ADR AND THE NLRA: WILL THE BOARD DEFER?

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The National Labor Relations Board ("Board") has, for many years, recognized the use of arbitration agreements to resolve disputes, even if those disputes involve alleged violations of the National Labor Relations Act (NLRA), when the arbitrations occur in the union setting.[1] However, despite its long standing reliance on the use of mandatory arbitration to encourage the voluntary settlement of labor disputes between an employer and a union or an employer and "union-represented" employees, the Board has seemingly adopted a contrary position with respect to the use of mandatory arbitration to resolve disputes between employers and employees who are not represented by a union.[2]

This article examines the Board's policy of deferral to arbitration in the context of a private employer-union relationship, a brief history of the Supreme Court's views on arbitration, and the Board's opposition to the use of mandatory arbitration agreements in the context of a private employer-employee relationship in which the employee is not represented by a union. The article will conclude with some practical and legal considerations involved in using mandatory arbitration to resolve alleged violations of the NLRA when the employee is not represented by a union. Finally, this article will argue that the Board should agree to recognize the use of mandatory arbitration agreements by employers in a "non-union" setting.[3]

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[1] United Technologies Corp., 268 N.L.R.B. 557, 558 (1984) ("Arbitration as a means of resolving labor disputes has gained widespread acceptance over the years and now occupies a respected and firmly established place in Federal labor policy.").

[2] The Board has not yet directly ruled on whether the use of mandatory arbitration agreements by non-union employers violates the National Labor Relations Act (NLRA). However, in three recent decisions, the General Counsel and administrative law judges concluded that mandatory agreements impermissibly waived the employee's rights under section 7 of the NLRA. Exceptional Prof'l, Inc., Nos. 17-CA-19272, 17-CA-19325, 17-CA-19385, 1998 N.L.R.B. LEXIS 563, at *1 (Aug. 5, 1998); Architectural Bldg. Products, Inc., No. 17-CA-19326, 1998 N.L.R.B. LEXIS 541, at *1 (July 28, 1998); Bentley's Luggage Corp., [1996–1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) ¶ 34028, at 212 (Aug. 21, 1995), *available at* 1995 N.L.R.B. GCM LEXIS 92 (1995); FRED FEINSTEIN, NLRB GEN. COUNS. REP., Daily Lab. Rep. (BNA) No. 36, at E-6 to E-7 (Feb. 23, 1996).

[3] Section 7 of the NLRA guarantees the following:

I. THE BOARD'S DEFERRAL DOCTRINE[4]

The Board has, over the last forty-five years, strived to fulfill the obligations imposed by section 10(a) of the Act to prevent unfair labor practices while simultaneously promoting the federal labor policy advancing arbitration as a means to resolve disputes.[5]

To satisfy both objectives, the Board fashioned a policy pursuant to which it "defers" its investigation of allegations that arguably constitute unfair labor practices until such time as the parties avail themselves of the grievance and arbitration procedures upon which they have agreed. After the arbitration, the Board reviews the arbitration process and the decision of the arbitrator and decides whether to proceed with an investigation and prosecution of the unfair labor practice charge. If the arbitration process and the decision of the arbitrator satisfy the standards enunciated by the Board, then the Board will defer to the arbitration and dismiss the charge.

A. *Post-Arbitration Review of Arbitration Awards*

In 1955, the Board formulated its policy for review of arbitral awards in unfair labor practice cases in *Spielberg Manufacturing Co.*[6] This policy, which became known as the *Spielberg* doctrine, addressed the situation in which the parties have already arbitrated the dispute, and the Board is faced with reviewing the ultimate decision.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by section 8(a)(3) [29 U.S.C. § 158(a)(3) (1994)].

29 U.S.C. § 157 (1994). The NLRA, and any violations of it, is not limited situations in which employees are represented by a labor organization.

[4] The Board uses the term "deferral" in both the pre and post arbitration context.

[5] Section 10(a) of the NLRA specifically empowers the Board to

> [P]revent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) 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 . . . .

29 U.S.C. § 160(a) (1994).

[6] Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).

In *Spielberg*, the parties agreed to arbitrate the employer's refusal to reinstate four employees who had gone out on strike and who were accused of picket-line misconduct.[7] The arbitration was heard by a three-member panel, which was selected pursuant to the terms set forth in the collective bargaining agreement.[8] The collective bargaining agreement also provided that the parties would be bound by the decision of the panel majority.[9] After a hearing in which three of the four strikers testified, a majority of the panel concluded that the employer did not have to reinstate the four employees.[10] Following the arbitration, the four individuals filed unfair labor practice charges, and the General Counsel issued a complaint.[11] The administrative law judge (ALJ) rejected the employer's affirmative defense that it could rely on the arbitration decision to justify its refusal to reinstate the strikers. He held that the employer violated the Act and ordered that the employer reinstate the strikers.[12]

On review of the employer's exceptions to the ALJ's Intermediate Report, the Board dismissed the complaint and found that the employer did not violate the NLRA when, consistent with the arbitration award, it refused to reinstate the four strikers.[13] In reaching this conclusion, the Board observed that all the parties had acquiesced in the arbitration proceeding and agreed to be bound by the decision, that the proceedings were fair and regular, and that the decision of the panel was not clearly repugnant to the purposes and policies of the Act.[14] Given the circumstances, the Board found that "the desirable objective of encouraging the voluntary settlement of labor disputes [would] best be served by [its] recognition of the arbitrators' award."[15] These standards became known as "the Spielberg deferral doctrine." The Board later modified the *Spielberg* doctrine in *Raytheon Co.* by adding a requirement that the issues involved in the unfair labor practice case must be presented to and considered by the arbitrator.[16] Unfortunately, the vagrancies of this later modification resulted in an inconsistent application of the doctrine.

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[7] *Id.* at 1084.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 1086.

[15] *Id.* at 1082.

[16] Raytheon Co., 140 N.L.R.B. 883, 886 (1963).

Almost twenty years later, in *Olin Corp.*,[17] the Board finally clarified its *Raytheon Co.* modification of the *Spielberg* doctrine. In *Olin Corp.*, the Board held that it would find that an arbitrator had "adequately considered the unfair labor practice [if] the contractual issue is factually parallel to the unfair labor practice issue, and if the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice."[18] The Board further noted that the arbitrator's award does not need to be totally consistent with Board precedent.[19] Unless the award is "palpably wrong," which the Board defined as a "decision that is not susceptible to an interpretation consistent with the Act," the Board will defer to the arbitration award.[20] The Board also placed the burden on the party objecting to deferral to establish that the *Spielberg* standards were not met.[21]

B. *Pre-Arbitration Deferral to Arbitration Procedure*

Consistent with its policy of post-arbitration deferral, the Board, in 1971, adopted specific criteria for pre-arbitral deferral to the parties' grievance/arbitration procedures.

In the seminal case of *Collyer Insulated Wire*,[22] the Board was faced with a claim by the employer that the union's section 8(a)(5) charge alleging a refusal to bargain and unilateral changes in the conditions of employment should be deferred to the grievance and arbitrations procedures of the collective bargaining agreement. A majority of the Board held that the Board should and would defer to the existing grievance and arbitrations procedures of the collective bargaining agreement.

The Board articulated several reasons to favor deferral to the parties' grievance/arbitration procedures. These reasons included (1) that the dispute arose within the "confines of a long and productive collective bargaining relationship;" (2) that there was no claim of employer animosity to the employee's exercise of protected rights; (3) that the parties contract provided for arbitration of a very broad range of disputes; (4) that the arbitration clause clearly

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[17] Olin Corp., 268 N.L.R.B. 573 (1984).

[18] *Id.* at 574.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). *Collyer Insulated Wire* involved allegations by the union that the employer had violated section 8(a)(5), 29 U.S.C. § 158(a)(5) (1994), of the NLRA by failing to bargain with the union over changes in conditions of employment. The employer contended that the charge should be deferred to the existing grievance and arbitration procedures in the collective bargaining agreement.

encompassed the dispute at issue; (5) that the employer had agreed to utilize arbitration to resolve the dispute; and (6) that the dispute was "eminently well suited to resolution by arbitration."[23] The various courts of appeal as well as the Supreme Court endorsed the Board's deferral policy.[24]

As with *Spielberg*, the Board modified and refined its policy of pre-arbitral deferral and expanded its application to cases involving various allegations of section 8(a) of the NLRA.[25] In 1984, the Board reaffirmed its intent to follow *Collyer Insulated Wire* when it issued its decision in *United Technologies Corp.*[26]

II. THE SUPREME COURT'S APPROVAL OF ARBITRATION AGREEMENTS

In 1925, Congress, in response to pressure from the business community adopted the Federal Arbitration Act (FAA).[27] The FAA gained new life in 1947 when it was reenacted to reverse the longstanding judicial hostility to arbitration

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[23] *Id.*

[24] R. W. Page Corp., 219 N.L.R.B. 268, 268 (1975); Arnold Co. v. Carpenters, 417 U.S. 12, 16–17 (1974).

[25] Subsequent cases have found deferral pursuant to *Collyer Insulated Wire* appropriate when the charge alleged a violation of section 8(a)(1), 29 U.S.C. § 158(a)(1) (1994), interfering with restraining or coercing employees in the exercise of their rights guaranteed under section 7, 29 U.S.C. § 157 (1994), and section 8(a)(3), 29 U.S.C. § 158(a)(3) (1994), of the NLRA discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. *E.g.*, United Techs. Corp., 268 N.L.R.B. 557 (1984); Machinists v. NLRB, 525 F.2d 237 (2d Cir. 1975); Nat'l Radio Co., 198 N.L.R.B. 527 (1972); United Aircraft Corp., 204 N.L.R.B. 879 (1972).

[26] The Board overruled *General Am. Transp. Corp.*, 228 N.L.R.B. 808 (1977), in *United Technologies Corp.*, finding that the decision in *General Am. Transp. Corp.* "essentially emasculated the Board's deferral policy, a policy that had favorably withstood the tests of judicial scrutiny and of practical application" for largely unsupportable reasons. *United Techs. Corp.*, 268 N.L.R.B. at 559.

[27] 9 U.S.C. §§ 1–14 (1925). Section 2 of the FAA states the following:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

agreements . . . to place arbitration agreements on the same footing as other contracts.[28] Despite Congress' apparent intent to promote arbitration, the Supreme Court did not really embrace the system until much later.[29]

A. Alexander v. Gardner-Denver Co.[30]

In its 1974 decision, the Supreme Court addressed the issue of whether an unsuccessful arbitration of a race discrimination claim precluded the plaintiff from subsequently bringing suit on the claim in court. The Court reviewed the legislative history of Title VII and concluded that Congress intended that individuals have the right to pursue their claims under both Title VII and other applicable statutes.[31] Furthermore, the Court held that the arbitration agreement limited the arbitrator's authority to resolve the dispute to interpreting the contract. In the Court's view, the arbitrator did not have the authority to interpret the employee's statutory rights.[32]

Finally, the Court held that the Union could not waive an employee's Title VII rights in a collective bargaining agreement.[33] The Supreme Court went on to question the arbitration process as well as the qualification and ability of non-lawyer labor arbitrations to decide statutory issues.[34]

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[28] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

[29] This paper does not attempt to fully outline the course taken by Supreme Court in addressing the use of arbitration as a means of alternative dispute resolution. Rather, the reader is merely provided with a short history of certain key cases that reflect the Supreme Court's changing attitudes towards the use of mandatory arbitration agreements. Additional cases in which the Supreme Court addressed the issue of the applicability of arbitration agreements include *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express., Inc. v. McMahon*, 482 U.S. 220 (1987); *McDonald v. City of W. Branch, Michigan*, 466 U.S. 284 (1984); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981); *United Steelworkers v. Warrior & Gulf Navigation* Co., 363 U.S. 574 (1960); *Wilko v. Swan*, 346 U.S. 427 (1953).

[30] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

[31] *Id.* at 48.

[32] *Id.* at 53–54.

[33] *Id.* at 52.

[34] *Id.* at 56–57.

B. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.[35]

About ten years later, in *Mitsubishi Motors Corp.*, the Supreme Court embraced the liberal federal policy encouraging the use of the arbitration to resolve disputes. The Court reviewed an arbitration agreement by a car dealership and held that the antitrust claims in the underlying suit were arbitrable pursuant to the Federal Arbitration Act.[36] The Court specifically stated: "[W]e find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims. . . . [T]he Act simply 'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.'"[37]

The Court then established a two-prong test for determining whether a dispute is subject to arbitration. Under this test, a court must first determine whether the parties intended to arbitrate the subject of the dispute.[38] Any doubt concerning the scope of arbitrability must be resolved in favor of arbitration, regardless of whether the problem was the construction of the contract language or allegations of defenses such as waiver or delay.[39]

Then, the court must determine whether, based on the statutory text and the legislative history, Congress intended to preclude the waiver of the right to a judicial forum.[40] If both prongs of this test are met, then the agreement to arbitrate should be upheld.

C. Gilmer v. Interstate/Johnson Lane Corp.[41]

In 1991, the Supreme Court issued its decision in *Gilmer v. Interstate/Johnson Lane Corp.* In *Gilmer,* the Supreme Court specifically stated that in an employment context "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."[42] However, the Court sidestepped the issue of whether the FAA applied to employment contracts, holding that the issue was not properly before the Court because the arbitration

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[35] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

[36] *Id.* at 625.

[37] *Id.* (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983)).

[38] *Id.* at 626.

[39] *Id.*

[40] *Id.* at 628.

[41] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[42] *Id.* at 26.

clause being enforced was not contained in a contract of employment.[43] Rather, it was part of the securities registration agreement, which Gilmer was required to sign before working in the industry.

In the years following this decision, the courts that have upheld the validity of these agreements as mechanisms to resolve statutory and contractual claims between private employers, and individuals in the non-union setting have required that the agreements comply with certain standards of procedural fairness and due process.[44]

D. Wright v. Universal Maritime Serv. Corp.[45]

In 1998, the Supreme Court revisited the issue of arbitration agreements as part of a collective bargaining agreement. In *Wright v. Universal Maritime Serv. Corp.*, the Supreme Court acknowledged the tension between its earlier decisions of *Alexander v. Gardner-Denver Co.* and *Gilmer v. Interstate/Johnson Lane Corp.*; however, the Court drew a distinction between compulsory arbitration provisions in an individual's employment contract and provisions contained in a collective bargaining agreement.

In *Wright*, the Court faced the question of whether an employee could be required to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act of 1990 (ADA),[46] because of a general arbitration clause in a collective-bargaining agreement. The Court held that an employee's statutory rights are not waived by an arbitration provision in the collective bargaining agreement unless the waiver is "clear and unmistakable."[47]

E. Circuit City Stores, Inc. v. Adams[48]

In *Circuit City Stores, Inc. v. Adams*, the Supreme Court granted Circuit City's petition for a writ of certiorari to determine whether the Ninth Circuit

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[43] *Id.* at 25 n.2.

[44] For a general discussion, see Judith B. Sadler, *Mandatory Arbitration: Recent Developments After Gilmer in the Evolving Area of Dispute Resolution Through the Use of Mandatory Arbitration Agreements*, A.B.A. 1999 Annual Meeting, *at* http://www.bna.com/bnabooks/ababna/annual/99/speech/pdf.

[45] Wright v. Universal Mar. Serv. Corp., 525 U.S. 70 (1998).

[46] 42 U.S.C. § 12101-213 (1994 & Supp. 2000).

[47] *Id.* at 80.

[48] Circuit City Stores, Inc. v. Adams, No. 99-1379, 2001 WL 273205, at *1 (U.S. Mar. 21, 2001).

erred in holding, directly contrary to the holding of every other United States court of appeals, that the Federal Arbitration Act did not apply to contracts of employment.[49]

On March 21, 2001, in a five to four decision, a majority of the Court concluded that the Ninth Circuit had erred and that the FAA does apply to employment contracts. The majority, led by Justice Kennedy, held that the FAA's section 1 exemption should be narrowly construed and applies only to "contracts of employment of transportation workers."[50] Additionally, the majority reiterated the Court's holding in *Gilmer* that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[51]

III. THE BOARD'S OPPOSITION TO THE USE OF MANDATORY ARBITRATION AGREEMENTS

To date, the Board has not ruled directly on whether mandatory arbitration agreements that require employees to submit all employment disputes to arbitration violate an employee's rights under section 7 of the NLRA.[52] However, three cases in which complaints were issued by the General Counsel provide a strong indication of the direction likely to be taken by the Board.

A. Bentley's Luggage Corp.[53]

In 1994, Bentley's Luggage Corporation, a non-union company, adopted a nationwide policy that required all then current employees to sign an arbitration agreement. The agreement provided that the employees submit any disputes regarding their employment or the termination of their employment to binding arbitration by a neutral third party, pursuant to the terms of the American Arbitration Association.[54] Employees who refused to sign the policy were terminated. Thus, when employee Allen Letwin refused to sign the agreement,

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[49] Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999).

[50] *Circuit City*, 2001 WL 273205, at *3.

[51] *Id.* at *10 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).

[52] *See supra* note 2.

[53] Bentley's Luggage Corp., [1996-1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) ¶ 34028, at 212 (Aug. 21, 1995), *available at* 1995 N.L.R.B. GCM LEXIS 92 (1995).

[54] *Bentley's Luggage Corp.*, [1996-1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 212, *available at* 1995 NLRB GCM LEXIS, at *1–2.

his employment was terminated.[55] He subsequently filed unfair labor practice charges with the Board.[56]

After the charge was filed, the Regional Director for Region 12 of the Board submitted the following questions to the Division of Advice:[57]

> (1) whether the Employer violated Section 8(a)(1), (3) and (4) of the Act by requiring employees and applicants to sign an agreement requiring employees to submit their employment claims to binding arbitration and pay a portion of the costs before they seek redress from any other forum concerning employment issues or termination;
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> (2) whether the Employer unlawfully discharged the Charging Party [Letwin] because he refused to sign such an arbitration agreement.[58]

Upon review, the Division of Advice determined that, absent settlement, the Region should issue a complaint against the employer and allege that the employer violated sections 8(a)(1) and 8(a)(4) by maintaining the agreement and by discharging Letwin for refusing to sign the agreement.[59]

In defense of the unfair labor practice charge, Bentley's Luggage Corp. argued that the agreement was lawful under the Supreme Court's decision in *Gilmer.* The General Counsel rejected this defense on several levels.

First, the General Counsel noted that the with respect to individual contracts of employment, the NLRA authorizes the Board "to treat individual contracts of employment, when used to frustrate the exercise of statutory rights, as either void or voidable."[60] Under the General Counsel's analysis, the arbitration agreement used by Bentley's Luggage Corp. required employees to waive their right to file

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[55] *Id., available at* 1995 NLRB GCM LEXIS, at *3.

[56] *Id.* Letwin also filed a charge with the EEOC and a civil suit under Florida law. *Id.*

[57] The Office of the General Counsel consists of four main divisions, including the Division of Advice. This division is supervised by an Associate General Counsel and oversees the functions of legal advice to regional offices, the injunction work of the district court branch and the legal research and special projects office. JEFFREY A. NORRIS AND MICHAEL J. SHERSHIN, JR., HOW TO TAKE A CASE BEFORE THE NLRB 31-39 (6th ed. 1992). For a discussion on the structure of the National Labor Relations Board, see the above referenced book.

[58] *Bentley's Luggage Corp.*, [1996-1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 212, *available at* 1995 N.L.R.B. GCM LEXIS, at *1.

[59] *Id., available at* 1995 N.L.R.B. GCM LEXIS, at *4.

[60] *Bentley's Luggage Corp.*, [1996-1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 213, *available at* 1995 N.L.R.B. GCM LEXIS, at *6.

charges with the Board as a condition of employment.[61] As such, the General Counsel found that the agreement deterred employees from seeking to file charges and thus constituted "an open attack on an employee's right to seek access to the Board . . . ."[62] The General Counsel also noted that the NLRA "gives the Board the authority to prevent or remedy unfair labor practices, regardless of any other dispute resolution mechanisms that may be available."[63] Then, in an apparent attempt to reconcile its arguments with the Board's frequent deferral to the grievance and arbitration procedures in the union setting, the General Counsel concluded that such use of its discretionary authority would be the "antithesis of the purpose of the Employer's attempt . . . to preclude the Board from exercising its jurisdiction in any manner."[64]

Second, the General Counsel essentially argued that it was unclear under *Gilmer* whether these agreements were enforceable in contracts of employment.[65]

Third, the General Counsel found that, because a charge must be filed before the Board can investigate, any arbitration agreement that might bar an employee from filing an unfair labor practice charge necessarily interferes with the Board's jurisdiction.[66]

Finally, the General Counsel concluded that the fact that the agreement at issue stated that the employment relationship was "at will," and that no "just cause" was required to terminate the employee, the agreement was "illusory" because the employee did not have a basis upon which to claim the termination was improper.[67] Ultimately, the case was settled before a trial.[68]

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[61] *Bentley's Luggage Corp.*, [1996-1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 212–13, *available at* 1995 N.L.R.B. GCM LEXIS, at *5.

[62] *Bentley's Luggage Corp.*, [1996-1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 213, *available at* 1995 N.L.R.B. GCM LEXIS, at *9.

[63] *Bentley's Luggage Corp.*, [1996-1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 214, *available at* 1995 N.L.R.B. GCM LEXIS, at *13.

[64] *Id.*

[65] *Id.*

[66] *Bentley's Luggage Corp.*, [1996-1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 213, *available at* 1995 N.L.R.B. GCM LEXIS, at *13.

[67] *Bentley's Luggage Corp.*, [1996-1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 214, *available at* 1995 N.L.R.B. GCM LEXIS, at *15.

[68] In its opinion, the Division of Advice noted that the employer offered to settle the matter (1) "by agreeing to send a memorandum to all current employees stating that the arbitration agreement was not meant to prohibit access to the Board"; (2) by including a clause within the agreement that it was not meant to prohibit access to the Board; (3) by reinstating Letwin upon his signing of the amended agreement; (4) by paying back pay to Letwin if Letwin was reinstated and (5) if the settlement included a nonadmission clause. *Bentley's Luggage Corp.*, [1996-1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 212, *available at* 1995 N.L.R.B. GCM LEXIS, at *4; *Accord Reached on*

B. Architectural Building Products, Inc.[69]

A couple of years after the *Bentley's Luggage Corp.* case settled, ALJ Steven Charno held a trial and issued a bench decision holding that Architectural Building Products, Inc. "violated [s]ections 8(a)(1), (3), and (4) of the NLRA by implementing and maintaining a grievance and arbitration provision which unlawfully restricts the right of its employees to use the Board's processes and unlawfully conditioning the reinstatement of two employees on their acceptance of the grievance and arbitration procedure."[70] The ALJ reached this conclusion, despite the fact that the language of the arbitration agreement stated that the agreement was not "a waiver of any requirement of the employee to timely file any charge with the NLRB" and the fact that the handbook contained a savings clause that any provision in the policies that were "inconsistent with any statute, regulation, law or precedent would be deemed to be inoperative and severable."[71] The judge based his decision on three aspects of the agreement: (1) that the agreement was the "'exclusive method of resolution of all disputes;'" (2) that employees must file any grievance within five days or lose their right to assert a claim in any forum; and (3) that an employee who asserted his rights to file a lawsuit or agency proceeding in violation of the agreement would be liable for reasonable costs, expenses, attorneys' fees, and costs of litigation incurred by the employer as a result of the employee's suit or proceeding if the employer secures a stay or dismissal of the action.[72] No exceptions were filed to this decision.

C. Exceptional Professional, Inc.[73]

Less than a month after the *Architectural Building Products, Inc.* decision was issued, ALJ Mary Miller Cracraft struck down a mandatory grievance and arbitration clause contained in an employment application as violative of sections 8(a)(1) and (3), and sections 2(6) and (7) of the NLRA.[74] Although the

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Unfair Practice Case Involving Mandatory Arbitration Pledge, Daily Lab. Rep. (BNA) No. 96, at A-11 (May 17, 1996) (discussing the settlement in which the employer was required to rescind its mandatory policy and reinstate the terminated employee with back pay).

[69] Architectural Bldg. Prods., Inc., No. 17-CA-19326, 1998 N.L.R.B. LEXIS 541, at *1 (July 28, 1998).

[70] *Id.* at *4.

[71] *Id.* at *6–7.

[72] *Id.* at *8.

[73] Exceptional Prof'l, Inc., Nos. 17-CA-19272, 17-CA-19325, 17-CA-19385, 1998 N.L.R.B. LEXIS 563, at *1 (Aug. 5, 1998).

[74] *Id.* at *72.

employer, Exceptional Professional, Inc. had providently included a provision allowing individuals the choice of using the company's grievance and arbitration procedure *or* filing a charge with the NLRB or any other agency, the language of the application also authorized sanctions in the form of reasonable costs, expenses, and attorneys fees for the improper resort to a court or agency in lieu of use of the company's procedure.[75]

Judge Cracraft acknowledged that no employee had utilized the procedure, and thus the nature of the agreement, *i.e.* whether it was voluntary or mandatory, was uncertain. However, she concluded that the employer, the drafter of the agreement, must "bear this burden of the ambiguity."[76] Although exceptions to this decision were filed, the Board has not yet issued a decision.

D. Bill's Electric, Inc.[77]

Approximately a year later, ALJ William L. Schmidt issued his decision in *Bill's Electric, Inc.*, holding that the company violated Section 8(a)(1)and 8(a)(4) of the Act by maintaining a grievance and arbitration system requiring employees and applicants for employment to utilize that system as the exclusive means of resolving all legal claims against the Company, including claims that would be filed with the NLRB. ALJ Schmidt found that the employer's grievance and arbitration procedure "tend[ed] to chill employee access to the Board's processes and would interfere with their statutory right to seek vindication of their rights at the Board."[78]

IV. THE PRACTICAL AND LEGAL CONSIDERATIONS SURROUNDING THE USE OF MANDATORY ARBITRATION AGREEMENTS [79]

Mandatory arbitration agreements will not be enforced by the courts unless the agreement meets certain procedural due process and fairness standards.[80]

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[75] *Id.* at *56.

[76] *Id.* at *57.

[77] Bill's Elec., Inc., Nos. 17-CA-18629-1, 17-CA-18697, 17-CA-18787, 17-CA-19112, 1999 N.L.R.B. LEXIS 572, at *1 (Aug. 10, 1999).

[78] *Id.* at *43–44.

[79] This Article does not purport to address all aspects of these agreements. Employers should tailor their agreements to their particular situation. *See* Scott S. Moore, *Arbitration of Employment Disputes—Drafting Enforceable Pre-Dispute Agreements*, 32 CREIGHTON L. REV. 1521 (1999).

[80] Cole v. Burns Int'l Sec. Servs, 105 F.3d 1465, 1483 (D.C. Cir. 1997); Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1 (1st Cir. 1999).

Given the Board's reluctance to defer to these agreements in situations involving non-union employees, it is logical to infer that the Board will require these standards as well. The following are suggested areas in which the employer and its attorney can modify arbitration agreements to improve the odds that the Board will defer to the grievance and arbitration procedures and decision in the non-union setting.

A. *No Waiver of Statutory Rights*

First, and perhaps most significantly, a mandatory arbitration agreement should not require that employees waive their statutory right to file an unfair labor practice claim.[81]

In *Gilmer*, the Supreme Court expressly noted that an individual claimant subject to an arbitration agreement is still free to file a charge of discrimination with the EEOC, "even though the claimant is not able to institute a private judicial action."[82] The Court also concluded that nothing in the agreement restricted the EEOC's ability to investigate allegations of age discrimination.[83]

With respect to the Board's jurisdiction, the Board and the courts have long held that agreements by private parties cannot restrict the Board's jurisdiction.[84] The Board has specifically noted that the policy of pre-arbitral deferral does not waive an employee's statutory rights.[85]

B. *Clear, Simple Language*

To comply with the principles established by the Board in the *Spielberg* and *Collyer* cases and the subsequent modifications, employers should use simple, clear language in the arbitration agreement. The language in the agreement approved by the court in *Cole v. Burns Int'l Sec. Servs* is broad and covers all

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[81] *Cole*, 105 F.3d at 1483; Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 791 (1990); Fred W. Batten, *Mandatory Arbitration For Non-Union Employers—Does It Violate the NLRA?*, 1997 A.B.A. SEC. OF LAB. & EMPLOYMENT LAW, MIDWINTER MEETING COMM. PAPERS, *at* http://www.abanet.org/LABOR/1997.html.

[82] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991).

[83] *Id.* at 28.

[84] NLRB v. Walt Disney Prods., 146 F.2d 44, 48 (9th Cir. 1944); Kinder-Care Learning Centers, Inc., 299 N.L.R.B. 1171 (1990); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1080 (1955).

[85] United Techs. Corp., 268 N.L.R.B. 557, 560 n.17 (1984) ("Nothing in this decision diminishes the right of employees to seek statutory relief for alleged unfair labor practices.").

matters directly or indirectly related to recruitment, employment, or termination of employment.[86] Notably, the agreement excludes worker's compensation claims.

To ameliorate the Board's concerns, an employer can expressly state that applicants and/or employees are not prohibited from filing a charge of discrimination with the NLRB. The use of this exclusionary phrase would eliminate the argument advanced by the General Counsel in *Bentley's Luggage Corp.* that employees' rights to utilize the Board are chilled. Additionally, the agreement must not impose sanctions, such as costs and attorneys fees, on the employee for pursuing his right under the NLRA.

C. *Employer Pays the Cost of the Arbitrator*

Another common objection raised by those who oppose the use of mandatory arbitration agreements is the cost of the arbitration proceedings. This objection should not impose a barrier to approval of these agreements by the Board as long as the employee is not compelled to pay the cost of arbitration. Resort to an agency usually involves little or no costs to the charging party. In a traditional employer-union relationship, the costs of the arbitration are often split between the company and the union. If employers set up arbitration procedures that are so expensive that employees are financially unable to proceed, the Board would have a justification for not deferring to the procedure. Costs cannot be used by employers to deter the employee from filing a statutory claim.[87]

Chief Judge Edwards noted the following in *Cole*:

> [W]e are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for services of the judge assigned to hear her or his case. Under *Gilmer*, arbitration is supposed to be a reasonable substitute for a judicial forum. Therefore, it would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.[88]

The statutory scheme established in the NLRA and the authority of the Board would be undermined if employees were unable to exercise their rights

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[86] *Cole*, 105 F.3d at 1469.

[87] Shankle v. B-G Maint. Mgmt. of Colorado, Inc., 163 F.3d 1230 (10th Cir. 1999) (holding the imposition of a fee-splitting provision effectively denied employee a forum to vindicate statutory rights).

[88] *Cole*, 105 F.3d at 1484.

because of costs, particularly when one considers the mandate of section 10(a) of the Act.[89]

The fact that the employer pays the cost of the arbitrator's fees does not justify the Board's refusal to defer to the arbitration procedure and arbitrator's decision unless there is evidence of bias, prejudice, fraud, or illegality.[90] Many, if not most, arbitrators will be appointed from agencies such as the American Arbitration Association or JAMS.[91] Moreover, since the process will be conducted under the watchful eyes of the Board and the courts, the employer and arbitrator have a built in deterrent to misconduct.[92]

D. *Procedural Due Process*

1. *Arbitrators*

One of the early criticisms of the Supreme Court in its decisions regarding arbitration was that "non-lawyer arbitrators" would not have the requisite knowledge to adequately decide the statutory issues.[93] This issue is not as persuasive as it once might have been due to the increase in the number of agencies that provide arbitrators to hear disputes. Many of these agencies, such as the American Arbitration Association or JAMS, have established criteria to govern the arbitration process.[94] These agencies often rely on former judges or attorneys to serve as arbitrators.

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[89] *See supra* note 5.

[90] 9 U.S.C. § 10(a) (1994); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991); *Cole*, 105 F.3d at 1486.

[91] See Rules 12, 38, and 39 in the *National Rules for the Resolution of Employment Disputes (Including Mediation and Arbitration Rules)*, American Arbitration Association, *at* http://www.adr.org/rules/employment/employment_rules2.html [hereinafter *National Rules*], as well as the TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995), *reprinted in* DISP. RESOL. J., Oct.–Dec. 1995, at 37–39, *available at* http://www/adr.org/education/education/protocol.html (May 9, 1995).

[92] *Cole*, 105 F.3d at 1485–86; First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (noting that arbitration awards that are "in manifest disregard of the law" can be vacated).

[93] Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 n.18 (1974).

[94] *See supra* note 91.

2. *Discovery*

One of the benefits frequently espoused by employers is the ability to reduce the cost of the process by reducing the cost of discovery. Plaintiff's lawyers, on the other hand, argue that the individual is hampered by the limitations on discovery that are often imposed in the arbitration process. The courts have not found this issue to be a basis for refusing to enforce the agreements.[95]

Likewise, this argument should not serve as a basis for the Board to refuse to recognize the validity of a mandatory arbitration agreement. First, this argument has never limited the Board in its decision to defer to grievance and arbitration procedures when a union is representing the individual. There is no support for the proposition that individuals, who are not represented by the union, would necessarily have less access to documents or witnesses.

Second, arbitrators should have the authority to issue subpoenas or order the production of documents, just as in the situation in which employees are represented by a union.[96]

Third, currently under the NLRA, parties are not generally afforded the opportunity to conduct discovery as they are in a traditional civil proceeding. Although the Board can request that the employer make witnesses or documents available, the employer can refuse to comply with the request, at which time the Board must then resort to issuing a subpoena and, if necessary, seek enforcement of the subpoena in court.

To avoid the use of this argument as a reason for the Board to refuse to defer to the mandatory arbitration process, companies can rely on the use of rules such as the National Rules for the Resolution of Employment Disputes prepared by the American Arbitration Association.[97] These rules provide the arbitrator with the authority to order such discovery as he or she considers necessary for "a full and fair exploration of the issues in dispute."[98]

3. *Remedies*

Initially, some companies tried to limit the remedies available to employees under the arbitration agreement. With respect to statutory claims, this proposition will not hold up. In *Mitsubishi* and *Gilmer*, the Supreme Court specifically noted the need for the "prospective litigant" to be able to effectively vindicate his

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[95] *Gilmer*, 500 U.S. at 31.

[96] *See supra* note 91; *Gilmer*, 500 U.S. at 31.

[97] *See supra* note 91.

[98] *National Rules*, *supra* note 91, at R. 7.

statutory cause of action.[99] Unless an arbitrator can successfully remedy the issues before him, the Board will be reluctant to defer to his authority.[100]

V. CONCLUSION

Whether the Board will ever accept the use of mandatory arbitration agreements that require employees to submit all disputes to binding arbitration in the private employment setting in which the employees are not represented by a union is uncertain. Does the Board have an established process by which it could allow employers to require that employees resolve disputes through this process prior to utilizing the Board's resources? Yes. Does the Board have an established process pursuant to which it could review arbitration decisions to determine if the proceedings were "fair and regular" and addressed the unfair labor practice allegations? Yes. Would the decision to, at least initially, defer to the arbitration proceedings and arbitration decisions in the non-union setting undermine the Board's authority? No. Will the Board accept the opportunity to get ahead of the curve? Who knows. Should the Board? Yes. The Board's authority would not be undermined if it were to apply the principles enunciated in *Spielberg* and *Collyer Insulated Wire* and their progeny. The Board would always retain the right, pursuant to its statutory mandate, to review the proceedings and/or the arbitration decision, and, if necessary, issue a complaint and institute proceedings. In fact, because the Board might take action after the arbitration, employers will have an incentive to conduct the arbitration in accordance with the Board's established policies.

Moreover, employees will benefit from this process. Decisions that often take years to obtain will be reached much sooner and with less likelihood of appeal due to the nature of the arbitration process.

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[99] *Mitsubishi Motors*, 473 U.S. at 637; *Gilmer*, 500 U.S. at 28.

[100] Cone Mills Corps, 298 N.L.R.B. 661 (1990); Am. Commercial Lines, Inc., 291 N.L.R.B.1066, 1072-1076 & n.44 (1988); *cf.* Specialized Distribution Mgmt., Inc., 318 N.L.R.B. 158 (1995).