NLRB Deferral to the Arbitration Process: The Arbitrator's Awesome Responsibility*

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The National Labor Relations Board, since its decision in Spielberg, has articulated constantly evolving standards for deferring to arbitrators its authority to adjudicate legal issues under the NLRA. Professor Morris traces the history of the Board's deferral policy since Spielberg. He then analyzes the current deferral standards as defined by the Board's recent decision in Olin Corporation. Given the broad responsibilities given to arbitration under Olin, Professor Morris offers a number of recommendations which he believes are necessary in order to protect the arbitration system and the integrity of the NLRA.

In 1966, at the 20th annual meeting of the National Academy of Arbitrators, Bernard Meltzer and Robert Howlett launched a debate about the role that external law should play in the arbitrator's decision-making process. Meltzer espoused the restrictive view that “whenever there” appears to be an irrepressible conflict between a labor agreement and the law, an arbitrator whose authority is typically limited to applying or interpreting the agreement “should respect the agreement and ignore the law.”

Howlett rejected Meltzer’s confined approach, and championed the role of external law, asserting that “arbitrators should render decisions . . . based on both contract language and law [because] a separation of contract interpretation and . . . law is impossible in many arbitrations.” This debate continued for a decade. The participants included Richard Mittenthal, Harry Platt, Michael Sovern, William

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Gould, Theodore St. Antoine, Edgar Jones, and the author. In 1976 David Feller submitted what appeared to be the last word on this debate in which he discussed the “golden age” of arbitration. While lamenting the passing of the golden age, Feller acknowledged the “great advantages to both unions and employees in attempting to resolve their problems at home, even those involving the external law . . . that ultimately may be subject to final adjudication elsewhere.”

While the debate continued, the National Labor Relations Board and the courts handed down several decisions that answered some of the questions raised by the debate, but the answers raised many new questions. As a result of the Board and court decisions, the debate, at least in its original format, ended. While the NLRB and the Supreme Court decisions will require further explication, there are a few observations that can be stated with reasonable certainty. Arbitrators are now expected to apply the law of the National Labor Relations Act in an increasing number of situations.

The broad changes in labor arbitration have been dictated by several Labor Board decisions which have been buttressed, at least in part, by appellate court approval and strong Supreme Court dicta. As a result of these changes, many private sector grievance arbitrations will become, or have already become, more complex, more prolonged, more legalized, and probably more formalized. However, these changes need not apply to most arbitrations because when the Board expanded the arbitrator’s role in NLRA-related cases, the Supreme Court took pains in other cases to reaffirm the jurisdictional limits of the arbitrator, emphasizing that the arbitrator’s authority “derives solely from the contract.”

The Supreme Court recently noted the strict jurisdictional limitation of arbitration in McDonald v. City of West Branch, a case involving assertion of a res judicata or collateral estoppel effect to an arbitration

11. 29 U.S.C. §§ 151-169 (1982). This paper is concerned only with the law of the National Labor Relations Act.
13. Id.
award in a section 1983 employment discrimination case. Justice Brennan, writing for a unanimous Court, reaffirmed what the Court had previously written in Alexander v. Gardner-Denver, that "an arbitrator's expertise pertains primarily to the law of the shop, not the law of the land." Thus, an arbitrator "may not . . . have the expertise required to resolve the complex legal questions that arise in 1983 actions." The Court has applied the same limitation to an arbitration award which had been interposed to preclude the adjudication of a subsequent suit alleging violation of the minimum wage provisions of the Fair Labor Standards Act.

From its pronouncements, one might assume that the Supreme Court would also question the competence of arbitrators to resolve complex legal questions arising under the National Labor Relations Act. But either that is not so or the Court has not yet faced the issue in a case involving NLRB deferral. Although numerous courts of appeals have approved NLRB deferrals to arbitration, the Supreme Court has done so only indirectly. Nevertheless, the frequency and the firmness with which that Court has written on the matter, albeit in dicta, strongly suggest that the Court generally approves of the Board's policy of deferral to the arbitration process. The Court's approval would seem to include both pre-arbitration and post-arbitration deferral.

As early as ten years ago, in William E. Arnold Co. v. Carpenter's Dist. Council, the Court noted that the Board's Collyer policy of refraining from exercising its jurisdiction over conduct that was "arguably both an unfair labor practice and a contract violation" when voluntary contractual arbitration was available, "harmonizes with Congress' articulated concern," expressed in section 203(d) of the Taft-Hartley Act, "that, '[f]inal adjustment by a method agreed upon by the parties . . . is the desirable method for settlement of grievance disputes arising over the application of interpretation of an existing collective bargaining agreement.' Section 203(d) was indeed the statutory rationale for the deferral process. That provision, however, needed to be accommodated with

16. 104 S. Ct. at 1803.
19. See infra notes 20-26 and accompanying text.
22. 417 U.S. at 17.
language in another provision of the Act, Section 10(a), to the effect that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment . . . established by agreement, law, or otherwise." 23

In 1984, the Supreme Court again affirmed its general support of the Board's deferral policy. In NLRB v. City Disposal Systems, Inc., 24 the case in which the Court approved the Interboro 25 doctrine, Justice Brennan, writing for the majority, stated that "to the extent that the factual issues raised in an unfair labor practice action have been, or can be, addressed through the grievance process, the Board may defer to that [the arbitration] process," citing Collyer 26 and Spielberg. 27

Although these and other judicial expressions of approval for the deferral process confirm the Board's general jurisdiction to defer to arbitration, it should not be assumed that all aspects of the Board's deferral standards will pass judicial muster.

This paper discusses two recent board decisions, United Technologies 28 and Olin Corporation, 29 wherein the board redefined the circumstances under which it would defer to arbitration. But before doing so, a brief review of the decisional highlights in the development of the Board's deferral doctrine is in order. The development indicates that at least as to the basic deferral process, the doctrine itself is well established and is not likely to be invalidated. 30 The remaining question is not whether deferral itself violates section 10(a) of the NLRA, but rather under what circumstances and by what standards may the Board defer to arbitration without abusing its statutory discretion.

The debate over the appropriate standards will undoubtedly continue for years to come, certainly until the next shift in the political makeup of the Board's majority. Not surprisingly, the Board's shifting standards in this area, particularly since the Collyer decision in 1971, have reflected the changes in the Board's political orientation, i.e., so-called pro-employer Board majorities have tended to defer widely, and so-called pro-labor majorities have been more reluctant to defer.

26. 104 S. Ct. at 1515 (citing Collyer Insulated Wire, 192 N.L.R.B. 837 (1971)).
27. 104 S. Ct. at 1515 (citing Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955)).
30. See supra note 19 and accompanying text.
I

DECISIONAL HIGHLIGHTS

The central guidelines for a historical review of the deferral process can be found in a few key decisions of the Board.\textsuperscript{31} But those guidelines, as well as the Board’s new guidelines, which are considered below, and also the Board’s ordinary deferral cases, can be deceptive as indicators of what takes place in the deferral process. What the Board does visibly in the area of deferral is but the tip of the iceberg.

Most deferral cases are never officially reported, because they are handled at the administrative, pre-complaint level of the General Counsel’s office.\textsuperscript{32} Such cases are resolved by a Regional Directors’ determination of whether or not to defer. Pre-arbitration deferral decisions are made in two stages, neither of which is highly visible. The first stage, which commences when the unfair labor practice charge is filed, calls for an administrative decision as to whether the case is one which should be deferred to arbitration. The second stage begins after the arbitration award has been issued. If the General Counsel, acting through the local Regional Director, is of the opinion that the award satisfies the Board’s deferral standards, the charge will be dismissed. Deferral thus may occur without the Board’s or court’s participation. Relatively few cases reach the Board for decision. Nevertheless, the few deferral cases which are reported adequately highlight the history of the deferral process. I shall have more to say later about the unreported pre-complaint cases—the hidden part of the iceberg.

The first case in which the Board articulated deferral standards, though not the first time the Board deferred to arbitration,\textsuperscript{33} was Spielberg Manufacturing Co.\textsuperscript{34} The Spielberg standards still form the core of the Board’s deferral policy. The Board stated that it would defer to an existing arbitration award where the subject matter was the same as the unfair labor practice being charged, provided three conditions were met: (1) that the arbitration proceedings were fair and regular; (2) that all parties had agreed to be bound by the arbitration award; and (3) that the arbitration decision is not repugnant to the purposes and policies underlying the Act.

The last condition, the repugnancy factor, eventually became the main reason used to justify Board scrutiny and non-deferral. Eventually, however, the Board added what may be considered either a fourth standard or a requisite for satisfaction of the repugnancy factor. In its 1963

\begin{itemize}
  \item\textsuperscript{31} See generally 1 THE DEVELOPING LABOR LAW, supra note 18, at 914-91.
  \item\textsuperscript{32} See infra note 88 and accompanying text.
  \item\textsuperscript{34} 112 N.L.R.B. 1080 (1955). See also International Harvester Co., 138 N.L.R.B. 923 (1962), enforced sub nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), cert. denied, 377 U.S. 1003 (1964).
\end{itemize}
Raytheon decision the Board announced that it would require proof that the issue involved in the unfair labor practice case had actually been presented to and considered by the arbitrator. Many reviewing courts deemed this fourth standard essential. For example, the Sixth Circuit stated in *NLRB v. Magnetics International, Inc.*:

[W]e 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. . . . Any doubts regarding the propriety of deferral will be resolved against the party urging deferral.

The Raytheon requirement moved to center stage. Indeed, as we shall see when we examine the recent Board decisions, the present Board's approach to Raytheon may prove to be the Achilles' heel of its new deferral policy.

Another decisional highlight of the deferral policy is the 1963 *Dubo Manufacturing Co.* case. The Board held in *Dubo* that deferral to arbitration would be appropriate prior to issuance of the arbitrator's award in cases in which the dispute had already been submitted to the grievance or arbitration machinery and where the matter was then pending. The Board held, however, that final deferral would depend on whether the eventual award met the Spielberg standards.

The next major development in the deferral policy, and the one that aroused the most opposition, was contained in *Collyer Insulated Wire*.

In Collyer the Board deferred when arbitration had not previously been invoked. The Board held that an employer's unilateral change in conditions of employment violated section 8(a)(5) of the Act. The employer based its defense on a clause in the collective agreement and on the availability of arbitration to resolve disputes arising under that agreement. Relying on the conditions which it found prevailing, the Board held that it would dismiss the complaint and defer to the existing grievance-arbitration procedure. The Board retained jurisdiction, however, pending review of the arbitrator's award under Spielberg standards. The relevant conditions in *Collyer* were the following: (1) the dispute had arisen

37. 699 F.2d 806 (6th Cir. 1983).
38. *Id.* at 811 (footnotes omitted).
“within the confines of a long and productive collective bargaining relationship” and there was no claim of employer enmity to the employees’ exercise of protected rights under the Act; (2) the employer had “credibly asserted its willingness to resort to arbitration” under a clause in the agreement which was broad enough to cover the matter in dispute before the Board; and (3) “[t]he contract and its meaning . . . [lay] at the center of this dispute.”42 This last factor, which I shall refer to as the “congruence factor,” has never been listed by the Board as a separate Spielberg standard, yet it may be the most critical element in a fair and efficient deferral system.

The next historical highlight involved deferral cases that concern individual employee rights under the Act, primarily discipline and discharge cases in which unfair labor practices are alleged under sections 8(a)(1) and (3) and 8(b)(1)(A) and (2).43 In National Radio,44 decided shortly after Collyer, the Board extended its pre-arbitration deferral policy to cases involving individual rights. Five years later, however, in General American Transportation Corp.,45 the Board reversed National Radio and returned to the original Collyer dimensions, holding that: the Board should stay its process in favor of the parties’ grievance arbitration machinery only in those situations where the dispute is essentially between the contracting parties and where there is no alleged interference with individual employees’ basic rights under Section 7 of the Act.46 From that holding until the overruling of General American Transportation in 1984, the Board refrained from applying the pre-arbitration Collyer doctrine to individual employees, reasoning that the determinative issue in such cases is not whether the employer’s conduct toward the employee is permitted by the contract, but rather whether the conduct was unlawfully motivated or whether it otherwise violated employee statutory rights. During that period the Board majority held to the view that “an arbitrator’s resolution of the contract issue [would not or should] not dispose of the unfair labor practice allegation.”47

The final background highlight concerns the question of how much consideration an arbitrator must give to the underlying unfair labor practice issue in order to meet Spielberg and Raytheon standards. Some of the Board’s early decisions48 had suggested that when an employer was charged with unilaterally changing working conditions, the employer

42. 192 N.L.R.B. at 842.
45. 228 N.L.R.B. 808 (1977).
46. Id.
47. Id. at 811 (Murphy, Chairman, concurring).
48. McDonnell Aircraft Corp., 109 N.L.R.B. 903 (1954); Crown Zellerbach Corp., 95 N.L.R.B. 753 (1951); Consolidated Aircraft Corp., 47 N.L.R.B. 694 (1943); enforced as modified, 141 F.2d 785 (9th Cir. 1944).
could satisfy its bargaining obligation by indicating a willingness to proceed to arbitration, even though the arbitrator would only rule on whether the conduct violated the contract. This was the beginning of the have-your-cake-and-eat-it-too syndrome. The employer received the benefit of arbitration with an arbitrator's finding of no violation of the contract because the matter was not covered by the contract, and at the time the employer avoids the Board's jurisdiction even though the arbitrator had not ruled on the unfair labor practice issue.

As the deferral process matured, however, it became apparent that if deferral was not to be a sham and a means to avoid statutory obligations, the arbitrator must address the unfair labor practice issue in a meaningful way. This result is more easily achieved when the unfair labor practice issue and the contractual issue are virtually the same, or at least when the unfair labor practice issue is clearly embraced by the contractual issue. In many cases, however, such congruence does not exist, or else the arbitrator avoids consideration of the unfair labor practice issue either because he has not been made aware of it or because he prefers to leave such matters to the Board.

In 1974, the Nixon Board issued the ultimate cake-and-eat-it-too decision. Overruling a substantial line of earlier cases, it held, in Electronic Reproduction Service, that before deferral would be denied, a party seeking correction of an alleged unfair labor practice would have the burden of showing that the arbitrator either did or could not have decided the unfair labor practice issue. Thus, if there was an "opportunity" for the arbitrator to decide the statutory issue, regardless of whether the matter was presented to him or whether he availed himself of that opportunity, the Board would defer to his award unless the arbitrator had expressly declined to rule on the statutory issue or the parties by agreement had excluded that issue from arbitration. Electronic Reproduction fared badly in the appellate courts because the Board's reliance on a mere presumption that an arbitrator had decided the underlying unfair labor practice, when there was no evidence that he or she had actually done so, was deemed an abdication of the Board's responsibility under the Act and hence an abuse of discretion.

Predictably, the Carter Board overruled Electronic Reproduction.

51. Id. at 764.
52. Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977). Cf. NLRB v. Magnetics Int'l Co., 699 F.2d 806 (6th Cir. 1983); NLRB v. Motor Convoy, Inc., 673 F.2d 734 (4th Cir. 1982) (implicitly rejecting Electronics Production standard); Ad Art, Inc. v. NLRB, 645 F.2d 669 (9th Cir. 1980); St. Luke's Memorial Hosp. v. NLRB, 623 F.2d 1173 (7th Cir. 1980); Banyard v. NLRB, 505 F.2d 342 (D.C. Cir. 1974).
In *Suburban Motor Freight*\textsuperscript{53} the Board ruled that it would not defer to an arbitration award unless the unfair labor practice issue had been "presented to and considered by"\textsuperscript{54} the arbitrator and the award indicates that the arbitrator ruled on the statutory issue. In all such cases, the burden of proof falls on the party seeking deferral.

### II

#### The New Standards

When the Reagan appointees achieved a majority on the Board, *Suburban Motor Freight* was overruled, as was *General American Transportation*.\textsuperscript{55} Although the Board reversed *Suburban Motor Freight* in the *Olin Corporation*\textsuperscript{56} case, it did not directly embrace the discredited *Electronic Reproduction* doctrine. Instead, the Board announced a new formula which, according to dissenting Board Member Zimmerman, would achieve the same result because "the Board [would] now defer to an arbitrator's award based on a presumption that an unfair labor practice issue has been resolved, without actually knowing if the issue was presented to or considered by the arbitrator."\textsuperscript{57}

The majority in *Olin Corporation* held that henceforth the Board would use a two-tiered approach to decide *Spielberg* deferral issues, but that the burden of proof as to non-adherence to the Board standards would fall upon the General Counsel. The majority stated that the Board:

- would find that an arbitrator has adequately considered the unfair labor practice 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.\textsuperscript{58}

Regarding burden of proof, the majority said that henceforth the Board:

- would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the [Board's] standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award.\textsuperscript{59}

This shifting of the burden of proof may operate in most cases as a pure presumption that the arbitrator has considered and decided the unfair labor practice labor practice issue, even when he or she has not done so. As Member Zimmerman noted, there is no sound procedural basis

\textsuperscript{53} 247 N.L.R.B. 146 (1980).


\textsuperscript{55} 228 N.L.R.B. 808 (1977).

\textsuperscript{56} 268 N.L.R.B. No. 86 (1984).

\textsuperscript{57} Id., slip op. at 20 (Zimmerman, Member, dissenting).

\textsuperscript{58} Id. at 5.

\textsuperscript{59} Id. at 6.
for imposing on the General Counsel, the one party to the litigation "who is not in privity through a collective-bargaining agreement," the responsibility of producing the negative evidence required for assertion of Board jurisdiction. The Board in Suburban Motor Freight had treated the deferral issue as an affirmative defense and placed the burden of showing that the arbitrator had considered the statutory issues on the party raising that defense. The new Board has reversed that process.

A strong case can be made for the deferral process in general: First, it advances the congressional purpose embodied in the statute of furthering the process of collective bargaining. Second, it avoids determining the same dispute in two different forums. It also provides a more expeditious means for dispute resolution by a method agreed upon by the parties, and it allows the Board to devote more of its limited resources to areas in which collective bargaining has not been established, such as protecting the rights of individuals to organize (or to refrain from organizing) and policing the initiation of the collective bargaining obligation.

The deferral process, when fairly applied and carefully reviewed, can provide meaningful expression to the congressional preference for final adjustment by arbitration pursuant to voluntary agreement of the parties. But this beneficial function depends on the existence of a fragile accommodation between the Board's process and the arbitration process. The Board abuses its discretion when it shifts a substantial part of its statutory jurisdiction to arbitrators without guaranteeing the compatibility of the particular arbitration environment or that the necessary facts and issues have been considered and passed upon by the arbitrator. For this reason, the Board's latest reversals of the burden of proof should not survive judicial review. Thus, the Board may be forced to return essentially to the Raytheon-Suburban Motor Freight standards, except perhaps when it can be shown that the charging party, in order to obtain two bites at the apple, has deliberately withheld presentation of facts and issues which the arbitrator would need to decide an unfair labor practice. Even in that situation, however, if individual rights are involved, a union's conduct in presenting the case may not necessarily be binding on the grievant-employee as a waiver of his or her statutory rights.

Aside from the burden of proof question, is there anything else in the Board's new standards which might be judicially vulnerable? It may be too early to answer that question with any certainty, although the answer will probably depend on how the Board applies its two-tiered ap-

60. Id. at 23 (Zimmerman, Member, dissenting).
How the Board applied those standards in the *Olin* case actually tells us nothing, because all the decision-makers involved in the *Olin* case agreed that the employer had not acted improperly in discharging the grievant. The new Board majority had thus chosen as their herald to announce the new standards a case in which deferral would have occurred anyway, even under the *Suburban Motor Freight* test; consequently, Member Zimmerman dissented only as to the new rules which the majority was promulgating, not as to the actual holding in the case.

The facts of *Olin* illustrate the manner in which an unfair labor practice issue is often presented to an arbitrator in a "just cause" discharge grievance, and the resulting award is evaluated for deferral purposes. The grievant, the local union president, had been discharged for threatening to participate in and for failing to prevent a sick-out, which involved 43 employees. The arbitrator found that the grievant "partially caused" the sick-out and had "failed to try to stop it until after it occurred."63

The arbitrator found that the grievant’s conduct violated a specific clause in the contract. The clause provided that officers and representatives of the union will "not permit its members to cause any striking, slowdown or stoppage. . . ."64 The Administrative Law Judge (ALJ) and all the Board Members agreed that this clause satisfied the waiver requirements of the *Metropolitan Edison* case, in which the Supreme Court held that, absent a clear and unmistakable waiver in a collective bargaining agreement, an employer cannot impose more severe discipline on union stewards and other officials than upon rank-and-file employees without violating sections 8(a)(1) and (3) of the Act.

In the *Olin* case, although the Arbitrator did not specifically refer to the statutory issue, his opinion did include the statement that he found "no evidence that the Company discharged the grievant for his legitimate Union activities."66 Although the ALJ upheld the discharge, he refused to defer to the arbitration award because he did not consider the arbitra-

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62. Several recent decisions since *Olin* suggest that the Board is mechanically applying its new standards without any scrutiny as to whether the arbitrator has in fact considered the statutory issue. For example, in United Parcel Serv. Inc., 274 N.L.R.B. No. 93 (1985), United Parcel Serv., Inc., 274 N.L.R.B. No. 66 (1985), Ryder Truck Lines, Inc., 273 N.L.R.B. No. 98 (1984), and in Yellow Freight Sys., Inc. 273 N.L.R.B. No. 7 (1984), the Board deferred to decisions of union-management joint committees, where there was no neutral arbitrator, no adequate record of the proceedings, and no written opinions. Not surprisingly, in such cases the General Counsel was unable to sustain the burden of proving that the "arbitration" boards did not consider the statutory issue. But even if they had considered the issue, such consideration would have been exercised by lay members of a arbitrator, contrary to the implied premise of the *Spielberg/Collyer* doctrine.

63. 268 N.L.R.B. No. 86, slip op., at 6.
64. *Id.* at 13.
tor "competent to decide the unfair labor practice issue" because he had demonstrated "no cognizance of the statutory right and waiver issues implicated by the charge." The ALJ reasoned that the arbitrator demonstrated "no cognizance of the statutory right and waiver issues implicated by the charge." Member Zimmerman agreed with the Board majority that the ALJ should have deferred to the award. Zimmerman thought the deferral fully complied with Suburban Motor Freight standards because the company discharged the grievant for violating a contractual provision that constituted an adequate waiver under Metropolitan Edison and because all the necessary facts were before the arbitrator. The arbitrator, according to Zimmerman, had thus been "presented with, considered, and ruled on the statutory issue."

Although the contractual issue in Olin met established deferral requirements, the majority's announcement of the new deferral standards contained no specific reference to the congruency factor. The standards announced in Olin merely required that the contractual issue be "factually parallel to the unfair labor practice issue." But it does not necessarily follow, that merely because the same facts are involved in both contexts that the contractual issue embraces or is the same as the statutory issue.

The Ninth Circuit in its second Servair decision distinguished between two extreme types of cases which may arise in a deferral setting. That court noted that "[t]he 'clearly decided' criteria appears relevant to the deferral analysis only to the extent that it assists in deciding whether the arbitrator's decision is repugnant to the Act." The Ninth Circuit commented on two situations, illustrating that valid deferral may depend upon the degree of congruence existing between the contractual and statutory issues. Regarding the first type of case, the court stated:

[w]here the statutory issue is primarily factual or contractual, an arbitrator is in as good, if not better, position than the Board to resolve the issue. . . . [And] deferral in such circumstances . . . may serve the purposes of the Act even where the arbitrator does not explicitly address the statutory issue. . . . Accordingly, where the issue was not clearly decided, deferral may still be appropriate if the resolution of the statutory issue is dependent upon the resolution of the contractual issue."

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67. Id. at 11-12.
68. Id. at 11.
70. 268 N.L.R.B. No. 86, slip op. at 25 (Zimmerman, Member, dissenting).
71. Id. at 5.
72. Servair, Inc. v. NLRB, 726 F.2d 1435 (9th Cir. 1984). See also 236 N.L.R.B. 1278 (1978), enf'd in part and remanded, 607 F.2d 258 (9th Cir. 1979), opinion withdrawn and case remanded, 624 F.2d 92 (9th Cir. 1980).
73. 726 F.2d at 1440-41.
74. Id. at 1441.
Because the arbitration issues in the *Olin* case were both factual and contractual, they satisfied the Ninth Circuit's requirement for valid deferral. The second type of case, like *Servair*, was the opposite situation. That type occurs when "resolution of the statutory issue is not dependent on resolution of the contractual issue."75 In such a case, it would be proper for the Board to refuse to defer to the arbitrator's award.

There is yet another type of situation which often arises in potential deferral cases. In this third situation, the unfair labor practice issue is embedded in contractual provisions but is not readily apparent. These are cases in which the coverage and meaning of the contractual provisions might include the legal requirements of pertinent statutory rights or duties, but such interpretation may not be known until after the arbitrator has analyzed and decided the case and written the award. It is in such cases that arbitrators have a special obligation to articulate their consideration of the statutory issue. Moreover, it is in such cases that the Board should have a special duty to provide clear guidelines and also to maintain adequate oversight jurisdiction over the arbitral results. The *Olin* majority, however, did not provide any clear guidelines that would inform the collective bargaining parties, their arbitrators, or the General Counsel of the kinds of situations for which deferral would be deemed appropriate.

The *Olin* majority required only "factual" parallelism. For example, in the *Raytheon*76 case the arbitrator ruled solely on a contractual issue, whether the grievants had violated a no-strike provision in the agreement. The arbitrator held that the grievants had, and he therefore upheld their discharges. But the Board refused to defer to his award because the arbitrator had not resolved, and perhaps could not resolve,77 the unfair labor practice issue, which was whether the employer's assigned cause for discharge had been merely a pretext for anti-union motivation. An arbitrator in such a case could normally resolve that issue, because "just cause" (or similar requirement) for discharge implies a proper cause for discharge, so that if the real cause is an unlawful motive rather than the pretextual assigned cause, the contractual "cause" standard has not been met.

Thus, the *Raytheon* case illustrated a recurrent deferral situation—an unfair labor practice issue arising under an ordinary contract clause in which the issue, if it is recognized by the arbitrator, can and should be decided by him. If, however, the arbitrator fails to recognize the issue, or otherwise fails to consider and resolve it, the deferral problem arises.

75. *Id.*
77. The Board noted that the arbitrator could not have received evidence of the employer's union animus against grievants "in the frame of reference in which the arbitration proceeding was conducted." *Id.* at 885.
Under *Suburban* the Board would not have deferred in this situation. Under *Electronic Reproduction* the Board would have deferred because the arbitrator had the "opportunity" to decide the issue.

Under the *Olin* decision if the Board views the facts of the unfair labor practice charge as sufficiently parallel to those of the arbitrated contractual dispute it will defer; even if the facts are not parallel, or if the arbitrator has simply ignored the statutory issues, the Board might still defer. The Board is more likely to defer under *Olin* because the General Counsel has the burden of proving that the arbitrator did not consider the statutory issue. Thus, unless it is clear that the arbitrator did not consider the statutory issue, deferral under the Board's new standard is likely to occur, and consequently the charging party will be denied consideration of a statutory issue. Thus, under *Olin* the Board has imposed an awesome responsibility on the arbitrator.

In view of the broader problem of congruency, in which propriety of deferral should depend on either a similarity of issues or on an implicit inclusion of the statutory issue within the interpretive framework of the contractual issue, the *Olin* standards are sorely deficient. It is true that the majority in *Olin* said that "differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is ‘clearly repugnant to the Act.’ " But rather than stress the importance of congruency in the weighing process, they emphasized that they "would not require an arbitrator’s award to be totally consistent with Board precedent." It was sufficient if the award is not "palpably wrong," i.e., . . . not susceptible to an interpretation consistent with the Act,"78 or, to use the formulations of two appellate decisions which were expressly approved by the *Olin* majority, "[i]f the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, . . . the award is [not] ‘clearly repugnant’ to the Act,"79 and "an arbitral result [can] be sustained which is only arguably correct and which would be decided differently in a trial de novo."80 Unfortunately, the *Olin* majority did not address and reaffirm the congruency factor which the Board had emphasized in its earlier *Collyer* decision. In *Collyer*, deferral was deemed appropriate because "the alleged unfair labor practices [were] intimately entwined with matters of contractual interpretation."81

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78. 268 N.L.R.B. No. 86, slip op. at 5. For a post-*Olin* example of deferral based solely on factual parallelism without recognition of the critical difference between the contractual and statutory issues, hence the absence of congruence, see *United Food Mgt. Serv., Inc., Alabama*, 273 N.L.R.B. No. 201 (1985).


81. 192 N.L.R.B. at 842. See the D.C. Court of Appeals opinion in *Banyard v. NLRB*, 505
Since its *Olin* decision, the Board has deferred to arbitration awards in several cases in which there was either no congruence between the statutory and contractual issues or no showing that the arbitrator (or joint committee) actually considered the unfair labor practice issue. For example, in the *Stroh Brewery Co.* 82 case, an Administrative Law Judge read the message of *Olin* to require reconsideration of his prior ruling. He therefore deferred to an arbitrator's award and supplemental award upholding the discharge of a chief union steward for conduct occurring during a grievance meeting, notwithstanding that the arbitrator had issued an express disclaimer in which he had stated: "My decisions were not made with reference to any matters related to the National Labor Relations Act or any provisions thereof." The ALJ said that because of the *Olin* guidelines, he was "forced to conclude that the arbitrator adequately considered the unfair labor practice . . . notwithstanding the explicit disclaimer. . . . The Board affirmed. Thus, even if an arbitrator chooses not to consider an unfair labor practice issue, a course which many arbitrators have followed in the past, the Board, under *Olin* standards, may still defer. 83

The new Board majority has indicated that henceforth NLRB deferral to the arbitration process will be the standard procedure and non-deferral will be the rare exception. Whether this marks a return to the have-your-cake-and-eat-it-to period will now depend primarily on what arbitrators do with the authority which has been thrust upon them. Most deferral decisions—which represent the huge and virtually unseen iceberg—are made in the NLRB regional offices. Presumably the Board's new standards will produce an increase in the number of deferrals at the pre-complaint level. For cases in which no complaint issues there can be no appeal, neither to the Board nor to the courts. 84 The arbitrator will thus act alone, which was not an unsatisfactory situation under *Enterprise Wheel* 85 and the *Steelworkers Trilogy* doctrine, whereby

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83. For other post-*Olin* cases in which deferral occurred either where there was no congruence between issues or no showing of any consideration of the unfair labor practice issue, see Shimazaki Corp., 274 N.L.R.B. No. 4 (1985); Cone Mills Corp., White Oak Plant, 273 N.L.R.B. No. 188 (1985); also cases cited in supra note 62.
84. In *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), the Supreme Court acknowledged that "the General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint." See also *George Banta Co. v. NLRB*, 626 F.2d 354 (4th Cir. 1980); *Seafarers Union v. NLRB*, 88 L.R.R.M. (BNA) 2629 (D.C. Cir. 1975) (per curiam).
the arbitrator interpreted only a collective bargaining contract, for he was the parties' chosen reader\textsuperscript{86} or proctor\textsuperscript{87} for that task. But when the arbitrator is expected to apply the law of the NLRA, his role assumes new dimensions for which there may also be new grounds for judicial review.

Member Zimmerman included some revealing statistics about deferred cases in his \textit{Olin} dissent. He stated:

The Agency's own statistics, officially maintained by the Data Systems Branch of our Division of Administration, indicate that at the end of December 1983 there were 2,185 pending unfair labor practice cases which had been deferred to arbitration machinery under \textit{Dubo} . . . or \textit{Collyer}. . . . Between 1 October 1981 and the end of December 1983, in excess of 3,800 cases were deferred under \textit{Collyer} and \textit{Dubo}. During the same period, the General Counsel's application of \textit{Suburban Motor Freight} and \textit{Spielberg} standards resulted in the issuance of complaints in only 163 previously deferred cases. In sharp contrast, over 1,700 previously deferred cases were dismissed (357), withdrawn (1,159), or settled (62).\textsuperscript{88}

According to these statistics, 22 of every 23 deferral-type cases were decided at the pre-complaint stage during the 27 months noted. Thus, the majority of deferral cases—the submerged iceberg—remain unseen and unreviewable. Two Members\textsuperscript{89} of the \textit{Olin} majority questioned Zimmerman's statistics, indicating the fact that the Board, as well as the general public, has no way of ascertaining what is really happening in the deferral process. The lack of information regarding labor deferrals leads to the first of a series of observations and recommendations that seem appropriate in view of the responsibility which arbitrators now have under the Board's deferral policy—a responsibility which was substantial under \textit{Suburban} standards but which under \textit{Olin} now assumes even greater implications for its effect on national labor policy.

III

OBSERVATIONS AND RECOMMENDATIONS

A. \textit{First}, awards in deferral cases should be readily and generally available for analysis. The industrial relations community needs to know how arbitrators have decided the cases to which the Board has deferred, espe-


\textsuperscript{88} "Cases classified as withdrawn include those numerous cases in which the General Counsel has formally notified the charging party that the case will be dismissed if not withdrawn." 268 N.L.R.B. No. 86, slip op. at 25 n.12 (Zimmerman, Member, dissenting).

\textsuperscript{89} \textit{Id.} at 7 n.9 (Dotson, Chairman, and Hunter, Member).
cially those in which the unfair labor practice charge has been dismissed and no complaint ever issues.

Awards, once submitted to the Board and relied upon by the General Counsel as basis for dismissal of the charge, should be clearly disclosable under the Freedom of Information Act (FOIA).\textsuperscript{90} The Supreme Court held in \textit{Sears Roebuck}\textsuperscript{91} in 1975 that because dismissal of a charge and refusal to issue a complaint constitutes final agency action, advice and appeals memoranda of the General Counsel in such cases are "final opinions made in the adjudication of cases"\textsuperscript{92} within the meaning of the FOIA and are thus required to be made available to the public and indexed. The same conclusion should be applicable to arbitration awards that provide the basis for dismissal of charges. The Board itself should make these awards and the awards which are involved in the litigated unfair labor practice cases available on a routine basis, preferably by publication. Additionally, and perhaps mainly because I have little faith that the Board will publish these decisions in the foreseeable future, I call upon labor relations publishing firms to request, index, and publish these arbitration decisions on a regular basis. Furthermore, such decisions would seem to be clearly exempted from the confidentiality requirements of the arbitrators' Code of Professional Responsibility.\textsuperscript{93} Regardless of the intent of the parties, publication would be proper under paragraph C.1 of the Code, which is applicable where "disclosure is required or permitted by law."

B. \textit{Second}, it is likely that there will be a dramatic increase in the number of cases containing statutory NLRA issues, not only because of the now greater awareness of parties and arbitrators to arbitrators' responsibilities under the deferral doctrine, but also because of several key decisions such as the Supreme Court's \textit{NLRB v. Weingarten, Inc.},\textsuperscript{94} \textit{Metropolitan Edison Co. v. NLRB},\textsuperscript{95} and \textit{NLRB v. City Disposal Systems},\textsuperscript{96} and the Board's \textit{Milwaukee Springs}\textsuperscript{97} and \textit{Otis Elevator}\textsuperscript{98} cases.

Under \textit{Weingarten}, arbitrators must determine issues and remedies based upon whether union representation was made available, on request of the employee, when he or she was being interrogated by the employer

\textsuperscript{91} \textit{NLRB v. Sears, Roebuck & Co.}, 421 U.S. 132 (1975).
\textsuperscript{92} \textit{Id.} at 158.
\textsuperscript{93} \textit{CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES} (National Academy of Arbitrators, American Arbitration Ass'n. & Fed. Mediation & Conciliation Serv. (1974)).
\textsuperscript{94} 420 U.S. 251 (1975).
\textsuperscript{95} 460 U.S. 693 (1983).
\textsuperscript{96} 104 S. Ct. 1505 (1984).
\textsuperscript{97} 268 N.L.R.B. No. 87 (1984).
and reasonably believed the investigation would result in disciplinary action.\textsuperscript{99} Under \textit{Metropolitan Edison}, as previously noted, the Court held that an employer cannot discipline union officials, i.e., shop stewards, more severely than other employees for participating in an unlawful work stoppage, unless the union has waived its officials' section 7 rights, but such waiver will not be found unless it is "clear and unmistakable."\textsuperscript{100} In \textit{City Disposal} the Court affirmed the "‘Interboro\textsuperscript{101} doctrine,' under which an individual's assertion of a right grounded in a collective bargaining agreement is recognized as 'concerted activity' and therefore accorded the protection of § 7."\textsuperscript{102} And under the Board's \textit{Milwaukee Springs} and \textit{Otis Elevator} decisions, more unions may turn to the arbitration process rather than to the Board to seek contractual enforcement to restrain removal of work from the bargaining unit. In some of those cases the Board will have to decide whether to defer to the arbitrators' decisions.\textsuperscript{103}

With this anticipated increase in statutory-issue arbitration, arbitration cases will become naturally divided into two major types. The majority will probably continue to be relatively simple, traditional, contractual interpretation cases. The minority will be a growing number of cases containing one or more unfair labor practice issues. Such cases will almost always require a transcript, have attorney-representation on both sides, and elaborate briefs will usually be submitted to and welcomed by the arbitrator. Such cases will take longer to hear, and the evidence required to satisfy proper NLRB standards will probably be more detailed and extensive than that submitted in the usual arbitration hearing. These cases will thus tend to be more formal and trial-like, and some of the arbitral remedies will be non-traditional.\textsuperscript{104}

99. 420 U.S. at 257 (footnote omitted).
100. 460 U.S. at 708.
102. 104 S. Ct. at 1510.
103. The Board majority in \textit{Olin Corp.}, 268 N.L.R.B. No. 86 (1984), criticized earlier Board refusals to defer as "overzealous dissection of [arbitrator's] opinions," \textit{id.}, slip op. at 6, "misdirected zeal," \textit{id.}, and more "whim" than "policy." \textit{Id} at 9. According to the \textit{Olin} majority, the "arbitrator's interpretation" of the language of the contract was "what the parties . . . have bargained for and . . . what national labor policy promotes." \textit{Id} at 12. Presumably the Board will apply the same deference to all arbitral interpretation of contractual clauses regardless of the subject matter of the clauses, although problems could arise as to clauses involving permissive bargaining subjects, even though such clauses could be enforced by arbitration pursuant to § 301(a) of the LMRA, 29 U.S.C. § 185(a) (1982). \textit{Cf. Retail Clerks v. Lion Dry Goods, Inc.}, 369 U.S. 17 (1962); \textit{Mailers Local 92 v. Chattanooga News-Free Press Co.}, 524 F.2d 1305 (6th Cir. 1975).
104. For an example of an arbitration award containing injunctive relief restraining the shutting down of a plant and the transfer of work to another location, see \textit{Joseph Schlitz Brewing Co.}, 58 Lab. Arb. (BNA) (1972) (Lande, Arb.). For an example of an award providing for the conditional reopening of a plant which had been closed, see \textit{Pabst Brewing Co.}, 78 Lab. Arb. (BNA) 772 (1982) (Wolff, Arb.).
These longer and more complex cases will naturally also be more expensive. The parties, more often the unions, frequently complain about the high cost of arbitration, and some union representatives have noted that the cost of arbitration is greater than the cost of filing a case with the NLRB, where the General Counsel's office provides the legal representation. Although one can sympathize with such complaints, it is important to recognize the advantages of the Board deferring to arbitration in appropriate cases. The greatest advantage is that arbitrators can and do complete their cases many times more quickly than the Labor Board. What real advantage can there be to the collective bargaining system from disposition by the Board, which typically requires several years to reach a final decision? Arbitration, though more expensive, can be more expedient and more effective.

There are, however, inadequacies to the arbitration process. For example, as Zimmerman noted in his dissent in United Technologies, a union, without breaching its duty of fair representation, might not vigorously support an employee's claim in arbitration inasmuch as the union, in balancing individual and collective interests, might trade off an employee's statutory right in favor of some other benefits for employees in the bargaining unit as a whole. It is thus absolutely essential that both the General Counsel and the Board carefully screen all arbitration cases presented to them for deferral. The Board must not neglect its oversight jurisdiction, particularly in cases involving individual employee rights. But I cannot fully agree with Zimmerman's blanket and negative appraisal that "[t]he arbitration process is not designed to and is not particularly adept at protecting employee statutory or public rights." Compared to the National Labor Relations Board, the arbitration process has an enviable record of achievement. Provided the statutory

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105. For fiscal year ending Sept. 30, 1981, the median number of days required from filing of unfair labor practice charge to issuance of Board decision was 490 days. The median age of cases pending Board decision on Sept. 30, 1981, was 534 days. (The Board does not publish figures showing average length of such time periods. Average periods would greatly exceed the median periods). 46 N.L.R.B. Ann. Rep. 228 (1981). These periods do not include time elapsed from Board decision to date of compliance where unfair labor practices are found.

106. 268 N.L.R.B. No. 86, slip op. at 20 (Zimmerman, Member, dissenting).

107. Although I am not in agreement with the absolute prohibition on deferral for individual rights cases advocated by Member Zimmerman (and former Members Fannin, Jenkins, and Murphy), the argument for that position does support the need for strict and alert oversight. See United Technologies, 268 N.L.R.B. No. 83, slip op. at 13-22 (Zimmerman, Member, dissenting).

108. 268 N.L.R.B. No. 86, slip op. at 20 (Zimmerman Member, dissenting).

109. Relying on published NLRB data, Freeman and Medoff made the following observation:

Beginning in the 1960s the relative number of illegal activities committed by management, after declining for years, rose at phenomenal rates. From 1960 to 1980 the number of charges of all employer unfair labor practices rose fourfold; the number of charges involving a firing for union activity rose threefold; and the number of workers awarded back pay or ordered reinstated to their jobs rose fivefold. By contrast, the number of NLRB elections scarcely changed in the same period. Despite increasingly sophisticated methods
rights in issue are congruent with contractual rights, and provided the arbitrator conscientiously considers the statutory questions, most experienced arbitrators are fully capable of protecting employees' rights with fair, effective, and relatively speedy process.110 If the same could be said of the Labor Board's process, a stronger case could be made for the Board's assertion of exclusive jurisdiction over cases involving individual section 7 rights.

Until the Board improves its record of protecting employees' individual rights, however, the burden of providing that protection will fall increasingly on arbitrators, at least for cases in which grievance-arbitration machinery exists. But inasmuch as the present Board has embarked on a policy of providing only minimal oversight, arbitrators have an obligation to their profession and to the parties whom they serve to educate themselves as to any NLRA issues which may arise in their cases.111

C. A third observation concerns the effectiveness of arbitration. The effectiveness of arbitration in making statutory determinations depends on how the parties and their arbitrators treat the statutory issues. If the parties to collective bargaining agreements and their arbitrators are to intelligently assume the responsibility which the Board's deferral policy entails, certain improvements in channels of communication need to occur.

First, the Board's deferral letter should clearly apprise the parties and the arbitrator of the Board's general deferral policy, i.e., what will be expected of the arbitrator.112

Second, when any party anticipates the presence of an unfair labor practice issue in an arbitration case, ample notice to that effect should be

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110. This does not always occur, either by reason of inadequate presentation of the case by one or both of the parties, or by some failure on the part of the arbitrator. See supra notes 62, 82, 83. For such cases it is essential that the Board maintain vigilant oversight of the process pursuant to Spielberg standards, particularly regarding the requirement that the "proceedings be fair and regular" and also the general requirement that the award not be repugnant to the purpose and policies of the Act. See 1 THE DEVELOPING LABOR LAW, supra note 18, at 966-68 & 970-74. For a general review of the arbitration process in discipline and discharge cases, see Zirkel, A Profile of Grievance Arbitration Cases, 38 Arb. J. 35 (1983).


112. Under the Board's present practice, an arbitrator may hear and decide a case without knowing of the Board's deferral or that the case contains an unfair labor practice issue.
given so that the selecting agencies, i.e., the American Arbitration Association or the Federal Mediation and Conciliation Service, can pass that information on to the arbitrator, either before or after selection. Any arbitrator who does not consider himself or herself qualified to rule on an unfair labor practice issue should decline to be considered for appointment or should withdraw prior to acceptance of such an appointment. Because of the statutory responsibilities which arbitrators must now shoulder under the deferral doctrine, the arbitration process will not be well served by arbitrators who are uncomfortable in handling National Labor Relations Act issues. Most arbitrators, however, will probably rise to the occasion, especially with the assistance of comprehensive briefs, which the arbitrators have a right to demand whenever issues are complex and unfamiliar.113

D. A fourth observation concerns the development of a new or clarified standard for judicial review of arbitration awards that treat statutory issues. The standard should cover not only NLRB deferred cases but also cases involving unfair labor practices in which no deferral has occurred. For such cases the Enterprise Wheel114 standard, which requires that the award draw its “essence” from the collective bargaining agreement and that arbitrators not dispense their “own brand of industrial justice”115 may no longer suffice, at least not in such simplistic form. The Supreme Court in Gardner-Denver116 stressed, with reference to Enterprise Wheel, that:

[i]f an arbitral decision is based solely upon the arbitrator’s view of the requirements of enacted legislation, rather than on his interpretation of the collective bargaining agreement, the arbitrator has “exceeded the scope of the submission,” and the award will not be enforced. . . . Thus the arbitrator has authority to resolve only questions of contractual rights. . . .117

Although the court made specific reference to statutory rights under Title VII,118 there is no reason to believe that the arbitrator’s jurisdiction would be broader where NLRA rights are in issue. As I once emphasized in an arbitration case that had been deferred under Dubo:119

Although I am mindful of the NLRB deferral to arbitration in the instant case, I am also aware that such deferral cannot vest the Arbitrator with any authority which he does not have under the collective bar-

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115. Id. at 597.
117. Id. at 53-54.
Neither the Board’s deferral doctrine nor appellate court approval and Supreme Court encouragement of that doctrine serve to enlarge the arbitrator’s jurisdiction.

The arbitrator must still rely on the agreement as the sole source of his or her authority. Thus, the congruence factor remains paramount to the deferral process. The arbitrator can apply the external law of the National Labor Relations Act only to the extent that such law is entwined with the interpretation of the agreement being construed. Thus, when the statutory issue is properly before the arbitrator, he or she should be mindful that although the Labor Board no longer provides a broad safety net to catch arbitral errors of law under the NLRA, the courts could be available to provide a similar reviewing function through judicial oversight pursuant to section 301 of the LMRA.

Two Supreme Court cases suggest a viable basis for broadening the Enterprise standard to cover an arbitrator’s commission of serious error in the interpretation of statutory law. In Connell Construction Co. v. Plumbers Local 100, the Court confirmed that federal courts have jurisdiction to decide unfair labor practice questions, even when the matter has never been decided by the Labor Board, provided those questions “emerge as collateral issues in suits brought under independent federal remedies . . .,” which presumably would include section 301 actions as well as the anti-trust action which was immediately involved in Connell. Judicial review of arbitrators’ awards under section 301 may thus be available to correct serious errors of law committed by arbitrators in their application of the law of the National Labor Relations Act. A proper standard for such an expanded area of judicial review is contained in the following statement by the Court in W.R. Grace & Co. v. Rubber Workers, Local 759:

If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it . . . . Such a policy, however, must be well defined and dominant, and is to be ascertained “by reference to the laws and legal precedents and not from general considerations of supposed public interests.”

This paper does not support any expansion of the scope of review in ordinary contract interpretation cases. But when an arbitrator seriously misconstrues a right or a requirement under the NLRA, even

123. Id. at 626.
126. Id. at 760.
127. See Morris, supra note 87, at 351-55.
though such right or requirement is imbedded in contractual language, such construction should be deemed "repugnant to the purpose and policies of the Act." And regardless of whether an unfair labor practice charge has been filed with the Board, an arbitration award based on a misconstrued statutory right or requirement should be subject to judicial reversal, modification, or remand under section 301 in accordance with the \textit{W.R. Grace} standard quoted above.

IV

CONCLUSION

With the "golden age" of arbitration behind us, we may now look ahead to a new age of arbitration with new challenges. Arbitrators should meet those challenges in a positive way, particularly the challenge of deciding unfair labor practice issues when they are imbedded in contractual issues, but also the challenge of declining to decide such issues when they are not. The distinction is significant, both for the arbitration system and for the integrity of the National Labor Relations Act.

\footnote{128. Spielberg Mfg. Co., 112 N.L.R.B. at 1082.}