

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

BABCOCK & WILCOX CONSTRUCTION  
COMPANY, INC.

and

Case 28-CA-022625

COLETTA KIM BENELI

**BRIEF OF *AMICUS CURIAE*  
COUNCIL ON LABOR LAW EQUALITY**

Charles I. Cohen  
Jonathan C. Fritts  
David R. Broderdorf  
Rachel Adams Ladeau  
MORGAN, LEWIS & BOCKIUS LLP  
1111 Pennsylvania Avenue, NW  
Washington, DC 20004  
(202) 739-3000

Date Submitted: March 25, 2014

Counsel for *Amicus Curiae* Council on Labor  
Law Equality

**TABLE OF CONTENTS**

	<b>Page</b>
INTRODUCTION .....	1
STATEMENT OF COLLE’S MEMBERSHIP AND INTEREST .....	3
SUMMARY OF THE CASE .....	4
ARGUMENT .....	6
I.    The Board Should Adhere to the Existing Standard for Post-Arbitral Deferral Under Spielberg Mfg. Co. and Olin Corp. ....	6
A.    The Spielberg/Olin Deferral Standard Is Sound and Consistent with the Objectives of the Act. ....	6
B.    The Board’s Existing Deferral Standards Adequately Protect the Statutory Rights of Employees Who Are Covered by a Collective Bargaining Agreement. ....	8
1.    The Just Cause Standard Protects Employees from Arbitrary or Unlawful Disciplinary Action.....	8
2.    The Just Cause Standard Provides Sufficient Protection Against Discipline That Violates the Act.. ....	11
3.    The Spielberg/Olin Deferral Standard Protects Against Arbitration Awards That Are Repugnant to the Act.....	12
II.   The Board Should Not Adopt the Deferral Standard Outlined in GC Memo 11-05.. .....	14
A.    The General Counsel’s Proposal Would Replace the Current, Practical Test With a Rigid, Legalistic Framework.....	14
B.    The General Counsel’s Proposed Standard Creates an Artificial Distinction Between Section 8(a)(1) and (3) Cases and Section 8(a)(5) Cases.. .....	17
C.    The General Counsel’s Proposed Standard Will Lead to Duplicative Litigation and Will Delay Final Resolution of Disputes Concerning Disciplinary Action.. .....	18
III.  The Board Should Not Change the Collyer Standard for Pre-Arbitral Deferral.. .....	20
IV.  The Board Should Not Modify Its Deferral Standard for Pre-Arbitral Grievance Settlements Under Alpha Beta. ....	23
CONCLUSION.....	25

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>110 Greenwich Street Corp.</i> , 319 NLRB 331 (1995) .....	13, 14
<i>Alpha Beta</i> , 273 NLRB 1546 (1985) .....	23, 25
<i>Babcock &amp; Wilcox Construction Co.</i> , NLRB Case No. 28-CA-022625 (Sept. 30, 2009) .....	passim
<i>Cardinal Home Prods., Inc.</i> , 338 NLRB 1004 (2003) .....	10
<i>Collyer Insulated Wire</i> , 192 NLRB 837 (1971) .....	passim
<i>Grief Bros. Cooperage Corp.</i> , 42 LA 555 (Daugherty, 1964).....	9
<i>Independent Stave Co.</i> , 287 NLRB 740 (1987) .....	23, 24
<i>International Harvester Co.</i> , 138 NLRB 923 (1962), <i>aff'd sub nom., Ramsey v. NLRB</i> , 327 F.2d 784 (7th Cir. 1964) .....	6
<i>Key Food Stores</i> , 286 NLRB 1056 (1987) .....	13
<i>Merillat Indus., Inc.</i> , 307 NLRB 1301 (1992) .....	10
<i>Mobil Oil Exploration</i> , 325 NLRB 176 (1997) .....	13
<i>National Radio Co.</i> , 198 NLRB 527 (1972) .....	7
<i>NLRB v. Motor Convoy, Inc.</i> , 673 F.2d 734 (4th Cir. 1982) .....	11, 19, 20
<i>Olin Corp.</i> , 268 NLRB 573 (1984) .....	passim

<i>SFIC Properties, Inc. v. Machinists, Dist. Lodge 94</i> , 103 F.3d 923 (9th Cir. 1996) .....	8
<i>Smith v. Kerrville Bus Co., Inc.</i> , 709 F.2d 914 (5th Cir. 1983) .....	8
<i>Spielberg Mfg. Co.</i> , 112 NLRB 1080 (1955) .....	passim
<i>The Courier-Journal</i> , 342 NLRB 1148 (2004) .....	24, 25
<i>U.S. Postal Serv.</i> , 300 NLRB 196 (1990) .....	23, 25
<i>United Technologies Corp.</i> , 268 NLRB 557 (1984) .....	8
<i>Wright Line, Inc.</i> , 251 NLRB 1083 (1980), <i>enfd</i> 662 F.2d 899 (1st Cir. 1981) .....	10
<b>STATUTES</b>	
Labor Management Relations Act of 1947 .....	6
National Labor Relations Act. ....	3, 6, 11, 15
<b>OTHER AUTHORITIES</b>	
Adolph M. Koven & Susan L. Smith, <i>Just Cause: The Seven Tests</i> (3d ed. 2006).....	9
Bureau National Affairs, <i>Basic Patterns in Union Contracts</i> (BNA, 14th ed. 1995).....	8
Decision of the Administrative Law Judge, <i>Babcock &amp; Wilcox Construction Co.</i> , JD(SF)- 15-12 .....	4, 5, 19
Dennis O. Lynch, <i>Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again</i> , 44 U. Miami L. Rev. 237 (1989).....	11
<i>Fairweather's Practice and Procedure in Labor Arbitration</i> (4th ed. 1999).....	10
Frank Elkouri & Edna Asper Elkouri, <i>How Arbitration Works</i> (7th ed. 2012).....	9, 15, 18
Jonathan Reiner, <i>Preserving Workers' Statutory Rights: An Analysis of the NLRB General Counsel's Proposed Post-Arbitration Deferral Policy</i> , 28 ABA J. Lab. & Emp. L 145 (Fall 2012).....	16

Laura J. Cooper et al., <i>How and Why Labor Arbitrators Decide Discipline and Discharge Cases: An Empirical Explanation</i> , in 60 <i>Proceedings of the National Academy of Arbitrators</i> (2007) .....	10, 14
Marvin F. Hill, Jr. & Anthony V. Sinicropi, <i>Evidence in Arbitration</i> (2d ed. 1987).....	10
Nat'l Acad. of Arbitrators, Am. Arbitration Ass'n, Fed. Mediation & Conciliation Serv., <i>Code of Professional Responsibility for Arbitrators of Labor-Management Disputes</i> , § 1.B.1 (Sept. 2007), available at <a href="http://www.naarb.org/code.html">www.naarb.org/code.html</a> .....	15
NLRB Casehandling Manual, Part One, Unfair Labor Practice Proceedings, § 10118.1 (Nov. 2013).....	21
Norman Brand & Melissa H. Biren, <i>Discipline and Discharge in Arbitration</i> (2d ed. 2008) .....	9, 17
Office of the General Counsel, Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3).....	1
Paul Berks, <i>Social Change and Judicial Response: The Handbook Exception to Employment-at-Will</i> , 4 <i>Emp. Rts. &amp; Emp. Pol'y J.</i> 231 (2000) .....	10
Reginald Alleyne, <i>Courts, Arbitrators, and the NLRB: The Nature of the Deferral Beast</i> , in 33 <i>Proceedings of the National Academy of Arbitrators</i> 249 (1980).....	11
Roger I. Abrams et. al., <i>Arbitral Therapy</i> , 46 <i>Rutgers L. Rev.</i> 1751 (Summer 1994) .....	17, 19
Table 23 of the Annual Reports of the National Labor Relations Board for fiscal years ending September 30, 2001 to September 30, 2009, available at <a href="http://www.nlr.gov/reports-guidance/reports/annual-reports">www.nlr.gov/reports-guidance/reports/annual-reports</a> .....	19

## INTRODUCTION

The Council on Labor Law Equality (“COLLE”) submits this *amicus curiae* brief in response to the Board’s February 7, 2014 Notice and Invitation to File Briefs. The Board’s invitation flows directly from General Counsel Memorandum 11-05, issued on January 20, 2011, wherein the General Counsel proposed a new standard that would impose additional burdens on the party urging deferral in Section 8(a)(1) and (3) cases. *See* Office of the General Counsel, Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases (Jan. 20, 2011) (hereinafter “GC Memo 11-05”). Specifically, the General Counsel’s proposed standard would require the party seeking deferral to show that (1) the collective bargaining agreement incorporates the statutory right, or that the statutory issue was presented to the arbitrator; and (2) the arbitrator correctly enunciated and applied the applicable statutory principles in deciding the issue.

Under the current standard, the Board will defer to an arbitration award where (1) the arbitration proceeding was fair and regular; (2) all parties agreed to be bound; and (3) the arbitral decision is not repugnant to the purposes and policies of the Act. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). In addition, the Board requires that the arbitrator must have considered the unfair labor practice issue. The unfair labor practice is adequately considered if (1) the contractual issue is factually parallel to the unfair labor practice issue; and (2) the arbitrator was presented generally with facts relevant to resolving the unfair labor practice issue. *Olin Corp.*, 268 NLRB 573 (1984).

We understand that the General Counsel’s proposal, and the Board’s invitation to file briefs, is limited to Section 8(a)(1) and (3) cases. We do not understand the General Counsel to

be advocating, or Board to be considering, any change to the existing deferral standard in Section 8(a)(5) cases.

COLLE respectfully submits that the *Spielberg/Olin* deferral standard should be maintained in all cases, including Section 8(a)(1) and (3) cases, because it properly balances the public policy of promoting final and binding arbitration under a collective bargaining agreement with the statutory objective of protecting employees' rights under the Act. The *Spielberg/Olin* standard is a practical one, which has withstood the test of time. It promotes the final and binding resolution of disputes through arbitration, a process that is quicker and more efficient than Board litigation. Whether the dispute involves the discipline or discharge of an individual employee under a contractual just cause standard, or whether it raises a broader claim involving other terms of a collective bargaining agreement, final and binding arbitration serves the interests of all parties to the dispute – the employer, the union, and the grievant/alleged discriminatee. The *Spielberg/Olin* standard also protects employees' statutory rights. If the arbitrator's award is repugnant to the purposes and policies of the Act, the Board will not defer to it.

Changing the deferral standard in Section 8(a)(1) and (3) cases, as proposed by the General Counsel in GC Memo 11-05, will make arbitration more legalistic in nature and undermine the finality of the process, to the detriment of employers, unions, and employees alike. Since the implementation of GC Memo 11-05, many employers have been unwilling to engage in pre-arbitral deferral under the *Collyer* and *Dubo* standards. Employers will be even less willing to engage in pre-arbitral deferral if the Board is less likely to defer to the results of that process. And arbitrators may be unwilling or unable to take on the additional burden of correctly enunciating and interpreting Board precedent, as the General Counsel's proposed standard would require. Many arbitrators will find that the interpretation and application of

Board precedent is beyond the scope of their expertise and authority, even though the arbitrator may be fully capable of resolving the dispute fairly and equitably and with appropriate consideration of employees' right to engage in union and concerted activities.

Furthermore, adopting a different standard for deferral in Section 8(a)(1) and (3) cases will be confusing and practically unworkable because many discipline and discharge cases also involve issues of contract interpretation that would be subject to the existing deferral standard for Section 8(a)(5) cases. COLLE therefore urges the Board to maintain its existing and well-established deferral standards in all categories of cases. COLLE addresses these issues, and the other questions posed in the Board's invitation, more fully below.

#### **STATEMENT OF COLLE'S MEMBERSHIP AND INTEREST**

COLLE is a national association of employers that was formed to comment on, and assist in, the interpretation of the law under the National Labor Relations Act. COLLE's single purpose is to follow the activities of the Board and the courts as they relate to the Act. Through the filing of *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach – in the formulation and interpretation of national labor policy – to issues that affect a broad cross-section of industry. COLLE has participated as *amicus curiae* in numerous cases before the NLRB.

With respect to this case, COLLE's members are large, national employers that handle hundreds or even thousands of grievances each year under collective bargaining agreements with various labor organizations. The vast majority of these grievances are resolved without arbitration, but some of COLLE's members receive hundreds of demands for arbitration each year (based on a volume of several thousand grievances annually). Dozens of these cases proceed to arbitration each year.

The General Counsel's proposed change to the post-arbitral deferral standard is therefore of special importance and significance to COLLE's members. If the standard is changed as the General Counsel has proposed, there is a substantial risk of duplicative, lengthy, and costly post-arbitration Board litigation in discipline and discharge cases. The parties and the arbitrator simply may be unable or unwilling to meet the additional burdens of the General Counsel's proposed standard in these cases. COLLE is also concerned about potential changes to the *Collyer* standard for pre-arbitration deferral, as well as changes to the standard for deferral to grievance settlements, as suggested in the Board's Notice and Invitation.

Changing these deferral standards would have real and substantial consequences for COLLE's members. If the standard for deferral becomes more difficult to meet, that will place additional burdens on the grievance-arbitration process that is vital to resolving the hundreds or thousands of disputes that arise each year under various local and national collective bargaining agreements. Ultimately, the finality of arbitration awards and grievance settlements will be undermined, and these labor disputes will be prolonged for potentially years of Board and court litigation. While COLLE appreciates the Board's responsibility to protect employees' statutory rights, the Board must give equal weight to the statutory objective of promoting industrial peace and stability as well as the federal labor policy favoring the resolution of labor disputes through collectively bargained grievance-arbitration procedures. COLLE respectfully submits that the Board's existing deferral standards appropriately balance these important statutory objectives and should not be changed.

#### **SUMMARY OF THE CASE**

The underlying case involves Section 8(a)(3) and (1) allegations by a former employee and union steward at the employer's Joseph City, Arizona worksite, regarding the employee's discharge resulting from "improper conduct." Decision of the Administrative Law Judge,

*Babcock & Wilcox Construction Co.*, JD(SF)-15-12, at 1-3 (Apr. 9, 2012) (“ALJD”). On March 19, 2009, the union filed a grievance over the steward’s suspension and discharge, alleging that the termination violated the parties’ collective bargaining agreement (the National Maintenance Agreement) and the Act. *Id.* at 4. The case progressed through Step 4 of the Agreement’s grievance procedure, which provided for a hearing before a joint labor-management grievance review subcommittee. *Id.* In the meantime, the former employee filed a charge on July 30, 2009, alleging violations of Section 8(a)(3) and (1) of the Act. Region 28 issued a *Dubo* deferral letter on September 30, 2009. *See* Docket, *Babcock & Wilcox Constr. Co.*, NLRB Case No. 28-CA-022625 (Sept. 30, 2009).

The subcommittee conducted a hearing on October 8, 2009, and that same day issued a letter denying the grievance and upholding the discharge. ALJD at 4-5. The subcommittee’s decision was final and binding.

The Charging Party thereafter contacted Region 28. The Regional Director did not defer to the subcommittee’s decision under the *Spielberg/Olin* standard and issued a complaint on August 29, 2011. *Id.* The General Counsel concedes that the proceedings before the subcommittee were fair and regular and that all parties had agreed to be bound by the subcommittee’s decision. *Id.* at 5. The basis for the General Counsel’s refusal to defer was that the subcommittee’s decision was alleged to be repugnant to the Act.

The case was tried before the Administrative Law Judge (“ALJ”) in January 2012. On April 9, 2012, the ALJ issued his decision recommending dismissal of the complaint. *Id.* at 6. Applying the *Spielberg/Olin* standard, the ALJ reasoned that while he would have credited the steward’s witnesses, the subcommittee reasonably credited the employer’s witnesses and found that the steward was discharged for profanity and insubordination, not her protected, concerted

activity as a steward. Therefore, the ALJ found that the subcommittee's decision was *not* repugnant to the NLRA and recommended that the Board defer to it. *Id.* at 5-6.

The General Counsel filed exceptions on May 11, 2012, in which the General Counsel urged the Board to reject the ALJ's conclusions and to adopt a new framework in post-arbitral deferral cases, as outlined in GC Memo 11-05. *See* Acting Gen. Counsel's Brief in Support of Exceptions, at 19-20 (May 11, 2012). That led to the Board's February 7, 2014 Notice and Invitation to File Briefs.

## **ARGUMENT**

### **I. The Board Should Adhere to the Existing Standard for Post-Arbitral Deferral Under *Spielberg Mfg. Co. and Olin Corp.***

#### **A. The *Spielberg/Olin* Deferral Standard Is Sound and Consistent with the Objectives of the Act.**

The *Spielberg/Olin* deferral standard has its origin in a policy objective that is at the core of the Act: "the desirable objective of encouraging the voluntary settlement of labor disputes[,] [which] will best be served by our recognition of the arbitrators' award." *Spielberg Mfg. Co.*, 112 NLRB at 1082. That objective remains just as valid and desirable today as it did when the *Spielberg* decision issued almost sixty years ago, just eight years after the passage of the Labor Management Relations Act of 1947. Several years later, in 1962, the Board again recognized the importance of final and binding arbitration as a method of furthering the Act's core objective of promoting industrial peace and stability through collective bargaining:

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

*International Harvester Co.*, 138 NLRB 923, 925-26 (1962), *aff'd sub nom.*, *Ramsey v. NLRB*, 327 F.2d 784 (7th Cir. 1964).

This rationale is at the heart of the Board's decision in *Olin*, which again affirmed these core principles and policies of the Act:

It hardly needs repeating that national policy strongly favors the voluntary arbitration of disputes. The importance of arbitration in the overall scheme of Federal labor law has been stressed in innumerable contexts and forums.

*Olin Corp.*, 268 NLRB at 574.

The *Spielberg/Olin* standard represents a proper balancing of federal labor policies. The balance should not depend on whether a case involves Section 8(a)(5) or Section 8(a)(3) and (1) allegations. As long as the employer and union have voluntarily agreed that a dispute is covered by the collective bargaining agreement and its grievance-arbitration procedures, the Board should defer to those procedures. It is for this very reason that the Board in *National Radio Co.*, 198 NLRB 527 (1972), established a uniform pre-arbitral deferral standard for Section 8(a)(1), (3), and (5) cases:

Here, as [in *Collyer*], an asserted wrong is remediable in both a statutory and a contractual forum. Both jurisdictions exist by virtue of congressional action, and our duty to serve the objectives of Congress requires that we seek a rational accommodation within that duality. We may not abdicate our statutory duty to prevent and remedy unfair labor practices. Yet, once an exclusive agent has been chosen by employees to represent them, we are charged with a duty fully to protect the structure of collective representation and the freedom of the parties to establish and maintain an effective and productive relationship. In this context, abstention simply cannot be equated with abdication. We are, instead, adjuring the parties to seek resolution of their dispute under the provisions of their own contract and thus fostering both the collective relationship and the Federal policy favoring voluntary arbitration and dispute settlement.

*Id.* at 531; *see also United Techs. Corp.*, 268 NLRB 557, 559 (1984) (“[D]eclin[ing] to defer cases alleging violations of Sections 8(a)(1) and (3) and 8(b)(1)(A) and (2) . . . essentially emasculate[s] the Board’s deferral policy, a policy that had favorably withstood the tests of judicial scrutiny and of practical application.”).

In sum, the Board’s existing deferral standards are well-established, time-tested, and uniformly applicable to Section 8(a)(1) and (3) cases as well as Section 8(a)(5) cases. These standards reflect an appropriate balancing of the policies of the Act with the federal labor policy favoring arbitration as an effective and efficient method of resolving labor disputes. There is no reason to upset that balance, as the General Counsel has proposed to do in this case. COLLE urges the Board to adhere to its existing deferral standards.

**B. The Board’s Existing Deferral Standards Adequately Protect the Statutory Rights of Employees Who Are Covered by a Collective Bargaining Agreement.**

1. The Just Cause Standard Protects Employees from Arbitrary or Unlawful Disciplinary Action.

Employees who are covered by a collective bargaining agreement have the procedural and substantive protections of the just cause standard for discipline or discharge. Over 90% of collective bargaining agreements contain an explicit “just cause” standard for discipline. *See* Bureau of National Affairs, *Basic Patterns in Union Contracts 7* (BNA, 14th ed. 1995). Notably, even if a contract is silent with respect to the just cause standard, arbitrators and the federal courts will infer that the just cause standard is inherent in a collective bargaining agreement that allows the union to challenge disciplinary action through a grievance-arbitration process. *See, e.g., SFIC Props., Inc. v. Machinists, Dist. Lodge 94*, 103 F.3d 923, 925-26 (9th Cir. 1996) (agreeing with arbitrator’s rationale that just cause restrictions are inferred “in all modern day collective bargaining agreements”); *Smith v. Kerrville Bus Co., Inc.*, 709 F.2d 914, 917 (5th Cir.

1983) (“In instances where the language of a collective contract does not explicitly prohibit dismissal except for just cause, arbitrators typically infer such prohibitions from seniority clauses or grievance and arbitration procedures.”); *see also* Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 15-3 (7th ed. 2012).

Arbitrators typically find that the just cause standard has seven components, which are commonly known as the “seven tests” of just cause. *See* Adolph M. Koven & Susan L. Smith, *Just Cause: The Seven Tests* 27 (3d ed. 2006). The seven tests encompass procedural and substantive protections, including protection against unfair or discriminatory discipline:

1. Did the employer give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?
2. Was the employer’s rule or managerial order reasonably related to the orderly, efficient, and safe operation of the company’s business?
3. Did the employer, before administering the discipline to an employee, make an effort to discover whether the employee violated or disobeyed an order of management?
4. Was the employer’s investigation conducted fairly and objectively?
5. At the investigation, did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?
7. Was the degree of discipline administered by the employer in a particular case reasonably related to the seriousness of the employee’s proven offenses and the record of the employee’s service?

*See* Norman Brand & Melissa H. Biren, *Discipline and Discharge in Arbitration* 33-34 (2d ed. 2008); *Grief Bros. Cooperage Corp.*, 42 LA 555, 557-59 (Daugherty, 1964).

Arbitrators place the burden on the employer to prove just cause for any disciplinary action taken under a collective bargaining agreement. *See* Elkouri & Elkouri, at 15-23.

This is a substantial evidentiary burden for employers to meet. Paul Berks, *Social Change and Judicial Response: The Handbook Exception to Employment-at-Will*, 4 Emp. Rts. & Emp. Pol’y J. 231, 248 (2000); *see generally* Marvin F. Hill, Jr. & Anthony V. Sinicropi, *Evidence in Arbitration* 40 (2d ed. 1987) (discussing the burden of proof that management carries to show just cause for discipline or discharge); *Fairweather’s Practice and Procedure in Labor Arbitration* 275 (4th ed. 1999) (noting that the “clear weight of authority” establishes that management must bear the burden of showing that discipline was for cause).<sup>1</sup>

A 2007 study of 2,055 arbitration awards in discipline and discharge cases, issued by 81 different arbitrators between 1982 and 2005, found that in less than half of those cases (48%) did the employer succeed in proving just cause for the discipline imposed. Laura J. Cooper et al., *How and Why Labor Arbitrators Decide Discipline and Discharge Cases: An Empirical Explanation*, in 60 *Proceedings of the National Academy of Arbitrators* 423 (2007) (Table 2). In another 30% of the cases studied, the arbitrator found sufficient just cause for some level of discipline, but not the level imposed by the employer. *Id.* In 22% of cases, the union succeeded in proving no just cause for any discipline. *Id.* These statistics confirm that the just cause standard provides substantial protection for employees who are covered by a collective

---

<sup>1</sup> While the employer has the burden of proof under the just cause standard, the General Counsel has the burden to establish a *prime facie* case under Section 8(a)(3) and (1) of the Act. *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enfd* 662 F.2d 899 (1st Cir. 1981). If the General Counsel meets that burden, the employer may defend the charge “[by] asserting a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation.” *Cardinal Home Prods., Inc.*, 338 NLRB 1004, 1008 (2003); *see also* *Merillat Indus., Inc.*, 307 NLRB 1301, 1303 (1992) (holding that an employer “is required to establish its *Wright Line* defense only by a preponderance of the evidence,” which “does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it”). The General Counsel ultimately has the burden of persuasion under the *Wright Line* test.

bargaining agreement, including protection against discipline that might otherwise be found to violate the Act.<sup>2</sup>

2. The Just Cause Standard Provides Sufficient Protection Against Discipline That Violates the Act.

The just cause standard sufficiently protects employees' rights under the Act. The employer has the burden of proving a legitimate basis for the disciplinary action, taken without discrimination or unlawful motive. Even though the arbitrator is applying a contractual just cause standard rather than Board or court precedent under the Act, arbitrators will not uphold discipline that is taken in response to union or concerted activities:

[V]irtually every arbitrator who found union activity or concerted activities to be the motivation behind discipline would sustain a challenging grievance. Indeed, arbitrators are prone to find just-cause violations for any reason that appears to be arbitrary and without a foundation in fundamental fairness. That would include any discharge or discipline that had no satisfactory explanation. That is so much a part of the fabric of grievance arbitration that an arbitrator who had never heard of the NLRA or read an NLRB decision would undoubtedly find discipline action based on union or concerted activities to be without just cause.

Reginald Alleyne, *Courts, Arbitrators, and the NLRB: The Nature of the Deferral Beast*, in 33 *Proceedings of the National Academy of Arbitrators* 249 (1980); see also Dennis O. Lynch, *Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again*, 44 U. Miami L. Rev. 237, 312 (1989) (noting that a collective bargaining agreement's "just cause" provision or a clause stating that the employer will not discriminate based on an employee's union activity "essentially incorporates Section 7, and Subsections 8(a)(1) and 8(a)(3) into the agreement"); see, e.g., *NLRB v. Motor Convoy, Inc.*, 673 F.2d 734, 736 (4th Cir. 1982) ("The [arbitration] panel concluded that Walker was fired for just cause thereby

---

<sup>2</sup> The Labor Arbitration Information System ("LAIS") has reviewed 45,756 arbitration awards on discipline and found that management won 48%, the union won 23%, and the parties split in 28%.

concluding, necessarily, that Walker was not fired for engaging in protected union activities.

[The NLRB's] subsequent conclusion that Walker was fired because of protected union activities is nothing other than an improper reversal of the [arbitration] panel's prior factual determination."").

Thus, the premise of the General Counsel's proposed changes to the deferral standard – that employees' Section 7 rights are not adequately protected in arbitration – does not reflect the realities of arbitration under the just cause standard. *See* GC Memo 11-05, at 4-6 (arguing that the Board's *Olin* standard fails to protect employees' Section 7 rights by failing to require explicit arbitral consideration of those rights). Arbitrators are inherently protective of employees' right to engage in union and concerted activities. If an employer takes disciplinary action in order to interfere with that right, arbitrators generally will find that the discipline does not meet the just cause standard. It is not necessary for the arbitrator to cite or articulate Board precedent in order to reach this conclusion.

3. The *Spielberg/Olin* Deferral Standard Protects Against Arbitration Awards That Are Repugnant to the Act.

No change to the *Spielberg/Olin* deferral standard is needed in order to guard against the rare case in which an arbitrator issues an award that conflicts with the Act. In *Olin Corp.*, the Board emphasized that it would maintain vigilance in policing arbitration awards that intersect with potential unfair labor practices, in response to similar concerns as have been raised in GC Memo 11-05:

On the contrary, the Board expressly retains and fulfills its statutory obligation to determine whether employee rights have been protected by the arbitral proceedings by our commitment to determine in each case whether the arbitrator has adequately considered the facts which would constitute unfair labor practices and whether the arbitrator's decision is clearly repugnant to the Act.

268 NLRB at 574.

The Board's decision in *Collyer Insulated Wire*, 192 NLRB 837 (1971) addressed the same concern in the context of pre-arbitration deferral:

Nor are we 'stripping' any party of 'statutory rights.' The courts have long recognized that an industrial relations dispute may involve conduct which, at least arguably, may contravene both the collective agreement and our statute. \*\*\* [W]e guarantee that there will be no sacrifice of statutory rights if the parties' own processes fail to function in a manner consistent with the dictates of our law.

*Id.* at 842-43 (emphasis added).

In GC Memo 11-05, the General Counsel did not cite any specific case in which the Board did not fulfill the promises of *Collyer* and *Olin*. Indeed, the General Counsel's brief in support of his exceptions in this case acknowledges that the Board has, under the current standard, refused to defer to arbitration awards that are repugnant to the Act. *See* General Counsel's Brief, NLRB Case No. 28-CA-022625, at 16-18. For example, in *Mobil Oil Exploration*, 325 NLRB 176 (1997), the Board did not defer to an arbitrator's award upholding the discharge of an employee who had engaged in insubordination by disobeying a security officer's instruction that he not discuss with other employees a pending investigation regarding the union's president. *Id.* at 176-77. The Board held that the arbitrator's decision was repugnant to the Act because the employee's conduct constituted protected concerted activity under Section 7. *Id.* at 179.

Similarly, in *Key Food Stores*, 286 NLRB 1056, 1056-57 (1987), also cited by the General Counsel in his exceptions brief in this case, the Board found that an arbitration award was repugnant to the Act when the arbitrator sustained an employee's discharge based, in part, on actions taken by the employee as a shop steward. And in *110 Greenwich Street Corp.*, 319

NLRB 331 (1995), the Board refused to defer to an arbitrator's award that found that just cause existed to discharge an employee who posted "controversial placards" in front of the employer's building protesting the employer's pay practices, finding that such a decision was repugnant to the Act as "not susceptible of an interpretation that is consistent with the . . . right[] to engage in concerted activities." *Id.* at 335.

Simply put, in the rare instances in which an arbitrator issues an award that conflicts with an employee's rights under the Act, the *Spielberg/Olin* deferral standard preserves the Board's authority to reject the award and find a violation of the Act. The Board has, in fact, exercised this authority when needed. There is no need to alter the standard in order for the Board to exercise this authority.

## **II. The Board Should Not Adopt the Deferral Standard Outlined in GC Memo 11-05.**

### **A. The General Counsel's Proposal Would Replace the Current, Practical Test with a Rigid, Legalistic Framework.**

The standard proposed by the General Counsel should not be adopted. It would impose a new duty on arbitrators, and party representatives in those arbitral proceedings, to (1) clearly present "the statutory issue" and (2) "correctly enunciate[] the applicable statutory principles" and apply them in the award. Yet, the proposed standard fails to recognize that many arbitrators, and many advocates in labor arbitration proceedings, are not lawyers. A 2007 study of 2,055 arbitration awards issued by 81 arbitrators found that approximately 65% of those arbitrators had law degrees, meaning that around 35% did not. *See Cooper et al., supra*, at 427. That same study found that a non-attorney represented the union in 49% of those cases, and in 32% of the same cases a non-attorney represented management. *Id.* at 450 (Table 15).

The General Counsel's proposed standard runs the risk of disqualifying many experienced labor arbitrators and advocates, who are not trained or equipped to research and

apply Board precedent. Under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, prepared by the National Academy of Arbitrators, the American Arbitration Association, and the Federal Mediation and Conciliation Service, arbitrators must decline an appointment if the case “requires specialized knowledge beyond the arbitrator’s competence.” Nat’l Acad. of Arbitrators, Am. Arbitration Ass’n, Fed. Mediation & Conciliation Serv., *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, § 1.B.1 (Sept. 2007), available at [www.naarb.org/code.html](http://www.naarb.org/code.html).

Furthermore, some arbitrators will find that they are not authorized to decide a statutory issue, usually when the collective bargaining agreement limits the arbitrator’s authority to interpret and apply the terms of the agreement. *See* Elkouri & Elkouri, at 10-43 (“In some cases arbitrators have refused to consider NLRA issues (or have disclaimed authority to do so) or to consider the NLRA and NLRB doctrine in deciding contractual issues.”). Such limitations on the arbitrator’s authority are typical in collective bargaining agreements. *Id.* at 10-45 (“Frequently, prohibitory language in the parties’ collective bargaining agreement is cited for the arbitrator’s declination.”). Arbitrators will, however, consider the employee’s right to engage in union or concerted activities in the context of the contractual just cause standard (as an element of discrimination under the seven tests of just cause, as discussed above).

If the Board changes the deferral standard to require the arbitrator to specifically consider and apply the relevant statutory principles, that may require the parties to modify their collective bargaining agreement in order to provide the arbitrator with the authority to do so. The Board should not assume that this solution would be easy to implement. One or both parties may be reluctant to reopen well-established, and in many cases decades-old, contract language governing

the scope of the arbitrator's authority. The Board should not unnecessarily burden the parties with resolving this issue in collective bargaining.

Even in cases in which the arbitrator is authorized and competent to decide the statutory issue, the General Counsel's proposed standard is impractical and formalistic. It would require the parties to present and the arbitrator to "correctly articulate" the applicable statutory principles in the award. These formalistic requirements would place additional burdens on the parties and the arbitrator, but are unlikely to change the outcome of the award. In most cases, the arbitrator reaches the correct statutory result, but without articulating the relevant statutory principles. For instance, a recent study compared deferral under *Spielberg/Olin* versus the General Counsel's proposed standard in 11 recent cases. The study's author concluded that in 82% of the cases, or 9 of 11, the deferral outcome would be different simply because of the change in the standard. Jonathan Reiner, *Preserving Workers' Statutory Rights: An Analysis of the NLRB General Counsel's Proposed Post-Arbitration Deferral Policy*, 28 ABA J. Lab. & Emp. L. 145, 151-53 (Fall 2012). The study's author concluded that the arbitrator's mere failure to cite the applicable statutory standard in the award would greatly reduce the overall rate of deferral. Yet, the author acknowledged that the contractual just cause standard may actually provide *more* protection to the employee because it "incorporates a whole host of factors including term of service, severity of infraction, past practices between the parties, contractual language, and broader notions of fairness." *Id.* at 160.

The General Counsel's proposed standard presents a threat to the very nature of the arbitration process, which is fundamentally different from court or administrative litigation. Arbitration is intended to be a "therapeutic" process in which the parties peacefully resolve a

dispute within the context of an ongoing collective bargaining relationship. The “therapeutic value” of arbitration would be undermined by making the process more legalistic in nature:

A dispute based on the reading of a statute is likely to be more formal than one that requires interpreting a privately-written contract. A swarm of lawyers descending on the local Holiday Inn conference room for an arbitration hearing brings with it legalisms and court-like trappings.

\* \* \*

As Justice Douglas said in the Trilogy, arbitration is a continuation of the collective bargaining process. Excessive legalism endangers labor arbitration’s procedural values. If we are to fulfill Justice Douglas’s promise, we must preserve arbitration’s therapeutic value from these external threats. If we are to maintain arbitration’s positive role in the workplace, we must protect those elements that help employees reach a better understanding of themselves and their behaviors.

Roger I. Abrams et al., *Arbitral Therapy*, 46 Rutgers L. Rev. 1751, 1783-85 (Summer 1994).

COLLE urges the Board to consider the fundamental differences between arbitration and Board or court litigation, as well as the fact that many labor arbitrators and advocates are not lawyers. The General Counsel’s proposed standard should not be adopted because it would threaten the informal and “therapeutic” nature of the arbitration process, and it would disqualify many competent and experienced arbitrators and advocates from that process.

**B. The General Counsel’s Proposed Standard Creates an Artificial Distinction Between Section 8(a)(1) and (3) Cases and Section 8(a)(5) Cases.**

The General Counsel’s proposed standard in GC Memo 11-05 is based, at least in part, on the notion that Section 8(a)(1) and (3) cases are “different” from Section 8(a)(5) cases. GC Memo 11-05, at 6. This distinction, however, is artificial and does not reflect the realities of many discipline and discharge cases that are presented to arbitrators. Many discipline and discharge cases, which are analogous to Section 8(a)(1) and (3) cases, also involve issues of contract interpretation, which would be analogous to a Section 8(a)(5) or 8(d) allegation. For

example, determining whether an employee’s violation of a particular workplace rule constitutes “just cause” for discipline or discharge may require the arbitrator to examine whether the rule was promulgated in a manner that is consistent with the collective bargaining agreement and/or the parties’ past practice. *See generally* Brand & Biren, *supra*, at 91-92 (discussing how arbitrators’ evaluation of fair process in discipline and discharge cases may require examining a workplace rule’s potential conflict with the collective bargaining agreement or with past practice). Furthermore, many collective bargaining agreements enumerate specific grounds for discharge or discipline, requiring the arbitrator to interpret and apply those contractual provisions when determining whether the employer’s disciplinary action was warranted. *See* Elkouri & Elkouri, *supra*, at 15-5.

By neglecting to recognize that discipline and discharge cases frequently involve disputes over contract interpretation and past practice, the General Counsel’s proposed standard would create a distinction that is artificial and unworkable in practice.

**C. The General Counsel’s Proposed Standard Will Lead to Duplicative Litigation and Will Delay Final Resolution of Disputes Concerning Disciplinary Action.**

The General Counsel’s proposed standard also risks undermining the final and binding nature of labor arbitration. Federal labor policy strongly favors arbitration as an efficient process for achieving a final and binding resolution of labor disputes. The Board in *Collyer* recognized that public policy, as well as the benefits of final and binding arbitration for all involved parties as compared to Board litigation:

The long and successful functioning of grievance and arbitration procedures suggests to us that in the overwhelming majority of cases, the utilization of such means will resolve the underlying dispute and make it unnecessary for either party to follow the more formal, and sometimes lengthy, combination of administrative and judicial litigation provided for under our statute.

192 NLRB at 843.

The efficiency of arbitration as compared to Board litigation is clearly borne out by objective data. Between 2001 and 2009 (the year the Board stopped publishing an annual report including the tabulation of such data), the average length of time between the filing of a charge and a final Board decision was over two years, or 776 days, with a peak of over three years in 2007, or 1,173 days. By contrast, the average number of days from a request for an arbitration panel to the issuance of the arbitrator's decision was less than a year, or 320 days.<sup>3</sup>

The General Counsel's proposed standard would undermine the finality of arbitration – a fundamental goal of the arbitration process. *See Abrams et al., supra*, at 1781 (“The most important task for the arbitrator is to resolve the dispute with finality.”). A stricter standard for post-arbitration deferral would inevitably lead to more post-arbitration Board litigation involving the same underlying dispute. “Arbitration would become nothing more than a costly extra step . . . rather than the cost efficient and rapid resolution of disputes it is designed to be.” *See Motor Convoy*, 673 F.2d at 736-37.

The procedural history of the underlying case here, *Babcock & Wilcox Construction Co.*, JD(SF)-15-12, exemplifies this concern. Pursuant to the contractual procedure, the union in this case filed a grievance on behalf of the Charging Party approximately one week after her termination, on March 19, 2009. The case quickly progressed to Step 4 of the contractual grievance procedure, in which the parties participated in a hearing before the subcommittee panel and submitted position statements and documentary evidence. The subcommittee rendered a decision on October 8 of that same year. The contractual grievance procedure, from start to

---

<sup>3</sup> These figures were calculated by averaging data from Table 23 of the Annual Reports of the National Labor Relations Board for fiscal years ending September 30, 2001 to September 30, 2009, available at [www.nlr.gov/reports-guidance/reports/annual-reports](http://www.nlr.gov/reports-guidance/reports/annual-reports), and data from the Federal Mediation and Conciliation Service's Arbitration Statistics for fiscal years 2001 to 2009, tabulations of which were obtained from the Federal Mediation and Conciliation Service.

finish, thus provided the parties with a resolution less than seven months after the challenged disciplinary action took place.

By contrast, the Board proceedings in this case have prolonged this dispute for almost five years. The Region issued a complaint in this case on August 29, 2011, almost two years after the subcommittee's decision. ALJ's decision issued on April 9, 2012, over three years after the employee's discharge, and upheld the subcommittee's decision. The case has now been pending at the Board for nearly two additional years. As of today, the parties have spent five years waiting for this matter to be finally resolved.

The greater likelihood of post-arbitration Board litigation under the General Counsel's proposed standard could ultimately cause the parties to forgo arbitration entirely. Employers and unions may come to realize that by agreeing to arbitrate a disciplinary dispute in which there is a related Section 8(a)(1) or (3) allegation, they may be resigning themselves to litigating the same dispute twice – once in arbitration, and then again in subsequent Board litigation. As a result, employers and unions may decline to submit the dispute to arbitration in the first place, in order to avoid adding an extra step to the already long process of Board and court litigation. *See Motor Convoy*, 673 F.2d at 737 (restricting NLRB deferral would make “certain that arbitration machinery would be included in fewer collective bargaining agreements inevitably expanding unnecessarily the caseloads of the federal courts and the National Labor Relations Board”).

Supplanting arbitration with Board and court litigation is more costly for employers, bad for labor relations, and provides no real benefit to an employee who has been unjustly disciplined or discharged. Regardless of the outcome, all parties have an interest in resolving the dispute sooner rather than later. That is the principal benefit of arbitration, which will be directly

undermined by adopting a more stringent standard for post-arbitration deferral, as the General Counsel has proposed.

**III. The Board Should Not Change the *Collyer* Standard for Pre-Arbitral Deferral.**

Just as there is no need to alter the post-arbitral deferral standard, there is also no need to alter the pre-arbitral deferral standard under *Collyer*. The *Collyer* standard allows for charges to be deferred to the grievance-arbitration process, without a full investigation of the charge by the Region. In explaining this standard, the Board in *Collyer* recognized that it must balance competing policies in its administration of the Act, including the public policy favoring the resolution of labor disputes through final and binding arbitration:

[L]abor law as administered by the Board does not operate in a vacuum isolated from other parts of the Act, or, indeed, from other acts of Congress. In fact, the legislative history suggests that at the time the Taft-Hartley amendments were being considered, Congress anticipated the Board would develop by rules and regulations, a policy of entertaining under these provisions only such cases ... as cannot be settled by resort to the machinery established by the contract itself, voluntary arbitration.

192 NLRB at 840-41. COLLE urges the Board to adhere to the *Collyer* standard.

If, however, the Board does alter the *Spielberg/Olin* standard to make post-arbitral deferral less likely, COLLE proposes that the pre-arbitral deferral process be modified to require that the investigation be completed and a merit determination be made before deciding whether to defer under *Collyer*. Such an approach would (1) put the parties on clear notice of whether the General Counsel will prosecute the charge if the parties do not agree to defer under *Collyer*; and (2) put the arbitrator on clear notice of the General Counsel's theory of violation and the applicable legal standard.

Requiring the Regional Offices to complete their investigation and make a merit determination would represent a change in existing practice, which only requires the Regional

Director to find that the charge has “arguable merit.” See GC Memo 11-05, at 9-10; *NLRB Casehandling Manual, Part One, Unfair Labor Practice Proceedings*, § 10118.1 (Nov. 2013). The “arguable merit” standard is, in the experience of COLLE’s members, a low threshold to clear. Although the Regional Directors have discretion to undertake “a more complete investigation” before making a determination of “arguable merit” (GC Memo 11-05, at 10 n.26), Regional Directors generally do not do so. As a result, many charges are deferred to arbitration even though they ultimately would be found *not* to have merit after a complete investigation.

COLLE submits that any change in the post-arbitral deferral standard in Section 8(a)(1) and (3) cases should, correspondingly, trigger more scrutiny from the Regions prior to invoking *Collyer* deferral for these cases. If a more burdensome standard will be applied post-arbitration, the Regions should be instructed to fully investigate the charge and make a merit determination before deciding whether pre-arbitration deferral is appropriate. Not only would a full investigation allow the Region to accurately assess the facts and law at a time much closer to the alleged violation, it would avoid the inefficiencies of a “second” investigation that may include a need to interview more witnesses and/or submit additional position statements on the issues partially addressed in the “first” investigation. See GC Memo 11-05, at 9 (“[I]nvestigation of the alleged unfair labor practice at the end of the process is more difficult.”).

In addition, and perhaps most importantly, a full investigation and merit determination as part of the pre-arbitration deferral process would provide the parties, and the arbitrator, with a clear understanding of the General Counsel’s legal theory and the applicable legal standard. If the case is deferred to arbitration, the *Collyer* deferral letter could include this information so that the parties and the arbitrator have clear notice of the standard to be applied in arbitration. Clear notice of the applicable legal standard would aid the parties and the arbitrator, especially when

non-lawyers are involved in the arbitration process. This would help ensure that the correct legal standard is applied in arbitration, and perhaps would provide a “safe harbor” for the arbitrator and the parties under a more burdensome post-arbitration deferral standard.

Finally, requiring the Region to make a merit determination would allow the parties to make an informed decision about whether to defer – and incur the risk of litigating the same dispute twice if the Board does not defer to the arbitrator’s award – or, instead, to simply litigate the charge before the Board. In making this decision, the parties should know whether the charge will be prosecuted and under what theory. Armed with that information, the parties can make a more educated decision about whether the dispute should be resolved before the Board rather than in arbitration.

**IV. The Board Should Not Modify Its Deferral Standard for Pre-Arbitral Grievance Settlements Under *Alpha Beta*.**

Finally, the Board should not modify its standard for deferral to voluntary grievance settlements. In *Alpha Beta*, 273 NLRB 1546 (1985), the Board held that the policies supporting deferral to arbitration apply equally to settlements reached during the grievance/arbitration process:

[T]he deferral principles apply equally to settlements arising from the parties’ contractual grievance/arbitration procedures because they further the national labor policy which favors private resolutions of labor disputes.

*Id.* at 1547. The current standard, which requires the Board to “examine whether the unfair labor practice issue was considered by the parties” when they agreed to the settlement, sufficiently protects statutory rights in the context of a voluntary resolution by an employer and union. *U.S. Postal Serv.*, 300 NLRB 196, 198 (1990).

The General Counsel’s proposed modification of this standard would require evidence that the parties “intended to settle the unfair labor practice charge as well as the grievance” and it

would apply the *Independent Stave* factors for non-Board settlements, including “whether the parties have agreed to be bound by the General Counsel’s position” and “whether the settlement is reasonable in light of the alleged violations, risks of litigation, and state of litigation.” GC Memo 11-05, at 9 & n.24.

This standard is impractical and would make it more difficult to resolve grievances with a reasonable expectation of finality. As stated previously, COLLE’s members receive hundreds or thousands of grievances under their collective bargaining agreements each year. Lawyers are often not involved in the resolution of these grievances. Typically, grievance settlements are negotiated by the employer’s labor relations or human resources representatives and the union’s business agents or other non-lawyer representatives.

In many cases, the grievance settlement is reached before any unfair labor practice charge is filed. The deferral standard advocated by the General Counsel would require the non-lawyer representatives of the employer and the union to anticipate potential unfair labor practice charges and, in some way, evidence an intention to resolve those statutory issues. This is unrealistic. Even if the parties do not anticipate and express an intention to resolve potential unfair labor practice charges, there is no question that a grievance settlement is intended to be a final and binding resolution of the dispute.

Not only does the standard advocated by the General Counsel require parties to anticipate potential unfair labor practice allegations; it also requires, through application of the *Independent Stave* factors, that the parties anticipate the General Counsel’s position on that charge and undertake a “reasonable” settlement that evaluates the “risks of litigation” on that hypothetical charge. GC Memo at 9 n.24 (quoting *Independent Stave Co.*, 287 NLRB 740, 743 (1987)). This also is entirely unrealistic. While these factors can be applied in the context of a non-Board

settlement of a charge that actually has been filed, these factors cannot reasonably be applied to grievance settlements that are negotiated before any charge has been filed – but that are intended to be a final and binding resolution of the dispute.

The Board has endorsed a policy favoring the final and binding resolution of disputes through non-Board settlements. As explained in *The Courier-Journal*, 342 NLRB 1148 (2004):

The Board's policy favoring the peaceful resolution of disputes without litigation, inter alia, through settlement agreements, is too longstanding and well established to require extensive comment.

\*\*\*

This policy can be effective, however, only if it brings closure to the settled disputes and repose to the parties. That means that, once their disputes have been finally settled, parties should not be able to circumvent settlement agreements by later attempting to revive those disputes.

*Id.* at 1149. This policy equally applies to grievance settlements that are negotiated before any unfair labor practice charge is filed. COLLE urges the Board to adhere to its existing and well-established standard for deferral to grievance settlements, as set forth in *Alpha Beta* and *Postal Service*. This standard is realistic and consistent with the public policy favoring the peaceful resolution of labor disputes through a collectively bargained grievance-arbitration process.

### **CONCLUSION**

COLLE urges the Board to adhere to its existing standards for pre- and post-arbitration deferral, as well as its existing standard for deferral to grievance settlements. These existing standards reflect a proper balancing of employees' statutory rights, the Act's objective of promoting industrial peace and stability, and the public policy favoring the final and binding resolution of labor disputes through a collectively bargained grievance-arbitration process.

Respectfully submitted,

s/ Charles I. Cohen \_\_\_\_\_

Charles I. Cohen

Jonathan C. Fritts

David R. Broderdorf

Rachel Adams Ladeau

MORGAN, LEWIS & BOCKIUS LLP

1111 Pennsylvania Avenue, NW

Washington, DC 20004

(202) 739-3000

Counsel for *Amicus Curiae* Council on  
Labor Law Equality

Date Submitted: March 25, 2014

**CERTIFICATE OF SERVICE**

I certify that on March 25, 2014, a true and accurate copy of the foregoing Brief of *Amicus Curiae* Council on Labor Law Equality was served by e-mail on the following:

**Charged Party/Respondent**

Dean E. Westman (Legal Representative)  
Kastner Westman & Wilkins, LLC  
3480 W. Market St. Suite 300  
Akron, OH 44333  
dwestman@kwwlaborlaw.com

Dave Crichton  
Babcock & Wilcox Construction Co.  
P.O. Box 802  
74 Robinson Avenue  
Baberton, OH 44203  
dcrichton@babcock.com

**Charging Party**

Coletta Kim Beneli  
P.O. Box 2527  
98 Cnt Rd. 305 Cncho Az Nt. Fr. M  
Show Low, AZ 85902  
kbee@starband.net

**Involved Parties**

Helen Morgan, Esq. (Legal Representative)  
Deputy General Counsel  
Int'l Union of Operating Engineers  
1125 17th Street, NW  
Washington, DC 20036  
HMorgan@iuoe.org

Shawn Williams  
District Business Representative  
6601 N. Black Canyon Highway  
Phoenix, AZ 85015  
shawn.williams@iuoe428.com

**NLRB Regional Office**

Cornele A. Overstreet  
Regional Director, Region 28  
2600 North Central Avenue, Suite 1400  
Phoenix, AZ 85004  
NLRBRegion28@nrb.gov

I further certify that on March 25, 2014, after contacting the following representatives by phone, I caused a true and accurate copy of the foregoing Brief of *Amicus Curiae* Council on Labor Law Equality to be served by overnight mail on the following:

**Involved Party**

Paul Garcia  
Business Manager  
IUOE, Local 428  
6601 N. Black Canyon Highway  
Phoenix, AZ 85015

s/ David R. Broderdorf

Charles I. Cohen

Jonathan C. Fritts

David R. Broderdorf

Rachel Adams Ladeau

MORGAN, LEWIS & BOCKIUS LLP

1111 Pennsylvania Avenue, NW

Washington, DC 20004

(202) 739-3000

Counsel for *Amicus Curiae* Council on  
Labor Law Equality

Date Submitted: March 25, 2014