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DEFERRAL TO ARBITRATION
AFTER OLIN AND UNITED TECHNOLOGIES:
HAS THE NLRB GONE TOO FAR?

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MARK KELLY**

I. Introduction

Labor arbitration traditionally has been praised as a dispute resolution procedure. Section 203(d) of the Labor Management Relations (Taft-Hartley) Act (LMRA) declares arbitration to be the "desirable method" for settlement of disputes arising out of collective bargaining agreements.¹ In 1957 the Supreme Court gave its first official recognition to the preferred status of labor arbitration in Textile Workers Union v. Lincoln Mills,² holding that federal courts must grant specific performance of collective bargaining agreements to arbitrate disputes. Three years later, in a group of cases collectively known as the Steelworkers' Trilogy,³ the Supreme Court emphasized that arbitration plays a vital role in the maintenance of industrial peace in the United States.⁴ To promote arbitration and its goal of maintaining industrial peace, the Court declared that arbitration agreements would be broadly construed⁵ and given "full play."⁶ The Court's willingness to defer is based largely upon the belief that arbitrators are highly qualified to resolve controversies arising from interpretation of collective bargaining agreements.⁷

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1. Labor Management Relations Act [hereinafter cited as LMRA], § 203(d), 29 U.S.C. § 173(d) (1976). "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases." Id.
5. Id. at 583. The Court stated: "Apart from matters that the parties specifically exclude, all of the question on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement." Id. at 581. Furthermore, the court concluded that "[d]oubts should be resolved in favor of coverage." Id. at 583.
7. See United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. at 582. The Court observed that even the "ablest judge cannot be expected to bring the same experience
The Court noted that arbitrators are generally selected because of their knowledge of the "common law of the shop," as well as their ability to consider factors not expressly articulated in the agreement. The Court’s reliance on arbitrators to decide contractual disputes encouraged other courts and judicial agencies to adopt the deferral policy and extend it to allow arbitrators to decide statutory issues as well.

For over thirty years, the National Labor Relations Board (NLRB or Board) has adhered to a policy requiring deferral to arbitration awards whenever certain minimum procedural standards are met. The Board gradually has expanded and refined its deferral policy over the years in an effort to reconcile the maximum efficiency of the arbitration process with adequate protection for employees’ rights. Recently, however, the Board in Olin Corp. and United Technologies significantly expanded the existing deferral policy and effectively foreclosed individuals from vindicating their statutory rights in the forums created by Congress. Now relegated to the arbitral forum, individuals must depend upon a mechanism not designed for or adept at adjudicating individuals’ rights. In contrast, since 1974 the Supreme Court has retreated from broad application of arbitral deferral. In three recent cases the Court found that the federal labor policy favoring arbitration does not justify deferral in cases where individual rights are at stake. The propriety of the NLRB’s expanded deferral policy must be seriously questioned in light of the Supreme Court’s trend of limiting arbitrators’ jurisdiction to decide “individual statutory rights” cases.

II. A History of the National Labor Relations Board’s Deferral Policies

A. Post-Arbitral Deferral: Spielberg and Its Progeny

The National Labor Relations Board recognized the importance of arbitration in achieving the objectives of federal labor policy even before the

and competence to bear upon the determination of a grievance, because he cannot be similarly informed.” Id. 8. Id. 9. Id. The arbitrator is able to consider the effect that a particular interpretation of the collective bargaining agreement might have upon productivity, morale or shop tension. Id. 10. See generally Moses, Deferral to Arbitration in Individual Rights Cases: A Re-examination of Spielberg, 51 TENN. L.R. 187, 188 (1984). In establishing the content of the NLRB’s deferral policy, the Board must balance the tension between its duty to prevent unfair labor practices and the desire to uphold the integrity of the arbitral process. See International Harvester Co., 138 N.L.R.B. 923, 925-26 (1962), aff’d sub nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), cert. denied, 377 U.S. 1003 (1964). 11. 268 N.L.R.B. 573 (1984). 12. 268 N.L.R.B. 557 (1984). 13. National Labor Relations (Wagner) Act § 1, 29 U.S.C. § 151 (1976). “It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions
DEFERRAL TO ARBITRATION

Supreme Court's endorsement of arbitration in the Steelworkers' Trilogy. To promote voluntary dispute resolution through arbitration, the Board began to limit its own jurisdiction and defer to arbitration awards. In 1955 the Board articulated its first clear standard for deferral to arbitration awards in Spielberg Manufacturing Co. The controversy in Spielberg centered on the union's allegation that the company violated the anti-discrimination policy of section 8(a)(3) of the National Labor Relations Act (NLRA) by refusing to reinstate four strikers. The Board dismissed the complaint based upon an existing arbitration award that upheld the discharges on grounds of strike misconduct. The NLRB announced that it would continue to defer to existing arbitral awards where three requirements were satisfied: (1) the arbitration proceedings appear to be fair and regular, (2) the parties to the contract have agreed to be bound by the arbitral award, and (3) the decision of the arbitrator is not repugnant to the purposes and policies of the Act. In Raytheon Co., the Board added an important fourth requirement: the arbitrator must be presented with and resolve the unfair labor practice issue. The goal of these standards for deferral was to promote the voluntary resolution of labor disputes by a method mutually agreed upon by the parties, without undermining the Board's jurisdiction to decide unfair labor practice disputes and its duty to protect public statutory rights set forth in the NLRA. In addition, deferral would refer to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for purposes of negotiating the terms and conditions of their employment or other mutual aid or protection.


16. NLRA § 8(a)(3), 29 U.S.C. §§ 158(a)(3) (1976). Section 8(a)(3) provides in relevant part: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment on any term or condition of employment to encourage or discourage membership in any labor organization." Id.


18. Id. at 1082.

19. 140 N.L.R.B. 883 (1963), set aside on other grounds, 326 F.2d 471 (1st Cir. 1964).

20. 140 N.L.R.B. at 884. Subsequent Board decisions refined the Raytheon requirement. In Airco Industrial Gases, 195 N.L.R.B. 676 (1972), the Board held that it would not defer to an arbitration award which gave no indication that the arbitrator ruled on the unfair labor practice issue. In Yourga Trucking, Inc., 197 N.L.R.B. 928 (1972), the Board placed the burden of proving that the unfair labor practice issue had been addressed by the arbitrator upon the party seeking deferral.


22. See NLRA § 10(a), 29 U.S.C. § 160(a) (1976). "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . .
prevent the expense and injustice which would result if the respondent were required to defend himself in two separate forums on the same charge.

Encouraged by the Supreme Court's endorsement of labor arbitration and judicial approval of Spielberg, the Board and reviewing courts continued to expand the Spielberg deferral doctrine. In International Harvester Co., the Board reaffirmed its Spielberg position and announced that it would defer to the arbitrator's decision unless "palpably wrong." The NLRB stated that it would "voluntarily withhold" its authority to adjudicate statutory unfair labor claims arising out of arbitrated contractual claims "unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act." With this decision the Board significantly restricted the circumstances under which it would review and reverse an arbitration award.

The Spielberg doctrine was expanded to its furthest extent in 1974 by Electronic Reproduction Service Corp. There the Board announced that it would defer to an arbitration award, and thus refuse to hear the unfair labor practice charges, where the complainant failed to present to the arbitrator available evidence concerning the unfair labor practices. The Board held that it would presume that the arbitrator adequately determined all related unfair labor practice claims unless "unusual circumstances are shown which demonstrate that there were bona fide reasons . . . which caused the failure to introduce such evidence at the arbitration proceeding." In effect, this policy eliminated the Raytheon requirement from the Spielberg deferral standards, thereby giving arbitration awards much greater finality.

The Board's decision in Electronic Reproduction was based upon the belief that the main function of the NLRB was to promote industrial peace 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. . . ." Id.

23. See supra notes 3-4 and accompanying text (discussing Steelworkers' Trilogy).
25. Id. at 928-29.
26. Id. at 927.
28. Id. at 762.
29. Id. By presuming that the arbitrator had considered the statutory issues inherent in the unfair labor practice claim, Electronic Reproduction directly overruled two earlier Board decisions: Airco Industrial Gases and Yourga Trucking, Inc. Id. at 761. The Board in Electronic Reproduction held that Airco and Yourga were "essentially incompatible with the underlying policies of both Collyer and Spielberg" because they undermined the contractual dispute resolution process "by encouraging . . . a withholding of clearly relevant evidence." Id. Under the presumption announced in Electronic Reproduction, the Board shifted the burden of proof onto the party seeking to assert the unfair labor practice issue.
30. 213 N.L.R.B. at 762. "Bona fide reasons" which would justify a refusal to defer to an arbitration award include instances where the arbitrator has specifically refused to rule on certain issues because he considers them statutory as opposed to contractual issues, and where the unfair labor practices occur after the arbitration award. Id.
31. See supra notes 19-20 and accompanying text.
by encouraging the fullest possible use of the collective bargaining and arbitration processes. The Board was concerned that parties might deliberately fail to introduce evidence of possible NLRA violations at the arbitration proceeding in order to have a "second bite of the apple" in a subsequent unfair labor practice proceeding. Such practices would undermine the arbitration process by permitting inefficient dual litigation. The dissent, relying primarily upon the Supreme Court decision of Alexander v. Gardner-Denver Co., argued that the vindication of individuals' rights guaranteed

32. See LMRA § 203(d), supra note 1.
33. 213 N.L.R.B. at 761. The term "two bites of the apple" refers to dual or multiple litigation. See Elwell and Feville, Arbitration Awards and Gardner-Denver Lawsuits: One Bite or Two?, 23 Indus. Rel. 287, 295 (1984) (concluding that Gardner-Denver affords aggrieved workers a second bite at the apple if they are dissatisfied with arbitrator's decision).
34. 213 N.L.R.B. at 761-62. The majority in Electronic Reproduction likened the practice of intentionally withholding evidence as "furthering the very multiple litigation which Spielberg and Collyer were designed to discourage." Id. at 761.
35. Although dual litigation is inefficient, the issue is whether Congress intended to provide individuals with a separate forum in which they can pursue and protect their statutory rights granted by the NLRA. Some commentators maintain that the argument against dual litigation has been severely deflated in the wake of the Supreme Court decision in Alexander v. Gardner-Denver Co. (discussed at notes 128-139 infra). See Siber, The Gardner-Denver Decision: Does it Put Arbitration in a Bind?, 25 Lab. L.J. 708, 717 (1974).
36. 415 U.S. 36 (1974). The Supreme Court held in Alexander v. Gardner-Denver Co. that in Title VII discrimination cases, a court may not properly defer to an arbitrator's determination of the discrimination issue. The rationale of the Supreme Court's decision in Gardner-Denver was primarily founded upon a recognized dichotomy between private contractual and public statutory rights. While noting that a union may waive collective rights (such as the right to strike) during collective bargaining in order to obtain benefits for its members, the Court made it plain that a union could not waive an employee's individual statutory rights. Id. at 51. The Court held that the rights guaranteed by Title VII of the Civil Rights Act are individual statutory rights. Id. at 52. The Court supported the dichotomy by describing the limited role of the arbitrator, by observing that the arbitral process is not suited to resolving rights under Title VII, and by questioning the suitability of the informal fact-finding procedures of arbitration to vindicate Title VII rights. Id. at 53-54 ("the arbitrator has authority to resolve only questions of contractual rights. . ."); id. at 57 (because arbitrator's specialized competence is in "the law of the shop, not the law of the land,"); Court determined that resolution of statutory issues is responsibility of courts and not of arbitrators.); id. at 57-58 (discussion of informal fact-finding procedures).

The Electronic Reproduction dissent, Members Fanning and Jenkins, argued that the reasoning of Gardner-Denver was equally applicable to the NLRA and Electronic Reproduction because both cases involved a nearly identical issue—whether deferral to an arbitration award would be permitted when a complaint involved a statutory violation of an employee's rights. Electronic Reproduction Service Corp., 213 N.L.R.B. at 766. The Board majority in Electronic Reproduction found that Gardner-Denver was limited to the Title VII area because different
by the NLRA should be the NLRB's primary concern and should take precedence over the Board's concern that arbitration be maintained as a quick and efficient means of settling labor disputes.\textsuperscript{37}

The \textit{Electronic Reproduction} rule was not well received.\textsuperscript{38} In \textit{Stephenson v. NLRB},\textsuperscript{39} the Ninth Circuit expressly rejected the rule because the Board would defer to arbitration upon the "mere presumption in total absence of any evidence" that the unfair labor practice had ever been resolved.\textsuperscript{40} The Ninth Circuit held that deferral is appropriate only where the arbitration panel is competent to resolve the issues subject to deferral and only when those issues are clearly decided.\textsuperscript{41} Despite the \textit{Stephenson} decision,\textsuperscript{42} the Board declined to overrule \textit{Electronic Reproduction} until the 1980 decision of \textit{Suburban Motor Freight}.\textsuperscript{43} This case returned the NLRB to the standard of deferral set by \textit{Raytheon}.\textsuperscript{44} According to \textit{Suburban Motor Freight}, the Board "will give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue" involved in the

37. 213 N.L.R.B. at 765. Reconciling the competing Congressional policies of NLRA § 203(d) has been the major stumbling block in establishing a workable deferral policy. \textit{Collyer Insulated Wire Co.}, 192 NLRB 837, 841 (1971); see also Simon-Rose, \textit{Deferral Under Collyer by NLRB of Section 8(a)(3) Cases}, 27 LAB. L.J. 201, 202 (problem of competing policies resulted from failure of Congress "to explain what impact, if any, LMRA Section 203(d) would have on the Board's exclusive authority to administer the NLRA pursuant to Section 10(a) of the Act."). Section 10(a) of the NLRA empowers the Board to protect the individual statutory rights of employees and commands that "this power shall not be affected by any other means of adjustment. . . ." 29 U.S.C. § 160(a) (1976). This policy requires open access to Board processes. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 55 (1974). \textit{See also NLRB v. Industrial Union of Marine Workers}, 391 U.S. 418, 424 (1968) (stating that "the overriding public interest makes unimpeded access to the Board the only healthy alternative. . . ."). On the other hand, NLRA § 203(d) states the Congressional preference for private dispute resolution, supports a broad deferral policy, and obviously limits access to the Board. \textit{See supra} note 1.


39. 550 F.2d 535 (9th Cir. 1977).

40. \textit{Id.} at 541.

41. \textit{Id.} at 538. The requirements that the arbitrator be competent to resolve the issues in question and that the arbitrator actually decide those issues were borrowed from \textit{Banyard v. NLRB}, 505 F.2d 342 (D.C. Cir. 1974). These requirements are applied in addition to the \textit{Spielberg} requirements and essentially form a five-pronged test. \textit{Stephenson}, 550 F.2d at 537-538.

42. The Board paid little attention to \textit{Stephenson}. When the Board finally overruled \textit{Electronic Reproduction}, \textit{Stephenson} was mentioned only in a footnote reference as part of the overall criticism of \textit{Electronic Reproduction}. \textit{Suburban Motor Freight}, 247 N.L.R.B. 146, 146 n.5 (1980).

43. 247 N.L.R.B. 146 (1980).

44. \textit{See supra} notes 19-20 and accompanying text.
unfair labor practice charge. Additionally, the Board imposed "on the party seeking Board deferral to an arbitration award the burden to prove that the issue of discrimination was litigated before the arbitrator."46

The majority opinion in Suburban Motor Freight relies heavily upon the arguments made by Members Fanning and Jenkins in their Electronic Reproduction and Collyer dissents. Although recognizing that the deferral policy of Electronic Reproduction was economically praiseworthy and that relationships,47 the majority reiterated the argument that the NLRB's primary concern should be protection of the individual's rights contained in the NLRA.48 To justify overruling Electronic Reproduction, the Board borrowed the dichotomy between contractual and individual statutory rights from the Supreme Court's Gardner-Denver decision.49 Whereas the majority in Electronic Reproduction said that Gardner-Denver and its rationale were not applicable outside Title VII discrimination cases,50 the Suburban Motor Freight majority decided to extend the analogy to the NLRA.51 By extending the distinction to statutory rights cases under the NLRA, the Board could avoid deferral and could provide employees access to forums in which they could adequately pursue and protect their rights. The Board declared that it would "no longer adhere to a doctrine which forces employees to seek simultaneous vindication of private contractual and public statutory rights, or risk the latter."52

B. Pre-Arbitral Deferral: Collyer and its Progeny

In Collyer Insulated Wire,53 decided in 1971, the Board made a "quantum jump"54 in its deferral policy. The Board's decision to defer, not to an existing arbitration award, but rather to the arbitration process, created a preclusion doctrine.55 The effect of this extension was to preclude the Board from hearing an unfair labor practice complaint where the parties had not exhausted grievance-arbitration remedies contained in the collective bargaining agreement. In Collyer, the union alleged that the employer violated the good faith bargaining requirement of section 8(a)(5)56 by making unilateral

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45. Suburban Motor Freight, 247 N.L.R.B. at 147.
46. Id.
47. See infra notes 58-60 and accompanying text (discussing Collyer).
49. See NLRA § 10(a), 29 U.S.C. § 160(a) (1976); supra note 37 and accompanying text.
50. See infra notes 128-139 and accompanying text.
51. Electronic Reproduction, 213 N.L.R.B. at 763-64.
52. Suburban Motor Freight, 247 N.L.R.B. at 147.
53. Id. at 146.
56. Collyer, 192 N.L.R.B. at 843.
adjustments of wage rates. The employer claimed that these adjustments were authorized by the labor contract and that, in any event, the dispute should be resolved through the arbitration procedure. Referring to the congressional preference for private dispute resolution and to arbitrators' special skills in resolving contractual disputes, the Board stated that pre-arbitral deferral was appropriate where: (1) the dispute arose within the confines of a long and productive relationship and there was no claim of anti-union animus, (2) the parties indicated a willingness to arbitrate under an arbitration clause broad enough to encompass the dispute, and (3) the contract and its meaning lie at the center of the dispute. Noting that these conditions existed in the present case, the Board referred the complaint to arbitration. The Board stated that in pre-arbitral deferral cases it would retain jurisdiction for the limited purpose of ensuring that the dispute was either settled or submitted to arbitration and that the final arbitration award was not "repugnant to the Act."

Collyer's implicit principal of compulsory arbitration has provoked much criticism. Member Fanning, in his Collyer dissent, insisted that the decision would "strip the parties of statutory rights merely on the availability of such [arbitration] procedure." Additionally, Fanning argued that Collyer deprived the complaining party of his traditional choice of forum. While the Spielberg deferral doctrine merely binds a party to his initial choice of forums, Collyer eliminates a party's initial choice altogether.

Despite the criticisms of Collyer, one year later the Board expanded its pre-arbitral deferral policy in National Radio Co. to include cases involving section 8(a)(3) violations. In National Radio, the complaint alleged that the employer violated section 8(a)(3) by discharging a union steward for his failure to comply with a unilaterally instituted rule which required union stewards to report their movements while handling grievances. Applying the

in relevant part: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees."Id.

58. See LMRA § 203(d), supra note 1.
59. See supra notes 7-9 and accompanying text.
60. Collyer, 192 N.L.R.B. at 842.
61. Id. at 843.
63. Collyer, 192 N.L.R.B. at 849 (Member Fanning, dissenting).
64. Id. at 847. Spielberg is less compulsory than Collyer. Whereas Spielberg permits the Board to review existing arbitration decisions for consistency with the Act, Collyer entirely eliminates the Board as a forum merely because a nonexistent arbitration award could vindicate the violation of petitioner's statutory rights. Under Spielberg, since the parties chose arbitration as the initial forum and have invested time and resources in reaching a final decision, there is every reason to uphold that final arbitration award. No similar justification for pre-arbitral deferral exists in Collyer. Note, Limiting Deferral under the Spielberg Doctrine, 67 VA. L.R. 615, 617 n.17 (1981).
65. 198 N.L.R.B. 527 (1972).
66. See supra note 16.
Collyer policy of pre-arbitral deferral, the Board deferred the section 8(a)(3) charge to arbitration. Unlike the Collyer decision, however, National Radio dealt with a dispute over rights that went far beyond mere conflicting interpretations of collective bargaining agreements. By deferring, the Board significantly expanded the policy announced in Collyer and permitted arbitrators to resolve statutory as well as contractual issues.

The majority acknowledged that it was extending Collyer beyond its original intended scope of section 8(a)(5) violations, but argued that arbitrators were fully competent to decide discipline cases based upon "just cause" clauses. Insisting that abstention cannot be equated with abdication, the majority argued that they were merely "adjuring the parties to seek resolution of their dispute under the provisions of their own contract and thus fostering both the collective relationship and the federal policy favoring voluntary arbitration and dispute settlement." Members Fanning and Jenkins, in a vehement dissent, argued that section 8(a)(3) charges were even less suited to pre-arbitration deferral than section 8(a)(5) charges. Additionally, they questioned the competence of arbitrators to resolve the statutory issues involved and cautioned the Board against "subcontracting" public authority to private tribunals.

The Board abruptly reversed the liberal pre-arbitral deferral policy of Collyer and National Radio in 1977 with General American Transportation Corp. In General American, the union alleged that the employer violated

68. Id.
69. Id. The National Radio dissent distinguished section 8(a)(3) from section 8(a)(5) by arguing that:

[Statutory protection against discrimination on the job because of engaging in, or refraining from, union activity is an individual right, unlike the union or group right, to be protected from unilateral changes in the collective-bargaining agreement. Because it is granted by statute to individuals, it cannot be reduced altered or displaced by an agreement between the employer and the union.

Id. (emphasis in original). This is one of the earliest statements of the argument that "individual" statutory rights, unlike "group" statutory rights, are inappropriate for Board deferral. Cf. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); infra notes 128-139 (discussing Gardner-Denver).

70. National Radio Co., 198 N.L.R.B. at 533 (Members Fanning & Jenkins, dissenting). The dissent compared the arbitrator's ability to resolve statutory issues with the Board's ability and stated:

The special competence of arbitrators in contract disputes, which is the only substantive justification the Supreme Court has found for ordering the contracting parties to arbitrate rather than litigate, does not exist in the field of statutory rights. The arbitration process cannot use the Board's investigative or legal resources and capabilities, and arbitrators do not have expertise in statutory issues which the Board has necessarily acquired through long, intimate, and specialized experience.

Id.

71. Id. "To compel the victim of this alleged discrimination to resort to arbitration is not "deferral," but a subcontracting to a private tribunal of the determination of rights conferred and guaranteed solely by the statute." Id.

section 8(a)(3) by laying off an employee because of his union activities. The Board, in affirming the administrative law judge's refusal to defer to arbitration, overruled National Radio and expressly rejected pre-arbitral deferral in cases involving section 8(a)(3) violations.73

General American exposed the sharp division between Board members regarding the proper deferral policy. Two members supported continued adherence to the liberal deferral policy announced in National Radio,74 while two other members favored abandoning the Collyer deferral doctrine completely.75 Chairman Murphy, in her decisive concurrence, assumed a middle position which limited pre-arbitral deferral to cases where the dispute was “essentially between contracting parties” and where there was no alleged interference with the individual’s basic section 7 rights.76 She found that complaints alleging violations of sections 8(a)(5) and 8(b)(3)77 fell squarely within this category. With respect to these cases, Murphy stated that she would continue to defer to the arbitration process because such disputes “are eminently suited to the arbitral process, and resolution of the contract issue by an arbitrator will . . . dispose of the unfair labor practice issue.”78 Chairman Murphy refused to defer in cases involving the individual rights of employees contained in sections 8(a)(1), 8(a)(3), 8(b)(1)(A) or 8(b)(2), however, because arbitration decisions based on the contract would not dispose of the unfair labor practice issues involved in those cases.79

III. A CHANGE IN COURSE: Olin AND United Technologies

The deferral policies established in Suburban Motor Freight and General American remained intact until January 1984 when a change of Board membership caused a change of Board policy.80 The Republican-dominated Board announced two decisions that significantly expanded the arbitrator's role in resolving statutory disputes. In Olin Corp.,81 the Board altered the standards of deferral and reallocated the burden of proof, thereby allowing

73. Id. at 811 (Chairman Murphy, concurring).
74. See id. at 813-19 (Members Penello and Walther, dissenting).
75. See id. at 808-10 (Members Fanning and Jenkins supported complete abandonment of Collyer doctrine).
76. Id. at 810.
77. 29 U.S.C. § 158(b)(1976). Section 8(b) of the NLRA provides in relevant part: “It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . .; (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . .; (3) to refuse to bargain collectively with an employer . . ..” Id.
79. Id. at 811.
80. In May 1983 President Reagan appointed Patricia Diaz Dennis to the NLRB. She has consistently joined Chairman Donald L. Dotson and Robert P. Hunter to form a 3-to-1 pro-management majority to outvote the last remaining Carter appointee, Don A. Zimmerman. (One seat on the five-member board is vacant.)
DEFERRAL TO ARBITRATION
deferral to existing arbitration awards even in cases where the arbitrators did not consider the unfair labor practice issue. In the companion case of United Technologies,\textsuperscript{82} the Board extended the Collyer deferral doctrine to cases dealing with individual statutory rights.

\textit{Olin Corp.} involved the discharge of Salvatore Spatorico, president of the Oil, Chemical and Atomic Workers Union, because of his encouragement of and participation in a "sick out."\textsuperscript{83} Such behavior contravened a no-strike clause in the collective-bargaining agreement which prohibited any union officers from causing a work stoppage.\textsuperscript{84} The union grieved the discharge and claimed that by discharging Spatorico while merely reprimanding other employees who participated in the sick out, Olin discriminated against Spatorico in violation of section 8(a)(3).\textsuperscript{85} The arbitrator found that Spatorico "at least partially caused or participated" in the sick out and concluded that "[u]nion officers implicitly have an affirmative duty not to cause strikes which are in violation of the clause, not to participate in such strikes and to try to stop them when they occur."\textsuperscript{86} Accordingly, the arbitrator found that Spatorico was properly discharged.

The administrative law judge refused to defer to the arbitration decisions because the arbitrator did not consider the section 8(a)(3) unfair labor practice issue "in any serious way."\textsuperscript{87} On the merits, however, the judge agreed that the discharge was valid. While an employer, consistent with section 8(a)(3), cannot unilaterally insist that union officials assume greater obligations than rank-and-file employees with respect to the enforcement of a no-strike clause, the judge noted that the union may bargain away the statutory protection accorded union officials in order to secure valuable concessions for union members.\textsuperscript{88} Finding that the no-strike clause was a "clear and unmistakable"\textsuperscript{89}

\begin{itemize}
  \item \textsuperscript{82} 268 N.L.R.B. 557 (1984).
  \item \textsuperscript{83} Olin Corp., 268 N.L.R.B. 573 (1984). On December 17, 1980, the Olin Corp. management suspended two pipefitters for refusing to perform a job that the employees felt was millwright work. \textit{Id.} After the management refused to lift the suspensions, a "sick out" ensued during which 43 employees, including Spatorico, left work with medical excuses. \textit{Id.}
  \item \textsuperscript{84} \textit{Id.} The no-strike clause provided: "During the life of the Agreement . . . neither the Local Union nor the International Union, nor any officer or representative [sic] of either, will cause or permit its members to cause any strike, slowdown or stoppage (total or partial) of work or any interference, directly or indirectly with the full operation of the plant." \textit{Id.} at 576.
  \item \textsuperscript{85} See supra note 16 (quoting section 8(a)(3)).
  \item \textsuperscript{86} Olin Corp., 268 N.L.R.B. at 573.
  \item \textsuperscript{87} \textit{Id.}
  \item \textsuperscript{88} \textit{Id.} at 586-87; see Metropolitan Edison Co. v. NLRB, 103 S. Ct. 1467 (1983). In \textit{Metropolitan Edison}, the Supreme Court recently clarified the uncertain area of disparate punishment of union officials for their participation in wildcat strikes. The Court concluded that a "union and an employer reasonably could choose to secure the integrity of a no-strike clause by requiring union officials to take affirmative steps to end unlawful work stoppages." \textit{Id.} at 1477. However, such an added burden upon union officials with its implied additional sanctions, must be clearly inferred "from a general contractual provision that the parties intended to waive a statutorily protected right unless . . . the waiver [is] clear and unmistakable." \textit{Id.} at 1477.
  \item \textsuperscript{89} \textit{Id.}
\end{itemize}
waiver of Spatorico’s section 8(a)(3) rights, the judge concluded that the disparate punishment of Spatorico did not violate the anti-discrimination policy of section 8(a)(3). The judge therefore dismissed the complaint.

The Board majority reaffirmed the decision to dismiss the Olin complaint, not on the merits, but on the ground that deferral to the arbitrator’s award was appropriate under Spielberg. The majority used the opportunity to expand its post-arbitral deferral policy. In revising the Spielberg standards to “more fully comport with the aims of the Act and American labor policy,” the Olin majority rejected the Raytheon requirement that conditioned deferral upon the arbitrator resolving the unfair labor practice issue. The Olin majority then reallocated the burden of proof as established in Suburban Motor Freight.

The Board majority in Olin also criticized its decision in Propoco which expanded the prerequisites for deferral set forth in Raytheon. Under Propoco, the Board or an Administrative Law Judge would not defer unless all statutory claims were presented to the arbitrator and the arbitrator fully considered these claims. The standard of deferral set forth in Propoco severely limited the Board’s ability to defer to the decisions and remedies arising out of private arbitration decisions. As a consequence, the Olin majority concluded that Propoco “serve[d] only to frustrate the declared purpose of Spielberg . . . [which recognizes] the arbitration process as an important aspect” of federal labor policy. Borrowing from the Propoco dissent, the majority adopted a new two-part standard and rejected the old Raytheon requirement. According to the new standard, an arbitrator has adequately considered the unfair labor practice issue 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.”

An equally significant change of policy came with the Board’s reallocation of the burden of proving the deferral requirements. Arguing that “infrequent deferrals by the Board” under the Suburban Motor Freight policy demonstrated the need for a different allocation of burdens, the majority adopted a new standard. Under the new standard the party seeking to have the Board reject deferral and ignore the arbitrator’s decision must demonstrate that the standards of deferral have not been satisfied. Thus,

91. Id. at 574.
92. See supra notes 19-20 and accompanying text (discussing Raytheon).
93. See supra notes 39-42 and accompanying text (discussing Suburban Motor Freight).
95. See supra note 88.
96. 263 NLRB at 137-38.
97. Olin Corp., 268 NLRB at 574.
98. Id.
99. Id.
100. Id. In a footnote the Olin majority denied the dissent’s claim that the new standard
for a party to obtain *de novo* Board review of an arbitration proceeding, he has the burden of demonstrating: (1) the *Spielberg* deferral standards were not met, (2) the contractual issue is not factually parallel to the unfair labor practice issue, or (3) the arbitrator was not presented with facts relevant to resolving the unfair labor practice.101

The *Olin* majority disagreed that its new standard of review of arbitrators’ awards and the reallocation of burden of proof “depriv[ed] employees of their statutory forum.”102 The majority justified these clarifications of *Spielberg* as necessary to restrict the “overzealous dissection of [arbitrators’] opinions by the NLRB”103 and to return the Board to a consistent deferral policy. The majority expressed concern that the Board’s failure to defer in a consistent manner set an improper example for General Counsel and administrative law judges.104 Citing six circuit court decisions105 that disagreed with the Board’s refusal to defer as evidence that the Board’s past deferral policy “was not so much policy as it was whim,”106 the majority declared its “commitment to a policy of full, consistent, and evenhanded deference . . . where it meets what we understand to be appropriate safeguards for statutory rights.”107

Member Zimmerman, in a sharp dissent, rebuked the majority for overruling *Suburban Motor Freight* and *Propoco*108 and argued that the new post-arbital deferred standard adopted in *Olin* was “indistinguishable in result from the rule of *Electronic Reproduction*.”109 He charged the majority with unjustifiably rejecting a judicially approved addition to the original

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101. *Id.* at 575; *but cf.* infra note 103.
103. *Id.*
104. *Id.* at 575 n.9.
107. *Id.* at 576.
108. *Id.* at 577; *see* *Suburban Motor Freight*, 247 N.L.R.B. 146 (1980); *Propoco*, Inc., 263 N.L.R.B. 136 (1982). Although the *Olin Corp.* majority did not overrule either *Suburban Motor Freight* or *Propoco*, Zimmerman argued to the contrary: “The majority suggests that *Suburban Motor Freight* has been overruled only to the extent that it ‘provided for a different allocation of burdens in deferral cases.’ I will not indulge my colleagues in the canard that *Propoco, Suburban Motor Freight, Yourga and Airco* have not been totally overruled, or that *Raytheon and Monsanto* have not suffered the same fate.” *Olin Corp.*, 268 N.L.R.B. at 579.
109. *Id.* at 577; *see* *Electronic Reproduction Service Corp.*, 213 N.L.R.B. 258 (1974).
Spielberg doctrine and replacing it with a thoroughly discredited rule.\textsuperscript{110}

Under the new Olin standard, the Board will defer to an arbitration award if the contractual and unfair labor practice issues are factually parallel.\textsuperscript{111} Zimmerman noted that this doctrine of factual parallelism is the foundation upon which the Electronic Reproduction majority based its presumption that the resolution of the contract issue necessarily resolved the unfair labor practice issue.\textsuperscript{112} Zimmerman argued that the use of this presumption to justify deferral amounts to an abdication of the Board's obligation to protect employees' rights under Section 10(a) of the Act. He further argued that the new deferral standard is contrary to overwhelming judicial precedent that the Board has no authority to defer without affirmative proof that the unfair labor practice issue was resolved.\textsuperscript{113}

The Olin dissent also objected to the "inequity" of the majority's new burden of proof. Zimmerman supported the Board's previous position imposing the burden of proof upon the party seeking deferral. He argued that by shifting the burden of proof, the Board transformed "an affirmative defense into a part of the General Counsel's prima facie case."\textsuperscript{114} Zimmerman further objected to the majority's assertion that the reallocation of the burden was necessitated by the Board's infrequent deferrals under the Suburban Motor Freight standard. Citing agency statistics to rebut the majority's assertion, he argued that the Board had deferred to the arbitration process in the vast majority of cases.\textsuperscript{115}

Zimmerman questioned the majority's central assumption that an expan-

\textsuperscript{110} Olin Corp., 268 N.L.R.B. at 579. Zimmerman cited numerous court of appeals cases that have either expressly or implicitly rejected the Electronic Reproduction rule. Id. at 578 n.5; see supra note 38 (discussing Stephenson and Banyard).

\textsuperscript{111} Olin Corp., 268 N.L.R.B. at 579. Zimmerman argued that the new two-step majority test involves only one step. He reasoned:

\textit{If the contractual issue is factually parallel to the unfair labor practice issue, then how can one possible prove that the facts relevant to resolving the unfair labor practice issue have not been presented to the arbitrator unless one proves the absurdity that even the facts relevant to the contract issue were not presented?... It will presume that an arbitrator has considered both contract and unfair labor practice issues unless the General Counsel can prove that there is no factual parallel between the issues.}

\textit{Id. at 579.}

\textsuperscript{112} Id.

\textsuperscript{113} Id. at 579-80; see Stephenson v. NLRB, 550 F.2d 535, 538 (9th Cir. 1977) (the "arbitral tribunal must have clearly decided the unfair labor practice issue on which the Board is later urged to give deference"); NLRB v. Magnetics Int'l, Inc., 699 F.2d 806, 811 (6th Cir. 1983) (the court would 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"); United Parcel Serv. Inc. v. NLRB, 706 F.2d 972, 981 (3d Cir. 1983) ("for the Board's deferral policy not to be one of abdication, the Board must be presented with some evidence that the statutory issue has actually been decided") (quoting NLRB v. General Warehouse Corp., 643 F.2d 965, 969 (3d Cir. 1981)), vacated, 464 U.S. 979 (1983); cert. denied, ___ U.S. ___,

\textsuperscript{114} Olin Corp., 268 N.L.R.B. at 580.

\textsuperscript{115} Id. at 581.
sive deferral policy and a reallocation of burden would promote the federal labor policy favoring dispute resolution through arbitration. He argued that the Board's deferral policy has reached a point where it actually discourages arbitration. Noting that arbitration is an attractive way to resolve minor grievances because it is cheaper, faster and less formal than Board review, he warned that forcing parties to resolve disputes in the contractual setting would impair those attributes that made arbitration attractive. He suggested that, as the result of the new Board procedures, unions might insist that arbitration proceedings be conducted under all the formal procedures of a case before the Board. He concluded: "The final irony of the stress created by a Board policy of wholesale deferral may be that one or both parties to collective-bargaining negotiations will oppose the inclusion of any form of arbitration provision in a contract." 116

As a final point, Zimmerman maintained that adoption of the broad deferral rule of Olin was unnecessary in this case to justify deferral to the arbitration award. Since the arbitrator was clearly presented with and considered the unfair labor practice issue, he agreed that the judge should have deferred by applying the proper Suburban Motor Freight standard. 117

In United Technologies, the Board addressed a charge that the employer had violated section 8(a)(1) 118 by threatening an employee with disciplinary action if she persisted in processing a grievance to the second step. At the administrative law hearing, the employer denied that it had violated section 8(a)(1). Since the dispute was cognizable under the grievance-arbitration provisions of the collective bargaining agreement, the employer also urged that the dispute be deferred to arbitration pursuant to Collyer. The administrative law judge properly applied the General American Transportation standard of refusing to defer in individual rights cases, and ultimately found that the violations had occurred. The Board majority reversed the judge's decision, expressly overruled General American Transportation, and ordered that the dispute be deferred to arbitration.

The United Technologies majority opinion offered no new arguments in support of the Board's decisions to extend the Collyer pre-arbitral deferral policy to cases involving individual statutory rights. In fact, for the most part, the majority reiterated the arguments presented by the majority opinion in Collyer. The opinion emphasized the importance of arbitration in federal labor law, repeated the congressional intent of section 203(d) that arbitration is the "desirable method" for dispute resolution and cited the Steelworker's Trilogy to show that the Supreme Court has consistently "sanction[ed] arbitration as a preferred instrument for preserving industrial peace." 119

116. Id.
117. Id.
118. United Technologies, 268 N.L.R.B. at 557. Section 8(a)(1) provides in relevant part: "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." 29 U.S.C. § 158(a)(1)(1976).
The majority also presented a history of the Board’s deferral policy in which it emphasized that “the Board has played a key role in fostering a climate in which arbitration could flourish.” The opinion praised both the Collyer decision to defer in section 8(a)(5) cases and the National Radio decision to defer in section 8(a)(3) cases as promoting the federal policy favoring arbitration by requiring the parties to resolve labor disputes under the grievance mechanisms of their own contract. The majority characterized the General American Transportation decision, however, as an abrupt change from the sound deferral policies of Collyer and National Radio. Claiming that the majority’s refusal in General American Transportation to defer to section 8(a)(1) and (3) cases “essentially emasculated the Board’s deferral policy... for reasons that are largely unsupportable,” the majority concluded that the Collyer policy “deserves to be resurrected and infused with new life.”

The central theme supporting the majority’s decision to extend the Collyer deferral policy to cases involving statutory individual rights was the oft-repeated argument that parties to a collective bargaining agreement should be bound by the terms of their contract. The majority argued that:

[I]t is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes... [T]he statutory purpose of encouraging the practice and procedure of collective bargaining is ill-served by permitting the parties to ignore their agreement and to petition this Board in the first instance for remedial relief.

Although the Board gave greater reign to arbitrators, the majority maintained that “deferral is not akin to abdication. It is merely the prudent exercise of restraint...”. The majority also pointed out that if the arbitration award was inconsistent with the standards of Spielberg, the Board’s processes could always be invoked to remedy the abuse.

Member Zimmerman strongly dissented to the overruling of General American Transportation and charged that a return to the standard of National Radio “needlessly sacrifices basic safeguards for individual employee rights under the Act.” Maintaining that former Chairman Murphy’s position in General American Transportation was the correct deferral policy, Zimmerman argued that the Board should not force parties into arbitration unless “their unfair labor practice disputes essentially involve the interpretation of a collective-bargaining agreement.”

120. Id.
121. Id. at 559.
122. Id.
123. Id. at 560.
124. Id.
125. Id. at 561 (Member Zimmerman, dissenting).
126. Id.
In rejecting the majority's contention that the universal judicial acceptance of the Collyer doctrine also encompasses the overbroad deferral policy of National Radio, Zimmerman cited strong judicial support in the circuit courts approving the General American Transportation policy.\(^{127}\) While noting that national labor policy favoring private dispute resolution requires the judiciary to give broad deference to arbitration in the resolution of contract issues, he argued that "the Supreme Court has made clear that the same degree of deference . . . cannot be applied . . . by the Board . . . where statutory issues are at stake."\(^{128}\) Citing the Supreme Court decisions in Barrentine v. Arkansas-Best Freight System\(^{129}\) and Alexander v. Gardner-Denver Co.\(^{130}\) in support of the distinction between group contractual and individual statutory rights, the dissent argued that employees' individual section 7 rights are "public rights" which the Board "expressly is required to protect."\(^{131}\)

Zimmerman also rejected the majority's central argument that grievance-arbitration provisions in collective bargaining agreements bind individual employees to arbitration as the only forum of first resort. While acknowledging that a union may agree to waive some individual statutory rights, the dissent argued that "a union cannot waive an individual employee's right to choose a statutory forum in which to . . . litigate an unfair practice issue."\(^{132}\) He charged that the majority's deferral policy does not require a "clear and unmistakable" waiver of the statutory right to pursue claims before the Board, but rather "simply assume[s] that the mere existence of a contractual grievance and arbitration procedure proves a waiver."\(^{133}\)

Zimmerman sharply criticized the majority's reassurances that the new deferral policy of United Technologies is merely an exercise of "prudent restraint." Pointing out that the arbitration process is not designed to or adept at protecting employee statutory rights, he argued that the majority's reliance on the Spielberg "catchall safety net" does not adequately protect employee statutory rights for several reasons: (1) a union might not vigorously present an employee's arbitration claim in order to advance the interests of the union as a whole, (2) the arbitrator may lack the competency necessary to resolve statutory issues because his specialty is in "the law of the shop, not the law of the land," and (3) because the arbitrator must decide the dispute in accordance with the parties' intent expressed in the collective-bargaining agreement, he may issue a ruling inconsistent with the policies of

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128. 268 N.L.R.B. at 562.
129. See infra notes 140-151 and accompanying text.
130. See infra notes 137-150 and accompanying text.
131. United Technologies, 268 N.L.R.B. at 563 (Member Zimmerman, dissenting).
132. Id.
133. Id.
Additionally, Zimmerman argued that the limited protection of employee rights afforded by *Spielberg* will disappear in the wake of the new post-arbitral deferral policy announced in *Olin Corp.*

**IV. THE SUPREME COURT: RESTRICTING DEFERRAL**

The new policies announced in *Olin* and *United Technologies* effectively foreclose employees from asserting and pursuing individual statutory rights before the Board. Under present policy, the *Collyer* doctrine and *United Technologies* preclude the Board from entertaining unfair labor practice charges that are subject to arbitration. Additionally, once a case is arbitrated, the Board will defer to the arbitrator's decision unless the General Counsel can prove that the proceedings did not conform with the requirements of *Spielberg* and *Olin*. The result in both cases has been to expand significantly the jurisdiction of arbitrators; originally restricted to the resolution of contractual disputes, arbitrators now have authority to decide statutory issues as well. This has prompted considerable criticism that the Board has abdicated its duty under section 10(a) to protect employees' statutory rights.

The propriety of the Board's new deferral policies must be evaluated in light of the Supreme Court's recent trend toward restricting the authority of arbitrators to decide statutory issues. The Court has held that in Title VII, Fair Labor Standards Act (FLSA) and section 1983 cases, a prior arbitral award does not preclude an individual's right to pursue his statutory rights in a judicial forum. While the applicability of these decisions to other bodies of law is still unresolved, similarities between the NLRA, Title VII, FLSA and § 1983 raise serious questions about the Board's current deferral and preclusion policies.

In *Alexander v. Gardner-Denver Co.*, the Supreme Court determined the proper role of arbitration in the resolution and enforcement of an individual's rights under Title VII of the Civil Rights Act. Alexander, a black employee, filed a grievance alleging that he was discharged for racially discriminatory reasons. The grievance was arbitrated and the arbitrator, without considering the Title VII issue, ruled that Alexander had been discharged for cause. Subsequently, Alexander filed a

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134. *Id.* at 563-64.
135. *Id.* at 564. Zimmerman argued that the *Spielberg* review will afford individuals no protection in pre-arbitral *Collyer* cases if the party seeking deferral need not prove that the unfair labor practice issue has been presented to and considered by the arbitrator. *Id.*
136. *Olin Corp.*, 268 N.L.R.B. at 579 (Member Zimmerman, dissenting).
139. 415 U.S. at 42. Alexander filed the grievance through his union representative of Local 3029 of the United Steelworkers of America, pursuant to the grievance arbitration clause of the collective bargaining agreement. *Id.* at 39. The grievance stated: "I feel I have been unjustly discharged and ask that I be reinstated with full seniority and pay." *Id.* No claim based upon racial discrimination was raised until the final prearbitration step of the grievance procedure. *Id.* at 42.
Title VII action in federal district court, but it was dismissed on the grounds that his discrimination claim previously had been submitted to arbitration. The Supreme Court unanimously reversed, holding that an employee’s statutory right to a trial de novo under Title VII was not foreclosed by a prior submission to binding arbitration of a grievance based upon the same discrimination claim.

In Gardner-Denver, the Court recognized that employees have two separate and distinct rights that protect them against employer discrimination: contractual rights which arise from the nondiscrimination clause in the collective-bargaining agreement, and statutory rights which are independent of the contract. Each of the rights provides a separate cause of action and the decision to enforce one action does not preclude vindication of the other. The Court explained that “[t]he distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as the result of the same factual occurrence. . . . No inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.”

The Court relied upon this dichotomy between statutory and contractual rights to reverse the district court’s holding that submission of a grievance to arbitration precludes subsequent consideration of the claim in court. Additionally, the Court rejected the employer’s contention that even if a preclusion rule is not adopted, federal courts should defer to arbitral decisions of discrimination claims. Noting the obvious analogy to the Board’s deferral policy in Spielberg, the Court refused such a rule because it would “deprive the petitioner of his statutory right to attempt to establish his claim in federal court.”

The Court declined to extend the Spielberg deferral policy to Title VII cases because arbitration is an inappropriate forum for final resolution of Title VII rights. A review of the characteristics and limitations of arbitration provided ample support for that conclusion. First, the Court noted that since the specialized competency of arbitrators pertains to the law of the shop, many arbitrators have insufficient knowledge and skill to resolve the constitutional or statutory questions involved in Title VII cases. Even if the

142. Id. at 50.
143. See id. at 49, 51, 54.
144. See id. at 55-56. The employer suggested that the requirements for deferral should be: “(i) the claim was before the arbitrator; (ii) the collective-bargaining agreement prohibited the form of discrimination charged in the suit under Title VII; and (iii) the arbitrator has the authority to rule on the claim and to fashion a remedy.” Id.
145. Id. at 56.
146. Id. at 57. The Supreme Court’s opinion made a subtle but important change in its view of the arbitrator’s expertise. Historically, arbitrators were viewed as particularly competent in effectuating industrial peace. See supra note 7 and accompanying text (discussing United Steelworkers of Am. v. Warrior & Gulf Navigation Co.). However, the Gardner-Denver decision
arbitrator is competent, however, he must still effectuate the intent of the parties rather than enforce the statute.\textsuperscript{147} Secondly, since arbitration proceedings do not have the same procedural safeguards as courts, the court considered federal courts a more appropriate forum for resolution of Title VII issues.\textsuperscript{148} Finally, the Court expressed concern that because the union has exclusive control over the presentation of grievances, the rights of individual union members may be sacrificed to benefit the union as a whole.\textsuperscript{149}

The Court concluded that the conflict between the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices could be best accommodated by permitting an employee to pursue both his contractual remedy in the arbitral forum and his statutory remedy under Title VII. Thus, the federal courts were directed to hear an employee's Title VII claim de novo with evidence of the arbitration award "accorded such weight as the court deems appropriate."\textsuperscript{150}

In \textit{Barrentine v. Arkansas-Best Freight Systems, Inc.},\textsuperscript{151} the Supreme Court extended the holding and rationale of \textit{Gardner-Denver} to disputes arising under the FLSA. Barrentine, a company truck driver, filed a grievance claiming that truck drivers were entitled to compensation for time spent conducting pre-trip inspections of their trucks and transporting trucks to the repair facility. After the grievance committee rejected the grievance without explanation, Barrentine brought suit in federal district court alleging that the

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clarified the limitations of the arbitrator. The ramifications of the Court's clarification are twofold: (1) it casts doubt on an arbitrator's ability to resolve labor-management conflicts alleging employment discrimination, and (2) it opens the door to court review of the arbitrator's decision when evaluating its admissibility as evidence in Title VII litigation. Siber, \textit{The Gardner-Denver Decision: Does It Put Arbitration in a Bind?}, 25 \textit{Lab. L.J.} 708, 711 (1974).
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\textsuperscript{147} 415 U.S. at 57. In \textit{Gardner-Denver}, the Court stated:
The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties. . . . If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective bargaining agreement, the arbitrator has "exceeded the scope of the submission," and the award will not be enforced.

\textit{Id.} at 53 (quoting United Steelworkers of Am. v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597 (1960)).

\textsuperscript{148} \textit{Id.} at 57-58. The Court noted that arbitration does not provide procedural safeguards such as a complete record, application of evidence rules, discovery, compulsory process, cross-examination and testimony under oath. \textit{Id.} Additionally, the Supreme Court has recognized that "[a]rbitrators have no obligation to the court to given reasons for an award." \textit{Id.} at 58 (quoting United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960)).

\textsuperscript{149} \textit{Id.} at 58 n.19.

\textsuperscript{150} \textit{Id.} at 60. The Court adopted no standards concerning the weight to be accorded an arbitral award in a \textit{de novo} proceeding, but did indicate that relevant factors include: the existence of racial discrimination provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness, adequacy of the record on the Title VII issue, and the special competence of the arbitrator. \textit{Id.} at 60 n.21. The Court stated that where the arbitrator has fully considered the Title VII claim, the trial court can give great weight to the arbitrator's award. \textit{Id.}

\textsuperscript{151} 450 U.S. 728 (1981).
employer's failure to pay employees "for all time spent in the service of the Employer" violated section 6(a) of the FLSA. The complaint also alleged that the union had breached its duty of fair representation by entering into a "side deal" with the employer concerning compensation for inspection and transportation time. The District Court rejected the union's fair representation claim and allowed the grievance committee's decision to stand. The Court of Appeals affirmed, concluding that the employees' voluntary submission of their grievances to arbitration foreclosed a subsequent court action to assert the same claim. The Supreme Court reversed.

As in Gardner-Denver, the Court in Barrentine furthered the distinction between grievances arising out of collective bargaining agreements and grievances based upon statutory rights. Rejecting the employer's contention that the national labor policy favoring the collective bargaining process mandated the courts to defer to an arbitral determination of the wage claim, the Court stated:

Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

Noting that the purpose of FLSA is to protect workers from "substandard wages and oppressive working hours," that the Act's statutory enforcement scheme grants individual employees broad access to the courts, and that employees' rights under the Act are nonwaivable, the Court concluded that FLSA rights are best protected in a judicial rather than an arbitral forum.

The Court gave two reasons, similar to those in Gardner-Denver, to support its decision not to adopt a foreclosure rule. First, a union may

152. Id. at 731. Article 50 of the collective-bargaining agreement between Arkansas-Best and Barrentine's union (Local 878 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers) provided: "All employees covered by this Agreement shall be paid for all time spent in the service of the Employer. Rates of pay provided for by this Agreement shall be minimums. Time shall be computed from the time that the employee is ordered to report for work and registers in until the time he is effectively released from duty. Such payment for employee's time shall be at the hourly rate." Id. at 731 n.3.


156. Barrentine, 450 U.S. at 737.

157. Id. at 739.

158. Id. at 740. Section 16(b) of FLSA permits an aggrieved employee to bring his statutory wage and hour claim "in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b) (1976).

159. Barrentine, 450 U.S. at 745.
decide not to support vigorously an employee's meritorious wage claim in order to maximize the overall compensation of union members. Second, statutory rights may go unvindicated because the arbitrator is not competent to interpret the FLSA; even if an arbitrator is competent, however, he is still required to effectuate the intent of the parties as expressed in the collective bargaining agreement. The Court added a final reason not mentioned in Gardner-Denver, that the arbitrator is often powerless to award the aggrieved employee the types of relief that a court could grant.

The Court concluded by reiterating that individual statutory rights are independent of the collective bargaining process. Maintaining that the courts have a duty to protect the congressionally granted FLSA rights, the Court held that an employee cannot be precluded from pursuing his statutory remedy in court because he first sought relief through the contractual grievance-arbitration procedure.

Recently in McDonald v. City of West Branch the Supreme Court reaffirmed the holdings of Gardner-Denver and Barrentine by refusing to give preclusive effect to an arbitration award in a subsequent section 1983 civil rights action. McDonald, a police officer and union steward, was discharged, allegedly for sexual harassment. Pursuant to the collective bargaining agreement, McDonald filed a grievance contending that there was "no proper cause" for his discharge. After exhausting the preliminary grievance-reduction steps, the grievance was taken to arbitration where the arbitrator ruled against McDonald. McDonald did not appeal the arbitrator's decision; instead he filed a section 1983 suit against the City of West Branch.

160. Id. at 742.
161. Id. at 743-44.
162. Id. at 745.
163. Id. Accord, Castle and Lansing, Arbitration of Labor Grievances Brought Under Contractual and Statutory Provisions: The Supreme Court Grows Less Deferential to the Arbitration Process, 21 Am. Bus. L.J. 49, 88 (1983). Castle and Lansing note that while the holding of Barrentine appears consistent with the general thrust of the FLSA, it is not dictated by any express statutory language. Castle and Lansing suggest that Congress modify the FLSA to allow courts to defer to arbitration awards (and avoid subsequent litigation) when the following requirements are met: (1) the contract right coincides with the FLSA right; (2) the arbitrator's decision does not violate the private rights created by FLSA; (3) the factual issues before the court are identical to those decided by the arbitrator; (4) the contract authorized the arbitrator to decide FLSA claims; (5) the arbitrator's decision explains the resolution of the FLSA claim; and (6) the arbitration proceeding was fair and allowed all facts and arguments to be presented. Id. at 88.
165. Id. at 1804. Section 1983 of the Civil Rights Act provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In his complaint McDonald alleged that he was discharged for exercising his First Amendment rights of freedom of speech, freedom of association, and freedom to petition the government for redress of grievances. McDonald won in the district court, but the Sixth Circuit Court of Appeals reversed.\textsuperscript{166} Reasoning that the parties had agreed to settle their disputes through the arbitration process and that the arbitrator had considered the reasons for the discharge, the Court of Appeals concluded that res judicata and collateral estoppel barred McDonald's First Amendment claims.\textsuperscript{167} The Supreme Court reversed.

The Court first rejected the City's contention that the Federal Full Faith and Credit Statute (section 1738)\textsuperscript{168} requires courts to give preclusive effect to arbitration awards. The Court stated that "[a]rbitration awards are not . . . subject to the mandate of section 1738."\textsuperscript{169} This conclusion, Justice Brennan explained, follows from the plain language of section 1738 which guarantees full faith and credit only to judicial proceedings. Since arbitration is not a judicial proceeding, section 1738 does not apply to arbitration awards.

The Court also found the judicially fashioned doctrines of res judicata and collateral estoppel to be inapplicable in section 1983 actions. Noting that both \textit{Gardner-Denver} and \textit{Barrentine} had rejected the contention that arbitration awards should preclude subsequent suits in federal court,\textsuperscript{170} the Court refused to adopt an arbitration preclusion rule. Although the Court recognized that arbitration is well suited to resolving contractual disputes,

\textit{Barrentine} and \textit{Gardner-Denver} compel the conclusion that [arbitration] cannot provide an adequate substitute for a judicial proceeding.

\textsuperscript{166} McDonald v. City of West Branch, Nos. 81-1420, -1442, -1707, -1805, slip op. at 1-2 (6th Cir. Apr. 19, 1983).

\textsuperscript{167} 104 S. Ct. at 1801. The Supreme Court defined the term "res judicata" as the "effect of a judgment on the merits in barring a subsequent suit between the same parties or their privies that is based upon the same claim." \textit{Id.} at 1801 n.5. "Collateral estopped," by contract, provides that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of that issue in a suit on a different cause of action involving a party to the first case." \textit{Id.} (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)).

\textsuperscript{168} 28 U.S.C. § 1738 (1982). The Federal Full Faith and Credit Statute (section 1738) provides in pertinent part:

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

\textit{Id.}

\textsuperscript{169} McDonald v. City of West Branch, 104 S. Ct. at 1802 (quoting Kremer v. Chemical Construction Co., 456 U.S. 461, 477 (1982)).

\textsuperscript{170} \textit{Id.} at 1802-03.
in protecting the federal statutory and constitutional rights that section 1983 is designed to safeguard . . . [A]ccording preclusive effect to an arbitration award in a subsequent section 1983 action would undermine that statute’s efficacy in protecting federal rights.\textsuperscript{171}

The Court based its conclusion upon four familiar arguments previously set forth in the \textit{Gardner-Denver} and \textit{Barrentine} opinions. First, since an arbitrator’s expertise “pertains primarily to the law of the shop, not the law of the land,” an arbitrator may not have the expertise required to resolve the complex legal questions that arise in section 1983 actions. Second, an arbitrator may not have the authority to enforce section 1983 because an arbitrator’s authority derives solely from the collective bargaining agreement. Third, since the union has exclusive control over the manner and extent to which an individual grievance is presented, the risk exists that an employee’s rights could be sacrificed for the benefit of the union. Finally, arbitral factfinding generally is not equivalent to judicial factfinding.\textsuperscript{172} Concluding that an arbitration proceeding is not an adequate substitute for a judicial trial and that according preclusive effect to arbitration awards in section 1983 actions would severely undermine the statute’s purpose, the Court held that federal courts should not give res judicata or collateral estoppel effect to arbitration awards in section 1983 cases.\textsuperscript{173}

V. Conclusion

In Title VII, Fair Labor Standards Act (FLSA), and section 1983 cases, the Supreme Court has held that arbitration does not foreclose an individual’s right to pursue his statutory rights in a judicial forum. The reasons and arguments supporting these holdings apply with equal force to individual statutory rights cases arising under the National Labor Relations Act.

According to the Court’s analysis in \textit{Gardner-Denver} and \textit{Barrentine}, statutory rights of employees are separate from and may be asserted independently of any contractual rights arising under the collective bargaining agreement. Since each right grants the employee a distinct cause of action, employees are not precluded from asserting their statutory rights before the Board because of a prior arbitral award.\textsuperscript{174} Recently, in \textit{McDonald}, the Court

\textsuperscript{171} \textit{Id.} at 1803.

\textsuperscript{172} \textit{Id.} at 1803-04.

\textsuperscript{173} \textit{Id.} at 1804.

\textsuperscript{174} \textit{See supra} notes 136-138, 148-150, 159 and accompanying text. The principle arguments against deferral apply with equal force to individual rights cases under the NLRA: (1) an arbitrator may not have the expertise required to resolve the complex legal issues that arise in certain NLRA cases, (2) the arbitrator must enforce the agreement even if it conflicts with statutory law, (3) since the union has exclusive control over the presentation of the grievance, the individual’s rights may be sacrificed to benefit the union, and (4) arbitral factfinding is generally not equivalent to judicial factfinding. \textit{Id.}

\textsuperscript{174} \textit{See supra} text accompanying notes 141-43 and 156. The dichotomy between individual statutory and contractual rights is based primarily upon a recognition that individuals play a significant role in the enforcement and vindication of important congressional policies. \textit{See, e.g.}, \textit{Alexander v. Gardner-Denver}, 415 U.S. at 45. In \textit{Gardner-Denver}, the court stated, “[T]he private
reaffirmed this position by refusing to accord a prior arbitral award res judicata or collateral estoppel effect in a section 1983 action.175 Because the NLRA also provides employees rights both as individuals and as members of the collective bargaining unit,176 Gardner-Denver, Barrentine and McDonald are apposite. The reasons the Court advanced in these cases against a deferral or preclusion policy are equally applicable to individual rights cases in the NLRA arena.177

Finally, the decisions in Gardner-Denver, Barrentine and McDonald make clear that Congress intended the federal courts to bear final responsibility for the enforcement of important congressional objectives and for the redress of violations of individuals' statutory rights.178 Since the NLRA, like Title VII, FLSA, and section 1983 of the Civil Rights Act, provides for a federal forum in which to protect congressionally granted rights,179 arbitration should not foreclose, by deferral or preclusion, an employee from asserting his individual statutory rights under the NLRA in the forum Congress created.180

right of action remains an essential means of obtaining judicial enforcement of Title VII . . . . In such cases, the private litigant not only redresses his own injury, but also vindicates the important congressional policy against discriminatory employment practices." Id.

175. See McDonald, 104 S. Ct. at 1804.

176. See, e.g., NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3)(1976) (protecting individual's right to engage in or refrain from union activity); NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5)(1976) (prohibiting employer from refusing to bargain with employees' representatives); see also General American Transportation Corp., 228 N.L.R.B. at 810 (Chairman Murphy, concurring); supra text accompanying notes 76-79.

177. See supra text accompanying notes 147-149, 160-162 and 171. The principal arguments against deferral apply with equal force to individual rights cases under the NLRA: (1) an arbitrator may not have the expertise required to resolve the complex legal issues that arise in certain NLRA cases, (2) the arbitrator must enforce the agreement even if it conflicts with statutory law, (3) since the union has exclusive control over the presentation of the grievance, the individual's rights may be sacrificed to benefit the union, and (4) arbitral factfinding is generally not equivalent to judicial factfinding. Id.

178. See Gardner-Denver, 415 U.S. at 44 ("final responsibility for enforcement of Title VII is vested with federal courts."); Barrentine, 450 U.S. at 740 (statutory enforcement scheme of FLSA "permits an aggrieved employee to bring his statutory wage and hour claim 'in any Federal or State court of competent jurisdiction.' [quoting FLSA § 16, 29 U.S.C. § 216(b)]. . . .[N]o other forum for enforcement of statutory rights is referred to or created by the statute."); McDonald, 104 S. Ct. at 1803. In McDonald, the Court stated, "Because § 1983 creates a course of action, there is, of course, no question that Congress intended it to be judicially enforceable. . . .The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under the color of state law."" (quoting Mitchum v. Foster, 407 U.S. 225, 242 (1972)).

179. Even though cases arising under the NLRB are not given a judicial hearing before a court of law (as provided in Title VII, FLSA and section 1983 actions), litigants in NLRA actions are entitled to access to a federal forum which provides many of the same procedural safeguards as the judicial system. See 29 U.S.C. § 160 (1976) (NLRB plaintiff may appeal decision of administrative law judge first to Board and then to Circuit Court of Appeals); 29 C.F.R. § 102.45 (1981) (administrative law hearing is conducted according to Federal Rules of Evidence and includes preparation of complete transcript of proceedings). Arbitration hearings, on the other hand, lack most of the procedural safeguards and evidentiary procedures of the courts. See Gardner-Denver, 415 U.S. at 56-58.

180. No language in the NLRA implies that private dispute resolution (arbitration) is proper. The Act empowers and obligates the Board to prevent unfair labor practices by enforcing
The position taken by Chairman Murphy in *General American Transportation* that permitted Board deferral in cases dealing with contractual issues, but not in cases involving individual employee rights, is consistent with the Court's views announced in *Gardner-Denver, Barrentine* and *McDonald*. The new NLRB deferral policies presented by *Olin* and *United Technologies*, however, cannot be reconciled with the Court's position. In spite of the Court's retrenchment, the Board has expanded its deferral policy making it nearly impossible for an employee to present his individual rights case before the Board. In light of the Supreme Court's recent pronouncements, the Board should reconsider its deferral policy in individual rights cases to ensure that employees' statutory rights are adequately protected.