

something about it, i.e., union representatives. Unions can use the process selectively as an organizing tool.

Whatever the political realities, the Ad Hoc Committee's recommendations provide a framework for debate. Whatever legislative formula emerges, it is time that all workers, unionized or not, be protected against arbitrary and unfair discharge.<sup>46</sup>

### III. NLRB DEFERRAL TO THE ARBITRATION PROCESS: THE ARBITRATOR'S AWESOME RESPONSIBILITY

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Eighteen years ago, speaking before the 20th Annual Meeting of this Academy, Bernie Meltzer and Bob Howlett launched the great debate about the role which external law should play in the arbitrator's decision-making process. Bernie Meltzer espoused a restrictive view that "where there appears to be an irrepressible conflict between a labor agreement and the law, an arbitrator whose authority is typically limited to applying or interpreting the agreement should follow the agreement and ignore the law."<sup>1</sup> Rejecting such a confining approach, Bob Howlett boldly championed the role of external law, asserting that "arbitrators should render decisions . . . based on both contract language and law [because] a separation of contract interpretation and . . . law is impossible in many arbitrations."<sup>2</sup> This debate raged fiercely—though always politely—for a decade. Among the participants were Dick Mittenthal,<sup>3</sup> Harry Platt,<sup>4</sup> Mike Sovern,<sup>5</sup> Bill

<sup>46</sup>Other countries which have provided more substantial job security do not seem to have been placed at a competitive disadvantage. See W. Gould, *Japan's Reshaping of American Labor Law* (MIT Press, 1984).

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<sup>1</sup>Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration* in *The Arbitrator, the NLRB, and the Courts*, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 16. See also Meltzer, *The Role of Law in Arbitration: A Rejoinder*, in *Developments in American and Foreign Arbitration*, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968), 58.

<sup>2</sup>Howlett, in *The Arbitrator, the NLRB, and the Courts*, *supra* note 1 at 67. "All contracts are subject to statute and common law; and each contract includes all applicable law." *Id.* at 83.

<sup>3</sup>Mittenthal, *The Role of Law in Arbitration*, in *Developments in American and Foreign Arbitration*, *supra* note 1 at 42.

<sup>4</sup>Platt, *The Relations Between Arbitration and Title VII of the Civil Rights Act of 1964*, 3 Ga. L. Rev. 398 (1969).

<sup>5</sup>Sovern, *When Should Arbitrators Follow Federal Law?* in *Arbitration and the Expanding Role of Neutrals*, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 29.

Gould,<sup>6</sup> Ted St. Antoine,<sup>7</sup> Ted Jones,<sup>8</sup> and even myself.<sup>9</sup> Finally Dave Feller submitted what many hoped would be the last word by reminding us of the good old days—the “golden age” of arbitration. But while lamenting the passing of that age, Dave realistically, though perhaps grudgingly, acknowledged that there are “great advantages to both unions and employers in attempting to resolve their problems at home, even those involving the external law . . . that ultimately may be subject to final adjudication elsewhere.”<sup>10</sup>

In the meantime, while we were busy debating, the National Labor Relations Board and the courts were busy grinding out decisions which answered some of the questions that we had posed; but their answers raised many new questions.

I need not tell you what you already know, that as a result of those decisions, the debate, at least in its original format, is now over. I don't know who won, or whether there were any winners. But I do know that both the NLRB and the Supreme Court have now addressed many of our questions, and while the answers they have given will require further explication, there are a few observations about which we can now be reasonably certain. As to the law of the National Labor Relations Act<sup>11</sup>—this paper is concerned only with that law, not with EEO<sup>12</sup> or any other law—arbitrators are now expected to apply the law of that statute in an increasing number of situations. Labor arbitration has indeed changed.

The broad changes which I shall discuss have all been dictated by several Labor Board decisions which, at least in major part, have been buttressed by appellate court approval and strong Supreme Court dicta. As a result of these changes many private sector grievance arbitrations will become, or have already

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<sup>6</sup>Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 18 Pa. L. Rev. 40 (1969).

<sup>7</sup>St. Antoine, in *Developments in American and Foreign Arbitration*, *supra* note 1 at 75.

<sup>8</sup>Jones, *The Role of Arbitration in State and National Labor Policy*, in *Arbitration and the Public Interest*, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1971), 42.

<sup>9</sup>Morris, Comment on *The Role of Arbitration in State and National Labor Policy*, *supra* note 8 at 65.

<sup>10</sup>Feller, *The Coming End of Arbitration's Golden Age*, in *Arbitration—1976*, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 97, 125.

<sup>11</sup>29 U.S.C. §§ 151–169.

<sup>12</sup>Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*

become, more complex, more prolonged, more legalized, and probably more formalized. Happily, such changes need not apply to most arbitrations; for during the very period when the Board, with considerable judicial approval, was expanding the arbitrator's role in NLRA-related cases, the Supreme Court was taking pains in other types of cases to reaffirm that the arbitrator's jurisdiction was limited, emphasizing repeatedly that the arbitrator's authority "derives solely from the contract."<sup>13</sup> That strict limitation was noted as recently as a month ago in *Gary McDonald v. City of West Branch*,<sup>14</sup> a case involving assertion of a res judicata or collateral estoppel effect to an arbitration award in a Section 1983<sup>15</sup> employment discrimination case. Denying any such effect, Justice Brennan, writing for a unanimous court, reaffirmed what the Court had previously written in *Alexander v. Gardner-Denver*,<sup>16</sup> that "an arbitrator's expertise pertains primarily to the law of the shop, not the law of the land." Thus, an arbitrator "may not . . . have the expertise required to resolve the complex legal questions that arise in § 1983 actions."<sup>17</sup> The Court has applied the same limitation to an arbitration award which had been interposed to preclude the adjudication of a subsequent suit alleging violation of the minimum wage provisions of the Fair Labor Standards Act.<sup>18</sup>

From such pronouncements one could assume that the Supreme Court might also question the competence of arbitrators to resolve complex legal questions arising under the National Labor Relations Act. But either that is not so, or else the Court has not yet faced up to the issue in a case actually involving NLRB deferral. Although numerous courts of appeals<sup>19</sup> have approved NLRB deferrals to arbitration, the Supreme Court has done so only indirectly. Nevertheless, the frequency and the firmness with which that Court has written on the matter, albeit

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<sup>13</sup>*McDonald v. City of West Branch, Mich.*, 52 USLW 4457, 4459, 115 LRRM 3646 (1984).

<sup>14</sup>*Id.*

<sup>15</sup>42 U.S.C. § 1983.

<sup>16</sup>*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974).

<sup>17</sup>*Supra* note 13 at 4459.

<sup>18</sup>29 U.S.C. § 200 *et seq.* (1938); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 24 WH Cases 1284 (1981).

<sup>19</sup>*E.g.*, *NLRB v. General Warehouse Corp.*, 643 F.2d 965, 1006 LRRM 2729 (3d Cir. 1981); *Machinists Lodge 700 (United Aircraft Corp.) v. NLRB*, 525 F.2d 237, 90 LRRM 2922 (2d Cir. 1975); *Electrical Workers (IBEW) Local 2188 (Western Elec. Co.) v. NLRB*, 494 F.2d 1087, 85 LRRM 2576 (D.C. Cir.), *cert. denied*, 419 U.S. 835, 87 LRRM 1052 (1974); *Ramsey v. NLRB*, 327 F.2d 784, 55 LRRM 2441 (7th Cir.), *cert. denied*, 377 U.S. 1003, 56 LRRM 2544 (1964). See generally Morris, ed., *The Developing Labor Law*, 2d ed. (Washington: BNA Books, 1983), Chap. 20.

in dicta, strongly suggest that it does approve, at least in general, of the proposition that the Board may lawfully defer to the arbitration process, and such approval would seem to include both prearbitration and postarbitration deferral.

As early as ten years ago, in *Arnold v. Carpenter's Dist. Council*,<sup>20</sup> the Court noted that the Board's *Collyer* policy of refraining from exercising its own jurisdiction as to conduct which was "arguably both an unfair labor practice and a contract violation" when voluntary contractual arbitration was available, "harmonizes with Congress' articulated concern," expressed in Section 203(d)<sup>21</sup> of the Taft Hartley Act, "that, '[f]inal 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.'"<sup>22</sup> Section 203(d) was indeed the statutory rationale for the deferral process. That provision, however, needed to be accommodated with language in another provision of the Act, Section 10(a), to the effect that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment . . . established by agreement, law, or otherwise."<sup>23</sup>

As recently as two months ago the Supreme Court again affirmed its general support of the Board's deferral policy. In *NLRB v. City Disposal Systems, Inc.*,<sup>24</sup> the case in which the Court approved the *Interboro*<sup>25</sup> doctrine, the majority opinion, again written by Justice Brennan, relied in part on the observation that "to the extent that the factual issues raised in an unfair labor practice action have been, or can be, addressed through the grievance process, the Board may defer to that process," citing *Collyer*<sup>26</sup> and *Spielberg*.<sup>27</sup>

Although these and other judicial expressions of approval for the deferral process confirm the Board's general jurisdiction to defer to arbitration while staying and yielding its own process, it should not be assumed that all aspects of the Board's deferral standards will pass judicial muster.

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<sup>20</sup>*William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 86 LRRM 2212 (1974).

<sup>21</sup>Labor Management Relations Act, 29 U.S.C. § 173(d).

<sup>22</sup>417 U.S. at 17.

<sup>23</sup>29 U.S.C. § 160(a).

<sup>24</sup>*NLRB v. City Disposal Sys., Inc.*, 115 LRRM 3193, 52 USLW 4360 (1984).

<sup>25</sup>*NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 75 LRRM 2459 (2d Cir. 1970), cert. denied, 402 U.S. 915, 76 LRRM 3027 (1971).

<sup>26</sup>*Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971).

<sup>27</sup>*Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955).

The Board recently issued two decisions, *United Technologies*<sup>28</sup> and *Olin Corp.*,<sup>29</sup> wherein it redefined the circumstances and applicable standards under which it would defer to arbitration. I shall examine those decisions in some detail and try to fathom their meaning and implication, but before doing so I want to briefly review the decisional highlights in the development of the Board's deferral doctrine. That development indicates that at least as to the basic deferral process, the doctrine is well established and is not likely to be invalidated.<sup>30</sup> The open question is not whether deferral as such violates Section 10(a) of the Act, but rather under what circumstances and by what standards may the Board defer to arbitration without abusing its statutory discretion. The debate over the appropriate standards will undoubtedly continue for years to come, and certainly until the next shift in the political makeup of the Board's majority. Not surprisingly, the Board's pendulum-swinging standards in this area, particularly since the *Collyer* decision in 1971, have reflected the changes in the Board's political orientation, i.e., so-called pro-employer Board majorities have tended to defer widely and so-called pro-labor majorities have been more reluctant to defer.

#### A. Decisional Highlights

The major guidelines for this historical review can be found in a few key decisions of the Board.<sup>31</sup> But those guidelines, as well as the Board's new guidelines, which I shall be examining shortly, and also the Board's run-of-the-mill deferral cases, can be deceptive as indicators of what really happens in the deferral process. What the Board does visibly in the area of deferral is but the tip of the iceberg.

The overwhelming bulk of the deferral cases are never officially reported, for they are handled at the administrative, pre-complaint level of the General Counsel's office.<sup>32</sup> Most of those cases are decided by Regional Directors' determinations of whether or not to defer. And in prearbitration deferral, that decision is made in two stages, neither of which is highly visible.

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<sup>28</sup>*United Technologies Corp.*, 268 NLRB No. 83, 115 LRRM 1049 (1984).

<sup>29</sup>268 NLRB No. 86, 115 LRRM 1056 (1984).

<sup>30</sup>See note 19 *supra*.

<sup>31</sup>See generally Morris, ed., *The Developing Labor Law*, 2d ed., *supra* note 19 and p. 914 therein for a listing of literature on the subject.

<sup>32</sup>See note 88 *infra*.

The first stage, which occurs when the unfair labor practice charge is filed, calls for an administrative decision as to whether the case is one which should be deferred to arbitration. The second stage occurs after the arbitration award has been issued. If the General Counsel, acting through the local Regional Director, is of the opinion that the award satisfies the Board's deferral standards, the charge will be dismissed. Deferral will have occurred, but neither the Board nor any court, ordinarily, will have participated in or have reviewed the process. Thus only relatively few cases, those which survive the administrative screening process and for which complaints have been issued, ever reach the Board for decision. I shall have more to say later about the hidden part of the iceberg—the deferral cases for which no complaints have issued.

Now for the decisional highlights. The first case in which the Board articulated deferral standards, though not the first time the Board deferred to arbitration,<sup>33</sup> was *Spielberg Manufacturing Co.*<sup>34</sup> The *Spielberg* standards still form the core of the Board's deferral policy. The Board stated that it would defer to an existing arbitration award where the subject matter was the same as the unfair labor practice being charged, provided three conditions were met: (1) that the arbitration proceedings were fair and regular; (2) that all parties had agreed to be bound by the arbitration award; and (3) that the arbitration decision was not repugnant to the purposes and policies of the Act.

This last feature, the *repugnancy factor*, eventually became the chief area of Board scrutiny and a common rubric used to justify nondeferral. Eventually, however, the Board added what may be considered either a fourth standard or simply a requisite for satisfaction of the repugnancy factor, the third *Spielberg* standard. This additional requirement was announced in the 1963 *Raytheon*<sup>35</sup> decision: a requirement of proof that the issue involved in the unfair labor practice case had actually been presented to and considered by the arbitrator. This feature has

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<sup>33</sup>E.g., *Paramount Pictures, Inc.*, 79 NLRB 557, 22 LRRM 1428 (1948). Cf. *Timken Roller Bearing Co.*, 70 NLRB 500, 18 LRRM 1370 (1946).

<sup>34</sup>*Spielberg Mfg. Co.*, *supra* note 27. See also *International Harvester Co.*, 138 NLRB 923, 51 LRRM 1155 (1962), *enfd sub nom. Ramsey v. NLRB*, *supra* note 19.

<sup>35</sup>*Raytheon Co.*, 140 NLRB 883, 52 LRRM 1129 (1963), *set aside on other grounds*, 326 F.2d 471, 55 LRRM 2101 (1st Cir. 1964). See also *Monsanto Chem. Co.*, 130 NLRB 1097, 47 LRRM 1451 (1961).

been deemed critical by many of the reviewing courts.<sup>36</sup> For example, the Sixth Circuit stated in *NLRB v. Magnetics International, Inc.*:<sup>37</sup>

“[W]e will honor the Board’s decision to defer only when it appears from the arbitrator’s award that the arbitrator considered and clearly decided all unfair labor practice charges. We will not speculate about what the arbitrator must necessarily have considered. . . . [A]ny doubts regarding the propriety of deferral will be resolved against the party urging deferral.”<sup>38</sup>

The *Raytheon* requirement moved to center stage. Indeed, as we shall see when we examine the recent Board decisions, the present Board’s approach to *Raytheon* may prove to be the Achilles’ heel of its new deferral policy.

The Board decided another key deferral decision in 1963: *Dubo Manufacturing Co.*<sup>39</sup> There it held that deferral to arbitration would be appropriate prior to issuance of the arbitrator’s award in those cases where the dispute had already been submitted to the grievance or arbitration machinery and where the matter was then pending; final deferral, however, would depend on whether the eventual award met the *Spielberg* standards.

The next major development, the one which aroused the most opposition concerning basic deferral policy, was contained in *Collyer Insulated Wire*,<sup>40</sup> in which the Board deferred where arbitration had not previously been invoked. The case charged a unilateral change in conditions of employment in violation of Section 8(a)(5)<sup>41</sup> of the Act. The employer’s defense was based on a clause in the collective agreement and on the availability of arbitration to resolve disputes arising under that agreement. Relying on the conditions which it found prevailing, the Board held that it would defer to the existing grievance-arbitration procedure. It retained jurisdiction, however, pending review of

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<sup>36</sup>*NLRB v. Magnetics Int’l, Inc.*, 699 F.2d 806, 112 LRRM 2658 (6th Cir. 1983); *Distillery Workers, Liquor Salesmen’s Local 2 v. NLRB*, 664 F.2d 318, 107 LRRM 3137 (2d Cir. 1981), cert. denied, 110 LRRM 2320 (1982); *NLRB v. General Warehouse Corp.*, supra note 19; *St. Luke’s Memorial Hosp., Inc. v. NLRB*, 623 F.2d 1173, 104 LRRM 2788 (7th Cir. 1980); *Stephenson v. NLRB*, 550 F.2d 535, 94 LRRM 3224 (9th Cir. 1977); *Banyard v. NLRB*, 505 F.2d 342, 87 LRRM 2001 (D.C. Cir. 1974).

<sup>37</sup>*NLRB v. Magnetics Int’l, Inc.*, supra note 36.

<sup>38</sup>*Id.* at 811.

<sup>39</sup>*Dubo Mfg. Corp.*, 142 NLRB 431, 53 LRRM 1070 (1963).

<sup>40</sup>Supra note 26.

<sup>41</sup>29 U.S.C. § 158(a)(5).

the arbitrator's award under *Spielberg* standards. The relevant conditions in *Collyer* were the following: (1) the dispute had arisen "within the confines of a long and productive collective bargaining relationship" and there was no claim of employer enmity to the employees' exercise of protected rights under the Act; (2) the respondent had "credibly asserted its willingness to resort to arbitration" under a clause in the agreement which was broad enough to cover the matter in dispute before the Board; and (3) "[t]he contract and its meaning . . . [lay] at the center of this dispute."<sup>42</sup> This last factor, which I shall refer to as the "congruence factor," has never been listed by the Board as a separate *Spielberg* standard, yet it may be the most critical element in a fair and efficient deferral system. I shall have more to say about this factor in my discussion of the new Board decisions.

The next major area of historical contention involved deferral in cases concerning individual employee rights under the Act, primarily discipline and discharge cases in which unfair labor practices were alleged under Sections 8(a)(1) and (3) and 8(b)(1)(A) and (2).<sup>43</sup> These cases had never been excluded under *Spielberg* and *Dubo*, but *Collyer* had only involved a Section 8(a)(5) refusal to bargain charge. Shortly after deciding *Collyer*, the Board, in *National Radio*,<sup>44</sup> extended its prearbitration deferral policy to cases involving individual rights. Five years later, however, in *General American Transportation Corp.*,<sup>45</sup> the Board reversed *National Radio* and returned to the original *Collyer* dimensions, holding that

"the Board should stay its process in favor of the parties' grievance arbitration machinery only in those situations where the dispute is essentially between the contracting parties and where there is no alleged interference with individual employees' basic rights under Section 7 of the Act."<sup>46</sup>

From that holding until the overruling of *General American Transportation* this year, the Board refrained from applying the prearbitration *Collyer* doctrine to individual employees, reasoning that the determinative issue in such cases is not whether the employer's conduct toward the employee is permitted by the contract, but rather whether the conduct was unlawfully moti-

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<sup>42</sup>*Collyer*, *supra* note 26, 192 NLRB at 842.

<sup>43</sup>29 U.S.C. § 158(a)(1), (3), (b)(1)(A), & (2).

<sup>44</sup>*National Radio Co.*, 198 NLRB 527, 80 LRRM 1718 (1972).

<sup>45</sup>228 NLRB 808, 94 LRRM 1483 (1977).

<sup>46</sup>*Id.*

vated or whether it otherwise violated employee statutory rights. During that period the Board majority held to the view that “an arbitrator’s resolution of the contract issue [would not or should] not dispose of the unfair labor practice allegation.”<sup>47</sup>

This brings me to the final background highlight: the question of how much consideration an arbitrator must give to the underlying unfair labor practice issue in order to meet *Spielberg* and *Raytheon* standards. Some of the Board’s very early decisions<sup>48</sup> suggested that when an employer was charged with unilaterally changing working conditions, it could satisfy its bargaining obligation by indicating a willingness to proceed to arbitration, even though the arbitrator would only rule on whether the conduct violated the contract. This was the beginning of what I like to call the “have-your-cake-and-eat-it-too” syndrome. The employer gets the benefit of arbitration with an arbitrator’s finding of no violation of the contract because the matter was not covered by the contract, but at the same time the employer avoids the Board’s jurisdiction even though the arbitrator has not ruled on the unfair labor practice issue. As the deferral process matured, however, it became apparent that if deferral was not to be a sham and a means to avoid statutory obligations, the arbitrator must address the unfair labor practice issue in a meaningful way. This result is more easily achieved when the unfair labor practice issue and the contractual issue are virtually the same, or at least when the unfair labor practice issue is clearly embraced by the contractual issue. In many cases, however, such congruence does not exist, or else the arbitrator avoids consideration of the unfair labor practice issue either because he has not been made aware of it or because he prefers to leave such matters to the Labor Board.

The 1974 Nixon Labor Board issued the ultimate cake-and-eat-it-too decision. Overruling a substantial line of earlier cases,<sup>49</sup> it held in *Electronic Reproduction Service*<sup>50</sup> that before deferral would be denied, a party seeking correction of an alleged unfair labor practice would have the burden of showing

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<sup>47</sup>*Id.* at 811 (concurring opinion of Chairman Murphy).

<sup>48</sup>*McDonnell Aircraft Corp.*, 109 NLRB 930, 34 LRRM 1472 (1954); *Consolidated Aircraft Corp.*, 47 NLRB 694, 12 LRRM 44 (1943); *enfd as modified*, 141 F.2d 785, 14 LRRM 533 (9th Cir. 1944); *Crown Zellerbach Corp.*, 95 NLRB 753, 28 LRRM 1357 (1951).

<sup>49</sup>*Yorgia Trucking, Inc.*, 197 NLRB 928, 80 LRRM 1498 (1972); *Airco Indus. Gases*, 195 NLRB 676, 79 LRRM 1497 (1972). See also *John Sexton & Co.*, 213 NLRB 794, 87 LRRM 1241 (1974).

<sup>50</sup>*Electronic Reproduction Serv. Corp.*, 213 NLRB 758, 87 LRRM 1211 (1974).

that the arbitrator either did not or could not have decided the unfair labor practice issue. Thus, if there was an "opportunity"<sup>51</sup> for the arbitrator to decide the statutory issue, regardless of whether the matter was presented to him or whether he availed himself of that opportunity, the Board would defer to his award unless the arbitrator had expressly declined to rule on the statutory issue or the parties by agreement had excluded that issue from arbitration. *Electronic Reproduction* fared badly in the appellate courts,<sup>52</sup> for the Board's reliance on a mere presumption that an arbitrator had decided the underlying unfair labor practice, when there was no evidence that he or she had actually done so, was deemed an abdication of the Board's responsibility under the Act, hence an abuse of discretion.

Predictably, the Carter Board overruled *Electronic Reproduction*. In *Suburban Motor Freight*,<sup>53</sup> decided in 1980, the Board ruled that it would not defer to an arbitration award unless the unfair labor practice issue had been "presented to and considered by"<sup>54</sup> the arbitrator and the award indicated that the arbitrator had ruled on the statutory issue. In all such cases, the burden of proof falls on the party seeking deferral.

### B. The New Standards

Surprise, surprise: When the Reagan appointees achieved a majority on the Board, *Suburban Motor Freight* was overruled, as was also *General American Transportation*. In *United Technologies*<sup>55</sup> the Board returned to the rule of *National Radio*, applying the *Collyer* deferral doctrine to individual employee unfair labor practice cases. Although it reversed *Suburban Motor Freight* in the *Olin Corporation*<sup>56</sup> case, it did not directly embrace the discredited *Electronic Reproduction* doctrine. Instead, it announced a new formula, which, according to dissenting Board Member

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<sup>51</sup>*Id.* at 764.

<sup>52</sup>*Arthur N. Stephenson v. NLRB*, 550 F.2d 535, 94 LRRM 3224 (1977). *Cf. NLRB v. Magnetics Int'l*, *supra* note 36; *NLRB v. Motor Convoy, Inc.*, 673 F.2d 734, 109 LRRM 3201 (4th Cir. 1982); *Ad Art, Inc. v. NLRB*, 645 F.2d 669, 107 LRRM 3292 (9th Cir. 1980); *St. Luke's Memorial Hosp. v. NLRB*, *supra* note 36; *Banyard v. NLRB*, 505 F.2d 342, 87 LRRM 2001 (1974).

<sup>53</sup>247 NLRB 146, 103 LRRM 113 (1980).

<sup>54</sup>*Id.* at 147. The *Suburban Motor Freight* rule was reaffirmed in *Propoco, Inc.*, 263 NLRB No. 34, 110 LRRM 1496 (1982), *enfd with unpublished opinion*, Case No. 83-4058 (2d Cir. 1983).

<sup>55</sup>*Supra* note 28.

<sup>56</sup>*Supra* note 29.

Zimmerman, would achieve the same result, for “the Board [would] now defer to an arbitrator’s award based on a presumption that an unfair labor practice issue has been resolved, without actually knowing if the issue was presented to or considered by the arbitrator.”<sup>57</sup>

What the majority actually said was that henceforth the Board would use a two-tiered approach but that the burden of proof as to nonadherence to these standards would fall upon the General Counsel. They stated that the Board

“would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.”<sup>58</sup>

Regarding burden of proof, the majority said that henceforth the Board

“would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the [Board’s] standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award.”<sup>59</sup>

Such a shifting of burden of proof may indeed operate in most cases as a pure presumption that the arbitrator has considered and decided the unfair labor practice issue even when he or she has not. As Member Zimmerman noted, there is no sound procedural basis for imposing on the General Counsel, the one party to the litigation “who is not in privity through a collective bargaining agreement,”<sup>60</sup> the responsibility of producing the negative evidence required for assertion of Board jurisdiction. *Suburban Motor Freight* had treated the deferral issue as an affirmative defense and put the burden of showing that the arbitrator had considered the statutory issues on the party raising that defense. The new Board has reversed that process. In my view, this is the most vulnerable aspect of its new standards.

A strong case can indeed be made for the deferral process in general: (1) that it advances the congressional purpose embodied in the statute of furthering the process of collective bargain-

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<sup>57</sup>*United Technologies Corp.*, *supra* note 28, slip op. at 20.

<sup>58</sup>*Id.* at 5.

<sup>59</sup>*Id.* at 6.

<sup>60</sup>*Id.* at 23.

ing, (2) that it avoids determining the same dispute in two different forums, (3) that it provides a more expeditious means for dispute resolution by a method agreed upon by the parties, and (4) that it allows the Board to concentrate more of its limited resources in areas where collective bargaining has not been established—such as in protecting the rights of individuals to organize (or to refrain from organizing) and in policing the initiation of the collective bargaining obligation. The deferral process, when fairly applied and carefully reviewed, can certainly provide meaningful expression to the congressional preference for final adjustment by arbitration pursuant to voluntary agreement of the parties.<sup>61</sup> But this beneficial function depends on the existence of a fragile accommodation between the Board's process and the arbitration process. It is when the Board shifts a substantial part of its own statutory jurisdiction to arbitrators without guaranteeing that the particular arbitration environment is compatible or that the necessary facts and issues have been considered and passed upon by the arbitrator, that the Board abuses its discretion. If I am correct in this appraisal, the Board's latest reversal of the burden of proof will not survive on judicial review, in which event the Board may be forced to return essentially to *Raytheon-Suburban Motor Freight* standards, except perhaps where it can be shown that the charging party, in order to obtain two bites at the apple, has deliberately withheld presentation of facts and issues which the arbitrator would need to decide the unfair labor practice aspect of the case. Even in that situation, however, if individual rights are involved, a union's conduct in presenting the arbitration case may not necessarily be binding on the grievant-employee as a waiver of his or her statutory rights.

Aside from the burden-of-proof question, is there anything else in the Board's new standards which might be judicially vulnerable? It may be too early to answer that question with any certainty, although the answer will probably depend on how the Board applies its two-tiered approach in specific cases.<sup>62</sup> How it

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<sup>61</sup>Sec. 203(d) of the Act, *supra* note 21. See also *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957) and *Steelworkers Trilogy: Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

<sup>62</sup>Two post-*Olin* decisions, *John Morrell & Co.*, 270 NLRB No. 1, 116 LRRM 1171 (1984), and *Louis G. Freeman Co.*, 270 NLRB No. 7 (1984), provide no additional clarification. The *Morrell* case was simply another clear example of nondeferral where the

applied those standards in the case before it actually tells us nothing, for all the decision-makers involved in the *Olin* case agreed that the employer had not acted improperly in discharging the grievant. The new Board majority had thus chosen as their herald to announce the new standards a case in which deferral would have occurred anyway, even under the *Suburban Motor Freight* test; consequently, Member Zimmerman dissented only as to the new rules which the majority was promulgating, not as to the actual holding in the case. The facts in *Olin* are worth noting, however, because they illustrate the manner in which an unfair labor practice issue was presented to an arbitrator in a "just cause" discharge grievance and how the resulting award was arrived at and evaluated for deferral purposes. The grievant, the local union president, had been discharged for threatening a sick-out, for actually participating in a sick-out which involved 43 employees, and for failing to prevent that sick-out. The arbitrator found that the grievant indeed had "partially caused" the sick-out and had "failed to try to stop it until after it occurred."<sup>63</sup> Such conduct was held to be a violation of a specific clause in the contract which provided that officers and representatives of the union will "not permit its members to cause any striking, slowdown or stoppage . . . ."<sup>64</sup> The Administrative Law Judge and all the Board Members agreed that this clause satisfied the waiver requirements of the *Metropolitan Edison*<sup>65</sup> case, where the Supreme Court had held that absent a clear and unmistakable waiver in a collective bargaining agreement an employer cannot impose more severe discipline on union stewards and other officials than upon rank-and-file employees without violating Sections 8(a)(1) and (3) of the Act. In the *Olin* case, however, although the Arbitrator did not specifically refer to the statutory issue, his opinion did include the statement that he found "no evidence that the Company discharged the grievant for his legitimate Union activities."<sup>66</sup> Although the Board's

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arbitrator had failed to apply the rule of *Metropolitan Edison Co. v. NLRB*, 112 LRRM 3265, 51 USLW 4350 (1983) (see discussion *infra* at note 65). In the *Freeman* case, the Board deferred where the arbitrator had explicitly considered facts involved in the alleged unfair labor practice and concluded that the grievants' conduct fell outside the protection of the Act. The Board held that conclusion to be sufficient because "the General Counsel failed to show that the arbitrator did not consider the statutory issue or that his award is clearly repugnant to the purposes and policies of the Act." Slip op. at 6.

<sup>63</sup>*Supra* note 29, slip op., ALJ Decision, JD-184-83, at 6.

<sup>64</sup>*Id.* Slip op. at 11.

<sup>65</sup>*Supra* note 62.

<sup>66</sup>*Supra* note 63 at 11.

ALJ upheld the discharge, he refused to defer to the arbitration award as such because he did not consider the arbitrator "competent to decide the unfair labor practice issue" for he had demonstrated "no cognizance of the statutory right and waiver issues implicated by the charge."<sup>67</sup> Member Zimmerman agreed with the Board majority that the ALJ should have deferred to the award, for Zimmerman thought that it fully complied with *Suburban Motor Freight* standards: The grievant had been discharged for violating a contractual provision which constituted an adequate waiver under *Metropolitan Edison*,<sup>68</sup> and all the necessary facts were before the arbitrator for he had expressly found that the grievant had not been discharged for his legitimate union activities; the arbitrator had thus been "presented with, considered, and ruled on the statutory issue."<sup>69</sup>

Although the contractual issue in *Olin* was sufficiently congruent with the statutory issue to meet established deferral requirements, the majority's announcement of the new standards contained no specific reference to the congruency factor, which factor is really the central problem in the deferral area. The standards announced in *Olin* merely required that the contractual issue be "factually parallel to the unfair labor practice issue."<sup>70</sup> But it does not necessarily follow that merely because the same facts are involved, the contractual issue embraces or is the same as the statutory issue. Very often it is, and in such cases deferral makes good sense. The Ninth Circuit, in its second and recent *Servair*<sup>71</sup> decision perceptively distinguished between two extreme types of cases which may arise in a deferral setting. That court noted that "[t]he 'clearly decided' criterion appears relevant to the deferral analysis only to the extent that it assists in deciding whether the arbitrator's decision is repugnant to the Act."<sup>72</sup> The court then commented on two situations, illustrating that valid deferral may depend upon the degree of congruence existing between the contractual and statutory issues. It said that

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<sup>67</sup>*Id.*

<sup>68</sup>*Supra* note 62.

<sup>69</sup>*Supra* note 54.

<sup>70</sup>*Supra* note 29, slip op. at 5.

<sup>71</sup>*Servair, Inc. v. NLRB*, 726 F.2d 1435, 115 LRRM 3067 (9th Cir. 1984), *enfg* 265 NLRB No. 114, 111 LRRM 1438 (1982); *see also* 236 NLRB 1278, 99 LRRM 1259 (1978), *enfd in part and remanded*, 607 F.2d 258, 102 LRRM 2705 (9th Cir. 1979), *opinion withdrawn and case remanded*, 624 F.2d 92, 105 LRRM 2649 (9th Cir. 1980).

<sup>72</sup>115 LRRM at 3071.

“[w]here the statutory issue is primarily factual or contractual, an arbitrator is in as good, if not better, position than the Board to resolve the issue. . . . [And] [d]eferral in such circumstances . . . may serve the purposes of the Act even where the arbitrator does not explicitly address the statutory issue. . . . Accordingly, where the issue is not clearly decided, deferral may still be appropriate if the resolution of the statutory issue is dependent upon the resolution of the contractual issue.”<sup>73</sup>

Because the arbitration issues in the *Olin* case were both factual and contractual, they satisfied the Ninth Circuit’s requirement for valid deferral. The second type of case noted by that court was the opposite situation: where “resolution of the statutory issue is not dependent on resolution of the contractual issue.”<sup>74</sup> In such a case, it would be proper for the Board to refuse to defer to the arbitrator’s award.

There is yet another type of situation which often arises in potential deferral cases. That is the situation where the unfair labor practice issue is embedded in contractual provisions but not obviously apparent. These are cases where the coverage and meaning of the contractual provisions might include the legal requirements of pertinent statutory rights or duties, but such interpretation may not be known until after the arbitrator has analyzed and decided the case and written the award. It is in such cases that arbitrators have a special obligation to articulate their consideration of the statutory issue. And it is in such cases that the Board should have a special duty to provide clear guidelines and also to maintain adequate oversight jurisdiction over the arbitral results. But the *Olin* majority did not provide any clear guidelines that would inform the collective bargaining parties or their arbitrators—or for that matter even the General Counsel—of the kinds of situations for which deferral would be deemed appropriate.

The *Olin* majority seemed satisfied to require only “factual” parallelism, which is not enough. For example, in the *Raytheon*<sup>75</sup> case the arbitrator ruled solely on a contractual issue, whether the grievants had violated a no-strike provision in the agreement. He held that they had and therefore upheld their discharges. But the Board refused to defer to his award because he

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<sup>73</sup>*Ibid.*

<sup>74</sup>*Ibid.*

<sup>75</sup>*Supra* note 35.

had not resolved, and perhaps could not resolve,<sup>76</sup> the unfair labor practice issue, which was whether the employer's assigned cause for discharge had been merely a pretext for anti-union motivation. In my view, an arbitrator in such a case could normally resolve that issue, for "just cause" (or similar requirement) for discharge implies a proper cause for discharge, so that if the real cause is an unlawful motive rather than the pretextual assigned cause, the contractual "cause" standard has not been met. *Raytheon* thus illustrated a not uncommon situation: an unfair labor practice issue arising under an ordinary contract clause where the issue, if it is recognized by the arbitrator, can and should be decided by him. If the arbitrator, however, fails to recognize the issue, or otherwise fails to consider and resolve it, under *Suburban* the Board would not have deferred. Under *Electronic Reproduction* the Board would have deferred because the arbitrator had the "opportunity" to decide the issue. Under *Olin*, it is not clear what the Board would do. If it were to view the facts as sufficiently parallel it would defer; and even if the facts were not parallel, or if the arbitrator simply ignored the statutory issues, it might still defer because of the presumption created by its shifting to the General Counsel the burden of proving the negative proposition that the arbitrator did not consider the statutory issue. Unless the arbitrator's award is crystal clear on the matter of nonconsideration, deferral under the Board's new standard is likely to occur, and the charging party will have been denied consideration of a statutory issue and therefore, in some cases, an important statutory right. The Board has thus imposed an awesome responsibility on the arbitrator.

Viewing the broader problem of congruency, where propriety of deferral should depend on either a similarity of issues or on an implicit inclusion of the statutory issue within the interpretive framework of the contractual issue, the *Olin* standards are sorely deficient. It is true that the majority in *Olin* said that "differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is 'clearly repugnant' to the Act." But rather than stress the importance of congruency in the weighing process, the majority

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<sup>76</sup>The Board noted that the arbitrator could not have received evidence of the employer's union animus against grievants "in the frame of reference in which the arbitration proceeding was conducted." 140 NLRB at 885.

emphasized that they would not require an arbitrator's award to be totally consistent with Board precedent." It was sufficient if the award is not "palpably wrong, i.e., . . . not susceptible to an interpretation consistent with the Act,"<sup>77</sup> or, to use the formulations of two appellate decisions which were expressly approved<sup>78</sup> by the *Olin* majority, "[i]f the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, . . . the award is [not] 'clearly repugnant' to the Act,"<sup>79</sup> or "an arbitral result [can] be sustained which is only arguably correct and which would be decided differently in a trial de novo."<sup>80</sup> It is unfortunate that the *Olin* majority did not readdress and reaffirm the congruency factor, which the Board had emphasized in the original *Collyer* decision, where deferral had been deemed appropriate because there the alleged unfair labor practices were intimately entwined with matters of contractual interpretation.<sup>81</sup>

The new Board majority has certainly indicated that henceforth NLRB deferral to the arbitration process will be the standard procedure; nondeferral will be the rare exception. Whether this marks a return to the have-your-cake-and-eat-it-too syndrome will depend primarily on what arbitrators do with the authority which has been thrust upon them. Before examining some of the possibilities ahead, I want to remind you again of the huge deferral iceberg which, though virtually unseen, represents the bulk of the deferred cases. As previously noted, most of the deferral decisions are made in the NLRB regional offices. Presumably the new standards will mean an even greater increase in the number of deferrals at the precomplaint level, and as to each of those cases, where no complaint issues there can be no appeal, either to the Board or to the courts.<sup>82</sup> The

<sup>77</sup>*Supra* note 29, slip op. at 5.

<sup>78</sup>*Id.* at 8, n.11.

<sup>79</sup>*Douglas Aircraft Co. v. NLRB*, 609 F.2d 352, 354, 102 LRRM 2811 (9th Cir. 1979).

<sup>80</sup>*NLRB v. Pincus Bros.*, 620 F.2d 367, 374, 104 LRRM 2001 (3d Cir. 1980).

<sup>81</sup>*Supra* note 26 at 842. See the D.C. Court of Appeals opinion in *Banyard v. NLRB*, *supra* note 52, where the court stated that its "approval of the Board's deferral under *Spielberg* of statutory issues to arbitral resolution along with contractual issues is conditioned upon the resolution by the arbitral tribunal of *congruent* statutory and contractual issues. . . . If [the arbitral tribunal] applied to the issue before it a standard correct under the contract but not under judicial interpretation of [the statute], then it cannot be said that the statutory issue was decided. . . . In that event the Board's abstention goes beyond deferral and approaches abdication." 50 F.2d 348.

<sup>82</sup>In *Vaca v. Sipes*, 386 U.S. 171, 182, 64 LRRM 2369 (1967), the Supreme Court acknowledged that "the General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint." See also *George Banta Co. v. NLRB*, 626 F.2d 354, 104 LRRM 3103 (4th Cir. 1980); *Seafarers Union v. NLRB*, 88 LRRM 2629 (D.C. Cir. 1975), (per curiam).

arbitrator will be acting alone, which was not an unsatisfactory situation under the *Steelworker Trilogy*<sup>83</sup>-*Enterprise Wheel*<sup>84</sup> doctrine where the arbitrator was interpreting only a collective bargaining contract, for he was the parties' chosen reader<sup>85</sup> or proctor<sup>86</sup> for that task. But when he is expected to apply the law of the National Labor Relations Act, his role assumes new dimensions for which there may also be new grounds for judicial review. I shall address that possibility in a few moments.

First, however, I want to note some revealing statistics which Member Zimmerman included in his *Olin* dissent. He stated:

"The Agency's own statistics, officially maintained by the Data Systems Branch of our Division of Administration, indicate that at the end of December 1983 there were 2185 pending unfair labor practice cases which had been deferred to arbitration machinery under *Dubo* . . . or *Collyer*. . . . Between 1 October 1981 and the end of December 1983, in excess of 3800 cases were deferred under *Collyer* and *Dubo*. During the same period, the General Counsel's application of *Suburban Motor Freight* and *Spielberg* standards resulted in the issuance of complaints in only 163 previously deferred cases. In sharp contrast, over 1700 previously deferred cases were dismissed (357), withdrawn (1159),<sup>87</sup> or settled (62)."<sup>88</sup>

If those statistics are accurate, and I have no reason to believe otherwise, 22 of every 23 deferral-type cases were decided at the precomplaint stage during the 27 months noted. The unseen and unreviewable iceberg was indeed huge in size. Two Members<sup>89</sup> of the *Olin* majority questioned Zimmerman's statistics, which simply indicates the appalling fact that the Board itself—as well as the general public—has no way of knowing with certainty what is really happening in the deferral process. That lack of information leads me to the first of a series of observations and recommendations that seem appropriate in view of the responsibility which arbitrators now have under the Board's

<sup>83</sup>*Supra* note 61.

<sup>84</sup>*Id.*

<sup>85</sup>St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 Mich. L. Rev. 1137, 1140 (1977).

<sup>86</sup>*Alexander v. Gardner Denver*, *supra* note 16 at 53. See also Morris, *Twenty Years of Trilogy: A Celebration*, in *Decisional Thinking of Arbitrators and Judges*, Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1981), 331, 347.

<sup>87</sup>Footnote 12 in original: "Cases classified as withdrawn include those numerous cases in which the General Counsel has formally notified the charging party that the case will be dismissed if not withdrawn."

<sup>88</sup>*Supra* note 29, slip op. at 25.

<sup>89</sup>Chairman Dotson and Member Hunter, *id.* at 7, n.9.

deferral policy—a responsibility which was substantial under *Suburban* standards but which under *Olin* now assumes even greater implications for its possible effect on national labor policy.

### C. Observations and Recommendations

1. My *first* observation and recommendation is that because the industrial relations community needs to know how arbitrators have decided the cases to which the Board has deferred, especially those where the unfair labor practice charge has been dismissed and no complaint ever issues, the awards in such cases should be readily and generally available. Such awards, once they have been submitted to the Board and relied upon by the General Counsel as basis for dismissal of the charge, should be clearly disclosable under the Freedom of Information Act (FOIA).<sup>90</sup> The Supreme Court held in the 1975 *Sears Roebuck*<sup>91</sup> case that because dismissal of a charge and refusal to issue a complaint constitutes final agency action, advice and appeals memoranda of the General Counsel in such cases are “final opinions made in the adjudication of cases”<sup>92</sup> within the meaning of the FOIA and are thus required to be made available to the public and indexed. The same conclusion should be applicable to arbitration awards that provide the basis for dismissal of charges. The Board itself should make these awards and the awards which are involved in the litigated unfair labor practice cases available on a routine basis, preferably by publication. Additionally, and perhaps mainly because I have little faith that the Board will publish these decisions in the foreseeable future, I call upon all the labor relations publishing firms to request, index, and publish these arbitration decisions on a regular basis. Furthermore, such decisions would seem to be clearly exempted from the confidentiality requirements of the Academy’s Code of Professional Responsibility.<sup>93</sup> Regardless of the intent of the parties, publication would be proper under Par. C.1 of the Code, which is applicable where “disclosure is required or permitted by law.”

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<sup>90</sup>5 U.S.C. § 700 *et seq.* (1976).

<sup>91</sup>*NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 89 LRRM 2001 (1975).

<sup>92</sup>*Id.* at 158.

<sup>93</sup>Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, of the National Academy of Arbitrators, American Arbitration Ass’n., & Federal Mediation & Conciliation Serv. (1974).

2. My *second* observation concerns the effect which deferral is having and will continue to have on arbitration procedure and process. We shall likely see a dramatic increase in the number of cases containing statutory NLRA issues—not only because of the now greater awareness of parties and arbitrators to arbitrators' responsibilities under the deferral doctrine, but also because of such decisions as the Supreme Court's *NLRB v. Weingarten, Inc.*,<sup>94</sup> *Metropolitan Edison Co. v. NLRB*,<sup>95</sup> and *NLRB v. City Disposal Systems*,<sup>96</sup> and the Board's *Milwaukee Spring*<sup>97</sup> and *Otis Elevator*<sup>98</sup> cases. Under *Weingarten*, arbitrators must determine in a variety of situations involving discipline the effect to be given the Court's requirement that union representation be made available, on request of the employee, when he or she is being interrogated and "reasonably believes the investigation will result in disciplinary action."<sup>99</sup> Under *Metropolitan Edison*, as previously noted, the Court held that an employer cannot discipline union officials more severely than other employees for participating in an unlawful work stoppage, unless the union has waived its officials' Section 7 rights; but such waiver will not be found unless it is "clear and unmistakable."<sup>100</sup> In *City Disposal* the Court affirmed the "'*Interboro*'<sup>101</sup> doctrine,' under which an individual's assertion of a right grounded in a collective-bargaining agreement is recognized as 'concerted activity' and therefore accorded the protection of § 7."<sup>102</sup> And because of *Milwaukee Spring* and *Otis Elevator*, more unions may turn to the arbitration process rather than to the Board to seek contractual enforcement to restrain removal of work from the bargaining unit; and inevitably in some of those cases the Board will have to decide whether to defer to the arbitrators' decisions.<sup>103</sup>

<sup>94</sup>*NLRB v. Weingarten, Inc.*, 420 U.S. 251, 88 LRRM 2689 (1975).

<sup>95</sup>*Metropolitan Edison Co.*, *supra* note 62.

<sup>96</sup>*NLRB v. City Disposal Systems, Inc.*, *supra* note 24.

<sup>97</sup>*Milwaukee Spring Div. of Illinois Coil Spring Co.*, 268 NLRB No. 87, 115 LRRM 1065 (1984).

<sup>98</sup>*Otis Elevator Co., Subsidiary of United Technologies*, 269 NLRB No. 162, 116 LRRM 1075 (1984). *Cf. NLRB v. First National Maintenance Corp.*, 452 U.S. 666, 107 LRRM 2705 (1981).

<sup>99</sup>*Supra* note 94 at 257.

<sup>100</sup>112 LRRM at 3271.

<sup>101</sup>*Interboro Contractors, Inc.*, 157 NLRB 1295, 61 LRRM 1537 (1966), *enfd.*, 388 F.2d 495, 67 LRRM 2083 (2d Cir. 1967).

<sup>102</sup>*City Disposal Systems, Inc.*, *supra* note 24, 115 LRRM at 3196.

<sup>103</sup>The Board majority in *Olin Corp.*, *supra* note 29, criticized earlier Board refusals to defer as "over zealous dissection of [arbitrator's] opinions," slip op. at 6, "misdirected zeal," *id.*, and more "whim" than "policy," *id.* at 9. According to the *Olin* majority, the "arbitrator's interpretation" of the language of the contract was "what the parties . . .

With this anticipated increase in statutory-issue arbitration, arbitration cases will become divided naturally into two major types. The majority will probably continue to be relatively simple, traditional, contractual interpretation cases. The other type will be the growing number of cases containing one or more unfair labor practice issues. Such cases will almost always require a transcript, have attorney-representation on both sides, and elaborate briefs will usually be submitted to and welcomed by the arbitrator. Such cases will take longer to hear, and the evidence required to satisfy NLRB standards will be more detailed and extensive than that submitted in the usual arbitration hearing. These cases will thus tend to be more formal and trial-like, and some of the arbitral remedies will be nontraditional.<sup>104</sup> These longer and more complex cases will naturally also be more expensive. The parties—unions in particular—often complain about the high cost of arbitration, and some union representatives have complained that the cost of arbitration is greater than the cost of filing a case with the NLRB, where the General Counsel's office provides the legal representation. Although I can sympathize with such complaints, I can also recognize some important advantages of the Board deferring to arbitration in proper cases, one of which is that arbitrators can and do complete their cases many times more quickly than the Labor Board. What real advantage can there be to the collective bargaining system from disposition by a Board which typically requires several years to reach a final decision?<sup>105</sup> Arbitration, though more expensive, can be more efficient and more effective.

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have bargained for and . . . what national labor policy promotes." *Id.* at 12. Presumably the Board will apply the same deference to all arbitral interpretation of contractual clauses regardless of the subject matter of the clauses, although problems could arise as to clauses involving permissive bargaining subjects, even though such clauses could be enforced by arbitration pursuant to § 301(a) of the LMRA, 29 U.S.C. § 185(a). *Cf. Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17, 49 LRRM 2670 (1962); *Mailers Local 92 v. Chattanooga News-Free Press Co.*, 524 F.2d 1305, 90 LRRM 3000 (6th Cir. 1975).

<sup>104</sup>For an example of an arbitration award containing injunctive relief restraining the shutting down of a plant and the transfer of work to another location, see *Joseph Schlitz Brewing Co.*, 58 LA 653 (J. Lande 1972). For an example of an award providing for the conditional reopening of a plant which had been closed, see *Pabst Brewing Co.*, 78 LA 772 (S. Wolff, 1982).

<sup>105</sup>For fiscal year ending Sept. 30, 1981, the median number of days required from filing of unfair labor practice charge to issuance of Board decision was 490 days. The median age of cases pending Board decision on Sept. 30, 1981, was 534 days. (The Board does not publish figures showing *average* length of such time periods. Average periods would greatly exceed the median periods.) 46th Annual Report, National Labor Relations Board (1982), 228, Table 23. These periods do not include time elapsed from Board decision to date of compliance where unfair labor practices are found.

I am not unmindful, however, of the inadequacy of the arbitration process in certain types of cases. For example, as Member Zimmerman noted in his dissent in *United Technologies*,

“A union, without breaching its duty of fair representation, might not vigorously support an employee’s claim in arbitration inasmuch as the union, in balancing individual and collective interests, might trade off an employee’s statutory right in favor of some other benefits for employees in the bargaining unit as a whole.”<sup>106</sup>

It is thus absolutely essential that both the General Counsel and the Board screen carefully all arbitration cases presented to them for deferral. The Board must not neglect its oversight jurisdiction, particularly in cases involving individual employee rights.<sup>107</sup> But I cannot fully agree with Zimmerman’s blanket and negative appraisal that “[t]he arbitration process is not designed to and is not particularly adept at protecting employee statutory or public rights.”<sup>108</sup> Compared to what? Compared to the National Labor Relations Board the arbitration process has an enviable record of achievement;<sup>109</sup> provided the statutory rights in issue are congruent with contractual rights, arbitrators are fully capable of protecting employee rights with a fair, effective, and relatively speedy process.<sup>110</sup> If the same could be said

<sup>106</sup>*Supra* note 28, slip op. at 20.

<sup>107</sup>Although I am not in agreement with the absolute prohibition on deferral for individual rights cases advocated by Member Zimmerman (and former Members Fanning, Jenkins, and Murphy), the argument for that position does support the need for strict and alert oversight. See Zimmerman’s dissent in *United Technologies*, *supra* note 28, slip op. at 13–22.

<sup>108</sup>*Supra* note 28, slip op. at 20.

<sup>109</sup>Relying on published NLRB data, Freeman and Medoff made the following observation:

“Beginning in the 1960s the relative number of illegal activities committed by management, after declining for years, rose at phenomenal rates. From 1960 to 1980 the number of charges of all employer unfair labor practices rose fourfold; the number of charges involving a firing for union activity rose threefold; and the number of workers awarded back pay or ordered reinstated to their jobs rose fivefold. By contrast, the number of NLRB elections scarcely changed in the same period. Despite increasingly sophisticated methods for disguising the cause of such firings, more employers were judged guilty of firing workers for union activity in 1980 than ever before. To obtain an indication of the risk faced by workers desiring a union, one may divide the number of persons fired for union activity in 1980 by the number of persons who voted for a union in elections. The result is remarkable: one in twenty workers who favored the union got fired. Assuming that the vast bulk of union supporters are relatively inactive, the likelihood that an outspoken worker, exercising his or her legal rights under the Taft-Hartley Act, gets fired for union activity is, by these data, extraordinarily high. Put differently, there is roughly one case of illegal discharge deemed meritorious by the NLRB for every NLRB representation election.”

Freeman & Medoff, *What Do Unions Do?* (New York: Basic Books, Inc., 1984), 232–33.

<sup>110</sup>I readily concede that this does not always occur, either by reason of inadequate presentation of the case by one or both of the parties, or by some failure on the part of the arbitrator. For such cases it is essential that the Board maintain vigilant oversight of the

of the Labor Board's process, a stronger case could be made for the Board's assertion of exclusive jurisdiction over cases involving individual Section 7 rights.

Until the Board improves its record of protecting employees' individual rights, however, the burden of providing that protection will fall increasingly on arbitrators, at least where grievance-arbitration machinery exists. And inasmuch as the present Board has embarked on a policy of providing only minimal oversight, arbitrators, on their own, out of a sense of obligation to their profession and to the parties whom they serve, have a duty to educate themselves as to any NLRA issues which may arise in their cases. Where there exists the necessary congruence between statutory and contractual issues, an arbitrator should boldly but sensitively consider any statutory issue properly presented. For an arbitrator to do otherwise—unless he or she has been expressly instructed by the parties to refrain from deciding the statutory issue—could mean omitting consideration of vital, albeit implied, terms of the contract.

3. How effective arbitration can be in making statutory determinations may depend on how the parties and their arbitrators treat the statutory issues. This brings me to my *third* set of observations and recommendations. If the parties to collective bargaining agreements and their arbitrators are to intelligently assume the responsibility which the Board's deferral policy entails, certain improvements in channels of communication need to occur.

a. The Board's deferral letter should clearly apprise the parties and their arbitrator of the Board's general deferral policy, i.e., what will be expected of the arbitrator;<sup>111</sup> and a copy of that letter should be sent to the arbitrator.<sup>112</sup>

b. When any party anticipates the presence of an unfair labor practice issue in an arbitration case, ample notice to that effect

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process pursuant to *Spielberg* standards, particularly regarding the requirement that the "proceedings be fair and regular" and also the general requirement that the award not be repugnant to the purpose and policies of the Act. See discussion in Morris, ed., *Developing Labor Law*, 2d ed., *supra* note 19 at 966–68 and 970–74. For a general review of the arbitration process in discipline and discharge cases, see Zirkel, *A Profile of Grievance Arbitration Cases*, 38 *Arbitration J.* 35 (March 1983).

<sup>111</sup>See Shank, "Deferral to Arbitration: Accommodation of Competing Statutory Policies" (Unpublished LL.M. Thesis, Southern Methodist University School of Law, 1984), 78.

<sup>112</sup>Under the Board's present practice, an arbitrator may hear and decide a case without knowing of the Board's deferral or that the case contains an unfair labor practice issue.

should be given so that the selecting agencies, the American Arbitration Association and the Federal Mediation and Conciliation Service, can pass that information on to the arbitrator, either before or after selection. And any arbitrator who does not consider himself or herself qualified to rule on an unfair labor practice issue, or prefers not to, should decline to be considered for appointment or should withdraw prior to acceptance of such an appointment. Because of the statutory responsibilities which arbitrators must now shoulder under the deferral doctrine, the arbitration process will not be well served by arbitrators who are uncomfortable handling National Labor Relations Act issues. Most arbitrators, however, will probably rise to the occasion, especially with the assistance of comprehensive briefs—which they have a right to demand whenever issues are complex and unfamiliar.<sup>113</sup>

4. My *fourth* observation concerns the development of either a new or clarified standard for judicial review of arbitration awards that treat statutory issues, a standard to cover not only NLRB deferred cases but also cases involving unfair labor practices where no deferral has occurred. For such cases the *Enterprise Wheel*<sup>114</sup> standard, which simply requires that the award draw its “essence” from the collective bargaining agreement and that the arbitrator not dispense his “own brand of industrial justice,”<sup>115</sup> may no longer suffice, at least not in such simplistic form. Indeed, there is already some judicial recognition, though without precise articulation, that the arbitrator’s duty may be altered by the presence of statutory issues. The Supreme Court in *Gardner-Denver*<sup>116</sup> stressed, with reference to *Enterprise Wheel*, that

“[i]f an arbitral decision is based ‘solely upon the arbitrator’s view of the requirements of enacted legislation,’ rather than on his interpretation of the collective bargaining agreement, the arbitrator has ‘exceeded the scope of the submission,’ and the award will not be enforced. . . . Thus the arbitrator has authority to resolve only questions of contractual rights. . . .”<sup>117</sup>

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<sup>113</sup>Briefs are typically filed in over half of all grievance arbitration cases. See Gold, *American Arbitration Association Sees Pattern in Labor Cases*, in *Arbitration & the Law—1982* (AAA General Counsel’s Annual Report, 1982), 83, 86.

<sup>114</sup>*Supra* note 61.

<sup>115</sup>363 U.S. at 597.

<sup>116</sup>*Supra* note 16.

<sup>117</sup>*Id.* at 53–54.

Although the court had specific reference to statutory rights under Title VII,<sup>118</sup> there is no reason to believe that the arbitrator's jurisdiction would be any broader where NLRA rights are in issue. As I once emphasized in an arbitration case that had been deferred under *Dubo*:<sup>119</sup>

“Although I am mindful of the NLRB deferral to arbitration in the instant case, I am also aware that such deferral cannot vest the Arbitrator with any authority which he does not have under the collective bargaining agreement.”<sup>120</sup>

In other words, neither the Board's deferral doctrine nor appellate court approval and Supreme Court encouragement of that doctrine serve to enlarge the arbitrator's jurisdiction. The arbitrator must still rely on the agreement as the sole source of his or her authority. Thus, the congruence factor remains paramount to the deferral process. The arbitrator can apply the external law of the National Labor Relations Act only to the extent that such law is entwined with the interpretation of the agreement being construed. But even when the statutory issue is thus properly before the arbitrator, he or she should be mindful that although the Labor Board no longer provides a broad safety net to catch arbitral errors of law under the NLRA, the courts might be available to provide a similar reviewing function through judicial oversight pursuant to Section 301 of the LMRA.<sup>121</sup>

Two Supreme Court cases suggest a viable basis for broadening the *Enterprise* standard to cover an arbitrator's commission of serious error in the interpretation of statutory law. In *Connell Construction Co. v. Plumbers Local 100*,<sup>122</sup> the Court confirmed that federal courts have jurisdiction to decide unfair labor practice questions, even when the matter has never been decided by the Labor Board, provided those questions “emerge as collateral issues in suits brought under independent federal remedies . . . ,”<sup>123</sup> which presumably would include Section 301 actions as well as the antitrust<sup>124</sup> action which was immediately

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<sup>118</sup>*Supra* note 12.

<sup>119</sup>*Dubo Mfg. Corp.*, *supra* note 39.

<sup>120</sup>*Keebler Co.*, 75 LA 975, 981 (C. Morris 1980).

<sup>121</sup>*Supra* note 21.

<sup>122</sup>*Connell Constr. Co., Inc. v. Plumbers Local 100*, 421 U.S. 616, 89 LRRM 2401 (1975).

<sup>123</sup>*Id.* at 626.

<sup>124</sup>Sherman Antitrust Act, 15 U.S.C. §§ 1-7. *E.g.*, *Carpenters Local No. 1478 v. Stevens*, 117 LRRM 2023 (9th Cir. 1984).

involved in *Connell*. Judicial review of arbitrators' awards under Section 301 may thus be available to correct serious errors of law committed by arbitrators in their application of the law of the National Labor Relations Act. A proper standard for such an expanded area of judicial review is contained in the following statement by the Court in *W.R. Grace & Co. v. Rubber Workers, Local 759*:<sup>125</sup>

"If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. . . . Such a policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."<sup>126</sup>

I am certainly not supporting any expansion of the scope of review in ordinary contract interpretation cases.<sup>127</sup> But where an arbitrator seriously misconstrues a right or a requirement under the NLRA, even though such right or requirement is imbedded in contractual language (whether explicitly or implicitly), such a construction should be deemed "repugnant to the purpose and policies of the Act;"<sup>128</sup> hence, regardless of whether an unfair labor practice charge has been filed with the Board, such an arbitration award should be judicially reversed, modified, or remanded to the arbitrator under Section 301 in accordance with the *W.R. Grace* standard quoted above.

#### D. Conclusion

With the golden age of arbitration behind us, we now look to the new age ahead with its new challenges. Arbitrators should meet those challenges in a positive way, particularly the challenge of deciding unfair labor practice issues when they are imbedded in contractual issues, but also the challenge of declining to decide such issues when they are not. The distinction is significant, both for the arbitration system and for the integrity of the National Labor Relations Act.

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<sup>125</sup>*W.R. Grace & Co. v. Rubber Workers, Local 759*, 461 U.S. \_\_\_, 76 L.Ed.2d 298, 113 LRRM 264 (1983).

<sup>126</sup>76 L.Ed.2d at 298.

<sup>127</sup>See *Morris*, *supra* note 86 at 351-55.

<sup>128</sup>*Spielberg*, *supra* note 27, 112 NLRB at 1082.