BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

BABCOCK & WILCOX CONSTRUCTION CO., INC.,	)	CASE NO. 28-CA-022625
Respondent,	)	
and	)	
COLETTA KIM BENELI, an Individual,	)	
Charging Party.	)	

REPLY BRIEF OF RESPONDENT BABCOCK & WILCOX CONSTRUCTION CO., INC.

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TABLE OF CONTENTS

Page

I. THE CIRCUMSTANCES OF THIS CASE DO NOT WARRANT A CHANGE IN DEFERRAL STANDARDS 1

II. THE GENERAL COUNSEL'S PROPOSED STANDARD IS RIDDLED WITH PROBLEMS 4

- A. The General Counsel's Proposed Standard is Unclear 4
- B. The General Counsel's Proposed Standard is Contrary to Important National Policies 6
  - 1. The General Counsel's Proposed Standard Fosters Perpetual Litigation of the Same Dispute 6
  - 2. The General Counsel's Proposed Standard Conflicts with the Liberal Federal Policy Favoring Arbitration Agreements and the Purposes of the NLRA 8

III. THE PURPORTED REASONS FOR THE PROPOSED CHANGES TO THE DEFERRAL STANDARDS LACK MERIT 9

- A. The General Counsel Misconstrues Judicial Precedent 9
- B. The General Counsel Misconstrues the Board's Role 11

IV. CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES AND ADMINISTRATIVE DECISIONS

14 Penn Plaza v. Pyett,
556 U.S. 247 (2009) 10, 11, 13

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 10

Alpha Beta Co.,
273 NLRB 1546 (1985) 8, 13

American Freight Sys. v. NLRB,
722 F.2d 828 (D.C. Cir. 1983) 9

Aramark Corp.,
1999 NLRB LEXIS 174 (1999) 4

Carey v. Westinghouse Electric Corp.,
375 U.S. 261 (1964) 8, 13

Federated Dept. Stores, Inc. v. Moitie,
452 U.S. 394 (1981) 7

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 8, 10, 11

Hammontree v. NLRB,
925 F.2d 1486 (D.C. Cir. 1991) 13

Hart Steel Co. v. Railroad Supply Co.,
244 U.S. 294 (1917) 7

IAP World Services Inc.,
358 NLRB No. 10 (2012) 5

International Harvester Co.,
138 NLRB 923 (1962) 8

Kentucky River Medical Center,
356 NLRB No. 8 (2010) 11

TABLE OF AUTHORITIES, CONT'D.

Page

CASES AND ADMINISTRATIVE DECISIONS

NLRB v. Seven-Up Bottling Co. of Miami, Inc.,
344 U.S. 344 (1953) 11, 12

Olin Corp.,
268 NLRB 573 (1984) 5, 6, 9, 12, 13

Professional Porter & Window Cleaning Co., Division of Propoco, Inc.,
263 NLRB 136 (1982) 5

Reed v. Allen,
286 U.S. 191 (1932) 7

Shands Jacksonville Medical Center, Inc.,
359 NLRB No. 104 (2013) 2

Suburban Motor Freight, Inc.,
247 NLRB 146 (1980) 5

Titanium Metals Corp. v. NLRB,
392 F.3d 439 (D.C. Cir. 2004) 12

William E. Arnold Co. v. Carpenters Dist. Council,
417 U.S. 12 (1974) 9

REGULATIONS

29 C.F.R. § 102.46(g) 3

OTHER

Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases,
GC Memo 11-05 (Jan. 20, 2011) 1, 2, 10

NLRB Labor-Management Relations Field Examiner brochure, available at
http://www.nlrb.gov/who-we-are/careers/job-descriptions-and-listings 12

The Respondent, Babcock & Wilcox Construction Co., Inc. ("B&W") hereby submits its Reply Brief as provided for in the Board's Notice and Invitation to File Briefs. For the reasons detailed in B&W's March 25, 2014 Brief ("B&W's Brief") and below, the Board should adhere to its existing deferral standards, affirm the decision of Administrative Law Judge Jay R. Pollack ("ALJ Pollack"), and dismiss the complaint.

I. **<u>THE CIRCUMSTANCES OF THIS CASE DO NOT WARRANT A CHANGE IN DEFERRAL STANDARDS.</u>**

The instant case does not serve as the appropriate vehicle for the changes to the Board's deferral standards requested by the General Counsel for many reasons. First, the General Counsel does not provide any necessity for the proposed changes in this case. In fact, glaringly absent from the General Counsel's Brief in Response to the Board's Notice and Invitation to File Briefs ("General Counsel's Brief") is any reference whatsoever to the substance of this case. *See* General Counsel's Brief. This omission is quite significant, as it reveals the complete lack of support or explanation justifying a change to the deferral standards based on the parties' factual record.

Second, the General Counsel's proposed changes would not remedy the only supposed "error" related to deferral in this case. Counsel for the General Counsel has explicitly stated that the only portion of the existing deferral standards at issue in this case is whether the decision of the Grievance Review Subcommittee of the National Maintenance Agreements Policy Committee ("NMAPC subcommittee") was clearly repugnant to the Act. Acting General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge ("GC Exceptions Brief") at 15 (filed May 11, 2012). The General Counsel's proposal, however, actually retains this portion of the deferral test. GC Memo 11-05 at 7 (Jan. 20, 2011) ("If the party urging deferral makes

[the required] showing, the Board should, *as now*, defer unless the award is clearly repugnant to the Act." (emphasis added)). Since the portion of the deferral standard at issue here is the same under both the existing and proposed standards, it is clear that the changes proposed would do nothing to remedy the error claimed by the General Counsel, and are therefore not warranted in this case. Indeed, the Board has declined to adopt the General Counsel's proposed standard under similar circumstances. *See Shands Jacksonville Medical Center, Inc.*, 359 NLRB No. 104, slip op. at 1, fn. 3 (2013) (noting that the General Counsel's proposal under GC Memo 11-05 does not "propose revisiting precedent concerning when an award is 'clearly repugnant' to the Act. That precedent speaks directly to the crux of this case.... Given those circumstances, we decline to pass on the Acting General Counsel's proposal in this case.").

As pointed out by amicus the National Association of Manufacturers ("NAM"), the General Counsel's own arguments in this case actually undermine his claim that the existing deferral standards do not adequately protect employees' statutory rights. *See* Amicus Brief of NAM at 16-18. Specifically, in urging the Board not to defer under the existing standards, counsel for the General Counsel cited several cases in which the Board declined to defer to an arbitrator's decision because it was "palpably wrong" or "repugnant to the Act." *See* GC Exceptions Brief at 15-19. He does not cite a single case in which he claims that the Board failed to adequately protect statutory rights by applying the existing standards; rather, he highlights that the Board has effectively used the existing standards to both defer and decline to defer to arbitration awards. *See id.*; *see also* Amicus Brief of NAM at 16-18.

Additionally, the General Counsel's request that the Board change its pre-arbitral deferral standard "to address a different problem limiting the effective enforcement of statutory rights" is completely irrelevant to the case at hand. *See* General Counsel's Brief at 14-15. The General Counsel clearly recognizes that this issue is outside the scope of this case by acknowledging that this is a "different" problem and by stating that "there are no changes in pre-arbitral deferral that need to be made as a result of the changes we propose in the post-arbitral deferral standard." *See id.* at 13-14. Not only is the General Counsel's request to change the Board's pre-arbitral deferral standard outside the scope of this case, and admittedly outside the scope of the Board's Notice and Invitation to File Briefs, but it is also improper under 29 C.F.R. § 102.46(g), which prohibits any matter not included in exceptions or cross-exceptions from being urged before the Board.

Finally, a change in deferral standards as applied to this case is not appropriate given the extreme delay by the NLRB in processing the matter. As explained in B&W's Brief, the NMAPC subcommittee promptly issued its decision upholding Charging Party's discharge, yet a complaint was not issued by the Region until almost two years after that. *See* B&W's Brief at 1-2. There was another significant delay of well over a year and a half between ALJ Pollack's decision and the NLRB's Notice and Invitation to File Briefs in this matter. *See ibid.* As the General Counsel acknowledges, there are serious practical effects to excessive delays.[1] *See* General Counsel's Brief at 14. It

[1] The "evidentiary diminution" decried by the General Counsel was certainly present in this case, as explained in B&W's Brief. General Counsel's Brief at 14-15; B&W's Brief at 26. Amicus the National Elevator Bargaining Association ("NEBA") quite aptly summarized this issue by pointing out that "any conclusions reached by the General Counsel based on evidence presented to Administrative Law Judge Pollack cannot be fairly compared to conclusions reached by the subcommittee shortly after the discharge." Amicus Brief of NEBA at 22.

has been stated that the phrase "'justice delayed is justice denied' has particular relevance to violations of the National Labor Relations Act," and the saying's relevance is apparent here. *Aramark Corp.*, 1999 NLRB LEXIS 174, *115 (1999). Despite the fact that its response to Charging Party's profanity and insubordination was entirely appropriate (as affirmed by the NMAPC subcommittee's decision), B&W has been subject to great effort and expense in defending its actions at two hearings and through extensive briefing on this matter. Not only that, but it is now over five years after Charging Party was discharged, and the parties are still dealing with this matter. It would be unfair and unjust to apply new deferral standards to the parties at this late date, and to continue to deny them the final and binding resolution to which they agreed.

Accordingly, the Board should affirm the decision of ALJ Pollack and defer to the decision of the NMAPC subcommittee.

II. THE GENERAL COUNSEL'S PROPOSED STANDARD IS RIDDLED WITH PROBLEMS.

A. The General Counsel's Proposed Standard Is Unclear.

As explained in B&W's Brief, the General Counsel's proposed standard is unclear, and as such, if it were adopted, it would result in inconsistent or arbitrary application and results.[2] B&W's Brief at 27-28. The various briefs filed in response to

[2] In addition to the confusion regarding the proposed standard itself, it is not clear from the Board's Notice and Invitation to File Briefs whether the Board is considering applying this standard only to Section 8(a)(1) and (3) cases, as requested by the General Counsel, or to all cases. Indeed, the Notice requests briefing on issues far beyond what the General Counsel proposed, so it is possible that the Board may consider applying the General Counsel's proposed standard to a broader array of cases. The General Counsel's Brief does not shed any light on this issue, other than a passing mention that the request is for Section 8(a)(1) and (3) cases. *See* General Counsel's Brief. The brief filed by amicus Council on Labor Law Equity ("COLLE") is based on the premise that the Board would not apply the proposed standard to Section 8(a)(5) cases, and provides further explanation of the problems with the proposed standard in that regard. *See* Amicus Brief of COLLE at 1-2.

the Board's Notice and Invitation to File Briefs in this matter provide further support for this point. The example in B&W's Brief regarding confusion as to whether the arbitrator must 'correctly apply' the law under the new standard (*see* B&W's Brief at 28) is apparent from the brief filed by amicus United Nurses Associations of California/Union of Health Care Professionals ("UNAC/UHCP"), which states that "inherent to the second prong [of the proposed standard] is a requirement that the arbitrator correctly applied the statutory principles when crafting the remedy." Amicus Brief of UNAC/UHCP at 2. While UNAC/UHCP believes that the proposed standard requires that the arbitrator 'correctly apply' the law, at least one NLRB administrative law judge disagrees, as explained in B&W's Brief. *See IAP World Services Inc.*, 358 NLRB No. 10, JD slip op. at 18, fn. 3 (2012) (noting that the General Counsel seemed to incorrectly suggest that "under the proposed standard the arbitrator must 'correctly apply' the law," even though "[t]he proposed standard preserves the repugnancy standard.").

Another example of the confusion regarding the General Counsel's proposed standard is whether it is simply a return to the Board's long-ago rejected standards set forth in *Suburban Motor Freight, Inc.*, 247 NLRB 146 (1980), or *Professional Porter & Window Cleaning Co., Division of Propoco, Inc.*, 263 NLRB 136 (1982), and whether the proposed standard requires *de novo* review. *See* Amicus Brief of the AFL-CIO at 2; Amicus Brief of the Postal Service at 5-6; Amici Brief of Realty Advisory Board on Labor Relations, Inc. and the League of Voluntary Hospitals and Nursing Homes ("RAB/LVH") at 7. The General Counsel acknowledges that the proposed approach "is not a novel one," but does nothing to explain why the Board should ignore its clear decision in *Olin Corp.*, 268 NLRB 573 (1984), rejecting this approach, nor does he explain why the

sound reasoning applied in *Olin* and in over 30 years' worth of decisions since then is suddenly flawed or in need of change. *See* General Counsel's Brief at 8.

Since the existing deferral standards have been applied, explained and clarified for decades, employers and unions alike are able to understand what is expected of them and act accordingly. If the General Counsel's proposed standard were adopted, this predictability and stability would be lost. There would be countless other problems that would arise from the lack of clarity regarding the proposed standard.[3] In addition to these issues, if the proposed standard were adopted, there would be further problems that would arise if the Board's existing pre-arbitral standard were not also adjusted.[4] Accordingly, the Board should not adopt the General Counsel's proposed standard.

B. The General Counsel's Proposed Standard Is Contrary to Important National Policies.

1. The General Counsel's Proposed Standard Fosters Perpetual Litigation of the Same Dispute.

By allowing unions and their members a 'second bite at the apple' in seeking a different decision from the Board if they do not like an arbitration decision, as explained

[3] If we were to speculate as to all the issues with the proposed standard, the list would be far too long for this brief. It is worth noting, however, that there are other problems regarding the application of the General Counsel's proposed changes. For example, the General Counsel states, without any support or explanation, that "[c]ases that involve the application of statutory principles to largely undisputed facts are less appropriate for deferral than cases in which the facts and/or the employer's motivation constitute the gravamen of the dispute." General Counsel's Brief at 15. Yet, as is evident from this case, such a distinction may be difficult or arbitrary to make. In this case, the operative facts are undisputed: Charging Party engaged in inappropriate and profane behavior. (Dec. 3). Nevertheless, the "employer's motivation constitute[s] the gravamen of the dispute." As this case demonstrates, the General Counsel's proposals are unclear and, if applied, would result in inconsistent or arbitrary application, and therefore should not be adopted.

[4] As explained in B&W's Brief, since the General Counsel's proposed post-arbitral deferral standard should not be adopted at all, and certainly not in this case, consequent changes are not necessary to the existing pre-arbitral deferral standard. *See* B&W Brief at 30-32. If the General Counsel's proposed standard were adopted, however, as explained more thoroughly by the COLLE and NAM briefs, the pre-arbitral deferral process should be modified to require a merit determination prior to referring the matter to arbitration, along with a clear notice to the arbitrator detailing what is required in order for the Board to defer to the arbitration decision. *See* Amicus Brief of COLLE at 21-23; Amicus Brief of NAM at 24-25.

in B&W's Brief, the General Counsel's proposed standard flies in the face of fundamental principles of justice and fairness. *See* B&W's Brief at 20-21; *see also* Amicus Brief of NAM at 10-11. As NAM explains, the General Counsel's proposed standard is contrary to the well established legal principle of "foreclosing perpetual litigation of the same disputes." Amicus Brief of NAM at 10-11 (explaining that this principle is exhibited in the doctrines of res judicata, collateral estoppel, claim preclusion, and the prohibition of claim splitting). As the Supreme Court has explained, these principles uphold the "'interest of the state...that there be an end to litigation – a maxim which comports with common sense as well as public policy,'" and are rules of "fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced" in order to avoid "'prolonging strife.'" *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401-02 (1981) (quoting *Reed v. Allen*, 286 U.S. 191, 198-99 (1932) and *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)).

Not only would the General Counsel's proposed standard unfairly allow unions and their members a second opportunity to receive a favorable decision in contravention of the important principles discussed above, but if adopted, the General Counsel's proposal would also likely result in more litigation, further prolonging strife and denying parties resolution of their disputes. *See* Amicus Brief of Chamber of Commerce at 10. The lack of clarity and associated inconsistent and arbitrary application of the proposed standard would assure additional litigation, effort, and expense for all parties. *See* B&W Brief at 27-28; Amicus Brief of Chamber of

Commerce at 10. To avoid such wasteful, unfair, and unnecessary results, the Board should not adopt the General Counsel's proposed standard.

2. The General Counsel's Proposed Standard Conflicts with the Liberal Federal Policy Favoring Arbitration Agreements and the Purposes of the NLRA.

For the reasons set forth above and in B&W's Brief, the General Counsel's proposed standard would destroy the final and binding nature of arbitration, and increase the expense, effort, and time required by parties to resolve disputes. To avoid (or at least minimize) these problems, parties may refuse to arbitrate their disputes. *See* Amicus Brief of NEBA at 14-15. Even if parties proceed with arbitration despite the onerous burdens of the General Counsel's proposed standard, they may have to engage in absurd actions during arbitration, such as an employer "rais[ing] raise the union's argument and present all the evidence the union would have presented." *Id.* at 15.

Since the General Counsel's proposed standard would actually discourage, not encourage, parties to use arbitration procedures, it is in direct conflict with the "liberal federal policy favoring arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991); *see also* B&W Brief at 7-9, 17-19. It also hinders the fundamental purpose of the Act, which is "'primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining.'" *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964) (quoting *International Harvester Co.*, 138 NLRB 923, 925-26 (1962)); *see also Alpha Beta Co.*, 273 NLRB 1546, 1547 (1985) ("'[E]ncouraging parties to use [grievance arbitration] procedures will further the fundamental purposes of the Act.'" (citation omitted)); B&W Brief at 9-10. To

avoid conflicting with the liberal federal policy favoring arbitration agreements and the purposes of the Act, the Board should not adopt the General Counsel's proposed standard.

III. THE PURPORTED REASONS FOR THE PROPOSED CHANGES TO THE DEFERRAL STANDARDS LACK MERIT.

A. The General Counsel Misconstrues Judicial Precedent.

While the General Counsel urges the Board to change its deferral standards based on "judicial assessment" criticizing the Board's approach, it is quite telling that the most recent cases cited in support of this proposition are from 1986. *See* General Counsel's Brief at 5. In fact, several of the cases "supporting" this basis for change were actually decided prior to the Board's decision in *Olin*. *See ibid.*; *see also* Amicus Brief of NAM at 6-8. Not only have countless decisions affirmed the Board's standards in the decades since those cases were decided, but the decisions cited by the General Counsel did not actually find fault with the Board's deferral standards themselves, but rather with the Board's failure to follow the standards. *See* Amicus Brief of NAM at 6-8. As NAM stated, "[t]his is a questionable basis to overturn 30 years of stable precedent." *Id.* at 6.

Furthermore, the General Counsel ignores precedent affirming deferral in cases where a dispute involves both a statutory and a contractual issue. *See* Amicus Brief of Chamber of Commerce at 9-10 (quoting *American Freight Sys. v. NLRB*, 722 F.2d 828, 832 (D.C. Cir. 1983), in pointing out that "[t]he obvious fallacy...is [the] contention that there is a statutory issue apart from the contractual issue"); Amicus Brief of NAM at 11-12 (noting the Supreme Court's approval in *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 16-17 (1974), of deferral where a dispute involves both

contractual and statutory issues). Despite this authority, or perhaps in a misguided effort to evade its application, the General Counsel's proposal is based on an artificial distinction between Section 8(a)(5) cases and those involving allegations of violations of Section 8(a)(1) or (3). *See* GC Memo 11-05 at 6. Nevertheless, as explained in B&W's Brief, and consistent with decades of court decisions upholding the existing deferral standards, these standards ensure that there is a "close identity of the statutory rights and contract interpretation issues" regardless of the section in dispute. *See* B&W's Brief at 15-16.

The General Counsel's argument that the proposed changes are necessary to be consistent with the Supreme Court's precedent in non-NLRA individual rights cases also misses the mark. *See* General Counsel's Brief at 10-13. As explained by NEBA and RAB/LVH, non-NLRA precedent is entirely irrelevant. *See* Amicus Brief of NEBA at 10-11; Amici Brief of RAB/LVH at 8-12. The statutes at issue in the cases cited by the General Counsel all deal with protecting *individual* rights, yet the NLRA is designed to promote *collective* bargaining. *See* Amicus Brief of NEBA at 10-11; Amici Brief of RAB/LVH at 8-12; *see also 14 Penn Plaza v. Pyett*, 556 U.S. 247, 282 (2009) (Souter, J., dissenting) ("'Title VII...stands on plainly different ground' from 'statutory rights related to collective activity.'" (alterations in original) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974)). Not only are the purposes of non-NLRA individual rights statutes quite different from the purposes of the NLRA, but the Supreme Court cases cited by the General Counsel were dealing with the issue of the enforceability of arbitration provisions, not whether there should be deferral to the decisions of an arbitrator, as is at issue here. *See Gilmer*, 500 U.S. at 23; *14 Penn Plaza*, above at

251. Indeed, as NAM points out, *Gilmer* is completely silent on the issue of the scope of review of arbitral decisions, and *14 Penn Plaza* merely makes a passing reference (in a footnote, nonetheless) that such review is "limited." *See* Amicus Brief of NAM at 14-15; *14 Penn Plaza,* above at 269, fn. 10. The General Counsel's proposed standard is not "limited" in its review of arbitral awards, misconstrues judicial precedent, and should not be adopted.

B. <u>The General Counsel Misconstrues the Board's Role</u>.

The General Counsel also misconstrues judicial precedent as it relates to the proper role of the Board. Specifically, the General Counsel claims that, since the "Board has a different role than the courts, operating 'on a wider and fuller scale' that 'differentiates...the administrative from the judicial process,'" the Board should therefore "even more zealously guard its mandate to protect statutory rights." General Counsel's Brief at 13 (quoting *Kentucky River Medical Center*, 356 NLRB No. 8, slip op. at 2-3 (2010)) (alterations in original). Notably, however, the Supreme Court's full statement in *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344 (1953), which was the source of the Board's quoted language, provides the true context of the Board's "wider and fuller" role. Explaining that the Board has a broad view when formulating remedies, the Court explained that:

> '[c]umulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.

Seven-Up Bottling Co., 344 U.S. at 349. When this full quote is considered, it is clear that it is "the constant process of trial and error" that is "on a wider and fuller scale," *not*

that the Board's role is "wider and fuller" and should therefore result in more zealous action by the Board. *See Seven-Up Bottling Co.*, above at 349.

The Board's existing arbitral deferral standards are a clear example of "the constant process of trial and error" that the Board has undergone to achieve the appropriate balance in exercising its discretion. As the General Counsel acknowledges, his proposal is not new – it is an approach that the Board has rejected, with sound reasoning (*see Olin*, 268 NLRB at 574), and has led to the "careful development of the *Spielberg* standards of deference," which have now "been reinforced by long-standing and consistent case precedent." *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 449 (D.C. Cir. 2004) (citations omitted). The Board should not abandon its carefully crafted and refined deferral standards, which are the result of the very benefit of the administrative process commended by the Supreme Court. *See Seven-Up Bottling Co.*, above at 349.

The proper role of the Board is not to impose formal, legalistic requirements on parties. *See* Amicus Brief of COLLE at 2. Contrary to the urging of UNAC/UHCP, the Board should also not be overly concerned with the technical training or education of arbitrators. *See* Amicus Brief of UNAC/UHCP at 5 (questioning the competence of arbitrators who "need not be [ ] licensed attorney[s] nor have ever heard of the NLRA."). Not only does the Board not require such training or education for its own field examiners (*see* NLRB Labor-Management Relations Field Examiner brochure, available at http://www.nlrb.gov/who-we-are/careers/job-descriptions-and-listings (explaining the investigative responsibilities of a field examiner and listing qualifications for such position, which notably does not require a law license)), but the Supreme Court has

explicitly renounced such a limited view of arbitrators. *14 Penn Plaza*, 556 U.S. at 1471 (explaining that the misconception that arbitrators are not competent to decide federal statutory issues has been corrected). As the Board itself has explained:

> Because both 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 deference to his findings. 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.

Olin, above at 576 (emphasis added) (citations omitted).

By exercising its discretion in deferring to arbitral awards according to the existing deferral standards, the Board fulfills its role of "fostering the overall well-being of labor-management relations." *Hammontree v. NLRB*, 925 F.2d 1486, 1502 (D.C. Cir. 1991) (Edwards, J., concurring); *see also* Amici Brief of RAB/LVH at 10-14. While administering its role of furthering the fundamental purposes of the Act, "the Board should not take a narrow, legalistic view of the Act and seek to rule on every dispute that may fall within the letter of the Act, but should instead take a broad view of the Act." *Alpha Beta*, 273 NLRB at 1547. It is the role of the union to protect the individual rights of its members, and to act on their behalf in each dispute.[5] *See* Amicus Brief of NEBA at 8-9. By respecting the union's role and giving deference to arbitration, the parties' agreed-upon method for resolving disputes, the Board performs its role of "encouraging the practice and procedure of collective bargaining." *Carey*, 375 U.S. at 265. As

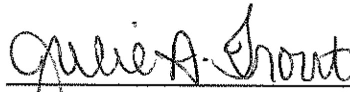
[5] As explained in several briefs filed with the Board, the "just cause" standard provides adequate protection of employees' statutory rights. *See* Amicus Brief of COLLE at 8-12; Amicus Brief of NAM at 19. For example, since the employer is generally held to have the burden of justifying its discipline or discharge under the "just cause" standard (as opposed to the burden on the General Counsel to show that an unfair labor practice occurred in proceedings before the Board), the employee is at an advantage under this standard. *See* Amicus Brief of NAM at 19, fn. 15; *see also* Amicus Brief of COLLE at 10-11 (summarizing studies that have indicated that the employer carried its burden of proving "just cause" in less than half of the cases studied).

explained above and in B&W's Brief, the existing deferral standards strike the proper balance of protecting employees' rights and upholding the Board's mandate to encourage collective bargaining. To continue to fulfill its proper role, the Board should maintain the existing deferral standards.

IV. CONCLUSION.

For all the reasons explained above, in B&W's Brief, and in the many *amici* briefs filed in this matter urging the Board to maintain its existing deferral standards, the Board should adhere to its existing deferral standards. Accordingly, the Board should affirm the decision of ALJ Pollack, defer to the decision of the NMAPC subcommittee, find that B&W did not violate the Act as alleged, and dismiss the complaint.

Respectfully submitted,



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