

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

UNITED PARCEL SERVICE, INC.

and

Case 06-CA-143062

ROBERT C. ATKINSON, JR.

**GENERAL COUNSEL'S BRIEF OF POSITION ON THE
STANDARD FOR POST-ARBITRAL DEFERRAL**

Submitted by:

Jonathan M. Psotka

Counsel for the General Counsel
National Labor Relations Board
Division of Advice
1015 Half Street SE
Washington, D.C. 20570
Phone: (202) 273-2890
Fax: (202) 273-4275
E-Mail: jonathan.psotka@nrlrb.gov

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ON THE STANDARD FOR POST-ARBITRAL DEFERRAL**

On March 15, 2019, the Board invited all interested parties to file briefs in the above-captioned case addressing the issues of (1) whether to modify or abandon the standard for post-arbitral deferral articulated in *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014); (2) whether to return to the holdings of *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984), or some other standard; and (3) whether any new standard should be applied prospectively or retroactively.

I. Summary of the General Counsel’s Position in Favor of Returning to the *Olin* Post-Arbitral Deferral Standard

The Board should overrule *Babcock & Wilcox* and return to the long-accepted standard established in *Olin Corp.* Moreover, the Board should take this opportunity to clarify when an arbitral award will be found clearly repugnant to the Act under that standard. Finally, the Board should follow established precedent and apply retroactively the standard it chooses.

II. Statement of the Case

On March 29, 2016, the Regional Director for Region 6 issued complaint alleging that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging an employee due to his protected concerted activity and his dissident union activity. The case was heard over nine days in June and August 2016 before Administrative Law Judge (“ALJ”) Geoffrey Carter, who issued his decision on November 25, 2016 finding, *inter alia*, that deferral to the decision of the parties’ grievance board was inappropriate under *Babcock & Wilcox* and that Respondent violated the Act by discharging the employee. Respondent filed exceptions to the ALJ’s decision, including to his decision not to defer, on January 23, 2017.

III. Argument

In *Babcock & Wilcox*, the Board created a new legal standard in reviewing whether to defer to an arbitrator’s award, and in so doing, overturned the standard articulated in *Olin Corp.*—a standard used for three decades without controversy or

complaint. Without articulating any problems with this standard or with the ability of arbitrators to rule on statutorily protected rights, the Board majority in *Babcock* created an unnecessarily strict standard for deferral determinations in order to set aside arbitrators' decisions under the guise of protecting Section 7 rights. This misguided decision, apparently based on unwarranted hostility to and suspicion of arbitration, undermines the arbitral process—the dispute resolution process to which the parties have agreed in collective bargaining. The *Babcock* decision thus subverts rather than supports the fundamental principles of the Act, including the protection of Section 7 rights and the rights of the parties to enforce their collectively-bargained agreements.

Thus, as discussed below, *Babcock* should be overturned because its premises and effects are contrary to the purposes of the Act, which support collective bargaining between employers and properly recognized or certified unions and giving effect to the parties' agreements. *Babcock* also fails to comport with Supreme Court and Board precedent recognizing the importance and centrality of arbitration to industrial dispute resolution. The *Babcock* decision has placed additional burdens on the parties to collective-bargaining agreements by injecting uncertainty as to the finality of arbitration decisions and creating litigation in multiple forums. In this regard, returning to the *Olin Corp.* standard would better effectuate the policies of the Act and reduce the burden on parties to collective-bargaining agreements as well as the National Labor Relations Board. Accordingly, the *Babcock* decision should be overturned, and the Board should return to the *Olin* standard.

A. The Board's Decision in *Babcock & Wilcox* is Based on a Flawed Legal Foundation and Should be Overturned

As to the first question posed by the Board, we respectfully urge the Board to abandon its decision in *Babcock & Wilcox Co.*, 361 NLRB 1127 (2014). The Board majority in that decision needlessly supplanted collectively-bargained grievance-arbitration systems to the detriment of the practice of collective bargaining as well as to the purposes of the National Labor Relations Act. The Board in *Babcock & Wilcox* failed to recognize that the Board and courts, including the United States Supreme Court, have determined that joint grievance-arbitration plays a preeminent role in the avoidance, moderation, and resolution of labor disputes litigable under its agreed-upon processes. Indeed, the arbitral process has long been the key alternative dispute-resolution mechanism used to avoid interruption of interstate commerce by actions such as strikes and lockouts. As the agreed-upon method of dispute resolution by the parties to collective-bargaining agreements, this process deserves greater deference than the Board majority in *Babcock & Wilcox* gives it. Finally, the *Babcock* standard invites duplicative proceedings, burdens the limited resources of the General Counsel and the Board, and unfairly subjects the public interest embodied in the Act to the self-interested strategies of the litigants coming before the Board.

1. The standard articulated in *Babcock & Wilcox* conflicts with the purposes of the Act

In *Babcock & Wilcox*, the Board created a new standard of review based on its apparent and unsupported suspicion of the arbitration process. This view of arbitration is inconsistent with, and indeed conflicts with, the purposes of the Act as well as long-standing Supreme Court and Board support for industrial dispute resolution through arbitration. As a result, the Board's decision in *Babcock & Wilcox* imposed a novel post-arbitral deferral standard that is not supported by the Act or good labor policy and creates additional burdens for parties and the Agency. Accordingly, for the reasons discussed below, the Board should overturn *Babcock & Wilcox*.

The Board majority based its decision on a supposed conflict between “two well-established premises” of American labor law, 1) that Congress explicitly empowered the Board through Section 10(a) of the Act to protect employees’ statutory rights; and 2) that arbitration plays a central role in promoting industrial peace and stability under both Section 1 of the Act and Section 203(d) of the Labor Management Relations Act (“LMRA”) . 361 NLRB at 1128–29 (citations omitted). In the majority’s opinion, the *Olin* standard sacrificed too much of the Board’s responsibility in favor of arbitration. However, as was noted by one of the *Babcock* dissenters at the time, any perceived conflict between the two statutory goals is a false dichotomy. *Id.* at 1141 (Member Miscimarra, concurring in part and dissenting in part).

Thus, the *Babcock* majority committed the same error that was committed by the majority in *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), *overruled by Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (May 21, 2018), i.e., premising its analysis on the supposition that private arbitration conflicts with statutory objectives. The reality is that the fundamental purpose of the Act as articulated by Section 1—the prevention of “obstructions to the free flow of commerce” through the encouragement of collective bargaining—is best served by utilizing the parties’ agreed-upon dispute resolution process. *See* 29 U.S.C. § 151.

Even prior to the passage of Section 203(d) of the LMRA, it was long understood that the grievance-arbitration procedure is integral to collective bargaining and labor peace. In *Consolidated Aircraft Corp.*, 47 NLRB 695 (1943), *enforced*, 141 F.2d 785 (9th Cir. 1944), the Board acknowledged its power to resolve unfair labor practices but nevertheless refused to intervene in determining certain Section 8(a)(1), (3) and (5) allegations. Finding that these allegations related to arbitrable unilateral changes and an arbitrable discharge, the Board said:

We are of the opinion . . . that it will not effectuate the statutory policy of “encouraging the practice and procedure of collective bargaining” for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. . . . We therefore do not deem it wise to exercise our jurisdiction in such a case, where the parties have not exhausted their rights and remedies under the contract as to which the dispute had arisen. *Id.* at 706.

The Board’s approach would be validated repeatedly in the following years. First Congress codified this sentiment in Section 203(d) of the LMRA of 1947, which stated that “[f]inal 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.” 29 U.S.C. § 173(d). Then the Supreme Court in the *Steelworkers Trilogy* recognized the vital role played by grievance-arbitration in the federal scheme. In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 US. 574, 578 (1960), e.g., in finding a presumption of arbitrability in labor disputes, the Court noted that “arbitration is the substitute for industrial strife,” and that “arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.” *Id.* Rather than addressing the breakdown of a relationship, as in the commercial context, the Court found that grievance-arbitration of labor disputes “is at the very heart of the system of industrial self-government . . . [and] is actually a vehicle by which meaning and content are given to the collective bargaining agreement.” *Id.* at 581. *See also United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 567 (1960) (finding arbitration a “stabilizing influence”); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (noting that arbitrators are “indispensable agencies in a continuous collective bargaining process”).¹

¹ More recently, the Supreme Court has continued to instruct the Board that there is great value in arbitration as an ameliorative process. *See, e.g., Circuit City Stores v. Adams*, 532 U.S. 105 (2001) (upholding binding arbitration agreements in

Indeed, the Board’s decision in *International Harvester Co.*, 138 NLRB 923 (1962), *enforced*, 327 F.2d 784 (7th Cir. 1964), cited with approval by the majority in *Babcock* for its articulation of Board authority, also held:

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 [sic] and disputes arising thereunder, “as a substitute for industrial strife,” contribute significantly to the attainment of this statutory objective. *Id.* at 926 (citations omitted).

Accordingly, the *International Harvester* Board decided it should “give hospitable acceptance to the arbitral process as ‘part and parcel of the collective bargaining process itself,’” and voluntarily withhold its authority to adjudicate unless “it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act.” *Id.* at 927 (quoting *Warrior & Gulf Navigation*, 363 U.S. at 578).

In attempting to counter the judgment of Congress, the Supreme Court, and the Board that arbitration serves the ultimate goals of the Act, the majority in *Babcock* cites only the Board’s generalized authority under Section 10(a) of the Act, the supposed risk that arbitration poses to the vindication of rights guaranteed by the Act, and a hypothetical inadequacy of *Olin* review. None of these arguments are

employment contracts subject to the Federal Arbitration Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (same); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (May 21, 2018) (finding no waiver of Section-7 rights in arbitration agreements in employment contracts).

persuasive. First, Section 10(a) of the Act merely states that the Board is empowered to prevent all unfair labor practices, regardless of what other means of adjustment may also be applicable. 29 U.S.C. § 160. This provision, predating the LMRA of 1947 with its creation of the General Counsel and preference for arbitration, does not say the Board *should* exercise its authority over all unfair labor practices. Rather, that question is left to the Board as a matter of national labor policy. Simply stating that the Board has the authority to not defer to an arbitration award does not answer the question of whether deferral to arbitration awards serves the policies and purposes of the Act.

Second, as noted by Member Johnson’s dissent in *Babcock*, presuming that arbitrators will not sufficiently protect statutory rights is inconsistent with Supreme Court precedent and is unsupported by any evidence. *Babcock & Wilcox*, 361 NLRB at 1159 (Member Johnson, concurring in part and dissenting in part). As the Supreme Court has noted, “arbitral tribunals are readily capable of handling . . . factual and legal complexities” and “there is no reason to assume at the outset that arbitrators will not follow the law.” *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 268 (2009) (citations omitted). Indeed, the Supreme Court has “rejected generalized attacks on arbitration that rest on suspicion of arbitration as a method of weakening the protection afforded in the substantive law to would-be complainants.” *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 89–90 (2000) (applying Federal Arbitration Act). Arbitrators are not only capable of considering statutory protections; they have proven time and time again that they will in fact

consider such protections, e.g., in determining whether employees have been terminated for “just cause” under a collective-bargaining agreement. Thus, an arbitrator will not uphold discipline that was issued in response to union or concerted activities. *Babcock & Wilcox*, 361 NLRB at 1159 (Member Johnson, concurring in part and dissenting in part) (citing Reginald Alleyne, *Courts, Arbitrators, and the NLRB: The Nature of the Deferral Beast*, in 33 *Proceedings of the National Academy of Arbitrators* 249 (1980)). In other words, under well-established arbitral law, anti-union motivation is not just cause for discharge or discipline. Mark A. Shank, *Deferral to Arbitration: Accommodation of Competing Statutory Policies*, 2 Hofstra Lab. L.J. 211, 253 (1985) (citing F. Elkouri & E. Elkouri, *How Arbitration Works*, 646–47 (1973)). Since arbitrators are competent to understand the Act, and since even under “just cause” principles an arbitrator would protect Section 7 rights, there is no basis for assuming that deferral to arbitration will in any way threaten individuals’ rights under the Act.

Third, there is no evidence that the Board’s ability to review arbitral decisions was inadequate under the longstanding *Olin* standard. The majority in *Babcock* could point to only two cases in the course of thirty years as evidence that the Board was deferring to awards that arguably did not consider the attendant unfair labor practice issues. See *Babcock & Wilcox*, 361 NLRB at 1132 (citing *Airborne Freight Corp.*, 343 NLRB 580 (2004) and *Anderson Sand & Gravel Co.*, 277 NLRB 1204 (1985)). Moreover, as Member Johnson noted in dissent, neither of those cases evidences a need for a stricter standard; the Board ultimately *refused* to

defer in *Airborne*, and in *Anderson*, the contractual and statutory issues were completely “coextensive” such that the statutory issue was in essence the same as the contractual issue resolved by the arbitrator. *Id.* at 1154–55 (Member Johnson, concurring in part and dissenting in part). The Babcock majority certainly did not demonstrate that the *Olin* standard was merely a rubber-stamp that permitted arbitrators to ignore employees’ statutory rights without any Board review. See *Airborne Freight*, 343 NLRB at 582 (finding deferral inappropriate because the grievance committee had not been generally presented the relevant facts); *ABF Freight Systems, Inc.*, 304 NLRB 585, 587 n.5 (1991) (affirming judge’s refusal to defer to an arbitration award because the record showed there was inadequate consideration of the unfair labor practice issues); *Dick Gidron Cadillac*, 287 NLRB 1107, 1111 (1988) (affirming without comment judge’s refusal to defer because the record showed evidence on the statutory issue was not presented to the arbitrator), *enforced mem.*, 862 F.2d 304 (2d Cir.).

Essentially, the whole of the majority’s introductory discussion and analysis of statutory background in *Babcock* consists of nothing more than an unremarkable assertion that the Board cannot be compelled to defer to arbitration where its statutory power to adjudicate unfair labor practices has been invoked. No Board or court has ever said otherwise. The question presented by *Babcock* was not whether the Board could be forced to step aside, but whether it had the wisdom and objectivity to recognize that its processes may at times be inferior to arbitration as a mechanism for achieving the ultimate goals of the Act. Where parties have an

agreed-upon method for resolving disputes that arise between them, it is better for them, for the collective-bargaining process, and for industrial peace generally to allow that process to finally resolve their disputes, even those disputes that implicate statutory rights, except in the rarest of circumstances.

2. The post-arbitral deferral standard articulated in *Babcock* burdens and reduces the effectiveness of the arbitral process

Not only did the Board in *Babcock* adopt a standard that both ignored decades of Supreme Court precedent and was unnecessary to protect statutory rights, but the new standard *interferes* with the statutory objectives of the Act and the ability of the Board to achieve those objectives. The *Babcock* standard imposes significant burdens on arbitrators and the parties to arbitration, reducing the efficiency and effectiveness of grievance-arbitration in the settlement of disputes. The new standard also undermines the use of arbitration by giving parties means to void awards or avoid arbitration altogether. Finally, the *Babcock* standard delays dispute resolution, burdens agency resources, and reduces agency efficiency to the detriment to the very parties seeking relief.

The *Babcock* standard burdens the grievance-arbitration procedure by inventing several requirements—boxes the arbitration would have to tick—before the Board will even consider deferral. Arbitration is an informal dispute-resolution system, which is part of why it is so valuable. Indeed, arbitrators for years have been fighting against creeping formalism in arbitration, such as the introduction of transcripts, rules of evidence, and detailed decisions. *See, e.g.*, Reginald Alleyne,

Delawyerizing Labor Arbitration, 50 Ohio St. L.J. 93 (1989); Morton Singer, *Labor Arbitration: Should It Be Formal or Informal?*, 2 Lab. L.J. 89 (1951). *Babcock's* requirements that the arbitrator be authorized to consider, be presented with, and actually consider the statutory issue sets an unwarranted threshold requirement that can only be met with full transcripts and/or detailed decisions and thus significantly push the system towards formalism. Assuming the statutory right at issue is not incorporated into the contract, both parties must formally authorize the arbitrator to consider that right in resolving the parties' dispute. And while the Board in *Babcock* did not demand a "detailed exegesis" of labor law in arbitration awards, it necessarily has required a specific articulation of legal principles not previously required and certainly has prohibited all short-form decisions, especially the kind often used by grievance-dispute panels like in the present case where the parties agreed that the prompt resolution of a dispute was paramount. Moreover, the requirement that arbitral awards be "reasonably permitted by the law" places the burden on arbitrators and parties of knowing all the subtleties of Board law in its current form. This can be a difficult burden to meet, since "many arbitrators, as well as many union and employer representatives who appear in arbitral proceedings, are not attorneys trained in labor law matters." *Babcock & Wilcox*, 361 NLRB at 1133. While the General Counsel's office has, since *Babcock*, devoted considerable resources to training labor arbitrators in the finer points of labor law—including a 155-page presentation to the conference of the National Academy of Arbitrators—as *Babcock* itself showed, labor law is subject to swift changes. See

National Academy of Arbitrators SEW Binder, <https://www.nlr.gov/how-we-work/national-labor-relations-act/manuals> (Oct. 2015). Indeed, the invented term “reasonably permitted” is ill-defined and foreign to arbitration proceedings.

Not only does *Babcock* reduce the effectiveness of arbitration, but it also undermines the use of arbitration altogether. As noted by Member Johnson in his dissent, the *Babcock* standard gives unions various means of obtaining “two bites of the litigation apple,” discouraging unions from expressly authorizing arbitrators to determine unfair labor practice issues, and incentivizing unions to hide any statutory claims during arbitration so they can be raised as unfair labor practices if the arbitration award is unfavorable. *Babcock & Wilcox*, 361 NLRB at 1158 (Member Johnson, concurring in part and dissenting in part). In addition, the “reasonably permitted by law” standard amounts to de novo review of arbitrators’ decisions, except in the rare situation where the Board majority might allow that a decision contrary to its own opinion is not unreasonable. *Id.* at 1153 (Member Johnson, concurring in part and dissenting in part). Furthermore, all these “second bites” are one-sided. While charging parties dissatisfied with an arbitral decision can resort to the Board for a second chance at proving their claim, respondents have little corresponding ability to seek judicial review of an arbitral award that is adverse to them. *See Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013) (“Under the FAA, courts may vacate an arbitrator’s decision ‘only in very unusual circumstances.’”) (citations omitted). The courts have uniformly limited the situations where arbitration awards are not enforced. *See, e.g., id.; Stolt-Nelson S.A.*

v. AnimalFeeds Int'l Corp., 559 U.S. 662, 671 (2010) (“It is not enough . . . to show that the [arbitrator] committed an error—or even a serious error.”). *See also* 9 U.S.C. § 10. Therefore, the majority’s one-sided approach allowing unions two independent forums discourages employers from entering into contracts with arbitration provisions.

3. The *Babcock* post-arbitral deferral standard unnecessarily burdens the resources of the General Counsel and the Board

Finally, the *Babcock* decision burdens the finite resources of the Agency. Regional offices must now conduct an investigation prior to pre-arbitral deferral to determine whether the statutory right at issue is incorporated in the collective-bargaining agreement and whether the parties will, in writing, authorize the arbitrator to decide the unfair labor practice. Memorandum GC 15-02, *Guideline Memorandum Concerning Deferral to Arbitral Awards, the Arbitral Process, and Grievance Settlements in Section 8(a)(1) and (3) Cases*, 11–12 (Feb. 10, 2015). Following an arbitral award, the Region then must conduct a significant investigation into the details of the arbitration process and decision to determine whether the statutory issue was presented to the arbitrator and the arbitrator actually considered the issue. The Region must determine whether the arbitrator misconstrued Board law, failed to give enough weight to various aspects of the evidence, or granted insufficient remedies. *Id.* at 8. And to determine whether the decision was reasonably permitted, the Region must conduct its own investigation into the charged unfair labor practice, essentially working up deferred cases as if

they were not deferred, thereby negating some of the administrative benefit of deferral. In addition, *Babcock* has likely further burdened the Board's case backlog, as Regions must refuse to defer to more cases due to the stricter standard.² The reverse effect was observed when *Olin* was first decided. See Patricia A. Greenfield, *The NLRB's Deferral to Arbitration Before and After Olin: An Empirical Analysis*, 42 ILR Review 34, 44 (1988) (finding that regional offices refusal to defer to an arbitral award fell from 18.9% of the time prior to *Olin*, to 3.8% of the time after *Olin*). Finally, it has been noted that where parties know a case will be deferred, they are less likely to bother filing it, saving the agency further resources. See Shank, 2 Hofstra L.J. at 249 (citing John S. Irving, *Arbitration & the N.L.R.B.*, 35 Arb. J. 5, 9 (1980)).

Babcock & Wilcox undermines arbitration, and as a result, undermines the institution of collective bargaining. The burden it creates on the grievance-arbitration system, on the parties, and on the Board itself demand that it be withdrawn and replaced with a different system.

B. The Board Should Return to the Standard Articulated in *Olin Corp.*

As to the second question, we urge the Board to reinstate for Section 8(a)(1) and (3) cases the post-arbitral deferral standard adopted by the Board in *Olin*. 268

² In the three years prior to *Babcock & Wilcox* the Board had on average about 1,500 cases on deferral status a year (including Section 8(a)(5) cases). In the three years subsequent, the Board had on average only 1,234 cases on deferral status, a decline of nearly 18%. See Memoranda GC 18-03, 17-02, 16-02, 15-05, 14-02, & 13-04, *Report on the Midwinter Meeting of the ABA* (2013–2018). During the same time frame the average number of Board charges fell only 4%.

NLRB at 574. The *Olin* standard was widely accepted and understood by the courts and the labor-management bar, standing largely unaltered for thirty years. More importantly, the *Olin* standard effectively promoted collective bargaining and labor peace by supporting the grievance-arbitration system. The only aspect of *Olin* that needs discussion is its articulation of the “clearly repugnant” test.

1. The *Olin* standard will prevent litigation

The Board should return to the *Olin* standard because it was predictable, widely accepted by the courts and less likely to result in litigation. Any possible benefit of creating an entirely new post-arbitral deferral standard is outweighed by the clear advantages of readopting a standard that was effective, understood by practitioners, and accepted by the courts. Following a series of sharp swings in the Board’s deferral standard, *Olin* was an effective compromise decision, which stood for thirty years. *See generally Yourga Trucking*, 197 NLRB 928 (1972) (finding party urging deferral bears burden of showing deferral standard was met), *overturned by Electronic Reproduction Service Corp.*, 213 NLRB 758, 761 (1974) (finding deferral appropriate unless party opposing deferral can show special circumstances prevented it from considering the statutory issue), *overturned by Suburban Motor Freight, Inc.*, 247 NLRB 146, 146–47 (1980) (requiring evidence that arbitrator ruled on statutory issue), *overturned by Olin Corp.*, 268 NLRB at 574–75 (1984). Such longevity has made *Olin* well-known in the labor-management bar, and the case has been cited at least 848 times. *See KeyCite for Olin Corp.*, 268 NLRB No. 86 (Jan. 19, 1984), Westlaw, <https://1.next.westlaw.com> (click “Citing References” tab).

A return to *Olin* rather than creation of a new standard would thus minimize disruption created by overturning *Babcock*, as well as serve the “values of stability, predictability, and certainty in the law.” See *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 726 (2001) (noting the benefits of *stare decisis*).

Olin was also met with near-universal acceptance from reviewing federal courts, most of which did so without criticism or even comment. See, e.g., *Doerfer Engineering*, 79 F.3d 101, 103 (8th Cir.); *Equitable Gas Co. v. NLRB*, 966 F.2d 861, 864–65 (4th Cir. 1992); *NLRB v. Yellow Freight Systems, Inc.*, 930 F.2d 316, 321 (3rd Cir. 1991); *Aces Mechanical Corp.*, 837 F.2d 570, 574 (2d Cir. 1988); *Grand Rapids Die Casting Corp. v. NLRB*, 831 NLRB 112, 115–16 (6th Cir. 1987); *NLRB v. Ryder/P.I.E. Nationwide, Inc.*, 810 NLRB 502, 506 (5th Cir. 1987); *Harberson v. NLRB*, 810 F.2d 977, 984 (10th Cir. 1987); *Garcia v. NLRB*, 785 F.2d 807, 809–10 (9th Cir. 1986); *Bakery, Confectionary & Tobacco Workers International Union 25 v. NLRB*, 730 F.2d 812, 815–16 (D.C. Cir. 1984).

Not only is the near-universal acceptance of *Olin* indicative of its value, but return to an accepted standard will undoubtedly prevent much potential litigation testing a brand-new standard. The only circuit that seriously criticized *Olin* was the Eleventh Circuit, in *Taylor v. NLRB*, 786 F.2d 1516 (11th Cir. 1986), where the court suggested that *Olin* was likely “an abdication of Board responsibility.” But the holding of *Taylor* was that the grievance committee there did not meet *Spielberg*’s requirement that the proceedings be “fair and regular,” given that the committee did not allow the charging party to participate, the union made no statements at all

on the charging party's behalf, and the decision read simply "DENIED, COST TO THE UNION." *Id.* at 1517, 1522. And, given the weight of federal precedent on *Olin* since *Taylor*, as well as the Supreme Court's decisions generally favoring arbitration, it seems unlikely that *Taylor's* view of *Olin* would stand today.

2. The *Olin* standard promotes the purposes and policies of the Act

The Board should return to the *Olin* standard because it is more consistent with the purposes of the Act in protecting Section 7 rights than the *Babcock* standard. In addition to the prudential reasons for returning to its previous standard, the Board in *Olin* fashioned a rule that did what *Babcock* did not: effectively promote the policies and purposes of the Act by encouraging the practice of collective bargaining, grievance arbitration, and labor peace without compromising rights guaranteed by Section 7. The *Olin* standard ensured that the Board would not needlessly undercut grievance-arbitration systems at the heart of collective bargaining and Section 7 itself.

First, judging that an arbitrator will have adequately considered the unfair labor practice if (1) the contractual issue was factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice effectively ensures that the Board does not defer to arbitrations where the arbitrator did not have the necessary facts to resolve the case. *See Olin*, 268 NLRB at 574. Second, returning to *Spielberg's* "clearly repugnant" standard as it was defined in *Olin* gives arbitrators the leeway they need to decide cases and fashion remedies in an efficient manner. *See id.* The

alternative, requiring that arbitrators make the same factual determinations the Board would make and apply Board precedent in a written discussion, which resolves the unfair labor practice precisely as the Board would, effectively transforms arbitrators into “*de facto* administrative law judges.” *Professional Porter & Window Cleaning Co.*, 263 NLRB 136, 145 (1982) (Member Hunter dissenting).

Third, placing the burden of proving the standard has not been met on the party arguing against deferral strikes the correct balance. As noted above, placing on the party urging deferral the burden of proving that an arbitration meets the deferral standard requires that the Agency investigate both the arbitration and the merits of the case itself. Moreover, under such a system, dissatisfied parties have no reason not to challenge deferral to unfavorable arbitral decisions, as the Agency bears the expense and there is always the possibility they will get a “second bite of the apple.” A better use of Agency resources is to place the burden of proving that the deferral standard was not met on the charging party. Where a charging party can point the General Counsel to no evidence that the arbitration was irregular, the facts were not parallel or presented, or the decision was clearly repugnant to the Act, Regions will not be requested to go on “fishing expeditions” to find such evidence. Thus, the *Olin* burden framework discourages frivolous challenges to deferral as well as reduces the expense to the Agency when investigating such challenges. In addition, as noted in *Olin* itself, treating deferral as an affirmative defense leads to infrequent deferrals by the Board and reduced deferral by the General Counsel at the complaint stage. *See Olin*, 268 NLRB at 575.

3. The Board should clarify the “clearly repugnant” test

Prior to *Olin*, the “clearly repugnant” test underwent massive swings in meaning, ranging from only applying to clear derogation of the Act’s basic policies to cases where an award simply did not coincide with the “shifting tides of Board precedent.” Shank at 257 (citing *American Interstate Freight*, 258 NLRB 1005 (1981)). In *Olin*, the Board attempted to settle the matter, noting that an arbitrator’s award did not have to be “totally consistent with Board precedent” and would be deferred to unless it was “palpably wrong,” that is, “not susceptible to an interpretation consistent with the Act.” 268 NLRB at 574 (citations omitted). However, the courts have continued to criticize the Board’s variability in applying the “clearly repugnant” test, with the D.C. Circuit noting that it “seems designed to permit the Board to give deference when it approves of the result . . . but to intervene when it does not.” *Plumbers & Pipefitters Local Union No. 520 v. NLRB*, 955 F.2d 744, 757 (D.C. Cir. 1992).

As the D.C. Circuit noted in a recent case criticizing the Board, “palpably wrong” should mean something other than merely “wrong.” See *Verizon New England Inc. v. NLRB*, 826 F.3d 480, 487 (D.C. Cir. 2016) (applying *Olin* in a Section 8(a)(5) case). It should mean “[e]gregiously wrong, clearly erroneous, badly flawed, totally wrong, jumping the rails.” *Id.* “Palpably wrong” should be explained as an arbitration award that finds clearly protected activity (as defined in Board decisions) unprotected or that reaches a conclusion that no reasonable person could reach based on the evidence presented.

C. The Board Should Apply Its New Standard Retroactively

Finally, as to the last question, the Board should follow longstanding precedent and apply its changed post-arbitral deferral standard retroactively. The Board has long held that new policies and standards should normally be applied “to all pending cases in whatever stage.” *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–07 (1958)), *enforced sub nom. Int’l Assoc. of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1990). The propriety of retroactive application is determined by balancing any ill effects of retroactivity against “the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.” *Id.* at 1389 (quoting *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

Here, the disruption of returning to the *Olin* standard is relatively minor, especially compared to the disruption the *Babcock* standard currently is wreaking on joint grievance-arbitration. The Board in *Babcock* prudently only applied its new standard prospectively to give parties time to incorporate unfair labor practices into collectively bargained arbitration clauses. 361 NLRB at 1140. Returning to *Olin*, which was the law for thirty years and was only displaced five years ago, will require no similar adjustments from labor or management; anything they have done to account for the *Babcock* standard will either be moot (e.g., specifically authorizing arbitrators to decide statutory issues) or still useful (e.g., educating arbitrators about the Board’s current interpretation of the Act). The only parties

that might be discomfited by the change would be those planning to exploit the current system to put their grievances before both an arbitrator and the Board. Accordingly, there is no reason not to follow the Board's usual retroactivity practice.

IV. Conclusion

We respectfully urge the Board to modify its approach to deferral in Section 8(a)(1) and (3) cases to better promote the ultimate objectives of the Act. Specifically, the Board should abandon the *Babcock & Wilcox* standard, which unnecessarily and inappropriately supplanted collectively-bargained grievance-arbitration systems. In its place, the Board should restore the long-accepted *Olin* standard. The Board should also take the opportunity to better define the "clearly repugnant" prong of *Olin*. Finally, the Board should follow its usual policy and apply the *Olin* deferral standard to all current cases at all stages of litigation.

Respectfully submitted,

/s/ Jonathan M. Psotka
Counsel for the General Counsel
National Labor Relations Board
Division of Advice
1015 Half St. SE
Washington, DC 20570
Ph. (202) 273-2890
Jonathan.psotka@nlrb.gov

April 29, 2019

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of GENERAL COUNSEL'S BRIEF OF POSITION ON THE STANDARD FOR POST-ARBITRAL DEFERRAL in Case 06-CA-143062 was served electronically and/or by regular mail upon the parties listed below on this 29th day of April 2019.

United Parcel Service
2006 River Road
North Apollo, PA 15673

(Regular Mail)

Tony C. Coleman, Esq.
Jennifer R. Asbrock, Esq.
Frost, Brown & Todd, LLC.
400 West Market Street
Suite 3200
Louisville, KY 40202-3363
tcoleman@fbtlaw.com
jasbrock@fbtlaw.com

Robert C. Atkinson Jr.
434 Chapeldale Drive
Apollo, PA 15613
blckndgldfn@yahoo.com

Catherine A. Hight, Esq.
Hight Law LLC
1022 SW Salmon St., Suite 430
Portland, OR 97205
cathy@hightlaw.com

/s/ Jonathan M. Psotka
Counsel for the General Counsel
National Labor Relations Board
Division of Advice
1015 Half St. SE
Washington, D.C. 20570
Ph. (202) 273-2890
E-Mail: Jonathan.psoyka@nlrb.gov

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