

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

In the Matter of:

UNITED PARCEL SERVICE, INC.

**Case No. 06-CA-143062**

and

ROBERT C. ATKINSON, JR.

**SUPPLEMENTAL BRIEF OF RESPONDENT  
UNITED PARCEL SERVICE, INC.**

**I. INTRODUCTION<sup>1</sup>**

Pursuant to the Notice and Invitation to File Briefs issued by the National Labor Relations Board (“Board”) on March 15, 2019, Respondent United Parcel Service, Inc. (“UPS” or “Company”) hereby files this Supplemental Brief, urging the Board to abandon the anomalous postarbitral deferral standard set forth in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014) and return to the time-honored postarbitral deferral standard set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984).<sup>2</sup> The Company further urges the Board to reinstate the *Spielberg/Olin* standard retroactively, “to all pending cases in whatever stage,” as retroactive application would not produce a result contrary to statutory design or legal and equitable principles and would—in fact—serve to restore the longstanding expectations and reliance

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<sup>1</sup> Joint Exhibits, General Counsel Exhibits, Charging Party Exhibits, and Respondent Exhibits are parenthetically referenced as “JX-\_\_\_,” “GC-\_\_\_,” “CP-\_\_\_,” and “RX-\_\_\_,” respectively. Transcript pages are parenthetically referenced as “Tr. \_\_\_.” Pages from the Decision are cited parenthetically as “ALJ, p. \_\_\_.”

<sup>2</sup> To be sure, UPS stands by its position that postarbitral deferral is appropriate in this case, even under the heightened *Babcock & Wilcox* standard. (See Exception Nos. 23, 24, 42, 46; Brief in Support of Exceptions, pp. 21-22, 35-39; Reply Brief in Response to Atkinson’s Answering Brief, pp. 1-5.) Nevertheless, in light of the Board’s invitation to comment on *Babcock & Wilcox*, UPS *does* respectfully submit that *Babcock & Wilcox* was wrongly decided and that it represents a drastic and imprudent departure from Board precedent on the issue of postarbitral deferral. UPS thus welcomes this opportunity to explain why the Board should return to its *Spielberg/Olin* standard.

of American employers, unions, and workers nationwide. *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987) (internal quotes and cites omitted).

## II. LAW AND ARGUMENT

### A. **As a threshold matter, it is entirely appropriate for the Board to reconsider its postarbitral deferral standard in the course of reviewing this case.**

Regarding Member McFerran's dissent to the Board's invitation for supplemental briefs, UPS respectfully contends that the Board's decision to revisit *Babcock & Wilcox* is both proper in this case and consistent with historic practices. Board precedent makes clear that (1) no party must specifically urge the overturning of controlling precedent for the Board to reconsider its own law in the course of considering general exceptions related to general concepts that implicate controlling law (e.g., whether deferral is/is not appropriate); and (2) even if a party raises no exceptions whatsoever on a particular legal issue, the Board may still reconsider its own law sua sponte. *See, e.g., Toering Elec. Co. & Foster Elec.*, 351 NLRB 225, 238 at fn.20 (2007) (viewing general exceptions and supporting briefs "as a request to reconsider precedent," finding "the arguments for and against a change in law are well known," and confirming Board is "free to change the law . . . without inviting additional argument"). This is perhaps best explained by Member McFerran's own political ally, Former Chairman Pearce, in *Dish Network Corp.*, 359 NLRB 311 (2012):

[W]e believe that the original panel majority erred insofar as it appeared to hold that the Board lacks the authority here to overrule *Tri-Cast*. As a general matter, the original panel majority's rationale would seem to foreclose the Board from overruling precedent sua sponte, but the Board (wisely or not) has done so in the past. . . .

First, Section 102.46(h) of the Board's Rules and Regulations . . . structures the briefing process, providing that a reply brief filed by the party excepting to the judge's decision "shall be limited to matters raised in the brief to which it is replying." But this limitation operates on the excepting party, not on the Board itself. . . .

Consistent with Section 102.46(h), the Board could choose to disregard a new (nonjurisdictional) argument in a reply brief, not least because the other party has had no opportunity to respond to that argument. Nothing in that rule, however, suggests that the Board would somehow lack the authority to "decide the matter" based on an argument made

for the first time in a reply brief, or on a rationale that did not appear in the briefs at all, so long as the decision was made “upon the record.” When it decides cases, the Board functions in certain respects like an appellate court. The Supreme Court, in turn, has rejected the view that a party’s failure to make an argument until its reply brief to the appellate court limits the court’s authority: When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law. *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991).

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In [the dissent’s] view, for the Board to have the authority to reconsider *Tri-Cast*, the Charging Party was required not merely to except to the judge’s dismissal of the relevant 8(a)(1) allegation (as it did), but to specifically except to the judge’s application of *Tri-Cast*—a decision that the judge was, in fact, required to apply unless and until the Board overruled it. But the Charging Party’s failure (if any) under Section 102.46(b)(2) would not itself deprive the Board of the authority to reconsider *Tri-Cast*. The rule provides that a defective exception “may be disregarded,” not that it *must* be disregarded. Put differently, the provision operates against the parties, not the Board. . . . “Even absent an exception, the Board is not compelled to act as a mere rubber stamp for its Examiner” (now administrative law judge), but rather is “free to use its own reasoning.” *NLRB v. WTVJ, Inc.*, 268 F.2d 346, 348 (1959). . . . A contrary rule . . . would “unduly cripple the Board in its administration of the Act.” *Id.* . . . If the Board has the authority to adopt its own legal rationale even in the absence of any underlying exception, it follows that the Board may do so when an exception was filed in accordance with the rules.

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[T]o the extent that due process concerns might be implicated . . . in a case where the Board sua sponte raised a potentially dispositive issue, argument, or legal theory . . . those concerns could be easily addressed by requesting supplemental briefing: i.e., providing the party or parties an opportunity to be heard on the specific point in question.

See 359 NLRB 311, \*\*312-314 and majority fns. 3-12 (emphasis in original).

As of the date this case was submitted to the Board, *Babcock & Wilcox* was (and currently still is) the controlling legal standard for postarbitral deferral—which is precisely why UPS cited *Babcock & Wilcox* in its briefing. But UPS also filed an Answer to the Complaint raising several deferral-related defenses, and further filed a Post-Hearing Brief as well as Exceptions to the ALJ’s Decision that generally implicate postarbitral deferral standards and urge application of cases from the *Spielberg/Olin* era. (See Answer to Complaint, p. 3 at Defenses 7-10; Post-Hearing Brief, pp.

33-35; Exception Nos. 23, 24, 42, 46.) Indeed, UPS relied on cases from the *Spielberg/Olin* era so consistently that the ALJ faulted the Company for “rel[ying] on caselaw that pre-dates (and thus does not account for) the modifications to the post-arbitration deferral standard . . . set forth in *Babcock*” (ALJ, p. 49); and Atkinson accused the Company of “ask[ing] the Board to incorporate the *Olin* standard rejected by *Babcock*” (Atkinson Answering Brief, p. 5). It is thus clear that the issue of postarbitral deferral—and the most appropriate standard therefor—is properly before the Board in this case.

Furthermore, in response to Member McFerran’s suggestion that amicus briefing be required prior to reconsidering *Babcock & Wilcox*, the Board recently confirmed that “[n]either the [NLRB], the Board’s Rules, nor the Administrative Procedures Act requires the Board to invite amicus briefing before reconsidering precedent,” as “[t]he decision to allow such briefing is purely discretionary.” *UPMC*, 365 NLRB No. 153, \*15 (Dec. 11, 2017). The Board invited amicus briefing prior to issuing the *Babcock & Wilcox* decision, so at this point, the Board would merely be “correcting a recent, ill-advised deviation from longstanding precedent.” *Id.*

**B. Arbitration Has Long Served as the “Backbone” of National Labor Policy.**

The United States “has long favored arbitration as a vehicle of promoting industrial peace.” *Botany 500*, 251 NLRB 527 (1980) (citing *USW v. American Mfg. Co.*, 363 U.S. 564 (1960); *USW v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *USW v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (hereinafter “*Steelworkers Trilogy*”). Indeed, “[t]he importance of arbitration in the overall scheme of Federal labor law has been stressed in innumerable contexts and forums.” *Olin*, 268 NLRB at 574. It has been widely recognized that “arbitration may . . . allow even the most contentious disputes to be resolved in a manner which permits the complaining employee to raise the dispute without permanently fracturing [his] working relationship with the employer.” *See*

COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. Dep't of Labor & U.S. Dep't of Commerce, Report and Recommendations 30 (1994).

For more than 50 years, the Board historically deferred to the contractual grievance and arbitration process under the *Spielberg/Olin* standard when “the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the [National Labor Relations] Act.” *Spielberg*, 112 NLRB at 1082. In addition, the arbitral forum must have “considered” the statutory question, which the Board formerly deemed to occur if (1) the contractual issue was factually parallel to the unfair labor practice allegation, and (2) the decision-maker was presented generally with the facts relevant to resolving the statutory issue. *Olin*, 268 NLRB at 574. The burden of proof rested with the party opposing deferral, as controlling federal labor policy confirmed that day-to-day disputes should be arbitrated unless it could be said with “positive assurance” that the parties had refused arbitration. *Olin*, 268 NLRB at 575; *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 254 (1977). Moreover, once arbitrated, the resolution could rarely be disturbed. *See Enterprise Wheel & Car*, 363 U.S. at 597-98.

**C. The *Babcock & Wilcox* Standard for Postarbitral Deferral Fundamentally Undermines the Collective Bargaining Process.**

In December 2014, the issuance of *Babcock & Wilcox* eviscerated the Board’s historic postarbitral deferral test under *Spielberg/Olin*, dramatically reshaping longstanding federal labor policy. Now, the party urging deferral bears the burden of proving that (1) either the labor agreement expressly incorporates the NLRA right(s) at issue, or the statutory issue was presented to (and actually considered by) the arbitral forum; and (2) the decision-maker correctly enunciated the applicable statutory principles and applied them in deciding the contractual issue. *Babcock & Wilcox*, 361 NLRB No. 132, at \*3. This new standard, and its shifted burden of proof, essentially

relegates labor arbitration to an “alternative” dispute resolution method—secondary and inferior to Board’s litigation processes—rather than honoring arbitration as the “heart and soul” of the collective bargaining process envisioned by the NLRA.

*1. The Babcock & Wilcox requirement that NLRA rights be incorporated into labor agreements—or that parties expressly agree that statutory issues be arbitrated case-by-case—is contrary to freedom-of-contract principles.*

Under *Babcock & Wilcox*, parties face major obstacles in preventing the re-litigation of previously arbitrated and/or settled grievances, effectively discouraging good faith participation in the contractual bargaining and dispute resolution process. This is because *Babcock & Wilcox* permits re-litigation of grievances by simply reframing them as unfair labor practices. The grievance process cannot be used to resolve unfair labor practice charges unless: (1) the parties expressly agree in advance to authorize the arbitrator to adjudicate any statutory issues; and (2) any such issues are, in fact, presented to and decided by the arbitrator. 361 NLRB No. 132, at \*3.

Whether a party can defeat a deferral request by refusing to consent to an arbitrator’s jurisdiction depends on if it can be proven to the Board that the party opposing deferral “prevented” the arbitrator from considering the statutory claim—the assertion of which can easily be strategically delayed until a grievance has already been arbitrated or settled. Thus, absent deferral, Board charges implicating matters covered by a labor agreement’s grievance and arbitration clause only serve to deprive parties of the prompt and efficient resolution their bargained-for contractual procedures were intended to achieve. Rather, to minimize re-litigation, parties must now re-bargain their grievance and arbitration procedures to expressly encompass statutory claims (or be left to argue over the issue on a grievance-by-grievance basis); and they must further ensure that any NLRA questions are actually presented at arbitration, thoroughly considered by the arbitrator, and explicitly addressed in the award.

The consequences of *Babcock & Wilcox* are far-reaching, as nearly all contractual grievances involve disputes that can also theoretically be challenged as unfair labor practices. As such, the potential for overlapping disputes—and strategic abuse of process—is a recurrent issue confronted with regularity, ***and*** subject to the heightened burden for postarbitral deferral. Parties are thus incentivized to file a parallel Board charge whenever they file a contractual grievance because, by doing so, they increase their chances for “a second bite at the apple” if arbitration fails them. Moreover, in order to fully resolve grievances (or other disputes leading to unfair labor practices charges), parties must also take special steps to ensure the finality of any settlements under *Babcock & Wilcox*. Unless a settlement agreement expresses the clear intent to resolve statutory claims, a disgruntled party may pursue Board charges even if the grievance settlement purports to be “final and binding.” All of these hurdles combine to reveal *Babcock & Wilcox* for what it truly is: An inequitable and unworkable embodiment of national labor policy that virtually ensures a right to *de novo* review of the dispute by the Board.

**2. *The reversed burden of proof under Babcock & Wilcox is not only unnecessary, but it also undermines the purpose and efficacy of deferral.***

Although no systemic problems were identified to justify abandonment of the *Spielberg/Olin* burden of proof, *Babcock & Wilcox* nevertheless shifts the evidentiary burden by obligating the party seeking deferral to prove that the statutory question was fully reviewed and properly decided. See, e.g., *Office of the General Counsel, Memorandum GC 15-02*, pp. 2-3 (Feb. 10, 2015); see also *Office of the General Counsel, Memorandum GC 11-05*, pp. 6-7 (Jan. 20, 2011) (urging revised burden of proof almost four years before its adoption in *Babcock & Wilcox*). In establishing a standard and burden of proof for postarbitral deferral, the Board need not jeopardize thorough adjudication for the sake of efficiency or finality. The goal instead is to protect the freedom to

contract and prioritize collective bargaining over the proverbial “quest for perfection,” which leads to never-ending “appeals” with plenary review of discrete events.

While deferral theoretically could—in the eyes of a few—leave statutory issues unremedied on an isolated occasion, “[t]he national policy in favor of labor arbitration recognizes that the societal rewards of arbitration outweigh a need for uniformity of results or a correct resolution of the dispute in every case.” *NLRB v. Pincus Brothers*, 620 F.2d 367, 374 (3d Cir. 1980). Indeed, the parties to a labor agreement containing an arbitration clause have accepted the distinct possibility that an arbitrator might view a certain set of facts differently under the contract than would the Board under the NLRA. It is therefore important to honor the expectations of both contracting parties by returning the burden of proof to the party opposing deferral, who will have every opportunity to demonstrate that a particular dispute was not resolved in arbitration pursuant to the standards established in *Spielberg/Olin*.

**3. *Spielberg/Olin’s time-tested “clearly repugnant to the NLRA” standard is far superior to Babcock & Wilcox’s “reasonably permit the award” standard, which leads the Board to second-guess the arbitrator and deprives the parties of the benefit of their contractual bargain.***

The substantive test under *Spielberg/Olin*—that the result not be “clearly repugnant” to the policies and purposes of the NLRA—is neither unclear nor difficult to apply, although the Board has occasionally declined to grant deferral. *See e.g., Liquor Salesmen’s Union, Local 2 v. NLRB*, 664 F.2d 318, 323-24 (2d Cir. 1981). The “clearly repugnant” standard has a naturally narrow scope by virtue of its modifier “clearly.” If it is ***at all possible*** to construe an arbitration award as being consistent with the NLRA, then the award cannot be “clearly repugnant” to the NLRA. *See, e.g., Associated Press v. NLRB*, 492 F.2d 662, 667 (D.C. Cir. 1974) (upholding Board’s deferral to arbitration award, where “arbitrator’s reasonable interpretation was not inconsistent with either the fundamental purposes or the specific provisions of the [NLRA]”). The *Babcock & Wilcox* decision,

in contrast, turns this standard on its head by forcing the Board to determine—in each and every case—whether the arbitration award is reasonably permitted by the NLRA. The inquiry essentially places the Board in a position of rejecting the arbitrator’s award whenever the result is different than what the Board in hindsight would have done.

Unlike *Babcock & Wilcox*, the *Spielberg/Olin* standard strikes an appropriate balance between the statutory requirements set forth in the NLRA and the policy interests in “giv[ing] substance to [labor] agreements through the arbitration process.” *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 265 (1964). Both the Board and the courts have long agreed that arbitration serves as a “substitute for industrial strife,” and labor agreements containing final and binding arbitration provisions “contribute significantly to the attainment of [the NLRA’s] statutory objective.” *Id.* at 271 (internal quotes and cites omitted). Deferral to arbitration effectively honors collective bargaining relationships by enforcing the contractual dispute resolution procedures for which parties have bargained. *Olin*, 268 NLRB at 576, fn.11. The concept of postarbitral deference is thus firmly “entrenched” in federal labor law, and it promotes freedom of contract as “one of the fundamental policies” of the NLRA. *See 14 Penn Plaza v. Pyett*, 556 U.S. 247, 257 (1974) (internal quotes and cites omitted); *United Technologies Corp.*, 268 NLRB 557, 558 (1984).

The *Spielberg/Olin* standard adequately protects NLRA rights by advancing federal labor policies favoring arbitration, fostering collective bargaining, and fulfilling the Board’s statutory responsibilities. The U.S. Supreme Court has recognized that “statutory claims may be the subject of arbitration agreements” and that “a party does not forgo the substantive rights afforded by statute” by submitting to binding arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). The Board thus satisfies its statutory obligation by determining, “in each [postarbitral deferral] 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 [NLRA].” *Olin*, 268 NLRB at 574.

**4. The new remedial standard under Babcock & Wilcox is as flawed as the substantive rule, given an arbitral remedy is only acceptable if it is one the Regional Director could accept under the Board's Case Handling Manual.**

The Board in *Babcock & Wilcox* dealt with the sufficiency of the remedy in a cursory manner, generally opining that an arbitrator's remedy need not be exactly what the Board would have imposed. The only absolute was that an award would not meet the new standards if there was an “absence of any effective remedy.” 361 NLRB No. 132, at \*11 fn.16. Shortly thereafter, the Board's General Counsel quickly filled the void, essentially directing that no arbitral remedy be accepted for deferral unless it is a remedy the applicable Region could unilaterally accept as a settlement pursuant to Section 10592.1 of the Case Handling Manual. *See Office of the General Counsel, Memorandum GC 15-02*, pp. 8 (Feb. 10, 2015). Thus, *Babcock & Wilcox's* abandonment of the “clearly repugnant” standard in the area of an acceptable remedy again ignores the realities of the arbitral process in a collective bargaining setting and undermines the efficacy of the parties' agreed-upon dispute resolution process. This is yet another reason to return to the principles set forth in *Spielberg/Olin* and its progeny.

**D. The Board Should Return to the *Spielberg/Olin* Test for Postarbitral Deferral, Applying That Standard Retroactively to This and All Other Pending Cases.**

UPS wholeheartedly urges the Board to return to its *Spielberg/Olin* standard, and in so doing, to follow its “usual practice” of applying policy modifications “to all pending cases in whatever stage.” *John Deklewa & Sons*, 282 NLRB at 1389. The propriety of retroactive application has long been 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.*

The reinstatement of *Spielberg/Olin* to this case, and in all pending cases, would mark the welcome return of a well-settled and familiar standard, whereas the infirmities and uncertainties of *Babcock & Wilcox* would be almost instantly ameliorated without detrimental reliance to any party. After all, the Board would be doing nothing more than holding parties to the bargained-for terms in their labor agreements—whatever those may be. Additionally, as discussed above, the need to promote freedom of contract, resume predictability, and cease manipulative re-litigation further supports retroactivity here. In sum, the statutory and policy-related benefits resulting from reimplementing of the *Spielberg/Olin* standard for postarbitral deferral far outweigh any hardships resulting from immediate reversion to that long-standing precedent. *Id.* In returning to *Spielberg/Olin*, the Board would restore “the very heart of the system of industrial government.” *Warrior & Gulf Navigation*, 363 U.S. at 581.

**E. The Application of *Spielberg/Olin* Postarbitral Deference is Particularly Well-Suited to the Grievance and State Panel Decision at Issue in this Case.**

The Board should defer to the grievance and arbitration procedure as to the lawfulness of the October 28, 2014, discharge of Charging Party Robert C. Atkinson, Jr. (“Atkinson”), as the State Panel fully complied with the *Spielberg/Olin* standard. The Board’s decision in *Botany 500*, 251 NLRB 527, is particularly instructive to the case at bar. There, the Board deferred the charging party’s complaint, finding that the proceedings were fair and regular, the charging party agreed to be bound by the arbitration process and the arbitration decision was not repugnant to the NLRA. *Botany 500*, 251 NLRB at 535. In reaching these conclusions, the Board relied upon the following facts: (1) the charging party’s union attempted to secure her reinstatement; (2) the arbitration was initiated by the charging party herself; (3) although the charging party had unsuccessfully run against the incumbent union business agent, no conflict existed; (4) the charging party’s protected concerted activity and union dissident campaign was fully aired at arbitration; (5) the charging

party's supervisors testified that she was discharged in conformity with the company's long-standing policy; (6) notwithstanding the charging party's allegation that she was discharged due to aggressive campaigning and an angry confrontation with a supervisor in connection therewith, the arbitrator found that the charging party's poor work performance was the actual reason for her discharge, relying in part on the fact that she admittedly received two past warnings; and (7) despite allegations that the arbitrator who denied the grievance had a vested interest in seeing incumbent union officials remain in power so that he could be retained in subsequent contracts, the connection drawn was too remote and attenuated to forfeit the arbitration when—in all other respects—it was fair and regular and the decision was otherwise not repugnant to the NLRA. *Id.* at 533-35.

Just as in *Botany 500*, in this case, Atkinson received fair treatment under the contractual grievance process with respect to his October 28th discharge. He clearly agreed to be bound by the Decision issued by the State Panel. Atkinson filed separate grievances in response to five different adverse actions UPS took against him, all but one of which was fully considered and decided by the State Panel in January 2015.<sup>3</sup> (Tr. 952; RX-9.) UPS presented unrebutted testimony that nothing about the arbitration procedure was “irregular,” other than the fact that it was unusually long and detailed, involved more extensive questioning of more witnesses than normal (i.e., Atkinson, Fisher, Kerr, Alakson, DeCecco, and McCready), and included lengthy discussion of unfair labor practice allegations. (Tr. 978, 981-82, 1002-03.) The State Panel deliberated for an hour before denying Atkinson's grievances and finding that his October 28th discharge resulted in “no violations of any

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<sup>3</sup> The sole adverse action and related grievance that was *not* heard by the State Panel relates to Atkinson's discharge on June 20, 2014 (“June 20th discharge”). The parties had postponed a hearing on Atkinson's June 20th discharge grievance numerous times, such that the October 28th discharge grievance was ultimately heard first, in January 2015. In deciding Atkinson's October 28th discharge grievance, the State Panel found that Atkinson was properly at the discharge step of the progressive discipline procedure based on his prior discipline up to and including June 19, 2014 (all of which was also deferred to as valid by the Regional Director for Board Region 6), so Atkinson's June 20th discharge and corresponding grievance was ultimately moot. (*See* Post-Hearing Brief, pp. 2-3, 14-17, 20-21, 29, 34.)

contract articles.” (Tr. 978, 982, 1004; RX-21.) The fact that the Union Business Agent not only represented Atkinson, but also testified before the State Panel on his behalf, is compelling evidence that no conflict of interest existed between Atkinson and his Union.<sup>4</sup> (Tr. 981.) The State Panel was comprised equally of Union and Company representatives from another geographic area with no prior knowledge of the dispute.<sup>5</sup> (ALJ, pp. 4-5, 42; Tr. 151, 293-94, 943, 975-76, 1002; RX-17; RX-21.) In any event, Atkinson never alleged the State Panel was biased against him; in fact, he readily acknowledged at the hearing that he was given a full opportunity to present his case and had been properly represented by his Union Business Agent.<sup>6</sup> (Tr. 980-82.) The striking similarities between *Botany 500* and the case at bar reveal that Atkinson received fair treatment under the contractual grievance process, so the Board should defer to the State Panel Decision as to the October 28th Discharge.

**F. While the State Panel’s Decision Also Comports with *Babcock & Wilcox*, It Is Worth Noting That This Case Presents a Perfect Example of How the *Babcock & Wilcox* Standard Undermines Collective Bargaining.**

Unlike many—perhaps even most—collective bargaining agreements, the labor contracts between the Company and the Union contain several express prohibitions against discrimination,

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<sup>4</sup> The fact that the Union Business Agent was Atkinson’s political rival does not demonstrate a conflict of interest. *See Asset Protection & Security Services*, 362 NLRB No. 72 (April 22, 2015) (although fact that discriminatee and union representative were on opposite tickets in campaign for union presidency “might have been awkward, it is insufficient to warrant a finding of hostility, conflict of interest, or adverse interest”).

<sup>5</sup> It is true that both union business agents who presided over the State Panel also sat on the WPA negotiations committee. However, all West Pennsylvania (“WPA”) Teamsters business agents sit on the WPA negotiations committee, so there were no business agents who did not participate in negotiations who could have presided over the Panel instead. (Tr. 976-77.) If Atkinson wanted to avoid any actual or perceived conflict of interest by members of the State Panel, he could have simply bypassed the Panel hearing and proceeded straight to arbitration. (JX-2, p. 190.) Atkinson chose not to exercise this contractual right.

<sup>6</sup> While one or more State Panel members may have asked questions about the “Vote No” campaign—or read or forwarded articles and social media postings about the “Vote No” campaign—these facts do not establish they could not be fair and impartial on the Panel. Any belated accusations against Company and Union Panel members stand in stark contrast to *Mercy Hospital & Serv. Employees Int’l Union*, 18-CA-155443, 2016 WL 2621337 (May 6, 2016), where the judge found the grievance procedure fair and regular, despite evidence that the employer threatened the grievant, threatened a union steward, and advised managers that the grievant was “not a team player,” among other things.

harassment, and retaliation for (among other things) NLRA-protected activity. The parties likewise have a decades-long practice of not issuing more than a one-line award in any given case—if only for the sake of maintaining operational efficiency while timely processing the heavy grievance volume generated by the more than two hundred thousand Teamster-represented employees who work for UPS—the largest Teamsters bargaining unit in the country. But under *Babcock & Wilcox*, Atkinson can use the State Panel’s historic brevity against it, by arguing that the Board should not defer “to a one-sentence decision” by the Panel because the award itself does not expressly reference the statutory issue. (Atkinson Answering Brief, pp. 1, 3-4.)

This argument highlights the fundamental flaws of *Babcock & Wilcox*, where the party seeking deferral must conclusively establish that the fact-finder was actually presented with, and expressly decided, the statutory issue. 361 NLRB 1127 at \*3. The Board appears to have attempted to explicitly reject such a heightened standard, stating:

[T]he General Counsel’s proposal that deferral is warranted only if the arbitrator “correctly enunciated the applicable statutory principles and applied them in deciding the issue” would set an unrealistically high standard for deferral. Our modified standard, by contrast, will require that the proponent of deferral demonstrate that the parties presented the statutory issue to the arbitrator, and the arbitrator considered the statutory issue, or was prevented from doing so by the party opposing deferral[.]

*Id.* (emphasis added). Despite this guidance, Atkinson and other parties have unfairly benefited from the newly-eviscerated postarbitral deferral standard.

This case stands in stark contrast to *Babcock & Wilcox*, where the arbitration award reflected absolutely no evidence the statutory issue was presented, considered, or decided. 361 NLRB No. 132, at \*8. The State Panel Decision here—although brief and nondescript—nonetheless demonstrates that the statutory issue was both expressly presented and actually considered and decided. (Brief in Support of Exceptions, pp. 37-38.) First, the UPS National Master Agreement (“Master Agreement”) and West Pennsylvania Supplement (“WPA Supplement”) expressly

authorized the State Panel to decide Atkinson's NLRA allegations. (ALJ, p. 49; JX-1, pp. 12-14, 20-28, 66, 127-28; JX-2, pp. 188-90, 205-06.) In fact, Atkinson's grievances' and case files expressly referenced his unfair labor practice claims and cited specific statutory provisions, and the State Panel asked detailed questions about the nature of Atkinson's NLRA-protected activity. (Tr. 287-96, 337-38, 353, 954, 981-82, 992, 995-96, 1002-04; RX-17; RX-20.) Because Atkinson's grievances and case files expressly cited and discussed the NLRA, as well as Master Agreement Articles 21 and 37 (which expressly prohibit discrimination for union activity or other protected concerted activity), the State Panel was obviously presented with the statutory issues. (Tr. 290-91, 954; RX-9, pp. 7-8; RX-21.)

In addition, given the State Panel's specific inquiries into the nature of Atkinson's concerted activity, as well as the Panel Decision's reference to multiple contract provisions, the Panel clearly considered Atkinson's NLRA allegations in denying the grievances and finding "no violations of any contract articles."<sup>7</sup> (ALJ, p. 42; Tr. 293, 954, 995-96, 978, 982, 1002-04; RX-21 (emphasis added).) If the State Panel had decided only the contractual "just cause" issue governed by Master Agreement Article 52, it would have had no reason to refer to "contract articles" in the plural context. (RX-21 (emphasis added).) It is nothing short of plainly obvious that this plural reference describes Master Agreement Articles 21 and 37, which are the primary provisions cited in Atkinson's two contractual grievances and discussed throughout his case file.<sup>8</sup> (RX-20, pp. 6-7.)

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<sup>7</sup> If the State Panel had decided only the contractual "just cause" issue governed by Master Agreement Article 52, it would have had no reason to refer to "contract articles" in the plural context. (RX-21 (emphasis added).) It is clear this plural reference describes Master Agreement Articles 21 and 37, which are the primary contract provisions cited in Atkinson's two grievances and discussed throughout his case file. (RX-20, pp. 6-7.) Indeed, it appears from the grievances that Atkinson added the reference to Article 52 only as an afterthought. (RX-20, pp. 6-7.)

<sup>8</sup> Quite frankly, it appears from the grievances that Atkinson added the passing reference to Article 52 only as an afterthought. (RX-20, pp. 6-7.)

The Board confirmed in *Babcock & Wilcox* that deferral “should not be a difficult standard to meet,” explaining, as one example, that “an arbitrator typically should understand that retaliation for the exercise of employees’ Section 7 rights can never constitute ‘just cause[.]’” 361 NLRB No. 132, \*11 (emphasis added). Here, the State Panel’s Decision is obviously a reasonable application of the NLRA. It is entirely permissible to terminate an employee because of repeated performance issues, regardless of his or her union activities. Moreover, there is no evidence or indication whatsoever that the State Panel believed Atkinson’s exercise of his Section 7 rights were “just cause” for termination. The State Panel asked detailed questions about the nature of Atkinson’s NLRA-protected activity (Tr. 287-89, 292-93, 295-96, 353, 337-38, 954, 995, 1002-04), and Atkinson’s grievances and case files expressly cited and discussed the NLRA, as well as Master Agreement Articles 21 and 37 (prohibiting discrimination for union activity or protected concerted activity), so the Panel was obviously presented with and considered the statutory issues. (Tr. 290-91, 954; RX-9, pp. 7-8; RX-21.)

In short, although it is undoubtedly clear that deferral in this case is appropriate even under the heightened standards set forth by *Babcock & Wilcox*, UPS nevertheless respectfully submits that *Babcock & Wilcox* was wrongly decided and appreciates this opportunity to explain why the Board should return to its time-tested *Spielberg/Olin* standard that more faithfully protects and encourages the nation’s traditional labor policy. Furthermore, if *Spielberg/Olin* had remained the law, this matter would have been properly concluded without dispute when the collective bargaining arbitration procedures were exhausted. There would have been no basis for Atkinson or the General Counsel to argue that the State Panel Decision failed to meet the standards for deferral.

### **III. CONCLUSION**

For the reasons detailed above, as well as those intimated by the Company’s Brief in Support of Exceptions and Replies in Support of Exceptions, UPS respectfully urges the Board to

vacate the inequitable and unworkable postarbitral deferral standard set forth in *Babcock & Wilcox* and to retroactively reinstate the historic *Spielberg/Olin* postarbitral deferral standard to this and all other pending cases.

Dated: April 29, 2019

Respectfully submitted,

A handwritten signature in blue ink, reading "Jennifer R. Asbrock", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 29, 2019, the foregoing was served via electronic filing through the National Labor Relations Board website (www.nlr.gov) to the National Labor Relations Board's Office of the Executive Secretary, located at 1015 Half Street SE, Washington, DC 20570-0001, with additional service copies sent as follows:

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