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Published in *Labor Law Journal*, vol. 67, pp. 429-436, Fall 2016

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The NLRB's *Babcock* Arbitral Deferral Standard: A Woman's Plight Leads to a Changed Policy but No Remedy

By David P. Twomey

I. INTRODUCTION

Employer actions may result in both a claim of a violation of employee contractual rights under the parties' collective bargaining agreement (CBA) and also a claim of a violation of statutory rights under the National Labor Relations Act (NLRA).[1] For example, a union may claim that the discharge of an employee is both a violation of the parties' "just cause" provision in its collective bargaining agreement and also assert the discharge is an unfair labor practice in violation of Sections 8(a)(3) and 8(a)(1) of the NLRA.[2] Where provisions of the collective bargaining agreement and sections of the NLRA both apply to a workplace dispute, should the National Labor Relations Board (NLRB or Board) be precluded from adjudicating unfair labor practice charges where the matter has been the subject of an arbitration proceeding and award?

Section 10(a) of the National Labor Relations Act expressly provides that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award.[3] And, the courts have uniformly so held.[4] It is well settled that the Board has discretionary authority to establish or modify standards for deferring to arbitral decisions involving alleged violations of Sections 8(a)(3) and (1) of the NLRA.[5] Some sixty years ago, in its *Spielberg Mfg. Co.*[6] decision, the Board held that it would defer, as a matter of discretion, to arbitral decisions in cases in which the proceedings (1) appear to have been fair and regular, (2) all parties agreed to be bound, and (3) the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. [7] The deferral doctrine announced in *Spielberg* was intended to reconcile the Board's obligation under Section 10(a) of the Act to prevent unfair labor practices with the federal policy of encouraging the voluntary settlement of labor disputes through arbitration.[8] Some thirty years later, in its *Olin Corp.* decision the Board modified the deferral standard, holding that deferral is appropriate where the contractual issue is "factually parallel" to the unfair labor practice issue, the arbitrator was presented generally with the facts relevant to resolving that issue and the award is not "clearly repugnant" to the Act.[9]

In 2014, contending that the *Olin* deferral standard is inadequate to ensure that employees' statutory rights are protected in the arbitral process, the General Counsel of the NLRB urged the Board to adopt a more demanding standard in

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Sections 8(a)(3) and 8(a)(1) cases in the Board's *Babcock & Wilcox Construction Co. Inc.* case.[10] The Board majority subsequently announced a new standard for deferring to post-arbitral decisions in Section 8(a)(1) and (3) cases, and in doing so, the Board modified its standard for prearbitral deferrals and deferral to grievance settlements.[11] The Board declared that its new standard will apply only prospectively. Thus, the Board applied the existing *Spielberg/Olin* standard to the facts of the *Babcock & Wilcox* case.[12]

II. THE *BABCOCK & WILCOX* DECISION: STILL APPLYING THE EXISTING *SPIELBERG/OLIN* STANDARD

A. The Factual Summary and the Arbitration Decision

Charging party Coletta Beneli was employed by Babcock & Wilcox Construction Company (Babcock) as a forklift and crane operator at the Arizona Public Service (APS) coal power plant in Joseph City Arizona where Babcock provided field construction and maintenance service for APS.[13] She served as union job steward there for the International Union of Operating Engineers Local 428 (IUOE).[14] In February and March of 2009, Beneli challenged several of Babcock's managerial actions as violative of the CBA.[15] Only a few hours before suspending Beneli, Babcock's project Superintendent Christopher Goff told the Union's assistant business manager Shawn Williams that he wanted to discharge Beneli because she was raising contractual issues and trying to tell the company what it was supposed to pay employees.[16] The administrative law judge (ALJ) summarized the facts as follows:

> Williams testified that at about 8 a.m. on March 11, he received a call from Goff. Ralph McDesmond, safety representative was also on the call. Goff told Williams that he wanted to terminate Beneli because she had overstepped her boundaries as the Union's steward and was crossing the line into management. Williams testified that Goff said Beneli was raising contractual issues and trying to tell Respondent what they are supposed to pay employees. Williams stated that in his view Beneli was acting as a steward should. Goff stated that Beneli should not be getting APS, Respondent's customer, involved by raising contractual issues with APS. Williams said that in the future Beneli would raise contractual issues solely with Respondent. Williams stated that if Goff discharged Beneli, the Union would fight the discharge and file a grievance.
>
> On March 11, sometime after 2:00 p.m., Alsop [a foreman and union member who had informed Beneli that he had not been paid properly] told Beneli that Goff had called him and wanted them both to go to Respondent's office. Beneli and Alsop went to Goff's office, where they found McDesmond and Matt Winklestine, safety representative, waiting. Winklestine told Beneli that she was being suspended for violating two safety policies earlier that day. Specifically Winklestine said Beneli had been observed eating a pastry during the jsa [job safety analysis] meeting, and that she had failed to fill out a separate jsa form. Beneli laughed and asked Winklestine where it stated she could not eat pastry during the jsa meeting. Winklestine said he would look for it. Beneli again asked to see it in writing. Winklestine said he did not have to show Beneli anything. Winklestine then stated that Beneli was being suspended for 3 days without pay for the safety violations.
>
> Beneli turned to McDesmond and said, "So this is the f—g game you guys are going to play?" Almost immediately Winklestine and McDesmond pointed their fingers at Beneli and stated that she was terminated. McDesmond said that Beneli had threatened them. Beneli said that she did not threaten anyone but said, "is this the f—g game you are going to play?" McDesmond stated there you go again and once more accused Beneli of threatening them. McDesmond then told Rhonda Roberson to prepare termination papers and to cut Beneli's final check. [17]

The union grieved the discharge and it was progressed to step 4, which calls for a hearing before the grievance review subcommittee. A quorum of five representatives consisting of at least two management representatives, two labor representatives, and one NMAPC staff representative considers and decides a grievance at Step 4. All subcommittee determinations are based upon the facts presented, both written and oral, and any decision rendered is final and binding and not subject to any appeal.[18]

On October 8, 2009, the subcommittee hearing was conducted and the union argued that Beneli was fired for certain steward activities in violation of the NLRA and Board decisions.[19] By letter also dated October 8, 2009

the subcommittee issued its decision denying the grievance and upholding Beneli's discharge. As set forth in the ALJ's decision the subcommittee noted:

> The "issue was the Union's contention the [Respondent] violated Article XXIII Management Clause of the National Maintenance Agreement by terminating the grievant, without just cause, for the grievant's use of profanity" and that the subcommittee "reviewed all the information submitted both written and oral" and determined that "no violation of the National Maintenance Agreement occurred and therefore, the grievance was denied.[20]

The majority decision of the Board stated:

> The [subcommittee's] decision states only that Beneli's termination for using profanity did not violate the contractual prohibition against termination without just cause; it fails even to mention the statutory issue or the contractual prohibition against retaliation for union activity. In denying the grievance, the subcommittee may have considered the statutory issue, or it may not have, there is simply no way to tell.[21]

B. THE BOARD'S DECISION DEFERRING TO THE SUBCOMMITTEE "ARBITRATION"

Under the *Spielberg/Olin* standard, the Board defers to arbitral awards and final disposition of joint employer-union committees when: (1) all parties agreed to be bound by the decision of the arbitrator; (2) the proceedings appear to be fair and regular; (3) the arbitrator adequately considered the unfair labor practice issue [under *Olin* the Board added the requirement that the contractual issue must be factually parallel to the unfair labor practice issue; and the arbitrator must have been presented generally with the facts relevant to resolving the unfair labor practice issue.]; and (4) the award is clearly not repugnant to the policies of the Act.[22] Under *Olin* the Board also places the burden on the party opposing deferral to demonstrate that the standards for deferral have not been met.[23]

Applying the above standard, the administrative law judge deferred to the Subcommittee's decision.[24] And the Board determined that the decision would appear to qualify for deferral under the above set forth current deferral standard, stating as follows:

> As the judge found, it is conceded that the proceedings were fair and regular, and that all parties agreed to be bound by the panel's decision. Further, under *Olin*, the Subcommittees would be deemed to have "adequately considered" the unfair labor practice issue – whether Beneli was discharged for her steward activities – even if it actually did not consider that issue at all, because it was "factually parallel" to the contractual issue – discharging Beneli for the use of profanity – and the Subcommittee was "presented generally" with the facts relevant to resolving the statutory issue. Additionally, the absence of any evidence that the statutory issue was considered presents no impediment to deferral under the current standard because the General Counsel has the burden to show that the statutory issue was *not* considered. Finally, the decision to deny Beneli's grievance was not found to be repugnant to the Act, because it was susceptible to an interpretation consistent with the Act.[25]

Because the General Counsel failed to demonstrate that the Subcommittee's decision was clearly repugnant to the Act, the Board deferred to the Subcommittee's decision and dismissed the complaint.[26]

III. THE CHANGE IN THE NLRB'S DEFERRAL STANDARD AFTER THIRTY YEARS UNDER *OLIN*

"Arbitration" according to *Roberts' Dictionary of Industrial Relations* is a "procedure whereby parties agree to submit a dispute to a third party known as an arbitrator for a final and binding decision." [27] Usually this involves mutual selection of the third party by the parties themselves. The Federal Mediation and Conciliation Service, the American Arbitration Association and the National Mediation Board maintain panels of qualified labor arbitrators, from which the parties can select an arbitrator acceptable to both parties who will be guided in conduct and procedures by the *Code of Professional Responsibility for Arbitration of Labor Management Disputes*.[28]

In the *Babcock* case, Coletta Beneli's grievance was progressed to step 4 of the grievance review subcommittee consisting of two management, two labor representatives and one NMAPC staff representative.[29] The NMAPC staff representative is a non-voting facilitator. In effect,t the decision is made jointly by the union and management members.[30]

The decision rendered is final and binding and not subject to any appeal.[31] On the same date as the step 4 hearing, the Subcommittee also issued its letter decision that:

> The "issue was the Union's contention the [Respondent] violated Article XXIII Management Clause of the National Maintenance Agreement by terminating the grievant, without just cause, for the grievant's use of profanity" and that the subcommittee "reviewed all the information submitted both written and oral" and determined that "no violation of the National Maintenance Agreement occurred therefore, the grievance was denied."[32]

The decision made without a neutral, professional arbitrator fails to even mention the statutory issue or the contractual prohibition in the CBA against retaliation for union activity. As the Board states: the Subcommittee may have considered the statutory issue, or it may not have; there is simply no way to tell.[33] Under *Olin,* the Subcommittee would be deemed to have "adequately considered" the unfair labor practice issue – whether Beneli was discharged for her steward activities – even if it actually did not consider that issue at all, because it was "factually parallel" to the contractual issue – discharging Beneli for the use of profanity – and the Subcommittee was "presented generally" with the facts relevant to resolving the statutory issue.[34] Moreover, the absence of any evidence that the statutory issue was considered presents no impediment to deferral under the current standard because the General Counsel has the burden to show that the statutory issues were *not* considered.[35] Thus, the standards established under *Olin* may impede access to the Board's remedial processes if disciplinary actions that are in fact unlawful employer reprisals for union activity are upheld in "arbitration." Coletta Beneli was left without any forum to vindicate her Section 7 rights under the NLRA.[36] Under the new *Babcock* deferral standard the *Olin* risk will no longer be countenanced by the Board. By utilizing Coletta Beneli's untenable demise under the *Olin* guidance, the NLRB has made a compelling case to change its *Spielberg/ Olin* deferral standard as set forth in *Babcock.*

IV. DEFERRAL TO EXISTING AWARDS (POST ARBITRAL DEFERRAL)

Under *Babcock*, the Board will defer to an arbitrator's decision in Section 8(a)(3) and (1) unfair labor practice cases where the arbitration procedures appear to have been fair and regular and the parties agreed to be bound,[37] and the party urging deferral demonstrates that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, (or was prevented from doing so by the party opposing deferral) and (3) Board law reasonably permits the arbitral award .[38] Moreover it is important to underscore that *Babcock* places the burden of proving that each element of the deferral standard is satisfied on the party urging deferral, typically the employer.[39]

A. Explicit Authorization

The arbitrator must be explicitly authorized to decide the statutory issue. This requirement is met by showing either that: (1) the specific statutory right at issue was incorporated in the collective-bargaining agreement, or (2) the parties agreed to authorize arbitration of the statutory issue in the particular case.[40]

B. Statutory Issue was Presented and Considered

The arbitrator must have been presented with and considered the statutory issue (or have been prevented from doing so by the party opposing deferral). The Board stated that either party can raise the statutory issue before the arbitrator.[41] Merely informing the arbitrator of the unfair labor practice allegation in a pending charge will usually be sufficient to show that the issue was presented.[42]

> The Board stated in part:
>
> We shall find that the arbitrator has actually considered the statutory issue when the arbitrator has identified that issue and at least generally explained why he or she finds that the facts presented either do or do not support the unfair labor practice allegation. We stress that an arbitrator will not be required to have engaged in a detailed exegesis of Board law in order to meet this standard. We recognize that many arbitrators, as well as many union and employer representatives who appear in arbitral proceedings, are not attorneys trained in labor law matters.[43]

C. The Arbitral Award is Reasonably Permitted Under Board Law

Board law must reasonably permit the award. By this the Board means that the arbitrator's decision must constitute a reasonable application of the statutory principles that would govern the Board's decision, if the case were

presented to it.[44] The arbitrator need not reach the same result as the Board would reach, only a result that a decision maker reasonably applying the Act could reach.[45] In deciding whether to defer, the Board will not engage in the equivalent of *de novo* review of the arbitrator's decision.[46]

D. Prospective Application of the New *Babcock* Postarbitral Deferral Standard

The Board's *Babcock* standard will apply only prospectively, with certain exceptions, because the Board stated it would be unfair to parties who relied on the continued applicability of the current *Spielberg/Olin* standard when they negotiated their existing contracts.[47]

V. REQUIRED GRIEVANCE ARBITRATION MACHINERY INSTEAD OF BOARD PROCEEDINGS (PREARBITRATION DEFERRAL)

In *Babcock* the Board modified its standard for prearbitration deferral set forth in *Collyer Insulated Wire* [48] and *United Technologies Corp.*[49] The Board stated:

> The AFL-CIO argues that the Board should not defer to the arbitral process unless the first prong of the postarbitral deferral standard is satisfied, that is, unless the arbitrator was explicitly authorized to decide the unfair labor practice issue. We agree. There is no apparent reason to defer to the arbitral *process* if it is plain at the outset that deferral to the arbitral *decision* would be improper. Thus, we shall no longer defer unfair labor practice allegations to the arbitral process unless the parties have explicitly authorized the arbitrator to decide the unfair labor practice issue, either in the collective-bargaining agreement or by agreement of the parties in a particular case.[50]

VI. DEFERRAL TO GRIEVANCE SETTLEMENTS

Under *Babcock*, the Board will apply essentially the same deferral standard to grievance settlements as it does to arbitral decision in Section 8(a)(1) and (3) cases. In such cases, it must be shown that: (1) the parties intended to settle the unfair labor practice issue; (2) they addressed that issue in the settlement agreement; and (3) Board law reasonably permits the settlement agreement.[51] In assessing whether the negotiated settlement is reasonably permitted, the Board will assess the agreement in light of the factors applicable to other non-Board settlement agreements, as set forth in *Independent Stave Co.*[52]

VII. THE NEW *BABCOCK* DEFERRAL STANDARD IS WARRANTED

Dissenting to the changes in the deferral standard, Member Miscimarra asserted that the Board's *Babcock & Wilcox* decision damages the parties' reliance on their collective bargaining agreements as "final and binding."[53] Moreover, he argued that the standard undermines the parties' ability to negotiate contract terms voluntarily and requires a wholesale rewriting of CBA "cause" and arbitration provisions.[54] Member Johnson's dissent urged that departure from the current longstanding deferral policy is unwarranted.[55]

A. Board Treatment of Statutory Section 8 (a) (3) and (1) Cases

In a situation where an individual has been disciplined or discharged by an employer allegedly in retaliation for employee activity specifically protected by the NLRA in a work environment where no collective bargaining agreement is in effect, the case will come before the Board members after: (1) unfair labor practice charges are filed with the Board's regional office alleging violations of Sections 8 (a)(3) and (1); (2) an investigation is conducted and the Regional Director finds that formal action on the unfair labor practice allegations should be taken; (3) the General Counsel issues a complaint; (4) a hearing is held before an administrative law judge (ALJ)[56] with a "Board attorney" representing the General Counsel (and the employee) and a retained attorney representing the employer, and the ALJ issues a decision and order in the case; and (6) an exception to the ALJ's decision and order is filed with the Board, at which point the Board will find the employer either guilty of the unfair labor practice and order appropriate remedial action or find the employer not guilty and dismiss the case.[57]

B. Comment on the Step 4 Decision by the Subcommittee: The "Arbitrators" in This Case

Unlike the resolution of an unfair labor practice complaint before an administrative law judge, the matter in this case was resolved under Step 4 of the grievance procedure of

the parties, set forth in their collective bargaining agreement. While consisting of five members and giving the illusion of a neutral member, only the two union members and the two management members had authority to vote on the disposition of the grievance,[58] with their joint decision being final and binding on the parties.[59] Had the joint committee of four deadlocked, the matter would have progressed to Step 5 with an actual arbitration, as administered by and under the procedures of the American Arbitration Association.[60] Nevertheless, under existing Board law, the Board has deferred to such joint employer-union committees that are final dispositions of a grievance.[61] Unlike an administrative law judge, a highly qualified, independent and impartial trier of fact obligated to properly apply Board law to the facts of record culminating in a written decision available to the parties, four individuals, two union representation and two management representatives made a final and binding decision on the contractual claim on behalf of Coletta Beneli. The four did not identify the statutory issue or explain facts supporting an unfair labor practice decision, and they conclusively foreclosed Beneli's statutory rights under Section 8(a) (3) and (1) of the NLRA as follows:

> The "issue was the Union's contention the [Respondent] violated Article XXIII Management Clause of the National Maintenance Agreement by terminating the grievant, without just cause, for the grievant's use of profanity" and that the subcommittee "reviewed all the information submitted both written and oral" and determined that "no violation of the National Maintenance Agreement occurred and therefore, the grievance was denied.[62]

Under the NLRB's rewriting of its deferral standard in *Babcock*, the employer would be obligated to show that the Subcommittee had been explicitly authorized to decide the statutory issue.[63] No such showing existed in Ms. Beneli's case. Moreover, at Step 4 the employer would have to show that the Subcommittee actually considered the statutory issue and generally explained in a written decision why the facts presented do not support Ms. Beneli's unfair labor practice allegations.[64] Thus the joint decision of the Subcommittee, under the *Babcock* ruling, would have required a statement of the facts for the record, including Beneli's activity as union steward enforcing the CBA,[65] which led to the employer assessing a suspension without pay for failing to fill out a safety form and for eating a pastry during a safety meeting;[66] which led to Beneli's response "is this the f-----g game you are going to play"; at which point two managers pointed their fingers at her and said she was terminated.[67] Can you imagine two union representatives on a joint grievance decision, no longer able to hide behind a conclusionary statement as actually issued at Step 4, upholding the termination of a union steward on these real facts, in the construction industry? These facts simply "won't write" as a basis to uphold a discharge under a just cause "standard" contained in a CBA. Nor, would a similar subcommittee appear to have the training and competency to apply "Board law" to the facts to make a determination on whether Section 8(a)(3) and (1) of the Act had been violated.

C. The Effect of the *Babcock* Decision on Deferring to Joint Employer-Union Committee Decisions Involving Statutory Rights

In the *Babcock* case, Step 5 of the contractual grievance procedure required the progression of the case to true "arbitration", where the parties would have an opportunity to select a mutually acceptable arbitrator, under the administration of the American Arbitration Association, to hear and decide the case.[68] Under the new deferral standard, the parties would thus be able to select a neutral arbitrator with the background and experience to apply the Babcock standard and reach a final and binding decision on the contractual and statutory claims.

Broadly speaking, it is highly unlikely that future Step 4 type contested subcommittee decisions, or joint employer-union committee decisions could be made to conform to the meticulous *Babcock* deferral standard. Future cases will therefore have to be progressed to the next step in the parties' grievance – arbitration procedures which will likely continue to provide for the selection of a neutral arbitrator highly qualified to resolve the contractual and statutory issues in question. It is highly likely, however, that a genuine settlement at a Step 4 type grievance hearing between a union and employer, acceptable to the grievant-charging party, could be drafted to meet the new deferral standard on settlements.

VIII. CONCLUSION

Judge Pollack, the impartial trier of fact in this case, credited the testimony of Ms. Beneli and union assistant business manager Shawn Williams.[69] The Board majority compellingly used the plight of Ms. Beneli to demonstrate that the *Olin* deferral standard is inadequate to ensure that employees' statutory rights are protected in the arbitral process. The Board, as a result, changed its deferral standard! The Board's usual practice is to apply all new policies

and standards in "all pending cases, in whatever stage." [70] However, stunningly, the Board left Ms. Beneli without a remedy, on the meritless position that "it would be unfair to the parties [nationwide] that have relied on the current standard in negotiating contracts...."[71] It is difficult to imagine that any party in contract negotiations actually consciously "relied" on the continuation of the *Spielberg/Olin* standard. Moreover, only a fraction of the cases decided by the Board involve deferral issues.[72] Basic fairness requires that the individual whose circumstances compelled the changed deferral policy, Ms. Beneli, should have the new policy apply to her, along with an appropriate remedy.[73]

ENDNOTES

[1] 29 U.S.C. §§1151-169 (2012).

[2] 29 U.S.C. §§158 (a)(1), 158 (a)(3).
(a) It shall be an unfair labor practice for an employer –
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
...
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: ...

[3] 29 U.S.C.§ 160 (a): The Board is empowered ... to prevent any person from engaging in any unfair labor practice... 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....

[4] *International Harvester Co.*, 138 N.L.R.B. 923, 925-926 (1962), enfd. 327 F.2d 784(7 th Cir. 1964), denied 377 U.S. 1003 (1964), cited with approval in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964).

[5] *Id.*

[6] 112 N.L.R.B. 1080 (1955).

[7] *Id.* at 1082.

[8] *See International Harvestor Co.*, 138 NLRB 923, 926-927 (1962).

[9] *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984).

[10] 361 N.L.R.B. No. 132 (Dec. 15 2014) at 1.

[11] *Id.* at 4, 12, 13.

[12] *Id.* at 13, 14.

[13] *Id.* at 5, 37.

[14] *Id.* at 37.

[15] *Id.* at 5.

[16] *Id.* at 6, 37.

[17] *Id.* at 37, 38.

[18] *Id.* at 39.

[19] *Id.* at 6.

[20] *Id.* at 38.

[21] *Id.* at 6.

[22] *Spielberg*, 112 N.L.R.B. at 1082; *Olin*, 268 N.L.R.B. at 574.

[23] *Id.*

[24] 361 N.L.R.B. No. 132 at 39. The ALJ credited the testimony of Beneli and Williams, nevertheless the ALJ stated that the Subcommittee could have credited Babcock's witnesses. And while the ALJ would have reached a different conclusion, he did not find the factual decision repugnant to the policy of the Act.

[25] *Id.* at 6.

[26] *Id.* at 14.

[27] ROBERTS, ROBERTS' DICTIONARY OF INDUSTRIAL RELATIONS, 4 th ed. (BNA Books, 1994) at 47.

[28] *Code of Professional Responsibility for Arbitrators of Labor Management Disputes of the National Academy of Arbitrators, The American Arbitration Association and the Federal Mediation and Conciliation Services.* https://www.adr.org/aaa/shawproperty.

[29] 361 N.L.R.B. No. 132 at 38.

[30] Telephone interview with Brian Powers, GC, IUOE, on March 14, 2016. The absence of neutral voting member on a bipartite or joint panel would not necessarily preclude deferral. *See Denver-Chicago Trucking Co.*, 132 N.L.R.B. 1416 (1961). But where, in addition it appears that all members of the bipartite panel are or would be arrayed in interest against the charging party, deferral would not be appropriate. *Roadway Express Inc.*, 145 N.L.R.B. 513 (1963). The ALJ relied on *K-Mechanical Services, Inc.*, 299 N.L.R.B. 114, 117 (1990) as authority to apply the *Spielberg/Olin* deferral standard to determinations by joint employer-union committees that are final dispositions of a grievance. Under the parties' CBA should the NMAPC step 4 process have failed to yield a decision, then at Step 5 the matter would have been submitted to the American Arbitration Association for a binding decision.

[31] 361 N.L.R.B. No. 132 at 38.

[32] *Id.*

[33] *Id.* at 7.

[34] *Id.*

[35] *Id.*

[36] Coletta Beneli is in the process of progressing a case against the NLRB to the 9 th Circuit Court of Appeals. *See* Re: 9 thCir. No. 15-73426—*Coletta Kim Beneli v. N.L.R.B.*, Board case No. 28-CA-022625.

[37] These traditional requirements under *Spielberg* and *Olin* were not affected by the *Babcock* decision.

[38] *Babcock*, 361 N.L.R.B. No.132 at 2.

[39] *See* Memorandum GC 15-02 (Feb. 10, 2015) p. 2.

[40] 361 N.L.R.B. No.132 at 5.

[41] *Id.* at 7.

[42] *Id.* at 7 n. 14.

[43] *Id.* at 7.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 13-14. *See* Memorandum GC 15-02 (Feb. 10, 2015) p. 9. where the General Counsel lists the following rules to determine whether to evaluate an arbitration award under *Olin* or *Babcock* in pending or future cases raising allegations of Section 8(a)(1) and (3). *Olin* applies if the arbitration hearing occurred on or before December 15, 2014, the date the *Babcock* decision issued; *Babcock* applies if the collective-bargaining agreement under which the grievance arose was executed after December 15, 2014. If the collective-bargaining agreement under which the grievance arose was executed on or before December 15, 2014, and the arbitration hearing occurred after December 15, 2014, which standard applies depends on whether the arbitrator was explicitly authorized to decide the statutory question (either in the collective-bargaining agreement or by agreement of the parties in a particular case). If the arbitrator was so authorized, then *Babcock* applies, even if the Region initially placed the case on administrative deferral. If the arbitrator was not authorized to decide the statutory issue, then *Olin* applies.

[48] 192 N.L.R.B. 837 (1971).

[49] 268 N.L.R.B. 557 (1984).

[50] 361 N.L.R.B. No. 132 at 12, 13.

[51] *Id.* at 13.

[52] 287 N.L.R.B. 740, 743 (1987). The Board in *Independent Stave* identified the following non-exclusive list of factors to consider in evaluating settlements: (1) whether all parties involved agreed to be bound by the non-Board settlement; (2) whether the proposed settlement is reasonable in light of the alleged violation, the risks of litigation, and the stage of litigation; (3) whether there is any indication of fraud, coercion or duress regarding the parties' settlement; and (4) whether the respondent has a history of violations or of breaching previous settlement agreements resolving unfair labor practices.

[53] *See* 761 N.L.R.B. No. 132 at 16, 24. (Miscimarra, M., dissenting).

[54] *Id. at* 20-23.

[55] *See id.* at 36. (Johnson, M., dissenting).

[56] The Administrative Law Judge (ALJ) function was created by the Administrative Procedure Act of 1946 to ensure fairness in administrative proceedings before Federal Government agencies. ALJs serve as independent, impartial triers of fact in formal proceedings requiring a decision on the record after a hearing. ALJs must have a full seven years of experience as a licensed attorney involving litigation in the government sector, and pass an examination testing their competency, knowledge, skills and abilities essential to their work. ALJs are held to a high standard of conduct to maintain the integrity and independence of the administrative judiciary. *U.S. Office of Personnel Management*, http://www.opm.gov/services-for-agencies/administrative-law-judges/.

[57] *See* 361 N.L.R.B. No. 132 at 9; *See also* DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW, 66 (2013).

[58] Telephone interview with Brian Powers, GC, IUOE, March 14, 2016. The National Maintenance Agreements Policy Committee (NMAPC) assigns

a NMAPC staff representative to the grievance committee as an "impartial administrator", See http://www.nmapc.orga/about/. As stated previously, this person is a non-voting member of the subcommittee.

[59] 361 N.L.R.B. No. 132 at 38.

[60] National Maintenance Agreement, Article VI – Grievances, Step 4 and 5...

Step 4. If the parties are unable to effect an amicable settlement or adjustment of any grievance or controversy, it shall be submitted to the National Maintenance Agreements Policy Committee, Inc., for a decision to become effective immediately. *(Parties should refer to NMAPC Grievance Procedures as amended June 12 & 13, 1990 at this step.)*

Step 5. Failure of the National Maintenance Agreements Policy Committee, Inc., to reach a decision shall constitute a basis for a submittal of the question by the affected parties to the American Arbitration Association for a binding decision. In such instances, the affected parties to the dispute shall appoint an arbitrator to review the matter and render a binding decision. If the parties are unable to agree upon an arbitrator, the American Arbitration Association shall make the designation. The affected parties to the arbitration shall equally share in the costs, including printing and publication of any record of such arbitration.

[61] K-Mechanical Services, Inc., 299 N.L.R.B 114, 117 (1990). See however, the position of Professor Clyde Summers that:

> The joint grievance committee process gives no assurance that the individual contract rights will be fully and fairly adjudicated on their merits. Although most cases may be properly decided, the process is structured to allow ex parte evidence, reliance on irrelevant considerations, grievance trading, political motivations, and personal bias.

Summers, *Teamsters Joint Grievance Committees: Grievance Disposal Without Adjudication*, 7 INDUS. REL. L. J. 313, 333 (1985).

[62] 361 NLRB No. 132 at 38.

[63] *Id.*at 5.

[64] *See id.*

[65] *See id.*

[66] *Id.* at 38.

[67] *Id.*

[68] National Maintenance Agreement, Article VI, Step 5.

[69] 361 N.L.R.B. No. 132 at 39.

[70] *Id.* at 13.

[71] *Id.* at 14

[72] *Id.*

[73] Ms. Beneli has recently progressed a case against the NLRB and Babcock & Wilcox Construction Co., Inc. to the 9 th Circuit Court of Appeals, *Coletta Kim Beneli v. NLRB*, No. 15-73426 (2015)