The Union’s Request for Review of the Regional Director’s Decision and Order Granting Unit Clarification is denied. Under Section 102.67(d) of the Board’s Rules and Regulations, “[t]he Board will grant a request for review only where compelling reasons exist therefor,” including when a “substantial question of law or policy is raised because of . . . [a] departure from[ ] officially reported Board precedent.” Contrary to the Union and our dissenting colleague, the Regional Director’s decision here is consistent with Board precedent, which the Union does not ask us to overrule.

The issue presented by the Employer’s unit clarification petition is one of accretion: whether the existing bargaining unit necessarily includes two employees, the Piqua technicians, working at the Employer’s new facility in Piqua, Ohio. “[I]t is well-established that accretion is a matter involving the application of statutory policy and standards—a matter within the particular province of the Board.” Central Parking System, 335 NLRB 390, 391 fn. 3 (2001), citing Marion Power Shovel Co., 230 NLRB 576, 577–578 (1977). See, e.g., Tweddle Litho, Inc., 337 NLRB 686, 686 (2002) (finding that the Regional Director erred in deferring unit-clarification case to arbitration when the issue posed by the union’s grievance was “whether the new employees are to be accreted to” the existing bargaining unit). As the Board has explained, “because accreted employees are added to the existing unit without an election or other demonstration of majority support, the accretion doctrine’s goal of promoting industrial stability is in tension with employees’ Section 7 right to freely choose a bargaining representative” and the “Board accordingly follows a restrictive policy in applying the accretion doctrine.” NV Energy, Inc., 362 NLRB 14, 16 (2015). Applying this well-settled law, the Regional Director concluded that because the Piqua technicians did not share an overwhelming community of interest with bargaining unit employees, they could not be accreted to the unit, as the Union had urged. In seeking Board review, the Union does not challenge the correctness of the Regional Director’s conclusion on the accretion issue. Nor has the Union ever argued that it has proof of majority support from the Piqua technicians. Instead, the Union pursues only its alternative argument that the Regional Director should have deferred this matter to the parties’ arbitration procedure, asserting that the issue presented is purely a question of contract interpretation. That view, endorsed by our dissenting colleague, is mistaken. As noted, the issue presented by the petition here is accretion, a statutory question for the Board alone to decide, based on the Board’s well-established standard.

Our dissenting colleague insists that the “parties agreed to a provision in their collective-bargaining agreement [Article 1, Section 1] that specifically addresses the parties’ precise dispute here” and that the “unit status of the Piqua technicians depends on the meaning” of this provision. However, the “precise dispute here,” as framed by the unit clarification petition, is whether, under the National Labor Relations Act, the Piqua technicians can be accreted to the unit. As we have shown, under Board precedent, that issue turns not on the meaning of the parties’ contract, but rather on application of the Board’s accretion standard. If the parties’ agreement purported to authorize even though there were “contractual issues relevant to the representation case issue.” 337 NLRB at 686 fn. 2. In this case, there are no contractual issues relevant to the issue of accretion and thus deferral would be even more inappropriate than it would have been in Tweddle Litho.

Our colleague notes that the Tweddle Litho Board distinguished Verizon Information Systems, 335 NLRB 558 (2001), and suggests that the basis for the distinction does not apply to this case. We disagree. In Verizon—which involved no accretion or unit-clarification issue—the Board dismissed a union’s representation petition after the union had invoked and benefitted from a voluntary-recognition agreement with the employer. The Tweddle Litho Board described the Verizon decision as based on estoppel and pointed out that “no issue of estoppel [was] raised by the employer’s UC [unit clarification] petition.” 337 NLRB at 686. The same is true here, even if the contractual provision cited by our colleague—despite its apparent differences from the agreement in Verizon—could be viewed as a voluntary-recognition agreement incorporating arbitration.

1 Under Sec. 102.67(g) of the Board’s Rules and Regulations, the Union thus has waived the issue. Our dissenting colleague argues that the Union’s failure to challenge the Regional Director’s accretion determination is immaterial, but he properly acknowledges that the determination is uncontroverted.

2 The provision recites that:

This Agreement shall also apply to all future Penske operations commenced in the greater Dayton, Ohio area, where Penske is contracted to provide truck maintenance and leasing services, however, such recognition is limited to Penske’s discretion to exclude any new facility or operation based on customer or operational requirements. This recognition shall in no way contravene the rights promulgated under the National Labor Relations Act, as [amended].

3 We are not persuaded by our colleague’s argument that Tweddle Litho, supra, is distinguishable. There, the Board held that a Regional Director had erred in deferring a unit clarification case to arbitration,
accretion in the circumstances here, without any evidence that the Union enjoys majority support, it would be contrary to law. See Melbet Jewelry-Orchard Park, 180 NLRB 107, 110 (1969) (finding employees at new store location, not found to be an accretion, could not be added to an existing unit without showing that those employees wish to authorize the union to represent them). But, in fact, the provision seems to expressly disclaim such an intent, reciting that “recognition shall in no way contravene the rights promulgated under the National Labor Relations Act.”

In advocating deferral, our colleague does not argue that the parties intended for an arbitrator to resolve the accretion issue, the issue presented and decided in this case. Instead, he contends that the Board need not even reach the accretion issue because an arbitrator might hold—under “other theories consistent with the Act”—that the Piqua technicians could be “part of the unit,” if (for example), the Union demonstrated that it had the majority support of the technicians (something it has not claimed here, much less proved). But the possibility that the unit status of the employees might ultimately be resolved in some other forum, on some other legal basis, provides no reason for the Board not to decide the narrow statutory issue properly presented to it in this case. We thus agree with the Regional Director’s observation that “[w]hile there may be a contractual dispute over whether the Employer violated the Agreement by failing to apply the parties’ collective-bargaining agreement to Piqua . . . , the penultimate issue, i.e., whether it is appropriate to accrete the Piqua technicians into the unit at Dayton, is not susceptible to resolution under the contract,” making deferral inappropriate.

Our colleague is mistaken, then, when he says that “today’s decision does not resolve the essential dispute between the parties[].” As noted, the issue presented by the Employer’s unit clarification petition is one of accretion. The Board has not been asked, and is not required, to decide any issue that implicates Article 1, Section 1 of the parties’ collective-bargaining agreement and whether that provision might require the Employer to apply the existing collective-bargaining agreement to the Piqua technicians or to recognize the Union as their bargaining representative. Nothing in today’s decision, which confirms that the Piqua technicians cannot be accreted into the bargaining unit (the “penultimate issue,” as the Regional Director described it), prevents the Union from seeking to add the employees to the unit through some other, lawful mechanism, established by the Act or by agreement. That ultimate issue is not before us, and we do not address it.

Dated, Washington, D.C. July 12, 2022

Lauren McFerran, Chairman

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER PROUTY, dissenting.

The Employer and Union in this case agreed in their collective-bargaining agreement that any new truck maintenance and leasing facility established within a certain geographic area would become part of the bargaining unit and covered by the existing labor agreement, subject to specified employer defenses, and with the express condition that the recognition must not contravene the National Labor Relations Act.

When the Employer established a new facility that appeared to fall within the geographic parameters of its agreement, the Union grieved the Employer’s unwillingness to place the two employees at the new facility under the agreement and, when the dispute was not resolved, requested arbitration. Only then did the Employer pretermit the ongoing grievance-arbitration process, filing a unit clarification petition with the Board and receiving a ruling from the Regional Director clarifying the unit to exclude the two employees working at the new facility.

Contrary to my colleagues, I would grant review and defer the parties’ dispute to their grievance and arbitration procedure, as requested by the Union but rejected by the Regional Director. It is axiomatic that federal labor policy favors the arbitral resolution of disputes between parties to a collective-bargaining agreement and the parties agreed to follow that policy here. The Board too

1 The parties’ most recent collective-bargaining agreement is effective from March 1, 2019 to February 28, 2023. Article 1, Section 1 of that agreement states in relevant part:

This Agreement shall also apply to future Penske operations commenced in the greater Dayton, Ohio area, where Penske is contracted to provide truck maintenance and leasing services, however, such recognition is limited to Penske’s discretion to exclude any new facility or operation based on customer or operational requirements. This recognition shall in no way contravene the rights promulgated under the National Labor Relations Act, as Amended.

Article VI of the contract provides that disputes arising over alleged violations of the agreement are subject to resolution through binding arbitration.

2 See Labor-Management Relations Act Sec. 203(d), 29 U.S.C. § 173(d) (“Final adjustment by a method agreed upon by the parties is declared to be the desirable method for the settlement of grievance disputes arising over the application or interpretation of an existing collective-
recognizes that national labor policy favors the honoring of voluntary agreements reached between employers and labor organizations, including agreements that explicitly address matters involving union representation. Verizon Information Systems, 335 NLRB 558, 559 (2001) (“The Board will enforce such agreements, including agreements that explicitly address matters involving union representation.”). “Although the Board only infrequently defers to arbitration in representation proceedings, the Board will find deferral appropriate when the resolution of the issues ‘turns solely on the proper interpretation of the parties’ contract.’” Central Parking System, Inc., 335 NLRB 390, 391 (2001), quoting St. Mary’s Medical Center, 322 NLRB 954 (1997).

In this case, the parties agreed to a provision in their collective-bargaining agreement that specifically addresses the parties’ precise dispute here, and further agreed that such disputes would be resolved by the grievance-arbitration procedure. Indeed, the Union had invoked, and the parties were participating in, the grievance-arbitration process when the Employer, mid-process, filed its petition with the Board. This is a contractual dispute. The unit status of the Piqua technicians depends on the meaning of Article 1, Section 1 of the parties’ collective-bargaining agreement, and therefore, involves the proper interpretation of the contract. Significantly, the parties agreed, and committed to the arbitrator, the issue that any recognition of the new facility “shall in no way contravene the rights promulgated under the [Act].”

Thus, by the express terms of the contract, the dispute—including the representation aspect of it—is susceptible to complete resolution by the arbitrator. I agree with then-Member Liebman, writing in dissent in Tweddle Litho Inc., 337 NLRB 686, 687 (2002):

“I believe that deferring to arbitration, at least initially, is the better course here. In this case, a question of contract interpretation is posed: whether the work performed by newly-hired employees at the Employer’s distribution center is covered by the Employer’s collective-bargaining agreement with the Union. Resolving that issue may, in turn, lead to representation-related questions, which under current law are matters for the Board. See, e.g., Williams Transportation, 233 NLRB 837 (1977). But that result is not inevitable. The parties may reach an accommodation.

The same is true here, except that Tweddle Litho is distinguishable, and the dissent there should be the majority decision here. In Tweddle, a Board majority rejected the contention that an employer’s UC petition should be deferred pending outcome of the parties’ grievance and arbitration procedure, because the case “presents, at its core, representation issues.” Id. at 686. However, in reaching this conclusion the Board distinguished the situation presented from that, such as in Verizon, supra, where an employer and union have a “specific procedure for voluntary recognition outside of the Board’s processes, including the right to have the unit issue decided by an arbitrator.” Id. That “specific procedure,” missing from Tweddle, is precisely what the parties in the instant case have and, based on the reasoning of Tweddle, the Board should defer to it.4

I also disagree with the weight my colleagues assign to the Union’s decision not to challenge the Regional Director’s accretion findings in its Request for Review. The Regional Director’s accretion findings were based on the incorrect premise that deferral was inappropriate. If review is granted and the case deferred, the Regional Director’s accretion argument need not be reached by the Board, nor did it need to be challenged by the Union. For even assuming the correctness of the Regional Director’s accretion determination, there are other theories consistent with the Act by which the Union might convince an

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4 My colleagues distinguish Verizon, supra, on grounds of estoppel, essentially defined by the majority in Verizon as the union’s initial invocation of and the parties’ participation in the contractually-agreed-to procedures for representation. Again, that is exactly what happened here. My colleagues ignore that the Board in Verizon acknowledged that the salient fact on which its finding was premised was “that the Petitioner invoked the provisions of the Agreement in seeking to organize the Employer’s employees” and thus, “[w]e find only that, the Petitioner having invoked the Agreement, the fundamental policies of the Act can best be effectuated by holding the Petitioner to its bargain.” Verizon, supra at 560. The same may be said of the Employer here, which was engaged with the Union in the contractual process chosen by the parties to resolve this dispute when, mid-process, after failing to obtain a settlement in the grievance portion of the process, it filed its petition with the Board.
arbitrator that it is entitled to have the Piqua facility employees as part of the unit. For instance, demonstrating to the arbitrator that (in addition to meeting any other contractual requirements or defenses) the Union has the majority support of the two new Piqua employees would result in a contractual outcome fully consistent with the Act.

As noted, the Supreme Court long ago dictated that arbitration is the favored method of dispute resolution between parties to a collective-bargaining agreement. See United States v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578–581 (1960). And “arbitration of disputes under a collective bargaining agreement” is not just a favored dispute resolution mechanism, it “is part and parcel of the collective-bargaining process itself,” a process the Act exists to promote. Id. at 578. My colleagues’ decision ignores this fundamental labor policy and does not give the Act’s fundamental purpose to promote collective bargaining its due. In this case, deferral would honor both the parties’ collective-bargaining agreement and the Board’s role as the ultimate determiner of representational issues. Given the parties’ contractual agreement to arbitrate this dispute, the Board should defer and allow the UC petition to proceed if (and only if) the arbitrator’s decision violates Board representation principles.

My colleagues observe that the Union’s contractual case can still move forward and is not decided by today’s ruling. That recognition is correct, but it highlights the certainty of piecemeal resolution that today’s ruling requires and the certainty that a matter that the parties chose to earmark for contractual resolution is unnecessarily being ruled on—in part only—by the Board. In short, their observation only strengthens the case for the Board staying its hand and deferring to the contract resolution procedures which would be likely to fully resolve the parties’ dispute. Instead of this fair, common-sense outcome, today’s decision does not resolve the essential dispute between the parties, although the parties bargained for a contractual process that does just that. Respectfully, I dissent.

Dated, Washington, D.C. July 12, 2022

David M. Prouty,
Member

NATIONAL LABOR RELATIONS BOARD

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Although there is no indication in the record that the Union has presented proof of that majority support yet, that is no impediment to deferral. The Union has sought arbitration and can wait until it is before the arbitrator to make its case, including satisfying the contractual requirement that recognition “shall in no way contravene the rights promulgated under the National Labor Relations Act.” This is no more than what the parties agreed to in their collective-bargaining agreement and contravenes no process or policy of the Act. Cf., Local 340, New York New Jersey Regional Joint Board (Brooks Brothers), 365 NLRB No. 61, slip op. at 3 fn. 7 (2017) (finding that the union violated the Act by seeking to enforce arbitration award granting union recognition where award “was not based on the arbitrator’s verification of the Union’s alleged majority support”). Of course, those arbitral proceedings “will remain subject to postarbitral review by the Board upon assertion by either party that the arbitral proceedings or decision fail to satisfy our standards for postarbitral deferral.” Appollo Systems, Inc., 360 NLRB 687, 688 (2014); see also Central Parking, supra at 391 fn. 5 (“In the unlikely event that an arbitrator would fail to read a ‘majority requirement’ into the after-acquired clause here, the Employer could seek appropriate recourse through the Board’s procedures.”).