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COMMENTS

NLRB DEFERRAL TO ARBITRATION: PLACING INDIVIDUAL EMPLOYEES’ STATUTORY RIGHTS UPON THE SACRIFICIAL ALTAR OF OLIN TO PROMOTE A NATIONAL LABOR POLICY FAVORING PRIVATE DISPUTE RESOLUTION

INTRODUCTION

Collective bargaining agreements between employers and unions generally provide for arbitration as the means for resolving labor disputes. Although arbitration has drawn considerable criticism, the Supreme Court has emphasized that the process plays a vital role in promoting industrial peace and stability in the United States. Recognizing that arbitrators are better qualified to settle

1. R. Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining 541-42 (1976). Generally, collective bargaining agreements between a union and an employer provide for arbitration as the last step in the grievance process. Id. at 542. As Professor Gorman explains:

Complaints of contract breach... are typically brought, by the union or the individual grievant, to a low-level supervisor in the first instance, and if unresolved to higher levels of supervision. If the dispute remains unresolved at the highest level of confrontation between union officials... and company officials... it will be submitted to an arbitrator, voluntarily selected by the parties to the contract.


3. United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960). This group of cases is known collectively as the Steelworkers’ Trilogy. See Meltzer &
The John Marshall Law Review

disputes arising from the interpretation of collective bargaining agreements, the Court is willing to defer to an arbitrator's decision in order to promote industrial harmony. The Court's reliance on arbitration for the resolution of contractual disputes has encouraged the National Labor Relations Board ("NRLB") to adhere to the deferral policy. The NRLB has also extended its deferral policy to allow arbitration of statutory issues, as well as contractual issues.

In over thirty years of exercising its policy of deferring to arbitration whenever certain procedural standards are met, the NRLB...

HENDERSON, supra note 1, at 925. Professors Meltzer and Henderson note five benefits arbitration provides in addition to providing an outlet for orderly protest:

1. It frees unions from the need to repudiate the position of individual employees, and management from the need to undercut supervisors.
2. It enables lower levels of supervision to obtain management's consideration of a problem when intermediate supervision blocks such consideration.
3. It may educate each party about the weaknesses of its own representatives, the erosion of formula rules by practice, the failure of communication within the enterprise or within the union or between the union and management, and the pressures and problems of the other side.
4. It serves as a channel for resolving problems not covered by the agreement.
5. It often gives able and articulate employees an opportunity to show their ability and qualifications for promotion within the union or the company.

Id.

4. See United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). The Court noted that the "ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." Id. at 582. The Court also observed that arbitrators who are well-versed in the "law of the shop" can determine whether a particular interpretation of the collective bargaining agreement will affect workers' morale, thus affecting productivity. Id. But see P. HAYS, supra note 2, at 40. Hays criticized arbitrators as generally being incompetent. Id. Hays noted that because arbitrators are dependent upon the parties for their future employment, the entire concept of arbitration is incompatible with a fair system of adjudication. Id.

5. United Steelworkers, 363 U.S. at 566.


9. See Spielberg, 112 N.L.R.B. at 1082. The NRLB distinguished Spielberg from an earlier case in which it refused to defer to a prior arbitral award. Id. See Monsanto Chem. Co., 97 N.L.R.B. 517, enforced, 205 F.2d 763 (8th Cir. 1961) (NLRB did not consider itself bound by an arbitration award which was at odds with the NLRA). In distinguishing the Monsanto case, the NRLB set forth three criteria under which it would defer to arbitration. Spielberg, 112 N.L.R.B. at 1082. First, the arbitration proceedings must have been fair and regular. Id. Second, all parties must have agreed to be bound by the arbitration. Id. Third, the arbitration award must not have been clearly repugnant to the NLRA. Id. Subsequently, the NRLB added a
has vacillated between two conflicting messages from Congress. In the Labor Management Relations (Taft-Hartley) Act ("LMRA"), Congress expressed its approval of a general national labor policy favoring arbitration as the desired means to private resolution of labor disputes.\textsuperscript{10} Section 10(a) of the National Labor Relations Act ("NLRA"),\textsuperscript{11} however, provides that the NLRB's power to prevent and penalize unfair labor practices\textsuperscript{12} will not be diminished by any other means of adjustment created by "agreement, law or otherwise . . . ."\textsuperscript{13} Thus, the NLRA expressly states that the NLRB's power to remedy unfair labor practices shall not be usurped. The LMRA, on the other hand, clearly indicates a preference for private resolution of labor disputes in a method agreed upon by the parties, including arbitration. Therefore, the NLRB must attempt to strike a balance between the national labor policy favoring arbitration and the NLRA's mandate of protecting individual employee rights.\textsuperscript{14}

The NLRB may pursue one of three possible courses of action when presented with an employer-union dispute involving allegations of an unfair labor practice as well as a contractual issue.\textsuperscript{15} In the case of pre-arbitral deferral, the NLRB may order the contractually provided grievance arbitration where the parties have not pre-

\textsuperscript{10} Fourth requirement that in order to warrant deferral, the arbitrator must have considered the statutory unfair labor practice claim as well as the contractual issue. Raytheon Col., 140 N.L.R.B. 883 (1963), set aside on other grounds, 326 F.2d 471 (1st Cir. 1964); Suburban Motor Freight, 247 N.L.R.B. 146 (1980), overruled, Olin Corp., 268 N.L.R.B. 573 (1984). See infra notes 20-33 and accompanying text.

\textsuperscript{11} Labor Management Relations (Taft-Hartley) Act ("LMRA") § 203(d), 29 U.S.C. § 173(d) (1976). Section 203(d) of the LMRA provides 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." Id.

\textsuperscript{12} NLRA § 10(a), 29 U.S.C. § 160(a) (1976).

\textsuperscript{13} "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158) 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 . . . ." Id. § 10(a).

\textsuperscript{14} Many courts have relied upon section 203(d) of the LMRA to approve of the NLRB's deferral policy. See, e.g., William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12, 16-17 (1974); NLRB v. Pincus Bros.-Maxwell, 620 F.2d 367, 372-73, 378 (3d Cir. 1980)(Gaith, J., concurring); Bloom v. NLRB, 603 F.2d 1015, 1019 (D.C. Cir. 1979); Nabisco, Inc. v. NLRB, 479 F.2d 770, 772-73 (2d Cir. 1974). The NLRB has also used section 203(d) of the LMRA to support its deferral policy. See, e.g., Collyer Insulated Wire, 192 N.L.R.B. 837, 840 (1971); Dubo Mfg. Corp., 142 N.L.R.B. 430, 431-32 (1963), enforced per curiam, 353 F.2d 157 (6th Cir. 1965); International Harvester Co., 138 N.L.R.B. 923, 926 (1962), enforced sub nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), cert denied, 377 U.S. 1003 (1964). But see NLRB v. Pincus Bros.-Maxwell, 620 F.2d at 387-89 (Gibbons, J., dissenting)(section 10(a) of the NLRA precludes NLRB deferral to arbitration).

viously submitted their dispute to the arbitrator.\textsuperscript{16} In the case of post-arbitral deferral, the NLRB may recognize and thereby defer to a previously issued arbitration award.\textsuperscript{17} Finally, the NLRB may review the grievance on its merits and resolve the issues itself.\textsuperscript{18} When deciding whether to defer to arbitration, the NLRB must endeavor to optimize industrial peace and simultaneously protect employee statutory rights.\textsuperscript{19}

This comment will trace the development of the NLRB's post-arbitral deferral policy from its seminal decision in Spielberg Manufacturing Co. through its current position in Olin Corp. It will then provide an analysis of certain problems inherent in the current deferral standard. This analysis indicates that the NLRB's current Olin Corp. deferral standard will predictably draw considerable judicial challenges. This comment concludes that the present deferral standard represents an abdication of the NLRB's responsibility to prevent unfair labor practices under the NLRA. Finally, this comment proposes that the NLRB reject the Olin Corp. standard be-

\textsuperscript{16} Id. See, e.g., Collyer, 192 N.L.R.B. 837 (NLRB deferred unfair labor practice charge to the arbitration process itself prior to any actual arbitral proceeding). In Collyer, the NLRB stated that pre-arbitral deferral was appropriate where (1) there was a long and productive collective bargaining relationship, (2) all parties were willing to arbitrate under the existing clause, and (3) the contract and its meaning were at the center of the dispute. Id. at 842. In 1972, the NLRB expanded its pre-arbitral deferral policy to cases involving section 8(a)(3) violations. National Radio Co., 198 N.L.R.B. 527 (1972). The NLRB reversed its liberal pre-deferral policy and overruled National Radio in 1977. General Am. Transpor. Corp., 228 N.L.R.B. 808 (1977) (NLRB announced that it would not defer prior to arbitration in cases involving section 8(a)(3) violations). In 1974, however, the NLRB overruled General American in United Technologies Corp., 268 N.L.R.B. 557 (1984). In United Technologies, the NLRB announced its most current policy statement that the Collyer doctrine will apply to charges of violations of sections 8(a)(1), 8(a)(3) and 8(b)(1)(A). Id. at 559. As in post-arbitral deferral cases, the NLRB emphasized section 203(d) of the LMRA and the importance of arbitration in federal labor law. Id. at 558.

This comment will address only those situations involving the NLRB's post-arbitral deferral policy. For a discussion and general criticism of the NLRB's pre-arbitral deferral policy, see Getman, Collyer Insulated Wire: A Case of Misplaced Modesty, 49 IND. L.J. 57 (1973); Henkel & Kelly, Deferral to Arbitration After Olin And United Technologies: Has The NLRB Gone Too Far?, 43 WASH. & LEE L. REV. 37 (1986); Johannesen & Smith, Collyer: Open Sesame to Deferral, 23 LAB. L.J. 723, 738-41 (1972); Note, Collyer's Effect on the Individual Charging Party, 25 LAB. L.J. 561, 569 (1974).


19. Id. at 691.
cause proper application may sacrifice individual employee rights.

I. Development of the NLRB's Deferral Policy

Although the NLRB began deferring cases to arbitration as early as 1946,20 it was not until 1955 that the NLRB formally announced a deferral policy in Spielberg Manufacturing Co.21 In Spielberg, the union claimed that the employer company had violated section 8(a)(3) of the NLRA22 by not reinstating four striking employees.23 The company and the union submitted the dispute to arbitration.24 The arbitrator upheld the employee discharges on the grounds of strike misconduct.25 The NLRB recognized and deferred to the arbitrator’s decision, and dismissed the complaint.26

The NLRB set forth three requirements that must be present before it would defer to an existing arbitral award. First, the arbitration proceedings must appear to be fair and regular.27 Second, all parties must have agreed to be bound by the arbitral award.28 Finally, the arbitrator’s decision must not be repugnant to the policies and purposes underlying the NLRA.29

20. The origins of the NLRB’s deferral policy can be seen in two early cases. See Timken Roller Bearing Co., 70 N.L.R.B. 500 (1946), enforcement denied on other grounds, 161 F.2d 949 (6th Cir. 1947); Consolidated Aircraft Corp., 47 N.L.R.B. 694 (1943), enforced as amended, 141 F.2d 785 (9th Cir. 1944); see also Note, NLRB Deferral to Arbitration: The Evolution of the Spielberg Doctrine, 23 WM. & MARY L. REV. 291, 291-93 (1981); Note, Spielberg Reconsidered, supra note 17, at 1116.


22. NLRA § 8(a)(3), 29 U.S.C. § 158(a) (1976). Section 8(a)(3) of the NLRA provides: “It shall be an unfair labor practice for an employer ... by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .” Id.


24. Id. The company and the union executed an agreement simultaneously with the collective bargaining agreement which provided that the decision of the arbitration panel would be binding upon the parties. Id.

25. Id. The arbitrator found that during the strike, the employees who were denied reinstatement used “profane, insulting, or vile language” toward the company officials, workers and customers. Id. at 1084. The arbitrator held that such actions constituted employee misconduct sufficient to allow the company to deny reinstatement. Id.

26. Spielberg, 112 N.L.R.B. at 1082. The NLRB found that although it was not bound, as a matter of law, by an arbitration award, “the desirable objective of encouraging voluntary settlement of labor disputes [would] best be served by . . . recognition of the arbitrators’ award.” Id. at 1081-82.

27. Id. at 1082.

28. Id. The NLRB reasoned that the parties must have agreed to be bound by the arbitrators’ decision where the four strikers, three of whom personally testified, actively participated in the arbitration proceeding. Id. at 1081.

29. Id. at 1082. The NLRB noted that in an earlier case it had held that “[t]here can be no justification for deeming ourselves bound, as a policy matter, by an arbitration award which is at odds with the statute.” Id. (quoting Monsanto Chem. Co., 97 N.L.R.B. 517, 520 (1951). The arbitration award in Spielberg, however, was found not to be “at odds with the statute.” Id. See supra note 9 for a discussion of NLRB procedural standards.
Soon after its formulation of the Spielberg doctrine, the NLRB realized that this policy would not sufficiently guarantee that the arbitrator had addressed the unfair labor practice issue. Therefore, in Raytheon Co., the NLRB added to the Spielberg standard a fourth requirement of proof—that the issue involved in the unfair labor dispute had actually been presented to and considered by the arbitrator. The NLRB considered the mere fact that the underlying factual issues in both the contractual dispute and the unfair labor practice allegation were factually parallel was not proof that the arbitrator must have resolved the unfair labor practice issue.

The requirement that an unfair labor practice must have been "fully and fairly litigated" in arbitration was repeated and refined in Airco Industrial Gases-Pacific and Yourga Trucking, Inc. in 1972. In Airco, the NLRB decided that it would not defer to an arbitration award where there was no indication that the arbitrator had ruled on the unfair labor practice issue. In Yourga Trucking, the NLRB held that the party seeking deferral must carry the burden of proving that the unfair labor practice issue had been "fully and fairly litigated" before the arbitrator. Thus, the NLRB viewed the issue of whether the unfair labor practice had been presented to and considered by the arbitrator as an affirmative defense that must be asserted and proven before deferral would be warranted.

Within two years of the Airco and Yourga decisions, the NLRB sharply deviated from its course in deferral policy. In Electronic Reproduction Service Corp., the NLRB held that it would defer to the arbitral findings unless "special circumstances" precluded the grievant from a full and fair opportunity to introduce evidence of an unfair labor practice. Under Electronic Reproduction, the NLRB would defer even in cases where there was no indication that the

30. In a second Monsanto Chem. Co. case, a post-Spielberg decision, the NLRB expressed concern that deferral to an award in which the arbitrator ignored the unfair labor practice issue would not promote voluntary settlements, nor the policies of the NLRA. Monsanto, 130 N.L.R.B. 1097, 1099 (1961).
31. 140 N.L.R.B. 883 (1963), enforcement denied on other grounds, 326 F.2d 471 (1st Cir. 1964).
32. Id. at 884-87.
33. Id. See infra note 100 for a discussion of instances in which factually parallel contractual and statutory issues are not legally parallel.
39. Id. at 761. Electronic Reproduction extended the deferral doctrine to situations in which a grievant could have, but did not, present evidence of an unfair labor practice in the arbitration proceeding. Id.
arbitrator had considered the unfair labor practice issue. Instead, the NLRB adopted a presumption that the arbitrator’s resolution of the contract issue necessarily resolved the unfair labor practice issue as well. Electronic Reproduction shifted the burden of proof to the party bringing the unfair labor practice charge. Thus, under the new policy, the NLRB would presume that the arbitrator had decided the unfair labor practice issue and defer to that presumed finding unless proven otherwise.

The Electronic Reproduction decision drew sharp criticism in the federal courts. In response, the NLRB overruled Electronic Reproduction, finding that it failed to protect employees in the exercise of their rights. Returning to the deferral standard of Raytheon, Airco and Yourga, the NLRB decided in Suburban Motor Freight, Inc., that it would no longer recognize the findings of an arbitration proceeding under Spielberg unless there was evidence that the arbitrator was presented with and considered the unfair labor practice issue. Suburban Motor Freight again shifted the burden back to the party seeking deferral to prove that the unfair labor practice issue was litigated before the arbitrator.

40. [citation]
41. [citation]
42. The NLRB reasoned that Electronic Reproduction’s presumption would effectively preclude employees from “two bites of the apple.” Id. at 761. The NLRB was concerned that an employee might retain some evidence of statutory violations so as to gain a second chance at litigation before the NLRB should the arbitral award be unfavorable. Id. For criticism of the Electronic Reproduction standard, see Schatzki, Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?, 123 U. Pa. L. Rev. 897, 909 n.32 (1975); Simon-Rose, Deferral Under Collyer by the NLRB of Section 8(a)(3) cases, 27 Lab. L.J. 201, 209-12 (1976).
44. Suburban Motor, 247 N.L.R.B. at 146. See supra notes 34-37 and accompanying text for a discussion of Airco and Yourga decisions.
Four years after *Suburban Motor Freight*, the NLRB again changed the standards of deferral and reallocated the burden of proof in *Olin Corp.* In *Olin Corp.*, the NLRB overruled *Suburban Motor Freight*, and allowed deferral to existing arbitral awards in cases where there is no indication that the arbitrator considered the unfair labor practice issue. The *Olin Corp.* decision rejected the Raytheon "fully and fairly litigated" requirement in the interest of revising the Spielberg standard to "more fully comport with the aims of the [NLRA] and American labor policy." 49

The *Olin Corp.* decision retained the three Spielberg criteria50 and adopted two additional requirements. First, the contractual issue before the arbitrator must be "factually parallel" to the unfair labor practice issue.51 Second, the arbitrator must have been generally presented with the facts relevant to resolving the unfair labor practice issue.52 Additionally, *Olin Corp.* places the burden on the party seeking to avoid deferral to show that the standards for deferral have not been met.53 In order to meet this burden, the party seeking NLRB review must show that the arbitral award was palpably wrong, that is not susceptible to an interpretation consistent with the NLRA.54 Thus, the NLRB may defer simply because the party seeking review was unable to prove what did not occur at the arbitration hearing.55

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49. *Olin Corp.*, 268 N.L.R.B. at 574.

50. See supra notes 9 and 26-29 and accompanying text for a discussion of the procedural standards set forth in Spielberg.

51. *Olin Corp.*, 268 N.L.R.B. at 574.

52. *Id.*

53. *Id.*

54. *Id.* The *Olin Corp.* majority noted that an arbitrator's award does not have to be totally consistent with NLRB precedent. *Id.* Thus, to obtain NLRB review of an unfair labor practice claim, a grievant must prove that the prior arbitration award was inconsistent in every detail from the policies of the NLRA.

55. The *Olin Corp.* standard places the burden of proof on the General Counsel of the NLRB. *Olin Corp.*, 268 N.L.R.B. at 575. When presented with a grievant's unfair labor practice charge, the General Counsel must determine whether there is valid support to issue a complaint. *Id.* at 575 n.9. In a situation where the parties had previously participated in an arbitration proceeding pursuant to a collective bargaining agreement, the General Counsel must defer to the arbitrator's award under the *Olin Corp.* standard, unless he can prove that the award was "palpably wrong." *Id.* at 574. In most cases, however, the General Counsel will have little, if no, evidence of what transpired at the arbitration hearing. See, e.g., Hilton Hotels Corp., d/b/a The Denver Hilton Hotel, 272 N.L.R.B. 4 (1984) (an employer representative of an arbitration panel testified before the NLRB to establish what evidence was presented at the arbitration hearing).
II. APPLICATION OF THE Olin Corp. DEFERRAL STANDARD

A. The Factually Parallel Criterion

The new Olin Corp. standard no longer requires the arbitrator to actually consider the unfair labor practice issue in order for the NLRB to defer to his award. The NLRB will presume that the arbitrator adequately considered the unfair labor practice issue if (1) the contractual issue is "factually parallel" to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue.56

As the Olin Corp. dissent argued, however, the majority's two-step rule involves actually only one step.57 Where the contractual issue is factually parallel to the unfair labor practice issue, it would be impossible to prove under the Olin Corp. second step that facts relevant to the unfair labor practice were not presented unless one proves that the facts relevant to the contractual issue also were not presented.58 Thus, in reality, the NLRB will presume that both the contract and unfair labor practice issues have been considered unless the General Counsel can prove that the two issues are not factually parallel.59 Depending upon how broadly the NLRB construes the notion of factual parallelism, the General Counsel may be faced with an impermissibly difficult burden of proof.60

The Olin Corp. dissent also noted that the new standard of factual parallelism is the same basis of the Electronic Reproduction presumption that consideration of the contract issue simultaneously resolves the unfair labor practice issue.61 Despite the substantial criticism and subsequent overruling of Electronic Reproduction,62 the Olin Corp. majority has returned to a standard that allows deferral to an arbitration award under circumstances where there is no indication that the unfair labor practice issue was even presented.
to, much less considered by, the arbitrator. The Olin Corp. standard allows the NLRB to abdicate its obligation under Section 10(a) of the NLRA to protect individual employee rights.

B. Improper Allocation of Proof

In Olin Corp., the NLRB imposed upon the General Counsel the burden of proving that the arbitral award was "palpably wrong" before the Board would be required to ignore the arbitrator's determination and subject the case to de novo review. Contrary to the views of the dissent, the Olin Corp. majority explained that the NLRB is not returning to Electronic Reproduction entirely. Rather, the majority claimed to resurrect only the part of Electronic Reproduction that placed the burden of proof on the General Counsel to show that the arbitration did not warrant deferral.

Under Yourga Trucking and Suburban Motor Freight, the burden of establishing that the unfair labor practice issue had been sufficiently resolved was placed on the party asserting the defense. Under the current Olin Corp. allocation of proof, what was previously an affirmative defense is now part of the General Counsel's prima facie case. As the Olin Corp. dissent appropriately argued, the General Counsel is the one party in the unfair labor practice litigation who is not in privity with the collective bargaining agreement. It is unsound, therefore, to impose upon the General Counsel the burden of producing evidence about an arbitral proceeding under an agreement with which he is not in privity.

III. The Future of the NLRB's Present Deferral Policy

The NLRB's Olin Corp. standard for deferral to arbitration has

63. Olin Corp., 268 N.L.R.B. at 579 (Member Zimmerman dissenting in part).
64. Id. at 574 (citing International Harvester Co., 138 N.L.R.B. 923, 929 (1962)).
65. Id. at 575. The NLRB announced that the burden lies with the General Counsel to show that there were "deficiencies in the arbitral process requiring the [NLRB] to ignore the determination of the arbitrator and subject the case to de novo review." Id.
66. Id. at 575 n.10.
67. Id.
69. Olin Corp. 268 N.L.R.B. at 580. The General Counsel must prove that the prior arbitration award was not susceptible to any interpretation consistent with the NLRA in order to issue an unfair labor practice complaint.
70. Id.
71. Id.
already met with sharp criticism from a variety of commentators. As the Olin Corp. dissent noted, the present standard is actually a return to the previously overruled Electronic Reproduction policy. In light of the overwhelming judicial disapproval of Electronic Reproduction, the Olin Corp. deferral standard predictably will arouse considerable challenges from the federal courts of appeals.

Three courts of appeals have expressly rejected the Electronic Reproduction standard on its merits, while several others have implicitly rejected it by approving the NLRB’s decision in Suburban Motor Freight. In Banyard v. NLRB, the United States Court of Appeals for the District of Columbia found that the Spielberg doctrine alone did not adequately protect employees’ statutory rights. The court held that, in addition to the Spielberg criteria, the arbitrator must have “clearly decided” the unfair labor practice issue. The court further required that the issue must have been within the

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73. Olin Corp., 268 N.L.R.B. at 577, 579 (Member Zimmerman dissenting). Member Zimmerman noted that the new deferral standard effectuates the same result as the Electronic Reproduction rule. Id.

74. See supra note 43 and accompanying text for a discussion of cases that criticized Electronic Reproduction.

75. See, e.g., Taylor v. NLRB, 786 F.2d 1516 (11th Cir. 1986) (expressly rejecting the Olin Corp. deferral policy as inadequate to protect employees’ statutory rights under the NLRA).

76. NLRB v. Magnetics Int’l, Inc., 699 F.2d 806, 811 (6th Cir. 1983); Stephenson v. N.L.R.B., 550 F.2d 535, 538 (9th Cir. 1977); Banyard v. NLRB, 505 F.2d 342, 348 (D.C. Cir. 1974).

77. Suburban Motor Freight overruled Electronic Reproduction. 247 N.L.R.B. at 146. For decisions approving of the Suburban Motor Freight decision that placed the burden on the party seeking deferral to prove that the arbitrator heard and decided the unfair labor practice issue, see NLRB v. Designcraft Jewel Indus., Inc., 675 F.2d 493 (2d Cir. 1982); Pioneer Finishing Corp. v. NLRB, 667 F.2d 199 (1st Cir. 1981), cert denied, 460 U.S. 1080 (1983); NLRB v. General Warehouse Corp., 643 F.2d 943 (3d Cir. 1981); St. Luke’s Memorial Hosp., Inc., v. NLRB, 623 F.2d 1173 (7th Cir. 1980).

78. 505 F.2d 342 (D.C. Cir. 1974).

79. Id. at 347. The Banyard court stated that it would accept the Spielberg doctrine only in cases where the contractual and statutory issues were essentially the same. Id. at 345. The court found that deferral to arbitration in cases where the contractual and statutory issues were incongruent would represent abdication, rather than deference. Id. at 345-46 (quoting Local Union 2188, AFL-CIO v. N.L.R.B., 494 F.2d 1087, 1091 (1974)).

80. Id. at 346-47.
The arbitrator’s competence.81

In Stephenson v. NLRB,82 the United States Court of Appeals for the Ninth Circuit adopted the Banyard “clearly decided” test.83 The Stephenson court held that the arbitrator must have “clearly decided” the unfair labor practice issue before the NLRB may defer.84 The court defined the Banyard “clearly decided” test as requiring that the arbitrator must “specifically deal with the statutory issue.”85 The court held that the NLRB may not defer if it is not possible to tell whether the arbitrator ruled on the unfair labor practice issue.86 The Stephenson court concluded that Electronic Reproduction was invalid because it did not ensure that the arbitrator actually considered the statutory issue in addition to the contractual dispute.87 Arguably, the Ninth Circuit will react adversely to the Olin Corp. standard, which creates a presumption that the statutory issue was decided unless the party seeking NLRB review can prove otherwise.88

Judicial rulings in other federal courts of appeals indicate that

81. Id. at 347. The court added these requirements in an effort to keep contractual issues separate from statutory issues. Id. The NLRB could thereby retain its jurisdiction over claims arising under the NLRA by requiring that the arbitrator have clearly decided the statutory issue. Id. Additionally, the NLRB could presume that resolution of the statutory issue was beyond the arbitrator’s competence, unless the unfair labor practice claim was substantially congruent to the contractual issue. Id. See also Bloom v. NLRB, 603 F.2d 1015 (D.C. Cir. 1979). The Bloom Court stated, “An employee does not waive his statutory right to be free from unfair labor practices by virtue of his being a party to a collective bargaining agreement with an arbitration clause; he is entitled to a forum in which his complaint is fully and fairly litigated.” Id. at 1020.
82. 550 F.2d 535 (9th Cir. 1977).
83. Id. In adopting the Banyard approach, the court expressly rejected the Electronic Reproduction rule as an unjustifiable extension of the Spielberg doctrine. Id. at 537.
84. Id. at 535.
85. Id. at 538 n.4.
86. Id. at 537. The Stephenson court required that there be definite and substantial proof that the arbitrator was presented with and indisputably resolved the unfair labor practice issue. Id. at 538 n.4.
87. Id. at 539. In elaborating on the Banyard “clearly decided” standard, the Stephenson court stated:
Merely because the arbitrator is presented with a problem which involves both contractual and unfair labor practice elements does not necessarily mean that he will adequately consider the statutory issue, and merely because he considers the statutory issue does not mean that he will enforce the rights of the parties pursuant to and consistent with the [NLRA]. The “clearly decided” requisite is designed to enable the [NLRB] and the courts to fairly test the standards applied by the arbitrator against those required by the [NLRA]. Id. at 538 n.4. See Ad Art, Inc. v. NLRB, 645 F.2d 669 (9th Cir. 1980) (the Ninth Circuit will allow the NLRB “wide discretion” in its deferral policy; however, in order for deferral to be proper, there must be evidence that the arbitrator clearly decided the unfair labor practice issue).
88. See supra notes 64-71 and accompanying text for a discussion of the General Counsel’s new burden of proof.
the present NLRB deferral policy may meet with future opposition. The United States Court of Appeals for the Sixth Circuit announced in \textit{NLRB v. Magnetics International, Inc.} that it would uphold the NLRB's decision to defer only when the arbitration award shows that the arbitrator considered and clearly decided all unfair labor practice charges. The Sixth Circuit added that any doubts as to whether the arbitrator addressed the statutory issue would be resolved against the party seeking deferral. Similarly, in \textit{United Parcel Service v. NLRB}, the Third Circuit held that unless the NLRB is presented with some evidence that the unfair labor practice issue had actually been decided the NLRB's policy was not one of deferral but one of abdication. Thus, judicial precedents indicate that the NLRB does not have broad discretion to defer to arbitral awards merely on the basis that the resolved contractual issue was factually parallel to the statutory issue.

The United States Court of Appeals for the Eleventh Circuit has recently rejected the \textit{Olin Corp.} standard as giving away too much of the NLRB's responsibility under the NLRA. In \textit{Taylor v. NLRB}, the Eleventh Circuit held that the \textit{Olin Corp.} standard does not adequately protect employees' rights under the NLRA because it incorrectly presumes that, until proven otherwise, all arbitration proceedings confront and decide every possible unfair labor practice issue. The court also criticized the NLRB for trying to avoid its statutory obligations by adopting such a "far-reaching" deferral policy.

The \textit{Taylor} court noted that under the \textit{Olin Corp.} standard, arg-

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89. See supra notes 43 and 76-77 and accompanying text for cases criticizing prior NLRB deferral policy that was similar to present \textit{Olin Corp.} standard.
90. 699 F.2d 806 (6th Cir. 1983).
91. \textit{Id.} at 811.
92. \textit{Id.} The court explained that it will not require evidence in written form that the arbitrator was presented with and considered the unfair labor practice charge. \textit{Id.} However, the court refused to speculate as to what the arbitrator must have considered. \textit{Id.} Instead, it would examine the arbitrator's award itself to determine the degree of congruence between an award and the unfair labor practice charges. \textit{Id.}
94. \textit{Id.} at 981 (quoting \textit{NLRB v. General Warehouse Corp.}, 643 F.2d 965, 969 (3d Cir. 1981)). The court noted that, although an arbitrator's award may "evince resolution of unfair labor practice issues," a finding favorable to the employer does not automatically dispose of an unfair labor practice claim. \textit{Id.} at 981 n.23 (quoting Hammermill Paper Co. v. NLRB, 658 F.2d 155, 160 (3d Cir. 1981), \textit{cert. denied}, 460 U.S. 1080 (1983)).
95. \textit{Taylor v. NLRB}, 786 F.2d 1516, 1522 (11th Cir. 1986).
96. \textit{Id.} at 1516.
97. \textit{Id.}
98. \textit{Id.} at 1520. The \textit{Taylor} court noted that a deferral policy that presumes that an unfair labor practice charge has been resolved in arbitration is insufficient to enforce the policies of the NLRA. \textit{Id.}
bitration awards have a nearly preclusive effect that is inappropriate in any situation where contractual and statutory issues arise together. The court recognized that in many instances, factually parallel issues are not necessarily legally parallel. In such instances, the Olin Corp. "factually parallel" test will result in inadequate or no litigation of the unfair labor practice issue. The Taylor court concluded that the Olin Corp. standard represents a reverse policy too far in the direction of Electronic Reproduction, which insufficiently protected employees' rights under the NLRA.

Although the United States Supreme Court has yet to review the Olin Corp. standard, it has limited deferral to arbitration in three other areas involving the federal statutory rights of employees. In Alexander v. Gardner-Denver Co., the United States Supreme Court recognized that contractual rights were separate from the statutory rights granted under Title VII of the Civil Rights Act of 1964. The Court found that an employee's assertion of a con-

99. Id.
100. Id. The Taylor court considered four examples in which an arbitrator's consideration of the contractual issue would be inadequate to resolve a factually parallel unfair labor practice issue:

(1) The facts relevant to establishing a contract violation may differ from those facts relevant to unfair labor practice violations, although there may be some overlap. Example: An arbitrator's finding of just cause for an employee's termination may overlook a real underlying reason for discharge arising from some protected activity.

(2) The standard of review for a contract violation may differ from a Board for an analogous unfair labor practice claim. Example: The amount of allowable insubordination by an employee differs for Board and arbitral purposes.

(3) The interest of the union may be to establish a favorable interpretation of a contract, not to protect an employee from a specific unfair labor practice. Example: A group of cases may be resolved jointly on a compromise basis, despite the wishes of one grievant to proceed with an unfair labor practice complaint.

(4) A bipartite grievance committee issues a decision denying a grievance but giving no indication of whether, and if so, what evidence or issues were considered in reaching that decision. Example: The majority of Teamster grievance committee decisions do not include written explanations, as demonstrated in the decision to deny Taylor's grievance.

101. Id. at 1520.
102. Id.
103. The Supreme Court has recently restricted the authority of arbitrators to decide statutory issues in Title VII, Fair Labor Standards Act ("FLSA"), and section 1983 cases. McDonald v. City of West Branch, 466 U.S. 284 (1984) (Supreme Court denied deferral to prior arbitral award in a subsequent section 1983 civil rights action); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) (Supreme Court held that the judicial forum can better protect FLSA rights than the arbitral forum); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (Supreme Court directed the federal courts to allow employees to bring Title VII claims in a judicial forum separate from their contractual claims in an arbitral forum).

tractual right in an arbitral proceeding should not preclude the employee from asserting a statutory right in a separate forum.\textsuperscript{106} The Court suggested that in a claim of a Title VII violation the district court should admit a prior arbitration award, but only accord it "such weight as the court deems appropriate."\textsuperscript{107}

More recently, in 1981 the Supreme Court applied the reasoning of \textit{Gardner-Denver} to claims for wages under the minimum wage provisions of the Fair Labor Standards Act ("FLSA").\textsuperscript{108} In \textit{Barrentine v. Arkansas-Best Freight Systems, Inc.},\textsuperscript{109} the Court reiterated that individual statutory rights are independent of the collective bargaining process.\textsuperscript{110} In reaching its conclusion, the Court noted that a union may sacrifice an individual employee's statutory claim during arbitration as a compromise for the benefit of the overall union membership.\textsuperscript{111} Additionally, an arbitrator may not be competent to adequately interpret the legal complexities of the FLSA.\textsuperscript{112} Finally, the Court recognized that the arbitrator may not have the authority to grant the grievant the type of relief that a court could grant.\textsuperscript{113}

In \textit{McDonald v. City of West Branch},\textsuperscript{114} the Supreme Court applied the \textit{Gardner-Denver} and \textit{Barrentine} decisions to a Section 1983 civil rights action.\textsuperscript{115} The Court set forth four arguments de-
rived from the Gardner-Denver and Barrentine opinions as the basis for refusing to give preclusive effect to a prior arbitral award. First, an arbitrator whose expertise "pertains primarily to the law of the shop" may not be competent to resolve complex legal questions. Second, an arbitrator may lack authority to enforce statutes because his authority derives solely from the contract. Third, the union, which usually has exclusive control over the grievant's claims in arbitration, may sacrifice the employee's statutory rights in the interest of the union as a whole. Finally, arbitral fact-finding generally is not the same as judicial fact-finding.\footnote{117}

The Gardner-Denver, Barrentine and McDonald decisions show that the Supreme Court has recognized a need for individual employees to be able to assert statutory rights independent of the arbitration process. Although the Supreme Court has not yet had the opportunity to review the Olin Corp. standard, the United States Court of Appeals for the Sixth Circuit has recently stated that the rationale of Barrentine would apply to NLRA cases.\footnote{117} The United States Supreme Court may soon have the opportunity to extend its views on post-arbital deferral to the NLRA, when the Olin Corp. standard meets with the anticipated federal courts' challenges.

\section*{Conclusion}

The NLRB's ruling in Olin Corp. represents an abdication of its responsibility to remedy unfair labor practices and protect individual employee rights under the NLRA. Under Olin Corp., the NLRB has adopted a policy that deferral to arbitration is proper in all cases, unless there is proof that some unusual circumstances require an independent investigation into a grievant's statutory claims. Olin Corp.'s standard for deferral fails to protect employee rights ade-

\footnote{116. \textit{McDonald}, 466 U.S. at 287. See \textit{Taylor v. NLRB}, 786 F.2d 1516, 1521 (11th Cir. 1986). The \textit{Taylor} court stated that "arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under [federal] statutes." \textit{Id.} (quoting \textit{McDonald}, 466 U.S. at 289); \textit{McNair v. United States Postal Service}, 768 F.2d 730 (5th Cir. 1985) (recognizing the need for a forum independent of the arbitration process for employees to assert statutory rights).}

\footnote{117. American Fed'n of Television and Radio Artists, Cleveland Local, AFL-CIO (APTRA) v. Store Broadcasting Co., 745 F.2d 392, 396 (6th Cir. 1984). See also \textit{Barrentine}, 450 U.S. at 749 (Burger, C.J., dissenting). The \textit{Barrentine} Court majority, in refusing to distinguish between Gardner-Denver and Barrentine, implicitly rejected Chief Justice Burger's argument in dissent that the Civil Rights Act protected much more important rights than those of the Fair Labor Standards Act. \textit{Id.} at 745-46 (majority opinion). See \textit{Peck}, supra note 72, at 386. Perhaps the Supreme Court might also refuse to see a distinction between FLSA and NLRA cases sufficient to warrant deferral to arbitration in the latter.}
quately in situations where contractual and statutory issues are factually parallel, yet involve distinct elements of proof.\textsuperscript{118} The NLRB has improperly expanded its deferral policy to a point where employees are precluded from litigating their NLRA rights within the forum that Congress has expressly provided for such purposes.

The NLRB should recognize that the arbitrator’s expertise lies in the law of the shop. For this reason, the arbitrator is best suited to interpret contracts and the intent of the drafters, thereby resolving disputes that arise under collective bargaining agreements. The NLRB’s expertise lies in the resolution of legal questions that arise under the NLRA. The NLRB, therefore, should accept its obligation of protecting employees’ statutory rights through the established procedure of an administrative law hearing with NLRB review.\textsuperscript{119} The NLRB could achieve this result by distinguishing between grievances involving individual statutory rights and those involving collective rights.\textsuperscript{120} The NLRB should defer to prior arbitral awards involving collective rights because, in such a case, the arbitrator is better suited to interpret the meaning of a collective bargaining agreement. The NLRB should refuse to defer, however, in cases involving the individual statutory rights of an employee presenting an unfair labor practice charge. In applying this method, the NLRB may achieve a balance between the general national labor policy favoring arbitration as the desired means of resolving labor disputes and the NLRA’s mandate to protect individual employee rights.

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\textsuperscript{118} See supra note 100 and accompanying text for a discussion of instances where factually parallel contractual and statutory issues are not legally parallel.

\textsuperscript{119} See NLRA § 10(b), 29 U.S.C. § 160(b) (1976).

\textsuperscript{120} See Comment, \textit{The Teamster Joint Grievance Committee}, supra note 72, at 1457.