.2d 1457 (9th Cir. 1983), cert. denied 465 U.S. 1012 (1984).

the Act,” i.e., “palpably wrong” or “not susceptible to an interpretation consistent with the Act.” *Olin*, 268 NLRB at 574 (fn. omitted). The effect of this standard has been to require deferral unless there is no conceivable reading of the facts in a given case that would support the arbitrator’s decision. Thus, in a case such as this one involving an alleged 8(a)(3) discharge, the Board would routinely defer to an arbitrator’s decision denying the grievance, even if there was considerable evidence of retaliatory motive. Notwithstanding a possibly rapid resolution of the workplace dispute and the avoidance of duplicative litigation before the Board, such an approach fails to ensure that employees’ statutory rights are adequately protected. The overriding aim of deferral is not to resolve disputes quickly or to reduce the Board’s caseload, although those are worthwhile aspects of the policy. The point, rather, is to give effect to the parties’ voluntarily chosen process for resolving workplace disputes, *provided* that process leads to decisions that adequately protect employees’ statutory rights. Our new standard is more likely to achieve this goal.

Contrary to the Respondent and several amici, adopting this standard will not necessarily reduce significantly the incidence of deferral in practice. As stated above, we are not seeking to turn arbitrators into administrative law judges, and we do not propose to review their decisions as though they were. All we require is a showing that the arbitrator’s decision is one that a decision maker reasonably applying the Act could reach. Moreover, this should not be a difficult standard to meet. For example, as COLLE, NAM, NEBA, and our dissenting colleagues have argued, most collective-bargaining agreements contain provisions prohibiting discipline and discharge except for “just cause,” and arbitrators are well versed in applying those principles. Thus, an arbitrator typically should understand that retaliation for the exercise of employees’ Section 7 rights can never constitute “just cause,” and the award would have to reflect that reasonable application of Board law.

We will not simply assume, however, merely from the fact that an arbitrator upheld a discharge under a “just cause” analysis, that the arbitrator understood the statutory issue and had considered (but found unpersuasive) evidence tending to show unlawful motive. Experience teaches that no such assumption is warranted. There have been numerous instances in which the Board declined to defer, even under the current standard, to arbitral decisions that upheld discipline or discharges under a “just cause” analysis *for conduct protected by the Act*. See, e.g., *Mobil Oil Exploration & Producing, U.S.*, 325 NLRB 176, 177–179 (1997), *enfd.* 200 F.3d 230 (5th Cir. 1999); *Garland Coal & Mining Co.*, 276 NLRB 963,

964–965 (1985) (finding in each case that the arbitrator’s decision was “repugnant to the Act”); see also *Cone Mills Corp.*, 298 NLRB 661, 666–667 (1990).¹⁷ As two leading scholars observe, “an arbitrator applying the ‘just cause’ provision in the contract—and sustaining the discharge—may well depart from the standards that the NLRB would apply” because they are “issues of legal characterization, in light of the policies of the NLRA, and are therefore not likely to have been precisely addressed by the arbitrator.”¹⁸

Member Miscimarra rejects this approach. He advances instead a novel theory based on the provision in Section 10(c) of the Act and its legislative history that “[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.” 29 U.S.C. §160(c). He contends that this provision, and its legislative history, “*makes ‘cause’ the relevant statutory issue* in all cases involving discharges and suspensions alleged to violate the Act (emphasis in original).” He further asserts that in enacting Section 10(c), Congress required that the Board’s General Counsel prove that an allegedly unlawful suspension or discharge was not “for cause,” and that deferral is appropriate unless the General Counsel can make that showing. Member Miscimarra claims that our decision today inappropriately treats “cause” as somehow “inferior to a more rigorous and exacting ‘unfair labor practice’ or ‘statutory’ issue.” There is no merit to any of these assertions.

In cases in which discipline or discharge is alleged to violate the Act, the Board has long employed the two-stage causation analysis first announced in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402–403 (1983). Under that analysis, the General Counsel first must prove, by a preponderance of the evidence, that the employee’s protected conduct was a motivating factor in the employer’s decision to discipline or discharge him.

¹⁷ These decisions also illustrate why it is appropriate to require a showing that the unfair labor practice issue was presented to the arbitrator and that the arbitrator explained why the facts presented either support or fail to support the statutory allegation. Because it was clear in each case what facts were presented to the arbitrator and what the basis for the arbitrator’s decision was, the Board could easily discern that the arbitrator’s decision was not subject to an interpretation consistent with the Act. Had either the factual record or the arbitrator’s reasoning been less fully developed in any of these cases, it might have been impossible for the party opposing deferral to show that the award was “palpably wrong.”

¹⁸ Gorman & Finkin, *Basic Text on Labor Law*, *supra*, §31.5 at 1037.

If the General Counsel fails to make that showing, there is no violation of the Act, regardless of whether the employer's action was for "cause"—e.g., incompetence, insubordination, or excessive absenteeism—or for some other reason. But if the General Counsel does carry his initial burden, the burden then shifts to the employer to prove, also by a preponderance of the evidence, that it would have taken the same action for other reasons (whether or not based on "cause" or "just cause"), regardless of the employee's protected activity. 251 NLRB at 1089. Thus, the employer need not assert "just cause" for its decision, but if it does, it must prove not only that just cause existed, but that it would have taken the same action *even absent the protected conduct*. Under *Wright Line*, then (contrary to our colleague), the Board may find a violation even if the employer shows the existence of "cause" for its action.

The Supreme Court's decision in *Transportation Management* undermines Member Miscimarra's Section 10(c) argument not only by endorsing the *Wright Line* standard, but in two additional ways. First, the Court observed that the legislative history of Section 10(c) indicates that Congressional drafters simply assumed that discharges were *either* "for cause" *or* in retaliation for protected activity; they were "not thinking of the mixed motive" situation found in some discipline and discharge cases.¹⁹ The Court remarked that the "for cause" proviso to Section 10(c)

was sparked by a concern over the Board's perceived practice of inferring from the fact that someone was active in a union that he was fired because of antiunion animus even though the worker had been guilty of gross misconduct. . . . [It] thus has little to do with the situation in which the Board has soundly concluded that the employer had an antiunion animus and that such feelings played a role in a worker's discharge.

Id. at 402 fn. 6. Second, the Court specifically rejected the argument that the General Counsel must show that the employer would *not* have taken the same action, regardless of the protected activity: "Section 10(c) places the burden on the General Counsel only to prove the unfair labor practice, not to disprove an affirmative defense." *Id.* at 401 fn. 6. Thus, the Court implicitly rejected our colleague's contention that Congress meant to require the General Counsel to prove that the employer's action was not for "cause." In sum, Member Miscimarra is mistaken in asserting that "cause" is "the relevant stat-

¹⁹ See, for example, Senator Taft's statement: "If a man is discharged for cause, he cannot be reinstated. If he is discharged for union activity, he must be reinstated." 93 Cong. Rec. 6677, reprinted in 2 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 1593.

utory issue" in all discipline and discharge cases under the Act and that deferral is appropriate wherever "cause" is shown.²⁰

Member Miscimarra's chief concern seems to be that the Board will routinely refuse to defer in cases in which the arbitrator has determined that "cause" existed for discipline or a discharge. He asserts that under the new standard, "the Board must independently redecide *every* case in which an arbitrator determines only that 'cause' existed for a suspension or discharge." (Emphasis in original.) These fears are unfounded. As indicated above, if an arbitrator's decision can fairly be read as finding that discipline or discharge was for "cause" *and not for protected activity*, the decision would satisfy the part of the deferral standard requiring that Board law reasonably permit the award. Moreover, our new deferral standard will be applied only to the tiny fraction of arbitration decisions that come before the Board and that involve discipline or discharge alleged to be in retaliation for employee activity specifically protected by the Act. And such a case comes before the Board only after: (1) unfair labor practice charges are filed with the Board's regional office alleging violations of Section 8(a)(3) or (1) (the Board cannot proceed *sua sponte*); (2) an investigation is conducted and the Regional Director finds the unfair labor practice allegations meritorious; (3) the dispute is not settled by the parties; (4) the General Counsel issues a complaint;²¹ (5) an administrative law judge issues a decision and order in the case; and (6) one or more parties file exceptions with the Board. In practice, only a small percentage of cases in which unfair labor practice

²⁰ We also reject our colleague's view that placing the burden of proof on the party seeking deferral in a *Wright Line* case is somehow inconsistent with Sec. 10(c). There is a basic distinction, of course, between the standard for deferral and the standard for finding a violation of the Act. Where the Board chooses not to defer to an arbitrator's decision, the General Counsel is still required to prove a violation of the Act under applicable law. As explained, we disagree both with our colleague's interpretation of *Transportation Management* and with his view that Sec. 10(c), which limits the Board's remedial authority when a suspension or discharge is "for cause," somehow constrains the Board's discretion with respect to deferral. Sec. 10(c) clearly contemplates that the Board will determine whether an employer's action is "for cause" within the meaning of the statute. Its terms in no way suggest that the Board must always accept an arbitrator's "for cause" determination (where there is one)—and Sec. 10(a) refutes any such suggestion.

²¹ The General Counsel's decision whether to issue complaints in unfair labor practice cases is final and unreviewable. See Sec. 3(d) of the Act; *NLRB v. Food & Commercial Workers Local 23*, 484 U.S. 112, 122 (1987). For a more complete description of the Board's procedures for processing unfair labor practice charges, see Sec. 102 Part B of the Board's Rules and Regulations.

are filed ever come before the Board.²² Further, only a fraction of the cases decided by the Board involve deferral issues. Consequently, there is no reason to fear, as Member Miscimarra suggests, that the Board will “inject itself more aggressively in every suspension and discharge case that [is] subject to binding grievance arbitration (or a grievance settlement) regarding the existence or non-existence of ‘cause.’”

4. The proponent of deferral has the burden to show that the standards for deferral have been met

Finally, we return to the rule enunciated in *Yourga Trucking, Inc.*, 197 NLRB at 928, and reaffirmed in *Suburban Motor Freight*, 247 NLRB at 147, that the party urging deferral has the burden to prove that the substantive requirements for deferral have been met. It is well settled that deferral is an affirmative defense. *SEIU United Healthcare Workers-West*, 350 NLRB 284, 284 fn. 1 (2007), enfd. 574 F.3d 1213 (9th Cir. 2009). Ordinarily, the proponent of an affirmative defense has the burden of establishing it. See, e.g., *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004) (finding the burden on the party raising an untimely charge defense under Section 10(b) of the Act), enfd. 483 F.3d 628 (9th Cir. 2007).²³ Moreover, as the Board observed in *Yourga Trucking*, the party urging deferral “may be presumed to have the strongest interest in establishing that the issue has been previously litigated[,]” and “in the usual case, that party will have ready access to documentary proof, or to the testimony of competent witnesses, to establish the scope of the issue submitted to the arbitrator.” 197 NLRB at 928.²⁴ Similar considerations apply with regard to the other requirements for deferral (i.e., whether the arbitrator was explicitly authorized to decide the unfair labor practice issue; whether the arbitrator actually considered that issue; and whether Board law reasonably permits the award). In addition, as remarked by Member

²² See the Board’s Performance and Accountability Report for FY 2013 at www.nlr.gov/reportsandguidance/reports/performance_and_accountability_reports (PAR).

²³ In general, the proponent of a rule has the burden to show that the rule applies in the circumstances presented; the proponent of an exception to the rule has the burden to show that the exception applies. See, e.g., 29 Am. Jur. 2d Evidence Sec. 174, 176. Deferral obviously is an exception to the general rule that if the Board has jurisdiction to decide an unfair labor practice issue, it will do so.

²⁴ See also Paul Alan Levy, *Deferral and the Dissident*, 24 U. Mich. J. Law. Ref. 479, 499 (1991) (noting under *Olin* that the “burden of showing the defects in the arbitration is placed on the General Counsel even when he seeks to enforce the statutory rights . . . [while] [i]ronically, it is the parties to the CBA . . . [who] are in the best position to say what actually was litigated and decided.”) Contrary to Member Johnson’s suggestion, if the General Counsel is in possession of the facts concerning the arbitration, it is only because he was so informed by the parties.

Zimmerman in his dissent in *Olin*, there is “no sound procedural basis at all for imposing on the General Counsel—the one party in unfair labor practice litigation who is not in privity through a collective-bargaining agreement—the responsibility of producing evidence about arbitral proceedings under that agreement.” 268 NLRB at 580.

In overruling *Yourga Trucking* and *Suburban Motor Freight* and placing the burden on the party opposing deferral to demonstrate that the standards for deferral had not been met, the Board majority in *Olin* was guided by its perception that the Board had previously been deferring too infrequently, and that this was inconsistent with the “goals of national labor policy.” 268 NLRB at 574, 575.²⁵ We find this reasoning unpersuasive. The test of an appropriate deferral policy is not the frequency or infrequency with which the Board defers. It is, rather, whether the Board’s policy gives due consideration to the vital role that arbitration plays in our national labor policy while ensuring that employees’ statutory rights are given adequate protection—in the public interest—by some tribunal, be it the Board or an arbitrator. As we have stated above, we think that the standard we adopt today implements that test, and that the current standard does not. Moreover, we think that by providing guidance to parties and arbitrators as to the appropriate handling of unfair labor practice issues in the arbitral process, we will increase the likelihood that the decisions that result from that process will be more, not less, likely to be appropriate for deferral.²⁶

D. Rejection of Arguments in Opposition to the New Standard

The Respondent, several amici, and our dissenting colleagues have raised various arguments against changing the current standard or adopting the standard we endorse today. We have carefully considered those arguments, but are not persuaded by them.

The Respondent and several amici oppose changing the current standard on the ground that it will discourage parties from settling their disputes informally through the grievance-arbitration process. Ironically, the same objection to the standard adopted in *Olin* was raised by dis-

²⁵ The *Olin* majority also stated that “[o]ur primary concern is with the failure of the Board itself to defer in a consistent manner thus setting an improper example for the General Counsel and administrative law judges.” 268 NLRB at 575 fn. 9 (emphasis added). Although we, too, favor consistency in deferral cases (and elsewhere), it is unclear to us what consistency has to do with which party has the burden of proof.

²⁶ COLLE notes that in arbitral proceedings, the employer has the burden to demonstrate that an employee’s discipline or discharge was for “just cause.” It would seem no great chore, then, for an employer that prevailed in arbitration under that standard to show that the facts and arguments presented to the arbitrator satisfy our deferral standard, if that is the case.

senting Member Zimmerman. 268 NLRB at 581. However, the Board has never cited actual evidence of such ill effects when adopting and revising its deferral standards. In any event, the standard we adopt today simply requires that parties explicitly decide whether they want an arbitrator to decide unfair labor practice issues, and if so, that those issues be *actually* presented to the arbitrator and *actually* decided in a manner reasonably permitted by Board law. We find it difficult to believe that many employers or unions will abandon the benefits of arbitration in cases implicating Section 8(a)(3) and (1) of the Act because of the new standards, but if some parties do decide not to arbitrate these statutory issues, that is their privilege. That some may do so because they may no longer benefit from the defects of the current standard is hardly a compelling argument against the new standard.

Member Miscimarra fears that our new standard will essentially force parties either to renegotiate their contractual provisions concerning “cause” and limits on the scope of the arbitrator’s authority to interpret the collective-bargaining agreement, or to submit to duplicative litigation when the Board declines to defer to arbitral awards. Again, these fears are unfounded. As we have stated, under our standard, even if a particular contract does not authorize arbitration of unfair labor practice issues, the parties can still authorize the arbitrator to decide such an issue in a given case; they do not have to renegotiate their contract to achieve that result. On the other hand, parties who wish to can draft appropriate contract language prohibiting retaliation for engaging in union activity, as the parties did in this case, or authorizing the arbitrator to decide such issues.²⁷ Because arbitration is a consensual matter, all that need be shown under our standard is that the parties have, in some fashion, explicitly authorized the arbitrator to decide the unfair labor practice issue. Under the new standard, the Board will not assume such grant of authority—it will be up to the parties to agree or not. It is not our province to hold them to a choice they have not made.²⁸

We also disagree with Member Miscimarra’s suggestion that unless parties renegotiate their contractual “just cause” provisions, the Board will not defer to arbitral decisions in cases involving discharge or discipline. Our

colleague himself asserts (as do several amici) that arbitrators know that engaging in activity protected by the Act can never constitute “just cause” for discipline or discharge, and therefore that an arbitrator who finds “just cause” for an employer’s action has implicitly found that the employer did not retaliate against the employee for his protected conduct. There is reason to doubt this claim, as we have suggested. But even if it is correct, it would seem a simple matter for the arbitrator to say so, and thus make explicit what is claimed to be implicit. In short, the policy and practical concerns identified by Member Miscimarra are more illusory than real and do not outweigh the Board’s statutory obligation to protect the public rights defined in the Act.

Member Johnson opposes the new standard for many of the same reasons as Member Miscimarra. We reject his position. First, Member Johnson opposes the requirement that the arbitrator must be explicitly authorized to decide the unfair labor practice issue, which he contends is inconsistent with the presumption of arbitrability established by the Supreme Court.²⁹ But Member Johnson is mistaken, as the Supreme Court itself has made clear. In *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), the Court held that an employee was not required, under the general language of a collective-bargaining agreement, to submit a claim alleging a violation of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§12101 et seq., to the arbitration procedure. In the process, the Court explicitly rejected the employer’s reliance on the presumption of arbitrability announced in the *Steelworkers Trilogy*³⁰ and later decisions. The Court reasoned that “[t]hat presumption . . . does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to *interpret the terms of a CBA*.” 363 U.S. at 78 (emphasis in original). “The dispute in the present case,” the Court observed, “ultimately concerns not the application or interpretation of any CBA, but the meaning of a federal statute.” *Id.* at 78–79. Moreover, the Court continued, “Not only is petitioner’s statutory claim not subject to a presumption of arbitrability; we think any CBA requirement to arbitrate must be particularly clear,” citing *Metropolitan Edison Co. v. NLRB*, 460 U. S. 693 (1983). *Id.* at 79–80.

²⁷ If parties do not wish to reopen their entire collective-bargaining agreement midterm, they have the option of drafting side agreements or agreeing on a case-by-case basis.

²⁸ See *Raytheon Co.*, supra, 140 NLRB at 886 (deferral inappropriate where arbitrator had been informed that he could not consider evidence that employees might have been discharged for engaging in union and other protected activity). As a general matter, the Board has no remedial authority to impose contract terms on collective-bargaining parties, including terms affecting the scope of arbitration provisions. *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970).

²⁹ See *Steelworkers v. Warrior & Gulf*, supra, 363 U.S. at 582–583 (“An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”).

³⁰ *Steelworkers v. Enterprise Wheel & Car*, supra; *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf*, supra.

As stated, the issue in *Wright* was whether to require the employee to arbitrate his statutory discrimination claims—not whether to give effect to an arbitral decision that may or may not have addressed such claims.³¹ But the Supreme Court addressed the latter issue in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); and again, its decision supports our new standard. In *Pyett*, the Court found that, unlike in *Wright*, the employee was required to arbitrate his claim arising under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§621 et seq., because the arbitration provision in the collective-bargaining agreement clearly and unmistakably required employees to arbitrate ADEA claims. 556 U.S. at 258–259. However, the Court distinguished earlier decisions in which it had found that employees had not waived their right to litigate employment discrimination claims by previously submitting contractual claims to arbitration, because the arbitration provisions did not encompass the statutory claims at issue.³² 556 U.S. at 260–264. The Court stressed that those decisions

did not involve the issue of the enforceability of an agreement to arbitrate statutory claims [, but] instead “involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. *Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions.*”

556 U.S. at 264, quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (emphasis added, internal citations omitted).³³ Thus, contrary to Member

Johnson’s assertion, the new standard’s requirement that the arbitrator be explicitly authorized by the parties to decide the statutory issue is solidly in line with Supreme Court precedent.³⁴

Nor is Member Johnson persuasive when he urges the Board to give collateral-estoppel effect to arbitrators’ factual findings. He objects that our “new collateral-estoppel standard” (i.e., our statement, above, that the Board will assess an arbitral award in light of the evidence presented during the arbitration) is “nowhere near[ly] specific or efficient enough to preclude relitigation of essential fact issues.” This suggestion misses the point. Our statement does not address collateral-estoppel. It is well settled that the Board does *not* give collateral estoppel effect to the resolution of private claims asserted by private parties, where the Board was not a party to the prior proceedings. See, e.g., *Field Bridge Associates*, 306 NLRB 322, 322 (1992), enf.d. 982 F.2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993).³⁵ We are simply cautioning parties that if they withhold evidence relative to statutory claims in arbitration proceedings, they do so at their peril.

E. Changes to Prearbitral Deferral Standard

As noted above, when the Board solicited briefs concerning whether to change its postarbitral deferral standard, we asked the parties and amici whether, if the Board modified its postarbitral deferral standard, changes would need to be made to the Board’s prearbitral deferral practices under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984). The AFL–CIO argues that the Board should not defer to the arbitral process unless the first prong of the postarbitral deferral standard is satisfied, that is, unless

however, disturb the reasoning quoted above, which it characterized as a “legal rule.” Id. at 263.

³⁴ Citing *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012), Member Johnson contends that a “flurry of FAA [Federal Arbitration Act] cases” decided since *Wright* and *Pyett*, supra, sap those decisions of their vitality. We disagree. The issue in *CompuCredit* was whether a party was contractually bound to arbitrate claims arising under a Federal statute, not the effect (if any) that an administrative agency must give to an arbitral award. There is no mention of either *Wright* or *Pyett* in the Court’s opinion, and the Court relied on cases that predate *Wright* and *Pyett*.

Member Johnson also argues that *Wright* supports, at most, only the requirement that the arbitrator be explicitly authorized to decide the statutory issue. But that is the only proposition for which *Wright* is cited. It is not otherwise relevant to the Board’s standard for giving deference to an already issued arbitral decision.

³⁵ To say that the Board will not give collateral estoppel effect to an arbitrator’s findings does not mean, as Member Johnson suggests, that they will be “discarded.” Rather, the Board will give them whatever weight is appropriate. In many labor arbitration cases, of course, there is no transcript or other evidentiary record and the arbitrator makes no formal findings.

³¹ The Court in *Wright* did not address whether the Federal Arbitration Act (FAA), 9 U.S.C. §§ et seq., was applicable in that case, because the issue had not been raised. The Court did note that it had previously “discerned a presumption of arbitrability under the FAA,” citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). 525 U.S. at 77–78 fn. 1. In *Mitsubishi Motors*, however, the Court expressly relied in part on *Steelworkers v. Warrior & Gulf*, supra, 363 U.S. at 582–583, where the Court first announced the presumption of arbitrability under Sec. 301 of the LMRA. 473 U.S. at 626. It would seem, then, at least where collective-bargaining agreements are concerned, that the presumption of arbitrability under the FAA would extend no farther than the Court indicated in *Wright*. That is, the presumption would extend only to disputes concerning the application or interpretation of a contract, and not to disputes over the meaning or application of a Federal statute.

³² See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (Fair Labor Standards Act); *McDonald v. West Branch*, 466 U.S. 284 (1984) (42 U.S.C. Sec. 1983).

³³ The Court disavowed certain other aspects of the analysis in *Gardner-Denver* and its progeny. See 556 U.S. at 265–272. It did not,

the arbitrator was explicitly authorized to decide the unfair labor practice issue. We agree. There is no apparent reason to defer to the arbitral *process* if it is plain at the outset that deferral to the arbitral *decision* would be improper. Thus, we shall no longer defer unfair labor practice allegations to the arbitral process unless the parties have explicitly authorized the arbitrator to decide the unfair labor practice issue, either in the collective-bargaining agreement or by agreement of the parties in a particular case.

COLLE and NAM suggest that if the Board adopts a more demanding postarbitral deferral standard, it should also, *inter alia*, require a completed investigation and merit determination before deciding whether to defer an unfair labor practice charge to the arbitral process. These suggestions are more appropriately addressed to the General Counsel. The General Counsel has unreviewable discretion as to whether or not to issue complaints in unfair labor practice cases; it follows that the General Counsel's choice of procedures for processing unfair labor practice charges, including whether and under what circumstances to defer to arbitration before issuing complaints, are matters left to the General Counsel's discretion. See *BCI Coca-Cola*, 361 NLRB No. 75, slip op. at 5 fn. 11 (2014).³⁶

F. Changes to Standard for Determining Whether to Defer to Settlement Agreements Arising from the Grievance-Arbitration Process

The Board also asked the parties and amici whether, if the Board modified its postarbitral deferral standard, changes would need to be made to the Board's standards for determining whether to defer to prearbitral grievance settlements under *Alpha Beta Co.*, 273 NLRB 1546 (1985), review denied sub nom. *Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987); and *Postal Service*, 300 NLRB 196 (1990). In response, the General Counsel and the AFL-CIO contend that we should apply essentially the same standard to settlement agreements as to arbitral decisions. The General Counsel also argues the Board should decide whether to accept the settlement agreement under current nonBoard settlement practices, including review under the standards of *Independent Stave Co.*, 287 NLRB 740, 743 (1987). COLLE, NAM, and Member Johnson, by contrast, argue that no change should be made to the Board's standards for deferring to grievance settlements. In this regard, COLLE and Member Johnson stress that grievances often are settled by nonlawyer

³⁶ Our approach here is deliberately incremental, to permit fuller experience and deliberation over time. However, the General Counsel's suggestion that prearbitral deferral should normally be for no more than 1 year is one that the General Counsel himself may wish to consider implementing in cases that are in the investigative stage.

representatives prior to the filing of Board charges, and therefore that parties typically do not focus on unfair labor practice issues when negotiating settlements.

We find it appropriate to apply the same deferral principles to prearbitral settlement agreements as to arbitral awards (i.e., as the Board has done under the current standard). See *Alpha Beta*, 273 NLRB at 1547. Thus, it must be shown that the parties intended to settle the unfair labor practice issue; that they addressed it in the settlement agreement; and that Board law reasonably permits the settlement agreement. As with arbitral awards, the Board will not expect the parties to have addressed the statutory issue in the same manner as administrative law judges, and the Board will not engage in *de novo* review of settlement agreements. Rather, we will assess such agreements in light of the factors set forth in *Independent Stave*, as the General Counsel suggests.³⁷ We specifically reject the argument raised by COLLE and Member Johnson that we should adopt a different standard merely because nonlawyers typically craft settlement agreements, often without being advised that an unfair labor practice charge may be waiting in the wings. We perceive no reason why settlement agreements that do not reflect the parties' consideration of statutory issues should stand on better footing than arbitral awards with similar drawbacks.³⁸

II. PROSPECTIVE APPLICATION OF THE NEW STANDARD

We turn now to the question whether to apply the new standard retroactively (i.e., in all pending cases) or only prospectively (in future cases). For the reasons explained below, we find prospective application to be appropriate.

The Board's usual practice is to apply all new policies and standards in "all pending cases, in whatever stage." *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 729 (2001), quoting *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987), *enfd.* 843 F.2d 770 (3d Cir. 1988), *cert.*

³⁷ Under *Independent Stave*, the Board considers all the circumstances surrounding a settlement agreement, including (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatees have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of unlawful conduct or has breached previous settlement agreements resolving unfair labor practice disputes. 287 NLRB at 743.

³⁸ Obviously, then, we also reject NEBA's contention that the Board should defer to *all* settlement agreements voluntarily reached in bargaining by employers and unions.

Member Johnson suggests that the Board should craft "safe harbor" language for parties to incorporate in settlement agreements. That issue is better left for a future case, presenting the issue squarely.

denied 488 U.S. 889 (1988) (internal citation omitted). However, the effects of retroactive application must be balanced against “the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.” *Levitz*, 333 NLRB at 729 (internal citations omitted).

We think that applying our new standard in pending cases would be unfair to parties that have relied on the current deferral standard in negotiating contracts and in determining whether, and in what manner, to process cases involving unfair labor practice issues through the grievance-arbitration process. Granted, retroactive application of the new standard would hasten the day when arbitral decisions more surely protect employees’ statutory rights. However, a principal purpose of the Act is to promote collective bargaining, which necessarily involves giving effect to the bargains the parties have struck in concluding collective-bargaining agreements. Retroactive application would tend to frustrate that aspect of the Act’s purpose. Thus, we find those concerns supporting retroactive application are outweighed by the injustice that would result from applying the new standard in pending cases. Accordingly, we will apply the new standard only prospectively.

Where parties’ contracts already provide for arbitration of unfair labor practice issues, or where parties have explicitly authorized arbitrators to consider such issues in particular cases, the first prong of the new deferral standard has been met. In such cases, applying the remaining criteria of the new standard in arbitrations that have yet to take place will not result in injustice because it will not contravene the parties’ settled expectations. Accordingly, where parties have already, either contractually or explicitly for a particular case or cases, authorized arbitrators to decide unfair labor practice claims, we shall apply the new standard to all future arbitrations. By contrast, where current contracts do not authorize arbitrators to decide unfair labor practice issues, we will not apply the new standards until those contracts have expired, or the parties have agreed to present particular statutory issues to the arbitrator.³⁹

III. DEFERRAL IS APPROPRIATE IN THIS CASE

Having declined to apply our new deferral standard in pending cases, we must decide whether deferral is appropriate in this case under the current standard. The judge found, and we agree, that it is. As noted above, it is con-

³⁹ We recognize that in some instances it will be several years before existing contracts expire and new contracts are concluded. In our view, however, the resulting delay in applying the new standard in those instances is justified by the need to avoid unfairness to contracting parties. In any event, by its very nature, this problem will become less and less serious with the passage of time.

ceded that the arbitral procedure was fair and equitable and that all parties agreed to be bound. It is also conceded that the contractual issue was factually parallel to the unfair labor practice issue and that the Subcommittee was presented generally with the facts relevant to deciding the statutory issue. The General Counsel excepts only to the judge’s finding that the Subcommittee’s decision was not clearly repugnant to the Act. The General Counsel asserts that Beneli was discharged primarily because of her activities as a union steward, and the Subcommittee’s decision upholding her discharge therefore was “palpably wrong” and not susceptible to any interpretation consistent with the Act. The Subcommittee phrased the issue before it as whether the Respondent terminated Beneli without just cause for her use of profanity, and its decision stated only that, having reviewed the facts presented (which included the facts concerning Beneli’s steward activities), it found no violation of the contract. Contrary to the General Counsel, the decision is arguably consistent with a finding that the Subcommittee considered and rejected the Union’s contention that Beneli’s discharge was motivated by her steward activities; at least, the General Counsel has failed to prove otherwise. See, e.g., *Airborne Express Corp.*, 343 NLRB at 581. The Subcommittee’s finding that Beneli was discharged for using profanity is therefore susceptible to an interpretation consistent with the Act. Because the General Counsel has failed to demonstrate that the Subcommittee’s decision was clearly repugnant to the Act, we shall defer to the decision and dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. December 15, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

The majority in this case performs surgery on two venerable institutions—final and binding grievance arbitration and the collectively bargained requirement of “cause”—that have benefited millions of employees. No

sickness warrants the majority's treatment. Labor arbitration and the concept of "cause" have been lauded by Congress, the Supreme Court, other courts, labor relations scholars, and arbitrators.¹ The majority wields a scalpel whose bluntness will cause injury to employees, unions and employers alike, particularly those that have existing collective-bargaining agreements. Worse, the tissue cut away has existed for decades: the *Spielberg* standard has governed this area for nearly 60 years,² and the *Olin* standard for 30 years.³ Most important, in my view, is the fact that the majority's changes are contradicted by our statute. Section 10(c) prohibits the Board from making the very distinction that forms the basis for the majority's reformulated deferral standards.

I concur in the outcome here only because the majority refrains from applying its changed deferral standards to the instant case.⁴ However, the changed standards cut a wide swath, prospectively affecting at least three types of deferral: (i) deferral to existing arbitration awards (governed by *Olin* and *Spielberg*), (ii) deferral to prospective

arbitration procedures (governed by *Collyer Insulated Wire*, supra, 192 NLRB at 839),⁵ and (iii) deferral to grievance settlements reached prior to arbitration (governed by *Alpha Beta Co.*, 273 NLRB 1546 (1985), review denied sub nom. *Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987), and *Postal Service*, 300 NLRB 196 (1990)).

For several reasons, I dissent from the changes adopted by my colleagues in the majority.⁶

First, the majority's approach is premised on a false dichotomy—between "statutory" issues, on the one hand, and the issue of "cause," on the other—that is contradicted by the Act's language. My colleagues preclude deferral in all arbitration cases that determine whether "cause" supported an employee's suspension or discharge, unless the party seeking deferral proves that the arbitrator considered what the majority regards as different and more onerous "statutory" or "unfair labor practice" issues. Yet, Section 10(c) precludes the Board from making this distinction. In Section 10(c), Congress imposed a requirement on the Board prohibiting reinstatement or backpay whenever "cause" exists for an employee's suspension or discharge. In other words, the Act makes "cause" the "statutory issue" as a matter of law in every discharge and suspension case.

Second, the Board will not defer to grievance arbitration in most cases under the newly adopted standards unless the parties rewrite their collective bargaining agreement (CBA) provisions relating to discipline and grievance arbitration. This aspect of the majority's approach is objectionable not only because the Act prohibits the Board from imposing substantive contract terms on parties, but also because my colleagues all but compel the renegotiation of extremely important contract provisions, which will cause increased conflict among the parties for whom the Board should most strive to foster stability—i.e., employers and unions that have existing collective-bargaining relationships. Alternatively, if parties do not rewrite their collective-bargaining agreements, the majority's new standards make two track arbitration/Board litigation a near certainty, thereby eliminating the benefits previously afforded by "final and bind-

¹ In *USWA v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960), the Supreme Court stated that "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." The Court continued: "[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *Id.* at 581. See also Labor Management Relations Act (LMRA) Sec. 203(d) ("Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."); *Collyer Insulated Wire*, 192 NLRB 837, 839 (1971) ("In our view, disputes such as these can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute."); Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1491 (1959) ("[J]ust cause" provisions are "an obvious illustration" of the fact that many provisions "must be expressed in general and flexible terms."). See generally *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 9 (2014) (Member Miscimarra, dissenting in part), where I stated that "just cause" provisions have been ubiquitous in collective-bargaining agreements throughout the Act's history. *Id.*, slip op. at 11 fn. 9, citing *Burgie Vinegar Co.*, 71 NLRB 829, 840 (1946) ("It is agreed that the right to discharge employees for just cause is a management prerogative."); *Solutia, Inc.*, 357 NLRB No. 15, slip op. at 4 fn. 8 (2011) (contract reserves to the company the right to "discipline or discharge for just cause"), enf. 699 F.3d 50 (1st Cir. 2012).

² *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

³ *Olin Corp.*, 268 NLRB 573 (1984).

⁴ The majority has announced that their changed deferral standards will only apply prospectively to cases arising after the issuance of today's decision.

⁵ The Board has recognized a variation of *Collyer* prospective deferral when a pending grievance awaits arbitration. See *Dubo Mfg. Corp.*, 142 NLRB 431 (1963).

⁶ In this separate opinion, I occasionally use the phrase "my colleagues" as a shorthand reference to my colleagues in the majority. However, I do not mean to suggest any disagreement with the separate opinion authored by another of my colleagues, Member Johnson, who dissents from the changes in Board deferral standards that have been adopted by the majority. I agree with the separate reasons articulated by Member Johnson in his own disagreement with the standards adopted by the majority.

ing” arbitration. In this respect, the majority deprives unions of a major benefit they could otherwise offer to unionized employers and represented employees. In the same way, because any newly negotiated arbitration and “cause” provisions will produce greater costs, burdens and delays (instead of facilitating the quick, inexpensive and final resolution of workplace disputes), nonunion employers are likely to more vigorously exercise their lawful right to oppose union representation during union organizing campaigns.

Third, I believe the changed deferral standards reflect an underlying hostility towards final and binding grievance arbitration and “cause” determinations, contrary to the federal policies favoring arbitration that Congress incorporated into the Federal Arbitration Act (in 1925) and into the Labor Management Relations Act (in 1947). The most important characteristic of “final and binding” arbitration is the notion that adjudicated outcomes will, in fact, be “final” and “binding.” Yet, my colleagues now effectively guarantee that, in most cases involving existing CBAs, arbitration will *not* be final and binding. The outcome will be more work for the Board, at the expense of speed, predictability, and certainty for the parties, and the virtual elimination of finality given the long litigation treadmill that is associated with Board and court litigation of unfair labor practice claims.

In my view, there is no reason for the Board to deviate from the well-established deferral standards applicable to existing arbitration awards (governed by *Olin* and *Spielberg*), prospective arbitration procedures (governed by *Collyer*), and grievance settlements reached prior to arbitration (governed by *Alpha Beta* and *Postal Service*). These standards are understandable and have been widely applied and enforced. These standards afford appropriate deference to final and binding arbitration *and* the concept of “cause.” These standards are consistent with our statute, including Section 10(c)’s requirement that makes “cause” a *statutory* issue binding on the Board in suspension and discharge cases. Finally, the existing deferral standards—instead of forcing parties to dramatically change existing labor contracts—would preserve the substantial benefits that existing arbitration and “cause” provisions confer on employees, unions and unionized employers.

A. The Majority’s New Deferral Standards Are Improper Because Section 10(c) Requires the Board to Treat “Cause” as a Statutory Issue in All Suspension and Discharge Cases

Under the new standards established by my colleagues, the Board will never defer to a determination that “cause” existed for a discharge or suspension unless the party urging deferral proves, first, that the parties “explicitly authorized” resolution of “the unfair labor prac-

tice issue,” and second, that the “the statutory issue” was presented and considered (or any failure on this score was caused by the party opposing deferral).⁷ Deferral cases most often arise from employee discharges or suspensions—subject to challenge in arbitration under a contractual “cause” standard—that are also alleged in Board charges to violate Section 8(a)(3) or (1). My colleagues justify a much more narrow deferral standard by drawing a distinction between the “cause” standard, on the one hand, and what they apparently view as a more onerous and demanding “statutory” or “unfair labor practice” standard, on the other. However, the Act prohibits such reasoning and precludes the Board from making this distinction. Section 10(c) states: “*No order of the Board shall require the reinstatement of any individual as an employee . . . or the payment to him of any backpay, if such individual was suspended or discharged for cause*” (emphasis added).

In other words, the majority today finds the Board must independently redecide *every* case in which an arbitrator determines only that “cause” existed for a suspension or discharge. However, the majority presumes, incorrectly, that “cause” is inferior to a more rigorous and exacting “unfair labor practice” or “statutory” issue unique to the NLRA. Section 10(c) *makes “cause” the relevant statutory issue* in all cases involving discharges and suspensions alleged to violate the Act. Obviously, this statutory mandate is binding on the Board, and it explicitly constrains the Board’s remedial authority.

Congress incorporated the “cause” requirement into the Act for good reason. The requirement of “cause”—whether referred to as “cause,” “just cause,” “proper cause” or similar other phrases⁸—has been called “the most important principle of labor relations in the unionized firm.”⁹ The meaning of “cause” in collective-bargaining agreements was explained nearly 60 years ago

⁷ My colleagues also impose a third deferral requirement—that “Board law reasonably permits the award.”

⁸ Different collective-bargaining agreements articulate “cause” requirements in different ways, referring (for example) to “just cause,” “proper cause” or “just and proper cause,” but these different formulations are generally regarded as identical. See, e.g., *Worthington Corp.*, 24 Lab. Arb. (BNA) 1, 6–7 (McGoldrick, 1955) (regarding the right to suspend and discharge for “just cause,” “proper cause,” “obvious cause” or “cause,” arbitrator states “[i]here is no significant difference between these various phrases”); Alan Miles Ruben, ed., Elkouri & Elkouri, *How Arbitration Works* 932 fn. 37 (6th ed. 2003) (collecting decisions “finding no significant difference between these terms”). I have previously noted that “just cause” provisions have been ubiquitous in collective-bargaining agreements throughout the Act’s history. See *supra* fn. 1.

⁹ Robert I. Abrams & Dennis R. Nolan, *Toward a Theory of “Just Cause” in Employee Discipline Cases*, Duke L.J. 594 (1985).

in *Worthington Corp.*, 24 Lab. Arb. (BNA) 1, 6–7 (McGoldrick, 1955):

[I]t is common to include the right to suspend and discharge for “just cause,” “proper cause,” “obvious cause,” or quite commonly simply for “cause.” There is no significant difference between these various phrases. These exclude discharge for mere whim or caprice. They are, obviously, intended to include those things for which employees have traditionally been fired. They include the traditional causes of discharge in the particular trade or industry, the practices which develop in the day-to-day relations of management and labor and most recently they include the decisions of courts and arbitrators. . . . Where they are not expressed in posted rules, they may very well be implied, provided they are applied in a uniform, non-discriminatory manner.

I am at a loss to understand the majority’s insistence that the Board must inject itself more aggressively in suspension and discharge arbitration regarding the existence or nonexistence of “cause.”¹⁰ Virtually everybody understands that “cause” will not exist if an arbitrator determines an employee’s suspension or discharge—instead of resulting from legitimate reasons—stemmed from antiunion discrimination or other protected activities, such that the suspension or discharge, if adjudicated by the Board, would be a violation of Section 8(a)(3), (1) or both.

More importantly, the Act clearly establishes that Congress understood this concept, which is why Congress imposed on the Board a requirement that the issue of “cause” be deemed controlling and coextensive with any other “statutory” issues pertaining to employee discharges or suspensions alleged to violate the Act. And contrary to the majority’s decision, which imposes the burden on the party seeking deferral to show that deferral is warranted, Congress prohibited the Board from impos-

¹⁰ The requirement of “cause” has nearly universal acceptance in most collective-bargaining agreements as a fundamental limitation on an employer’s authority to discipline or discharge employees. Over 90 percent of all collective-bargaining agreements include an explicit “just cause” provision for discipline. See Bureau of National Affairs, *Basic Patterns in Union Contracts* (BNA, 14th ed. 1995). Just cause provisions have been called “an obvious illustration” of the fact that many provisions “must be expressed in general and flexible terms.” Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1491 (1959). To the same effect, the Supreme Court has stated, in reference to collective-bargaining agreements, that there are “a myriad of cases which the draftsmen cannot wholly anticipate,” and “[t]here are too many people, too many problems, too many unforeseeable contingencies to make the words . . . the exclusive source of rights and duties.” *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578–579 (1960) (internal quotation omitted).

ing the burden of proof on any party to establish “cause” for discharge. Rather, Congress required that the Board’s General Counsel prove, by a preponderance of the evidence, that an alleged unlawful suspension or discharge was not “for cause.”¹¹ When an existing arbitration award indicates an employee was suspended or discharged for “cause,” therefore, I believe this makes deferral appropriate unless the General Counsel satisfies his or her burden to prove that deferral is unwarranted and “cause” did not exist.

The “cause” language in Section 10(c) was added as part of the Labor Management Relations Act (LMRA) amendments to the NLRA that were adopted in 1947.¹² During the Senate debates on the LMRA, Senator Taft—the legislation’s principal sponsor in the Senate—commented on the “cause” language set forth in Section 10(c) and stated: “If a man is *discharged for cause*, he cannot be reinstated. If he is *discharged for union activity*, he must be reinstated.”¹³

The legislative history likewise indicates that the Board was constrained to accept and apply a “cause” standard in all discharge and suspension cases. Thus, the Conference Report—commenting on House changes adopted by the Conference Committee—stated:

[I]n section 10(c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts consti-

¹¹ The Supreme Court has reaffirmed the settled principle, stated explicitly in Sec. 10(c), that the General Counsel has the burden of proving, “upon the preponderance of the testimony,” the elements of an unfair labor practice. See, e.g., *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983). In a mixed motive case, where there is evidence of both discrimination and “cause,” the General Counsel bears the burden of showing by a preponderance of the evidence that a suspension or discharge was motivated by animus against the employee’s union or other protected concerted activity. Although the Board allocates to the employer the burden of proving its affirmative defense, *Wright Line*, 251 NLRB 1083, 1088–1089 (1980) (subsequent history omitted), the ultimate burden of proving a violation remains with the General Counsel, *id.* at 1088 fn. 11. Regardless of intermediate burdens, the General Counsel must satisfy his ultimate burden to prove a violation of the Act. In such cases, it necessarily follows that the employee was not suspended or discharged for “cause.” See also fn. 20 below.

¹² See, e.g., Labor Management Relations Act (Taft-Hartley Act or LMRA), 61 Stat. 136 (1947), 29 U.S.C. §§ 141 et seq.

¹³ 93 Cong. Rec. 6677 (daily ed. June 6, 1947) (statement of Sen. Taft), reprinted in 2 NLRB, *Legislative History of the Labor Management Relations Act, 1947* (hereinafter LMRA Hist.) at 1593.

tuting the cause for discharge were committed in connection with a concerted activity.¹⁴

The report accompanying the House bill—H.R. 3020, 80th Cong. (1947)—likewise indicated that the “cause” standard would be binding on the Board in all suspension and discharge cases:

A third change forbids the Board to reinstate an individual *unless the weight of the evidence shows that the individual was not suspended or discharged for cause*. In the past, the Board, admitting that an employee was guilty of gross misconduct, nevertheless frequently reinstated him, “inferring” that, because he was a member or an official of a union, this, not his misconduct, was the reason for his discharge. Matter of Wyman-Gordon Company, 62 N.L.R.B. 561 (1945), is typical of the Board’s attitude in such cases. . . . The Board may not “infer” an improper motive *when the evidence shows cause for discipline or discharge*.¹⁵

The “cause” language in Section 10(c) was not a minor technical amendment of the Act. Rather, the Section 10(c) language was specifically referenced by President Truman when he vetoed the LMRA,¹⁶ and by Senator Taft in opposition to President Truman’s veto.¹⁷ Senator Taft reiterated that the “cause” standard—which the Board would be constrained to accept and apply—*was to be coextensive with the “statutory” standards governing suspension and discharge cases*. Senator Taft stated:

The President says an employer can discharge a man on the pretext of a slight infraction, even though his real motive is to discriminate against the em-

¹⁴ H.R. Rep. 80–510 at 39 (1947), reprinted in 1 LMRA Hist. 543 (emphasis added).

¹⁵ H.R. Rep. 80–245 at 42 (1947), reprinted in 1 LMRA Hist. 333 (emphasis added).

¹⁶ President Truman’s veto message received in House argued that the “cause” language would be controlling (therefore precluding reinstatement or backpay) even if the evidence established that a suspension or discharge resulted from antiunion discrimination. Thus, President Truman’s veto message stated: “The bill would make it easier for an employer to get rid of employees whom he wanted to discharge because they exercised their right of self-organization guaranteed by the act. It would permit an employer to dismiss a man on the pretext of a slight infraction of shop rules, even though his real motive was to discriminate against this employee for union activity.” 93 Cong. Rec. 7501, reprinted in 1 LMRA Hist. 916 (veto message received in the House).

¹⁷ The LMRA was enacted over President Truman’s veto when two-thirds majorities in the House and Senate voted to override the President’s veto. 93 Cong. Rec. 7504 (June 20, 1947), reprinted in 2 LMRA Hist. 922–923 (reflecting two-thirds majority vote in the House); 93 Cong. Rec. 7692 (June 23, 1947), reprinted in 2 LMRA Hist. 1656–1657 (reflecting two-thirds majority vote in the Senate).

ployee for union activity. This is not so. The Board decides under the new law, as under the former law, whether the man was really discharged for union activity *or for good cause*.¹⁸

As noted above, during its deliberations resulting in the LMRA amendments, Congress also focused on which party should bear the *burden* of establishing whether an employee’s suspension or discharge violated the Act or was supported by “cause.” Here, the legislation clearly placed the burden on the Board. Initially, the legislation stated that the Board could not order reinstatement or backpay “unless the *weight of the evidence* shows that the individual was not suspended or discharged for cause.”¹⁹ This “weight of the evidence” language was eventually deleted, but only because Section 10(c) independently requires (based on another amendment made in 1947) that Board determinations generally be supported by a “preponderance” of the evidence.²⁰

¹⁸ 93 Cong. Rec. S A3233 (daily ed. June 21, 1947) (statement of Sen. Taft).

¹⁹ H.R. Rep. 80–245 at 42 (1947), reprinted in 1 LMRA Hist. 333.

²⁰ See H.R. Rep. –80510 at 55 (1947), reprinted in 1 LMRA Hist. 559 (“The conference agreement omits the ‘weight of evidence’ language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause.”).

As noted in the text, Sec. 10(c) and its legislative history reveal that the General Counsel bears the burden of proof that disputed discipline violates the Act, which also entails establishing there was no “cause” for the discipline in question, and this makes inappropriate for the majority, when evaluating whether to defer to a “cause” determination made by an arbitrator, to place the burden of proof on the party seeking deferral. The decision in *Transportation Management*, relied upon by the majority, does not dictate otherwise. Indeed, the Supreme Court in *Transportation Management* held that Sec. 10(c)’s “preponderance of the testimony” language meant the General Counsel has the burden “throughout the proceedings” of proving “the elements of an unfair labor practice,” 462 U.S. at 401, and the Court stated that the “preponderance of the testimony” requirement was “*closely related*” to Sec. 10(c)’s provision “that no order of the Board reinstate or compensate any employee who was fired for cause,” *id.* at 401 fn. 6 (emphasis added). Moreover, *Transportation Management* did not involve deferral to arbitration; rather, it dealt only with the employer’s intermediate burden in *Wright Line* “mixed-motive” cases, where the employer asserts an “affirmative defense” by “showing what his actions would have been regardless of his forbidden motivation.” *Id.* at 401; see also *Wright Line*, 251 NLRB at 1088 fn. 11 (“The shifting burden merely requires the employer to make out what is actually an affirmative defense.”). Not only did the Supreme Court hold that the *Wright Line* mixed-motive standard “does not change or add to the elements of the unfair labor practice *that the General Counsel has the burden of proving under § 10(c)*,” 462 U.S. at 401 (emphasis added; footnote omitted), the Court held that this mixed-motive issue was *unrelated* to the “cause” language set forth in Sec. 10(c), *id.* at 401 fn. 6 (“the drafters of § 10(c) were not thinking of the mixed-motive case”). Therefore, Sec. 10(c) and its legislative history indicate that Congress intended the General Counsel would bear the burden of proving any alleged viola-

In my view, the “cause” language set forth in Section 10(c), combined with the Act’s legislative history as described above, warrant two important conclusions.

First, the majority’s changed standards regarding deferral are premised on a misreading of the Act, and the majority impermissibly disregards the statutory “cause” standard that Section 10(c) makes binding on the Board in all suspension and discharge cases. As noted above, under the new standard the Board will not defer to any arbitration award finding that “cause” existed for an employee’s discharge or suspension unless the party urging deferral proves (1) that the parties “explicitly authorized” resolution of “the unfair labor practice issue,” (2) that “the statutory issue” was presented and considered (or any failure on this score was caused by the party opposing deferral), and (3) that “Board law reasonably permits the award.” In suspension and discharge cases, *neither* of the first two requirements is permissible unless (i) the Board writes out of the Act the statutory “cause” standard set forth in Section 10(c), or (ii) the Board somehow goes back in time and restores the pre-1947 state of affairs that existed before Congress enacted the LMRA. In this regard, it is worth noting that Congress enacted the “cause” language in Section 10(c), as part of the LMRA amendments, at the same time final and binding arbitration received the unqualified endorsement of Congress in LMRA Section 203(d).²¹

Certainly, the Board might resolve the issue of “cause” differently than an arbitrator. However, this possibility relates to the majority’s third deferral requirement (that Board law “reasonably permits” whatever award is rendered by an arbitrator). As to the majority’s first two deferral requirements, Section 10(c) prohibits what the Board majority now asserts it will do—i.e., find that employee suspensions or discharges violate the Act, even if they are supported by “cause,” because the Board determination will be based on a more stringent Board-created “unfair labor practice issue” or “statutory issue” separate from “cause.”²²

tion, *including* the statutory requirement that the employee in question was *not* disciplined for “cause,” and the Supreme Court regarded this as separate and distinct from whatever burdens the Board devised or applied in mixed-motive cases. *Id.*; see also *id.* at 399 fn. 4 (“[N]owhere in the legislative history is reference made to any of the mixed-motive cases decided by the Board or by the Courts.”).

²¹ LMRA Section 203(d) states that “[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . .”

²² I believe Sec. 10(c) also renders implausible the majority’s stated reason for rewriting the Board’s multifaceted standards regarding deferral. My colleagues maintain that the current deferral standard “creates an unacceptably high risk that the Board will defer *when an arbitrator has not adequately considered the statutory issue*, or when it is impos-

There is a second conclusion that, in my view, follows from Section 10(c) and the Act’s legislative history: they provide ample support for the longstanding deferral standards—set forth in *Olin* and *Spielberg, Collyer, Alpha Beta* and *Postal Service*—that my colleagues now cast aside. Under *Olin*, as my colleagues note, deferral is appropriate as long as (1) the contractual issue is “factually parallel” to the unfair labor practice issue and the arbitrator was presented generally with the facts relevant to resolving that issue (268 NLRB at 573–574), and (2) the award is not “clearly repugnant” to the Act (defined as being “palpably wrong” or “not susceptible to an interpretation consistent with the Act”) (*id.* at 574). In addition, the party opposing deferral (e.g., the Board’s General Counsel) has the burden of proving that deferral is inappropriate. *Id.* The first requirement—evaluating whether the contractual issue is “factually parallel” to the unfair labor practice issue—recognizes the close relation between any collectively bargained “cause” standard and Section 10(c)’s prohibition against backpay or reinstatement where an employee is discharged or suspended for “cause.” The second requirement recognizes the primary purpose of deferral, which is to give effect to the parties’ agreement that arbitration shall constitute the final and binding means of resolving grievances regarding em-

sible to tell whether he or she has done so” (emphasis added). Because virtually all arbitrated discipline cases turn on whether “cause” existed for an employee’s suspension or discharge, and because Sec. 10(c) makes the presence or absence of “cause” controlling for the Board, the arbitrator in every case will, by definition, have “adequately considered the statutory issue” except in a rare case where the arbitrator refuses to apply the collectively bargained “cause” standard or otherwise resolves a case based on his or her “own brand of industrial justice.” *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). In the latter case, the arbitrator’s award will be clearly repugnant to the Act, and thus not entitled to deferral under the existing *Spielberg* and *Olin* standards. In my view, therefore, the majority does not identify any reasons existing deferral standards are insufficient to address such exceptional cases. I also respectfully disagree with the majority’s reliance on *Mobil Oil Exploration & Producing, Inc.*, 325 NLRB 176 (1997), *enfd.* 200 F.3d 230 (5th Cir. 1999); *Garland Coal & Mining Co.*, 276 NLRB 963 (1985); and *Cone Mills Corp.*, 298 NLRB 661 (1990). In each of these cases—decided under the *Spielberg/Olin* deferral standard—the Board *refused* to defer to an arbitrator’s decision on the ground that the award was clearly repugnant to the Act. These cases, therefore, illustrate the sufficiency of the preexisting *Spielberg/Olin* deferral standard, pursuant to which the Board has decided *not* to defer in appropriate circumstances.

Sec. 10(a) of the Act provides that the Board’s power to prevent unfair labor practices “shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.” But this statutory language does nothing more than make clear that the Board retains authority to overturn arbitration decisions that are contrary to the Act. Nothing in Sec. 10(a) indicates or establishes that the issue of “cause” is different from and inferior to the “statutory” issue in unfair labor practice cases involving suspensions and discharges. To the contrary, Sec. 10(c) expressly *makes* “cause” the “statutory” issue in such cases.

ployee suspensions and discharges, even though an arbitrator may resolve some disputes differently than would the Board, with the caveat that the Board will not defer to awards that are plainly contrary to the Act.²³ The final requirement—favoring deferral unless the party opposing it proves that deferral is inappropriate—is consistent with Section 10(c) and its legislative history, which show that Congress intended to require *the Board’s General Counsel* to prove any alleged violation. This allocation of burdens also recognizes that federal policy, reflected in LMRA Section 203(d), strongly favors “[f]inal adjustment by a method agreed upon by the parties” over other means of resolving disputes between employers, unions, and employees.²⁴

The Board’s traditional standards regarding deferral to arbitration awards—based on “cause” provisions in collective-bargaining agreements that have been freely negotiated by companies and unions, are easily understood by employees, and have been interpreted by thousands of arbitrators—reflect an appropriate balance between our strong federal policies favoring arbitration and the protection of statutory rights. Conversely, the majority here announces changed standards that reflect an intention to find suspensions and discharges unlawful—even if supported by “cause”—based on what the majority believes must be more stringent scrutiny of “statutory” or “unfair labor practice” issues. This is precisely what Section 10(c) prohibits because it expressly *requires* the Board to treat “cause” as the statutory standard.

I recognize that the majority characterizes deferral as a matter involving Board “discretion,” but we cannot take actions that are directly prohibited by the Act. In my view, this is the problem with the majority’s new deferral

²³ See *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960) (The judicial function should be “very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.”). I interpret the majority’s changed standard as recognizing this same principle, although the majority’s “Board law reasonably permits” standard will predictably permit deferral in fewer cases than the “clearly repugnant” standard.

²⁴ See also *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (Arbitration “should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”); *Nolde Brothers v. Bakery & Confectionary Works*, 430 U.S. 243, 254 (1977) (noting that the Supreme Court “has established a strong presumption favoring arbitrability” and describing as “noteworthy” the fact that “parties drafted their broad arbitration clause against a backdrop of well established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective bargaining agreements”) (citations omitted).

standards. I believe the new standards are irreconcilable with Section 10(c).

B. The Majority Dramatically Curtails Board Deferral to Arbitration or Requires a Wholesale Rewriting of CBA “Cause” and Arbitration Provisions

Collective-bargaining agreements typically span multiple years. When arbitration procedures and “cause” requirements have been agreed upon by employers and unions in existing collective-bargaining agreements, the Board should celebrate such agreements, since they are the successful culmination of good-faith bargaining required by the Act.²⁵ In many cases, existing collective-bargaining agreements also result from longstanding relationships between employers and unions that the Board should support and encourage.²⁶ And because labor arbitration procedures are mutually agreed upon between employers and unions, arbitration in this context should be afforded no less deference than the types of nonunion arbitration agreements that have received such deferential treatment by the Supreme Court. See, e.g., *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) (upholding binding arbitration agreements in employment contracts subject to the Federal Arbitration Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (same).

These considerations make it important to examine how the majority’s changed deferral standards will affect existing collective-bargaining agreements—specifically, existing “cause” requirements and labor arbitration provisions. If one looks at existing “cause” requirements, the majority’s changed deferral standards will basically

²⁵ Sec. 8(a)(5) and 8(b)(3) of the Act impose a duty to bargain collectively on employers and unions, respectively, which Sec. 8(d) defines as “the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . .”

²⁶ One of the Board’s primary functions is to foster stability in labor relations, to encourage good-faith negotiation, and to give effect to the parties’ agreements. See, e.g., *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) (“To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.”); *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) (“a basic policy of the Act [is] to achieve stability of labor relations”). Arbitration plays a central role in achieving these goals. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 578 (“[A]rbitration is the substitute for industrial strife.”). Stability is also clearly undermined when the Board adopts policies that detract from final and binding arbitration procedures that have been agreed to by employers and unions. As the Supreme Court stated in *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 596, 599: “The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. . . . [P]lenary review by a court of the merits would make meaningless the provisions that the arbitrator’s decision is final, for in reality it would almost never be final.”

never permit deferral (because my colleagues believe, mistakenly, that “cause” is different from and inferior to the “statutory” and “unfair labor practice” issues uniquely examined in Board litigation). If one looks at existing *arbitration* provisions, these typically limit the arbitrator’s authority to the “interpretation and application of this agreement” and typically prohibit the arbitrator from “adding to, subtracting from or modifying” the CBA.²⁷ Here too, therefore, the majority’s changed deferral standards will basically never permit deferral (because my colleagues would require proof that different and more onerous “statutory” and “unfair labor practice” issues were presented and considered by the arbitrator). In short, therefore, the changed standards mean existing “cause” and arbitration provisions, in most existing collective-bargaining agreements, will give rise to duplicative NLRB litigation over disputed suspensions and discharges unless, first, the CBA reproduces the text of the statute or incorporates statutory provisions by reference, or second, the parties engage in a case-by-case renegotiation of the CBA “cause” provisions, abandon arbitration-clause language limiting the arbitrator’s authority, and/or explicitly authorize the arbitrator to adjudicate 8(a)(3) and (1) issues in addition to whatever “cause” and other contractual issues pertain to the dispute.

In my view, this approach to deferral has several serious infirmities.

The most obvious problem is that the changed standards essentially *eliminate* Board deferral to arbitration in the overwhelming majority of cases involving current collective-bargaining agreements. As noted above, most current CBAs contain conventional “cause” requirements *and* standard restrictions on an arbitrator’s authority—for example, restricting the arbitrator to the “interpretation and application of this agreement,” and prohibiting the arbitrator from “adding to, subtracting from or modifying” the terms of the CBA.²⁸

²⁷ For example, in *Steelworkers v. American Mfg. Co.*, supra, which dealt with what the Court called the “standard form” of arbitration agreement (363 U.S. at 565), the contract provided for arbitration only regarding “disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement,” and the contract also stated that “[t]he arbitrator may interpret this agreement and apply it to the particular case under consideration but shall, however, have no authority to add to, subtract from, or modify the terms of the agreement.” *Id.* at 565 fn. 1.

²⁸ These types of restrictions on an arbitrator’s authority exist in most CBAs. Elkouri & Elkouri, supra fn. 8, at 1235 (citing “[t]he oft-included language denying the arbitrator the power to add or subtract from or modify any of the terms of the agreement”) (internal quotation omitted); Walter J. Gershenfeld & Gladys Gershenfeld, *Current Issues in Discharge Arbitration*, 55 *Dispute Resolution Journal* 48, 52 (May 2000) (citing “[t]he statement found in most contracts that arbitrators

The second infirmity is even more significant. In my view, the majority fails to appreciate the challenges associated with forcing parties to renegotiate fundamental contract provisions governing discipline (e.g., “cause” restrictions on discipline or discharge decisions) and grievance arbitration (e.g., restrictions on an arbitrator’s authority). Countless agreements contain discipline and grievance-arbitration provisions that have remained unchanged for decades. And with all due respect to the majority, many parties will be reluctant to convert their grievance-arbitration procedures into something resembling full-fledged NLRB and court litigation. Several other obvious points also warrant mention here.

1. The Board, of course, lacks authority to impose any substantive contract terms on any party. Section 8(d) explicitly states that the duty to bargain “does not compel either party to agree to a proposal or require the making of a concession.” And the Supreme Court stated in *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970):

It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, *leaving the results of the contest to the bargaining strengths of the parties*. . . . The Board’s remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. *One of these fundamental policies is freedom of contract*. While the parties’ freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate *the fundamental premise on which the Act is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract*.²⁹

may not add to, subtract from, alter, or modify the terms of an agreement”); Ann C. Hodges, *The Steelworkers Trilogy in the Public Sector*, 66 *CHI-KENT L. REV.* 631, 652 (1990) (citing “the common contractual restriction that arbitrators cannot add to, subtract from, or modify the contract”).

²⁹ *Id.* at 107–108 (emphasis added). Although the majority may contend that their changed deferral standards do not require any party to rewrite their arbitration agreements, this is only true to the extent that the employer and union are prepared to accept concurrent arbitration and NLRB/court proceedings whenever the employee or union fears that an arbitrator will sustain a particular suspension or discharge, or choose to ignore the new standard and simply forego the possibility of deferral to arbitration. I respectfully submit that such a Hobson’s choice is, by definition, no choice at all.

It is no answer to say that, instead of requiring parties to modify existing labor contract discipline provisions so they incorporate the Act (or portions of the Act), the majority’s standard provides an alternative—i.e., case-by-case authorization of the arbitrator to apply the Act. As explained elsewhere in the text, the majority’s new deferral standards effectively require major changes in fundamental contract terms, and this is true *regardless* of whether one focuses on discipline provi-

2. For many reasons, companies and unions predictably will have difficulty negotiating new or expanded standards—separate from a “cause” requirement—governing employee discipline, such as suspensions or discharges. Employees, unions and employers *already* have access to courts and agencies for the resolution of legal disputes that arise over discipline. For this reason, many parties will be reluctant to propose or accept expanded “contractual” discipline standards that duplicate legal rights and obligations. Unions may also be reluctant to make themselves responsible for pursuing what would otherwise be statutory claims that individual employees would pursue for themselves.

3. It is even more implausible that companies and unions will freely renegotiate existing grievance-arbitration provisions. In many cases, these have remained substantially unchanged for many years. Nobody could reasonably suggest it is routine, unimportant, or inconsequential to substantially revise a collective-bargaining agreement’s labor arbitration procedures. As the Supreme Court recognized in the *Steelworkers Trilogy* cases more than 50 years ago,³⁰ “the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government,” and “arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties.” *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 581.

4. Parties are likely to be even more reluctant to renegotiate restrictions on an arbitrator’s authority or the scope of issues that are subject to grievance arbitration. It is well known that, once a dispute is submitted to arbitration, it is very difficult to obtain meaningful review on

sions (e.g., explicitly expanding contractual remedies to encompass violations of the Act) or the CBA’s grievance-arbitration process (e.g., modifying contract language that states arbitrators may only resolve questions involving interpretation or application of the CBA, or that precludes them from “adding to, subtracting from or modifying” the CBA) (see fn. 28, *supra*). If anything, however, it is worse to condition deferral to arbitration on a “case-by-case” departure from the CBA’s existing grievance-arbitration process, since LMRA Sec. 203(d) explicitly favors the final resolution of disputes based on the “method agreed upon by the parties” (emphasis added), and the entire point of a CBA’s dispute resolution procedure is to *prevent* a case-by-case renegotiation of grievance-arbitration provisions that constitute the “very heart of the system of industrial self-government.” *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (labor arbitration is desirable, in part, because it avoids “leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces”).

³⁰ *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

appeal (putting aside Board review under the changed standards adopted by my colleagues).³¹ The great deference afforded to arbitration frequently makes parties devote significant attention to contract provisions identifying those matters that can—and cannot—be submitted to arbitration or be considered by the arbitrator. The care exercised by parties in this area is consistent with numerous Supreme Court cases establishing that labor arbitration is a creation of the labor contract, and parties cannot be required to submit a dispute to arbitration absent an agreement to do so.³²

The current deferral standards have provided a stable, consistent backdrop for the negotiation of collective-bargaining agreements. The concept of deferral originated nearly 60 years ago in *Spielberg* (decided in 1955), which remains the controlling case regarding Board deferral to existing arbitration awards. The more refined *Olin* standards (adopted in 1984) have governed this area for the past 30 years. Especially in this area, stability and consistency are important.

I recognize that my colleagues have a well-intentioned desire to ensure that the Board satisfies its statutory obligations. Yet, the majority gives inadequate consideration to the unintended consequences that are likely to follow

³¹ As the Supreme Court stated in *W. R. Grace & Co. v. Local 759, Int’l Union of Rubber Workers*, 461 U.S. 757, 759 (1983): “Under well established standards for the review of labor arbitration awards, a federal court may not overrule an arbitrator’s decision simply because the court believes its own interpretation of the contract would be the better one.” See also *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) (“[P]lenary review by a court of the merits would make meaningless the provisions that the arbitrator’s decision is final, for, in reality, it would almost never be final. . . . It is the arbitrator’s construction which was bargained for; and so far as the arbitrator’s decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.”); *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 39 (1987) (“grievous error” and “improvident, even silly fact-finding” is “hardly a sufficient basis” for overturning an arbitration award).

³² *AT&T Technologies Inc. v. CWA*, 475 U.S. 643, 648 (1986); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582; *Steelworkers v. American Mfg. Co.*, 363 U.S. at 570–571; *Gateway Coal Co. v. UMW*, 414 U.S. 368, 374 (1974). The considerations described in the text render implausible the majority’s suggestion that, whenever a particular contract does not authorize the arbitration of unfair labor practice issues, on a case-by-case basis parties can simply “authorize” the arbitrator to decide such issues. Given the central role played by grievance arbitration in most collective-bargaining agreements, and given the care and importance that parties, the Board and courts understandably attach to contractual restrictions on an arbitrator’s authority, it is unreasonable to suggest that parties can or should deviate from the labor contract provisions that govern and limit the arbitrator’s authority, particularly since the Board is without authority to compel parties to do so, Sec. 8(d); *H. K. Porter*, 397 U.S. at 108–109, and the Board has the statutory responsibility to foster stability rather than instability in bargaining relationships. See also fn. 26, *supra*.

from these changed deferral standards. In my view, they will impose higher costs and delays on parties in mature bargaining relationships that are covered by collective-bargaining agreements by effectively eliminating the finality associated with grievance arbitration. The changed standards will cause substantially greater conflict as parties attempt to renegotiate CBA provisions that, as noted above, involve the most fundamental aspects of their relationship. Again, I believe there is also likely to be greater conflict in union organizing campaigns based on employer resistance to the costs and burdens associated with two-track litigation that, in turn, would be considered part and parcel of a new union's demands for grievance-arbitration procedures and disciplinary "cause" restrictions.

C. The Majority's Changed Deferral Standards Are Ill-Advised as a Matter of Labor Relations Policy

As a final matter, I believe the majority's changed deferral standards are ill-advised as a matter of public policy because they reflect a deep-seated hostility towards arbitration that Congress rejected when it adopted the Federal Arbitration Act (in 1925) and again when it articulated a strong presumption favoring arbitration when adopting (in 1947) Section 203(d) of the LMRA.

The Federal Arbitration Act (FAA) was enacted to "reverse longstanding judicial hostility towards arbitration agreements and to place arbitration agreements upon the same footing as other contracts." *Seawright v. American General Financial Services, Inc.*, 507 F.3d 967, 979 (6th Cir. 2007) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). Consistent with the FAA, the Supreme Court has "rejected generalized attacks on arbitration that rest on suspicion of arbitration as a method of weakening the protection afforded in the substantive law to would-be complainants." *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 89–90 (2000). And the Court stated that "arbitral tribunals are readily capable of handling . . . factual and legal complexities" and that "there is no reason to assume at the outset that arbitrators will not follow the law." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 268 (2009) (citations omitted).

Congress reaffirmed the importance of arbitration in the Section 203(d) of the LMRA, which states: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." The unique importance of labor arbitration was underscored by the Supreme Court in the *Steelworkers Trilogy* cases.³³ Among other things, the Court stated:

In the commercial case, arbitration is the substitute for litigation. Here, arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, *the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.*³⁴

The majority's adoption of a much more narrow standard governing deferral to arbitration reveals the same hostility and suspicion towards arbitration that Congress repudiated and the FAA was enacted to reverse almost a century ago. In the 30 years since the Board has applied the *Olin* standard, no evidence suggests that arbitrators have declined to follow the law or have failed to protect employees' statutory rights.³⁵

The Board's traditional deferral policies also typically involve potential Board review at many points in the grievance-arbitration process. Thus, even with broad deferral (and without mandating duplicative Board litigation of cases already subject to grievance-arbitration procedures), the Board has been afforded multiple opportunities to review and reconsider the appropriateness of deferral in particular cases. Disputes not yet the subject of grievances pending arbitration are reviewed to determine whether deferral is appropriate under *Collyer*.³⁶ Disputes where there are pending grievances subject to arbitration are reviewed for possible deferral under *Dubo*.³⁷ Settlements can be reviewed by the Board under *Alpha Beta*³⁸ and *Postal Services*.³⁹ Cases previously deferred under *Collyer* or *Dubo* can be (and frequently are) subject to further postarbitration review under *Spielberg* and *Olin*. Finally, the practice of the Regions regarding *Dubo* and *Collyer* deferral is to require parties to provide timely reports regarding whether deferred cases

³⁴ *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 579 (emphasis added).

³⁵ My colleagues find that the prior deferral standard created an "unacceptably high risk" that the Board would defer when an arbitrator had not adequately considered the statutory issue. However, to illustrate this risk, the majority cited to only *two* cases from the last 30 years: *Airborne Freight Corp.*, 343 NLRB 580 (2004), and *Andersen Sand & Gravel Co.*, 277 NLRB 1204 (1985). Further, in the cited cases, as in the underlying case here, there is no evidence that the arbitrator *failed to consider* the charging parties' discrimination or retaliation claims, but only the absence of any explicit statement by the tribunal proving and explaining its consideration of those claims. The majority's evidence thus reveals no risk at all to employees' rights.

³⁶ *Collyer Insulated Wire*, 192 NLRB 837 (1971).

³⁷ *Dubo Mfg. Corp.*, 142 NLRB 431 (1963).

³⁸ 273 NLRB 1546 (1985).

³⁹ 300 NLRB 196 (1990).

³³ *Supra* fn. 69.

have proceeded to arbitration, which can (and does) result in the resumption of Board proceedings if arbitration is not occurring in a timely manner. These safeguards provide further assurances that employee rights are protected throughout the grievance-arbitration process, which reinforces the absence of any reasonable need to change existing deferral policies.

D. Conclusion

Today's decision disregards nearly a century of support by Congress and the courts for arbitration. It is especially surprising that the Board discredits "cause" requirements and labor arbitration, when both have resulted from good-faith collective bargaining that the Act requires and the Board should encourage.⁴⁰ Finally, as noted previously, the majority's changed deferral standards are based on the false premise that a difference exists, in cases involving suspensions or discharges, between "cause" determinations, on the one hand, and more onerous "statutory" and "unfair labor practice" issues, on the other. In Section 10(c), Congress prohibits the Board from making this distinction in employee suspension or discharge cases. In such cases, the Act *makes* "cause" the controlling "statutory" issue.

More generally, I believe the majority fails to adequately consider the damage their changed deferral standards are likely to inflict on "final and binding" arbitration. As the Supreme Court cautioned more than 60 years ago when discussing judicial review, our "federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. . . . [P]lenary review . . . of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 596, 599.

The Board's traditional deferral standards, for good reasons, have existed without substantial change over the past three decades. I do not believe any reasonable justification warrants the new standards adopted by the majority. For these reasons, as to the above issues, I respectfully dissent.

Dated, Washington, D.C. December 15, 2014

Philip A. Miscimarra,

Member

⁴⁰ Sec. 1 of the Act relevantly provides that "[i]t is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining"

NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, concurring in part and dissenting in part.

The decision to overrule [extant precedent on Board deferral to arbitration awards] represents yet another step in the ill-considered retreat from a fair, balanced, comprehensive, and efficacious accommodation between public and private mechanisms for the resolution of disputes. Once again, a Board majority has rendered a decision which will promote the proliferation of litigation and impede the maturation of peaceable labor-management relations. Once again, my colleagues have endorsed a policy which tightens the bureaucratic fetters on employees, unions, and employers alike, and so contravenes the very purposes of the Act which that policy is meant to serve. Once again, I must dissent.¹

Dissenting Member Penello wrote the foregoing in 1980, protesting what he correctly regarded as an arbitrary and inappropriate retreat by the majority in *Suburban Motor Freight* from Board precedent implementing a national labor policy, entrenched in statutory language and decades of judicial precedent, favoring the resolution of disputes in collective-bargaining relationships through mutually agreed private grievance and arbitration procedures. Thankfully, the regressive approach taken in *Suburban Motor Freight* was overruled only 4 years later in *Olin Corp.*, 268 NLRB 573 (1984). Regrettably, after 30 years of collective-bargaining relations conducted under that standard, the majority returns in substantial part to a significantly more restrictive and inimical deferral policy towards both arbitration awards and prearbitral proceedings, including settlements. They do so based largely on the speculative supposition that the policy they overrule has not adequately protected employees' statutory rights in an unknown number of grievance and arbitration proceedings that have never been brought to our attention. Like Member Penello before me, and for many of the same reasons as he and my dissenting colleague Member Miscimarra articulate, I must dissent.²

¹ *Suburban Motor Freight, Inc.*, 247 NLRB 146, 147 (1980) (citations and footnotes omitted).

² I note that I am dissenting from the change in law announced in this decision. Technically, I concur in the result reached by the majority because it applies the change prospectively while dismissing the complaint here under extant deferral policy. My colleagues state that the immediate imposition of their new deferral policy would disrupt practices under current collectively-bargained agreements and thereby frustrate the Act's purpose of promoting collective bargaining. A cynic might say that this is a convenient way to prevent immediate judicial review of the change in law, but I will take them at their word. To that point, not only do I agree that concern about the disruptive

I. THE CHANGE IN DEFERRAL STANDARDS

For the past 30 years, the standard for Board deferral to the results of arbitration awards made under collective-bargaining agreements has been that:

The Board will defer to an arbitration award when the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. See *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Additionally, the arbitrator must have considered the unfair labor practice issue which is before the Board. In *Olin Corp.*, 268 NLRB 573 (1984), the Board clarified 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, (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and (3) the decision is susceptible to an interpretation consistent with the Act. *Id.* at 574. The party seeking to have the Board reject deferral bears the burden of proof. *Id.*³

This *Spielberg/Olin* standard has been uniformly applied by the Board in all unfair labor practice cases where a party has urged deferral to an arbitration award. The Board has also applied this standard in determining whether to defer to prearbitral grievance settlements.⁴

Today that longstanding uniform deferral standard is substantially changed. Under the majority's new standard, the Board will defer to an arbitral decision in unfair labor cases addressing alleged violations of Section 8(a)(3) and (1) of the Act only "[i]f the arbitration procedures appear to have been fair and regular, and if the parties agreed to be bound [traditional *Spielberg* requirements] . . . [and] the party urging deferral shows that: (1) the arbitrator was explicitly authorized, either in the collective-bargaining agreement or by agreement of the parties in the particular case, to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award." It is the addition of this three-pronged requirement, and the imposition of the burden of proof on the party urging deferral, that so substantially departs from the existing deferral standard.

nature of the majority's change in law is a valid reason for not applying the new policy retroactively, I find that it is an extremely sound reason against making the change at all.

³ *Smurfit-Stone Container Corp.*, 344 NLRB 658, 659 (2005).

⁴ *Alpha Beta Co.*, 273 NLRB 1546 (1985), rev. denied sub nom. *Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987).

Corollary to the new standard for deferral to arbitration awards, the majority modifies the *Collyer*⁵ standard for deferral to the grievance and arbitration process. Deferral will no longer be appropriate unless the General Counsel has sufficient evidence from the party urging deferral that prong (1) above of the new standard has been met. Implicitly then, the Board's deferral policy under *Dubo Manufacturing*⁶ will also be modified to the same extent, so that even when the parties are already voluntarily engaged in grievance and arbitration proceedings relevant to conduct alleged as Section 8(a)(3) or (1) discrimination in an unfair labor practice charge, the General Counsel will not defer proceeding on that charge unless he has evidence that the arbitrator has the parties' express authority to resolve it. Finally, the Board will not itself defer to prearbitral grievance settlements unless the party urging deferral can meet its burden of proof with respect to all three prongs of the new test. Thus, the majority today overrules in significant part the entire body of precedent that has governed the Board's deferral practices for decades under *Spielberg/Olin*, *Collyer*, *Dubo*, and *Alpha Beta*.

II. THE DEPARTURE FROM CURRENT DEFERRAL POLICY IS UNWARRANTED.

The problems with the majority's standard are manifold. Among those problems, three are paramount. First, as with their prohibition of individual class action waiver agreements,⁷ the majority's new deferral standard fails to make the required accommodation of the national policy strongly favoring arbitration. Indeed, as Member Miscimarra states in his dissent, the new standard reflects an implicit hostility towards arbitration on matters where the Board claims jurisdiction. Second, the majority offers no rational basis in law or fact for departing from longstanding precedent that has been followed regardless of partisan shifts in Board membership. In particular, they can point to no nationwide wave of rogue arbitral decisions that threatens to undermine rights protected by Section 7 of the Act for workers in the United States. As such, their complete rewriting of existing deferral standards rests on nothing more than speculation about the possibility that these standards offer inadequate protection of employees' statutory rights to be free from retaliation for engaging in Section 7 activity. Speculation is an inadequate basis for such a wide-ranging revision of legal standards. Finally, I believe that my colleagues greatly understate the adverse impact of their new standard on the ability of parties in a collective-bargaining

⁵ *Collyer Insulated Wire*, 192 NLRB 837 (1971).

⁶ *Dubo Mfg. Corp.*, 142 NLRB 431 (1963).

⁷ See *Murphy Oil*, 361 NLRB No. 72 (2014).

relationship to achieve final adjustment of employee grievances through their mutually agreed grievance and arbitration procedures. In lieu of a single, more expeditious and less formal procedure for resolution of most cases addressing adverse employment actions, the majority's new standard practically guarantees a process in which almost any employee or his union representative dissatisfied with the result of grievance and arbitration can pursue an unfair labor practice claim at public expense with little or no regard for that prior result. Further, as in *Murphy Oil*, the majority's action here poses a significant risk that the Board's caseload will swell substantially, with a corresponding delay in our own ability to reach final decision in cases before us.

A. The New Standard Disfavors Arbitration in Contravention of Clear National Policy

"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 and fn. 5 (citations omitted). Apparently, the *Olin* majority was mistaken about the need for repetition. In spite of the fact that their decision put an end to several years of back and forth debate fully addressing the pros and cons of an expansive deferral policy that accords with national policy favoring arbitration, in spite of a host of Supreme Court opinions since 1984 that repeatedly endorse and expand that national policy,⁸ in spite of the majority's own lukewarm acknowledgment of the importance of arbitration in our Act and in the overall scheme of Federal laws, the majority today finds it appropriate to mount a full retreat to a past where arbitration is accorded far less importance and finality in Board proceedings. There is no reason to disregard this historical record that points only one way—in favor of recognizing arbitration as the primary, favored resolution system for labor disputes.

Congressional preference that parties to collective-bargaining agreements resolve their disputes through mutually agreed procedures was made plain in Section 203(d) of the Labor Management Relations Act: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or inter-

pretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d). The addition of this provision to the Act in 1947 was consistent with prior expressions of Federal policy dating back to the enactment of the Federal Arbitration Act (FAA) in 1925. The central purpose of the FAA was to force courts to enforce agreements to arbitrate, just as they would enforce any other contract provision, and reflects a national policy favoring arbitration and the enforcement of agreements to arbitrate disputes. See *Southland Corp. v. Keating*, 465 U.S. 1, 28 (1984) ("In enacting [the FAA], Congress declared a national policy favoring arbitration..."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, above, 473 U.S. at 625 (1985); *Gilmer v. Interstate/Johnson Lane Corp.*, above, 500 U.S. at 25 (1991). The language of Section 203(d) is also fully compatible with the statement of general policy and purpose in Section 1 of the National Labor Relations Act, which states in relevant part:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees. (Emphasis added).

29 U.S.C. § 151.

The central role of arbitration as the means for parties to collective-bargaining agreements to provide for final adjustment of their disputes was emphatically confirmed in 1960 by the Supreme Court in the *Steelworkers Trilogy* cases. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). The Supreme Court made clear that arbitration was seen as the preferred mechanism for resolving all disputes between the parties. Thus, in *Warrior & Gulf Navigation Co.*, the Court described the grievance procedure and arbitration in a collective-bargaining agreement as being "at the very heart of the system of industrial self-government":

Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with

⁸ See, e.g., *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013). *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064 (2013), *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012), *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011), *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (2009), *Gilmer v. Interstate/Johnson-Lane Corp.*, 500 U.S. 20 (1991), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

the variant needs and desires of the parties. (Emphasis added).

Warrior & Gulf Navigation Co., 363 U.S. at 580.

The Court further acknowledged the centrality of “[t]he grievance procedure [a]s... a part of the continuous collective bargaining process.” *Id.* at 581–582.

In *American Mfg.*, the Court similarly stated, “Arbitration is a stabilizing influence only as it serves as a vehicle for handling *any and all* disputes that arise under the agreement.” 363 U.S. at 567 (emphasis added). The Court also stressed the importance of finality of arbitration decisions in *Enterprise Wheel & Car* holding, “The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.” 363 U.S. at 596.

Soon after the *Steelworkers Trilogy*, the Board acknowledged that “the 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” *International Harvester Co.*, 138 NLRB 923, 927 (1962) (quoted with approval in *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964)). See *id.* at 925–926 (recognizing “[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”); *Olin Corp.*, 268 NLRB at 574 (stressing “[t]he importance of arbitration in the overall scheme of Federal labor law”); see also *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”).

Though giving a nominal nod to arbitration’s role, the majority’s return to a more restrictive deferral standard rests on a suspicion that private arbitration’s assurance of the Act’s antidiscrimination protections is so inadequate that the Board may be “abdicate[ing]” its enforcement obligations under Section 10(a) by deferring too readily. But long ago the Court of Appeals for the District of Columbia Circuit “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)).

To be sure, the Board’s deferral to arbitration awards must balance two policies in the Act. On one hand, Section 10(a) of the Act gives the Board authority to prevent and remedy unfair labor practices, unaffected by other means of dispute resolution including procedures provided for in collective-bargaining agreements. On the other hand, Section 203(d) expresses the Congressional preference that parties to collective-bargaining agreements resolve their disputes through their own grievance and arbitration procedures.

The majority’s standard fails to strike the appropriate balance between these two policies by imposing significant legalistic impediments to the prospect of achieving final adjustment of grievances through arbitration. Even assuming that the parties have authorized an arbitrator to decide an unfair labor practice issue, and that evidence relating to the issue has been presented and considered by the arbitrator, the majority’s new policy provides for Board review of the reasonableness of the arbitrator’s award. This is tantamount to requiring de novo review of the award by an administrative law judge in the unfair labor practice case and, upon exceptions, by the Board itself. There may be instances in which an award will survive this review even if the judge or Board might interpret the facts differently, but it seems far more likely that the current Board majority will defer only in circumstances where it would reach the same result under the facts as they would find them and under the law as they presently construe it.

This is not true deferral in any meaningful sense. The Board review required under the new deferral standard will predictably lead again to the “overzealous dissection of [arbitrators’] opinions by the NLRB” that was criticized in *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352, 355 (9th Cir. 1979). Other courts of appeals voiced this same criticism, which in significant part prompted the Board to adopt the broader deferral policy in *Olin*. See *Olin Corp.*, 268 NLRB at 575 fn. 11 (collecting cases), *NLRB v. Pincus Bros.*, 620 F.2d 367, 367 (3d Cir. 1980), *Liquor Salesmen’s Local 2 v. NLRB (Charmer Industries)*, 664 F.2d 318, 327, *NLRB v. Motor Convoy, Inc.*, 673 F.2d 734 (4th Cir. 1982), and *American Freight Systems v. NLRB*, 722 F.2d 828 (D.C. Cir. 1983); see also *Richmond Tank Car Co. v. NLRB*, 721 F.2d 499 (5th Cir. 1983).

Notably, there is a sharp contrast between the majority’s deferral standard and the standard for judicial review of arbitration awards. As summarized by the Supreme Court, “we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law;

although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.”⁹ What is the limited judicial review standard that the Supreme Court deemed to be sufficient?: “[u]nder the FAA, courts may vacate an arbitrator’s decision ‘only in very unusual circumstances.’”¹⁰ Thus, while courts have essentially the same obligation as the Board to ensure that statutory requirements are met in arbitration proceedings, that obligation is deemed satisfied by a very limited review. So, too, should it be with the Board.

The Board’s deferral standard under *Spielberg/Olin* effectively accommodates the arbitral process, which stands as “the central institution in the administration of collective bargaining contracts,”¹¹ without jeopardizing, much less abdicating, the Board’s statutory enforcement obligation. In contrast, the majority’s new standard falls far short of striking the appropriate balance, effectively subordinating private party dispute resolution systems to final Board de novo review in most cases involving 8(a)(3) and (1) allegations.

B. There Is No Experiential or Legal Justification for Changing the Deferral Standard.

Certainly, there are circumstances in which the Board’s expertise and experience under a particular legal regime may lead it to reconsider and overrule precedent for sound practical reasons, although I maintain that the more venerable the precedent, the more cautiously we ought to approach its revision. In other instances, a change in law may be viewed as a required response to intervening Supreme Court precedent or as a rational response to judicial criticism of extant precedent. However, the majority here has failed to justify overruling *Spielberg/Olin* and related deferral standards on either basis.

⁹ *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987).

¹⁰ *Oxford Health Plans LLC v. Sutter*, 569 U.S. —, 133 S.Ct. 2064, 2068 (2013) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)).

Sec. 10(a) of the FAA permits an award to be vacated only:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

¹¹ *Boys Markets, Inc.*, supra, 398 U.S. at 252 (1970).

1. *Experience with the Spielberg/Olin Deferral Standard.* The majority claims that employees may be left without any forum for the vindication of their statutory rights because the *Spielberg/Olin* standard permits deferral when there is no evidence the arbitrator actually considered the unfair labor practice issue. As an abstract concept, it is difficult to reconcile this claim with the Supreme Court’s statement that “there is no reason to assume at the outset that arbitrators will not follow the law.”¹² Consistent with this statement, it was reasonable for the Board in *Olin* to place the burden on the party opposing deferral to prove that which should not be assumed.¹³ Still, a litany of instances in which arbitration decisions were in fact shown not to have considered the statutory issue when resolving a grievance on a factually parallel contractual issue might support a change in law. Certainly, if there were an epidemic of labor arbitrators handing down decisions that let stand obvious employer 8(a)(3) and (1) violations, it would be the Board’s duty to adjust its deferral standards to put a stop to that. But, despite over 30 years of experience applying the *Spielberg/Olin* deferral standard, the majority can cite only the present case and two past cases—*Andersen Sand & Gravel Co.*, 277 NLRB 1204 (1985), and *Airborne Freight Corp.*, 343 NLRB 580 (2004)—as alleged proof that a grievant was unable to secure arbitral consideration of the unfair labor practice issue. This hardly suffices to justify a wholesale change in deferral law, even if the cases stood for the proposition asserted. One case every 10 or 20 years does not an epidemic make.

Moreover, in *Andersen Sand & Gravel Co.*, the Board had a reasonable basis for deferring to the arbitration award upholding the termination of employees for violating a contractual no-strike clause. In light of the General Counsel’s concession that the contractual and statutory issues were “coextensive,” the Board found deferral was “particularly appropriate.” 277 NLRB at 1204. While the arbitration panel did not expressly indicate that it considered and resolved the unfair labor practice issue, the Board reasonably assumed from the evidence presented to the panel and the panel’s resolution of

¹² *Shearson/American Express Inc.*, above, 482 U.S. at 232.

¹³ The majority now shifts the burden to the party urging deferral. It is true that deferral must be raised as an affirmative defense, but I would find the initial burden met by proof of an arbitration decision adverse to the unfair labor practice claimant. Beyond that, the General Counsel should have the burden of proving why the Board should not defer. This is no disadvantage. The General Counsel brings complaint on behalf of the charging party grievant or union that has participated in the arbitration proceeding, is in possession of the facts and evidence in support of the statutory claim, and, as advocate of that claim, is in a stronger position to pursue it.

the coextensive contractual issue that the statutory issue was adequately considered. *Id.* at 1205.

Airborne Freight, the other case cited by the majority, involved several deferral questions. The majority points only to the one where the Board panel unanimously deferred to a joint committee's resolution even though the hearing record before the administrative law judge did not show what arguments and evidence had been presented by the parties to the joint committee in that proceeding. 343 NLRB at 581. As I will shortly explain, the panel's disposition of other deferral issues in that case contradicts the majority's contention that the *Spielberg/Olin* standard fails adequately to protect statutory rights. In any event, the fact that the Board in this one case unanimously deferred to an arbitral award when the record did not show what evidence was presented and considered in arbitration is hardly an excuse to ignore a 30-year history in myriad cases where the same perceived shortcoming is not apparent.

To fill a considerable void in actual precedent, the majority relies on makeweight speculation that more cases challenging deferral to arbitration may have never been brought to the Board's attention because challengers and/or the General Counsel assumed that they could not meet *Olin's* allegedly impossible burden of proof. Thus, the majority pronounces that "[they] are no longer willing to countenance such results," albeit those results have not been shown to exist. Indeed, the Board invited "the parties and amici . . . to submit empirical and other evidence" in "answering" whether the deferral standard should be changed in this matter. *Notice and Invitation to File Briefs*, February 7, 2014. Given this, where is the empirical evidence before we undertake this nationwide reform? Where is the lengthy discussion of how such evidence points to the need for resetting decades of time-honored rules and policies? Neither is to be found in the majority's rationale. The most recent "evidence" they present, besides the facts themselves of this case, is one case, *Airborne Freight Corp.*, from 10 years ago. This is no way to make public policy, especially one that will fundamentally affect every collective-bargaining relationship in the United States.

Contrary to the majority's speculative concern, the Board's actual experience shows that the *Spielberg/Olin* limited review deferral standard has been more than adequate to protect employees' Section 7 rights. It is not, as the majority states, "virtually impossible" for the party opposing deferral to meet the evidentiary burden imposed under that standard. Far from conveying the impression that it would rubber stamp every arbitration award, the Board has not hesitated to refuse to defer where the current standards are not met. For instance, as

to the other deferral issues presented in *Airborne Freight*, the transcript was introduced into the record and showed that the union had been precluded from arguing or introducing evidence of antiunion motivation. The Board unanimously agreed that deferral was inappropriate because the grievance committee had not been not generally presented the relevant facts and thus it could not "adequately consider" the statutory issue. 343 NLRB at 582. See also, *ABF Freight System, Inc.*, 304 NLRB 585, 587 fn.5 (1991) (affirming judge's refusal to defer to an arbitration award because the record showed there was inadequate consideration of the unfair labor practice issues), and *Dick Gidron Cadillac*, 287 NLRB 1107, 1111 (1988) (affirming without comment judge's refusal to defer because the record showed evidence on the statutory issue was not presented to the arbitrator), *enfd. mem.* 862 F.2d 304 (2d Cir. 1988).

The Board has also declined to defer where it has been shown that an arbitration award is so clearly contrary to policy or precedent as to be "repugnant to the Act." See, e.g., *U.S. Postal Service*, 332 NLRB 340, 343-344 (2000) (finding arbitrator's decision upholding terminations for "insubordination" of employees engaging in concerted protected activity by attempting to enforce collective-bargaining agreement provisions was "repugnant to the Act"); *Mobil Oil Exploration & Producing*, 325 NLRB 176, 177-178, 179 (1997) (reversing judge and finding inappropriate deferral to arbitration award upholding employee's discipline based on his protected concerted activities); *110 Greenwich Street Corp.*, 319 NLRB 331 (1995) (agreeing with judge's failure to defer to arbitrator upholding discharge of employees for displaying "controversial placards" that were insufficient to constitute "gross disloyalty" warranting discipline under the Act); *Cirker's Moving & Storage Co.*, 313 NLRB 1318, 1318 fn. 2 (1994) (agreeing with judge that deferral inappropriate where contractual issue and statutory issue are not factually parallel); *United Cable Television Corporation*, 299 NLRB 138 (1990) (finding arbitrator's denial of backpay to employee disciplined for protected concerted activity because it was only "partially protected" was repugnant); *Barton Brands*, 298 NLRB 976, 979-980 (1990) (finding inappropriate deferral to arbitration award because issue not factually parallel with unfair labor practice issue and also repugnant); *Key Food Stores*, 286 NLRB 1056, 1056-1057, 1071-1072 (1987) (finding deferral inappropriate where arbitrator sustained discharge based on protected activities, including activities as shop steward), *Garland Coal & Mining Co.*, 276 NLRB 963 (1985) (finding deferral inappropriate to award upholding discipline for "insubordination" issued to employee "for actions he took in his capacity as union

representative” was not susceptible to any interpretation consistent with the Act).

In short, there is no sound basis in the Board’s 30-year experience operating under the *Spielberg/Olin* standard for substantial revision of that standard.

2. *Judicial Precedent Weighs in Favor of a Broad Deferral Policy Rather than Against It.* As previously discussed, there has been a steady, unrelenting tide of Supreme Court cases favoring private party arbitration as a preferred means of dispute resolution over which the judiciary should exercise limited review. The majority dismisses this precedent out of hand, branding it irrelevant to the question whether an administrative agency should exercise discretion to defer to arbitral resolution of statutory employment claims. Obviously, I could not disagree more, particularly when considering the administration of an Act that affirmatively endorses “final adjustment by a method agreed upon by the parties” as “the desirable method for settlement of grievance disputes.”

Of course, I could be wrong in my view that the deference accorded arbitration awards under the *Spielberg/Olin* standard is impermissibly overbroad. If so, one would expect that 30 years of judicial review of this standard would produce a cacophony of judicial criticism, especially where this standard gave rise to results that “one could not countenance,” in the majority’s words. That cacophony has not sounded. In fact, reviewing federal courts of appeals have routinely approved or applied without adverse comment the *Spielberg/Olin* standards. See *Bakery, Confectionery and Tobacco Workers v. NLRB*, 730 F.2d 812, 815–816 (D.C. Cir. 1984); *NLRB v. Aces Mechanical Corp.*, 837 F.2d 570, 574 (2nd Cir. 1988); *NLRB v. Yellow Freight Systems*, 930 F.2d 316, 321 (3rd Cir. 1991); *Equitable Gas Co. v. NLRB*, 966 F.2d 861, 864–865 (4th Cir. 1992); *NLRB v. Ryder/P.I.E. Nationwide*, 810 F.2d 502, 506 (5th Cir. 1987); *Grand Rapids Die Casting v. NLRB*, 831 F.2d 112, 115–116 (6th Cir. 1987); *Doerfer Engineering v. NLRB*, 79 F.3d 101, 103 (8th Cir. 1996); *Garcia v. NLRB*, 785 F.2d 807, 809–810 (9th Cir. 1986); *Harberson v. NLRB*, 810 F.2d 977, 984 (10th Cir. 1987). See also *Goodwin v. NLRB*, 979 F.2d 854 (Table) 1992 WL 337118 at *7 (9th Cir. 1992) (collecting cases approving *Olin* standards).

Against this legion of precedent, the majority stands two court of appeals decisions: *Stephenson v. NLRB*, 550 F.2d 535 (9th Cir. 1977), and *Taylor v. NLRB*, 786 F.2d 1516 (11th Cir. 1986). *Stephenson*, a pre-*Olin* case, focused on application of a requirement in an earlier Board deferral standard that “no more than an ‘opportunity’ to present the unfair labor practice issue to the arbitrator” was needed to warrant deferral. *Electronic Reproduction*

Services Corp., 213 NLRB 758 (1974). The Board in *Olin* explicitly did not adopt that part of *Electronic Reproduction* standard. 268 NLRB at 575 fn. 10. In decisions subsequent to *Stephenson*, the Ninth Circuit has acknowledged that Board deferral need not be contingent on proof that an arbitrator has explicitly decided the unfair labor practice issue. See *Servair, Inc. v. NLRB*, 726 F.2d 1435, 1440–1441 (9th Cir. 1984) (deference warranted when resolution of statutory issue depends on resolution of contractual issue even if arbitrator does not purport to resolve statutory issue); *NLRB v. Max Factor & Co.*, 640 F.2d 197, 203 fn. 6 (9th Cir. 1980) (“We see no useful purpose served, in cases where the arbitral award is not clearly repugnant to the Act, by precluding deferral because of uncertainty about whether the arbitrator intended to decide the statutory unfair labor practice issues.”). *Goodwin v. NLRB*, 1992 WL 337118 at *5 (“[The Ninth] Circuit has held that deferral may be appropriate even where the arbitrator did not clearly decide the statutory issue if the statutory issue is primarily factual or contractual and its resolution is dependent on the resolution of the contractual issue the arbitrator decided.”) (citing *Servair*, supra, 726 F.2d at 1440–1441). Thus, the law of this circuit is not contrary to the *Spielberg/Olin* deferral standard.

It is true that Eleventh Circuit was sharply critical of the *Olin* deferral standard in *Taylor*, finding that it “does not protect sufficiently an employee’s [statutory] rights.” 786 F.2d at 1521. However, the court’s finding that the Board had improperly deferred seems also to have been much influenced by its view that the Board had simply failed to follow its own *Spielberg/Olin* standard in the circumstances of that case. 786 F.2d at 1522. Indeed, the decision to defer there seems questionable. Employee Taylor first presented evidence in support of his discharge grievance to a multistate joint union-management committee, which was unable to resolve the matter. The hearing transcript and issue were then presented to an area wide joint committee. Only the employer presented evidence at the hearing before this committee. Taylor was not permitted to attend, and his union representative made no statement. The area wide committee summarily denied his grievance in a terse nine word statement. Reviewing these record facts, the court noted that “the ALJ found that the statutory issue clearly was considered at the Multi-State Committee hearing. If that hearing had produced a dispositive result, then deferral to that result would have been proper under any of the many variations of the *Spielberg* standard. It is the Area Committee’s decision, however, that is relevant for deferral purposes and the ALJ had no indication from the transcript of that proceeding whether the Area Committee consid-

ered any unfair labor practice claim.” *Id.* (emphasis added).¹⁴

Even accepting the Eleventh Circuit’s broad criticism of the *Spielberg/Olin* standard on its face, without reference to the unfavorable facts of the case, this single decision hardly seems sufficient to warrant the majority’s revisions of the Board’s current deferral practices. On this point, it is impossible to ignore the contrast between my colleagues’ willingness to follow the guidance of two dated court of appeals decisions in this case with their refusal to “acquiesce” to dozens of federal court decisions that either expressly or implicitly contradict the position they hold with respect to the legality of individual class action arbitration waivers in their recent *Murphy Oil* decision. 361 NLRB No. 72 (2014). It would seem that adverse judicial precedent matters only when it favors Board adjudication over private arbitration.

C. The Majority’s New Deferral Standard Will Adversely Impact Both Private Collectively Bargained Dispute Resolution Systems and Board Unfair Labor Practice Proceedings.

Let us suppose that the majority had presented a rational basis in Board experience and/or judicial criticism for changing the *Spielberg/Olin* deferral standard. I would then be willing to join in defining a revised standard. But that process would still have to be consistent with the Supreme Court’s and other federal courts’ endorsement of arbitration as a favored mechanism in dispute resolution. What is presented here would still not be the way to do that. The majority’s test has a number of major flaws. I will discuss each of these in turn.

1. The majority’s new test is inconsistent with the Federal Arbitration Act because of its cramped view of contract construction

Begin with the majority’s threshold requirement that the party opposing deferral must show that the arbitrator was “explicitly authorized,” either in the collective-bargaining agreement or by agreement of the parties in the particular case, to decide the unfair labor practice issue. The majority unfortunately does not define “explicit authorization” here. But it is most likely that the majority would require this authorization to be “clear and unmistakable,” as a waiver of the statutory right to exclusive Board consideration of a statutory discrimination claim.¹⁵ I assume as well that they reserve to the Board

final determination of whether an arbitrator has such authority. If this is the majority’s approach, it flies in the face of the Supreme Court’s long-settled, liberal standard for construing the coverage of arbitration clauses in collective-bargaining agreements. *E.g., AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 650 (1986) (“there is a presumption of arbitrability in the sense that ‘[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.’ Doubts should be resolved in favor of coverage.”) (quoting *Warrior & Gulf Nav. Co.*, 363 U.S., at 582–583); see also *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 fn. 4 (1964) (“[W]hen a contract is scrutinized for evidence of an intention to arbitrate a particular kind of dispute, national labor policy requires, within reason, that an interpretation that covers the asserted dispute ... be favored” (emphasis deleted; internal quotation marks omitted)).

The majority’s approach is also directly contrary to the general arbitration clause construction standard under the Federal Arbitration Act, which is identically liberal to the “presumption of arbitrability” of labor contracts. Under the FAA, the Supreme Court has held “that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). See also *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (FAA “mandates enforcement of agreements to arbitrate statutory claims”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (“no warrant in [FAA] for implying ... presumption against arbitration of statutory claims”); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (FAA “requires that [the Court] rigorously enforce agreements to arbitrate”). In the end, “the parties’ intentions control, but those intentions are *generously*

(2009), *infra*, the majority presumably would allow a comparable arbitration agreement to serve as a clear and unmistakable waiver. Also, as discussed below, the majority casts doubt on whether an arbitrator’s “just cause” determination will suffice to meet the requirement that the unfair labor practice issue was considered. They do not speak directly to the fundamental issue of whether an otherwise vanilla “just cause” contractual provision would suffice as proof that an arbitrator is even authorized to consider the unfair labor practice issue.

¹⁴ The court also expressed skepticism that a bipartite committee lacking any neutral member can provide the requisite fair and regular proceeding for resolution of a grievance. *Id.*

¹⁵ See generally *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007) (reaffirming clear and unmistakable standard for waiver of statutory rights). By citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247

construed as to issues of arbitrability.” *Mitsubishi Motors Corp.*, 473 U.S. at 626 (italics for emphasis).

The majority cites *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), and its arguable reaffirmation in *Penn Plaza* in claiming that the new deferral standard is entirely consistent with Supreme Court precedent on arbitration. The majority’s position would be ironclad if the only issue posed by the new standard was the “explicit contractual authorization” question, and if development of the law had stopped in 2009. But neither of those things is true.

Let’s start with the latter problem with the majority’s analysis. The Supreme Court has made it increasingly clear in a flurry of FAA cases, decided after *Wright* in 1998 and *14 Penn Plaza* in 2009, that the burden lies with the party resisting arbitration to demonstrate, even for federal statutory claims, either that: a plain-text reading of the arbitration contract’s terms does not require that contract’s enforcement, or the federal statute at issue contains an express command disavowing arbitration. See, e.g., *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012) (“[The FAA] requires courts to enforce agreements to arbitrate *according to their terms*. That is the case *even when the claims at issue are federal statutory claims*, unless the FAA’s mandate has been overridden by a *contrary congressional command*.” (internal quotations and citations omitted; emphasis added)). As one can read in this precedent, there is no requirement of showing “explicit contract authorization” before federal statutory claims go to arbitration. Moreover, as detailed in my dissent in *Murphy Oil*, *supra*, the text of the Act obviously does not contain a command to override the FAA—especially in relation to *already-completed* arbitrations. Indeed, the force of the FAA should be far greater here, given that we are not dealing with any provision of the Act, but only, as the majority concedes, with a completely discretionary policy of deferral.

Second, and more importantly, even if the *Wright* principle still endures today (independently or as construed in *Penn Plaza*), it cannot sustain the great weight that the majority places upon it. *Wright* stands only for the proposition that, before a statutory right will be sent to arbitration, the arbitration contract’s language must constitute a “clear and unmistakable waiver” of the judicial forum. In other words, *Wright* conceivably supports only the first prong of the majority’s test, i.e. a standalone requirement of “explicit authorization” in the labor contract. By the same token, *Wright* actually undercuts the majority’s total deferral standard, because that standard is “explicit authorization plus two more prongs.” To wit, *Wright* looks solely to contract language, and does not require more before effectuating an

arbitration process. Nowhere in *Wright* or any related cases does there appear a notion that, *in addition*, a claim must still be technically “presented” to an arbitrator and the arbitrator’s award must be “reasonably permissible.” These extra conditions go far beyond recognized boundaries. Thus, the majority’s new standard is a sizeable divergence from the standards mandated by the Supreme Court for construction of both (1) labor agreements specifically and (2) contracts in general under the FAA. This guarantees the new rule will be disfavored on court review.

2. The majority’s new test will impede labor peace, not enhance it, in the long run

Moreover, as more fully explored in Member Miscimarra’s dissent and accurately predicted by Member Penello 34 years ago, the new standards are guaranteed to produce less labor peace, not more. Why, exactly, would any exclusive collective-bargaining representative be willing to make an agreement that expressly waives its right to unlimited Board review of a statutory claim in favor of arbitration with an employer? Absent such agreement, a represented grievant is guaranteed two bites of the litigation apple, and the second bite in unfair labor practice litigation is “on the house,” because the government will pay for it. The majority’s new standard simply introduces a new stumbling block to productive negotiations over a grievance and arbitration procedure.

3. The majority’s new test will still encourage strategic claim splitting

The same “two bites” problem may apply even in instances where the parties have agreed that an arbitrator has the authority to consider the statutory claim. The majority states that deferral remains possible if the arbitrator was presented with and considered the statutory issue, *or was “affirmatively” prevented from doing so by the party opposing deferral*. This suggests a prohibition against claim splitting, albeit a very limited one. However, the majority then belies this suggestion by stating that an employer can easily raise the issue by simply informing the arbitrator of the unfair labor practice “allegation.” What if the employer is unaware of any such allegation, because the grievant has not made it yet, i.e. has effectively decided to reserve it? That is, what if the grievant and union representative, with a 6-month grace period in which to file an unfair labor charge under Section 10(b) of the Act, simply keep silent as to the statutory claim while taking the expeditious grievance and arbitration route in pursuit of the contractual claim? Would this be considered acting “affirmatively” to prevent consideration of the unfair labor practice claim? What if the employer asks the claimant/grievant—in prearbitral dis-

covery or during the course of the arbitration case or hearing—if the grievant intends to initiate any unfair labor practice claims against the employer as a result of the same events, and the grievant answers “no”? By keeping silent or answering “no” at the time of the arbitration, a grievant or claimant could effectively preserve the second litigation option independent of any adverse outcome from the first. This is another fault with the majority’s test.

4. The majority’s new test is an impermissible standard of de novo review

There is also the adverse impact of the Board’s review standard to be considered. As previously stated, the Board will now engage in what is essentially de novo review of an arbitrator’s award to determine whether Board law reasonably permits the award. Not only does the availability of this standard encourage a losing grievant to pursue this second chance litigation, but it reduces the arbitration decision to the stature of an administrative law judge’s decision, or even less so if any credibility resolutions and factual findings made in arbitration may be ignored or rebutted, as I note below. The limited extent to which actual deference will be given to the legal reasoning of the arbitrator is best measured by the majority’s summary rejection of “just cause” as textual protection for statutory rights.¹⁶ The majority’s supposition that an arbitrator who is forthrightly applying a “just cause” provision will somehow likely trample Section 7 rights is unexplained and unwarranted. As more fully discussed in Member Miscimarra’s dissent, Section 10(c) of the Act and its legislative history show that Congress was aware that “just cause” provisions in collective-bargaining agreements were interpreted by arbitrators to protect employees’ statutory rights. Thus, even though an arbitrator is applying a contractual “just cause” standard, and not Board principles per se, history shows us that an arbitrator will not uphold discipline issued in response to union or concerted activities.¹⁷ The “reason-

ably permissible” standard needs flesh on its bones ensuring that the Board is not simply substituting its after-the-fact judgment for the arbitrator’s.¹⁸ The majority supplies none.

5. The majority inexplicably fails to assign significant or specific collateral-estoppel value to any prior arbitration findings

Further, either when considering whether to defer *or* in those cases where deferral is held improper, the majority has severely cut back the collateral-estoppel impact of any fact findings by the arbitrator, which are, of course, made after taking testimony under oath. This unfortunately ensures that the arbitrator’s decision will have little effect, evidentiary or analytical, on subsequent litigation before the Board. Although the majority seems to allow a limited form of collateral estoppel, it is nowhere near specific or efficient enough to preclude relitigation of essential fact issues, or even seemingly factual representations made 180 degrees different than before the arbitrator. The majority’s new collateral-estoppel standard merely states that “the Board will assess the arbitrator’s decision in light of the evidence that was presented.” This will apparently preclude a party from withholding evidence in arbitration and then seeking to introduce it in a subsequent unfair labor practice proceeding.¹⁹

The majority, however, assigns no inherent deference to the fact finding or even the credibility determinations of the arbitrator whom the *parties themselves* voluntarily selected, and who will presumably have great experience

[V]irtually every arbitrator who found union activity or concerted activities to be the motivation behind discipline would sustain a challenging grievance. Indeed, arbitrators are prone to find just cause violations for any reason that appears to be arbitrary and without a foundation in fundamental fairness. That would include any discharge or discipline that had no satisfactory explanation. That is so much a part of the fabric of grievance arbitration that an arbitrator who had never heard of the NLRA or read an NLRB decision would undoubtedly find discipline action based on union or concerted activities to be without just cause.

¹⁶ A related problem with the new deferral standard is the assumption that in all instances the statutory issue can be easily separated from the contractual issue. That is not always the case, as for example, when the union has waived employees’ statutory rights. *American Freight System, Inc. v. NLRB*, 722 F.2d 828, 831–833 (D.C. Cir. 1983) (finding that the “obvious fallacy in the Board’s analysis is its contention that there is a statutory issue apart from the contractual issue,” where union had waived employees’ statutory rights in labor contract); *Fournelle v. NLRB*, 670 F.2d 331, 341–345 (D.C. Cir. 1982) (finding Board should have given precedential effect by deferring to prior arbitration decision permitting selective discipline of union officials under contract).

¹⁷ See Reginald Alleyne, *Courts, Arbitrators, and the NLRB: The Nature of the Deferral Beast*, in 33 *Proceedings of the National Academy of Arbitrators* 249 (1980):

¹⁸ The majority says that their standard means that the “arbitrator’s decision must constitute a reasonable application of the statutory principles that would govern the Board’s decision, if the case were presented to it, to the facts of the case.” But determining whether the arbitrator reasonably applied the statutory principles to the “facts” of the case—particularly since, as noted below, the majority seems unwilling to consider any deference to the arbitrator’s fact finding—seems a ripe opportunity to engage in de novo review, despite the majority’s claims to the contrary.

¹⁹ Presumably, this limited preclusion rule applies as well to the General Counsel, even though he was not a party to the arbitration. Otherwise, the rule is essentially meaningless. But this is far from certain given the majority’s pointed assertion that it is “well settled” that the Board does *not* give collateral estoppel effect to the resolution of private litigation, where the Board was not a party to the prior proceedings.

in fact finding in adversarial proceedings. The majority merely points to the traditional rule that—for the Board’s determination of deferral under the traditional standard—no collateral estoppel attaches. However, the majority misses that the traditional deferral standard would automatically “weed out” weak arbitrator decisions for collateral-estoppel purposes; decisions that are evaluated under and fail under the traditional deferral standard would be unworthy of any collateral-estoppel effect on any type of issue.

But, that same parallelism does not hold true for the new deferral standard. For example, an unfair labor practice issue may not have been technically “presented” to an arbitrator (in the sense that would satisfy the majority’s new rule and trigger deferral to the arbitrator’s ultimate decision), but that arbitrator may have made very detailed factual findings and credibility determinations that bear on the commission of the alleged unfair labor practice. The majority presents no reason or standards why, and how, those findings and determinations should be discarded, under the new rule.²⁰ If the arbitrator firmly considered and decided the issue of whether the stoplight was “red” or “green” and decided that it was “red,” how does it advance the enforcement of the Act to undermine that determination by allowing it to be relitigated de novo? In other words, in order to serve fairness, a wholesale reformulation of one set of legal standards often requires modification of other, related legal standards. But, the majority apparently will still woodenly apply the no-estoppel rule, even though it has obliterated the underlying deferral precedent that would supply any logical support for the rule’s premise.

Simply stated, arbitrators deserve far more deference than this. Indeed, the majority does not even supply a rule for parties or administrative law judges to determine how much deference to give the express or implicit fact finding made by an arbitrator. Nor does the majority discuss to what extent admissions or representations made in an arbitral transcript continue to bind a party before the Board. The majority’s standard guarantees duplicative, wasteful proceedings and leaves parties in the dark about how much the workings of the arbitral process will count before the Board, if they count for anything at all. The majority’s test needs improvement, which will probably be supplied by a court, unfortunately, on remand.

²⁰ Any contention by the majority that the arbitrator’s findings will not be automatically discarded but will be accorded “whatever weight is appropriate,” besides reinforcing the notion that the review will likely be de novo, provides no guidance to the parties, the presiding administrative law judge, or the arbitrator about what is needed to satisfy the new standard.

6. The majority’s application of its highly technical new standards to prearbitral settlements confounds and undermines the settlement process, but the majority inexplicably provides no “safe harbor” for parties to utilize in settlement agreements whatsoever

The majority’s overreach in reform of our postarbitral deferral policy becomes even more egregious by its application of the new restrictive standards to prearbitral grievance settlements, overruling *Alpha Beta Co.*, 273 NLRB 1546. Grievance settlements, including settlement of discipline or discharge disputes, are often reached at the work site, at the lower informal steps of the grievance process, and before any unfair labor practice charge is filed. They are agreements between the employer’s operating managers, supervisors, or human resources officials, and the local union business representatives, stewards, or grievance committee members, as well as the employee involved. At this stage, the parties are seeking a compromise that, from the employer’s perspective, assesses a suitable disciplinary penalty and, from the union’s perspective, returns the employee to work with limited or no financial loss. Their concern is a prompt and final resolution of the matter and not a hypothetical unfair labor practice charge. The settlement itself may be extremely informal, memorialized by little more than a hand-written statement on a grievance form, an entry or authorization made in the employer’s payroll system, and a notation in the employee’s personnel record. Bear in mind that many of the individuals involved in creating such settlements are laypersons, not lawyers, and more still are unaware of every specific nuance in the Board’s Section 7 jurisprudence. They are not well-served by imposing high standards before any settlement is given binding weight by the Board.

It is important to remember that “[b]y 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. The majority’s imposition of a stricter review standard makes little sense in this context. It simply adds to the heightened degree of uncertainty about the actual finality of the voluntary adjustment of disputes, even at the earliest stage of a collectively bargained grievance and arbitration procedure. This is anathema to our statutory policy of assuring labor relations stability through collective bargaining.

The majority identifies a problem here that does not exist, and I would not change the *Alpha Beta* standard. But, even accepting the ostensible problem on the majority’s terms, one would think the majority could simply provide a safe harbor by stating that their test would be

automatically satisfied if the grievance settlement had particular language in it. At least for some group of employers, this might provide a method to avoid duplicative litigation. Although I disagree the *Alpha Beta* standard should be altered at all, if the majority is going to upend a 30-year old standard for settlements entered into mostly by laypeople, it should provide a workable drafting solution rather than leave the details for another day. The majority's approach abandons parties to twist in the wind as they attempt to figure out how to write a settlement agreement that actually and finally settles their dispute—which, of course, is supposed to be the core function of settlement agreements.

Contrary to the majority, giving parties safe harbor guidance is the rational administrative law approach. The Board has taken this approach where the ultimate issue was the Board's future interpretation of contracts, just as in this case. See *Keystone Coat, Apron & Towel Supply Co.*, 121 NLRB 880, 885 (1958) (construction of maintenance of membership clauses). There, the Board set forth safe harbor language so that unions could conform their legitimate union security needs to the law, and have their contracts serve as a valid basis for an election bar. The Board did not consign these unions to the "mercy" of a case-by-case Board adjudication process until the unions eventually stumbled upon language that would pass Board muster. Surely, we can do the same for parties who want to settle labor contract disputes with finality.

Finally, this task is not that hard. I can perform it in 39 words: "The parties realize that this dispute may include what could be alleged as unfair labor practice violations of the National Labor Relations Act. Notwithstanding, the parties intend to fully and finally resolve all such potential allegations in this settlement."²¹ State legislatures have addressed analogous problems using a few lines of text as well. See, e.g., Cal. Civ. Code § 1542 (language to be used within a general release to effectively release unknown claims). I disagree strongly with the

²¹ The Board in *Keystone Coat* managed to craft a 136-word clause for its safe harbor: "It shall be a condition of employment that all employees of the Employer covered by this agreement who are members of the Union in good standing on the effective date of this agreement shall remain members in good standing and those who are not members on the effective date of this agreement shall, on the thirtieth day [or such longer period as the parties may specify] following the effective date of this agreement, become and remain members in good standing in the Union. It shall also be a condition of employment that all employees covered by this agreement and hired on or after its effective date shall, on the thirtieth day following the beginning of such employment [or such longer period as the parties may specify] become and remain members in good standing in the Union." [note omitted]. 121 NLRB at 885.

majority's approach here, and its lack of a valid excuse to take the same path.

7. The majority's test is very likely to further delay the parties and reduce agency efficiency in these and other matters

The institution of the majority's new standards also portends that more and more cases that could and should be resolved through collective bargaining will now be dropped on our doorstep. The Board already struggles with the processing of its current unfair labor practice caseload, without the extra increment of cases posed here. For fiscal years 2011 through the last completed fiscal year 2014, the Board's production has been at the following level of contested cases per year: 248 (2014); 213 (2013); 342 (2012); and 368 (2011). Adding a hundred—or even a few dozen—arbitration cases each year to the Board's overall case load out of the many arbitration proceedings that are initiated nationwide each year will seriously detract from the Board's enforcement of the Act in other milieus. That is a simple mathematical fact.

Parties also do not need the extra delay posed by the prospect of a new, highly technical Board review before they know that an arbitrator's decision is final. This is not an abstract concern; the danger of delay is manifest in this very case, in the contrast between how quickly an arbitral process handles a disputed termination and how fast the Board does. As noted in the amicus brief provided by the Council on Labor Law Equality (COLLE):

The procedural history of the underlying case here, Babcock & Wilcox Construction Co., JD(SF)-15-12, exemplifies [the concern about delay]. Pursuant to the contractual procedure, the union in this case filed a grievance on behalf of the Charging Party approximately one week after her termination, on March 19, 2009. The case quickly progressed to Step 4 of the contractual grievance procedure, in which the parties participated in a hearing before the subcommittee panel and submitted position statements and documentary evidence. The subcommittee rendered a decision on October 8 of that same year. The contractual grievance procedure, from start to finish, thus provided the parties with a resolution less than seven months after the challenged disciplinary action took place.

By contrast, the Board proceedings in this case have prolonged this dispute for almost five years. The Region issued a complaint in this case on August 29, 2011, almost two years after the subcommittee's decision. ALJ's decision issued on April 9, 2012, over three years after the employee's dis-

charge, and upheld the subcommittee's decision. The case has now been pending at the Board for nearly two additional years. As of today [March 25, 2014], the parties have spent five years waiting for this matter to be finally resolved.

COLLE amicus brief at 19–20 (emphasis added). It makes no sense for us to impose a system that will only encourage delays of this nature.

There may be occasions when it is nevertheless necessary to take on an increased caseload in order to assure the prevention of unfair labor practices. This is not such an occasion, not when we have for 30 years followed a deferral practice that fulfills our obligation to accommodate arbitration without any proven derogation of our statutory enforcement obligation. We should not effectively become “the nation’s just cause arbitrator,” when our own cases take too long to issue, and adding more will only delay this process and frustrate finality in the nation’s workplaces whenever a grievance arises.

In conclusion, I note that my colleagues downplay the possibility that their new deferral standard will have significant ramifications for arbitration, the incidence of deferral, and Board litigation. I disagree. The new policy virtually guarantees the proliferation of bifurcated, prolonged litigation in many more cases. Grievants and/or their union representatives will be encouraged to split their litigation claims, proceeding first solely on the contractual issue in arbitration, then, should they lose in that forum, turning to the General Counsel to proceed with litigation of the unfair labor practice claim at public expense. For that matter, even if they do zealously litigate the statutory claim in arbitration, but lose, they will be encouraged to pursue litigation before the Board with the prospect that the arbitration decision will be accorded little deference.

CONCLUSION

Although I dissent from my colleagues’ broadscale revision of Board deferral policy, I do not mean to suggest that certain refinements of the current policy would be out of order. If the majority had proposed a rational, less radical test, the lack of necessity for overall change would not weigh as heavily from my perspective. Despite the absence of any showing that a drastic departure was necessary, not only do my colleagues radically revamp the deferral policy, they do so by substantially returning to the regressive approach taken in *Suburban Motor Freight*, which the Board wisely overruled 30 years ago in *Olin Corp.*

I certainly endorse the majority’s general observation that “[a]n important and attractive feature of the grievance/ arbitration system is that it is less formal, less

structured, and less costly than litigation.” Unfortunately, however, the fundamental problem here, as well as in the recent *Murphy Oil* decision, is that the majority’s decision blights that attractive feature. By subordinating the arbitral process to Board litigation, rather than accommodating that process, they impose an overall system that is more formal, more structured, and potentially much more costly.

I yield to no one in faithfully assuring that the Board meets its statutory obligation to prevent unfair labor practices. Thirty years of experience under the *Spielberg/Olin* deferral standard fail to show that our statutory obligation has not been met. I also strongly adhere to the view that the Act and Supreme Court precedent mandate that the Board encourage final adjustment of work disputes through collectively bargained grievance and arbitration procedures. A broad discretionary deferral policy serves that mandate. The majority’s new restrictive deferral policy does not. Even if there was a basis for changing all the deferral standards the majority uproots here, there are too many flaws in the majority’s new test that will manifest themselves in too many scenarios. I therefore respectfully dissent.

Dated, Washington, D.C. December 15, 2014

Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

William Mabry III, for the General Counsel.

Dean E. Westman (Kastner, Westman & Wilkins), of Akron, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Show Low, Arizona, on January 17–18, 2012. On July 30, 2009, Coletta Kim Beneli (Beneli) filed a charge alleging that Babcock & Wilcox Construction Co., Inc. (Respondent or the Employer) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). On September 29, 2009, Beneli filed an amended charge against Respondent. On August 29, 2011, the Regional Director for Region 28, issued a complaint and notice of hearing alleging that Respondent violated Section 8(a) (3) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my

observation of the demeanor of the witnesses,¹ and having considered the post-hearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, at times material here, was engaged as a construction contractor providing field construction and maintenance service for Arizona Public Service at Joseph City, Arizona. During the 12 months prior to the filing of the charge, Respondent received gross revenues in excess of \$50,000 from services provided outside Arizona. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find, the International Union of Operating Engineers Local 428 has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Factual Summary

Since 1996, Respondent and the International Union of Operating Engineers (the International) and its Local 428 (the Union) have been parties to the National Maintenance Agreement, which is currently in effect. Respondent has also been signatory to a multiemployer association agreement between the Union and the Arizona Chapter of the Associated General Contractors of America, Inc. At all times material here, Respondent was performing construction and maintenance work for Arizona Public Service (APS) at a coal plant in Joseph City, Arizona.

On January 12, 2009, Beneli began working for Respondent at the Joseph City jobsite as a utility operator, operating a forklift and a crane. Shortly after beginning work for Respondent, Beneli became the union job steward for the worksite. On February 2, Respondent brought in a new operator, Ian Christianson, to work at the jobsite. Beneli called the Union and found out that Christianson had not been dispatched through the Union's hiring hall. Beneli spoke to Christianson and told the employee that he needed a dispatch from the Union's hiring hall. Christianson told Beneli that he would speak with management and take care of it. Later that day Christianson told Beneli that he had spoken to Respondent's timekeeper.

On February 16, Robert Alsop, a foreman and union member, told Beneli that he had not been paid properly for a full 40-hour week. Beneli spoke with Christopher Goff, Respondent's project superintendent. Beneli told Goff that Alsop was short 10 hours on his paycheck. Goff asked why and Beneli responded that the collective-bargaining agreement guaranteed

foremen 40 hours a week. Goff then asked Beneli to tell the timekeeper, Rhonda Roberson, to cut Alsop a check for the full 40 hours.

On March 10, Beneli saw another new operator on the job. Beneli asked the new operator, Heath Riley, whether he was referred from the Union's hiring hall. Riley answered that he had been called directly by Goff. Beneli called the Union and then had Riley speak with the union dispatcher. Beneli told Riley that the Union and Respondent would work it out.

On March 11, Alsop told Beneli that Bill Roberson, APS representative, wanted to speak with her. After a short discussion, Beneli stated that she had spoken to the Union about Alsop's guaranteed pay. Beneli told Roberson that it would be a lot better if Goff did not bring operators from outside the State without using the Union's hiring hall. Goff walked in at the end of the conversation.

On March 11, after meeting with Roberson, Beneli was late for the morning's job safety analysis (jsa) meeting. Goff told Beneli that he wanted to speak with her. When Beneli asked if he wanted to speak at that moment, Goff angrily responded, "I will take care of you later missy." After the meeting, Goff asked Beneli what she had discussed with Roberson. Beneli said she had told Roberson that Riley had not been dispatched from the Union's hiring hall and about Alsop's pay issue. Goff asked why Beneli had not discussed the matter with him. Beneli explained that Roberson had asked her to talk with him. Goff said that the contract was with Respondent and not with APS. Beneli said that she had made a mistake and that it would not happen again. Goff said that he did not say Alsop should be paid for 40 hours. Beneli disagreed telling Goff where and when he had told her to tell Rhonda Roberson to pay Alsop the full amount. Goff said that it was none of Beneli's business. Goff told Beneli that she had no business talking to APS. Beneli stated that she had made a mistake but that Bill Roberson had asked to talk to her. Goff told Beneli that she was sticking her nose where it does not belong and asking questions that were none of her business. Goff told Beneli that she was not supposed to take care of union business on company time. After this meeting, Beneli called Shawn Williams, union assistant business manager.

Williams testified that at about 8 a.m. on March 11, he received a call from Goff. Ralph McDesmond, safety representative was also on the call. Goff told Williams that he wanted to terminate Beneli because she had overstepped her boundaries as the Union's steward and was crossing the line into management. Williams testified that Goff said Beneli was raising contractual issues and trying to tell Respondent what they are supposed to pay employees. Williams stated that in his view Beneli was acting as a steward should. Goff stated that Beneli should not be getting APS, Respondent's customer, involved by raising contractual issues with APS. Williams said that in the future Beneli would raise contractual issues solely with Respondent. Williams stated that if Goff discharged Beneli, the Union would fight the discharge and file a grievance.

On March 11, sometime after 2 p.m., Alsop told Beneli that Goff had called him and wanted them both to go to Respondent's office. Beneli and Alsop went to Goff's office, where they found McDesmond and Matt Winklestine, safety repre-

¹ The credibility resolutions here have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings here, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

representative, waiting. Winklestine told Beneli that she was being suspended for violating two safety policies earlier that day. Specifically Winklestine said Beneli had been observed eating a pastry during the jsa meeting, and that she had failed to fill out a separate jsa form. Beneli laughed and asked Winklestine where it stated she could not eat a pastry during the jsa meeting. Winklestine said he would look for it. Beneli again asked to see it in writing. Winklestine said he did not have to show Beneli anything. Winklestine then stated that Beneli was being suspended for 3 days without pay for the two safety violations.

Beneli turned to McDesmond and said, "So this is the f—g game you guys are going to play?" Almost immediately Winklestine and McDesmond pointed their fingers at Beneli and stated that she was terminated. McDesmond said that Beneli had threatened them. Beneli said that she did not threaten anyone but said, "is this the f—g game you are going to play?" McDesmond stated there you go again and once more accused Beneli of threatening them. McDesmond then told Rhonda Roberson to prepare termination papers and to cut Beneli's final check. Beneli refused to sign the termination papers which stated that she was being terminated for "inappropriate conduct."

Respondent's Defense

Respondent presented evidence that Beneli was not a safety conscious employee. She used her cell phone while operating equipment, moved a crane without a spotter and drove a forklift through a prohibited area. She was given a written warning on February 2 for driving through the prohibited area.

Beneli was also late for several joint safety analysis meetings. On March 11, Beneli was late for the jsa meeting. She also admits to eating a pastry at the meeting. In addition she failed to fill out a second jsa form that day. Both Goff and McDesmond deny having a conversation with Williams on March 11.

On that day, Goff and McDesmond consulted over the telephone with Dave Crichton, Respondent's corporate manager of labor relations. They agreed to give Beneli a 3-day suspension for safety violations. Winklestine filled out the disciplinary suspension form. When Winklestine began to explain the suspension, Beneli became angry. She said in an angry tone, "if you guys want to play this f—g game, we'll see." McDesmond asked what she had said and Beneli repeated it. McDesmond immediately responded that Beneli was discharged. Respondent contends that Beneli was discharged for her angry outburst and use of profanity at this disciplinary interview. Respondent denied that Beneli was discharged because of her activities as union steward.

The Grievance

On March 19, the Union filed a grievance over Beneli's suspension and discharge. The grievance moved through the contractual grievance procedure to step 4, which calls for a hearing before the grievance review subcommittee (subcommittee). A quorum of five representatives consisting of at least two management representatives, two labor representatives, and one NAMPC staff representative considers and decides a grievance at step 4. All subcommittee determinations are based upon the facts presented, both written and oral, and any decision ren-

dered is final, binding and not subject to any appeal.

On their step 4 grievance fact form, the Union asserted that "Beneli's termination was in violation of the National Maintenance Agreement, NLR Section 7 . . . and decisions made by the NLRB." Additionally, the Union contended that "While engaged in a representational capacity as a Union steward [Grievant] made the following statement ' . . . so this is the f—g game you guys are going to play.' She was immediately terminated without further discussion in the process."

On October 8, the step 4 hearing was conducted before the subcommittee panel. Both the Respondent and the International Union provided the subcommittee with position statements and documentary evidence. The International Union submitted a statement position and provided various documents in support of the grievance, including a 3-page report setting out a detailed timeline of Beneli's extensive union and concerted activities in the month and a half before her suspension and discharge. Respondent's position statement stated in part, that Beneli "was terminated due to the inappropriate conduct which she engaged in when the Company Supervisor informed her of their intent to administer a . . . three day disciplinary suspension for safety violations." Respondent also asserted that a supervisor had complained that "the Steward was disruptive in terms of the amount of time being spent on Union duties, and had frequently evidenced a poor attitude toward safety on the job." Additionally, attached to Respondent's position statement were statements prepared by Respondent's witnesses who were present at the March 11 meeting.

By letter dated October 8, the subcommittee denied the grievance and upheld Beneli's discharge. The subcommittee noted the "issue was the Union's contention the [Respondent] 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."

On September 30, 2009, Region 28 issued a letter which deferred the charge to the parties grievance/arbitration procedure pursuant to *Dubo Mfg. Corp.*, 142 NLRB 431 (1963). A portion of the charge was resolved by a non-Board settlement whereby Respondent agreed to post a notice for 60 days. The parties provided the Region with a letter which stated:

At issue was the Union's contention that Respondent violated Article XXIII Management Clause of the National Maintenance Agreement by terminating the grievant, without just cause for the grievant's use of profanity.

Respondent contends that grievant was terminated for just cause due to the grievant's use of profanity and insubordinate conduct upon receipt of disciplinary action.

After reviewing all the information submitted, both written and oral, the subcommittee determined that no violation of the National Maintenance Agreement occurred and therefore, the grievance was denied. This determination is based on the facts presented and reviewed in the instant case and only applies to this specific grievance.

Thereafter Beneli informed the Region that she was not satisfied with the grievance decision and asked that the Region not defer to it. The Region considered Respondent's position but determined that the grievance decision was repugnant to the Act and reversed the deferral. On August 29, 2011, the Region issued the complaint in this matter.

Should the Board Defer to the Subcommittee's Decision?

Under the current *Spielberg/Olin* standards, the Board defers to arbitral awards and final disposition of joint employer-union committees when: (1) all parties agreed to be bound by the decision of the arbitrator; (2) the proceedings appear to be fair and regular; (3) the arbitrator adequately considered the unfair labor practice issue; and (4) the award is clearly not repugnant to the policies of the Act. *Spielberg Mfg. Co.*, 112 NLRB 1080 at 1082 (1955); *Olin Corp.*, 268 NLRB 573 at 574 (1984). See also, *K-Mechanical Services, Inc.*, 299 NLRB 114,117 (1990) (applying *Spielberg/Olin* deferral standards to determinations by joint employer-union committees that are final dispositions of a grievance).

Here 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 subcommittee was generally presented with the facts relevant to resolving the unfair labor practice. General Counsel contends that the subcommittee's decision was repugnant to the Act. Here, the subcommittee found that Beleni was discharged for the use of profanity and insubordination upon receipt of her

discipline. Although not stated in its decision, the subcommittee rejected the assertion that Beneli was discharged because of her duties as steward. While I credited Beneli and Williams, the subcommittee could have credited Respondent's witnesses. While I would reach a different conclusion, I do not find this factual decision by the subcommittee to be repugnant to the Act. Accordingly, I recommend that the Board defer to the arbitration and grievance procedure.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Board should defer to the decision of the NAMPC subcommittee.

3. Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.²

ORDER

The complaint should be dismissed.

Dated, Washington, D.C. April 9, 2012

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.