BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

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

BRIEF OF RESPONDENT BABCOCK & WILCOX CONSTRUCTION CO., INC.

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I. STATEMENT OF THE CASE.

Following her March 11, 2009 termination from employment with B&W, Charging Party filed a grievance dated March 19, 2009. (Dec. 4; R. Ex. 9).[1] The Step 4 grievance fact form asserted that Charging Party was terminated "in violation of the National Maintenance Agreement, NLRA Section 7...and decisions made by the NLRB." (Dec. 4; R. Ex. 6). Then, on July 30, 2009, Charging Party filed her initial unfair labor practice Charge. (Dec. 1; G.C. Ex. 1(a)). An Amended Charge followed on September 29, 2009. (Dec. 1; G.C. Ex. 1(c)). After securing confirmation that final and binding contractual grievance proceedings over Charging Party's termination were underway, and that B&W would agree to proceed to arbitration, if necessary, over the same claims that formed the basis for the Section 8(a)(1) and 8(a)(3) claims in the Amended Charge, waiving any timeliness defense in connection with those grievance and arbitration proceedings (R. Ex. 3), NLRB Region 28 notified B&W and Charging Party of its decision to defer further proceedings on the Amended Charge. (R. Ex. 2B).

Upon receiving notice of the Region's decision to defer to arbitration, B&W notified the entity that was contractually responsible for processing Charging Party's discharge grievance (the Grievance Review Subcommittee of the National Maintenance Agreements Policy Committee, hereinafter "NMAPC subcommittee" or "subcommittee") that the Region had issued a deferral determination. (R. Ex. 8). Thereafter, the NMAPC subcommittee issued its October 8, 2009, final and binding decision denying Charging Party's grievance, and thereby upholding B&W's termination of Charging

[1] References to ALJ Pollack's April 9, 2012 Decision will be in the following form: "(Dec. ____)." References to Respondent's exhibits from the January 2012 hearing will be in the form "(R. Ex. ____)", while references to the General Counsel's exhibits from the hearing will be in the form "G.C. Ex. ____)." References to the hearing transcript will be in the following form: "(Tr. ____)".

Party's employment due to her "use of profanity and insubordinate conduct upon receiving a disciplinary action." (R. Ex. 5). Despite its initial decision to defer to arbitration, the Region issued the complaint almost two years later, on August 29, 2011. (R. Ex. 2B; G.C. Ex. 1(e)).

Administrative Law Judge Jay R. Pollack ("ALJ Pollack") conducted the hearing in this matter in Show Low, Arizona on January 17 and 18, 2012, and issued his Decision on April 9, 2012. In his Decision, ALJ Pollack noted that the NMAPC "subcommittee found that Beneli was discharged for the use of profanity and insubordination upon receipt of her discipline," and that, "[a]lthough not stated in its decision, the subcommittee rejected the assertion that Beneli was discharged because of her duties as steward." (Dec. 5). Accordingly, he concluded that he did "not find this factual determination by the subcommittee to be repugnant to the Act." (Dec. 6). He further concluded that "[t]he Board should defer to the decision of the NMAPC subcommittee," and that "Respondent did not violate the Act as alleged in the complaint." (Dec. 6). The General Counsel filed Exceptions and a Brief in Support of Exceptions to the Decision on May 11, 2012, citing five exceptions to the Decision. B&W filed its Answering Brief to General Counsel's Exceptions on June 1, 2012, and the General Counsel filed a Reply Brief on June 14, 2012.

On February 7, 2014, the NLRB issued a Notice and Invitation to File Briefs in which it asked the parties to address the following four questions:[2]

> 1. Should the Board adhere to, modify, or abandon its existing standard for post-arbitral deferral under Spielberg Mfg. Co., 112 NLRB 1080 (1955), and Olin Corp., 268NLRB 573 (1984)?

[2] Notably, the first two questions relate to the General Counsel's fifth exception, but the last two questions go far beyond any exceptions or issues actually presented in this case.

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 post-arbitral deferral standard, would consequent changes need to be made to the Board's standards for determining whether to defer to pre-arbitral 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)?

II. STATEMENT OF FACTS.[3]

A. B&W's Business Operations.

B&W is a large, national contracting firm engaged in construction and maintenance operations primarily related to power generation equipment in public utility settings. (Tr. 145-146). It performs these services all over the country, and it employed approximately 6,000 craft labor employees in 2011. (Tr. 145). Its history dates back to the late 1800s, and it conducts its construction activities using unionized workers only. (Tr. 145-146).

B. The Cholla Power Generating Station Jobsite.

Until its six-year maintenance contract expired, B&W performed maintenance services at the Cholla Power Generating Station ("Cholla") in Joseph City, Arizona. (Tr.

[3] Because the factual record has been so thoroughly developed throughout this matter, including at the hearing before ALJ Pollack and in several levels of briefing, and because the Notice and Invitation to File Briefs relates almost exclusively to policy issues instead of factual issues, the Statement of Facts is not as detailed as it otherwise might be.

146-147). The Cholla facility is owned by Arizona Public Service ("APS"), and consists of four boilers that burn coal, generate steam, and turn turbines that then produce electricity. (Tr. 220). B&W performed services at this jobsite under National Maintenance Agreements with the various construction trades unions. (Tr. 146-147). One of these National Maintenance Agreements was between B&W and the International Union of Operating Engineers. (Tr. 147; G.C. Ex. 5).

Beginning in July of 2008, B&W's highest ranking management official at the Cholla jobsite was Site Manager Christopher Goff. (Tr. 218). When he arrived at the Cholla site it had the worst safety record of any B&W jobsite, so he took it upon himself to improve safety measures at the Cholla site, by ensuring that everyone on the jobsite was following the safety procedures set forth in B&W's Environmental, Health, and Safety Manual. (Tr. 219-220; R. Ex. 13). Mr. Goff's effort to improve the safety record at the Cholla site also included the implementation of a retraining process whereby all B&W employees were put through B&W's new hire safety orientation. (Tr. 220, 223).

C. Charging Party's Employment At Cholla.

Charging Party was referred to B&W's Cholla jobsite from the local union hiring hall operated by the Operating Engineers in Phoenix. (Tr. 226-227, 230). She arrived at the Cholla site on January 12, 2009. (Tr. 55). Upon her arrival, she went through the same B&W safety orientation as other new hires. (Tr. 227). She served as the Union Steward for the Operating Engineers at the Cholla site, which, including Charging Party and Operating Engineers Foreman Bobby Allsop, ranged from two to six. (Tr. 234-235). Although a qualified operator, Charging Party was not a safety conscious employee. (Tr. 228). She committed several safety infractions, such as using her cell phone while

operating a crane (Dec. 4; Tr. 97, 202-203, 228-229), moving a crane without a spotter (Dec. 4; Tr. 97-98, 186-187, 212-213), and driving a forklift through a prohibited area near a live, high voltage transformer. (Dec. 4; Tr. 58, 188-190). For this last infraction, which, like the others, Charging Party admitted, she received a written disciplinary warning on February 2, 2009. (Dec. 4; Tr. 86-87, 188-190; G.C. Ex. 6).

Charging Party was also late on several occasions for the daily Job Safety Analysis ("JSA") meetings. (Dec. 4). These were mandatory attendance meetings held at the beginning of each shift, and whenever there was a change in the job scope during the course of a shift. (Tr. 188, 232). At these JSA meetings, the Foreman reviewed with employees the work they will be doing that day, and the hazards they may encounter in doing that work, so that the risk of encountering those hazards could be mitigated. (Tr. 61, 188). Mr. Goff observed Charging Party reading newspapers during JSA meetings, and not paying attention. (Tr. 231). He spoke to her about the importance of being on time for the JSA meetings, and being focused on the work that was to take place that day. (Tr. 231). She did not take issue with his comments. (Tr. 231). It was never brought to Mr. Goff's attention that any other hourly worker at the Cholla site was repeatedly late for JSA meetings, and thus no other employee was disciplined for being late to those meetings. (Tr. 232).

Charging Party's employment with B&W ended when she was terminated on March 11, 2009, exactly two months after being hired. (Tr. 55; G.C. Ex. 4). According to the B&W Employment/Termination Form for Charging Party, she was discharged for "Inappropriate Conduct." (G.C. Ex. 4). On that same form, which was signed by Charging Party at the time she was hired, the following statement appeared just above

her signature, along with a reminder that her employment was covered by the state workers' compensation act:

> "I AGREE I SHALL BE GOVERNED BY ALL PROJECT SAFETY AND WORK RULES, INCLUDING APPLICABLE OCCUPATIONAL SAFETY AND HEALTH LAWS, AS WELL AS ANY INSTRUCTIONS (VERBAL OR WRITTEN) GIVEN TO ME BY THE FOREMAN AND/OR SUPERINTENDENT. VIOLATIONS OF ANY SAFETY OR WORK RULE WILL SUBJECT ME TO DISCIPLINARY ACTION."

(G.C. Ex. 4).

D. <u>Charging Party's Profane Outburst On March 11, 2009</u>.

On the day she was terminated, Charging Party was again, by her own admission, late in arriving for the JSA meeting. (Tr. 87-89). She also admits that she was eating some sort of pastry or doughnut during the JSA meeting that morning. (Dec. 4; Tr. 91). No other employees at that meeting were eating, just Charging Party. (Tr. 91-92). And by her own admission, Charging Party failed to fill out and turn in a second JSA form in connection with the change in her job tasks that day. (Dec. 4; Tr. 92-94). Charging Party knew that she was required to fill out a second JSA form during the course of the day when her job duties changed. (Tr. 92-93, 272). That was one of the specific infractions mentioned in the disciplinary suspension issued to her that day. (G.C. Ex. 7).

Before deciding what disciplinary action to take in response to these infractions, Mr. Goff and B&W Safety Representative Ralph McDesmond consulted over the telephone with Dave Crichton, B&W's corporate Manager of Labor Relations, and followed his advice to issue of a three-day disciplinary suspension to Charging Party. (Dec. 4; Tr. 148-149,172-177, 240-241). The other B&W Safety Representative at the Cholla jobsite at that time, Matt Winklestine, filled out the disciplinary suspension form

(Dec. 4; G.C. Ex. 7), and Charging Party and the Operating Engineers Foreman, Bobby Allsop, were summoned to the B&W office trailer at about 2:30 p.m. that day. (Tr. 76, 237, 241). Upon their arrival, Mr. Winklestine began to explain to Charging Party that she was being issued a three-day suspension for two safety infractions she had committed earlier that day. (Dec. 3; Tr. 76-77). In response, Charging Party went on an angry tirade, using profanity in a loud voice, and, by her own admission, repeating her profane remarks at least once when asked by Mr. McDesmond what she had said. (Dec. 3; Tr. 77, 94). In immediate response to her extraordinary and profane outburst, Mr. McDesmond told her she was fired. (Dec. 4; Tr. 192-193, 238-239).

III. ARGUMENT.

A. The Board Should Adhere to Its Existing Standard for Post-Arbitral Deferral Under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984).

1. National Policy Strongly Favors the Voluntary Arbitration of Disputes, Especially in the Labor Context.

As the NLRB has clearly recognized, "[i]t 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 Corp.*, 268 NLRB 573, 574 (1984). Indeed, the Supreme Court has repeatedly emphasized the "liberal federal policy favoring arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991); *see also United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (applying the "congressional policy in favor of settlement of disputes...through the machinery of arbitration"). The specific purpose of the existing post-arbitral deferral standards is to "recognize the arbitration process as an important aspect of the national

labor policy favoring private resolution of labor disputes." *Olin*, above at 574; *see also Spielberg Mfg Co.*, 112 NLRB 1080, 1082 (1955) ("[W]e believe that the desirable objective of encouraging the voluntary settlement of labor disputes will be best served by our recognition of the arbitrators' award.").

There are many reasons that arbitration is so widely accepted as a means of resolving labor disputes and "occupies a respected and firmly established place in Federal labor policy." *United Technologies Corp.*, 268 NLRB 557, 558 (1984). "'Arbitration offers 'simplicity, informality, and expeditio[us] resolution of disputes.'" Memorandum from Eugene Scalia, Solicitor of Labor, Dep't of Labor, to Regional and Associate Solicitors: Consideration of Employment Arbitration Agreements (Aug. 9, 2002) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Furthermore, "'arbitration may also allow even the most contentious disputes to be resolved in a manner which permits the complaining employee to raise the dispute without permanently fracturing the employee's working relationship with the employer.'" *Ibid.* (quoting COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, REPORT AND RECOMMENDATIONS 30 (1994)). The success of arbitration is based on "the underlying conviction that the parties to a collective bargaining agreement are in the best position to resolve, with the help of a neutral third party if necessary, disputes concerning the correct interpretation of their contract." *United Technologies*, above at 558. Accordingly, deference to the arbitral process has become entrenched in American jurisprudence. *Ibid.*

As described below, the strong national policy favoring arbitration furthers the goals and purposes of the National Labor Relations Act ("NLRA" or the "Act"), and the

existing post-arbitral deferral standards further this policy by upholding the parties' agreement to arbitrate.

a. Favoring Arbitration Furthers the Goals and Purposes of the NLRA.

"'The underlying objective of the national labor laws is to promote collective bargaining agreements and to help give substance to such agreements through the arbitration process.'" *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 265 (1964) (citation omitted). The NLRA in particular is "'primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining.'" *Id.* at 271 (quoting *International Harvester Co.*, 138 NLRB 923, 925-26 (1962)); *see also Warrior & Gulf Nav.*, above at 578 (noting the federal policy of promoting industrial stabilization through the use of collective bargaining agreements). Courts and the NLRB alike have found that arbitration serves as a "substitute for industrial strife," and that collective bargaining agreements providing for final, binding arbitration of disputes "contribute significantly to the attainment of this statutory objective.'" *Carey,* above at 271 (quoting *International Harvester,* above at 925-26); *see also Warrior & Gulf Nav.*, above at 578 (noting that a "major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."). The Supreme Court has explicitly held that "grievance procedures pursued to arbitration further the policies of the Act." *Carey*, above at 266.

To further the goals and purposes of the Act, the NLRB should encourage unions and employers to use grievance arbitration procedures by deferring to the arbitral process according to the existing deferral standards. *See Collyer Insulated Wire*, 192 NLRB 837, 844 (1971) (Brown, concurring) ("Since in most cases deferring to arbitration

will encourage collective bargaining, the Board, in carrying out the Act's purpose, should see that full play is given to the arbitral process."); *Alpha Beta Co.*, 273 NLRB 1546, 1547 (1985) ("'[E]ncouraging parties to use [grievance arbitration] procedures will further the fundamental purposes of the Act.'" (citation omitted)).

b. The Existing Arbitral Deferral Standards Uphold the Parties' Agreement.

The existing arbitral deferral standards further the NLRA's purpose of encouraging collective bargaining by "requir[ing] the parties to abide by their agreement that disputes shall be settled by grievance arbitration." *Collyer*, above at 845 (Brown, concurring). If the NLRB did not defer to arbitration decisions, "it would permit the parties to ignore their agreement. This would ill serve the statutory purpose of encouraging collective bargaining, especially where that part of the agreement the parties could ignore is itself an integral part of the bargaining process." *Ibid.* Indeed, it is well established that parties should be held to their agreements. *Gilmer*, 500 U.S. at 26 ("[H]aving made the bargain to arbitrate, the party should be held to it....'" (citation omitted)); *14 Penn Plaza v. Pyett*, 556 U.S. 247, 257 (2009) ("Courts generally may not interfere in this bargained-for exchange."). Deferring to the arbitrator's decision does not injure parties to a collective bargaining agreement, because they are the ones who have agreed to be bound by the arbitration process. *Olin*, 268 NLRB at 576, fn. 11 (*quoting NLRB v. Pincus Brothers*, 620 F.2d 367, 374 (3d Cir. 1980)). Freedom of contract has been recognized as "'one of the fundamental policies'" of the NLRA, and deferral to the agreed-upon arbitration process supports this policy. *14 Penn Plaza*, above at 257 (quoting *NLRB v. Magnavox*, 415 U.S. 322, 328 (1974)) (explaining that a union may agree to an arbitration provision in exchange for concessions from the

employer, and that "'[j]udicial nullification of contractual concessions...is contrary" to the fundamental policy of freedom of contract).

2. The Existing Standard for Post-Arbitral Deferral is Well Established and Predictable.

a. The Existing Standard Has Been Working Well for Decades.

As discussed above, arbitration "has gained widespread acceptance over the years and now occupies a respected and firmly established place in Federal labor policy." *United Technologies*, 268 NLRB at 558. The existing standard for post-arbitral deferral is based on NLRB decisions that are over 59 and 30 years old, respectively. *See Spielberg*, 112 NLRB 1080 (decided June 8, 1955) and *Olin*, 268 NLRB 573 (decided January 19, 1984). Naturally, the concept of deference to the arbitral process is therefore "entrenched" in American jurisprudence. *United Technologies*, above at 558. As a result, parties have come to rely on this standard when forming their collective bargaining agreements and in processing grievances to arbitration pursuant to those agreements. If the standard were to be changed at this point, the NLRA's important policy of promoting industrial stability (*see, e.g., Carey*, 375 U.S. at 271) would be greatly undermined, as parties have routinely relied on the consistent application of this standard in both the formation of collective bargaining agreements and in the processing of grievances to arbitration.

Not only has the existing standard been relied on for decades, but there have been countless decisions from the NLRB and courts noting the success of arbitration in resolving industrial disputes and preference for such deferral. *See, e.g., Spielberg*, above at 1082 (when first establishing this standard, noting that "the desirable objective of encouraging the voluntary settlement of labor disputes will *best be served by our*

recognition of the arbitrators' award." (emphasis added)); *Collyer*, above at 840 (noting that the Supreme Court "favors our deference" to the arbitration process (citing *Carey*, above at 271)); *Carey,* above at 271 (collective bargaining agreements providing for final, binding arbitration of disputes "contribute significantly to the attainment" of the objectives of the NLRA). Indeed, the grievance arbitration process is "at the very heart of the system of industrial self-government" (*Warrior & Gulf Nav.*, 363 U.S. at 581), and it "has been a principal means of resolving disputes in unionized workplaces for decades." Memorandum from Eugene Scalia, Solicitor of Labor, Dep't of Labor, to Regional and Associate Solicitors: Consideration of Employment Arbitration Agreements (Aug. 9, 2002).

b. Any Change to the Existing Standard Should Be Prospective, Not Retrospective.

Assuming, *arguendo*, that the NLRB could articulate a rational basis for abandoning its prior deferral case law, any new arbitral deferral standard should not be applied in this case. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). Courts, and by extension, administrative agencies in their adjudicative capacity, should instead strive to foster "a rule of law that gives people confidence about the legal consequences of their actions." *Id.* at 266. "'[R]etroactivity is not favored in the law.'" *Id.* at 264 (citation omitted). The presumption against retroactivity has "been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Id.* at 270. Thus, "prospectivity remains the appropriate default rule." *Id.* at 272. As the Ninth Circuit explained when reviewing the

NLRB's decision in *Alpha Beta*, "[o]ur holding in this case is not meant to suggest that this court will approve any arbitrary change in the Board's guidelines for deferring to private agreements. ... If the change catches the affected parties off base and defeats their justifiable expectations it will not survive judicial review." *Mahon v. NLRB*, 808 F.2d 1342, 1346 (9th Cir. 1987).

"One of the most serious adverse effects of using the adjudicatory process for policy formation is, of course, the retroactive effect upon the parties who legitimately relied on the former rules." Cornelius J. Peck, *A Critique of the NLRB's Performance and Policy Formation: Adjudication and Rule-Making*, 117 Univ. Pa. L. Rev. 254, 273 (1968). "In particular cases, for the Board to make its new ruling retroactive may well be an abuse of discretion." *NLRB v. E&B Brewing Co., Inc.*, 276 F.2d 594, 600 (6th Cir. 1960). "The test is whether 'the practical operation of the Board's change of policy...[will] work hardship upon respondent altogether out of proportion to the public ends to be accomplished.'" *Ibid* (citation omitted). The Board must explain "why the public interest demands that the new rule be imposed at once, and now" before it can achieve retroactivity. *Ibid.* That the NLRB has authority to rule-make its new policy into existence is also a factor. *Id.* at 601 (noting that "the Board has ample ways of instituting new rules without working any such hardship on these particular respondents.").

In this dispute, there is no question that B&W relied upon the Board's established deferral standards when it went forward with its course of conduct in processing the grievance through Step 4 of the contractual grievance procedure. The NLRB cannot, almost five years after a decision was issued by the NMAPC subcommittee, re-define

the contours of deferral, and then apply such new standards to well settled events. In fact, the NLRB itself has historically *not* retroactively applied new law where the employer detrimentally relied on the old. *See, Leonard Wholesale Meats*, 136 NLRB 1000, 1001 (1962) (applying prospectively-only new Board law "[o]therwise there could be detriment to the parties who have acted in good faith in reliance upon the Board's clear, present rules concerning timeliness"). In this case, a retroactive application of a new standard would be for naught because B&W no longer has the contract with APS under which Charging Party was employed.

3. The Existing Standard for Post-Arbitral Deferral Adequately Protects Statutory Rights.

While the General Counsel argues in GC Memorandum 11-05 that the existing standard for post-arbitral deferral does not adequately protect statutory rights, he also explicitly acknowledges that the Supreme Court "clearly envisions that employees will receive full consideration of their statutory rights in arbitration." GC Memo 11-05, at 4. Indeed, the Supreme Court has held that it is "clear that statutory claims may be the subject of arbitration agreements" and that a "'party does not forgo the substantive rights afforded by the statute'" by submitting the matter to arbitration. *Gilmer*, 500 U.S. at 26 (citation omitted). The Court has also emphasized that although arbitration proceedings are often more streamlined than other proceedings, that does not make arbitration an inadequate forum to protect an individual's statutory rights, a principle with which the NLRB has expressly agreed. *14 Penn Plaza*, 556 U.S. at 269; *see also Olin*, 268 NLRB at 574, fn. 5 ("'And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee

until the employee has attempted to implement the procedures and found them so.'" (citing *Republic Steel v. Maddox*, 379 U.S. 650, 653 (1965)).

The Board has also unambiguously and repeatedly affirmed that the existing arbitral deferral standards adequately protect statutory rights. *See Olin*, above at 576 ("What we declare today is our commitment to a policy of full, consistent, and evenhanded deference to a significant process within our national labor policy where it meets what we understand to be *appropriate safeguards for statutory rights*." (emphasis added)); *Collyer*, 192 NLRB at 843 ("Nor are we 'stripping' any party of 'statutory rights.'"). Contrary to the General Counsel's assertion, "deferral is not akin to abdication. It is merely the prudent exercise of restraint." *United Technologies*, 268 NLRB at 559-60. The Board has actually repeated this principle to emphasize its importance: "abstention simply cannot be equated with abdication." *Ibid.* The NLRB has explained that it "expressly retains and fulfills its statutory obligation...by [its] commitment to determine in each case whether the arbitrator has adequately considered the facts which would constitute unfair labor practices and whether the arbitrator's decision is clearly repugnant to the Act." *Olin,* above at 574.

The General Counsel even recognizes that the current *Olin* deferral standard adequately safeguards statutory rights in certain cases. *See* GC Memo 11-05, at 6. He states that the statutory rights are adequately protected in cases solely alleging violations of Section 8(a)(5) of the Act "given the close identity of the statutory rights and contract interpretation issues." *Ibid.* Notably, however, the existing post-arbitral deferral standard ensures that such "close identity" is present in *any* case in which deferral occurs, since the contractual issue must be factually parallel to the unfair labor practice

issue. *See Olin*, above at 574. Thus, whether the case involves Section 8(a)(1), (3), or (5), an employee's statutory rights are adequately protected under the current deferral standard.

In this case, there is clearly a "close identity of the statutory rights and contract interpretation issues," since Charging Party alleges that her termination violated "the National Maintenance Agreement, NLRA Section 7...and decisions made by the NLRB." (Dec. 4; R. Ex. 6). One single act – Charging Party's termination – forms the basis of both the statutory right and contractual issue. There is no dispute in this case that "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 issue." (Dec. 5). Given the close identity of statutory rights and contractual issues in this case, by the General Counsel's own analysis (*see* GC Memo 11-05, at 6), the existing post-arbitral deferral standards adequately protect Charging Party's statutory rights and deferral was therefore appropriate.

In addition, the existing deferral standards do not result in automatic or indiscriminate deferral. *See United Technologies*, above at 560 ("'The Board has not deferred cases to arbitration in an indiscriminate manner, nor has it been insensitive to the statutory rights of employees in deciding whether to defer and whether to give effect to an arbitration award.'" (quoting *General American Transportation*, 228 NLRB 808 (1977)). As then-Chairman of the NLRB John Truesdale explained to the National Academy of Arbitrators back in 2000, "deferral is not as broad or as automatic as some critics had feared." John Truesdale, Chairman, NLRB, Address at the National Academy of Arbitrators 53rd Annual Meeting: NLRB Deferral to Arbitration: Still Alive and Kicking

(June 3, 2000). Since the Board reserves jurisdiction, it "guarantee[s] that there will be *no sacrifice of statutory rights* if the parties' own processes fail to function in a manner consistent with the dictates of our law." *Collyer,* above at 843 (emphasis added). There was no sacrifice of statutory rights in this case, nor was there any indiscriminate or automatic deferral to the NMAPC subcommittee's decision. Rather, ALJ Pollack carefully examined the record, heard testimony, and concluded that the decision of the NMPAC subcommittee was not repugnant to the Act. (Dec. 6).

B. The Board Should Not Adopt the Standard Outlined by the General Counsel in GC Memorandum 11-05 (January 20, 2011).

1. The General Counsel's Proposed Standard Does Not Encourage the Use of Arbitration in the Labor Context.

As discussed above, to further the goals and purposes of the Act, the Board should encourage parties to use arbitration by deferring to the arbitral process according to the existing deferral standards. *Collyer,* above at 844 (Brown, concurring) ("[T]he Board, in carrying out the Act's purpose, should see that full play is given to the arbitral process."); *Alpha Beta*, 273 NLRB at 1547 ("'[E]ncouraging parties to use [grievance arbitration] procedures will further the fundamental purposes of the Act.'" (citation omitted)). The General Counsel's proposed standard is far less deferential than the existing standard, since it requires greater scrutiny and second guessing of the arbitrator's decision and also places the burden on the party urging deferral. If the Board were to adopt the General Counsel's narrow proposed standard, it would not give "full play" to the arbitral process, and would not encourage parties to use arbitration. Thus, the proposed standard does not carrying out the fundamental purposes of the

Act, and does not exhibit a "healthy regard for the federal policy favoring arbitration," as urged by the Supreme Court. *Gilmer*, 500 U.S. at 26.

The allocation of burdens in the General Counsel's proposed standard is particularly at odds with the important federal policy favoring arbitration. When it established the current requirement that the party opposing deferral bears the burden of showing that the standards for deferral have not been met, the Board specifically noted that such "allocation of burdens is more consistent with the goals of national labor policy." *Olin*, 268 NLRB at 575. In *Olin*, the NLRB also expressed its intent to restrict "'overzealous dissection of [arbitrators'] opinions by the NLRB,'" since such "misdirected zeal has resulted in such infrequent deferral by the Board that its occasional exercise has had little substantive relationship to a mechanism which daily settles uncounted labor disputes to the satisfaction of the labor relations community." *Ibid.* (quoting *Douglas Aircraft Co. v. NLRB,* 609 F.2d 352, 355 (1979)) (alterations in original). The Board should not return to a standard that allows for such infrequent deferrals.

The current allocation of burdens comports with the guidance of the Supreme Court and the NLRB itself, while the General Counsel's proposed standard would not. The Supreme Court has declared that "'there is no reason to assume at the outset that arbitrators will not follow the law,'" which means that (as is the case with the current allocation of burdens) the party seeking to ignore the arbitrator's decision should have the burden of showing that the arbitrator did not follow the law. *14 Penn Plaza*, 556 U.S. at 268 (quoting *Shearson/American Express v. McMahon*, 482 U.S. 220, 232 (1987)). Similarly, in *Gilmer*, the Supreme Court clearly stated that the burden is on the party seeking to avoid arbitration to show that Congress intended to preclude arbitration.

Gilmer, above at 26. Thus, the General Counsel's proposed allocation of burdens does not comport with the allocation of burdens set forth by the Supreme Court in *Gilmer*, the very case cited by the General Counsel as spurring this proposed change in standard. *See* GC Memo 11-05 at 6.

Furthermore, grievance and arbitration procedures have been used successfully for such a long time that, in most cases, it is unnecessary for the Board to exercise its jurisdiction in order to resolve the dispute. *Collyer*, 192 NLRB at 843 ("[I]n the overwhelming majority of cases, the utilization of [grievance and arbitration procedures] will resolve the underlying dispute and make it unnecessary for either party to follow the more formal, and sometimes lengthy, combination of administrative and judicial litigation provided for under our statute."). In fact, the Board has emphasized that it need not rule on every case over which is has jurisdiction, but rather should seek to further the purposes of the Act. *See Alpha Beta*, above at 1547 ("[T]he Board should not take a narrow, legalistic view of the Act and seek to rule on every dispute that may fall within the letter of the Act, but should instead take a broad view of the Act and seek to further the spirit and purpose of the Act."); *Collyer*, above at 840-41 (the legislative history of the Act "suggests that...Congress anticipated that the Board would 'develop...a policy of entertaining under these provisions *only* such cases...as cannot be settled by resort to the machinery established by the contract itself, voluntary arbitration.'" (emphasis added)).

2. The General Counsel's Proposed Standard Would Destroy the Final, Binding Nature of Grievance Arbitration.

a. Unions Would Have a 'Second Bite at the Apple' Under the General Counsel's Proposed Standard.

Under the General Counsel's proposed standard, if the collective bargaining agreement does not incorporate statutory rights, there is no incentive for a union to present the unfair labor practice issue to the arbitrator. *IAP World Services Inc.*, 358 NLRB No. 10, JD slip op. at 17-18 (2012). In fact, the proposed standard would actually encourage a union *not* to present the issue, as it would have the opportunity to receive a more favorable decision from the NLRB if it lost at arbitration, since the NLRB would not defer to the arbitration award under those circumstances. *Ibid.* The result would be a sort of forum shopping, undermining the arbitration process altogether. The Supreme Court and the NLRB have disapproved of allowing such an unfair 'second bite at the apple' under similar circumstances. *See William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 18 (1974) (declining to exercise jurisdiction in Section 10(k) cases to avoid frustrating the statutory purpose of voluntary settlement of jurisdictional disputes, since to do otherwise would encourage a party receiving an adverse decision to ignore such decision, "'then come before this Board for a more favorable resolution of the dispute.'" (quoting *Laborers Local 423 (V & C Brickcleaning)*, 199 NLRB 450, 451 (1972))); *Collyer*, above at 843 ("We believe it to be consistent with the fundamental objectives of Federal law to require parties here to honor their contractual obligations rather than, by casting this dispute in statutory terms, to ignore their agreed-upon procedures.").

The General Counsel's proposed standard essentially allows a union to attempt to receive its desired outcome more than once, in multiple forums. An employer, however, would have no additional chances at a favorable decision under the proposed standard – it would simply be bound by the arbitration decision. Yet there is "no compelling reason why a Union which has executed an arbitration agreement should be in a more favorable forum shopping position." *United Aircraft Corp. v. Canel Lodge*, 436 F.2d 1, 4 (2d Cir. 1970). Not only does the proposed standard unfairly give unions a second opportunity without extending such opportunity to employers, but this 'second bite at the apple' for unions also effectively destroys the final and binding nature of grievance arbitration. If a union does not like the arbitration decision, it can simply seek a different decision from the Board. As former Chairman of the Board Ronald Meisberg so aptly stated, the NLRB "should avoid any standard that undermines the utility and finality of labor arbitration by making grievance-arbitration procedures simply another step in the NLRB process." Ronald Meisberg, *Is Deferral to Labor Arbitration Awards in Jeopardy?* (Feb. 10, 2014), http://www.laborrelationsupdate.com/nlrb/is-deferral-to-labor-arbitration-awards-in-jeopardy/.

b. The Entire Landscape of Labor Relations Would Change.

As explained above, the grievance arbitration process is "at the very heart of the system of industrial self-government," and collective bargaining agreements providing for final, binding arbitration of disputes significantly further the Act's purpose of promoting industrial peace and stability. *Warrior & Gulf Nav.*, 363 U.S. at 581; *Carey*, 375 U.S. at 271. Since the General Counsel's proposed standard destroys the final and binding nature of grievance arbitration, the entire landscape of labor relations would

change if the proposed standard were adopted by the Board. Accordingly, the Board should not adopt the General Counsel's proposed standard.

In the words of former Member Brown,

> The scope, both in function and utilization, of grievance arbitration is by itself sufficient reason to consider deferring to that process. The grievance-arbitration process is one of the most important tools of collective bargaining, and the *raison d'etre* of the National Labor Relations Act is to encourage collective bargaining. As stated by the Supreme Court: '...A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.' *Certainly great damage could be done to the entire system of grievance arbitration, and to the process of collective bargaining, if parties believed they could ignore an agreed-upon method of settling disputes.*

Collyer, 192 NLRB at 844 (Brown, concurring) (internal citations omitted) (emphasis added).

Furthermore, while countless collective bargaining agreements include provisions for arbitration of grievances, many of these agreements do not explicitly incorporate the statutory rights under the NLRA. *See* Jonathan Reiner, *Preserving Workers' Statutory Rights: An Analysis of the NLRB General Counsel's Proposed Post-Arbitration Deferral Policy*, 28 ABA J. of Labor & Emp't Law, No. 1, 145 (2012) (noting that, of 11 deferral decisions from the previous 10 years produced by the NLRB in response to a Freedom of Information Act request, only one of the arbitration awards cited contract provisions that incorporated NLRA rights). If the General Counsel's proposed standard were adopted, parties would likely need to renegotiate their current collective bargaining agreements in order to explicitly incorporate the NLRA's statutory rights. The concurrent renegotiation of innumerable collective bargaining agreements would further drastically change the landscape of labor relations in America, and serves as another reason the Board should not adopt the General Counsel's proposed standard.

3. The General Counsel's Proposed Standard Would Result in Great Inefficiencies, Delay, and Additional Expense for All Involved.

The General Counsel's proposed standard, which is less deferential to arbitration decisions than the existing standard, is not nearly as efficient as the current deferral standard for many reasons. First, it requires great duplication of effort. One of the advantages of the existing standards is the avoidance of fragmentation of disputes, but the proposed standard would remove this advantage. *See Carey*, above at 272. Not only would the parties have to go through the entire grievance arbitration procedure, but under the less deferential proposed standard, it is more likely that they will also have to go through the administrative processing of a charge before the NLRB as well. This would likely require preparation for at least two separate hearings (one before an arbitrator and one before the Board), which may be years apart (as in this case), as well as preparation of at least two separate post-hearing briefs. The parties may also put in extra effort at the arbitration level to try to ensure that the proposed deferral standards are met, only to find after the fact that the arbitrator's decision did not meet the strict proposed standard and therefore the time and effort was simply a waste. Even if, after choosing not to defer, the result of the NLRB's decision is the same as that of the arbitrator's decision, the parties will have wasted a great deal of time, money and effort simply to remain in the same position. If, however, the NLRB decides the issue differently than the arbitrator, then the parties will still have wasted their time and money going through the arbitration proceeding, since the NLRB's decision would take precedence over the arbitrator's decision.

In addition to the duplication of effort, there would be great additional costs if the less deferential standard proposed by the General Counsel were adopted. Not only

would the duplication of effort require additional time and money, but the cost of arbitration itself would likely increase if the proposed standard were adopted. This is because, in an effort to comply with the proposed standard, the parties may spend even more time and expense on arbitration in order to develop the record on how the statutory issue was presented to and considered by the arbitrator. In addition, the arbitrator's fees would likely increase, since he or she would need more time to write a decision that clearly enunciates the applicable statutory principles. This additional time and expense would destroy one of the primary reasons that parties generally favor arbitration, which is for its economical dispute resolution. *See 14 Penn Plaza*, 556 U.S. at 257. Arbitration would no longer offer the same "simplicity, informality, and expeditio[us] resolution of disputes," and would therefore not be as attractive to parties. *Mitsubishi Motors*, 473 U.S. at 628. For this reason, the General Counsel's proposed standard does not promote the liberal federal policy favoring arbitration. It is entirely possible that some employers would simply not be able to afford the expense of such a contorted, duplicative process and elect to capitulate to the result, regardless of its merit. How is justice served by such a result?

Furthermore, the General Counsel's less deferential proposed standard would result in a greater number of cases being heard by the Board. The existing standard allows for more deferrals than the proposed standard would, and more deferrals "facilitates case handling and conserves resources" of the Board. John Truesdale, Chairman, NLRB, Address at the National Academy of Arbitrators 53rd Annual Meeting: NLRB Deferral to Arbitration: Still Alive and Kicking (June 3, 2000). According to the NLRB's FY 2013 Performance and Accountability Report, one of the Board's strategic

goals is to "[i]nvestigate, prosecute, and remedy cases of unfair labor practices by employers or unions, or both, impartially and promptly." NLRB, FY 2013 Performance and Accountability Report 18 (2013). The NLRB has established a goal of resolving all unfair labor practice cases within 120 days of the filing of the charge. *Ibid.* In FY 2013, this goal was accomplished in only 73.3% of all cases. *Id.* at 19. That means that in almost a third of all cases, the case was not resolved within 120 days of the filing of the charge. If the General Counsel's proposed standard were adopted, there would be even more cases for the Board to handle, which would result in even more delays.

The importance of prompt resolution of cases is also emphasized in the General Counsel's January 20, 2012 Memorandum. *See Guideline Memorandum Concerning Collyer Deferral Where Grievance-Resolution Process is Subject to Serious Delay*, GC Memo 12-01. In suggesting that the Board modify its deferral approach in Section 8(a)(1) and (3) cases where arbitration will not be completed within a year, then-Acting General Counsel Solomon noted that:

> [e]xcessive delays can render enforcement of a Board order 'pointless and obsolete.' The circumstances may have changed so much at the job site that by the time a Board order issues it would be impossible to effect meaningful compliance, and the Charging Party would be left without a remedy. This lack of a remedy can erode public respect and confidence in the law.

Id. at 5-6 (citations omitted). The opportunity for an effective trial can be lost due to delay, since "as time passes memories fade, evidence is lost, and witnesses become harder to locate. It has been noted that in a year's time, memories had begun to fade (notwithstanding the existence of pretrial affidavits), and the fading was noticeable." *Id.* at 6-7 (citations omitted).

While General Counsel Memorandum 12-01 specifically addresses delay in arbitration proceedings, such analysis is equally applicable here, where there was great delay by the Region in investigating and proceeding to the point of issuing a complaint on the discharge portion of the Amended Charge. (*See* Dec. 1). Many of the concerns noted in the Memorandum are present in this case. The circumstances have changed so much that B&W's presence on the jobsite no longer exists and the people involved are gone. The Region's excessive delay has caused memories to noticeably fade. This was apparent in several instances during the hearing. (*See, e.g.*, Tr. 22, 27, 33, 169-170. 264). The goal set forth in the Memorandum is to ensure prompt resolution of disputes instead of allowing a backlog to hold up the process for over a year. In this case, the NMAPC subcommittee's decision provided a prompt resolution to the matter, since it was issued within only a few months after Charging Party's discharge. (R. Ex. 5).

The Region's delay in proceeding with the issuance of the complaint was far greater than the one year threshold set forth in the Memorandum, and even greater still than the NLRB's 120 day goal for resolution of the matter. (*See* G.C. Ex. 1(e)). This case reveals that the issue of delay in proceedings before the NLRB is greater than simply the percentage of cases in which delays occur – it also is an issue of how gross the delay can be. Not only was there excessive delay in the issuance of the complaint in this case, but there was an additional delay of *over 600 days* between the filing of exceptions to ALJ Pollack's decision and the Board's Notice and Invitation to File Briefs. Indeed, this very Brief is being submitted to the Board over *five years* after Charging Party was discharged.

As this case so clearly demonstrates, there is already great delay in proceedings before the Board. If the less deferential standard proposed by the General Counsel were adopted, and consequently more cases would be heard by the Board, this delay would only increase. Instead of a delay of years, the result could be a delay measured in decades. Notably, the NLRB is already facing significant challenges that will present difficulties in dealing with its caseload without even changing its deferral standards. *See* FY 2013 Performance and Accountability Report, above at 47 ("The reduction in Agency funding combined with an increase in caseload, wages, and other non-discretionary costs..., along with required spending..., will cause drastic measures to be undertaken, such as RIFs and/or furloughing of employees which will detrimentally affect casehandling, and as a consequence, the public we serve."). The NLRB should therefore not adopt the General Counsel's proposed standard, which would only exponentially increase its casehandling burden and result in additional delays. *See generally United Technologies*, 268 NLRB at 559 ("Being keenly aware of the limited resources of this Agency, we are not particularly desirous of inviting any labor organization...to bypass their [sic] own procedures and to seek adjudication by this Board of the innumerable individual disputes which are likely to arise in the day-to-day relationship between employees and their immediate supervisors." (alterations in original)).

4. The General Counsel's Proposed Standard Would Result in Inconsistent or Arbitrary Application.

The standard outlined by the General Counsel in GC Memo 11-05 is unclear, and would therefore result in inconsistent or arbitrary application. Since the standard has not yet been adopted, there are very few cases discussing how the standard should be

applied. Despite this paucity of decisions to provide guidance on its application, however, there has already been at least one decision noting confusion regarding the proposed standard. *See IAP World Services*, 358 NLRB at 18, fn. 3 (noting that the General Counsel seemed to incorrectly suggest that "under the proposed standard the arbitrator must 'correctly apply' the law," even though "[t]he proposed standard preserves the repugnancy standard."). Since the proposed standard is unclear, and does not have the benefit of guidance from decisions spanning decades of application, as does the existing deferral standard, it would result in inconsistent or arbitrary application. For this additional reason, the Board should not adopt the standard proposed by the General Counsel.

5. If the Board Modifies the Existing Standard, It Should Be More Deferential to Arbitration Decisions.

As discussed above in Section A, the Board should adhere to its existing standard for post-arbitral deferral under *Spielberg* and *Olin*. If, however, the Board were to modify the existing standard, it should not adopt the standard outlined by the General Counsel in GC Memo 11-05, but rather, should adopt a standard that is more deferential to arbitration decisions. This would comport with the goals and purposes of the Act, and would further the liberal federal policy in favor of arbitration. *See Gilmer*, 500 U.S. at 25; *Olin*, 268 NLRB at 574; *Carey*, 375 U.S. at 265; *Collyer*, 192 NLRB at 844 (Brown, concurring); *Alpha Beta*, 273 NLRB at 1547. For example, the Board could adopt a standard under which it simply determines whether the arbitral proceedings were fair and regular, and whether the union violated its duty of fair representation. *See, e.g., Casehandling Regarding Application to Spielberg Olin Standards*, OM Memo 10-13 (CH) (Nov. 3, 2009) (citing *Plumbers Local 520 v. NLRB*, 955 F.2d 744, 756 (D.C. Cir.

1992)). Such an approach would give great deference to the arbitrator's decision, and would still ensure that parties had a fair opportunity to be heard. This modification would also "foster[ ] a climate in which arbitration could flourish," which is a key role for the Board to fulfill. *United Technologies*, above at 558.

Alternatively, the Board could modify the existing standard by deferring to the arbitrator's findings of fact and interpretations of the contract when the *Spielberg* requirements are met, but then independently applying the arbitrator's findings of fact to determine whether there have been any statutory violations. *See* Berendt & Youngerman, *The Continuing Controversy Over Labor Board Deferral to Arbitration – An Alternative Approach,* 24 Stetson L. Rev. 175, 178 (1994) (citing the Illinois Educational Labor Relations Board's 1992 *University of Illinois* decision, 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1035 (IELRB 1992)). Under this approach, arbitration is encouraged, since the arbitrator's findings of fact and contractual interpretations are maintained. This is much more efficient than the General Counsel's proposed standard, and makes better use of resources, since the facts need not be determined twice. Furthermore, it avoids inconsistent conclusions regarding the same set of facts, which could occur under the General Counsel's proposed standard. *See International Harvester,* 138 NLRB 923 (noting that the Board should not substitute its judgment for that of the arbitrator, because to do so would defeat the purposes of the Act and would not encourage the final adjustment of disputes). This approach also ensures that statutory rights are adequately protected, since the Board itself would determine whether there were any statutory violations based on the factual findings of the arbitrator.

Under this alternative approach, it is clear that no statutory violation occurred in this case. ALJ Pollack explained that the "factual decision" of the NMAPC subcommittee was that Charging Party "was discharged for the use of profanity and insubordination upon receipt of her discipline" and that the subcommittee "rejected the assertion that Beneli was discharged because of her duties as steward." (Dec. 5-6). Given this factual decision, it is obvious that no statutory violation occurred. Accordingly, the Board should find that B&W did not violate the Act as alleged in the complaint, and the complaint should be dismissed.

C. The Board Should Not Change Its 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).

Changes to the Board's standards for determining whether to defer a case to arbitration under *Collyer*, *United Technologies*, and *Dubo* have not been requested in this case. While the General Counsel filed five exceptions to ALJ Pollack's decision in this case, none of these exceptions in any way involve the Board's standards for determining whether to defer a case to arbitration under *Collyer* and its progeny. Accordingly, it is inappropriate to argue this issue before the Board at this time. *See* 29 C.F.R. § 102.46(g) ("No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding."); *see also Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB No. 83, slip op. at 66-67 (2011) (Hayes, dissenting) (noting that the decision was "the culmination of an ill-considered journey," since the Board went beyond the inquiry requested by the parties in "solicit[ing] comment on questions ranging far beyond the actual issue presented in th[e] case.").

Furthermore, changes to the Board's standards for pre-arbitral deferral are not necessary. As discussed above, the Board should adhere to its existing standard for post-arbitral deferral under *Spielberg* and *Olin*. Consequently, no changes need to be made to the Board's standards for determining whether to defer a case to arbitration under *Collyer, United Technologies*, and *Dubo*. In addition, these standards further the statutory purposes of the Act, and should therefore be maintained. *See United Technologies,* 268 NLRB at 559 ("[T]he statutory purpose of encouraging the practice and procedure of collective bargaining is ill-served by permitting the parties to ignore their agreement and petition this Board in the first instance for remedial relief."); *see also Collyer,* above at 842 ("We...are merely giving full effect to [the parties'] own voluntary agreements to submit all [ ] disputes [arising during a contract term] to arbitration, rather than permitting such agreements to be sidestepped and permitting the substitution of our processes, a forum not contemplated by their own agreement."). The Supreme Court has recognized and approved of these standards as "harmoniz[ing] with Congress' articulated concern that, 'final adjustment by a method agreed upon by the parties is...the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.'" *William E. Arnold Co.*, 471 U.S. at 17 (quoting 29 U.S.C. § 173(d)).

Even if the Board were to make changes to its existing standard for post-arbitral deferral, however, such changes would first have to be clearly articulated and established in order to determine whether and how to consequently change the Board's standards for determining whether to defer a case to arbitration under *Collyer, United Technologies*, and *Dubo*. It is evident from the Board's Notice and Invitation to File

Briefs that the Board is not only considering whether to "adhere to, modify, or abandon its existing standard for post-arbitral deferral," but also what modifications may be appropriate. *See* Notice, questions 1 and 2. Without knowing the Board's decisions on these two issues, it would simply be guessing to say whether consequent changes need to be made to the Board's pre-arbitral deferral standards. The issue is simply not ripe before the Board at this time.

For all these reasons, the Board should not change its standards for determining whether to defer a case to arbitration under *Collyer, United Technologies*, and *Dubo*.

D. The Board Should Not Change Its Standards for Determining Whether to Defer to Pre-Arbitral 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).

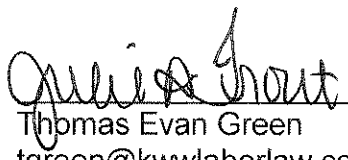
For the same reasons set forth above in Section C, the Board should not change its standards for determining whether to defer to pre-arbitral grievance settlements under *Alpha Beta* and *Postal Service*. Specifically, no changes to these standards have been requested; changes are not necessary since the Board should adhere to its existing standard for post-arbitral deferral under *Spielberg* and *Olin*; and the issue is simply not ripe before the Board at this time. Furthermore, the current standards for deferral to pre-arbitral grievance settlements comport with the "national labor policy which favors private resolutions of labor disputes." *Alpha Beta*, 273 NLRB at 1547. This policy is clearly embodied in the NLRB's own strategy, which is to "encourage settlements as a means of promptly resolving ULP disputes at all stages of the casehandling process." NLRB, FY 2013 Performance and Accountability Report 41 (2013). Given the NLRB's stated concerns about the detrimental effect on casehandling that budget cuts and increased caseload will have, it is important to note that the NLRB

"calculates that every one-percent drop in the settlement rate costs the Agency more than $2 million." *Id.* at 47-48. Accordingly, the Board should not change its standards for determining whether to defer to pre-arbitral grievance settlements under *Alpha Beta* and *Postal Service.*

IV. CONCLUSION.

For all the reasons explained above, and most importantly, to uphold the policies and purposes of the Act, and to avoid industrial strife, the Board should adhere to its existing deferral standards. Accordingly, the Board should affirm the decision of ALJ Pollack, defer to the decision of the NMAPC subcommittee, find that B&W did not violate the Act as alleged, and dismiss the complaint.

Respectfully submitted,



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