The National Labor Relations Board's Policy of Deferring to Arbitration

James I. Briggs, Jr.
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I. INTRODUCTION

Collective-bargaining agreements between private employers and unions usually contain provisions governing the procedure for the arbitration of unfair labor practice complaints. When an unfair labor practice dispute arises, must the parties process the dispute through the contractual arbitration process and accept the arbitrator's determination, or, alternatively, does the complainant have the option to bypass the contractual procedure and petition the National Labor Relations Board (NLRB) for resolution of the dispute? A third possibility is that the party receiving an unfavorable result in the arbitration process could obtain a second bite at the dispute resolution apple by then bringing the dispute before the NLRB. After years of vacillation by the Board as to which forum should resolve these disputes, the NLRB has announced standards for determining whether it will resolve the dispute itself or require that the dispute be settled by the contractual arbitration procedures.

In *United Technologies Corp.*¹ and *Olin Corp.*,² the NLRB broadened its policy on deferral to arbitration. In *United Technologies*, the Board held that the NLRB's processes will be stayed in favor of the contractual grievance-arbitration procedures voluntarily invoked by the parties.³ In *Olin Corp.*, the Board concluded that, if the arbitral proceeding satisfies the standards given in *Spielberg Manufacturing Co.*⁴ and the arbitrator adequately considers the unfair labor practice issues, the Board will defer to the award given in the arbitration proceeding.⁵ The Board thus overruled its 1977 decision in *General American Transportation*

3. 268 N.L.R.B. at 560.
5. 268 N.L.R.B. at 576-77.
Corp., in which it had sharply restricted its policy of deferring to the contractual grievance-arbitration machinery.

This Comment discusses the development of the Board's policy of deferring grievances to arbitration rather than processing them itself, and the acceptance by the courts of the deferral to voluntarily contracted grievance-arbitration procedures.

II. DEVELOPMENT OF THE NLRB'S POLICY ON DEFERRAL TO ARBITRATION

Congressional intent regarding the use of arbitration is expressed in Title 29 of the United States Code: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." However, section 10(a) of the National Labor Relations Act (NLRA) expressly provides that an arbitral proceeding and award resolving unfair labor practice issues does not preclude the Board from also resolving those same issues.

The NLRB's policy on deferral to arbitration consists of two parts. The first part involves the deferral to the arbitration process itself: Whether the arbitration machinery in the contract between the union and the employer must be exhausted before the Board's jurisdiction can be invoked. The second part involves the deferral to the award made during the arbitration process: Whether the Board will determine the merits of the case or defer to the arbitration award and dismiss the action.

8. "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section [8 of the Act]), affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." Id. § 10(a), 29 U.S.C. § 160(a).
9. International Harvester Co., 138 N.L.R.B. 923, 925 (1962), affirmed sub nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), cert. denied, 377 U.S. 1003 (1964); see, e.g., NLRB v. Hershey Chocolate Corp., 297 F.2d 286, 293-94 (3d Cir. 1961); NLRB v. Walt Disney Prods., 146 F.2d 44, 48 (9th Cir. 1944), cert. denied, 324 U.S. 877 (1945). In Hershey Chocolate Corp., the Third Circuit believed that deferral, rather than rejection, by the Board of the arbitration decision "would have resulted in the effectuation of the final adjustment policy declared desirable by Section 203(d) of the Labor-Management Relations Act." 297 F.2d at 293-94.
A. Deferral to the Arbitration Process

In the 1943 case of Consolidated Aircraft Corp.,\(^\text{10}\) the NLRB determined that if the statutory policy of "encouraging the practice and procedure of collective bargaining"\(^\text{11}\) was to be implemented, then the Board's jurisdiction should not be exercised until the rights and remedies under the contract between the labor organization and the employer was exhausted. If the NLRB agreed prematurely to determine whether the disputes over the meaning and administration of collective bargaining agreements constituted unfair labor practices, then the Board's interference in the contractual collective bargaining process would encourage unions and employers to abandon their arbitration efforts and defer their contract administration to the Board.\(^\text{12}\)

Even though the presence of a contractual arbitration procedure does not prevent the NLRB from exercising its jurisdiction, the Board in its discretion will defer disputes to arbitration when it determines that arbitration is appropriate.\(^\text{13}\) In Jos. Schlitz Brewing Co.,\(^\text{14}\) the Board held that it should defer the issue of an employer's unilateral action to the arbitration process when (1) arbitration is clearly provided for in the contract, (2) a substantial claim of contractual privilege, not a design to undermine the union, is the basis for the employer's action, and (3) arbitration will apparently resolve the unfair labor practice and the contract interpretation issue in a manner compatible with the NLRA's purposes.\(^\text{15}\)

In 1971, the NLRB in Collyer Insulated Wire\(^\text{16}\) deferred to the arbitration machinery an alleged violation of section 8(a)(5) of the NLRA.\(^\text{17}\) By deferring to the parties' agreement to arbitrate disputes, the Board merely gave full effect to the collective bargaining contract.\(^\text{18}\) The NLRB held the union and the employer "to their bargain by directing them to avoid substituting the Board's

\(^{10}\) 47 N.L.R.B. 694, 12 L.R.R.M. (BNA) 44 (1943), enforced in pertinent part, Consolidated Aircraft Corp. v. NLRB, 141 F.2d 785 (9th Cir. 1944).
\(^{11}\) 12 L.R.R.M. at 45.
\(^{12}\) 16.
\(^{14}\) 175 N.L.R.B. 141 (1969).
\(^{15}\) Id. at 142.
\(^{16}\) 192 N.L.R.B. 837 (1971).
\(^{17}\) Id. at 839; National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982) ("(a) . . . It shall be an unfair labor practice for an employer— . . . (5) to refuse to bargain collectively with the representatives of his employees . . . ").
\(^{18}\) See United Technologies Corp., 268 N.L.R.B. at 558.
processes for their own mutually agreed-upon method for dispute resolution.”

Five particular circumstances in Collyer favored deferral to arbitration: (1) a long and productive collective-bargaining relationship, (2) an absence of a claim that the employer harbored animosity toward the employees’ exercise of their protected rights, (3) the dispute was clearly covered by the arbitration agreement, (4) the asserted willingness of the employer to arbitrate the dispute, and (5) the excellent suitability of the dispute to resolution by arbitration because the center of the dispute was the contract and its meaning.

In the following year, in National Radio Co., the Board extended to NLRA sections 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2) its policy of deferring to contractual arbitration procedures even though the arbitrator’s resolution of the contractual issues would not necessarily resolve the unfair labor practice dispute. However, the NLRB noted its belief that resolution of the contractual dispute would also resolve the unfair labor practice dispute. The Board thus asserted that an unfair labor practice could be remedied either in a statutory forum (before the Board) or in a contractual forum (before an arbitrator). The Board denied that it was abdicating its responsibility of resolving unfair labor

19. Id.; see also Lab. Rel. Expediter, supra note 13, at LRX-33 (the dispute in Collyer was deferred under the contract’s arbitration procedure because the dispute was essentially “over the terms and meaning of a collective bargaining contract”).
20. 192 N.L.R.B. at 842.
23. “(a) . . . It shall be an unfair labor practice for an employer— . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .” Id. § 8(a)(3), 29 U.S.C. § 158(a)(3).
24. “(b) . . . It shall be an unfair labor practice for a labor organization or its agents— (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section [7] . . . .” Id. § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A). This section was not mentioned by the Board in National Radio Co., but it is the union counterpart to section 8(a)(1). See, e.g., General Am. Transp. Corp., 228 N.L.R.B. 808, 811 (1977) (Chairman Murphy, concurring).
25. “(b) . . . It shall be an unfair labor practice for a labor organization or its agents— . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . or to discriminate against an employee . . . .” National Labor Relations Act § 8(b)(2), 29 U.S.C. § 158(b)(2) (1982). This section was not mentioned by the Board in National Radio Co., but it is the union counterpart to section 8(a)(3). See, e.g., General Am. Transp. Corp., 228 N.L.R.B. at 811 (Chairman Murphy, concurring).
26. 198 N.L.R.B. at 531.
27. Id. at 532.
practice disputes. It reasoned instead that, by allowing the parties to proceed under their own contractual process, "both the collective relationship and the Federal policy favoring voluntary arbitration and dispute settlement" would be fostered.  

Developing its policy of allowing the collective-bargaining contract to control, the Board ruled in United Aircraft Corp. that when the "contract makes available a quick and fair means for the resolution of the dispute," the union is required to utilize the voluntarily contracted arbitration machinery before the NLRB's jurisdiction is invoked. The Board refused to settle, prior to arbitration, the day-to-day disputes between employees and supervisors. Minor and isolated occurrences of unfair labor practices did not establish an unwillingness on the part of the employer to follow the contractual procedures for dispute resolution. However, in 1977, in General American Transportation Corp., the Board overruled National Radio Co. and held that it would no longer defer any unfair labor practice issues to the contractual arbitration process because the NLRB has a statutory duty to resolve unfair labor practice disputes involving the statutory rights of employees. NLRB Chairman Murphy, in a concurring opinion, posited the determinative factor for refusing to defer as being that the "arbitrator's resolution of the contract issue will not dispose of the unfair labor practice allegation" that the conduct "interfered with, restrained, or coerced employees in the exercise of the rights guaranteed them by section 7 of the Act." She disagreed with the plurality's opinion that the Board lacks the power to defer, but believed that the Board has the discretion to defer to arbitration disputes arising under section 8(a)(5) and 8(b)(3) from the parties' collective-bargaining agreement. When the dispute concerns whether the conduct allegedly in violation of section 8(a)(5) or

28. Id. at 531.
29. 204 N.L.R.B. 879 (1972), enforced sub nom. Lodges 700, 743, 1746, Int'l Ass'n of Machinists v. NLRB, 525 F.2d 237 (2d Cir. 1975).
30. 204 N.L.R.B. at 880 n.4.
31. Id. at 880.
32. 228 N.L.R.B. 808 (1977) (plurality opinion by Members Fanning and Jenkins).
33. Id. at 810 n.7.
34. Id. at 808; see also id. at 810-11 (Chairman Murphy, concurring).
35. Id. at 811 (Chairman Murphy, concurring) (footnote omitted).
36. "(b) . . . It shall be an unfair labor practice for a labor organization or its agents— . . . (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section [9(a) of this Act] . . . ." National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158 (b)(3) (1982).
37. Id. at 810.
8(b)(3) is permitted by the contract, then the dispute is "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."38 Contrary to the plurality's holding, Chairman Murphy concluded that the Board will continue to defer to arbitration the alleged violations of section 8(a)(5) and 8(b)(3) when the dispute between the employer and the union is based on conduct that is allegedly in derogation of the collective-bargaining contract.39 The two dissenters, Members Penello and Walther, rejected the reasons advanced for restricting the NLRB's policy on deferral and believed that, when appropriate, the Board should continue to defer to arbitration alleged violations of section 8(a)(1), 8(a)(3), 8(a)(5), 8(b)(1)(A), 8(b)(2), and 8(b)(3).40 A majority of the Board, therefore, did agree to defer alleged violations of section 8(a)(5) and 8(b)(3).41

In 1984, however, in United Technologies Corp.,42 the NLRB overruled General American Transportation and decided to defer to the contractual grievance-arbitration procedures for alleged violations of section 8(a)(1), 8(a)(3), 8(a)(5), 8(a)(1)(A), 8(b)(2), and 8(b)(3) of the NLRA. The Board believed that General American Transportation had emasculated the policy of deferral announced in Collyer Insulated Wire by permitting parties to ignore their contractual dispute resolution procedure and petition the NLRB for remedial relief, thus defeating the statutory purposes of encouraging collective bargaining.43 The Board held that the policies of the NLRA would best be effectuated by deferring, under the principles of Collyer and National Radio, to the grievance-arbitration procedures of the parties' collective-bargaining agreement:44

It is fundamental to the concept of collective bargaining that the parties to a collective-bargaining agreement are bound by the terms of their contract. Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the [NLRA] for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes

38. Id. at 810-11.
39. Id.
40. Id. at 813-14 (Members Penello and Walther, dissenting).
41. The majority consisted of Chairman Murphy, and Members Penello and Walther.
43. Id. at 559.
44. Id. at 560.
through that machinery. For dispute resolution under the grievance-arbitration process is as much a part of collective bargaining as the act of negotiating the contract. . . . 45 [Otherwise, the parties] . . . "could ignore an agreed-upon method of settling disputes. Since in most cases deferring to arbitration will encourage collective bargaining, the Board, in carrying out the Act's purpose, should see that full play is given to the arbitral process." 46

In 1985, in Spann Building Maintenance Co., 47 the NLRB reaffirmed the policy of deferring to the arbitration process expressed in United Technologies Corp. 48 The Board held that it is proper to require the parties to settle the dispute in arbitration when the contract clearly covers the issues comprising the unfair labor practice allegation and when there is no indication "that the grievance-arbitration procedure has been or is likely to be unfair or irregular or has produced or is likely to produce a result repugnant to the Act." 49 The Board believed that General Dynamics Corp. 50 compelled it to defer the dispute to the arbitration process. 51

In General Dynamics Corp., the Board followed the policy announced in United Technologies Corp. and held that it would defer to the contractual grievance-arbitration procedure when an employee withdrew the dispute from arbitration prior to completing the grievance process. The Board concluded that deferral was appropriate when the collective bargaining contract clearly encompassed the unfair labor practice issue, there was no indication that the arbitration would be unfair or likely to produce a result repugnant to the Act, and the employee had voluntarily initiated the grievance procedure. 52 To refuse to defer "would be in effect to render meaningless both the contractual agreement of the parties to establish a grievance-arbitration procedure and the statutory

45. Id. at 559 (footnote omitted). The Supreme Court has stated that the "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).
46. 268 N.L.R.B. at 559-60 (quoting Collyer Insulated Wire, 192 N.L.R.B. 837, 844 (1971)). The Board in United Technologies stated that it was simply holding "that where contractual grievance-arbitration procedures have been invoked voluntarily we shall stay the exercise of the Board's processes in order to permit the parties to give full effect to those procedures." 268 N.L.R.B. at 560 n.17.
48. Id. at 1209.
49. Id. at 1210.
51. 119 L.R.R.M. at 1210 n.3.
52. 271 N.L.R.B. at 189.
policy of the Board, as expressed in *United Technologies*, to encourage the use of grievance-arbitration procedures.\(^{53}\)

In *Chevron, U.S.A., Inc.*,\(^{54}\) the NLRB once again followed the deferral policy announced in *United Technologies Corp.* and deferred to the grievance-arbitration procedure for alleged violations of section 8(a)(3). In *Chevron*, the Board deferred to an arbitrator's award "because the contractual issue [was] factually parallel to the unfair labor practice issue and the parties presented the arbitration panel with facts relevant to resolving the issue."\(^{55}\)

**B. Deferral to the Arbitration Award**

In attempting to encourage utilization of the arbitration process, the NLRB has not only developed a policy of deferring to the arbitration process itself but has also developed a policy of deferring to and enforcing the resulting arbitration awards.\(^{56}\) In *Spielberg Manufacturing Co.*,\(^{57}\) the Board first announced its standard for deferring to an arbitration award: (1) "the proceedings appear to have been fair and regular," (2) "all parties had agreed to be bound," and (3) "the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the [NLRA]."\(^{58}\) The Board believed that deferring to the arbitration award under these circumstances would best serve the "desirable objective of encouraging the voluntary settlement of labor disputes."\(^{59}\)

Narrowing its deferral policy, the NLRB slowly began to develop a fourth criterion of requiring the arbitrator to have considered the unfair labor practice issue before the Board would defer to the arbitration award. In 1961, in *Monsanto Chemical Co.*,\(^{60}\) the NLRB

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53. Id. at 190.
55. Id. at 1239.
56. See Malrite of Wisconsin, Inc., 198 N.L.R.B. 241 (1972), enforced in part, Local Union No. 715, Int'l Bhd. of Elec. Workers v. NLRB, 494 F.2d 1136 (D.C. Cir. 1974); Lab. Rel. Expediter, *supra* note 13, at LRX-32, 34. The Board in *Malrite of Wisconsin* held that not only should the NLRB defer to both the arbitration process and the award when the standards for deferral have been met, but that noncompliance with the award should not be a concern of the Board. The Board reasoned that immediate access to the courts to enforce the award is preferable to conducting an administrative procedure before seeking an enforceable decree in the courts. 198 N.L.R.B. at 242.
57. 112 N.L.R.B. 1080 (1955).
58. Id. at 1082.
59. Id.
60. 130 N.L.R.B. 1097 (1961). One commentator believes that the NLRB's acceptance of the arbitrator's decision has become the exception and not the rule. *See* Van De Water, *New Trends in NLRB Law*, 33 LAB. L.J. 635, 638 (1982).
did not defer to the arbitration award when an arbitrator expressly chose to ignore the unfair labor practice issue. The arbitrator believed that the dispute could be decided on grounds other than the unfair labor practice issue. He therefore chose to leave the unfair labor practice issues to the jurisdiction of the Board. However, the Board reasoned that giving an arbitration award binding effect in an unfair labor practice proceeding would not encourage voluntary settlements or effectuate the policies of the NLRA when the award "does not purport to resolve the unfair labor practice issue which was before the arbitrator." In the 1963 case of Raytheon Co., the NLRB refused to defer to an arbitration award when the parties expressly limited the arbitrator's authority to the contract issues, the arbitrator received no evidence on the unfair labor practice issue, and the arbitrator could not and did not resolve the unfair labor practice issue. The Board held that the arbitrator must consider the unfair labor practice issue and the fact that the contract and statutory issues are factually parallel cannot be used to show that the arbitrator must have resolved the unfair labor practice issue. When the arbitrator "'does not purport to resolve the unfair labor practice issue which was before the arbitrator and which is the very issue the Board is called upon to decide,'" the Board's deferral to the arbitration award could not encourage the voluntary settlement of disputes or effectuate the policies and purposes of the NLRA. In 1972, in Airco Industrial Gases and Yourga Trucking, Inc., the NLRB concluded that deferral would be inappropriate unless there was at least some evidence that the arbitrator had been presented with and had considered the unfair labor practice issue.

61. 130 N.L.R.B. at 1099.
62. 140 N.L.R.B. 883 (1963), order set aside, Raytheon Co. v. NLRB, 326 F.2d 471 (1st Cir. 1964) (insufficient evidence for Board's findings; Board did not affirmatively find an improper reason for employee's discharge).
63. 140 N.L.R.B. at 884, 886.
64. Id. at 884 (quoting Monsanto, 130 N.L.R.B. at 1099); see also D.C. Int'l, Inc., 162 N.L.R.B. 1383, 1384 (1967) (the statutory issue must be considered by the arbitrator). In International Harvester Co., 138 N.L.R.B. 923 (1962), the Board deferred to an arbitration award when the facts and issues presented to the arbitrator were essentially the same as those before the Board and the legal conclusions of the arbitrator were not clearly repugnant to the purposes of the NLRA. Id. at 928.
However, in *Electronic Reproduction Service Corp.*, the NLRB relaxed its standard for deferring to arbitration awards. Deciding that it had been insufficiently deferential to arbitration awards, the Board adopted the standard expressed in the dissenting opinion in *Airco Industrial Gases* and the concurring opinion in *Yourga Trucking* and held that it would defer to an arbitration award even if there is no indication that the unfair labor practice issue was considered or even presented to the arbitrator. Where the facts underlying both the contractual and the unfair labor practice issues are essentially the same, the Board reasoned that a arbitrator's resolution of the contractual issue of whether a discharge was for cause will necessarily involve a determination of the unfair labor practice issue of whether the true reason for the action was discriminatory. The arbitrator's resolution of the contractual issue was therefore presumed to have also resolved the unfair labor practice issue.

The Court of Appeals for the Ninth Circuit in *Stephenson v. NLRB* rejected the Board's conclusion in *Electronic Reproduction Service* as an "unjustifiable extension" of the Board's deferral policy. The court felt that the NLRB abdicated its obligation to resolve unfair labor practices if the Board deferred to the arbitration award when definite proof was absent that the statutory issue was presented to and "clearly decided" by the arbitrator. Deferral upon this mere presumption in total absence of any evidence

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69. 195 N.L.R.B. at 677 (Member Kennedy, dissenting).
70. 197 N.L.R.B. at 929 (Member Kennedy, concurring in result).
71. 213 N.L.R.B. at 761, 764. The Board believed that deferral here would prevent the multiple litigation that *Spielberg* intended to prevent because the issue could not then be raised before the NLRB following arbitration. In application, the *Airco* and *Yourga* decisions tended to artificially separate the contractual issue to be resolved in arbitration from the statutory issue to be resolved before the Board. This practice of separating the issues would be detrimental to both the arbitration and the NLRB's process. The arbitration process is therefore less likely to quickly and fairly resolve the dispute. The Board stated:

> Instead, such an artificial separation of issues seems likely to lead . . . to piecemeal litigation in which a party may well prefer to have "two bites of the apple,"

trying part of the discharge case before the arbitrator but holding back evidence material to its claim so as to be able to pursue the matter in yet another proceeding before this Board.

*Id.* at 761. The Board, however, stated that it would not defer to arbitration when special circumstances were shown to have precluded a full and fair opportunity for the complaining party to present evidence of the alleged unfair labor practice. *Id.* at 764.
72. 550 F.2d 535 (9th Cir. 1977).
73. *Id.* at 539.
74. *Id.* at 539-41.
fails to meet the "clearly decided" criterion of *Banyard v. NLRB.*

The court concluded that the contractual arbitration process was not a substitute or a prerequisite for NLRB resolution of statutory issues because it would be illogical to defer to an arbitrator, who is under no duty to consider the statutory issue, solely upon the basis of an unsupported presumption.

In *Atlantic Steel Co.*, the NLRB in 1979 began to tighten the criteria for deferring to arbitration awards. The Board held that even though it preferred that the arbitrator rule directly on the unfair labor practice issue, the arbitrator had to, at a minimum, "implicitly" resolve the issue by "considering" all the evidence relevant to the unfair labor practice. In *Atlantic Steel Co.*, the arbitrator had not explicitly addressed the unfair labor practice issue. However, the arbitrator did make the necessary findings of fact for resolving the issue. Ruling that the arbitration award was not repugnant to the NLRA, the Board deferred to the award.

In the 1980 case of *Suburban Motor Freight, Inc.*, the NLRB tightened even further the criteria for deferring to arbitration awards and overruled its decision in *Electronic Reproduction* as an impermissible delegation of the Board's jurisdiction. The Board would no longer defer to an arbitration award under *Spielberg* unless the unfair labor practice issue "was both presented to and considered by the arbitrator."

*Electronic Reproduction* did promote the policy of encouraging collective bargaining relationships, but it did so at the cost of derogation of the policy of protecting the em-

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75. *Id.* at 540-41; see *Banyard v. NLRB*, 505 F.2d 342, 347-48 (D.C. Cir. 1974) (adding a "clearly decided" criterion to the *Spielberg* test).

76. 550 F.2d at 540-41.

77. 245 N.L.R.B. 814 (1979).

78. *Id.* at 815. In *Raytheon*, where the Board refused to defer, the record before the "arbitrator was inadequate for resolving the unfair labor practice." *Id.*

79. *Id.* at 816-17.

80. 247 N.L.R.B. 146 (1980). In overruling *Electronic Reproduction*, the NLRB reinstated the decisions of *Airco* and *Yourga.* *Id.* at 147. The Board concluded that it could "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." *Id.* at 146; see *Truesdale, Recent Trends at the NLRB and in the Courts*, 32 Lab. L.J. 131, 135 (1981) (the "second bite at the apple" concern is not serious because the complainant will not purposely withhold unfair labor practice evidence and thus risk that the Board will defer to the arbitration award; the normal scenario is that the employee, through ignorance, will inadvertently fail to allege the unfair labor practice or fail to present evidence at the arbitration proceeding).

81. 247 N.L.R.B. at 146.

82. *Id.* at 146-47.
ployee's exercise of rights under section 7 of the NLRA.83 Also, the party seeking deferral would have the burden of proving that the unfair labor practice issue was presented to and considered by the arbitrator.84 In 1982, in Propoco,85 the NLRB adhered to the Suburban Motor Freight requirements that the unfair labor practice must be presented to and considered by the arbitrator. In Propoco, the unfair labor practice issue was not presented to or considered by the arbitrator.86 The Board also rejected the view that "Suburban Motor Freight's requirements are satisfied whenever the contractual and unfair labor practice issues are factually parallel and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue."87 Thus, the deferral policy was further restricted so that the scenario in Atlantic Steel would no longer result in deferral to the arbitration award.

In 1984, realizing that the role of arbitration was being diminished, the NLRB in Olin Corporation88 reexamined its policy on deferral to arbitration awards and adopted the standards announced in the dissenting opinion in Propoco.89 The NLRB returned to only that part of the Electronic Reproduction Service standard that places upon the party seeking to block deferral the burden of proving that the Board should ignore the arbitration award.90 However, the Electronic Reproduction Service holding that no more than an opportunity to present the unfair labor practice issue to the arbitrator was necessary for deferral treatment by the Board remained overruled.91

The Board in Olin Corporation adopted three requirements for deferring to arbitration awards. The first requirement, adopted from Raytheon, is that the unfair labor practice issue must be adequately considered by the arbitrator. This requirement is satisfied when "(1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally

83. Id. at 146.
84. Id. at 147.
86. Id. at 137.
87. Id. at 138. But see Truesdale, supra note 80, at 131, 136 (Suburban Motor Freight did not require that the arbitrator explicitly decide the unfair labor practice issue but only required that the contractual issue be parallel to the statutory issue so that the arbitrator implicitly resolved the statutory issue when he resolved the contractual issue).
89. Id. at 574.
90. Id. at 574, 575 n.10.
91. Id. at 575 n.10.
with the facts relevant to resolving the unfair labor practice.” 92 Any differences in the contractual and statutory standards of review will be included in the Board’s determination under the Spielberg standards of whether an award is “clearly repugnant” to the NLRA. The second requirement is that under the “clearly repugnant standard,” the arbitration award is not required to be totally consistent with NLRB precedent. The Board will defer “unless the arbitrator’s decision is not susceptible to an interpretation consistent with the Act.” 93 The third requirement is that the party asking the Board not to defer, but to consider the merits, must affirmatively demonstrate the defects in the arbitration process or award by showing that the first and second requirements for deferral have not been met. 94

The NLRB has continued to follow the criteria given in the Olin Corp. case for deferring to arbitration awards. In 1985, in Ohio Edison Co., 95 the Board deferred to an arbitration award that met the Spielberg criteria 96 and also met the criteria in Olin Corp. for consideration of the unfair labor practice issue. 97 In United Parcel Service, Inc., 98 the Board followed its Olin Corp. decision by deferring to an arbitration award because the party arguing against deferral failed to demonstrate any deficiencies in the arbitral process or award or that the award was “clearly repugnant to the Act.” 99 The Board also held that whether it might have resolved the statutory issue differently does not affect the validity of the arbitration award. The Board reasoned “that the voluntary resolution of disputes promotes industrial peace and stability between labor and management. . . . [A] refusal to defer could undercut the purpose of the grievance mechanism and discourage the Union and the [employer] from negotiating their differences and abiding by their settlements.” 100

92. Id. at 574; see, e.g., Atlantic Steel Co., 245 N.L.R.B. 814, 815 (1979); Kansas City Star Co., 236 N.L.R.B. 866, 867 (1978) (in each case the Board determined that the unfair labor practice issue was adequately considered by the arbitrator because his findings were complete and factually parallel to the unfair labor practice issue).
93. 268 N.L.R.B. at 574.
94. Id.
96. Id. at 1430.
97. Id. at 1430 n.5.
99. Id. at 1416.
100. Id. at 1417; see NLRB v. City Disposal Syss., Inc., 104 S. Ct. 1505 (1984). The Supreme Court recognized that the principal tool by which an employee invokes the rights granted him in a collective-bargaining agreement is the processing of a grievance according
III. Judicial Response to the NLRB's Deferral Policy

A. Judicial Acceptance of the NLRB's Policy of Deferring to the Arbitration Process

Section 301(a) of the Labor Management Relations Act\textsuperscript{101} provides the federal courts with authority to enforce collective-bargaining agreements, but the United States Supreme Court has held that where the agreement requires the use of arbitration to settle disputes, the contractual grievance procedure must be exhausted before the agreements may be enforced by federal courts.\textsuperscript{102} The Supreme Court has sanctioned the contractual arbitration process\textsuperscript{103} as the preferred method of preserving the industrial peace mandated by Congress.\textsuperscript{104} In \textit{United Steelworkers v. Warrior & Gulf Navigation Co.},\textsuperscript{105} the Court stated: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."\textsuperscript{106} In \textit{Carey v. Westinghouse Electric Corp.},\textsuperscript{107} the Court added that, while to whatever procedures his contract establishes. The Supreme Court emphasized 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." \textit{Id.} at 1515.

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.


\textsuperscript{104} See \textit{Labor-Management Reporting and Disclosure Act} of 1959, § 203(d), 29 U.S.C. § 173(d) (1982). Congress has mandated that the "[f]inal 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." \textit{Id.}

\textsuperscript{105} 363 U.S. 574 (1960).

\textsuperscript{106} \textit{Id.} at 582-83.

\textsuperscript{107} 375 U.S. 261 (1964); see also Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1081-82 (1955) (the NLRB may invoke its processes at any time the arbitration result is inconsistent with
arbitration is more desirable for the settlement of labor disputes, the NLRB at any time may invoke its authority over labor-management disputes. However, in Republic Steel Corp. v. Mad- 
dox, the Court stated that the courts will not hear complaints from employees who have failed to utilize the contractual grievance-arbitration procedure unless the contract specifically states that the arbitration process is not the sole remedy.

In Schneider Moving & Storage Co. v. Robbins, the Supreme Court stated that the presumption of the Steelworkers Trilogy favoring arbitration is an "accepted rule of construction" of arbitration clauses: "Such a presumption furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining." The courts' only function in actions to enforce an agreement to arbitrate is to determine whether an agreement to arbitrate was made and whether the claim to be arbitrated falls within the agreement's scope. Thus, the Supreme Court not only sanctions the NLRB's deferral but also requires the courts to defer to the arbitration process when the parties to the collective bargaining agreement have agreed in their contract to submit disputes

the standards set forth in Spielberg); NLRB v. International Union, United Auto. Workers Local 291, 194 F.2d 698, 702 (7th Cir. 1952) (an arbitration award in favor of a union does not preclude the Board from thereafter finding that the union's conduct violated the LMRA).

108. 375 U.S. at 272. See Servair, Inc. v. NLRB, 726 F.2d 1435, 1438 (9th Cir. 1984) ("The presence of other means of resolving disputes, including arbitration, does not oust the Board of jurisdiction."); NLRB v. Wagner Iron Works, 220 F.2d 126, 137 (7th Cir. 1955) (a contractual arbitration remedy does not oust NLRB of jurisdiction to remedy an unfair labor practice), cert. denied, 350 U.S. 981 (1956), petition to vacate denied, 243 F.2d 168 (7th Cir. 1957).

Section 10(a) of the National Labor Relations Act, 29 U.S.C. § 160(a) (1982), states:

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section [8 of this Act]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise


110. Id. at 657-58; see also Vaca v. Sipes, 385 U.S. 895 (1967); United Elec. Workers v. Honeywell, Inc., 522 F.2d 1221 (7th Cir. 1975) (in seeking to bypass the contract's arbitration clause, union was not entitled to an action in federal court based on Taft-Hartley Act § 301).


112. See supra note 103.

113. 104 S.Ct. at 1849 (citation omitted).

to arbitration.\textsuperscript{115}

As opposed to disputes involving the NLRA, disputes involving the Fair Labor Standards Act of 1938 (FLSA)\textsuperscript{116} and Title VII of the Civil Rights Act of 1964\textsuperscript{117} will not be deferred to arbitration. Rather than require deferral to the contractual arbitration procedures, the Supreme Court has held that an individual is allowed to maintain an action in federal court under these Acts because an employee's congressionally-granted statutory rights are better protected in a judicial, rather than an arbitral, forum.\textsuperscript{118} While the NLRA encourages employees to promote their interests collectively, the FLSA and Title VII were intended to ensure that the interests of each employee would be protected.\textsuperscript{119} The rights of employees under the FLSA are independent of the collective bargaining process.\textsuperscript{120} The employee's right to a judicial determination is not foreclosed by his failure to submit, or his prior submission of, the dispute to final arbitration under a collective bargaining agreement.\textsuperscript{121}

In \textit{Alexander v. Gardner-Denver},\textsuperscript{122} the Supreme Court held that in a Title VII action an individual employee may still main-

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119. 450 U.S. at 739; 415 U.S. at 48, 52. \textit{Barrentine} involved two aspects of the national labor policy: (1) encouragement of the union and the employer to utilize the collective bargaining process to negotiate terms and conditions of employment, and (2) the guarantee in employer-employee relations of specific substantive rights to individual employees. The Supreme Court stated that when the parties (union and employer) to a collective bargaining contract make an employee's substantive statutory rights subject to contractual arbitration procedures, tension arises between the two policies. 450 U.S. at 734-35.

120. 450 U.S. at 745.

121. \textit{Id.}; 415 U.S. 59-60; see also U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 356 (1971) (seaman's right under a 1790 federal statute to sue for wages due was not displaced by the grievance arbitration provisions of the NLRA); \textit{Thompson v. Iowa Beef Packers, Inc.}, 185 N.W.2d 738 (Iowa 1971) (an employee's failure to pursue contractual grievance arbitration procedures did not bar his action under the FLSA), \textit{cert. dismissed}, 405 U.S. 228 (1972). (Court declined to address whether the employee would be barred from pursuing the statutory remedy because he might have filed a grievance on the basis of a contractual claim arising out of the same event).

tain an action in federal court even though the employee filed the lawsuit after having received an adverse decision from the arbitrator.\textsuperscript{123} After the Court's decision in \textit{Gardner-Denver}, the Court of Appeals for the Tenth Circuit, in \textit{Satterwhite v. United Parcel Service, Inc.},\textsuperscript{124} held that under the FLSA, unlike under Title VII, an employee may not file a lawsuit for recovery, on the basis of the same factual occurrence, when the employee has received an adverse decision from final arbitration proceedings voluntarily entered by the employee.\textsuperscript{125} However, the Supreme Court in \textit{Barrentine v. Arkansas-Best Freight System}\textsuperscript{126} has extended its \textit{Gardner-Denver} holding and overturned \textit{Satterwhite} so that an individual employee may maintain a court action under the FLSA even when he has received an adverse decision from final arbitration proceedings voluntarily entered by him and arising from the same event.\textsuperscript{127}

Whereas \textit{Gardner-Denver} dealt with the Civil Rights Act of 1964, the Supreme Court in \textit{William E. Arnold Co. v. Carpenters District Council}\textsuperscript{128} endorsed the NLRB's deferral policy enunciated in \textit{Collyer} regarding actions under the NLRA. The Court stated that the NLRA requires, when appropriate, that the Board defer to the voluntary settlement of disputes by the procedures agreed upon in the collective-bargaining agreement.\textsuperscript{129}

\section*{B. Judicial Acceptance of the Board's Deferral to Arbitration Awards}

In 1960, the Supreme Court in \textit{United Steelworkers v. Enterprise Wheel & Car Corp.}\textsuperscript{130} reasoned: "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."\textsuperscript{131} However, if the arbitrator fails to base the award upon the collective bargaining agreement, then the

\begin{itemize}
\item \textsuperscript{123} Id. at 47, 46 n.6. For a discussion of the effect of \textit{Alexander v. Gardner-Denver} upon arbitration, see Hill, \textit{The Effects of Non-Deferece on the Arbitral Institution: An Alternative Theory}, 28 LAB. L.J. 230 (1977).
\item \textsuperscript{124} 496 F.2d 448 (10th Cir.), cert. denied, 419 U.S. 1079 (1974).
\item \textsuperscript{125} Id. at 452.
\item \textsuperscript{126} 450 U.S. 728 (1981).
\item \textsuperscript{127} Id. at 745.
\item \textsuperscript{128} 417 U.S. 12 (1974).
\item \textsuperscript{129} Id. at 17-18.
\item \textsuperscript{130} 363 U.S. 593 (1960).
\item \textsuperscript{131} Id. at 599.
\end{itemize}
arbitrator's award should not be enforced.\textsuperscript{132} The courts of appeal have followed the Supreme Court's lead by requiring the NLRB to defer to the arbitration award although the Board would interpret the contract differently than did the arbitrator who made the award.\textsuperscript{133} If the arbitrator's award meets the 

*Spielberg* requirements, then the NLRB must defer to the award.\textsuperscript{134} In *Pincus Brothers*, the Court of Appeals for the Third Circuit added that "where there are two arguable interpretations of an arbitration award, one permissible and one impermissible, the Board must defer to the decision rendered by the arbitrator."\textsuperscript{135} The Third Circuit held that the arbitrator's decision was thus not repugnant to the NLRA and overturned the Board's refusal to defer. The Board had ruled that the arbitrator's decision was repugnant to the Act.\textsuperscript{136} However, in *Ciba-Geigy Pharmaceuticals*,\textsuperscript{137} the Third Circuit held that the NLRB correctly refused to defer to the arbitration award because the award failed to meet all the *Spielberg* requirements for deferral.\textsuperscript{138} Earlier, in *NLRB v. General Warehouse Corp.*,\textsuperscript{139} the Third Circuit had approved the four criteria that the Board uses in its exercise of discretion to defer to arbitration awards.\textsuperscript{140} In *Ciba-Geigy Pharmaceuticals*, the arbitrator's decision was clearly repugnant to the policies of the NLRA, and the arbitrator did not clearly decide the unfair labor practice issue. The court thus indicated its adherence to the rule that deferral is

\begin{itemize}
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} *Ciba-Geigy Pharmaceuticals Div. v. NLRB*, 722 F.2d 1120, 1125-26 (3d Cir. 1983); *Liquor Salesmen's Union Local 2 v. NLRB* (Charmer Indus.), 664 F.2d 318, 326 (2d Cir. 1981); *NLRB v. General Warehouse Corp.*, 643 F.2d 965, 969-70 (3d Cir. 1981); *Arco-Polymers, Inc. v. Local 8-74, 671 F.2d 752, 756 (3d Cir.)*, *cert. denied*, 459 U.S. 828 (1982); *NLRB v. Pincus Brothers, Inc.-Maxwell*, 620 F.2d 367, 374 (3d Cir. 1980).
  \item \textsuperscript{134} *Ciba-Geigy Pharmaceuticals Div.*, 722 F.2d at 1125-26; *Liquor Salesmen's Union Local 2*, 664 F.2d at 326; *General Warehouse Corp.*, 643 F.2d at 969-70; *Pincus Brothers, Inc.-Maxwell*, 620 F.2d at 374.
  \item \textsuperscript{135} In *General Warehouse Corp.*, the Third Circuit approved the three standards set forth by the NLRB in *Spielberg* (1955), for deferring to arbitrators' awards: (1) the proceedings have been fair and regular; (2) the parties agreed to be bound; and (3) the decision was not clearly repugnant to the purposes and policies of the National Labor Relations Act. The court also approved the fourth criterion given by the Board in *Raytheon Co.*, 140 N.L.R.B. 883 (1963), that the Board would refuse to defer to an arbitrator's decision if the arbitrator failed to consider and decide the unfair labor practice issue. 643 F.2d at 968-69.
  \item \textsuperscript{136} Id. at 377 (citation omitted).
  \item \textsuperscript{137} Id. at 375.
  \item \textsuperscript{138} Id. at 1126.
  \item \textsuperscript{139} Id. at 968-69.
  \item \textsuperscript{140} Id. at 968-69.
\end{itemize}
not proper unless the arbitrator has decided the unfair practice issue. However, the court stated: "This is not a case in which the existence of the unfair labor practice depends on interpretation of the contract, and in which the Board has disregarded the arbitrator's interpretation."141

In the 1979 case of Servair, Inc. v. NLRB,142 the Court of Appeals for the Ninth Circuit ruled that the NLRB had improperly refused to defer to the arbitrator's award when the contractual issue and the unfair labor practice issue were essentially the same.143 The court set forth three guidelines for the Board to follow in deferring to arbitration awards: (1) if only statutory violations are alleged, the Board should not defer to the arbitration award; (2) if only violations of the collective bargaining agreement are alleged, the Board should defer to the arbitration award; and (3) if the alleged contractual violation is capable of being alleged as a statutory breach and if the arbitrator's resolution of the contractual breach also resolves the underlying issues of statutory breach, then the Board should respect the arbitrator's judgment.144 The Court of Appeals for the Second Circuit in Carey v. General Electric Co.145 held that a court must order arbitration (as long as the contract provides for arbitration) even if the employee in his grievance action is seeking to enforce an unfair labor practice. The question of whether the arbitrator's award compels an unfair labor practice is to be resolved after, not before, the arbitrator renders an award.146

Most circuits have ruled that, in certain situations, the NLRB abuses its discretion when it fails to defer to an arbitrator's award.147 In Douglas Aircraft Co. v. NLRB,148 the Ninth Circuit held that if there are two possible interpretations of the reasoning for the arbitrator's award, one permissible and the other impermis-

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141. 722 F.2d at 1126.
142. 102 L.R.R.M. (BNA) 2705 (9th Cir. 1979), opinion withdrawn and remanded, 624 F.2d 92 (9th Cir. 1980).
143. Id. at 2709; see also ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, LABOR LAW FOR THE GENERAL PRACTITIONER § 7.18, at 7-19 (1980).
144. 102 L.R.R.M. at 2709.
145. 315 F.2d 499 (2d Cir. 1963), cert. denied, 377 U.S. 908 (1964).
146. Id. at 507-08, 512.
147. American Freight Sys., Inc. v. NLRB, 722 F.2d 828 (D.C. Cir. 1983); Richmond Tank Car Co. v. NLRB, 721 F.2d 499 (5th Cir. 1983); NLRB v. Motor Convoy, Inc., 673 F.2d 734 (4th Cir. 1982); Liquor Salesmen's Union Local 2 v. NLRB (Charmer Indus.), 664 F.2d 318 (2d Cir. 1981), cert. denied, 466 U.S. 973 (1982); NLRB v. Pincus Bros., Inc.-Maxwell, 620 F.2d 367 (3d Cir. 1980); Douglas Aircraft Co. v. NLRB, 609 F.2d 352 (9th Cir. 1979).
148. 609 F.2d 352 (9th Cir. 1979).
sible, then the Board may not rule that the award is clearly repugnant to the NLRA. In *NLRB v. Pincus Brothers, Inc.-Maxwell*, the Third Circuit concluded that the national policy favoring arbitration of labor disputes gives priority to the societal rewards of arbitration over "a need for uniformity of result or a correct resolution of the dispute in every case." In concluding that the arbitrator need not state that "his resolution of the contractual dispute is intended as a resolution of the statutory issue as well," the Second Circuit in *Liquor Salesmen's Union Local 2 v. NLRB* reasoned that when "the contractual and statutory issues rest on the same factual determinations, the arbitrator's better position and expertise as a factfinder strengthen the case" for deferring to the arbitrator's award.

Some circuit court decisions have required the arbitrator to have "clearly decided" the unfair labor practice issue. In *Stephenson v. NLRB*, the Ninth Circuit held that the NLRB must not defer to an arbitration award merely on a presumption, with no evidence, that the unfair labor practice issue was resolved by the arbitrator. The decision by the arbitrator must deal specifically with the unfair labor practice issue:

> Merely because the arbitrator is presented with a problem which involves both contractual and unfair labor practice elements does not necessarily mean that he will adequately consider the statutory issue, and merely because he considers the statutory issue does not mean that he will enforce the rights of the parties pursuant to and consistent with the Act.

In *NLRB v. Magnetics International, Inc.*, the Sixth Circuit, also concluding that the arbitrator must consider and decide all

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149. *Id.* at 354; see also *Pincus Bros.*, 620 F.2d at 377.
150. 620 F.2d 367 (3d Cir. 1980).
151. *Id.* at 374.
152. 664 F.2d 318 (2d Cir. 1981).
153. *Id.* at 325. Although the arbitrator did not expressly resolve the statutory issue, his express resolution of the contractual issue was "necessarily dispositive of the statutory issue," in that if no contractual violation occurred, then no statutory violation occurred. "Under these circumstances, to insist here that the arbitrator announce that his resolution of the contractual dispute is intended as a resolution of the statutory issue as well is to impose a purely formalistic requirement. Thus, we decide that the Board's 'clearly decided' criterion was met in substance . . . ." *Id.*
154. 550 F.2d 535 (9th Cir. 1977).
155. *Id.* at 539.
156. *Id.* at 538 n.4.
157. 699 F.2d 806 (6th Cir. 1983).
unfair labor practice issues, stated that the courts will not "speculate about what the arbitrator . . . considered." In *United Parcel Service v. NLRB*, the Third Circuit stated that some evidence that the arbitrator actually decided the statutory issues must be present; otherwise, the deferral policy of the Board would be one of abdication. However, in 1984, slightly modifying its earlier stance, the Ninth Circuit in *Servair, Inc. v. NLRB* held that when the resolution of the contractual issue by the arbitrator is dispositive of the statutory issue, deferral to the arbitrator's award may accomplish the purposes of the NLRA "even where the arbitrator does not explicitly address the statutory issue. . . . Accordingly, where the issue was not clearly decided, deferral may still be appropriate if the resolution of the statutory issue is dependent upon the resolution of the contractual issue."

The Fourth Circuit, in *NLRB v. Motor Convoy, Inc.*, did not appear to require evidence that the arbitrator had resolved the unfair labor practice issue when the contractual issue was identical to the statutory issue in order for the Board to defer to the arbitrator's award. The court reasoned that the resolution of the contractual issue resolved the statutory issue. To defer would motivate employees to not submit unfair labor practice charges to arbitration as provided in their collective bargaining agreements. Instead, during an arbitration proceeding, an employee would not assert a possible unfair labor practice charge but hold it in reserve for 'appeal' to the Na-

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158. *Id.* at 811.
159. 706 F.2d 972 (3d Cir.), *judgment vacated and remanded*, 104 S. Ct. 419 (1983).
160. 706 F.2d at 981; *see also* NLRB v. General Warehouse Corp., 643 F.2d 965 (3d Cir. 1981). In General Warehouse Corp., both the employer and the union raised the unfair labor practice issue before the arbitrator, but the arbitrator did not explicitly address it in his decision. Because no evidence was presented that the arbitrator had decided the unfair labor practice issue, the Third Circuit ruled that the NLRB is required to refuse deferral and to determine the unfair labor practice issue itself. If the Board were to defer without some evidence that the arbitrator decided the statutory issue, the NLRB's deferral policy would be one of abdication. *Id.* at 969-71. However, Judge Aldisert, dissenting, argued that the proper way to interpret any arbitration award is to assume, absent some substantial countervailing indication, that the arbitrator properly resolved the dispute. *Id.* at 975. The Ninth Circuit, in *Stephenson*, had earlier rejected this argument and concluded that the NLRB should not defer to an arbitrator, who is under no obligation to consider the statutory issue, solely upon the presumption that the arbitrator had considered the issue. 550 F.2d at 539-40.
161. 726 F.2d 1435 (9th Cir. 1984).
162. *Id.* at 1441 (citation omitted).
163. 673 F.2d 734 (4th Cir. 1982).
164. *Id.* at 736.
tional Labor Relations Board in case of an adverse ruling. Arbitration would become nothing more than a costly extra step in the march to federal court rather than the cost efficient and rapid resolution of disputes it is designed to be.\textsuperscript{166}

Holding the NLRB to its deferral policy developed under \textit{Spielberg}, the court agreed that the Board is allowed to change that deferral policy, but, until it does, the Board must defer when the \textit{Spielberg} guidelines are met.\textsuperscript{166}

The Second Circuit in \textit{Liquor Salesmen's Union Local 2} has taken a stronger stance in restricting the NLRB's discretion to change the circumstances under which it will defer to arbitration. The Second Circuit agrees that the Board is not required by statute to defer.\textsuperscript{167} However, the court believes that if the Board is allowed to ignore its announced deferral standards or to change the rules on a case by case basis, then the "laboriously developed standards of deference" would be rendered "virtually meaningless, depriving parties to collective bargaining agreements of a reasonable expectation of finality in properly conducted arbitrations and significantly undermining the value and efficacy of arbitration as an alternative to the judicial or administrative resolution of labor disputes."\textsuperscript{168}

In 1984, the Court of Appeals for the District of Columbia Circuit in \textit{Bakery, Confectionery and Tobacco Workers International Union 25 v. NLRB}\textsuperscript{169} approved the Board's rulings in \textit{Olin Corp.}\textsuperscript{170} and \textit{Spielberg}\textsuperscript{171} on deferring to arbitration awards. In this case, the contractual issue presented to the arbitrator was parallel to the unfair labor practice issue.\textsuperscript{172} The D.C. Circuit held that the NLRB's deferral to the arbitrator's decision was properly within the Board's discretion because the arbitrator's decision was not clearly repugnant to the NLRA,\textsuperscript{173} as resolution of the contractual issue would resolve the unfair labor practice issue,\textsuperscript{174} and because the \textit{Spielberg} standards for deferral had been met.\textsuperscript{175} The court

\begin{itemize}
  \item \textsuperscript{165} \textit{Id.} at 736-37.
  \item \textsuperscript{166} \textit{Id.} at 736.
  \item \textsuperscript{167} 664 F.2d at 326.
  \item \textsuperscript{168} \textit{Id.} at 327.
  \item \textsuperscript{169} 730 F.2d 812 (D.C. Cir. 1984).
  \item \textsuperscript{170} Olin Corp., 268 N.L.R.B. 573 (1984).
  \item \textsuperscript{171} \textit{Spielberg Mfg. Co.}, 112 N.L.R.B. 1080 (1955).
  \item \textsuperscript{172} 730 F.2d at 815.
  \item \textsuperscript{173} \textit{Id.} at 816.
  \item \textsuperscript{174} \textit{Id.} at 815.
  \item \textsuperscript{175} \textit{Id.} at 816.
\end{itemize}
also approved the Board's statement in *Olin Corp.* that as long as the arbitrator's decision is susceptible to an interpretation consistent with the NLRA, the Board should defer.\(^\text{176}\)

Also in 1984, the Court of Appeals for the Tenth Circuit in *NLRB v. Babcock & Wilcox Co.*\(^\text{177}\) held that the NLRB did not abuse its discretion when it refused to defer to an arbitrator's award when the arbitrator expressly refused to resolve the unfair labor practice issue.\(^\text{178}\) The court cited *Olin Corp.* but did not discuss whether the Board's decision to defer followed the criteria set forth in that case. The court also did not state its opinion on the deferral policy adopted by the Board in *Olin Corp.*\(^\text{179}\)

IV. INDUSTRY ANALYSIS AND IMPLEMENTATION OF THE NLRB'S POLICY

Former NLRB Chairman Edward B. Miller\(^\text{180}\) has stated that *Olin Corp.* and *United Technologies*, which indicated that the Board would give greater deference to the arbitration process and arbitration awards, were not "a large break from past Board law"\(^\text{181}\) but were a return to a policy similar to the *Collyer* doctrine of deferral to the arbitration procedures of a collective bargaining agreement. Mr. Miller stated, however, that the Board has adopted a stricter standard for deferral than it did in the early 1970's. The NLRB's deferral policy is "neither pro-union nor pro-company, but rather one of granting greater or lesser effect to agreements between companies and unions to arbitrate . . . . [T]he current Board is more willing to trust the judgment of arbitrators than were the members who served on the Board in 1977."\(^\text{182}\) Peter Nash, former NLRB General Counsel, also believes that the Board's policy, clarified in *Olin Corp.* and *United Technologies Corp.*, on deferring to the arbitration proceedings within the collective bargaining agreement and to arbitration awards "is neither pro-management nor pro-union." Mr. Nash reasons that "[i]t makes sense for NLRB to tell the parties to abide by the arbitra-

\(^{176}\) *Id.* at 815.

\(^{177}\) 736 F.2d 1410 (10th Cir. 1984).

\(^{178}\) *Id.* at 1414.

\(^{179}\) *Id.* at 1413.


\(^{181}\) *Id.* at 104.

\(^{182}\) *Id.* (quoting Edward Miller's remarks at the May 29, 1984, meeting of the Chicago Ass'n of Commerce and Industry's Labor-Management Relations Committee).
tion procedure in a collective bargaining agreement under the [NLRA], which encourages collective bargaining.”

In 1984, the Office of General Counsel for the NLRB issued memoranda stating that the Board in its decisions in United Technologies Corp. and Olin Corp. did not change its deferral policy but only extended the deferral doctrine to include not only alleged violations of NLRA section 8(a)(5) and 8(b)(3), but also of section 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2). The Office of General Counsel is taking the approach that the NLRB did not otherwise change the law of deferral and that the existing substantive and procedural law for deferring to the arbitration process or the arbitration award should continue to be applied. In disputes alleging violations of these sections, the Board will hold the case in abeyance until “the parties use their grievance-arbitration machinery to resolve their dispute.”

When the NLRB is presented with an employer-union dispute involving contractual and statutory issues, it must decide whether to order contractually-provided grievance arbitration, to defer to a previously issued arbitration award, or to administratively resolve the issues itself. The central issue for the Board to resolve in the development of its deferral policy is whether deferral of unfair labor practice issues both optimizes labor peace and protects employees' statutory rights. There are several arguments in favor of deferral to the internal settlement of disputes through the parties' contractual arbitration provisions: (1) encouragement of the use of a mutually formulated procedure for resolution of disputes, thereby improving the collective bargaining process and labor-


188. Id. at 691.
management relations;\(^{189}\) (2) encouragement of the voluntary resolution of disputes;\(^{190}\) (3) achievement of a more acceptable resolution in shorter time by basing the award upon shop law and the parties’ mutually agreed-upon contract;\(^{191}\) (4) conservation of resources of the parties by foreclosing the presentation of the same issue before two different tribunals and of resources of the NLRB by reducing the case load of the Board to allow more time to devote to significant issues;\(^{192}\) and (5) skill and expertise of the arbitrator which are superior to those of the Board and the courts in terms of industry and shop practices that are an unwritten part of the collective bargaining agreement.\(^{193}\)

Critics claim that the benefits derived from the NLRB’s deferral of unfair labor practice issues to arbitration are outweighed by negative consequences. Several arguments are presented in opposition to deferral: (1) abdication by the NLRB of the obligation placed upon it by Congress to resolve statutory issues,\(^{194}\) (2) unremedied violations for parties refusing to arbitrate because of the substantial expense,\(^{195}\) (3) the limited scope of review in arbitration preventing full treatment of statutory matters by the arbitrator,\(^{196}\) (4) inadequate remedies available in arbitration to ensure full redress of unfair labor practice violations,\(^{197}\) (5) incapability of arbitrators to interpret statutory language and legal precedent with only blatantly erroneous applications of the law being corrected by the courts,\(^{198}\) and (6) subordination of the rights of the individual to the relationship between labor and management.\(^{199}\)


193. See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960); Liquor Salesmen’s Union Local 2, 664 F.2d at 325; Collyer Insulated Wire, 192 N.L.R.B. at 839.


195. See General Am. Transp. Corp., 228 N.L.R.B. at 813 (Chairman Murphy, concurring); Hayford & Wood, supra note 187, at 681.

196. See General Am. Transp. Corp., 228 N.L.R.B. at 811 (Chairman Murphy, concurring).

197. See id. at 813 (Chairman Murphy, concurring); Novack, supra note 194, at 790.

198. See Stephenson, 550 F.2d at 538 n.4; Hayford & Wood, supra note 187, at 681-82.

199. See Novack, supra note 194, at 791.
While some commentators believe that the NLRB should only defer to arbitration disputes that can be determined solely on the contract,\textsuperscript{200} former NLRB member John Penello believes that the Board should not become involved with disputes over trivial issues or with disputes that have been resolved fairly and equitably by the parties themselves under a collective-bargaining agreement.\textsuperscript{201} When the parties have had a stable collective-bargaining relationship, refusal by the Board to defer to the arbitration decision not only damages the collective-bargaining relationship but also consumes the NLRB's scarce resources that could be better spent elsewhere. The Board should not give a claimant a second chance to prevail when an issue has been resolved pursuant to the arbitration procedure within a collective-bargaining agreement.\textsuperscript{202}

After the NLRB's decision in \textit{United Technologies}, the Office of General Counsel for the NLRB issued a memorandum explaining the guidelines to be followed for deferral to the arbitration process.\textsuperscript{203} Alleged violations of section 8(a)(1), 8(a)(3), 8(a)(5), 8(b)(1)(A), 8(b)(1)(B), 8(b)(2), and 8(b)(3) of the NLRA should be deferred to the contractual arbitration procedure if the case is appropriately deferrable. The memorandum sets out the requirements for a dispute to be deemed "appropriately deferrable." First, the grievance-arbitration provision of the collective-bargaining agreement should "clearly encompass" the unfair labor practice issue.\textsuperscript{204} Second, the party requesting the NLRB to defer must be willing to arbitrate the unfair labor practice issue.\textsuperscript{205} Third, the use of the grievance-arbitration procedures must not appear to be futile, as when a party's conduct demonstrates a rejection of the principles of collective bargaining. As long as the grievance-arbitration procedures are workable and the parties freely resort to the procedures, the dispute should be deferred to arbitration. Fourth, the past relationship between the parties must be balanced with the parties' current collective bargaining relationship to determine whether the grievance-arbitration machinery can reasonably be expected to properly resolve the current unfair labor practice issue.\textsuperscript{206}

\textsuperscript{200} See General Am. Transp. Corp., 228 N.L.R.B. at 813 (Chairman Murphy, concurring); Novack, \textit{supra} note 194, at 799.

\textsuperscript{201} Penello, \textit{The NLRB's Misplaced Priorities}, 30 LAB. L.J. 3, 3 (1979).

\textsuperscript{202} \textit{Id.} at 5.


\textsuperscript{204} \textit{Id.} at 344.

\textsuperscript{205} \textit{Id.}

\textsuperscript{206} \textit{Id.} at 335.
Fifth, if the allegation is filed by an individual employee alleging a violation of section 8(a)(1), 8(a)(3), 8(b)(1)(A), or 8(b)(2), then the dispute should be deferred. If the union lawfully refuses to process the grievance or if the interests of the union are adverse to those of the employee, then the NLRB should not defer because "a refusal by the Board to entertain the unfair labor practice case would be a denial of the employee's right to seek redress for a statutory wrong, and such denial would be an abdication of the Board's public responsibility to provide an avenue for redressing statutory wrongs."207

The memorandum further states that the NLRB should consider deferral to the arbitration procedures regardless of whether the dispute has been presented to arbitration. However, when the dispute reaches the administrative law judge, the request for deferral must be made before the administrative hearings are closed; otherwise, the dispute will not be deferred.208 The memorandum concludes by stating that the United Technologies Corp. decision only extended the scope of the unfair labor practice cases to which the Board will defer but did not change the deferral principles existing prior to that case.209

The Office of General Counsel also issued a memorandum outlining the guidelines to be followed by the NLRB in deferring to arbitration awards under the Olin Corp. decision.210 The General Counsel set forth the same guidelines as expressed by the Board in Olin Corp. for deferral to arbitration awards. First, the proceedings must have been fair and regular. Second, the parties must have agreed to be bound by the decision of the arbitrator. Third, the arbitrator's decision must not be clearly repugnant to the purposes and policies of the NLRA.211 Even though the arbitration award is not required to be totally consistent with the Board's precedent, the award will be repugnant to the Act when the arbitrator's decision is not susceptible of an interpretation consistent with the Act.212 Fourth, the arbitrator must have adequately considered the unfair labor practice issue. If the contractual issue is factually parallel to the statutory issue and the facts relevant to resolving the

207. Id. at 336.
208. Id. at 336-37.
209. Id. at 337.
211. Id. at 166.
212. Id. at 167.
statutory issue are presented to the arbitrator, the arbitrator will be assumed to have adequately considered the statutory issue. Fifth, the party requesting the NLRB to reject deferral has the burden of proving that these criteria for deferral have not been satisfied.

V. Conclusion

The NLRB and the courts have made the policy decision that the arguments in support of deferral to arbitration override the arguments opposing deferral. The first four arguments mentioned above criticizing this policy are not significant. However, the fifth and the sixth criticisms are concerns that are legitimately raised by the deferral procedure. If the arbitrators do not become better versed in statutory interpretation and legal precedent, then the collective and individual rights of employees will be sacrificed for the convenience of the NLRB and for the maintenance of a stable relationship between unions and employers. The NLRA itself represents a decision by Congress to exalt the collective rights of employees over the individual rights of an employee in order to reach the congressional objective of industrial stability and peace. Therefore, Congress itself has ruled out the sixth criticism as a basis for opposing deferral.

If the union, as the representative of the employees, breaches its duty of fair representation and refuses to present the employee's grievance before an arbitrator or inadequately represents the employee, then a safety valve is available to the employee which allows him to take the grievance before the Regional Director of the NLRB. Of course, the union has the responsibility to screen em-

213. Id. at 166.
214. Id. at 167.
215. See supra notes 194-97 and accompanying text. The following are the first four criticisms advanced: (1) abdication by the NLRB of the obligation placed upon it by Congress to resolve statutory issues, (2) unremedied violations for parties refusing to arbitrate because of the substantial expense, (3) the limited scope of review in arbitration preventing full treatment of statutory matters by the arbitrator, and (4) inadequate remedies available in arbitration to ensure full redress of unfair labor practice violations.
216. See supra notes 198-99 and accompanying text. The fifth criticism is that arbitrators are incapable of interpreting the statutory language and legal precedent and that only blatantly erroneous applications of the law will be corrected by the courts. The sixth criticism is that the rights of the individual will be subordinated to the relationship between labor and management.
ployee complaints before attempting to resolve them with management and to dispose of complaints that are petty or unfounded.\textsuperscript{218}

The past instability in the NLRB's incipient deferral policy was a part of a process of experimentation to determine which would be the best standards to further the objectives of the NLRA. The courts helped the Board in this process of formulating a deferral policy by defining the boundaries beyond which the Board could not go and also by supporting the deferral standards which were within its authority. Even though the past uncertainty as to which alleged unfair labor practices the Board would defer to arbitration and the requirements which it would impose could have caused problems with the construction of and compliance with the arbitration provisions of collective-bargaining agreements between unions and management, no such difficulties appear to have materialized. The current deferral policy appears to have become stabilized within the Board and is receiving full support in the federal circuits and in the United States Supreme Court. Parties entering collective-bargaining agreements may safely depend on the current policy to remain stable. Arbitration provisions in those agreements may be structured and applied with the deferral policy in mind.

The NLRB's policy of deferral to the arbitration process, as explained in \textit{United Technologies Corp.} and of deferral to the arbitration award, as explained in \textit{Olin Corp.}, is being followed by the current Board. The circuit courts and the United States Supreme Court have concurred with the current Board's policy. Thus, it appears that the NLRB and the courts are relying on the collective bargaining agreements between unions and employers for the enforcement of certain statutory rights of the employees. This deference to mutually agreed-upon contractual procedures places greater burdens upon the arbitration process to ensure that employee's rights are not violated by either the employer or the union. The arbitrators will also have to become more proficient in interpreting the appropriate statutes and applying the Board's and the courts' precedent. Of course, the resulting reduction in the NLRB's case load should free its resources so that the Board can be more productive in resolving other pressing disputes between labor and management.

\textsuperscript{218} See \textit{Vaca v. Snipes}, 386 U.S. at 190-93.