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NLRB Changes Standard for Deferral to Arbitration in Discrimination and Retaliation Cases

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In a significant recent decision, the National Labor Relations Board (NLRB or Board) again abandoned long-standing, accepted Board precedent. In *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (Dec. 15, 2014), the Board changed its standard for deferral to arbitration awards, grievance/arbitration proceedings and pre-arbitration grievance settlements in cases where it is alleged that employees suffered retaliation or reprisal for engaging in union and/or protected concerted activity in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (Act).[1] Agreeing with the Board's General Counsel (GC) that the existing deferral standard for arbitration awards in the Board's 1984 decision in *Olin Corp.* "does not adequately balance the protection of employees' rights under the Act and the national policy of encouraging arbitration of disputes arising over the application or interpretation of a collective-bargaining agreement," the Board ruled that, going forward, employers urging deferral to an arbitration award have the burden of showing that the "statutory issue" was presented to the arbitrator, that the arbitrator considered the statutory issue and that Board law "reasonably permits" the award. The Board also changed the standards for pre-arbitration deferral and deferral to pre-arbitration settlements to be consistent with the change to the arbitration award standard.

What the Standard Was and the General Counsel's Distaste for it

The Board issued its first decision agreeing to defer to arbitration awards in 1955 in *Spielberg Mfg. Co.*, holding that it would defer to arbitration decisions in cases where the proceedings were fair and regular, all parties agreed to be bound, and the decision of the arbitrator was not "clearly repugnant" to the Act. In 1984, in *Olin Corp.*, the Board added the requirements that the contractual issue addressed by the arbitrator be "factually parallel" to the unfair labor practice issue and that the arbitrator be presented generally with the facts relevant to resolving the unfair labor practice. Returning to prior precedent, the Board also placed the burden on the party opposing deferral to show that the requirements for deferral had not been met.

Interpretation of the law remained unchanged until January 2011, when the GC issued GC Memorandum 11-05, which, among other things, stated that the *Olin Corp.* standard was inadequate to ensure that employees' statutory rights were protected in the arbitral process and recommended that the Board adopt more demanding standards regarding deferral of Section 8(a)(3) and (1) cases. In February 2014, in connection with its consideration of the appeal of the

1 The deferral standard for cases involving Section 8(a)(5) bad faith bargaining/unilateral change allegations was not addressed.

judge's decision in *Babcock & Wilcox*, the Board requested briefs addressing four issues, including whether the *Olin Corp.* standard should be modified and, if so, whether the modifications previously recommended by the GC should be adopted.

What the Board Did

Rejecting contrary arguments raised by dissenting Members Miscimarra and Johnson and arguments offered by others in the briefing process, the Board majority of Chairman Pearce and Members Hirozawa and Schiffer adopted virtually all of the GC's recommendations. In the majority's opinion, deferral to arbitration was a matter of "statutory" discretion for the Board to exercise in its judgment and—such "discretion" was not restricted or prohibited by any section of the Act. It was for the Board to decide whether its intervention in the arbitration process was necessary based on the statutory rights involved, or whether it should withhold its authority to adjudicate alleged unfair labor practices where federal labor policy would be best served by deferring to an arbitration decision involving the same subject matter. In *Babcock & Wilcox*, the Board concluded that the employees' statutory rights affected in Section 8(a)(3) and (1) cases warranted intervention, and it then proceeded to change all of the standards for deferral of cases involving those and similar allegations.

The newly established standard for deferral to arbitration awards is as follows: if the arbitration procedures appear to have been fair and regular, and if the parties agreed to be bound, the Board will defer to an arbitral decision if the party urging deferral shows 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 award. According to the Board, the "explicitly authorized" requirement would be met by showing either that the specific statutory right at issue was incorporated in the parties' collective bargaining agreement (CBA) or that the parties agreed to explicitly authorize the arbitrator to decide that issue in that case. With respect to the "Board law" requirement, the arbitrator's decision had to constitute a "reasonable application of the statutory principles that would govern the Board's decision, if the case were presented to it, to the facts of the case."

Turning to the pre-arbitration deferral standard under *Collyer Insulated Wire* and *United Technologies Corp.*, the Board changed the standard to be consistent with the post-arbitration deferral standard. Thus, the Board held that it would not defer Section 8(a)(3) and (1) allegations to the grievance/arbitration process unless the parties "explicitly authorized" the arbitrator to decide the unfair labor practice issue, either in the CBA or by specific agreement in a particular case. The Board also decided to apply the new deferral standard to pre-arbitration grievance settlements. To comply, the employer must show that the parties intended to settle the unfair labor practice issue, that they addressed the issue in the settlement agreement and that Board law "reasonably permits" the settlement reached by the parties.

Fortunately for employers, the Board will apply its new deferral standards only prospectively, and not retroactively to all pending cases, as it usually does. Because the new arbitration award deferral standard did not apply to the *Babcock & Wilcox* case, the Board followed the *Olin Corp.* standard, which had been met, deferred to the arbitration award upholding the discharge of the employee, and dismissed the complaint.

The Dissenters' Views

While Members Miscimarra and Johnson both agreed with the decision to dismiss the complaint, each filed separate, lengthy dissents. Member Miscimarra's primary argument was that the majority's decision to deny deferral in all arbitration cases that determined whether "cause" supported an employee's suspension or discharge, unless the party seeking deferral proved that the arbitrator considered so-called "statutory" or "unfair labor practice" issues, was precluded by Section 10(c) of the Act. Miscimarra also complained that the new standards required parties to rewrite certain CBA provisions or be prepared for two track arbitration/Board litigation, thereby eliminating the benefits of "final and binding" arbitration. In Miscimarra's view, the changed deferral standard reflected an underlying hostility toward final and binding grievance arbitration and "cause" determinations, contrary to the federal policies favoring arbitration. Finally, Miscimarra argued that there was no reason for the Board to change any of the well-established, understood, and widely applied and enforced deferral standards. Member Johnson also argued that the new standards reflected an implicit hostility toward arbitration, that there was no rational basis for departing from the prior standards, and that a result of the changes would be for unions and employees to embrace the two track litigation option, with the Board litigation being at public expense.

Effect on Unionized Employers

Once again, the Board majority has overruled long-standing (30 years) Board precedent. The relatively stable, collectively bargained process of grievance resolution and final and binding arbitration has been disrupted. The known and understandable standards for deferral to arbitration

of matters within the Board's jurisdiction have been changed substantially, and how those standards will be interpreted and applied by the Board has yet to be determined. There are however, some known effects of the Board's decision:

1. Regardless of whether the proposed deferral is to an existing arbitration award, to prospective arbitration procedures or to pre-arbitration grievance settlements, the proponent of arbitration – generally the employer – bears the burden of showing satisfaction of all requirements of the deferral standard.
2. To satisfy the requirement that the arbitrator be "explicitly authorized" to decide the unfair labor practice issue, the parties' CBA must contain a provision prohibiting discipline for engaging in union and/or protected concerted activity. If it does not, the parties have to either negotiate such a provision or execute a written agreement containing the authorization for each case involving Section 8(a)(3) and (1) allegations. As noted in both dissenting opinions, however, neither renegotiating discipline provisions nor negotiating case-by-case agreements are simple matters for either party, for many reasons.
3. In accordance with the Board's decision to apply the new standards prospectively, outstanding arbitration awards and pending (post-hearing) awards are governed by the *Olin Corp.* deferral standard. With respect to arbitrations that have not occurred, the new standard will be applied where the parties already have, either contractually or explicitly for a particular case or cases, authorized arbitrators to decide unfair labor practice claims. However, where current CBAs do not authorize arbitrators to decide unfair labor practice issues, the Board will not apply the new standard until those CBAs have expired or the parties have agreed to present particular statutory issues to the arbitrator. Based on this statement by the Board and an accompanying footnote, it appears that the *Olin Corp.* deferral standard will govern arbitration awards under those contracts, even if the arbitration occurs after the *Babcock & Wilcox* decision. The decision does not address deferrals to the arbitration process or to pre-arbitration grievance settlements under such contracts.
4. There is a substantial likelihood that the current Board (now with Member McFerran sworn in as Member Schiffer's replacement) will refuse to defer to any arbitration award that is not consistent with what it would do under Sections 8(a)(3) and (1) with the same facts, regardless of the majority's assertion that the Board would not do so. More aggressive unions and dissatisfied employees are likely to take advantage of that possibility, especially if they do not prevail in the underlying arbitration.
5. Employers will have to make a request to the union that unfair labor practice charges alleging Section 8(a)(3) and (1) violations be deferred to the grievance/arbitration process and show that the "explicitly authorized" requirement has been met. Again, more aggressive unions may reject such requests. In addition, some arbitrators are inclined not to consider NLRA deferral matters, even if both parties agree to the contrary. In such circumstances, a parallel NLRA claim will be permitted to move forward.
6. Depending upon the circumstances, pre-arbitration settlements of grievances are now much more complicated. Lower level managers, supervisors, and Human Resources representatives often resolve grievances at early stages quickly and cost effectively. In many cases, such resolutions will not be challenged simply because both parties sincerely wanted a settlement. Where a challenge later occurs, however, to warrant deferral to such settlement, the employer will have to prepare a written agreement showing that the requirements of the new standard have been satisfied.
7. Employers cannot preclude employees from engaging in two-track litigation, even if the CBA contains a provision authorizing an arbitrator to resolve unfair labor practice issues, because employees can pursue their unfair labor practice claims with the Board, which may or may not defer to the arbitration award. If there is no CBA provision authorizing arbitration of the unfair labor practice, the opportunity for employees to pursue their claims through both the grievance/arbitration process and the Board is guaranteed.
8. An immediate appeal of the Board's decision may not occur, as the underlying complaint in *Babcock & Wilcox* was dismissed. As a result, employers should anticipate these substantial changes to the deferral process to be in effect now, subject to the conditions described above. Ultimately, however, the Board's new standards are likely to be challenged in some later case.

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