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BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED PARCEL SERVICE, INC.

Respondent,

and

ROBERT C. ATKINSON, JR.,

Charging Party.

Case No 06-CA-143062

**CHARGING PARTY'S
SUPPLEMENTAL BRIEF ON
DEFERRAL**

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I. INTRODUCTION

Robert Atkinson alleges, and an Administrative Law Judge has found, that United Parcel Service (UPS) terminated Atkinson's employment because he opposed a collective bargaining agreement between UPS and his union. Atkinson's grievances were presented to a Joint Panel by a union officer against whom he had run for office and who had recently attempted to get him fired for that campaign activity. Every member of the Joint Panel had participated in negotiating the contract Atkinson opposed, and one of them had monitored and complained about the "Vote No" activity for which Atkinson was fired. The Joint Panel's decision, in its entirety, stated: "Based on the facts presented and the grievant's own testimony, the committee finds no violation of any contract articles, therefore the grievances (#22310 and #22311) are denied. NRNP."

It is impossible to tell from those few words why the Joint Panel held as it did. Under *Babcock*, that lack of information precludes deferral. *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014). Under *Olin*, the very fact that the Board had no idea of the basis for a decision meant the Board must defer to it. *Olin Corp.*, 268 NLRB 573 (1984). The Board's Notice and Invitation to File Briefs asks whether it should abandon *Babcock* and return to *Olin*.

This case perfectly illustrates why *Babcock* is necessary. *Olin* presumed until proven otherwise that any arbitration award¹ considered and appropriately decided all statutory issues. Section II(C)(1), *infra*. Reviewing courts have widely condemned this presumption. Section II(C)(2). The parties to a collective bargaining agreement are free to negotiate substantive rights and standards different from those in the NLRA. Section II(B)(2). Arbitrators must adhere to

¹ For ease of reading, Atkinson will use "arbitration" to refer to the private contract dispute resolution generally. The Board's Invitation notes "the standard for deferral to a joint grievance panel is identical to that generally applicable to arbitration awards." Notice and Invitation to File Briefs, p. 1 fn 1 *citing Airborne Freight Co.*, 343 NLRB 550, 580 (2004).

those contractual standards. Section II(B)(3). Meaningful analysis of an award is therefore necessary to determine whether the arbitrator addressed statutory issues. Meaningful analysis is also necessary to determine whether the parties have purported to waive statutory rights they cannot waive – such as the right to dissent at issue in this case. Section II(B)(5). The Board’s duty is to protect the interests of the public and employees, not just those of the unions and employers who control the arbitration process. Section II(B)(4).

In addition, *Olin* effectively forced parties to arbitrate statutory issues whether wished to or not. Section II(D). *Babcock* honors freedom of contract by allowing parties to negotiate for themselves the scope of their arbitration process.

In any event, this is not the case in which to reconsider *Babcock*. There are two additional reasons why deferral is inappropriate which are independent of *Babcock*: a delay of five years in scheduling arbitration and the bias of both Atkinson’s union representative and the Joint Panel. Section II(A). Because the appropriateness of *Babcock* is moot and for several additional reasons, using this case to reconsider *Babcock* would more nearly resemble rulemaking without public notice or comment than appropriate adjudication. Section II(B).

II. ARGUMENT

A. This is not the case to reconsider *Babcock*

1. Atkinson has three independent arguments against deferral.

The first reason the Board should not use this case to reconsider *Babcock* is that the result on the question of deferral will be the same with or without *Babcock*. At all stages in these proceedings, Atkinson has argued three independent bases for deferral: because (1) *Babcock* & *Wilcox* precludes it; (2) years after the first discharge the Union and Employer have not even scheduled an arbitration hearing; and (3) conflicts of interest prevented “fair and regular”

proceedings. Charging Party's Post-Hearing Brief, p. 5-19; Charging Party's Exceptions Nos. 2-7; ; Brief in Support of Charging Party's Exceptions ("CP Opening Brief"), p. 10-15; Charging Party's Answer to Respondent's Exceptions ("CP Answer"), p. 3-8; Charging Party's Reply in Support of Exceptions ("CP Reply"), 1-7.

Since the ALJ found that *Babcock* precluded deferral, he did not reach the other two grounds. ALJ Decision, p. 48-50. Atkinson excepted to this failure to the extent necessary for the Board to resolve the issues before it. Exceptions Nos. 2-7. Atkinson reiterates those exceptions here and requests that prior to revisiting *Babcock* the Board decide whether it is necessary to do reach that question. The answer is clearly not.

The first reason Atkinson has argued deferral is inappropriate regardless of *Babcock* is excessive delay. Charging Party's Exceptions No. 2; CP Opening Brief, p. 10; CP Answer, p. 3; CP Reply, p. 1-2. Before the ALJ was not one but two discharges of Atkinson: one on June 20, 2014 and one on October 28, 2014. ALJ Decision, p. 1. As of April 29, 2019, the June 20, 2014 discharge still has not been scheduled for arbitration. CP Brief on Exceptions, p. 10; Tr. 5:954 (McCready). The Board has long required that deferred cases be "submitted promptly to arbitration." *Collyer Insulated Wire*, 192 NLRB 837, 843 (1971). Five years is not prompt.

Second, Atkinson argued deferral is inappropriate because the Joint Panel proceedings were not "fair and regular" as required by *Spielberg* and *Olin*. Charging Party's Exceptions Nos. 3-7; CP Opening Brief, p. 10-15; CP Reply, p. 4-7; *quote from Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082 (1955). Atkinson respectfully requests the Board consider his full briefing on this subject, as the facts and law supporting his position are abundant.

As a brief reminder, however, the union official responsible for Atkinson' grievances was Betty Fischer. In the summer and fall of 2014 – i.e. at exactly the time she was handling his

grievances – Atkinson ran for office against Fischer and earned 40% of the vote. Exception 6; Tr. 1:45-46, 1:232-34. Fischer forwarded Atkinson’s Vote No activity to management and went so far as to speculate that perhaps a meeting Atkinson mentioned in one post occurred while he was on the clock. Exception 7; ALJ Decision, p. 15; CPX 4, p. 1; CPX 4; CPX 5; CPX 7; Tr. 2:206-07. If Fischer’s speculation had been accurate, Atkinson would have engaged in a “cardinal infraction” warranting immediate termination. Exception 7; Tr. 4:803.

Like Fischer, every member of the Joint Panel had participated in the negotiation of the contract that Atkinson successfully opposed. Exception 4; Tr. 1:206-07, 5:975-76; CPX 7. Moreover, Joint Panel Co-Chair Dennis Gandee was deeply involved in monitoring and trying to limit the Vote No activity for which Atkinson was fired. *See, e.g.*, Tr. Tr. 1:189, 5:976, CPX 1; CPX 2; CPX 5, pp. 46, 48; RX 1, p. 11. Gandee forwarded material identifying Atkinson as a “ring leader” to upper management, and he asked whether UPS needed to tolerate the Vote No activity. CX 1; RX 1, p. 11 of PDF; Tr. 4:663, 838; *see also* CX 2; CX 4, p. 45-46, 47-49, 81-82; RX 1, p. 1, 5, 6, 7.

Finally, Atkinson argued that any one of his three arguments against deferral is sufficient to preclude deferral of all charges. CP Opening Brief, 9; CP Reply, p. 1-4. If two claims are factually and/or legally related and one is deferrable while the other is not, then the Board proceeds on both charges. *Id.*

Thus, the Employer’s failure to schedule arbitration for the June 20, 2014 discharge precludes deferral both on that discharge and on the closely related October 28, 2014 discharge. The lack of fair proceedings likewise entirely precludes deferral. Determining whether *Babcock* should apply to the Joint Panel decision on the October 28 discharge is superfluous.

2. *The Board should avoid overreaching.*

The Board should not revisit *Babcock* in this case because doing so would more nearly resemble rulemaking without notice and public comment than adjudication of issues actually disputed by the parties to a particular case.

The Administrative Procedure Act requires administrative agencies to provide public notice and an opportunity for comment before rulemaking. 5 U.S.C. § 553(b) and (c). Unlike most agencies, the Board has a practice of developing new legal principles primarily through adjudication. *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 374 (1998). Such a practice is in general within the Board’s discretion, but “there may be situations where the Board’s reliance on adjudication would amount to an abuse of discretion or a violation of the Act.” *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974).

Using this case to revisit *Babcock* would amount to such an abuse of discretion, because it would more nearly resemble rulemaking without an opportunity for public comment than adjudication of the issues necessary to decide a case.

First, as discussed above, the the Board need not determine the validity of *Babcock* to decide this case. Section II(A), *supra*.

Second, no party has argued that *Babcock* should be revisited. *See, e.g.* Respondent Brief in Support of Exceptions, p. 36-40; Respondent Answer to Charging Party’s Exceptions, p. 11-17; Respondent’s Answer to General Counsel’s Exceptions (no mention of deferral); Respondent’s Reply to Charging Party’s Exceptions, p. 16; Respondent’s Reply to General Counsel’s Exceptions, p. 3-6. This fact adds to the appearance of rulemaking.

Third, the panel majority declined, despite the urging of the dissent, to provide notice to the public and invite *amicus* briefing. Notice and Invitation to File Briefs, p. 4.

Since at least the 1950's, the Board has solicited briefing in some major cases . . . While the Board may be expert in the National Labor Relations Act, employers, employees, and unions are expert in the effects of the Board's decisions in workplaces around the country. It should be clear that the Board benefits from public input and that the public is interested in being heard.

Boeing Co., 365 NLRB No. 154, p. 31-32 (2017)(McFerran dissenting)(footnotes including extensive citations omitted).

Fourth, the Board has had almost no adjudicative experience with *Babcock*. The *Babcock* Board exercised restraint not only by applying its holdings prospectively only, but by delaying its application to many contracts until they had come open for renegotiation, so that employers and unions could address any language that might have relied on *Olin*. *Babcock*, 361 NLRB 1139-40. Therefore, the only published Board decision applying *Babcock* of which Atkinson is aware is *Mercy Hospital*. 366 NLRB No. 165 (2018).

The primary change since *Babcock* is the composition of the Board. And that is no basis for reconsideration. *Boeing Co.*, 365 NLRB No. 154, p. 31-32 (2017)(McFerran dissenting); *Brown & Root Power & Manufacturing Inc.*, 2014 WL 4302554, 2014 NLRB LEXIS 669 (Aug. 29, 2014); *UFCW, Local No. 1996 (Visiting Nurse Health System, Inc.)*, 338 NLRB 1074, 1074 (2003) (full Board), *citing Iron Workers Local 471 (Wagner Iron Works)*, 108 NLRB 1237, 1239 (1954).

B. The Board needs some idea what it is deferring to.

1. The Act distinguishes ULPs and grievances.

Even if it were appropriate to reconsider *Babcock* in this case, the Board should not do so. *Babcock* corrected two fatal flaws in *Olin*. First, and most relevant here, *Babcock* requires the Board to have some idea what it was deferring to. Atkinson will begin by discussing why the

structure of the Act requires at least some analysis of the basis for an arbitration award prior to deferral.

The assessment of any deferral policy should begin with the statutes at issue. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 290-92 (2002). Section 10(a) of the Act sets out the power of the Board:

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

29 U.S.C. § 160(a)(emphasis added).

Section 203(d) of the Labor Management Relations Act sets out a policy favoring arbitration: “Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising *over the application or interpretation of an existing collective-bargaining agreement.*” 29 U.S.C. § 173(d)(emphasis added).

The italicized text of these two statutes set out a clear distinction: arbitration is favored for the interpretation of collective bargaining agreements, while the Board holds authority over the enforcement of the NLRA. 26 U.S.C. § 160(a); 29 U.S.C. § 173(d); *Babcock & Wilcox*, 361 NLRB 1129-30; *NLRB v. Yellow Freight Systems*, 930 F.2d 316, 321 (3rd Cir. 1991); *NLRB v. General Warehouse Corp.*, 643 F.2d 965, 969 fn 15 (3rd Cir. 1980); *Stephenson v. NLRB*, 550 F.2d 535, 539-40 (9th Cir. 1977).

The NLRA and a collective bargaining agreement are different. They promote different interests, create different substantive rights, and require different enforcement mechanisms. Any deferral policy that fails to contend with this basic distinction will lack a sound statutory basis.

Plumbers & Pipefitters Local Union No. 520 v. NLRB, 955 F.2d 744, 746 (D.C. Cir. 1992). To contend with the difference requires meaningful assessment of the arbitration award at issue.

2. *The Act and union contracts create different substantive rights.*

A “fundamental premise” of the National Labor Relations Act is “freedom of contract . . . private bargaining under governmental supervision of the procedure alone, without any compulsion over the actual terms of the contract.” *Babcock*, 361 NLRB at 1147 (Miscimarra, dissenting) quoting *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107-08 (1970)(emphasis from *Babcock* removed). There is no requirement that the parties agree to any particular proposal, let alone integrate the provisions of the Act or caselaw interpreting it into their agreement. *Id.*; 29 U.S.C. § 158(d). The parties are free to some extent² to waive their own or employees’ rights under the Act – but they are by no means required to do so. *Babcock*, 361 NLRB at 1147 (Miscimarra, dissenting); see also *Darr v. NLRB*, 801 F.2d 1404, 1408 (D.C. Cir. 1986); *Bloom v. NLRB*, 603 F.2d 1015, 1020 (D.C. Cir. 1979)(“an employee does not waive his statutory right to be free from unfair labor practices by virtue of his being a party to a collective bargaining agreement”).

Thus, the parties may limit by contract some acts the NLRA permits employers to take, and they may choose not to address some acts the NLRA prohibits. “[C]ontract and statutory issues may be factually parallel but involve distinct elements of proof and questions of factual relevance.” *Taylor v. NLRB*, 786 F.2d 1516, 1522 (11th Cir. 1986).

Take, for example, the words “for cause” – words the dissent in *Babcock* emphasized appear in many collective bargaining agreements as well as the Act. *Babcock*, 361 NLRB at

² Section II(B)(5) discusses some of the limits on this ability.

1140-45 *citing* 29 U.S.C. § 160(c). Both the Board and many Circuit Courts have emphasized that those words may refer to very different standards in the two different places. *Babcock*, 361 NLRB at 1131-32, 1134-35; *NLRB v. Ryder/P.I.E. Nationwide*, 810 F.2d 502, 506 (5th Cir. 1987); *NLRB v. Magnetics International, Inc.*, 699 F.2d 806, 812 (6th Cir. 1983); *Pioneer Finishing Corp. v. NLRB*, 667 F.2d 199, 202-03 (1st Cir. 1981); *General Warehouse*, 643 F.2d at 970 (Third Circuit); *St. Lukes Memorial Hospital, Inc. v. NLRB*, 623 F.2d 1173, 1178-79 (7th Cir. 1980); *Stephenson*, 550 F.2d at 538-39 (Ninth Circuit).

The Third Circuit explained the point well in *General Warehouse*:

[In arbitration,] ‘Just cause’ is to be determined by the terms of the collective bargaining agreement. The arbitrator may or may not take into account all motives for the discharge. Section 8(a)(1) and (3) violations, on the other hand, are to be adjudged in accordance with judicial standards and must take into account both the employer's justifiable cause to discharge the employee and its possible discriminatory motive.

General Warehouse, 643 F.2d at 970 fn 19.

The Fifth Circuit agreed in *Ryder*:

The issue before the ALJ and the Board was whether Ryder had discharged Pate for his grievance-filing activity. The arbitration proceedings addressed only the issue of whether Ryder had good cause to discharge Pate under the collective bargaining agreement. Although the arbitration hearing dealt to some degree with Pate’s claim that he was treated more severely than other drivers, it did not consider evidence pertaining either to Pate’s prior history of grievance filing or the company’s alleged hostility to grievance filing.

Ryder, 810 F.2d at 506. The Sixth, Seventh and Ninth Circuits agree as well. *Magnetics International*, 699 F.2d at 812 (fact that there was “just contractual cause” for discharge independent of the “crux of the statutory issue”); *St. Lukes Memorial Hospital*, 623 F.2d at 1178-79; *Stephenson*, 550 F.2d at 539-40.

An example from the First Circuit shows the discrepancies between a contractual “just cause” right and the rights provided by Section 8(a)(3) can be increased by other provisions of the contract:

The arbitrator’s opinion clearly evidences that he was solely concerned with Pacheco had violated the contract by distributing the leaflets . . . In the case at bar, the finding that the contract was violated does not necessarily determine that Pacheco had no protection under the statute. To so determine, the arbitrator would have had to consider the separate, statutory issues: whether the content of the leaflet was protected under the statute and whether the contract waived statutory rights to enter and to distribute the leaflet.

Pioneer Finishing, 667 F.2d at 202-03. Other common provisions that could increase the discrepancies would include a list of grounds for termination (such as the “cardinal sins” in the UPS contract here, tr. 4:803), no-fault attendance policies, and last-chance agreements.

Of course, there are many times when the crux of a case will be contractual. For example, if an employer discharges an employee for violating a no-strike provision, both a grievance and a ULP are likely to turn on the question of whether the employee’s actions violated that provision. *See, e.g. Plumbers & Pipefitters Local 520*, 955 F.2d at 754. However, the fact that congruence between statutory and contractual issues is common does not mean that it can be presumed. *Magnetics International*, 699 F.2d at 812 (“we will not presume that the arbitrator’s award makes such an implicit finding” about the “crux of the statutory issue”); *Pioneer Finishing*, 667 F.2d at 203 (“speculation” that just cause award considered statutory rights); *General Warehouse*, 643 F.2d at 970, 970 fn 19 (arbitrator “could, and apparently did, make his decision without considering” company’s possible illegal motives).

3. *Arbitrators confine themselves to the contract.*

Not only can it not be presumed that contract and statutory provisions are the same – it also decidedly cannot be presumed that arbitrators will import statutory considerations into their contract awards.

It is axiomatic that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.” *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *see also Babcock*, 361 NLRB at 1148 (Miscimarra, dissenting). This principle limits not only which cases reach an arbitrator but how the arbitrator analyzes them. As explained by the Supreme Court, “an arbitrator is confined to interpretation and application of *the collective bargaining agreement . . .* his award is legitimate only so long as it draws its essence from the collective bargaining agreement.” *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)(emphasis added).

Section 203(d) incorporates this limitation by favoring arbitration of “disputes arising over the application or interpretation of an existing collective-bargaining agreement.” 29 U.S.C. § 173(d)(emphasis added).

On top of that, most collective bargaining agreements also emphasize the same restriction. As noted by Chairman Miscimarra, “If one looks at existing arbitration provisions, these typically limit the arbitrator’s authority to the ‘interpretation and application of this agreement’ and typically prohibit the arbitrator from ‘adding to, subtracting from, or modifying’ the CBA.” *Babcock*, 361 NLRB at 1146.

In other words, if a contract and the National Labor Relations Act differ, it is the duty of the arbitrator to apply the contract and only the contract. Because “arbitration is a contractual

mechanism, arbitrators are obligated to effectuate the will of the parties to the contract. Thus, they are not bound to apply the Board's or the courts' definition of contractual standards, or to enforce rights under the Act. *Stephenson*, 550 F.2d at 540. The "arbitrator's primary duty is to effectuate the intent of the parties to the contract rather than the requirements of the law." *General Warehouse*, 643 F.2d at 970 fn 19 citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974). The "arbitrator's competence lies in 'the law of the shop, not the law of the land.'" *Taylor*, 786 F.2d at 1520 quoting *Gardner-Denver Co.*, 415 U.S. at 57.

The restrictions on arbitrators could not be clearer. Absent evidence to the contrary, the most reasonable presumption is that an arbitrator complied with these limitations and confined his or her analysis to the terms of the parties' contract. A meaningful inquiry must be made to determine whether the arbitrator in a particular case addressed the statutory issues entrusted to the NLRB.

4. *The Board must safeguard the public interest.*

A final point about the structure of the NLRA that any deferral policy must consider is that the Act concerns interests beyond those of the union and the employer. Many unfair labor practice cases will involve four distinct and potentially conflicting sets of interests: those of the union, the employer, individual employees, and the public. The handling of unfair labor practices "is to be performed in the public interest and not in vindication of private rights." *Independent Stave Co.*, 287 NLRB 740, 741 (1987) quoting *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957).

The Board and many courts have emphasized the importance of these multiple interests to any deferral policy. *Babcock* 361 NLRB at 1129; *Plumbers & Pipefitters Local 520*, 955 F.2d

at 752, 756; *Yellow Freight*, 930 F.2d at 321; *Taylor*, 786 F.2d at 1521-22, 1522 fn 8; *Ad Art, Inc. v. NLRB*, 645 F.2d 669, 676 (9th Cir. 1980); *Stephenson*, 550 F.2d at 539, 539 fn 6.

For example, the Fifth and Eleventh Circuits have noted that “the union, which generally controls the grievance process, because its interests are not necessarily identical to those of its employees, may not adequately protect their statutory rights.” *Taylor*, 786 F.2d at 1521 quoting *McNair v. United States Postal Service*, 768 F.2d 730, 736 (5th Cir. 1985).

Taylor held that *Olin* did not account for this potential conflict:

The [*Olin*] standard further ignores the practical reality of many bipartite proceedings, in which *individual rights may be negotiated away in the interest of the collective good*. The circumstances surrounding bipartite proceedings such as Taylor’s Area Committee hearing hardly inspire confidence in the fairness of the process or the accuracy of the result. A recent survey of Teamster Grievance Committees casts doubt on the competence of union representatives, thoroughness of investigation, adequacy of preparation, and reliability of evidence.

Taylor, 786 F.2d at 1522 (footnote omitted, emphasis added) citing *Summers, The Teamster Grievance Committees: Grievance Disposal Without Adjudication*, 37 Proceedings of the National Academy of Arbitrators 130 (1984).

By contrast, the Ninth Circuit held the Board’s standard prior to *Olin* did account for potential conflicts of interest:

The Board apparently recognized [in *Suburban Motor Freight*, 247 NLRB 146 (1980)] that the union’s interest in arbitration may not coincide with that of the individual, and that the *Electronics Reproduction* [213 NLRB 748 (1974)] policy in some instances deprived individuals of statutory rights under the guise of encouraging private dispute resolution.

Ad Art, 645 F.2d at 676.

Other circuits also agree deferral policy must protect the public’s interest. Section 10(a) “has been cited to emphasize that the Board acts in the public interest to enforce public, not private rights, and that the parties cannot by contractual agreement divest the Board’s function to

operate in the public interest.” *Yellow Freight*, 930 F.2d at 321 (Third Circuit) quoting *Gulf State Manufacturers v. NLRB*, 593 F.2d 896, 901 (5th Cir. 1979)(*en banc*).

The Board [unlike an arbitrator] is primarily concerned with the statutory and policy considerations. . . . This difference is emphasized by the remedial powers of the two entities. The arbitration award is limited to the specific controversy at hand whereas the Board may issue orders which cover present and future actions as well as past practice and reach individuals who are not immediate parties to the collective bargaining agreements and/or the controversy under consideration.

Stephenson, 550 F.2d at 539, 539 fn 6 (Ninth Circuit). See also *Plumbers & Pipefitters Local 520*, 955 F.2d at 752, 756 (D.C. Circuit)(deferral policy must consider whether union can compromise conflicting interests of employees).

A deferral policy that requires no explanation whatsoever of the basis for a decision deprives employees of the most rudimentary due process protection against this very real risk. Demanding that employees prove the bias of a particular decision-maker is no substitute. Most deferral decisions are made at the charging stage, where the employee has no means to obtain concrete evidence, should any exist. In the case at hand, for example, much of the evidence of the bias was obtained in response to a trial subpoena. CPX 1 - 6; see also RX 1. At the charging stage, Atkinson did not have available to him the email from his union president suggesting (falsely) he had committed time fraud or the emails showing the participation of the Joint Panel in monitoring and objecting to the “Vote No” activity he helped lead. It was only thanks to *Babcock* that this evidence came to light.

5. Unions cannot waive employees’ right to dissent.

A corollary to the fact that unions, employees, and the public have distinct interests is the doctrine that there are limits on the degree to which unions may waive their employees’ substantive and procedural rights under the Act.

In *Magnavox*, the Supreme Court explained that the ability of unions to waive employees' Section 7 rights is premised on the employees' democratic selection of the bargaining representative and remains valid only so long as the choice remains free. *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325-26 (1974) citing *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956). It is appropriate for unions to negotiate a *quid pro quo* on employees' behalf surrendering the employees' right to strike in exchange for improvements in wages, for example. *Id.* The interests of the union are aligned with those of the employees. Most collective bargaining exchanges are of this nature.

But not all. With respect to the right to dissent, the interests of incumbents and dissidents are opposed. "When the right to such a choice is at issue, it is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating itself as the bargaining representative." *Magnavox*, 415 U.S. at 325. "It is the Board's function to strike a balance among 'conflicting legitimate interests' which will 'effectuate national labor policy,' including those who support versus those who oppose the union." *Magnavox*, 415 U.S. at 326 quoting *NLRB v. Truck Drivers Local Union No. 449, International Brotherhood of Teamsters*, 353 U.S. 87, 96 (1957).

The example considered in *Magnavox* is particularly relevant here. That case concerned limitations on the distribution of leaflets in the workplace. 415 U.S. at 323. The Supreme Court held that right could not be waived because the workplace is "uniquely appropriate for dissemination of views concerning the bargaining representative" which is necessary to the "full freedom of association, self-organization, and designation of representatives of their own choosing." *Magnavox*, 415 U.S. at 325-26 quoting 29 U.S.C. § 151. In the case at hand, the ALJ

found UPS terminated Atkinson for criticizing the acts of the incumbent union. ALJ Decision, p. 6-7, 9-10, 52. It is hardly surprising that UPS and the union agreed the termination should stand.

Grievance handling and arbitration are extensions of the collective bargaining process, so the limits on unions' ability to waive employees' right to dissent extend to that part of the process as well – and therefore to deferral. *Plumbers & Pipefitters Local 520*, 955 F.2d at 751-52, 756; *Darr* 801 F.2d at 1408.

Under the contractual waiver doctrine, the Board could never give deference to a settlement with respect to a “non-waiveable” statutory right - such as the employees' choice of a bargaining representative, the NLRA's prohibitions against “closed shops” and secondary boycotts, and the like. Because a union and an employer may not legally bargain about non-waiveable matters, the Board could not, consistent with the NLRA, give deference to a settlement which implicated such rights.

Plumbers & Pipefitters Local 520, 955 F.2d at 756.

In *Darr*, for example, the D.C. Circuit criticized and remanded a deferral decision in part because the Board did not “consider whether a union can legitimately waive an employee's rights under Section 8(a)(1) and (3) of the Act, and if so whether the agreement in this case has in fact done so.” 801 F.2d at 1408.

If unions cannot waive employees' right to dissent, then the Board cannot defer to an arbitration award without determining whether it purports to do so.

C. Reviewing courts reject ill-informed deferral.

1. Olin requires deferral to silence.

As this case vividly demonstrates, the *Olin* framework requires the Board to defer when it has no idea of the basis for an arbitration decision.

Olin requires deferral if

(1) The contractual issue is 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 . . . unless the arbitrator’s decision is not susceptible to an
interpretation consistent with the Act . . .

Finally, we would require that *the party seeking to have the Board reject deferral*
and consider the merits of a given case show the above standards for deferral have
not been met.

Olin, 268 NLRB at 574 (emphasis added). Because the bar is very low for deferral and the
burden is on the party opposing it, deferral is most likely when it is least appropriate – when the
arbitrator’s decision does not indicate its basis.

The first standard, “factually parallel,” will be nearly automatically met in any retaliation
case – the employee was disciplined.

The second *Olin* standard requires not that the unfair labor practice have been decided or
even considered, but only that facts relevant to it have been presented. Indeed, *Olin* specifically
discarded a prior requirement that the statutory issue actually have been considered. 268 NLRB
at 574 *rejecting Raytheon Co.*, 140 NLRB 883 (1963). Instead, *Olin* instructed that any question
of what was considered be subsumed into the third standard.

And the burden to prove this third, remarkable condition – that the award be “clearly
repugnant” to the Act – is on the party opposing deferral. *Olin*, 268 NLRB at 574. If the award
is silent, then the burden cannot be met.

To reiterate: if the Board has not the faintest idea why the grievance was decided as it
was – whether rights enshrined in the Act received any consideration whatsoever – then under
Olin, the Board defers.

Consider, for example, the full Joint Panel decision in the case at hand: “Based on the
facts presented and the grievant’s own testimony, the committee finds no violation of any
contract articles, therefore the grievances (#22310 and #22311) are denied. NRNP.” How is one

to show that this is not “susceptible to an interpretation consistent with the Act”? There is nothing in it to contradict any interpretation whatsoever. It would be as easy to prove tea leaves “clearly repugnant” to the Act as those few words.

2. *Reviewing courts condemned Olin’s presumption.*

a. Many circuits rejected the logic of *Olin*.

Unsurprisingly, standards requiring deferral to an award without any idea of its basis have not been warmly received by reviewing courts. *Plumbers & Pipefitters Local 520*, 955 F.2d at 746, 767; *Yellow Freight*, 930 F.2d at 322; *Darr* 801 F.2d at 1408-09; *Taylor*, 786 F.2d at 1521-22; *Magnetics International*, 699 F.2d at 810-11; *General Warehouse*, 643 F.2d at 969; *Stephenson* 550 F.2d at 539-540; *See also Pioneer Finishing*, 667 F.2d at 202-03; *Banyard v. NLRB*, 505 F.2d 342, 347 (D.C. Cir. 1974).

For example, the Eleventh Circuit held in *Taylor* that “*Olin Corp.*’s standard appears on its face to represent an abdication of Board responsibility.” *Taylor*, 786 F.2d at 1522.

By presuming, until proven otherwise, that all arbitration proceedings confront and decide every possible unfair labor practice issue, *Olin Corp.* gives away too much of the Board’s responsibility under the NLRA . . . Such a result cannot be reconciled with the need to protect statutory rights, as expressed by the Supreme Court in *Alexander, Barrentine*, and *McDonald, supra*. *Olin Corp.* either overlooks or ignores those instances where contract and statutory issues may be factually parallel but involve distinct elements of proof and question of factual relevance.

Taylor, 786 F.2d at 1521-22 citing *Alexander, supra*., 415 U.S. 36, *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 284 (1984) and *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

The D.C. Circuit has also expressed frustration with *Olin*. *Plumbers & Pipefitters Local 520*, 955 F.2d at 746, 757; *Darr* 801 F.2d at 1408-09. In *Darr*, the court reversed a deferral decision under *Olin*:

We have profound doubts that the Board may defer to an arbitrator's award merely because the award is roughly analogous to that which the Board would grant – a sort of “Kentucky Windage” approach – without explicitly articulating its view of the interrelationship between the law of a particular bargaining agreement and the NLRA.

Darr 801 F.2d at 1409. When the Board had not revisited the *Olin* doctrine six years later, the D.C. Circuit urged to do so, calling the doctrine “vacuous in significant respects, because it lacks any coherent theoretical basis.” *Plumbers & Pipefitters Local 520*, 955 F.2d at 746.

While the Third Circuit in *Yellow Freight* did not need to consider whether *Olin* requires deferral too readily (the Board had refused to defer), the court's reasoning is inconsistent with *Olin*'s presumption in favor of deferral:

We have explicitly recognized the importance of the Board's condition that deferral depends on the arbitrator's consideration of the statutory issue. In *Al Bryant* we stated, “the requirement that the statutory issues have been presented to and decided by the arbitrator is of particular significance to insure that the Board does not abdicate its responsibility to protect statutory rights.”

Yellow Freight, 930 F.2d at 322 quoting *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 550 (3rd Cir. 1983) and *General Warehouse*, *supra*, 643 F.2d 965; see also *Yellow Freight*, 930 F.2d at 317 (Board had not deferred). The *General Warehouse* case relied upon in *Yellow Freight* held:

We agree with the Ninth Circuit that

It is illogical for the Board, which is responsible for resolving the unfair labor practice issue, to defer to a decision by an arbitrator, who is under no duty and indeed may not be particularly predisposed to consider the statutory issue, solely on the basis of a factually unfounded presumption that the arbitrator had considered the issue.

Stephenson [550 F.2d at 540]. Rather, in order for the Board's deferral policy not to be one of abdication, the Board must be presented with some evidence that the

statutory issue has actually been decided.

General Warehouse, 643 F.2d at 969 (footnotes omitted).

The Ninth Circuit case endorsed in *General Warehouse* rejected a predecessor to *Olin* as abdicating the Board's duties, for reasons that would apply equally to *Olin*:

Under *Electronic Reproduction*, the Board is now willing to defer to an arbitration award even though no indication is given that the arbitrator considered the unfair labor practice issue. Deferral in that situation is contrary to Section 10 of the Act wherein the Board is empowered to prevent unfair labor practices. That power is specifically held "not to be affected by other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . . ." 29 U.S.C. § 160(a). Consequently while the Board may decide to defer where the situation justifies such action, the Board cannot abdicate its duty to consider unfair labor practice charges by deferring when it has no lawful basis for doing so.

Stephenson 550 F.2d at 539-40 (ellipses in *Stephenson*) citing *Electronic Reproduction Service Corp. supra*, 213 NLRB 758. "The Board cannot properly exercise its discretion in deferring to an arbitration decision when it is ignorant of the issues presented to and considered by that panel and of the basis for the latter's decision." *Stephenson* 550 F.2d at 541.

The Sixth Circuit has likewise rejected such abdication:

The policy considerations underlying these opinions by the Third, Ninth, and District of Columbia circuits are compelling. . . .

Therefore, we will honor the Board's decision to defer only when it appears from the arbitrator's award that the arbitrator considered and clearly decided all unfair labor practice charges. We will not speculate about what the arbitrator must necessarily have considered.

Magnetics International, 699 F.2d at 810-11 (footnotes omitted). See also *Pioneer Finishing*,

667 F.2d at 202-03 (Board need not "defer merely on the speculation that he must have considered an employee's rights under the statute")(First Circuit); *Banyard*, 505 F.2d at 347

(D.C. Circuit) quoting *Local Union 715, IBEW v. NLRB*, 494 F.2d 1136, 1138 (D.C. Cir.

1974)("This reasoning appears to contradict the Board's own decision to the effect that deferral

is not appropriate with respect to an issue not considered by the arbitration panel. We do not know what *was* considered in the case at bar.”)(emphasis in original).

b. *Olin* was often mentioned but rarely embraced.

The dissent in *Babcock* argued, “In fact, reviewing federal courts of appeals have routinely approved or applied without adverse comment the *Spielberg/Olin* standards.” 361 NLRB at 1155-56 (Miscimarra, dissenting). That is at best narrowly accurate, and it certainly would not be fair to imply that many reviewing courts have endorsed *Olin*’s willingness to presume statutory issues have been considered and resolved. Only one published case cited by the dissent does so. *NLRB v. Aces Mechanical Corp.*, 837 F.2d 570, 574 (2nd Cir. 1988).

For example, the first case cited by the dissent is a 1984 D.C. Circuit case. *Babcock*, 361 NLRB at 1156 *citing Bakery, Confectionery and Tobacco Workers v. NLRB*, 730 F.2d 812, 815-816 (D.C. Cir. 1984). While that case might not have commented adversely on *Olin*, it considered carefully the interaction of the statutory and contract issues in a way that *Olin* often will not permit. 730 F.2d at 815-16. Subsequent DC Circuit cases definitely did comment adversely. *Plumbers & Pipefitters Local 520*, 955 F.2d at 746, 757 (“vacuous”, “lacks coherent theoretical basis”, “well-advised to reconsider”); *Darr* 801 F.2d at 1409 (“profound doubts”, “Kentucky Windage”).

Two other cases cited by the dissent are discussed in detail above – they uphold decisions *not* to defer using reasoning that is *not* consistent with *Olin*. *Babcock* 361 NLRB at 1156 *citing Yellow Freight*, 930 F.2d at 321 *and Ryder*, 810 F.2d at 506. *Yellow Freight* emphasized the necessity of an arbitrator’s actual consideration of the statutory issue, drawing on a line of cases that had rejected previous versions of *Olin* for failing to insist on clear evidence of actual consideration. Section II(C)(2)(a), *supra*, discussing *Yellow Freight*, 930 F.3d at 322. *Ryder*

emphasized the difference between just cause under a collective bargaining agreement and the statutory standard. Section II(B)(2), *supra*, discussing *Ryder*, 810 F.2d at 506.

Most of the remaining cases simply did not consider whether *Olin*'s core reasoning was valid. *Equitable Gas* and *Grand Rapids Die Casting* turned on the doctrine that Section 8(a)(4) allegations preclude deferral. *Equitable Gas Co. v. NLRB*, 966 F.2d 861, 865-67 (4th Cir. 1992); *Grand Rapids Die Casting v. NLRB*, 831 F.2d 112, 115-116 (6th Cir. 1987). In *Haberson*, the court explicitly reserved the question of the validity of the *Olin* doctrine as applied by the Board.³ *Haberson v. NLRB*, 984 F.2d 977, 983-84 (10th Cir. 1987). *Doerfer* essentially applied estoppel against the union, and *Garcia* found that even under *Olin* the award at issue was repugnant to the Act. *Doerfer Engineering v. NLRB*, 79 F.3d 101, 103 (8th Cir. 1996); *Garcia v. NLRB*, 785 F.2d 807, 809-810 (9th Cir. 1986); *see also* Section II(C)(2)(a), discussing *Stephenson* 550 F.2d at 539-40 (Ninth Circuit has rejected predecessor to *Olin* presumption).

In sum, it is of little relevance that circuit courts have repeatedly mentioned *Olin*, often (though by far not always) without criticizing it. What matters is the substance of their legal holdings. One circuit has accepted the presumption at the heart of *Olin*. The rest have condemned it as abdication.

D. The Board should not dictate to parties what they arbitrate.

The second error corrected by *Babcock* is that involves the Act's principle of freedom of contract. *Olin* had the effect of forcing parties to arbitrate unfair labor practices whether they wanted to or not, while *Babcock* looks to what the parties actually agreed.

³ The court endorsed a fairly searching analysis performed by an ALJ, which the Board had rejected as beyond that permitted by *Olin*. *Id.* The court remanded for further explanation. *Id.*

As discussed above, the Act espouses “freedom of contract . . . private bargaining under governmental supervision of the procedure alone, without any compulsion over the actual terms of the contract.” Section II(B)(2), *supra quoting Babcock*, 361 NLRB at 1147 (Miscimarra, dissenting) *quoting H. K. Porter Co*, 397 U.S. at 107-08 (emphasis from *Babcock* removed). This principle extends to the terms of arbitration agreements – “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.” Section II(B)(3), *supra quoting Warrior & Gulf Navigation*, 363 U.S. at 582; *see also Babcock*, 361 NLRB at 1148 (Miscimarra, dissenting).

The Act encourages arbitration “over the application or interpretation of an existing *collective-bargaining agreement*.” Section II(B)(1), *supra*, quoting 29 U.S.C. § 173(d)(emphasis added). The Act does not encourage, let alone compel, arbitration of statutory issues. *Id.*; 29 U.S.C. § 160(a). As noted by the dissent in *Babcock*, “Unions may also be reluctant to make themselves responsible for pursuing what would otherwise be statutory claims that individual employees would pursue for themselves.” 361 NLRB 1148.

Yet *Olin* effectively adds statutory issues to the parties’ arbitration provision regardless of their intent. *Olin* specifically rejected any requirement of “the arbitrator’s having considered the unfair labor practice issue.” 268 NLRB at 574 *quoting Raytheon, supra*, 140 NLRB 883. Nor is there any requirement that the parties have submitted any statutory issue to the arbitrator or have agreed to do so. *Id.* It is enough that the statutory issues be “factually parallel” and “facts relevant to resolving the unfair labor practice” be put before the arbitrator “generally.” *Olin*, 268 NLRB at 574.

Thus, under the logic of *Olin*, if a party presented a grievance to the arbitrator, then any generally related unfair labor practice was swept up with it. The contract might have specifically

excluded the statutory issue. The parties might have agreed the arbitrator had no authority to decide it. Yet if there was a significant factual overlap between the grievance the parties agreed to arbitrate and the statutory issue they agreed not to, then the facts relevant to the latter would have been “generally” presented. *Olin* would deem the award to have resolved the unfair labor practice unless it failed the remarkably lenient test of being “clearly repugnant to the Act.” 268 NLRB at 574. In other words, the Board forced the parties to arbitrate statutory issues.

Babcock returned control of arbitration where it belongs, with the parties. 361 NLRB at 1131. If the parties agree to submit statutory issues to the arbitrator, the Board honors that with a lenient standard for deferral – the arbitrator need only have considered the statutory issue and reached “a decision maker reasonably applying the Act could reach.” 361 NLRB at 1131, 1133. Agreement to submit a statutory issue can be direct or indirect – it is enough that the parties have included the issue in their contract and agreed to arbitrate contractual disputes. 361 NLRB at 1131. However, if the parties have never agreed to submit an issue to the arbitrator, the Board will not require them to. 361 NLRB at 1131.

The Board should continue to honor the principle of freedom of contract by allowing parties to decide for themselves what they want to submit to arbitration.

III. CONCLUSION

The Board posed three questions in its Notice and Invitation. First, the Board asked whether it should adhere to, modify or abandon *Babcock*. The Board should adhere to *Babcock*. As set out above, this is not the case to revisit *Babcock*. There are two other reasons deferral is inappropriate, so the wisdom of *Babcock* is moot. Revising *Babcock* would give the appearance of rulemaking without notice and comment. *Babcock* ensures that the Board has

some idea of what it is deferring to, rather than presuming that contractual issues are identical to statutory ones and ignoring potential for conflict among the interests of unions, employees and public. *Babcock* also honors freedom of contract by allowing parties to decide for themselves whether they wish to include statutory issues in their arbitration agreements.

Second, the Board asks whether it should return to *Olin*. It should not. *Olin* requires the Board to abdicate its statutory role by deferring even when it has no idea whether statutory issues have been considered and if so, what was decided about them. Reviewing courts have widely condemned this presumption. Any deferral policy must enable meaningful assessment of what has been decided and why. It must also honor the right of parties to decide for themselves what to arbitrate.

Finally, the Board asks whether any new standard should be applied retroactively or prospectively. In the case at hand, any new standard selected by the Board would be moot; the Board should consider the two additional reasons why deferral is inappropriate. Atkinson is in no position to argue on behalf of the parties to other cases, but he does note (in addition to the concerns set out above) that the Board in *Babcock* gave all parties years to renegotiate their contracts in case prior language had relied upon *Olin*. The Board should not change course shortly after the conclusion of that negotiation period without providing the parties a similar opportunity to readjust.

DATED this 29th Day of April, 2019

Respectfully submitted,

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