UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BABCOCK & WILCOX CONSTRUCTION, v. COLETTA KIM BENELI, an individual	)	Case No. 28-CA-022625

BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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The Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this brief *amicus curiae* in response to the request of the National Labor Relations Board ("the Board" or "NLRB") for views regarding whether the Board should adhere to or modify its standard for post-arbitral deferral over a parallel unfair labor practice charge under *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). For the reasons noted herein, the Chamber advocates that the NLRB maintain the standard set forth by *Spielberg* and *Olin*.

STATEMENT OF INTEREST

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the nation's business community.

Many of the Chamber's members regularly enter into agreements to arbitrate with the union representatives of their employees because arbitration allows prompt and efficient resolution of disputes and avoidance of the costs associated with litigation, with the understanding that both parties must agree to be bound by the arbitrator's findings. In reliance upon the precedents of the Supreme Court and the Board, the Chamber's members have agreed to provisions requiring arbitration with unions with the expectation that the grievance-arbitration process will be final and not simply another step in the NLRB process.

A modification of the *Spielberg*/*Olin* standard that restricts the currently broad deferral standard not only undermines the Act's purpose to encourage collective bargaining, but also

directly contravenes the strong public policy favoring grievance arbitration. Conversely, no identifiable public policy supports relitigation of the issues settled by arbitration.

ARGUMENT

I. THE BOARD SHOULD ADHERE TO THE *SPIELBERG*/*OLIN* STANDARD FOR DEFERRAL

The General Counsel asks the Board to modify the *Spielberg*/*Olin* standard for deferral to an arbitrator's award in accordance with a Guideline Memorandum issued by the General Counsel in 2011. Under the *Spielberg*/*Olin* standard, the Board defers to an arbitration award where: (1) the arbitration proceedings are fair and regular; (2) all parties agree to be bound by the award; and (3) the award is not repugnant to the National Labor Relations Act. *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955). Furthermore, the arbitral forum must have adequately considered the unfair labor practice issue. The Board deems the unfair labor practice issue adequately considered if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue. *Olin Corp.*, 268 NLRB 573 (1984). The burden of proof rests with the party opposing the award.

Under the General Counsel's proposed revision, the party urging the Board to defer to the award would have the burden to demonstrate that: (1) either the collective-bargaining agreement incorporates the right under the National Labor Relations Act that allegedly was infringed or the statutory issue was presented to the arbitrator; and (2) the arbitrator *correctly* enunciated the applicable statutory principles *and* applied them in deciding the issue. If the party urging deferral makes those showings, then the Board would defer unless the award was clearly repugnant to the Act.

The General Counsel's proposed standard would abandon deferral, ignoring decades of precedent and refusing to acknowledge the paramount importance of arbitration to federal labor policy. The General Counsel offers no reason to impair the vitality of labor arbitration by departing from the well-settled approaches to deferral in *Spielberg* and *Olin*—and there is none.

A. The *Spielberg/Olin* Deferral Standard Furthers Federal Labor Policy In Favor Of Arbitration

A sound deferral policy requires reaffirmation of the deferral standard of *Spielberg/Olin* and rejection of the approach urged by the General Counsel. The current *Spielberg/Olin* standard of deferral advances the federal policy favoring arbitration, fosters collective bargaining, and fulfills the Board's statutory responsibilities. At the same time, deferral under the *Spielberg/Olin* standards serves the Board's mandate by ensuring that statutory rights are not undermined by a collective bargaining agreement. Deferral pursuant to *Spielberg/Olin* standards furthers the fundamental aims of the Act and national labor policy.

1. Federal Labor Policy Favors Arbitration

Arbitration is the cornerstone of federal labor policy as expressed by Congress. The National Labor Relations Act's fundamental statement of policy in Section 1 "marries" the virtues of collective bargaining with the virtues of "friendly adjustment of industrial disputes":

> 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.

29 U.S.C. § 151.

Federal policy favors arbitration, *see generally, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*, 472 U.S. 614 (1985)*; Gilmer v. Interstate/Johnson Lane Corp.*, 500

U.S. 20 (1991), and there can be no doubt that arbitration is of paramount importance in federal labor policy, *see e.g.*, Section 203 of the LMRA, 29 U.S.C. 173(a), and the so-called "*Steelworkers Trilogy*", *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *see also Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). Arbitration, which itself is a product of collective bargaining, is the bedrock of federal labor policy. More specifically, Congress declared the national policy favoring the settlement of labor disputes through grievance arbitration in Section 203(d) of the Labor Management Relations Act, which states: "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." 29 U.S.C. § 173(d).

Based upon these well-established declarations of congressional policy, the *Steelworkers Trilogy* confirmed the centrality of arbitration in furthering the congressional goal of facilitating labor peace. *See, e.g., American Manufacturing*, 363 U.S. at 568-69; *Warrior & Gulf Co.*, 363 U.S. at 584-85; *Enterprise Wheel & Car*, 363 U.S. at 598-99; *see also Lincoln Mills*, 353 U.S. at 454. Under federal labor law, the collective bargaining agreement is "more than a contract"; because it is a "generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *Warrior & Gulf Co.*, 363 U.S. at 578. Since it covers "the whole employment relationship" it "call[s] into being a new common law—the common law of a particular industry or of a particular plant" because it is "an effort to erect a system of self-government." *Id.* at 579-80. The grievance-arbitration machinery is "at the very heart" of this system of industrial self-government." *Id.* at 581.

Hence, in the first case of the *Trilogy*, *American Manufacturing*, the Court 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). And, in *Warrior & Gulf Co.*, the Court insisted, "[a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement," 363 U.S. at 578, and further acknowledged the centrality of "[t]he grievance procedure [a]s, in other words, a part of the continuous collective bargaining process." *Id.* at 581-82. In order to encourage arbitration, the Court in *Enterprise Wheel & Car* held, "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.

In cases following the *Trilogy*, the Court has continued to emphasize the strong national policy favoring arbitration of labor disputes. For example, in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), the Court again recognized the importance of grievance-arbitration as a machinery for dispute resolution:

> Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant. LMRA § 203(d), 29 U.S.C. § 173(d), § 201(c), 29 U.S.C. § 171(c) …. Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. 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.

Id. at 653. Further, in *Boys Markets, Inc. v. Retail Clerks Union, Local 776*, 398 U.S. 235, 251 (1970), the Court endorsed arbitration and other "administrative techniques for the peaceful resolution of industrial disputes." And in *Gateway Coal Co. v. United Mine Workers of*

America, 414 U.S. 368, 377 (1974), the Court stated, "The federal policy favoring arbitration of labor disputes is firmly grounded in congressional demand," and found that policy applicable to labor disputes even touching the safety of employees.

For more than five decades, the prime imperative of federal labor policy is that day-to-day disputes should be arbitrated unless it can be said with "positive assurance" that the parties have refused arbitration, *see Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. at 254; *Gateway Coal Co. v. Mine Workers Dist. 4, Local 6330*, 414 U.S. 368, 377 (1975); *see also W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 764 (1983) and once arbitrated, the resolution should rarely be disturbed. *See Enterprise Wheel & Car*, 363 U.S. at 597-98.

2. A Strong Policy Of Deferral Facilitates Federal Labor Policy

Labor arbitration is not, as the General Counsel suggests, an alternative means of dispute resolution, rather it is part and parcel of the collective bargaining process fostered by the Act. When the Board addresses the deferral issue, its policy does not balance efficiency versus a thorough adjudication. It balances preservation of a critical element of federal labor policy against the incremental review of particular events.

As far back as 1962, the Board determined that the policies announced by the Court in the *Steelworkers Trilogy* applied to *Spielberg* deferral. The Board reasoned:

> The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective-bargaining agreements that provide for *final and binding* arbitration of grievances and disputes arising thereunder, "as a substitute for industrial strife," contribute significantly to the attainment of this statutory objective.

International Harvester Co. (Indianapolis Works), 138 NLRB 923, 926 (1962), *aff. sub. nom. Ramsey v. NLRB*, 327 F.2d 784 (7th Cir. 1964) (emphasis added). The Supreme Court adopted

this statement in *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964). Thus, the Board's well-established policy where the parties have committed to pre-dispute arbitration to resolve their disputes is to defer to the arbitrator's decision unless the arbitration proceedings themselves are unfair or irregular or the award is repugnant to the National Labor Relations Act. By adopting this standard, the Board ensures finality and certainty in arbitral awards, advances the national policy favoring arbitration, and facilitates the primary objective of the Act: to encourage collective bargaining.

A strong policy of deferral to arbitral awards is not an abdication of the Board's statutory responsibility to prevent unfair labor practices; the *Spielberg/Olin* criteria ensure otherwise. As the D.C. Circuit reasoned in *Associated Press v. NLRB*, "the Board does not abdicate its responsibilities to implement the National Labor Relations Act by respecting peaceful resolution of disputes through voluntarily agreed-upon procedures as long as it is assured that those techniques are procedurally fair and that the resolution is not clearly inconsistent with or repugnant to the statute." 492 F.2d 662, 667 (D.C. Cir. 1974).

Even if the Board might conclude that there is a risk in a particular case of a "wrong" result, that risk is a tiny price to pay for the protection of the broader policies of the Act. As stated by Judge Rosenn in the lead opinion in *NLRB v. Pincus Brothers*, 620 F.2d 367, 374 (3d Cir. 1980), "The national policy in favor of labor arbitration recognizes that the societal rewards of arbitration outweigh a need for uniformity of results or a correct resolution of the dispute in every case." Moreover, the parties to a collective-bargaining agreement using arbitration to resolve their disputes have accepted that an arbitrator might decide a particular set of facts under the agreement differently than would the Board. *See id.* ("[T]he parties are not injured by

deference to arbitration because it is the parties themselves who have selected and agreed to be bound by the arbitration process.").

B. The General Counsel's Approach Would Undermine Arbitration And Collective Bargaining

The question before the Board is when, if ever, the disposition of a contract grievance by arbitration should yield to the Board's jurisdiction over a parallel unfair labor practice charge. Without identifying any empirical problem with the Board's traditional deferral to arbitrators' awards, the General Counsel proposes reducing the standard of deferral to what in effect would be plenary review by the Board. The party asking the Board to defer to the arbitrator's decision would be obliged to prove that the statutory question was reviewed, and, for all practical purposes, the arbitrator must have decided the ULP case properly. *Office of the General Counsel, Memorandum GC 11-05*, at pp. 6-7 (Jan. 20, 2011).

"[S]ubmission to grievance and arbitration proceedings of disputes which might involve unfair labor practices would be substantially discouraged if the disputants thought the Board would have given *de novo* consideration to the issue which the arbitrator might resolve." *Associated Press*, 492 F.2d at 667. It would be ironic that deferral to labor arbitration would be at its lowest point when it is the enforcement of the Act itself which is purportedly at risk. Although deferral arguably might, in the eyes of some, leave an unfair labor practice unremedied—and for reasons discussed below that is almost impossible—the cost of the modification that the General Counsel urges would be to undermine what the Supreme Court has long held to be the focus of congressional policy.

Moreover, the General Counsel has identified no reasoned basis to modify the deferral afforded under the *Spielberg/Olin* standards. The *Spielberg/Olin* procedural standards—that the parties agree to be bound and that the proceedings appear to be fair—have not been difficult to

apply. The substantive standard—that the result is not clearly repugnant to the policies and purposes of the Act is neither unclear nor difficult to apply, although the Board on occasion has failed to grant the deferral that *Spielberg*/*Olin* contemplates. *See e.g.*, *Liquor Salesmen's Union, Local 2 v. NLRB*, 664 F.2d 318, 323-24 (2d Cir. 1981) (hereinafter *Chamber Industries*). The term "clearly repugnant" has a narrow scope by virtue of the modifier "clearly." If an arbitration award is susceptible of an interpretation that is plausibly consistent with the provisions of the Act, the award cannot be clearly repugnant to it. *See Associated Press*, 492 F.2d at 667 (upholding Board's deferral to arbitration award where it concluded that "the arbitrator's reasonable interpretation was not inconsistent with either the fundamental purposes of the specific provisions of the sections of the National Labor Relations Act which is at the duty of the Board to implement…"); *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352, 354-55 (9th Cir. 1979) (asserting that the Board should have deferred to the arbitrator's decision because "[i]f the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was "clearly repugnant" to the Act."); *Pincus Brothers*, 620 F.2d at 374 ("[W]e conclude that it is an abuse of discretion for the Board to refuse to defer to an arbitration award where the findings of the arbitrator may arguably be characterized as not inconsistent with the Board policy.").

The narrow deferral approach proposed by the General Counsel views arbitration as an inferior means to resolve statutory questions. The radical change the General Counsel advocates requires that, in order for the parties to have any degree of certainty that the Board will defer, the unfair labor practice *must* be litigated *and* decided in *exactly* the same manner as it would have been decided by the Board. That is, deferral is warranted only if the arbitrator makes the exact same factual determination, and applies Board precedent in a written decision that resolves the

unfair labor practice *precisely* as the Board would do. This approach in effect mandates turning arbitrators into *de facto* administrative law judges, or adjudicators who ultimately make mere recommendation; a result that is inconsistent with the strong national policy *favoring* a final disposition of the parties' dispute through arbitration.

Narrowing the set of cases in which the NLRB defers to arbitration awards will invite abuse. It guarantees re-litigation of issues resolved by the arbitrator any time the General Counsel disagrees with the result or where the Board discovers in hindsight some facts, arguments or legal theories not adduced in arbitration. Such an approach invites parties to squirrel facts and arguments, and virtually assures a "second bite of the apple." Such a formulation is not deferral at all.

Moreover, by narrowing the standard the Board would assure yet more litigation in the courts in each deferral case. Prior to the *Olin* standard, the courts of appeals in at least six circuits found that the Board had abused its discretion in failing to defer to arbitral awards under *Spielberg*. *See, e.g.*, *Douglas Aircraft*, 609 F.2d at 355; *Pincus Brothers*, 620 F.2d at 367; *Chambers Industries*, 664 F.2d at 327; *NLRB v. Motor Convoy, Inc.*, 673 F.2d 734 (4th Cir. 1982); *American Freight Sys. 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). These courts essentially reversed Board decisions declining to defer to arbitral awards using a standard that is comparable to what the General Counsel currently proposes. A modification back to the pre-*Olin* standard, as the Board's General Counsel advocates, is likely to result in the courts once again finding that the Board has abused its discretion.

Finally, the General Counsel's proposal for review of arbitrators' decisions misconceives both the Board's role and the arbitrator's role in federal labor policy. The parties to a collective

bargaining agreement have agreed to be bound by an arbitrator's interpretation of their agreement. That interpretation may be disturbed only if it does not "draw its essence" from the contract. *See Enterprise Wheel*, 363 U.S. at 597. The Board should protect employee rights only in those rare circumstances where that interpretation of the collective bargaining agreement is repugnant to the Act. The Board's function does not depend upon the *quality* of the arbitrator's reading of the agreement, but only upon the outcome of that reading. As expressed by Judge Harry Edwards:

> The obvious fallacy in the Board's analysis is its contention that there is a statutory issue apart from the contractual issue. This case [in ruling on a refusal of an employee to perform work] involves solely a contractual claim, not an unfair labor practice claim.… In other words, assuming, arguendo, that an individual employee has a right under the NLRA to refuse to work in order to pursue a contract claim that is not in fact "justified" but only supported by a "good faith" belief of wrongdoing, that alleged right was waived by the collective bargaining agreement in this case.

American Freight, 722 F.2d at 832. The arbitrator's interpretation of the agreement is what it is, and the only question for the Board is whether the agreement as interpreted by the arbitrator violates the Act.

The General Counsel's effort to assign to the arbitrator a dual role of deciding both a statutory issue independent of the contract and a contractual issue interpreting and applying the contract gives the arbitrator both too much and too little responsibility. Likely his interpretation of the contract, as Judge Edwards suggests, itself will answer the statutory question. If after the

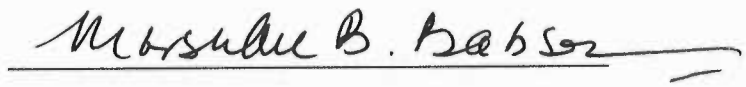
contract has been interpreted that interpretation is repugnant to the Act, then it is the Board's responsibility to say so. And if that interpretation is not clearly repugnant to the Act, then it is the Board's duty to defer to the arbitrator's decision.

CONCLUSION

For these reasons, the Chamber respectfully requests that the Board decline the General Counsel's request to modify the Board's deferral standard in a manner that would impair the longstanding federal labor policy favoring arbitration.

Respectfully submitted,

SEYFARTH SHAW LLP



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Dated: March 25, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2014, I caused a true and accurate copy of the foregoing Brief for *Amicus Curiae* The Chamber of Commerce of the United States of America to be filed electronically using the National Labor Relation Board's Electronic Filing System, and that I caused the same to be served electronically upon the following:

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Deponent is over the age of 18 years and not a party to this action.

I further certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 25, 2014

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