

BOSTON COLLEGE LAW REVIEW

VOLUME XXVIII

DECEMBER 1986

NUMBER 1

INDIVIDUAL RIGHTS AND NLRB DEFERRAL TO THE ARBITRATION PROCESS: A PROPOSAL†

DOUGLAS E. RAY*

I. INTRODUCTION

The purpose of the National Labor Relations Act,¹ set forth in section 1 of the Act, provides that it is the policy of the United States to aid commerce by:

protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.²

Section 10 of the Act³ empowers the National Labor Relations Board⁴ (the Board) to prevent any person from engaging in unfair labor practices which interfere with these rights and to make findings, issue orders, and petition for enforcement of such orders in court.⁵ In apparent disregard of the Act's clearly stated purpose, the National Labor Relations Board, in 1984, issued two opinions that seem to undercut Congress's attempt to protect employee rights. These cases, *United Technologies Corp.*⁶ and *Olin Corp.*,⁷ involve the Board's policy of deferring to the private labor arbitration process and affect the

†Copyright © 1987 Boston College Law School.

* Professor of Law, University of Toledo College of Law; B.A., University of Minnesota; J.D., Harvard Law School.

¹ National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1982)).

² 29 U.S.C. § 151 (1982).

³ 29 U.S.C. § 160 (1982).

⁴ The National Labor Relations Board (hereinafter "Board" or "NLRB") is an adjudicative body heading the federal agency bearing the same name. Section 3(a) of the National Labor Relations Act, as amended, provides that the National Labor Relations Board shall consist of five members "appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. § 153(a) (1982).

⁵ 29 U.S.C. § 160(a)-(i) (1982).

⁶ 268 N.L.R.B. 557, 115 L.R.R.M. 1049 (1984).

⁷ 268 N.L.R.B. 573, 115 L.R.R.M. 1056 (1984).

rights of the millions of persons represented by unions and covered by collective bargaining agreements.⁸

Deferral is a process which can occur both before and after private labor arbitration arising under a collective bargaining agreement. Under pre-arbitration deferral, the Board postpones consideration of an unfair labor practice charge filed with the NLRB by an employee or union pending the outcome of private grievance arbitration. Post-arbitration deferral is a term which refers to the degree of deference, if any, the Board will give the private arbitrator's award in finally resolving the unfair labor practice charge.

In *United Technologies*, the Board expanded the scope of pre-arbitration deferral in ruling that even in cases where an employee files a charge alleging a violation of individual rights, it would withhold its jurisdiction pending arbitration under a labor agreement if one exists.⁹ Furthermore, it held that an employee or union could not generally choose to forego arbitration in order to have his or her claim heard immediately before the Board.¹⁰ *United Technologies* substantially increases the importance of the standards the Board uses in determining whether a completed arbitration proceeding has adequately protected employee rights because it expands the number and type of arbitration awards where post-arbitration deferral is possible.

Olin Corp. substantially broadened the scope of post-arbitration deferral and made three significant modifications of the standards for determining whether the Board independently will exercise its jurisdiction or defer to an arbitration decision. First, *Olin Corp.* overruled Board precedent reserving deferrals for cases in which the arbitrator actually considered a statutory issue.¹¹ Second, and equally important, *Olin Corp.* placed the burden of proof on the party opposing deferral,¹² a burden that sometimes is impossible to meet under the *Olin Corp.* standards.¹³ Finally, the *Olin Corp.* Board held that it will defer to an arbitration outcome as long as the award is not "palpably wrong."¹⁴ Thus, even an award that is inconsistent with Board precedent is subject to deferral.¹⁵

As demonstrated by the 1985 case of *Ryder Truck Lines*,¹⁶ deferral under the *Olin Corp.* theory can substantially undercut individual employee rights. In *Ryder*, an administrative law judge of the National Labor Relations Board found that Mr. Taylor, a truck driver with twenty-six years' seniority, was unlawfully discharged by his employer for

⁸ The Board's changing policies for deferring to the process of labor arbitration by withholding an investigation pending the outcome of labor arbitration and deferring to the actual decision of a labor arbitrator are related historically in C. MORRIS, *THE DEVELOPING LABOR LAW* 914-91 (2d ed. 1983) (hereinafter C. MORRIS). Professor Charles Morris discusses *United Technologies* and *Olin Corp.* in Morris, *NLRB Deferral to the Arbitration Process: The Arbitrator's Awesome Responsibility*, 7 INDUS. REL. L.J. 290 (1985) (hereinafter Morris, *Arbitrator's Responsibility*).

⁹ *United Technologies*, 268 N.L.R.B. at 560, 115 L.R.R.M. at 1052.

¹⁰ *Id.* See *infra* notes 92-93 and accompanying text.

¹¹ See *infra* notes 108-12 and accompanying text.

¹² *Olin Corp.*, 268 N.L.R.B. at 575, 115 L.R.R.M. at 1058.

¹³ See *infra* notes 143-45 and accompanying text.

¹⁴ *Olin Corp.*, 268 N.L.R.B. at 574, 115 L.R.R.M. at 1058.

¹⁵ *Id.* The Board now puts the burden on the General Counsel to show "that the arbitrator's analysis is palpably wrong as a matter of law," a burden that is not met by reliance on "arguably distinguishable Board cases." *Brewery Workers Int. Loc. Exec. Bd.*, 277 N.L.R.B. No. 118 at 7, 121 L.R.R.M. 1050, 1051 (1985) (Administrative Law Judge had found seniority provisions of contract illegal because favorable only to Union-represented outside employees, but Board reversed and deferred to arbitration award upholding provisions).

¹⁶ 273 N.L.R.B. 713, 118 L.R.R.M. 1092 (1985).

refusing to drive a truck-tractor he reasonably believed to be unsafe due to a defective steering mechanism.¹⁷ The collective bargaining agreement negotiated between Ryder Truck Lines and Mr. Taylor's exclusive bargaining representative, the Teamsters Union, permitted such reasonable refusals.¹⁸ Had there been no arbitration proceeding, the National Labor Relations Board would have affirmed the judge's order reinstating Mr. Taylor with full back pay.¹⁹ Instead, the Board overruled the administrative law judge who had heard the evidence and deferred to the finding of a Teamsters Grievance Committee which had denied the grievance and refused to reinstate Mr. Taylor.²⁰ The Board deferred to the Committee's denial of Mr. Taylor's claim even though the Committee issued no written award and even though there was no evidence that the Committee had even considered facts or law relevant to the unfair labor practice charge filed by Mr. Taylor.²¹

Mr. Taylor appealed to the Court of Appeals for the Eleventh Circuit, which vacated the Board's order deferring to the decision of the Grievance Committee.²² In so ruling, the court held that the *Olin Corp.* standard "gives away too much of the Board's responsibility under the NLRA" by presuming that "all arbitration proceedings confront and decide every possible unfair labor practice issue."²³

This article suggests that the Eleventh Circuit was correct and that *Olin Corp.* represents an abdication of the Board's statutory authority and duty to prosecute and remedy unfair labor practices. The current deferral standards ultimately harm both employees and the arbitration process. This article will support these conclusions by analogizing the limits the Supreme Court has placed on deference to arbitration in other areas of the law,²⁴ briefly tracing the history of Board deferral to arbitration,²⁵ and describing the application of *Olin Corp.* and *United Technologies* in subsequent cases and analyzing their impact on individual rights and the arbitration process.²⁶ Finally, this article will present methods by which the current Board's desire to accommodate its policies to labor arbitration can be reconciled with the duties imposed on the Board by statute.²⁷

The article will focus primarily on the *Olin Corp.* Board's elimination of the requirement that an arbitrator actually consider a statutory issue before the Board will defer to an award. In addition, the article will focus on the *Olin Corp.* Board's institution of a test which places the burden on the party opposing deferral to show either that the arbitration and unfair labor practice matters are not factually parallel or that the arbitrator was not

¹⁷ *Ryder Truck Lines, Inc.*, 273 N.L.R.B. 713, 719 (Administrative Law Judge Decision) (hereinafter ALJD).

¹⁸ *Id.* at 718.

¹⁹ Complaining about safety matters which are the subject of a collective bargaining agreement is protected activity under the Act, and reinstatement and back pay are generally ordered in cases of discharge for such activity. See *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 115 L.R.R.M. 3193 (1984); *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 61 L.R.R.M. 1537 (1966), enforced *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 67 L.R.R.M. 2983 (2d Cir. 1967).

²⁰ *Ryder*, 273 N.L.R.B. at 713, 118 L.R.R.M. at 1093.

²¹ *Id.* at 713, 118 L.R.R.M. at 1093.

²² *Taylor v. NLRB*, 786 F.2d 1516, 122 L.R.R.M. 2084 (11th Cir. 1986).

²³ *Id.* at 1521-22, 122 L.R.R.M. at 2088-89.

²⁴ See *infra* notes 30-57 and accompanying text.

²⁵ See *infra* notes 58-113 and accompanying text.

²⁶ See *infra* notes 114-46 and accompanying text.

²⁷ See *infra* notes 147-75 and accompanying text.

presented generally with facts relevant to resolving the unfair labor practice issue.²⁸ This placement of the burden of proof distorts the role and function of private labor arbitrators who are retained only to interpret collective bargaining agreements. Furthermore, the standard fails to insure that the Board has an adequate factual basis to do *its* job of protecting employee rights. This article proposes a test whereby the Board will defer to the award of a labor arbitrator or arbitration panel only where it has proof that the arbitrator or panel considered facts relevant to resolution of the unfair labor practice charge and, in light of these facts and the record made in arbitration, it determines that the resolution of such facts in arbitration is consistent with the Act.²⁹

II. ARBITRATION AND THE SUPREME COURT

The Supreme Court has not directly reviewed the standards under which the National Labor Relations Board may defer to labor arbitration. While the Court, through dicta, has apparently approved the notion that the Board has some discretion to defer to the contractual arbitration process, it also has noted that important statutory rights, such as those arising under the civil rights laws, need not be sacrificed to the private labor arbitration process but must be protected independently by the courts.

The Court noted the Board's power to delay action pending arbitration in *Carey v. Westinghouse Corp.*,³⁰ a 1964 decision where the Court stated that:

By allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent; and those conciliatory measures which Congress deemed vital to "industrial peace" . . . and which may be dispositive of the entire dispute, are encouraged. The superior authority of the Board may be invoked at any time. Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area.³¹

Similar indications that the Court would not strike down all decisions to defer appear in more recent opinions. In a 1974 decision, *William E. Arnold Co. v. Carpenter's Dist. Council*,³² the Court noted that the Board's policy of refraining from exercising jurisdiction in cases that might be both contract violations and unfair labor practices pending voluntary contractual arbitration "harmonizes"³³ with Congress's concern expressed in section 203(d) of the Act³⁴ that:

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.³⁵

²⁸ See *Olin Corp.*, 268 N.L.R.B. at 574, 115 L.R.R.M. at 1058. See *infra* notes 112, 115-18 and accompanying text for further discussion of this standard.

²⁹ See *infra* notes 147-75 and accompanying text.

³⁰ 375 U.S. 261 (1964).

³¹ *Id.* at 272.

³² 417 U.S. 12 (1974).

³³ *Id.* at 16-17.

³⁴ 29 U.S.C. § 173(d) (1982).

³⁵ *Id.*, cited in *William E. Arnold Co.*, 417 U.S. at 17.

Once again, in 1984, the Court in *NLRB v. City Disposal Systems, Inc.*³⁶ cited the Board's two major deferral cases, *Collyer Insulated Wire*³⁷ and *Spielberg Mfg. Co.*,³⁸ for the proposition 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."³⁹

This dicta should not be read to indicate approval of the way in which the Board has exercised its discretion in recent cases. Rather, the concept of deferral to arbitration need be reviewed in light of a number of Court holdings limiting employees' rights in arbitration and indicating the limitations of the arbitration process. First, the Supreme Court repeatedly has held that employees, as opposed to unions, have only limited rights in labor arbitration. When a labor contract establishes a mandatory and binding grievance procedure and gives the union the exclusive right to pursue claims on behalf of aggrieved employees, the employee's remedy is limited to the result obtained by the union.⁴⁰ Thus, an aggrieved employee subject to such an agreement lacks independent standing to initiate the grievance procedure, sue for breach of the collective bargaining agreement or attack in court the result obtained in the arbitration process.⁴¹

In addition, even where the union or the employer attacks the arbitrator's decision in court, the scope of judicial review is very narrow. The Court will overturn the decision of an arbitrator only if it does not "draw[] its essence from the collective bargaining agreement."⁴² This is so even when the basis for the award of the arbitrator may be ambiguous.⁴³ An employee may bring an individual action only if the union has breached its duty of fair representation by arbitrarily refusing to process a case through to arbitration or by doing so in a perfunctory or otherwise arbitrary manner.⁴⁴ In such a case, the employee may sue the employer or union, or both, but must prove that the union breached its duty of fair representation and that the employer breached the collective bargaining agreement.⁴⁵ This is, however, a narrow exception.

In a second series of opinions, the Supreme Court reacted to the narrowness of employee rights under labor contracts and the limited ability of labor arbitrators to protect the individual rights of employees by limiting the preclusive effect of an arbitration award on employee rights when a statutory, as opposed to a contractual, right is involved. *McDonald v. City of West Branch*,⁴⁶ *Barrentine v. Arkansas-Best Freight Systems*,

³⁶ 465 U.S. 822, 115 L.R.R.M. 3193 (1984).

³⁷ 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971). For further discussion of this case, see *infra* notes 65-67 and accompanying text.

³⁸ 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955). For further discussion of this case, see *infra* notes 95-98 and accompanying text.

³⁹ *City Disposal Systems, Inc.*, 465 U.S. at 838, 115 L.R.R.M. at 3200-01.

⁴⁰ See *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 91 L.R.R.M. 2481 (1976); *Vaca v. Sipes*, 386 U.S. 171, 64 L.R.R.M. 2369 (1967).

⁴¹ See, e.g., *Acuff v. United Papermakers and Paperworkers*, 404 F.2d 169, 171, 69 L.R.R.M. 2828, 2829 (5th Cir. 1968), *cert. denied*, 394 U.S. 987, 70 L.R.R.M. 3378 (1969).

⁴² *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 L.R.R.M. 2423, 2425 (1960).

⁴³ *Id.* at 598, 46 L.R.R.M. at 2425. See also Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267 (1980).

⁴⁴ *Vaca*, 386 U.S. at 187-88, 64 L.R.R.M. at 2375-76.

⁴⁵ *Id.* at 187, 64 L.R.R.M. at 2375.

⁴⁶ 466 U.S. 284, 115 L.R.R.M. 3646 (1984).

Inc.,⁴⁷ and *Alexander v. Gardner-Denver Co.*⁴⁸ hold that federal courts are not required to give preclusive effect to arbitration awards when an aggrieved employee asserts an independent cause of action under 42 U.S.C. 1983,⁴⁹ the Fair Labor Standards Act,⁵⁰ or Title VII of the Civil Rights Act of 1964.⁵¹ In these three cases, the Court recognized that, while a final arbitration award usually determines an employee's rights under the collective bargaining agreement, an arbitrator's competence and authority are limited to interpreting collective agreements and applying "the law of the shop, not the law of the land."⁵² This is true even where the employee's independent statutory cause of action arises from the same conduct and facts submitted to the grievance procedure.

These decisions manifest the Supreme Court's position that "in instituting an action under [the statutes], the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process."⁵³ The Court further has concluded that "Congress intended the statutes at issue . . . to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes."⁵⁴ The Court identified at least four factors that support this conclusion. First, an arbitrator, schooled primarily in the law of shop, may lack the expertise to resolve complex statutory questions.⁵⁵ Second, "because an arbitrator's authority derives solely from the contract, . . . an arbitrator may not have the authority to enforce" statutes.⁵⁶ Third, the interests of the union which generally control the grievance process are not necessarily identical to those of its employees and the union may not adequately protect their statutory rights;⁵⁷ and fourth, "arbitral factfinding is generally not equivalent to judicial factfinding."⁵⁸ Thus, while the Court's dicta recognizes the Board's discretion to defer to a labor arbitrator's decision, in light of the concerns expressed in *McDonald*, *Barrentine*, and *Gardner-Denver*, the Board should carefully limit deferral to cases where arbitration is indeed "an adequate substitute."⁵⁹

III. BACKGROUND: THE NLRB AND ARBITRATION

Unquestionably, the National Labor Relations Board's power in unfair labor practice cases is superior to and independent of the arbitration process even where an arbitration case involves issues that may arise in an unfair labor practice proceeding. Section 10(a) of the Act makes this clear, stating that the Board's power "to prevent any person from engaging in any unfair labor practice . . . shall not be affected by any other means or adjustment or prevention that has been or may be established by agreement, law or

⁴⁷ 450 U.S. 728 (1981).

⁴⁸ 415 U.S. 36, 7 FEP Cases 81 (1974).

⁴⁹ *McDonald*, 466 U.S. at 292, 115 L.R.R.M. at 3648. See also 42 U.S.C. § 1983 (1982).

⁵⁰ *Barrentine*, 450 U.S. at 745. See also Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982).

⁵¹ See *Gardner-Denver Co.*, 415 U.S. at 51, 7 FEP Cases at 86. See also Title VII, 42 U.S.C. §§ 2000e-1-2000e-17 (1982).

⁵² *Gardner-Denver Co.*, 415 U.S. at 57, 7 FEP Cases at 89.

⁵³ *Id.* at 54, 7 FEP Cases at 88.

⁵⁴ *McDonald*, 466 U.S. at 289, 115 L.R.R.M. at 3648.

⁵⁵ *Id.* at 290, 115 L.R.R.M. at 3648.

⁵⁶ *Id.*

⁵⁷ *Id.* at 291, 115 L.R.R.M. at 3648.

⁵⁸ *Id.*

⁵⁹ *McDonald*, 466 U.S. at 289, 115 L.R.R.M. at 3648.

otherwise."⁶⁰ A number of decisions in the last thirty years indicate the situations in which the Board is willing to defer to the arbitration process. These decisions have developed what is now called the deferral doctrine.

The cases developing the deferral doctrine deal with two separate areas of Board deferral to the arbitration process. The first, pre-arbitration deferral, refers to the Board's policy of withholding its jurisdiction pending the outcome of grievance and arbitration procedures. In essence, the Board postpones consideration of unfair labor practice charges until completion of the arbitration process. The second, post-arbitration deferral, which will be the primary focus of this article, deals with the degree of deference, if any, the Board will give to a prior arbitration award in resolving unfair labor practice charges that arguably involve facts parallel to those litigated in the arbitration process.⁶¹

A. Pre-Arbitration Deferral

To understand how the Board defers to the findings of labor arbitrators, it is first necessary to understand that the Board sometimes awaits the conclusion of labor arbitration before acting. The greater the number of cases in which the Board temporarily withholds its jurisdiction, the more important will be the standards governing the weight given to the findings of arbitrators when the Board finally reviews these cases. In a 1963 decision, *Dubo Manufacturing Corp.*,⁶² the Board held that it would defer action on an unfair labor practice charge pending the outcome of grievance arbitration if the matter was already being dealt with in the grievance arbitration procedures.⁶³ In *Collyer Insulated Wire*,⁶⁴ a refusal to bargain case, the Board extended the deferral doctrine to include cases where neither party had yet invoked the grievance arbitration procedures of the contract (1) if the dispute arose within "a long and productive collective bargaining relationship"⁶⁵ where the employer is not claimed to be in enmity to the employees' exercise of rights; (2) where the employer is willing to resort to arbitration under a clause broad enough to reach the dispute in question; and (3) where the contract and its meaning lie at the center of the dispute.⁶⁶

In a controversial 1972 decision, *National Radio Co.*,⁶⁷ the Board extended *Collyer* deferral to charges alleging restraint and coercion of and discrimination toward individuals in violation of Sections 8(a)(1)⁶⁸ and 8(a)(3)⁶⁹ of the Act.⁷⁰ Although *National Radio*

⁶⁰ 29 U.S.C. § 160(a) (1982).

⁶¹ See *infra* notes 95-113 and accompanying text.

⁶² 142 N.L.R.B. 431, 53 L.R.R.M. 1070 (1963).

⁶³ *Id.* at 432-33, 53 L.R.R.M. at 1070.

⁶⁴ 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971).

⁶⁵ *Id.* at 842, 77 L.R.R.M. at 1936.

⁶⁶ *Id.*

⁶⁷ 198 N.L.R.B. 527, 80 L.R.R.M. 1718 (1972). For a thoughtful criticism of *National Radio* and the broad deferral principles for which it stands, see Getman, *Collyer Insulated Wire: A Case of Misplaced Modesty*, 49 IND. L.J. 57, 72-74 (1973).

⁶⁸ 29 U.S.C. § 158(a) (1) (1982). Section 8(a) (1) provides that employers may not "interfere with, restrain, or coerce employees in the exercise of [protected] rights." *Id.*

⁶⁹ 29 U.S.C. § 158(a) (3) (1982). Section 8(a) (3) provides in relevant part that employers may not "discriminat[e] in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.*

⁷⁰ *National Radio*, 198 N.L.R.B. at 531, 80 L.R.R.M. at 1722.

involved a statutory issue, the majority determined that the arbitration procedure could resolve the dispute consistent with *Spielberg*⁷¹ due to the Board's heavy caseload and the arbitrators' experience in resolving discharges and discipline issues under labor contracts. The Board also stated that its decision would aid in "fostering both the collective relationship and the federal policy favoring voluntary arbitration and dispute settlement."⁷²

In early 1977, the Board overruled *National Radio* in *General American Transportation Corp.*,⁷³ limiting *Collyer* pre-arbitral deferral to failure-to-bargain cases alleging violations of Sections 8(a)(5)⁷⁴ and 8(b)(3).⁷⁵ The decisive vote was that of Chairman Murphy, who stated that issues involving Sections 8(a)(1),⁷⁶ 8(a)(3),⁷⁷ 8(b)(1)(A),⁷⁸ and 8(b)(2)⁷⁹ are different from cases involving alleged refusals to bargain.⁸⁰ She explained that in cases alleging violations of the duty to bargain in good faith based on alleged violations of the contract:

[t]he principal issue is whether the complained-of conduct is permitted by the parties' contract. Such issues are eminently suited to the arbitral process, and resolution of the contract issue by an arbitrator will, as a rule, dispose of the unfair labor practice issue. On the other hand, in cases alleging violations of Section 8(a)(1), (a)(3), (b)(1)(A), and (b)(2), although arguably also involving contract violation, the determinative issue is not whether the conduct is permitted by the contract, but whether the conduct was unlawfully motivated or whether it otherwise interfered with, restrained, or coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act. In these situations, an arbitrator's resolution of the contract issue will not dispose of the unfair labor practice allegation. Nor is the arbitration process suited for resolving employee complaints of discrimination under Section 7.⁸¹

The same day the Board decided *General American*, Chairman Murphy provided the decisive vote in *Ray Robinson, Inc.*,⁸² reaffirming the application of *Collyer* deferral in refusal-to-bargain cases because they are "particularly suited to the arbitral process."⁸³

⁷¹ *Spielberg*, 112 N.L.R.B. at 1081, 36 L.R.R.M. at 1153. For further discussion of *Spielberg*, see *infra* notes 95-98 and accompanying text.

⁷² *National Radio*, 198 N.L.R.B. at 531, 80 L.R.R.M. at 1722.

⁷³ 228 N.L.R.B. 808, 810 n.7, 94 L.R.R.M. 1483, 1486 n.7 (1977).

⁷⁴ 29 U.S.C. § 158(a) (5) (1982). Section 8(a) (5) imposes on an employer the duty "to bargain collectively with the representatives of his employees." *Id.*

⁷⁵ 29 U.S.C. § 158(b) (3) (1982). Section 8(b) (3) imposes on a union the duty "to bargain collectively with an employer." *Id.* See *General American*, 228 N.L.R.B. at 810-11, 94 L.R.R.M. at 1486 (Murphy, Chairman, concurring).

⁷⁶ 29 U.S.C. § 158(a) (1) (1982). See *supra* note 69.

⁷⁷ 29 U.S.C. § 158(a) (3). See *supra* note 70.

⁷⁸ 29 U.S.C. § 158(b) (1) (A) (1982). Section 8(b) (1) (A) provides that labor organizations may not "restrain or coerce . . . employees in the exercise of [their] rights." *Id.*

⁷⁹ 29 U.S.C. § 158(b) (2) (1982). Section 8 (b) (2) provides that labor organizations shall not "cause an employer to discriminate [illegally] against an employee." *Id.*

⁸⁰ *General American*, 228 N.L.R.B. at 810-11, 94 L.R.R.M. at 1486 (Murphy, Chairman, concurring).

⁸¹ *Id.*, 94 L.R.R.M. at 1486-87 (Murphy, Chairman, concurring).

⁸² 228 N.L.R.B. 828, 94 L.R.R.M. 1474 (1977).

⁸³ *Id.* at 831, 94 L.R.R.M. at 1477 (Murphy, Chairman, concurring).

Finally, in 1984, the Board announced its *United Technologies*⁸⁴ decision overruling *General American*. *United Technologies* involved allegations that a foreman had threatened an employee with disciplinary action if she persisted in processing a grievance. The alleged action constituted a violation of Section 8(a)(1).⁸⁵ The administrative law judge, relying on *General American*, refused to defer the exercise of Board jurisdiction to the grievance arbitration machinery and found merit in the charge.⁸⁶ The Board majority found that the judge should not have exercised jurisdiction and overruled *General American*, holding that the judge should have deferred the case pending completion of the grievance arbitration process.⁸⁷ While the union had filed a grievance over the incident in question, it had withdrawn the grievance at the third step of the grievance procedure "without prejudice"⁸⁸ and refused the employer's request that the matter be submitted to arbitration.⁸⁹ Thus, the Board left the employee with no recourse; the union was not processing her grievance, and the Board would not proceed.

In returning to the standards of *National Radio*, the *United Technologies* Board ruled that deferral would be appropriate once again in cases alleging violations of Sections 8(a)(1) and (3) and 8(b)(1)(A) and (2).⁹⁰ Under *United Technologies*, "[w]hen a labor organization seeks instead to have (the Board) resolve each dispute, we think it proper to require it, before invoking our services, initially to invoke the available voluntary machinery."⁹¹ Thus, applying *United Technologies*, the Board now holds that employees who allege violation of individual rights under the National Labor Relations Act must first litigate their case in the forum designated by their contract when the contract calls for arbitration.⁹² Because this decision causes the Board to withhold its jurisdiction in a substantial number of cases pending arbitration,⁹³ the standards under which the Board

⁸⁴ 268 N.L.R.B. 557, 115 L.R.R.M. 1049 (1984).

⁸⁵ *Id.* Processing grievances is activity protected under section 7 of the Act, 29 U.S.C. § 157 (1982), or section 8(a) (1), *id.* § 158(a) (1). See 1 C. MORRIS, *supra* note 8, at 148-49.

⁸⁶ *United Technologies*, 268 N.L.R.B. at 568-69 (ALJD).

⁸⁷ *Id.* at 560, 115 L.R.R.M. at 1052.

⁸⁸ *Id.* at 557, 115 L.R.R.M. at 1049-50.

⁸⁹ *Id.*, 115 L.R.R.M. at 1050.

⁹⁰ *Id.* at 560, 115 L.R.R.M. at 1052. See also *id.* at 561, 115 L.R.R.M. at 1052-53 (Zimmerman, Member, dissenting).

⁹¹ *Id.* at 559, 115 L.R.R.M. at 1051 (quoting *United Aircraft Corp.*, 204 N.L.R.B. 879, 880 (1973)).

⁹² *Id.* at 560, 115 L.R.R.M. at 1052. *United Technologies* apparently is applied even where arbitration is not clearly available. In *United Beef Co.*, Roberto Rodriguez, a union shop steward, was discharged July 13, 1983. 272 N.L.R.B. 66, 66, 117 L.R.R.M. 1203, 1204 (1984). He filed a charge with the Board alleging that his employer had harassed him with vulgar language and personal vilification when he was processing grievances under the parties' collective bargaining agreement and had discharged him because of his protected activity. *Id.* Had there not been a collective bargaining agreement with an arbitration clause, the Board would have investigated and prosecuted the claim if it were found to be meritorious because processing grievances as a steward is protected activity under the Act. Instead, the Board refused to act and applied *United Technologies* in holding that Rodriguez was limited to arbitration of his claim even though union counsel had advised the Board that the union would not be processing Mr. Rodriguez' claim through to arbitration. *Id.* at 68, 117 L.R.R.M. at 1205.

⁹³ The majority opinion in *General American Transportation Corp.* noted that from May 1973 through December 1975, 1,632 cases were deferred under *Collyer*. 228 N.L.R.B. at 810, 94 L.R.R.M. at 1485-86. During the same period, 80,152 violation cases were filed with the Board. *Id.* Member Zimmerman's dissent in *Olin Corp.* indicated that from October 1981 through December 1983, over

will determine whether to defer to the ultimate arbitration award take on new importance.

B. Post-Arbitration Deferral

The development of the standards for determining whether to defer to an already decided arbitration award began in 1955 with *Spielberg Manufacturing Co.*⁹⁴ *Spielberg* involved an arbitration decision upholding the employer's discharge of four strikers accused of picket-line misconduct. The discharged employees filed an unfair labor practice charge after the arbitration panel denied their reinstatement.⁹⁵ In deciding to defer to the arbitration award, the Board established a three-part test: (1) did the arbitration proceedings "appear to have been fair and regular"; (2) have all parties to the arbitration proceedings "agreed to be bound"; and (3) is the decision of the arbitrator or panel "clearly repugnant to the purposes and policies of the Act."⁹⁶ A fourth part to the test, inquiring whether the issue involved in the unfair labor practice case had been presented to and considered by the arbitrator, was added in the Board's 1963 decision in *Raytheon Co.*⁹⁷ *Yourga Trucking*⁹⁸ added an important procedural corollary to the *Spielberg* decision by requiring the party seeking deferral to prove that the statutory issue was presented in the arbitration.⁹⁹

The Board generally applied this four-part test until 1974 when, in *Electronic Reproduction Service Corp.*,¹⁰⁰ it eliminated the *Raytheon* requirement for deferral in discipline and discharge cases. The Board announced that, absent unusual circumstances, it would defer under *Spielberg* to arbitration awards dealing with discharge or discipline cases regardless of the arbitrator's consideration of the unfair labor practice issue involved. The Board also indicated that it would generally presume that the arbitrator had considered the issue of whether the discharge or discipline of the grievant was for pretextual reasons.¹⁰¹ This decision received substantial criticism.¹⁰²

In 1980, the Board overruled *Electronic Reproduction* and returned to the original standards of *Spielberg*, *Raytheon*, and *Yourga Trucking* in *Suburban Motor Freight, Inc.*¹⁰³ *Suburban Motor Freight* concerned an employee who was discharged on two occasions but reinstated both times with reduced punishment pursuant to Joint Grievance Committee arbitral decisions.¹⁰⁴ Because it was undisputed that the unfair labor practice issue was

3,800 cases were deferred under *Collyer and Dubo. Olin Corp.*, 268 N.L.R.B. 573, 581, 115 L.R.R.M. 1056, 1064 (1984) (Zimmerman, member, dissenting).

⁹⁴ 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).

⁹⁵ *Id.* at 1081, 36 L.R.R.M. at 1153.

⁹⁶ *Id.* at 1082, 36 L.R.R.M. at 1153.

⁹⁷ 140 N.L.R.B. 883, 887, 52 L.R.R.M. 1129, 1131 (1963), *enforcement denied on other grounds*, 326 F.2d 471, 55 L.R.R.M. 2101 (1st Cir. 1964).

⁹⁸ 197 N.L.R.B. 928, 80 L.R.R.M. 1498 (1972).

⁹⁹ *Id.*, 80 L.R.R.M. at 1499.

¹⁰⁰ 213 N.L.R.B. 758, 87 L.R.R.M. 1211 (1974).

¹⁰¹ *Id.* at 762, 80 L.R.R.M. at 1216.

¹⁰² See, e.g., *Stephenson v. NLRB*, 550 F.2d 535, 538, 94 L.R.R.M. 3224, 3228 (1977) (rejecting *Electronic Production* rule); Simon-Rose, *Deferral under Collyer by the NLRB of Section 8(1)(3) Cases*, 27 LAB. L.J. 201, 209-12 (1976); Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897, 909 (1975).

¹⁰³ 247 N.L.R.B. 146, 146, 103 L.R.R.M. 1113, 1114 (1980).

¹⁰⁴ *Id.*

not presented in either of the two arbitration decisions,¹⁰⁵ the Board refused to defer, stating:

The Board can no longer adhere to a doctrine which forces employees in arbitration proceedings to seek simultaneous vindication of private contractual rights and public statutory rights, or risk waiving the latter. Accordingly, we hereby expressly overrule *Electronic Reproduction* and return to the standard for deferral which existed prior to that decision. In specific terms, we will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator. In accord with the rule formerly stated in *Airco Industrial Gases*, we will give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue of discrimination in determining the propriety of an employer's disciplinary actions. In like accord with the corollary rule stated in *Yourga Trucking*, we shall impose on the party seeking Board deferral to an arbitration award the burden to prove that the issue of discrimination was litigated before the arbitrator.¹⁰⁶

Two years later, in *Propoco, Inc.*,¹⁰⁷ a case involving the discharge of a cleaning service employee allegedly for refusing to apologize for writing a complaint letter signed by nine other employees, the Board affirmed and strengthened the *Suburban Motor Freight* doctrine.¹⁰⁸ In *Propoco*, the Board refused to defer to an arbitration award, finding a discharge to have been for just cause, even though the arbitrator specifically had found that the grievant was not discharged for union or other protected activity.¹⁰⁹ The Board majority found that the arbitrator's conclusion was unwarranted because the unfair labor practice issue had neither been presented to nor considered by the arbitrator. The Board also declared that an employee may choose to limit his or her arbitration case to non-statutory issues and thereby preserve his or her right to raise statutory issues with the Board.¹¹⁰

Finally, in 1984, the Board overruled *Suburban Motor Freight* and *Propoco* in *Olin Corp.*¹¹¹ *Olin Corp.* involved the discharge of Salvatore Spatorico, a union president who participated in a "sick out" in which 43 employees left work early with medical excuses. Thirty-nine were given formal written reprimands and the union president was discharged.¹¹² The discharge was grieved and arbitrated. The arbitrator upheld the discharge, finding that Spatorico violated an article of the collective bargaining agreement which imposed on union officers an affirmative duty to prevent and resist strikes in violation of the contract and to try to stop them when they occur. With regard to the unfair labor practice charge filed, the administrative law judge declined to defer because he found that while the arbitrator had mentioned the unfair labor practice charge, he

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 146-47, 103 L.R.R.M. at 1114 (footnote omitted).

¹⁰⁷ 263 N.L.R.B. 136, 110 L.R.R.M. 1496 (1982), *affirmed* NLRB v. Porter, 742 F.2d 1438 (2d Cir. 1983).

¹⁰⁸ *Id.* at 137, 110 L.R.R.M. at 1498.

¹⁰⁹ *Id.* at 136, 110 L.R.R.M. at 1497.

¹¹⁰ *Id.* at 137, 110 L.R.R.M. at 1498.

¹¹¹ 268 N.L.R.B. 573, 115 L.R.R.M. 1056 (1984).

¹¹² *Id.*, 115 L.R.R.M. at 1057.

did not consider it in "a serious way."¹¹³ The judge then heard the case and dismissed the complaint on the merits, finding that Spatorico, as a union officer, could be discharged under *Metropolitan Edison Co. v. NLRB*.¹¹⁴

The *Olin Corp.* Board majority held that the administrative law judge should have dismissed the case before reaching the merits and that deferral to the arbitrator's award was appropriate.¹¹⁵ The Board then announced a further modification to *Spielberg*, a new standard for deferral to arbitration awards, stating:

We 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. In this respect, 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. And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

Finally, we would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above 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.¹¹⁶

Cases following *Olin Corp.* suggest that these standards do not guarantee that arbitration is, in any particular case, an "adequate substitute"¹¹⁷ for adjudication before the National Labor Relations Board.

IV. THE PROGENY OF *OLIN CORP.*: AN ANALYSIS

An analysis of the cases following *Olin Corp.* glaringly demonstrates the weaknesses of the doctrines presented in that decision. The standard for determining whether an arbitrator has considered a statutory issue and the placement of the burden of proof regarding this standard on the party opposing deferral make it virtually impossible, in many cases, to guarantee that an arbitrator's award has protected statutory rights. In addition, the failure to distinguish between different types of arbitration proceedings fails to recognize that not all arbitration procedures provide the guarantee of a neutral, detached, and professional arbitrator. Finally, the new standard of refusing to defer only if an arbitrator's decision is "palpably wrong"¹¹⁸ can water down and eliminate important employee rights.

First, there is no guarantee under *Olin Corp.* that the arbitrator has considered material relevant to the unfair labor practice charge. The two alleged safeguards to *Olin*

¹¹³ *Id.*

¹¹⁴ *Id.* (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 603, 112 L.R.R.M. 3265 (1983)).

¹¹⁵ *Olin Corp.*, 268 N.L.R.B. at 576-77, 115 L.R.R.M. at 1060.

¹¹⁶ *Id.* at 574, 115 L.R.R.M. at 1058 (footnotes omitted).

¹¹⁷ See *supra* note 55 and accompanying text.

¹¹⁸ See *supra* note 96 and accompanying text.

Corp. deferral, that the contractual issue be "factually parallel!"¹¹⁹ and that the "arbitrator was presented generally with the facts relevant to resolving the unfair labor practice,"¹²⁰ are totally undercut by placing the burden of proof on the party opposing deferral. Because of the limited record accompanying many arbitration decisions, this shift of the burden means that the Board often will have no opportunity to determine whether an arbitration award adequately protects employee rights. While the Board talks of situations being "factually parallel," it cannot always determine whether the arbitrator had adequate facts to resolve an unfair labor practice issue. Equally important, the Board cannot always exercise its statutory authority to ensure that any award is not "repugnant to the Act" under the limitations of *Spielberg*.¹²¹ It cannot make this determination because it may know nothing about the arbitrator's factual basis and reasoning. Instead, it may have before it only an unexplained award. The Board's inability to perform reliably its statutory task under *Olin Corp.* becomes even more important when one realizes that *Olin Corp.* has the greatest impact at the NLRB's Regional Office level where the Board makes decisions to prosecute. Decisions not to prosecute based on *Olin Corp.* can deny employees their right to a hearing on otherwise meritorious unfair labor practice charges.¹²²

The decision in *Yellow Freight*¹²³ demonstrates the weakness of the *Olin Corp.* burden of proof requirement. In that case, Fred Foster, a truck driver, was discharged for refusing to operate a truck he believed to be unsafe because of defective brakes.¹²⁴ Mr. Foster and a number of other drivers had complained about the truck in question and a prior terminal manager had agreed not to use the truck. A new terminal manager ordered Mr. Foster to drive the truck. After he had driven six miles, Foster called the dispatcher to complain about the brakes. The manager told him he would be treated as a "voluntary quit" if he did not proceed. Foster refused and subsequently was discharged. Although the collective bargaining agreement permitted a driver to refuse to operate unsafe equipment, an arbitration panel, after a two-hour hearing, upheld the termination. Shortly after the hearing, the panel issued a two-sentence award which provided: "Based on the facts presented and the testimony submitted, the case of the Union is denied. The discharge of Mr. Fred Foster was for just cause."¹²⁵

An unfair labor practice charge was filed and a hearing held.¹²⁶ The Board decided *Olin Corp.* shortly after an administrative law judge held a hearing on the alleged unfair labor practice in *Yellow Freight*.¹²⁷ The General Counsel moved to withdraw the complaint

¹¹⁹ *Olin Corp.*, 268 N.L.R.B. at 574, 115 L.R.R.M. at 1058.

¹²⁰ *Id.*

¹²¹ See *Spielberg*, 112 N.L.R.B. at 1082, 36 L.R.R.M. at 1153. See *supra* notes 95-96 and accompanying text.

¹²² The vast majority of deferral decisions are made in the regional offices of the NLRB. While it is occasionally possible for a union to persuade the General Counsel through the Office of Appeals to reverse the region's decision not to prosecute, see U.S. Postal Service, 275 N.L.R.B. No. 65, 119 L.R.R.M. 1153 (1985), the General Counsel generally has "unreviewable discretion to refuse to institute an unfair labor practice complaint." *Vaca*, 386 U.S. at 182, 64 L.R.R.M. at 2373.

¹²³ 273 N.L.R.B. 44, 118 L.R.R.M. 1010 (1984).

¹²⁴ *Id.* at 45, 118 L.R.R.M. at 1010-11.

¹²⁵ *Id.*

¹²⁶ *Id.* at 44, 118 L.R.R.M. at 1010.

¹²⁷ See *Olin Corp.*, 268 N.L.R.B. 573, 115 L.R.R.M. 1056.

in light of *Olin Corp.*¹²⁸ The judge, affirmed by a majority of the Board panel reviewing the case, read *Olin Corp.* to require that the case be dismissed.¹²⁹

Because there was no record, however, the *Yellow Freight* Board could not possibly determine whether the process given Foster was an "adequate substitute" for normal Board procedure or whether the substance of the arbitral decision was "repugnant to the Act." By shifting the burden of proof to the party challenging deferral under the *Olin Corp.* doctrine, the *Yellow Freight* Board allowed a decision to stand which determined an employee's statutory rights yet which was not supported by substantial evidence. Thus, the Board could not have adequately safeguarded the employee's rights as required by section 10(a) of the Act.¹³⁰

*Ryder Truck Lines*¹³¹ further demonstrates the risks inherent in decision-making based on an inadequate or non-existent record. There, the Board deferred to the determination of a Grievance Committee that truckdriver Melvin Taylor could be discharged under a collective bargaining agreement despite the lack of a written award or proof that the Committee even considered facts relevant to resolution of the charge of discrimination.¹³² The Board somehow considered this determination more reliable than two separate decisions by an administrative law judge who *heard* the evidence and evaluated the facts.¹³³

The recent case of *Martin Redi-Mix*¹³⁴ demonstrates the flaw of shifting the burden of proof to the party opposing deferral. In *Martin*, the employer argued successfully to the arbitrator that an employee voluntarily had quit his job,¹³⁵ and the General Counsel introduced the arbitrator's award to show that facts relevant to the unfair labor practice charge were absent from the record.¹³⁶ An administrative law judge twice refused to defer, once before and once after the *Olin Corp.* decision, and, instead, heard the evidence.¹³⁷ The administrative law judge found that deferral was not appropriate because the arbitrator was not presented with facts relevant to the unfair labor practice and because the award was palpably wrong.¹³⁸ Despite these findings, the Board over-turned the judge's finding of discriminatory discharge and deferred to the arbitrator's decision upholding the discharge.¹³⁹ The Board reasoned that, under *Olin Corp.*, the

¹²⁸ See *Yellow Freight*, 273 N.L.R.B. at 44, 118 L.R.R.M. at 1010-11.

¹²⁹ *Id.* at 45, 118 L.R.R.M. at 1010-11.

¹³⁰ 29 U.S.C. § 160(a) (1982).

¹³¹ 273 N.L.R.B. 713, 118 L.R.R.M. 1092 (1985). See *supra* notes 17-23 and accompanying text.

¹³² *Ryder Truck Lines*, 273 N.L.R.B. at 713, 118 L.R.R.M. at 1093.

¹³³ See *id.*, 118 L.R.R.M. at 1092-93. The administrative law judge's fact findings were different from the facts on which the arbitrator based his decision. See *Ryder Truck Lines* at 715-17 (ALJD). This case demonstrates that arbitrations do not always effectively meet the employees' need for representation in NLRA matters. The Union was not represented by counsel and may well have done a less thorough job than did the attorney representing the General Counsel of the NLRB in the unfair labor practice proceeding.

¹³⁴ 274 N.L.R.B. No. 79, 118 L.R.R.M. 1425 (1985).

¹³⁵ *Martin Redi-Mix*, No. 7-CA-18563, slip op. at 4 (ALJD, Supplemental Decision, May 18, 1984).

¹³⁶ *Martin Redi-Mix*, 274 N.L.R.B. No. 79 at 3-4, 118 L.R.R.M. at 1426.

¹³⁷ *Martin Redi-Mix*, No. 7-CA-18563, slip op. at 1, 4 (ALJD, Supplemental Decision, May 18, 1984) (referring to initial decision of March 31, 1982).

¹³⁸ *Id.* at 4-5, 6.

¹³⁹ *Martin Redi-Mix*, 274 N.L.R.B. No. 79 at 6, 118 L.R.R.M. at 1426.

General Counsel must show that no facts relevant to the unfair labor practice were presented at any time in the hearing, a burden which was not met by merely introducing the decision of the arbitrator.¹⁴⁰

In effect, then, the Board merely assumed that the arbitrator heard the relevant evidence. Thus, the rule of *Olin Corp.* unreasonably substitutes conjecture about what an arbitrator heard for proof. Further, the rule puts the burden of proving the absence of evidence on the one party not present at the hearing where such evidence was allegedly not presented. For this reason alone, the rule of *Olin Corp.* is unworkable.

Further, the *Olin Corp.* deferral standards fail to distinguish between different types of labor arbitration. Some arbitration forums, particularly those comprised of management and union representatives, are less suited to protecting individual rights than is the traditional neutral arbitrator. As the Court of Appeals for the Eleventh Circuit noted in *Taylor v. NLRB*,¹⁴¹ "[t]he new standard further ignores the practical reality of many bipartite proceedings, in which individual rights may be negotiated away in the interest of the collective good."¹⁴²

The recent case of *Sachs Electric Company* demonstrates the correctness of this observation.¹⁴³ In *Sachs*, Joseph Verlin, acting on his authority as union steward, spoke out to the general foreman on behalf of other employees.¹⁴⁴ In late January, he complained about allocation of overtime.¹⁴⁵ On February 3, the general foreman was instructed to lay off one of three individuals due to a lack of work.¹⁴⁶ The foreman selected Verlin for layoff, allegedly because he was less efficient than the other two,¹⁴⁷ even though Verlin's work had never been criticized and, indeed, Verlin had been asked in the past to help correct the work of the other two considered for layoff.¹⁴⁸ The administrative law judge found that when the general foreman advised Verlin of his layoff, he said, "D-day, buddy, we are even."¹⁴⁹ The administrative law judge thus found that Verlin had been laid off for his protected and concerted activities on behalf of other employees and ordered him reinstated with full back pay.¹⁵⁰

The Board reversed and, under *Olin Corp.*, deferred to the conclusion of a Labor Management Committee, comprised of equal numbers of union and management rep-

¹⁴⁰ *Id.* at 3-4, 118 L.R.R.M. at 1426.

¹⁴¹ 786 F.2d 1516, 122 L.R.R.M. 2084 (11th Cir. 1986).

¹⁴² *Id.* at 1522, 122 L.R.R.M. at 2089. The court cites Summers, *The Teamster Grievance Committees: Grievance Disposal Without Adjudication*, 37 PROC. OF THE NAT'L ACAD. OF ARB. 130 (1984), reprinted in 7 INDUS. REL. L.J. 313 (1985) as a survey demonstrating the inadequacy of some grievance committee proceedings which may involve only 15-minute hearings lacking relevant facts. *Taylor*, 786 F.2d at 1522 & n.8, 122 L.R.R.M. at 2089 & n.8. A permanent arbitrator, too, may sometimes have a general interest in serving the parties that nominated him or her; the arbitrator's interest thus conflicts with the interest of the individual employee grievants whose rights are at stake. See Donald Brown d/b/a Bailey Distributors, 278 N.L.R.B. No. 17, 121 L.R.R.M. 1121 (1986) (Dennis, Member, dissenting).

¹⁴³ 278 N.L.R.B. No. 121, 1, 121 L.R.R.M. 1269 (1986).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 2-3, 121 L.R.R.M. at 1269.

¹⁴⁶ *Id.* at 2, 121 L.R.R.M. at 1269.

¹⁴⁷ *Id.*

¹⁴⁸ See *Sachs Electric Co.*, No. GR-7-CA-23230, slip op. at 4 (ALJD, 1984).

¹⁴⁹ *Id.* at 3.

¹⁵⁰ *Id.* at 4.

representatives, which had concluded that the layoff was not improper because Verlin was not a steward when laid off.¹⁵¹ The contract provided that stewards shall be the last laid off and shall not be discriminated against because of performing their duties as stewards. This provision formed the basis of the grievance.¹⁵² The administrative law judge, in refusing to defer to the award, noted that the Union representatives agreed with the company representatives because the Union had failed to properly notify the company in writing that Verlin was a steward.¹⁵³ The Board majority failed to adopt this finding and deferred to the committee's decision that the discharge was proper.¹⁵⁴

The decision in *Sachs Electric* does not pass muster either under the *Olin Corp.* "factually parallel" test¹⁵⁵ or under the broad principles underlying *Olin Corp.* The National Labor Relations Act protects employees who assert the contractual rights of others.¹⁵⁶ A joint labor management committee is not an adequate substitute for an administrative law judge because, as occurred in *Sachs Electric*, union-management bargaining interests can outweigh the rights of the individual. As Professor Summers has argued, the joint grievance committee process "is structured to allow ex parte evidence, reliance on irrelevant considerations, grievance trading, political motivations, and personal bias."¹⁵⁷

Finally, the *Olin Corp.* deferral also may water down or eliminate employee rights where arbitrators have ordered remedies less complete than would the Board. For example, in *Cone Mills*,¹⁵⁸ Marie Darr, an elected union steward, was discharged in November, 1977, for protesting changes in break scheduling. Both an arbitrator and an administrative law judge of the National Labor Relations Board found that Ms. Darr's discharge violated the National Labor Relations Act because it was motivated by her engaging in a protected activity. The administrative law judge ordered reinstatement and back pay.¹⁵⁹ Despite the propriety of the underlying finding of illegal motivation, the Board overruled the administrative law judge and deferred to the award of the arbitrator granting reinstatement but no back pay for the more than nine months Ms. Darr was improperly out of work.¹⁶⁰ Had there been no arbitration award, there is no question that under Board policies, she would have received full back pay under the Act.¹⁶¹

¹⁵¹ *Sachs*, 278 N.L.R.B. No. 121 at 4, 121 L.R.R.M. at 1270.

¹⁵² *Sachs*, No. GR-7-CA-23230, slip op. at 2.

¹⁵³ *Id.* at 2-3.

¹⁵⁴ *Sachs*, 278 N.L.R.B. No. 121 at 4, 6, 121 L.R.R.M. at 1270-71.

¹⁵⁵ *Id.* at 7, 121 L.R.R.M. at 1271.

¹⁵⁶ *NLRB v. City Disposal Systems*, 465 U.S. 822, 115 L.R.R.M. 3193 (1984).

¹⁵⁷ Summers, *supra* note 132; at 333, 7 INDUS. REL. L.J. at 333.

¹⁵⁸ 273 N.L.R.B. 1515, 118 L.R.R.M. 1197 (1985).

¹⁵⁹ *Id.* at 1516, 118 L.R.R.M. at 1198.

¹⁶⁰ *Id.*, 118 L.R.R.M. at 1199.

¹⁶¹ The Board generally has insisted on full back pay with reinstatement in areas other than deferral to labor arbitration. *See, e.g.*, *Community Medical Servs. of Clearfield, Inc.*, 236 N.L.R.B. 853, 98 L.R.R.M. 1314 (1978) (refusing to accept settlement agreement of reinstatement without back pay for persons illegally discharged). As the Board pointed out in another settlement case, *Ideal Donut Shop*, "reinstatement and back pay are remedies which the Board provides in the public interest to enforce a public right. No private right to such relief attaches to a discriminate which he can bargain away or compromise . . ." 148 N.L.R.B. 236, 237, 56 L.R.R.M. 1486, 1487 (1964).

Regional offices and the General Counsel, after a complaint has been issued, generally refuse

In *Darr v. NLRB*,¹⁶² the Court of Appeals for the D.C. Circuit remanded the *Cone Mills* case to the Board noting that if the Board had found what the arbitrator had found, it would have ordered back pay as well as reinstatement. In addition, the court noted that the Board neither explicitly set forth a waiver theory by which a union could waive employee rights nor did it explain how, if at all, the statutory claim merged into the contract claim. Because the Board had not adequately "articulat[ed] its view of the interrelationship between the law of a particular collective bargaining agreement and the NLRA," the court remanded the case to the Board "for further consideration (or explanation) of its reasons for deferring to the arbitrator's award."¹⁶³

The Board's application of *Olin Corp.* in these cases represents a too rigid adherence to a questionable holding. While extending *Suburban Motor Freight* may be within the Board's discretion,¹⁶⁴ *Olin Corp.*, as applied in these cases, is beyond the bounds of the Board's discretion. The Board, and not the arbitrator, is charged with enforcing the National Labor Relations Act and protecting employee rights. Where, in performing its duties, the Board chooses to defer to the finding of another fact finder, it must insure that those findings are based on fact and lead to a result consistent with the Act.

V. A PROPOSAL

Improved standards for deferral should reflect Congress's mandate that the National Labor Relations Act is to be enforced by the National Labor Relations Board, and not by private labor arbitrators. The problem is not one of selecting a standard by which the Board should review the arbitrator's decision, because the Board is not statutorily empowered to review or reverse a private labor arbitrator whose function it is to interpret the collective bargaining agreement. Rather, the focus should be on whether the Board has received enough information through the arbitration process to enable it to do its job of determining whether the employee's statutory rights have been sufficiently protected. Thus, the test should not be whether the arbitrator had an "opportunity to consider"¹⁶⁵ the unfair labor practice charge, and a proper standard should not presume that an arbitrator has been presented with the facts "relevant to resolving the unfair labor practice"¹⁶⁶ merely because the party opposing deferral cannot prove that such facts were not presented and allegations are "factually parallel."¹⁶⁷ Similarly, the test

to accept proposed settlements involving back pay claims unless the settlement offer is at least 80 percent of the maximum amount due. Aaron, *The NLRB, Labor Courts, and Industrial Tribunals: A Selective Comparison*, 39 INDUS. & LAB. REL. REV. 41 (1985). Regional offices encourage settlement efforts and these efforts have been substantially successful. In fiscal year 1981, 16.3 percent of charges were settled or adjusted before complaints issued and 12.4 percent of cases in which complaints issued were settled or adjusted before issuance of an administrative law judge opinion. *Id.* (citing Forty-Sixth Annual Report of the National Labor Relations Board, for the fiscal year ending September 30, 1981 (Washington, D.C. GPO 1983) at 10 and Table 8).

¹⁶² 801 F.2d 1404, 123 L.R.R.M. 2548 (D.C. Cir. 1986).

¹⁶³ *Id.* at 1409, 123 L.R.R.M. at 2552.

¹⁶⁴ See *supra* notes 30-39 and accompanying text.

¹⁶⁵ See *Electronic Reproduction*, 213 N.L.R.B. at 762, 80 L.R.R.M. at 1216. For a discussion of this case, see *supra* notes 99-103 and accompanying text.

¹⁶⁶ See *Olin Corp.*, 268 N.L.R.B. at 574, 115 L.R.R.M. at 1058. See *supra* notes 108-12 and accompanying text for a discussion of this case.

¹⁶⁷ *Olin Corp.*, 268 N.L.R.B. at 574, 115 L.R.R.M. at 1058.

should not be one which merely asks whether the arbitrator "considered" the unfair labor practice issues.¹⁶⁸

A proper test should inquire whether the Board has proof that the arbitrator or arbitration panel considered facts relevant to resolution of the unfair labor practice charge and, in light of these facts, whether the result was consistent with the Act. Only with such a test, can the Board fulfill its statutory duties.

Under this proposed standard, not all the decisions which applied *Olin Corp.* would be invalid. *Olin Corp.* itself, for example, involved a record of evidence from arbitration which demonstrated reasoned application of contract to fact. The Board had relevant facts to review and could determine whether the arbitrator's conclusions had bases in fact and were consistent with NLRB practice.¹⁶⁹

Similarly, the Board could continue to defer in recent cases like *Stroh Brewery Company*.¹⁷⁰ There, the Board applied *Olin Corp.* and deferred to an award upholding the discharge despite the arbitrator's explicit disclaimer that he was not relying on the Labor Management Relations Act.¹⁷¹ Not only was there a written transcript of the arbitration hearing, but the arbitrator also made findings of fact and provided a written opinion supporting the conclusions reached.¹⁷² Therefore, the Board had information allowing it to make a decision on the labor law issues.

The second major part of this proposal is that the Board must determine whether, in light of the facts presented to the arbitrator or panel as evidenced by the record, the resolution of the dispute is consistent with the purposes of the National Labor Relations Act. This is a change in wording from the *Spielberg* terminology of "clearly repugnant" to the Act.¹⁷³ The proposed standard is less deferential than the *Olin Corp.* standard of "palpably wrong," which was defined as a decision "not susceptible to an interpretation consistent with the Act."¹⁷⁴

Thus, the proposed standard should decrease the number of cases in which deferral is appropriate. This change is necessary for two reasons. First, the loose *Olin Corp.* standard can undercut employee rights and lead to results that the Board would not sanction even in voluntarily settled cases. As noted above, cases like *Cone Mills*, where an arbitrator has directed a remedy that is less favorable to the employee than the Board

¹⁶⁸ See *Raytheon*, 140 N.L.R.B. at 887, 50 L.R.R.M. at 1131. For a discussion of this case see *supra* note 97 and accompanying text.

¹⁶⁹ *Olin Corp.*, 268 N.L.R.B. at 585, 586 (ALJD) (indicating detail of award). See also *Olin Corp.*, 268 N.L.R.B. at 576 n.13, 115 L.R.R.M. at 1059 n.13 (indicating that there existed a "record" of the arbitration proceeding).

¹⁷⁰ 273 N.L.R.B. 1604, 118 L.R.R.M. 1238 (1985).

¹⁷¹ *Id.* at 1606-07, 118 L.R.R.M. at 1238.

¹⁷² *Stroh*, 273 N.L.R.B. at 1604-05 & nn. 6-8 (ALJD). Both parties were represented by counsel at the arbitration hearing. *Id.* at 1604. The existence of a detailed opinion also helps the Board decide if an award is under current standards "clearly repugnant" to the Act or "palpably wrong." In *Garland Coal & Mining Co.*, the Board declined to defer to an arbitrator's award which had reduced a discharge to a three week suspension. 276 N.L.R.B. No. 102, 120 L.R.R.M. 1159 (1985). From the detailed opinion, the Board was able to tell that the employee had been disciplined for protected activity and that no discipline could stand. Without a detailed opinion, the *Olin Corp.* standards may well have led to deferral to the arbitration award.

¹⁷³ *Spielberg*, 112 N.L.R.B. at 1082, 36 L.R.R.M. at 1153. See *supra* note 96 and accompanying text.

¹⁷⁴ *Olin Corp.*, 268 N.L.R.B. at 574, 115 L.R.R.M. at 1058.

would have directed, are dangerous.¹⁷⁵ While NLRB remedies exist for the protection of all employees, decisions like *Cone Mills* warn that it is not safe to exercise protected rights.¹⁷⁶ Other recent cases, such as the Board's 1985 decision in *U.S. Postal Service*,¹⁷⁷ suggest that arbitrators as well may compromise *Weingarten*¹⁷⁸ rights to the presence of a union representative at an investigatory interview. Arbitrators do not have the responsibility of enforcing public rights under the NLRA.¹⁷⁹ For this reason the NLRB must assure that the remedies and orders arbitrators impose are consistent with the Act before deferral is appropriate.

The second reason for replacing the *Olin Corp.* standard is that the proposed "consistent with the Act" standard is a necessary safeguard to maintain trust in the Board's exercise of its discretion to defer. The Board generally makes deferral decisions in relative secrecy at the Regional Office level. In deciding not to issue a complaint, an officer of the NLRB needs standards by which to guide his or her action. A standard that provides for deferral unless the result "is not susceptible to an interpretation consistent with the Act"¹⁸⁰ is too loose a standard to provide guidance and must lead to widespread deferral. This is particularly true when, as has occurred in cases such as *Cone Mills*,¹⁸¹ the Region, General Counsel, and Administrative Law Judge all have deemed an arbitrator's award "palpably wrong" and the Board has reversed their determination.¹⁸² Because the Board sets the policies which Regions, the Office of Appeals, and the Administrative Law Judges must follow, the message of *Cone Mills* will not be missed by those responsible for following Board policy.¹⁸³ This is especially true if the Region

¹⁷⁵ See *Cone Mills*, 273 N.L.R.B. 1515, 118 L.R.R.M. 1197. See *supra* notes 128-30 and accompanying text.

¹⁷⁶ A major purpose of the Board's remedies in discrimination cases is to send other employees the message that they, too, are protected. See e.g., *Budd Mfg. Co. v. NLRB*, 138 F.2d 86, 13 L.R.R.M. 512 (3d Cir. 1943) (upholding reinstatement and back pay for discriminatorily discharged employee despite his admitted incompetencies and failure to work).

¹⁷⁷ 275 N.L.R.B. No. 65, 119 L.R.R.M. at 1153 (1985). In *U.S. Postal Service*, the Board deferred to an arbitrator's award which held that the employee's *Weingarten* rights had not been violated. *Id.* Under *NLRB v. Weingarten*, an employee has a right to the presence of a union representative at an investigatory interview, 420 U.S. 251, 88 L.R.R.M. 2689 (1975). The arbitrator found in *U.S. Postal Service* that the employee's continued participation in the interview after having been told no union representative was available constituted waiver of her right to union representation, 275 N.L.R.B. No. 65, 119 L.R.R.M. 1153. The employer, however, had not advised the employee that she had a choice of either continuing the interview unrepresented or foregoing the interview. *Id.*

¹⁷⁸ See *NLRB v. Weingarten*, 420 U.S. 251, 88 L.R.R.M. 2689 (1975).

¹⁷⁹ As Chairman Murphy pointed out in her *General American* concurrence, arbitrators are not legally qualified to decide unfair labor practice issues and these issues should instead be decided by persons qualified by the Civil Service Commission as hearing examiners under Section 11 of the Administrative Procedures Act. 228 N.L.R.B. at 811 n.11, 94 L.R.R.M. at 1486-87 n.11 (Murphy, Chairman, concurring) (citing 5 U.S.C. § 557 (1982); N.L.R.B. Rules and Regulations and Statements of Procedure, Series 8, as amended §§ 101.10, 101.11, 102.35(j)).

¹⁸⁰ *Olin Corp.*, 268 N.L.R.B. at 574, 115 L.R.R.M. at 1058.

¹⁸¹ See *supra* notes 128-30, 158-60 and accompanying text.

¹⁸² See *supra* notes 128-30 and accompanying text.

¹⁸³ The recent *U.S. Postal Service* case reached the Board only because the Board's Office of Appeals had sustained the union's appeal of the Regional Director's decision not to issue a complaint. 275 N.L.R.B. No. 65, 119 L.R.R.M. 1153 (1985). After the decisions in *U.S. Postal Service* and *Cone Mills*, neither Regional Directors nor the Office of Appeals are likely to refuse to defer on repugnancy grounds.

is concerned about potential liability under the Equal Access to Justice Act¹⁸⁴ for pursuing the matter in the face of such Board precedent.

Moreover, the above proposals should be combined with the first two tests of the *Spielberg* standard to provide a standard for deferral which is more consistent with the purposes of the National Labor Relations Act. Thus, under this proposal,¹⁸⁵ the Board may defer to an already decided arbitration award if (1) the arbitration proceedings "appear to have been fair and regular;"¹⁸⁶ (2) all parties to the arbitration proceeding have "agreed to be bound;"¹⁸⁷ (3) the award or determination is in writing and from the award, opinion, and other evidence of what transpired at the hearing, it is clear that the arbitrator or arbitration panel considered facts relevant to resolution of the unfair labor practice charge;¹⁸⁸ and (4) in light of these facts, the resolutions of fact and the ultimate result are consistent with the purposes and policies of the Act.¹⁸⁹ The Board should place the burden of proof that these standards have been met on the party proposing deferral.¹⁹⁰ The proposed test represents a partial overruling of *Olin Corp.*

While proponents of broader deferral have cited numerous supporting policies, none of these policies supports the breadth of deferral suggested by *Olin Corp.* First, supporters of broader deferral have pointed to preserving the benefits of the bargain struck by the parties to the collective bargaining agreement and to an alleged national policy under Section 203(d)¹⁹¹ favoring private resolution of labor disputes.¹⁹² These arguments, however, cannot support the broad deferral of *Olin Corp.* The parties' bargain

¹⁸⁴ Under the Equal Access to Justice Act, certain prevailing parties may recover attorneys' fees and expenses if the General Counsel was not "substantially justified" in issuing the complaint. 5 U.S.C. § 504 (1982) as amended by Pub. L. No. 99-80, 99 Stat. 183 (1985).

¹⁸⁵ The proposal made here is that the *Olin Corp.* standard be changed. If it is not to be changed, the advice of Professor Charles Morris should be followed. Professor Morris has noted that the guidelines of *Olin Corp.* are based on the expectation that arbitrators will apply the law of the National Labor Relations Act and will lead to deferral in hundreds, if not thousands, of cases, the results of which never reach the public eye. Morris, *Arbitrator's Responsibility*, *supra* note 8, at 305. In response, he suggests that (1) awards in deferral cases be made publicly available, (2) arbitrators educate themselves as to NLRA issues; (3) both the Board and the parties give notice to arbitration selecting agencies when cases involve NLRA issues so that arbitrators who do not consider themselves qualified to rule in such cases may withdraw; and (4) standards for judicial review of arbitration awards which treat statutory issues be changed or clarified. *Id.* at 305-10.

¹⁸⁶ *Spielberg*, 112 N.L.R.B. at 1082, 36 L.R.R.M. at 1153. *See supra* note 96 and accompanying text. There is some question as to whether all *Olin Corp.* deferrals have been to "fair and regular" arbitration proceedings. *See Savin & Col., Inc.*, 277 N.L.R.B. No. 44, 120 L.R.R.M. 1287 (1985) (Board defers to award refusing to reinstate seven unfair labor practice strikers allegedly because of picket line violence despite fact that employer failed to present witnesses and presented only employees' affidavits in arbitration hearing). *See also supra* note 132. The proposal made here would require that deferral only take place if arbitration proceedings were genuinely fair, including regular hearings with witnesses, the opportunity to cross-examine, and other rudimentary elements of a traditional arbitration hearing.

¹⁸⁷ *Spielberg*, 112 N.L.R.B. at 1082, 36 L.R.R.M. at 1153. *See supra* note 96 and accompanying text.

¹⁸⁸ *See supra* notes 147-55 and accompanying text.

¹⁸⁹ *See supra* notes 156-69 and accompanying text.

¹⁹⁰ *Olin Corp.* places the burden of proof on the party opposing deferral. *See Olin Corp.*, 268 N.L.R.B. at 574, 115 L.R.R.M. at 1058. *See supra* note 112 and accompanying text.

¹⁹¹ 29 U.S.C. § 173(d) (1982).

¹⁹² *See Olin Corp.*, 268 N.L.R.B. at 574 n.5, 115 L.R.R.M. at 1057 n.5. *See also General American*, 228 N.L.R.B. at 815, 94 L.R.R.M. at 1491 (Penello and Walther, Members, dissenting).

was for arbitration of *contract* disputes. Section 203(d)¹⁹³ must be read in light of Section 10(a),¹⁹⁴ which appoints the Board to enforce the Act. Further, Section 203(d) is, on its face, limited to "grievance disputes arising over the application or interpretation of an existing labor agreement."¹⁹⁵ The cases in question involve more than contract disputes.

Second, supporters of broader deferral have pointed to a reduction of the Board's work load.¹⁹⁶ While this may be closest to the true reason for Board deferral, there is no clear evidence that deferral reduces the work load.¹⁹⁷ In any event, this reason alone cannot justify denying employees their statutory protections unless there are other safeguards to guarantee their rights. *Olin Corp.* offers no such safeguards.

Third, supporters have pointed to the alleged speed of arbitration as compared to the delay involved in receiving a Board determination.¹⁹⁸ While arbitration is more speedy, it too suffers from substantial delays, with the average arbitrated case requiring approximately 230 days from grievance to award.¹⁹⁹ Further, pre-arbitration deferral, under which the Board will defer pending the outcome of arbitration and will not even begin its work, exacerbates Board delay. Finally, determination by arbitration or Board proceedings does not logically have to be an either/or proposition. While an illegally discharged employee receiving a full remedy through arbitration may have no need of further proceedings before the Board, a person who feels that he or she did not receive the equivalent of statutory protection before the arbitrator should be able to approach the government agency charged with protecting his or her rights. Thus, the comparative speed of arbitration ought not be a reason for delaying already slow Board proceedings.

Fourth, and related to the third point, is an expressed concern that employees may somehow receive "two bites at the apple" by having their case heard by *both* an arbitrator and the Board.²⁰⁰ It is difficult to understand why this is viewed as undercutting either

¹⁹³ 29 U.S.C. § 173(d) (1982).

¹⁹⁴ 29 U.S.C. § 160(a) (1982). See *supra* note 3 and accompanying text.

¹⁹⁵ 29 U.S.C. § 173(d) (1982).

¹⁹⁶ See *General American*, 228 N.L.R.B. at 818-19, 94 L.R.R.M. at 1494 (Penello and Walther, Members, dissenting). See also Zimmer, *Wired for Collyer: Rationalizing NLRB and Arbitration Jurisdiction*, 48 IND. L.J. 141, 196 (1972).

¹⁹⁷ Even members of the Board cannot agree as to the impact of deferral on work load. Compare *Olin Corp.*, 268 N.L.R.B. at 581, 115 L.R.R.M. at 1064 (Zimmerman, Member, dissenting) and *General American*, 228 N.L.R.B. at 810, 94 L.R.R.M. at 1485-86 with *Olin Corp.*, 268 N.L.R.B. at 575 n.9, 115 L.R.R.M. at 1058 n.9 and *General American*, 228 N.L.R.B. at 819 n.48, 94 L.R.R.M. at 1494 n.48 (Penello and Walther, Members, dissenting).

¹⁹⁸ See *General American*, 228 N.L.R.B. at 818-19, 94 L.R.R.M. at 1494 (Penello and Walther, Members dissenting). See also Schatzki, *NLRB Resolution of Contract Disputes Under Section 8(a)(5)*, 50 TEX. L. REV. 225, 251-52 (1972).

¹⁹⁹ Federal Mediation and Conciliation Service, Thirty-Fourth Annual Report, Fiscal Year 1981 Table 19, p. 39. (230.26 average days elapsed between grievance filing and award.)

²⁰⁰ See *NLRB v. Motor Convoy*, 673 F.2d 734, 109 L.R.R.M. 3201 (4th Cir. 1982). The concept applied by the Board seems to be that arbitration gives both parties the "benefit of their bargain" and that they should be entitled to no more. The Board applied this rationale explicitly in *Anderson Prestress Div.*, a discharge case in which the Board overruled its Administrative Law Judge and deferred to an arbitration decision upholding discharge, stating that its standard of review did not contemplate substituting its own judgment for that of the arbitrator. 277 N.L.R.B. No. 127, 121 L.R.R.M. 1069 (1985). In this case, an employee refused to work in allegedly dangerous conditions, and picketed to protest unsafe conditions and alleged unfair labor practices, all of which the Administrative Law Judge thought to be protected activities. *Id.* at 4, n.4, 121 L.R.R.M. at 1070 n.4. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 50 L.R.R.M. 2235 (1962). In deferring to an award in which the Administrative Law Judge made no findings of fact or written disposition,

arbitration or the Board. Under the test proposed, if the issues are the same and the resolution is consistent with the Act, the Board could still defer. If these standards are not met, however, it is appropriate that the Board decide statutory issues. To do so in no way undercuts the authority of the arbitrator to decide contract issues.²⁰¹ Thus, the test proposed is consistent with the policies justifying Board deferral and better protects individual employee rights than does the overly broad test of *Olin Corp.*

Further, the proposed test is more likely than *Olin Corp.* to survive judicial review. The Court of Appeals for the Eleventh Circuit has rejected the Board's decisions in the deferral area which have applied *Olin Corp.*²⁰² The Court of Appeals for the D.C. Circuit has questioned these decisions,²⁰³ and the Court of Appeals for the Second Circuit has limited them.²⁰⁴ Further, *Olin Corp.* is modeled somewhat on *Electronic Reproduction*,²⁰⁵ which was rejected by courts and received substantial criticism.²⁰⁶ By contrast, a number

Anderson, 277 N.L.R.B. No. 127, at 9, 121 L.R.R.M. at 1069 (ALJD), the *Anderson* Board stated, "[d]eferral recognizes that the parties have accepted the possibility that an arbitrator might decide a particular set of facts differently than would the Board. This possibility, however, is one which the parties have voluntarily assumed through collective bargaining." *Id.* at 5 n.6, 121 L.R.R.M. at 1070 n.6. See also Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L.J. 23 (1985) (favoring deferral under *Olin Corp.* under a contractual waiver doctrine).

The problem with such benefit of the bargain or waiver analysis is two-fold. First, the argument should not apply in individual rights cases because individuals have their own rights under the statute which are not always waivable by the parties to the contract. Second, many current contracts were negotiated before *Olin Corp.* Thus, the parties had no notice that by agreeing to arbitration they were waiving rights.

²⁰¹ Former Member Penello, dissenting in *Suburban*, argued that non-deferral in discharge and discipline cases was "particularly destructive of the arbitral process" because a deferral standard that requires the arbitrator to have "considered" the unfair labor practice would cause the union to withhold evidence of discrimination from the arbitrator to maintain the employee's access to the Board. 247 N.L.R.B. at 148, 103 L.R.R.M. at 1115 (Penello, Member, dissenting). Thus, an arbitrator would not receive all the evidence needed to determine "just cause." *Id.* The test proposed, which does not require that the arbitrator have "considered" the unfair labor practice issues, does not pose this problem. Unions would need to put evidence of discrimination into the record so that the Board could consider it in making the decision to defer.

²⁰² See *Taylor v. NLRB*, 786 F.2d 1516, 122 L.R.R.M. 2084 (11th Cir. 1986). But see *Garcia v. NLRB*, 785 F.2d 807, 121 L.R.R.M. 3349 (9th Cir. 1986) (court did not seem to question application of *Olin Corp.* in denying enforcement of Board order where Board deferred to award that court thought contrary to law and inconsistent with Board standards). Board decisions in the deferral area are subject to review for abuse of discretion. See e.g., *NLRB v. General Warehouse Corp.*, 643 F.2d 965, 970, 106 L.R.R.M. 2729, 2732 (3d Cir. 1981).

²⁰³ See *Darr v. NLRB*, 801 F.2d 1404, 123 L.R.R.M. 2548 (D.C. Cir. 1986).

²⁰⁴ See *Nevins v. NLRB*, 796 F.2d 14, 122 L.R.R.M. 3147 (2d Cir. 1986). In *Nevins*, the court held that the *Olin Corp.* standard was not satisfied where a claim of constructive discharge for protected activity was not raised before the arbitrator. The Second Circuit vacated and remanded the case and labeled deferral an abuse of administrative discretion. In so ruling, the court rejected the Board's contention that the employee had purposefully not raised the issue before the arbitrator.

Regardless whether *Nevins* is to blame for not raising the issue before the arbitrator, however, the fact of the matter is that the *Olin* standard for deferral was not satisfied, since the issue was not raised and the facts necessary to resolve the issue were not presented to the arbitrator.

Id. at 19, 122 L.R.R.M. at 3152.

²⁰⁵ See *supra* notes 99-102 and accompanying text. The *Olin Corp.* majority denies the similarity. *Olin Corp.*, 268 N.L.R.B. at 575 n.10, 115 L.R.R.M. at 1059 n.10.

²⁰⁶ See *supra* note 102.

of courts of appeals approved the *Suburban Motor Freight* decision, which was overruled in *Olin Corp.*²⁰⁷ While the test here proposed does not require that the arbitrator have "considered" the unfair labor practice, it is generally consistent with *Suburban Motor Freight* and the views of the courts, most particularly with respect to placing the burden of proof on the party *proposing* deferral rather than on the party *opposing* deferral.²⁰⁸ Furthermore, the proposed requirement that arbitration outcomes must be consistent with the Act, rather than merely not repugnant to it, also has important implications for court review. Courts sometimes have overruled Board decisions not to defer on the basis of repugnancy to the Act on the grounds that where "the reasoning behind an [arbitration] award is susceptible of two interpretations," it cannot be called "clearly repugnant."²⁰⁹ The *Olin Corp.* standards of "palpably wrong" and "not susceptible to an interpretation consistent with the Act"²¹⁰ leave the Board even less discretion to refuse to defer to an award without being vulnerable to a charge of abusing its discretion.

VI. CONCLUSION

Read together, the recent Board decisions in *United Technologies* and *Olin Corp.* have a substantial impact on the degree to which the National Labor Relations Act protects employees' individual rights. *United Technologies* substantially increases the number of arbitration awards that will be eligible for deferral treatment. For this reason, the standards under which deferral is approved are extremely important. Care must be taken to insure that cases deferred under *United Technologies* pending arbitration are reviewed after arbitration to insure that individual rights are protected. Recent cases applying *Olin Corp.* demonstrate that the standards of *Olin Corp.* do not adequately protect these rights.

Olin Corp. must be modified to insure that the Board can perform its statutory duty of protecting employees. Arbitration cannot completely fulfill this duty. In their private collective bargaining agreement, the parties may agree that the arbitrator's award is the appropriate way to resolve their disputes. They may not, however, give the Board power to resolve their private contractual disputes nor may they voluntarily or otherwise relieve the Board of its public duty to carry out the policies of the Act. Public rights and public duties ought not be waived through the private negotiation process that leads to a collective bargaining agreement.

²⁰⁷ See, e.g., *NLRB v. Magnetics Int'l*, 699 F.2d 806, 112 L.R.R.M. 2658 (6th Cir. 1983); *United Parcel Serv. v. NLRB*, 706 F.2d 972, 113 L.R.R.M. 2174 (3d Cir. 1983); *Pioneer Finishing Corp. v. NLRB*, 667 F.2d 199, 109 L.R.R.M. 2112 (1st Cir. 1981), *cert. denied*, 460 U.S. 1080, 112 L.R.R.M. 3448 (1983); *Stephenson v. NLRB*, 550 F.2d 535, 94 L.R.R.M. 3224 (9th Cir. 1977); *Banyard v. NLRB*, 505 F.2d 342, 87 L.R.R.M. 2001 (D.C. Cir. 1974).

²⁰⁸ See, e.g., *NLRB v. Magnetics Int'l*, 699 F.2d at 811, 112 L.R.R.M. at 2663 ("any doubts regarding the propriety of deferral will be resolved against the party urging deferral").

²⁰⁹ See *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352, 354, 102 L.R.R.M. 2811, 2812-13 (9th Cir. 1979) (finding abuse of discretion under this standard where Board refused to defer to arbitration award of reinstatement without back pay).

²¹⁰ *Olin Corp.*, 268 N.L.R.B. at 574, 115 L.R.R.M. at 1048. See *supra* note 12 and accompanying text.

BOSTON COLLEGE LAW REVIEW

VOLUME XXVIII

DECEMBER 1986

NUMBER 1

BOARD OF EDITORS

ANNE E. CRAIGE
Editor in Chief

JOHN G. CASAGRANDE JR.
Executive Editor

TIMOTHY J. COURVILLE
Executive Editor

EILEEN M. FIELDS
Executive Editor

DAVID S. NEWMAN
Executive Editor

MICHAEL E. PEEPLES
Managing Editor

JANET K. ADACHI
Topics Editor

SARAH BORSTEL PORTER
*Executive Editor-Annual Survey
of Massachusetts Law*

WILLIAM A. HAZEL
Solicitations Editor

WILLIAM E. MARTIN
Business Manager

DOROTHY WHELAN
Production Editor

Articles Editors

MARGARET B. CROCKETT
JAMES C. DUDA
JEFFREY C. HADDEN
ANN L. KIRKPATRICK
DAVID M. RIEVMAN

Note and Casenote Editors

MARIS L. ABBENE
JOSEPH A. ACETO
THOMAS J. BARTON
JANE A. BELL
BRUCE D. BERNIS

MARK A. KATZOFF
ELIZABETH M. LEONARD
KATHLEEN M. MCLEOD
LISA RAYEL
TIMOTHY M. SMITH

SECOND YEAR STAFF

ALAN J. APPLEBAUM
DAVID Y. BANNARD
STEPHEN W. BERNSTEIN
BRIAN A. BERUBE
CAROLE A. CASEY
KEVIN W. CLANCY
MARY V. DECK
JOSEPH A. DiBRIGIDA JR.
CHRISTOPHER D. DILLON
ROYAL C. GARDNER

RICHARD L. GEMMA
JOHN A. GORDON
JAMES P. HAWKINS
DEBORAH A. KOLODZIEJ
ERIC I. LEE
KATE H. LIND
MARK D. LURIE
CONSTANCE J. MACDONALD
EIVAN MAHONY
WILLIAM T. MATLACK

KATHLEEN E. MCGRATH
VALERIE L. PASSMAN
LORETTA RHODES RICHARD
KYLE M. ROBERTSON
DAVID L. RUEDIGER
DIANE L. SALTOUN
MARK J. SHAFFER
LISA K. SNOW
MICHAEL J. SOUTHWICK
GRETCHEN M. VAN NESS

ROSALIND F. KAPLAN
*Coordinator of
Student Publications*

SCOTT T. FITZGIBBON
Faculty Advisor

MAUREEN A. SULLIVAN
Administrative Assistant
