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Labor Law - National Labor Relations Board Must Defer to Private Arbitration Committee's Decision to Uphold Dismissal of Employees if Such Decision Plausibly Was Based on Committee's Finding That the Employees Were Supervisors Unprotected by National Labor Relations Act

Jay Eisenhofer

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1985]

LABOR LAW—NATIONAL LABOR RELATIONS BOARD MUST DEFER TO
PRIVATE ARBITRATION COMMITTEE'S DECISION TO UPHOLD DISMISSAL
OF EMPLOYEES IF SUCH DECISION PLAUSIBLY WAS BASED ON
COMMITTEE'S FINDING THAT THE EMPLOYEES WERE
"SUPERVISORS" UNPROTECTED BY NATIONAL LABOR
RELATIONS ACT

NLRB v. Wolff & Munier, Inc. (1984)

The National Labor Relations Board (NLRB) is statutorily required to prevent unfair labor practices.¹ However, in cases involving disputes under a collective bargaining agreement, the Board encourages private resolution and arbitration by deferring to a private arbitrator's decision.² This policy has prompted questions as to how wide the scope of NLRB deference to private arbitration can be without compromising the Board's statutory mandate.³ In *NLRB v. Wolff & Munier, Inc.*,⁴ three dismissed plumbers who had been employed as foremen unsuccessfully challenged their dismissals in arbitration.⁵ On appeal to the NLRB, the Board ordered their reinstatement. The Third Circuit reversed the NLRB's decision and remanded the case.⁶ The court instructed the Board to determine whether the arbitration committee had decided that the three men were supervisors and therefore not "employees" entitled to protection under the National Labor Relations Act (NLRA).⁷ The

1. For a discussion of the Board's statutory mandate and the applicable text of the National Labor Relations Act (NLRA), see *infra* notes 7 & 16-17 and accompanying text.

2. The Board's policy of deferring to an arbitrator's decision has developed pursuant to a provision in the Labor Management Relations Act (LMRA) that encourages voluntary resolution of disputes. See Labor Management Relations Act § 203(d), 29 U.S.C. § 173(d) (1982). For a further discussion of this policy provision in the LMRA, see *infra* note 32 and accompanying text.

3. For a discussion of NLRB deference to private arbitration procedures, see *infra* notes 20-25 and accompanying text.

4. 747 F.2d 156 (3d Cir. 1984). The panel consisted of District Judge O'Neill of the United States District Court for the Eastern District of Pennsylvania, sitting by designation, and Circuit Judges Adams and Sloviter. Judge O'Neill wrote for the majority and Judge Sloviter dissented. *Id.* at 157.

5. *Id.* at 158.

6. *Id.*

7. *Id.* at 160-61. Section 2(3) of the NLRA provides: "The term 'employee' shall include any employee . . . but shall not include . . . any individual employed as a supervisor . . ." National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1982).

Section 2(11) of the Act provides:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively

(1040)

court held that if the committee had addressed that issue, the Board should defer to its decision, even though the case involved a determination of the Board's own jurisdiction.⁸

Ralph and Robert Campione and Walter Dowd were members of a plumbers union and were employed as foremen by Wolff & Munier.⁹ At one of the monthly union meetings the three workers each criticized union officials for allowing the employer to use workers from other unions in jobs reserved for their union.¹⁰ Shortly after the union meeting, a Wolff & Munier superintendent fired one man and warned the other two that they must stay away from union politics or they would also be fired.¹¹ The two men refused to agree to the ultimatum. Later in the

to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.

Id. § 152(11) (1982).

8. 747 F.2d at 161. For a discussion of NLRB deference to arbitration, see *infra* notes 20-25 and accompanying text. Judge Sloviter's dissent noted that it was most unusual to require the NLRB to defer to an independent body's determination of the Board's own jurisdiction. 747 F.2d at 168 (Sloviter, J., dissenting). For a discussion of Judge Sloviter's dissent, see *infra* notes 26-31 and accompanying text.

9. 747 F.2d at 158. Wolff & Munier, Inc., operated the Passaic Valley Sewage Treatment Plant at Newark, New Jersey. *Id.* The company employed approximately 30 plumbers at the jobsite. *Id.* Ralph Campione was hired in March, 1978, as a journeyman plumber and was promoted to foreman that summer. *Id.* Walter Dowd was hired in the late summer of 1979 and was promoted to foreman in June of 1980. *Id.* Robert Campione was hired as a foreman in May of 1979. *Id.* Each man was a member of Local Union #24 of the United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, AFL-CIO, with which Wolff & Munier had a collective bargaining agreement. *Id.*

10. *Id.* On August 28, 1980, Local #24 held its monthly meeting. *Id.* The three men criticized Local #24's business agent for allowing Wolff & Munier to place nonplumbers in jobs classified as belonging to union plumbers. *Id.* The business agent allegedly threatened to retaliate against the men. *Id.*

11. *Id.* The Wolff & Munier superintendent fired Ralph Campione immediately, explaining that Campione had repeatedly been warned to stay away from union politics. *Id.* Later in the day, the superintendent warned Robert Campione and Walter Dowd that they, too, would be fired if they continued to be involved in union politics. *Id.* Shortly thereafter, both Robert Campione and Walter Dowd were fired. *Id.* Wolff & Munier explained that it dismissed the foremen in order to cut costs. Wolff & Munier, 262 N.L.R.B. 333, 337 (1982). The evidence showed that the company's payroll included three foremen above the number required under its collective bargaining agreement with Local #24. *Id.*

The superintendent contended that on the day the men were fired he initially offered Ralph Campione a position as a journeyman plumber. *Id.* at 335. However, Campione became abusive and accused the superintendent of conspiring with Local #24 to reduce his involvement in workplace politics. *Id.* Only then did the superintendent fire Campione. *Id.* The superintendent testified that the warning he delivered to Robert Campione and Walter Dowd concerned their habit of engaging in union activities on company time. *Id.* According to the superintendent, the two men refused to comply with his request. *Id.*

day the superintendent notified them that they too had been fired.¹²

Pursuant to the union and Wolff & Munier's contractual arbitration procedure, which established an arbitration committee to adjudicate such disputes, the three discharged men submitted a grievance alleging unjust dismissal.¹³ The committee found no merit in the charge. The committee also found that the employer's right to terminate an employee with foreman status was unrestricted under the bargaining agreement.¹⁴

The three employees subsequently filed an unfair labor practice charge with the NLRB, which declined to defer to the decision of the arbitration committee.¹⁵ The Board found that the three employees were not supervisors as that term is defined by the NLRA and that therefore the employees were within the Act's jurisdiction and entitled to its protection.¹⁶ The Board then held that Wolff & Munier had violated

12. 747 F.2d at 158.

13. *Id.* The three men filed a charge with Local #24's grievance committee. 262 N.L.R.B. at 336. The committee, known as the "E Board," determined that the issue should be taken to the next step in the grievance procedure, the "Joint Conference Committee." *Id.* The Joint Conference Committee was an arbitration device required under the collective bargaining agreement for the settlement of disputes arising between parties to the agreement. 747 F.2d at 158. It was composed of five union officers and five management representatives. *Id.* The collective bargaining agreement stated that the committee's decisions were to be binding on the parties and their respective members. *Id.*

14. 747 F.2d at 158. The written record of the committee's decision totaled one page. *Id.* at 159. In pertinent part, it provided:

[T]here was no substantiation of the charge by the Campiones and Dowd that they were unjustly dismissed. The committee decided that there should be no restriction on an employer terminating a foreman in that it had been the employer's sole decision to employ the person in question as a foreman. In other words, if he had the right to appoint him he had the right to terminate him. The committee further believes that under the Local 24-MCA current collective bargaining agreement there is no restriction on the right to terminate any employee whether foreman or not under conditions similar to those occurring in this case.

Id.

15. *Id.* For a discussion of NLRB deference to arbitration, see *infra* notes 20-25 and accompanying text.

16. 747 F.2d at 158-59. For the statutory definition of supervisor, see *supra* note 7. Professor Gorman identifies several factors which the NLRB judges as important in determining whether an employee is a supervisor within the statutory meaning. See generally, R. GORMAN, BASIC TEXT ON LABOR LAW 36 (1976). The Board will usually find that an employee with authority to make judgmental personnel decisions is a supervisor, even if the authority is rarely used. *Id.* See, e.g., Phalo Plastics Corp., 127 N.L.R.B. 1511, 1513 (1960) (Board will look beyond appearances to determine how perfunctory authority is, as well as how regularly it is exercised); American Cable & Radio Corp., 121 N.L.R.B. 258, 259-60 (1958) (employees held to be supervisors even though 40-70% of their time was spent at rank and file tasks because they had authority, albeit rarely exercised, to discharge other employees); Yamada Transfer, 115 N.L.R.B. 1330, 1332-33 (1956) (authority to fire, even if rarely used, is most important factor in determining supervisory status).

If an employee is found to be a supervisor, his union-related activities are

sections 8(a)(1) and (3) of the NLRA by terminating the three men because of their participation in union affairs.¹⁷

The Third Circuit overturned the Board's decision and remanded the case,¹⁸ instructing the Board to determine whether the arbitration committee had decided that the three men were supervisors.¹⁹ The court ruled that if the committee had decided the issue, the Board's refusal to defer to that decision would be an abuse of discretion.²⁰

not protected by the NLRA. See *NLRB v. Inter-City Advertising Co.*, 190 F.2d 420 (4th Cir. 1951) (employer is free to discharge supervisors in retaliation for union activities), *cert. denied*, 342 U.S. 908 (1952). See also *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287 (5th Cir. 1980) (noting that purpose of exemption is to assure management of undivided loyalty of its supervisory personnel).

Ralph Campione's functions included assigning and overseeing the work of the journeymen plumbers. 262 N.L.R.B. at 334. The collective bargaining agreement specifically stated that foremen "shall supervise" the journeymen. *Id.* at 337. Yet, it should be noted that having a nominally supervisory role does not always place a worker within the NLRA supervisory exemption. See, e.g., *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 688 (7th Cir. 1982) (foremen are not automatically supervisors).

17. 747 F.2d at 159. The NLRA provides:

It shall be an unfair labor practice for an employer—

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

29 U.S.C. § 158(a)(1), (3) (1982).

The rights protected by § 7 are "the right to self-organization, to form, join or assist labor organizations." *Id.* § 157. Employees may file charges of unfair labor practices with the NLRB. See R. GORMAN, *supra* note 16, at 7-8.

The most typical employer violation of the Act is discharging an employee because of his membership in or support for a union. *Id.* at 137. See *NLRB v. Fibers Int'l Corp.*, 439 F.2d 1311, 1315 (1st Cir. 1971) (violation if, but for anti-union feeling, employer would not have taken punitive action). See also *NLRB v. Whitfield Pickle Co.*, 374 F.2d 576, 582 (5th Cir. 1967) (employer's punitive action unlawful as long as improper motive contributed to action, even if that motive was only small factor).

The NLRB ruled that Wolff & Munier's actions were precisely the type of § 8(a)(3) violation Professor Gorman had described. 262 N.L.R.B. at 339.

18. 747 F.2d at 158.

19. *Id.* at 160. The NLRB argued that it need not defer to the decision of the arbitration committee because there was no evidence that the committee considered whether the three men were protected as "employees" under the Act. *Id.* The Third Circuit, on the other hand, reasoned that the arbitrators might indeed have considered the issue and might have determined that the three men were "supervisors" who were not entitled to file § 8 unfair labor practice charges. *Id.* If it had considered the issue and made such a determination, the committee would have been justified in ending its inquiry when it did. *Id.*

20. *Id.* The Third Circuit adopted the Board's own four criteria for when deference to an arbitrator is appropriate in *NLRB v. Pincus Bros., Inc.*—Maxwell, 620 F.2d 367, 371 (3d Cir. 1980) (citing *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955)). See *Spielberg*, 112 N.L.R.B. at 1082 (Board established three-part standard for when it will defer to arbitration award). After *Spielberg*, the Board added the further requirement that the arbitrator must have considered the un-

The court noted that the arbitration committee had decided the employer had a contractual right to fire the three foremen at will.²¹ However, the court was unable to determine whether the committee's ruling was based on an implicit finding that the men were supervisors as defined by the NLRA.²² Under the standard enunciated in an earlier Third

fair labor practice issue and ruled on it. *Raytheon Co.*, 140 N.L.R.B. 883, 884-86 (1963). The four criteria are:

(1) The issue under the Act was presented and considered in arbitration. *Pincus*, 620 F.2d at 371. Currently, the Board will find that an arbitrator has adequately considered the unfair labor practice if the contractual issue is factually parallel to the unfair practice issue and the arbitrator was presented generally with facts relevant to resolving the issue. See *Olin Corp.*, 268 N.L.R.B. 573 (1984). However, some reviewing courts apply stricter standards. See generally *Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974). The *Banyard* court added two further requirements: that the arbitrator clearly decided the issue and that the issue was within the arbitrator's competence. *Id.* at 347. For a discussion of arbitral competence, see *infra* note 36. Other courts have approved these additional requirements. See *Stephenson v. NLRB*, 550 F.2d 535, 538 (9th Cir. 1977).

(2) The arbitral proceedings must have been fair and regular. *Pincus*, 620 F.2d at 371. The proceedings must meet minimum due process standards. See, e.g., *Precision Fittings, Inc.*, 141 N.L.R.B. 1034, 1041 (1963) (evidence deliberately withheld from arbitrator); *Gateway Transp. Co.*, 137 N.L.R.B. 1763, 1763-64 (1962) (insufficient time to prepare); *Honolulu Star-Bulletin*, 123 N.L.R.B. 395, 408 (1959) (no opportunity to confront witness). The Board has also declined to defer if the arbitrator is hostile to the grievant. See *Roadway Express Inc.*, 145 N.L.R.B. 513, 515 (1963). Similarly, the Board will not defer where the grievant's representative is hostile to the grievant. See *International Longshoremen & Warehousemen Local 27*, 205 N.L.R.B. 1141, 1147 (1973).

(3) All parties to the suit must have agreed to be bound by the arbitrator's decision. *Pincus*, 620 F.2d at 371. This requirement is the least controversial and most easily met since the parties themselves select the arbitration process and agree to be bound by it. *Id.* at 374.

(4) The arbitrator's decision cannot be repugnant to the policies of the Act. *Id.* at 371. In *Olin*, the Board held that it would find this standard not met only if the award is "palpably wrong" or not susceptible to an interpretation consistent with the NLRA. *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984).

The Board further requires that the party seeking to have the Board reject deferral show that the above standards are not met. *Id.* In *Pincus*, the Third Circuit held that if an arbitrator's decision is susceptible to two meanings, one permissible under the Act and one impermissible, the Board must assume the arbitrator intended the permissible meaning. 620 F.2d at 373. In such a case, the Board would be unable to find the arbitrator's decision repugnant to the purposes of the Act. *Id.*

21. 747 F.2d at 160. For the relevant portion of the committee's decision, see *supra* note 14.

22. 747 F.2d at 160. For a discussion of the statutory distinction between employees and supervisors, see *supra* note 7. One of the problems for the Third Circuit in *Wolff & Murner* was that the arbitrator's decision was vague as to whether it had considered this statutory distinction. 747 F.2d at 168 (Sloviter, J., dissenting). The arbitration committee first distinguished the employer's right to fire foremen ("no restriction on . . . terminating a foreman"), but then pointed out that a similar right existed in respect to other employees ("there is no restriction on the right to terminate any employee whether foreman or not"). See *id.* at 162 (Sloviter, J., dissenting) (citing language of arbitration committee's

Circuit decision, if an arbitrator's decision is susceptible to two meanings, one permissible, the other impermissible, the Board must choose the permissible meaning.²³ Therefore, the Board was ordered to determine, on remand, if the committee's decision plausibly could have been based on the employees' status as supervisors as defined by the NLRA.²⁴ The court ruled that if the Board were to find such a plausible basis it

decision). As Judge Sloviter noted, the decision's vagueness and brevity made it very difficult to determine if the contractual issue was parallel to the statutory issue and whether the arbitrator was presented with facts generally relevant to the statutory problem. *Id.* at 168 (Sloviter, J., dissenting).

The Third Circuit approves of Board deferral as long as it is arguable that the arbitrator decided the statutory issue or if the statutory and contractual issues are closely related. *Hammermill Paper Co. v. NLRB*, 658 F.2d 155, 160 (3d Cir. 1981), *cert. denied*, 460 U.S. 1080 (1983). The court in *Hammermill* stated that the Board could defer as long as the arbitrator had "at least arguably considered" the statutory issue. *Id.* The court ruled that deference could be proper even where the statutory issue was not specifically raised before the arbitrator as long as the issues were factually similar. *See id.* (failure to raise statutory issue not *sine qua non* for refusal to defer).

In *Pincus*, the court held that arbitration decisions are not clearly repugnant to the NLRA if they are susceptible to two interpretations, one permissible and one impermissible. 620 F.2d at 374. In *Hammermill*, the court seemingly adopted this test as the standard to determine whether an arbitrator has resolved the statutory issue. *See Hammermill*, 658 F.2d at 160. During a discussion of presentation of the statutory issue, the *Hammermill* court cited *Pincus* for this proposition. *Id.* (quoting *Pincus*, 620 F.2d at 374).

Prior to *Hammermill*, the Third Circuit required that the arbitrator must have clearly decided the statutory issue in order for Board deference to be proper. *See NLRB v. General Warehouse Corp.*, 643 F.2d 965, 969 (3d Cir. 1981). In *General Warehouse*, the court held that the arbitrator's decision must indisputably resolve the unfair labor practice issue. *Id.* at 969 n.16 (quoting *Stephenson v. NLRB*, 550 F.2d 535, 538 n.4 (9th Cir. 1977)).

More recent Third Circuit decisions appear to have adopted the *Hammermill* standard. *See, e.g., United Parcel Serv. v. NLRB*, 706 F.2d 972, 981 (3d Cir. 1983) (deference inappropriate only because *no* evidence of protected activity presented to arbitrator; Board must be presented with *some* evidence of such resolution) *vacated on other grounds*, 104 S. Ct. 419 (1983).

For a discussion of the standards applied by other courts and the NLRB, see *supra* note 20.

23. *See Pincus*, 620 F.2d at 374. The court in *Pincus* ruled that the NLRB must defer as long as "the findings of the arbitrator may arguably be characterized as not inconsistent with Board policy." *Id.* If the arbitrator's reasoning is susceptible to two interpretations, one permissible and one impermissible, the Board must accept the permissible meaning and defer. *Id.* Therefore, an arbitration award which is only "arguably correct" must be sustained. *Id.* The Board must defer even though it might have reached a different conclusion in a trial *de novo*. *Id.*

24. 747 F.2d at 161. The court stated: "What is not clear is why the Board chose not to defer to a finding that the employees were foremen and thus could be discharged at will." *Id.* Under current NLRB standards, the party urging rejection of deferral bears the burden of proof. *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984). Therefore, the three employees can prevail only if they are able to show that the arbitrator was not presented with facts generally relevant to resolving the supervisor issue. *See id.* For further discussion of the *Olin* standard, see *supra* note 20.

would have to defer unless it determined that the committee's decision was clearly repugnant to the purposes of the NLRA.²⁵

In a dissenting opinion, Judge Sloviter disagreed with the majority's characterization of when Board deferral to arbitration is appropriate.²⁶ The dissent distinguished two situations in which the issue of deference might arise. In the first, the dispute is solely concerned with an issue arising under the collective bargaining agreement and is clearly a matter for Board deference.²⁷ In the second, the conduct in question both violates the agreement and constitutes an unfair labor practice.²⁸ Judge Sloviter stated that the Board may exercise its discretion and defer to arbitration in the second situation but that such deference is a matter of choice and is not required by law.²⁹ The dissent also commented that a question concerning NLRB jurisdiction was particularly inappropriate for deferral to an arbitrator.³⁰ Judge Sloviter felt that even if the arbi-

25. 747 F.2d at 161. Under the *Olin* standards, an arbitrator's decision does not have to be totally consistent with Board policy. *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984). The Board will not overturn the decision unless it is "palpably wrong." *Id.*

26. 747 F.2d at 167-68 (Sloviter, J., dissenting).

27. *Id.* at 167 (Sloviter, J., dissenting). For a discussion of Board deference to arbitration in these situations, see *infra* notes 20-25.

28. 747 F.2d at 168 (Sloviter, J., dissenting).

29. *Id.* at 167 (Sloviter, J., dissenting). Judge Sloviter also argued that under § 10(f) of the NLRA, Board decisions supported by substantial evidence may not be overturned by a reviewing court. *Id.* Judge Sloviter found that there was substantial evidence that the arbitration committee had never addressed the "supervisor" issue. *Id.* Therefore, in her view, the court abused its authority by reversing the Board. *Id.*

The substantial evidence rule does not apply to questions of law. See *Pincus*, 620 F.2d at 372. However, in *Pincus*, the Third Circuit held that Board deferral to arbitration was a matter of discretion and therefore not mandated by law. *Id.* The *Pincus* court held that the substantial evidence standard applied to the question of whether that discretion was abused. *Id.*

Judge Sloviter also claimed that *Wolff & Munier* did not raise the supervisor issue before the Board. 747 F.2d at 163 (Sloviter, J., dissenting). Judge Sloviter argued that this issue was only mentioned before the Board by the administrative law judge when he rejected testimony on the point and noted that it had not been raised as an issue. *Id.* Section 10(e) of the NLRA provides: "No objection that has not been urged before the Board . . . shall be considered by the court. . . ." 29 U.S.C. § 160(e) (1982). As application of § 10(e) is mandatory, when an issue is not raised before the Board, the court of appeals may not consider such an issue. See *Wolke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (court is powerless to consider questions not raised before Board). Therefore, Judge Sloviter reasoned, the court should not have even considered the supervisor issue. 747 F.2d at 165-66 (Sloviter, J., dissenting).

30. 747 F.2d at 168 (Sloviter, J., dissenting). Judge Sloviter argued that the question of whether or not the three men were supervisors was a "threshold issue . . . central to the Board's general enforcement of the Act." *Id.* The dissent pointed out that NLRB deference to arbitration, in cases of alleged statutory violations, is a matter of choice, limited only by the standards the Board has adopted for itself. *Id.* Judge Sloviter stated that she would find it surprising "were the Board to choose to defer to an arbitral determination of its own jurisdiction." *Id.*

tration committee had considered and resolved whether the three men were supervisors, the Board was not bound by that decision.³¹

NLRB deferral to contractual arbitration procedures is a problematic area because the labor relations statutes contain two conflicting policies on the subject. Section 203(d) of the Labor Management Relations Act (LMRA) declares that an agreed method to resolve problems arising under a collective bargaining agreement is "the desirable method for settlement of . . . disputes."³² However, section 10(a) of the NLRA empowers the Board to prevent unfair labor practices and states that this power is unaffected by any other means of adjustment or prevention.³³

The Supreme Court has ruled that courts must defer to an arbitrator's decision if the alleged grievance arises under a collective bargaining agreement.³⁴ The Court, in *United Steel Workers v. Warrior & Gulf*

The Board has chosen to afford broad deference to arbitration, even when the matter is purely one of law. See *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984). This approach has met with criticism, from inside and outside the Board. See, e.g., *Collyer Insulated Wire, Gulf & Western Sys.*, 192 N.L.R.B. 837, 846 (1971) (Fanning, M., dissenting) (Board must not abdicate its statutory responsibilities through deference or parties will be stripped of their statutory rights); *Panel Discussion of the Labor Relations Law Section of the ABA*, 83 LAB. REL. REP. (BNA) 355 (1973) (decision may be placed in hands of persons who are not legally trained).

The Board has chosen some areas as inappropriate for deference. See, e.g., *Commonwealth Gas Co.*, 218 N.L.R.B. 857, 858 (1975) (Board will not defer to arbitration award concerning representation issues); *Servair, Inc.*, 236 N.L.R.B. 1278, 1280 (1978) (Board cannot defer in cases alleging unlawful employer assistance to union); *Filmaton Assocs.*, 227 N.L.R.B. 1721 (1977) (prohibition against discharging employee for filing charges under NLRA is fundamental guarantee to employees and deference will not be applied in such cases in order to protect Board processes from abuse). For a discussion of other restrictions on the Board's power to defer, see *infra* note 63.

31. 747 F.2d at 167-68 (Sloviter, J., dissenting).

32. Labor Management Relations Act § 203(d), 29 U.S.C. § 173(d) (1982). The Act provides in pertinent part: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." *Id.*

33. National Labor Relations Act § 10(a), 29 U.S.C. § 160(a) (1982). The Act reads in pertinent part:

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [29 U.S.C. § 158]) 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.

34. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). In the now famous *Steelworkers* trilogy, the Supreme Court decided that courts may enforce a grievance arbitration procedure created pursuant to a collective bargaining agreement. *Id.* at 585. See also *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). The Court in *Warrior & Gulf* held that if a particular grievance is plausibly covered by the agreement's arbitration clause, courts should require arbitration. 363 U.S. at 582-83. The Court in *Enterprise Wheel*

Navigation Co.,³⁵ reasoned that industrial peace would be advanced through voluntary resolution of problems aided by arbitrators with special expertise in the "common law of the shop."³⁶ Yet many grievances

also held that courts may not question the arbitrator's interpretation of the agreement. 363 U.S. at 597. The Court stated that under the agreement, "[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Id.* at 599. The Court reasoned that to allow plenary review on the merits would make meaningless the contractual intent that the arbitrator's decision should be final. *Id.* The Court in *American Mfg.* also endorsed a broad reading of the typical arbitration clause. 363 U.S. at 567-68. According to the Court, disputes concerning the meaning, interpretation and application of the collective bargaining agreement include all claims which are facially covered by the contract. *Id.* at 568. See Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MOUNTAIN L. REV. 247 (1958).

Professor Cox wrote that:

[t]he typical arbitration clause is written in words which cover, without limitation, all disputes concerning the interpretation or application of a collective bargaining agreement. Its words do not restrict its scope to meritorious disputes or two-sided disputes. . . . What one man considers frivolous another may find meritorious, and it is common knowledge in industrial relations circles that grievance arbitration often serves as a safety valve for troublesome complaints. Under these circumstances it seems proper to read the typical arbitration clause as a promise to arbitrate every claim, meritorious or frivolous, which the complaint bases upon the contract.

Id. at 261.

35. 363 U.S. 574 (1980).

36. *Id.* at 581. The *Warrior & Gulf* Court characterized the functions of the labor arbitrator as foreign to the competence of courts. *Id.* The Court felt that the arbitrator's source of law includes the express terms of the contracts and the industrial common law—"the practices of the industry and the shop." *Id.* at 581-82. The arbitrator is chosen because the parties have confidence that he possesses this knowledge and because they trust his personal knowledge. *Id.* at 582. They expect that his judgment will be based not only on the contract but on the productivity of the shop, its morale, and whether tensions will increase as a result of the decision. *Id.*

The Court stated that the grievance procedure is a part of the continuous collective bargaining process. *Id.* The Court viewed the collective bargaining agreement as an effort to create a system of industrial self-government, and an attempt to regulate the employer-employee relationship through a rule of law rather than through constant contention and struggle. *Id.* at 580. The Court stated that the

grievance machinery . . . is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise. . . . The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

Id. at 581.

The Court described the agreement as more than a contract. *Id.* at 578. "[I]t is a generalized code. . . . It calls into being a new common law . . . of a particular industry or . . . plant." *Id.* at 578-79.

But see Hays, *The Future of Labor Arbitration*, 74 YALE L.J. 1019 (1965). Judge Hays argued that the special expertise of the industrial arbitrator is a myth and

arising under collective bargaining agreements also involve potential unfair labor practices.³⁷ The Court has held that the NLRB's power in such cases is superior to that of the arbitrator.³⁸ However, in a case

that in reality, the arbitrator will know nothing of the background of the dispute or of the "common law" of the industry. *Id.* at 1034. Judge Hays stated that only a few arbitrators actually possessed the necessary training and skill to make them good judges. *Id.* He felt that thousands of decisions were handed down every year by arbitrators who were wholly unfit for their jobs. *Id.* at 1035. Judge Hays also felt that a large proportion of awards were based not on contractual interpretation but on appeasement of the involved parties, a result stemming from the arbitrator's desire to be invited back to hear other cases. *Id.*

Studies of the arbitration process have indicated that the evaluation of the Supreme Court may be more accurate than that of Judge Hays. *See* Rothschild, *Arbitration and the National Labor Relations Board*, 28 OHIO ST. L.J. 195, 259 (1967) (Supreme Court's characterization of arbitration is closer to that of satisfied participants). *See also* Finley, *Labor Arbitration: The Quest for Industrial Justice*, 18 CASE W. RES. L. REV. 1091, 1100 (1967) (Finley, a union attorney, concludes that arbitrators are better qualified than judges).

37. *See* Atleson, *Disciplinary Discharges, Arbitration and NLRB Deference*, 20 BUFFALO L. REV. 355 (1971). The same conduct may give rise to both unfair labor practice charges and to an arbitrable grievance. *Id.* at 358. For example, a shop steward dismissed because of his union activities may have a contractual claim that he was dismissed without just cause, as well as a claim under § 8(a)(3) of the NLRA. *Id.* at 368.

After the Supreme Court's *Steelworkers* decisions, many observers and some courts felt that the NLRB had no power in disputes subject to a contractual arbitration procedure, even if there was an alleged unfair labor practice. *See, e.g.,* Square D Co. v. NLRB, 332 F.2d 360, 365-66 (9th Cir. 1964) (court refused to enforce Board order, concluding that NLRA does not control matters subject to contractual grievance procedure; Board "had no power to determine that the Company committed unfair labor practices"); Timken Roller Bearing Co. v. NLRB, 325 F.2d 746, 754 (6th Cir. 1963) (now established law that where dispute is subject to grievance procedure and arbitration that procedure is exclusive), *cert. denied*, 376 U.S. 971 (1964).

The Board expressed its own opinion on the subject in *International Harvester Co.*, 138 N.L.R.B. 923 (1962):

There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. . . . However, it is . . . established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.

The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that . . . arbitration of grievance[s] . . . contribute[s] significantly to the attainment of this statutory objective.

Id. at 925-26.

The Board concluded that in cases where it would "effectuate the policies of the Act to respect the [arbitration] award," the Board would voluntarily defer. *Id.* at 929. However, the Board specifically noted that "an arbitrator's award . . . cannot oust the Board of its jurisdiction to adjudicate unfair labor practice charges. . . ." *Id.*

38. *See* NLRB v. Strong Roofing & Insulating Co., 393 U.S. 357, 360 (1969). In *Strong Roofing*, the Court made clear that the Board's authority to remedy un-

involving a potential unfair labor practice in the context of a question of workplace jurisdiction, the Court held that the Board may exercise its discretion and defer to the arbitrator's decision as a matter of choice.³⁹ The NLRB and reviewing courts have not interpreted this ruling as limiting Board deference to cases involving workplace jurisdiction or similar questions.⁴⁰ Board deference has been permitted as long as the

fair labor practices is not affected by the existence of a grievance procedure under the collective bargaining agreement. *Id.* at 360-61.

The Court later rejected the idea that the Board might lack jurisdiction over alleged unfair labor practices because the dispute also involved interpretation of the collective bargaining agreement. *See* *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 428 (1967). The Court noted that Congress gave the Board supreme power to remedy unfair labor practices. *Id.* at 428. *See* 29 U.S.C. § 160(a) (1982) (NLRB is empowered to prevent any unfair labor practice).

The contention that the Board lacks jurisdiction over unfair labor practices involving contract interpretation subject to arbitration is not without support in the Act's legislative history. *See* S. REP. No. 105, 80th Cong., 1st Sess. 20-21, 23 (1947).

In 1947, Congress refused to adopt an amendment to the NLRA which would have given the Board unfair labor practice jurisdiction over all breaches of collective bargaining agreements. *Id.* at 23. Congress adopted the current § 203(d) of the LMRA instead, declaring that voluntary arbitration is the desired method for settlement of contractual disputes. For the applicable portion of the LMRA, see *supra* note 32.

The Supreme Court has expressed its opinion that Congress failed to pass the amendment because it did not want the Board to have a generalized power to regulate the terms of private collective bargaining agreements. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 427 (1967).

39. *See* *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271-72 (1964). A dispute over workplace jurisdiction concerns which union should represent employees doing particular work. *Id.* at 263. The union in *Carey*, the International Union of Electrical, Radio and Machine Workers (IUE), asserted that employees in the salaried, technical employee bargaining group were actually production and maintenance employees. *Id.* The Board deferred to an arbitrator's judgment on the matter and the employer objected. *Id.* The Court stated that the Board may defer to arbitration even though the matter in question may constitute an unfair labor practice. *Id.* at 271. The Court acknowledged that arbitration advances industrial peace. *Id.* However, the Court noted that should the Board disagree with the arbitrator, the Board's ruling takes precedence. *Id.* at 272. Justice Douglas, writing for the majority in *Carey*, expressed his belief that Board deference to arbitration was an appropriate policy because it advanced industrial peace with no loss of statutory protection as the Board could invoke its superior authority at any time. *Id.*

40. *See* *Olin Corp.*, 268 N.L.R.B. 573, 577-81 (1984) (Zimmerman, M., dissenting) (discussion of scope of board deference). *See also* *NLRB v. Pincus Bros., Inc.-Maxwell*, 620 F.2d 367, 383 (3d Cir. 1980) (Garth, J., concurring). In *Pincus*, Judge Garth stated that "*Carey*'s approval of the deferral doctrine . . . was in no way limited to [workplace jurisdiction] cases alone." *Id.* Judge Garth pointed out that the *Carey* Court quoted with approval two Board cases involving deference to arbitral resolution of § 8(a)(3) claims. *Id.* at 383 n.6 (Garth, J., concurring) (citing *Carey*, 375 U.S. at 270-72).

In *Pincus*, Judge Gibbons argued that Board deferral to arbitration is a policy set by the Board. 620 F.2d at 384-88 (Gibbons, J., dissenting). As such, he noted, it is within the Board's power to reverse the policy and entertain all claims on a de novo basis. Judge Gibbons reasoned that since deferral was a

controversy has arisen under the collective bargaining agreement.⁴¹

The Board itself has established criteria for when it will defer to an arbitrator's award but reviewing courts have often been suspicious of the Board's application of its standards.⁴² Courts have attempted to insure that the Board does not become overly deferential and thereby abdicate its statutory mandate to remedy unfair labor practices.⁴³ In *Alexander v. Gardner-Denver Co.*,⁴⁴ the Supreme Court expressed its con-

voluntary Board policy, a court of appeals should never reverse a Board decision declining to defer. *Id.*

Judge Garth agreed that deferral was a voluntary Board policy. *Id.* at 384 (Garth, J., concurring). However, he stated that the standards of administrative law require the Board to follow its own announced policies until those policies are abandoned or modified. *Id.*

41. For a discussion of NLRB deference to private arbitration, see *supra* notes 20-25 and accompanying text.

42. See *Spielberg*, 112 N.L.R.B. at 1082. See also *Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974). The *Banyard* court announced two additional requirements which must be met before Board deferral is appropriate: The arbitrator must clearly decide the unfair labor practice issue and the issue must be within the arbitrator's competence. *Id.* See also *Stephenson v. NLRB*, 550 F.2d 535 (9th Cir. 1977). In *Stephenson*, the Ninth Circuit adopted the *Banyard* criteria, stating:

Where the question of unfair labor practice depends on contract interpretation, the expertise of arbitrators (or at least its recognition by the parties to the collective bargaining agreement) is held to be superior to that of the Board which primarily considers the statutory issues. Thus, deference in situations where the statutory and contractual issues are congruent is entirely reasonable. Likewise, where resolution of the unfair labor practice charge involves mainly factual rather than statutory issues, the arbitrator is in as good a position to make a correct decision as is the Board, given the former's access to the facts and to the current practices of the industry. . . . However, where the decision to be made rests primarily on issues of public law rather than on contractual or factual determinations, the arbitrator possesses no special expertise and there is no reason for allowing his decision to determine the statutory rights of the parties. . . . Therefore, the "competence" requirement requires the Board to ascertain the underlying issues in the unfair labor practice charges and to determine whether arbitral expertise and institutional competence justify deferral to arbitration of a particular statutory dispute.

Id. at 538 n.4 (citations omitted).

43. See, e.g., *Banyard*, 505 F.2d at 348. The *Banyard* court noted: "If . . . the . . . Committee applied to the issue before it a standard correct under the contract but not under judicial interpretation . . . then it cannot be said that the statutory issue was decided. . . . In that event the Board's abstention goes beyond deferral and approaches abdication." *Id.*

The Seventh Circuit has upheld the Board's refusal to defer to an award that would have permitted violation of the employee's § 7 rights. See *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 330 (7th Cir. 1976). See also *NLRB v. Magnetics Int'l, Inc.*, 699 F.2d 806 (6th Cir. 1983) (Board must resolve any doubts about deferral against party urging deference in order to protect statutory mandate from abdication).

44. 415 U.S. 36 (1974). Title VII of the Civil Rights Act of 1964 bars discrimination in employment on the basis of race and provides that aggrieved individuals may resort to lawsuits once the Equal Employment Opportunity Commission has attempted conciliation. 42 U.S.C. § 2000e-17 (1982). In *Gard-*

cern with an analogous problem, and held that a reviewing court may not defer to the outcome of a contractual arbitration procedure when there is an alleged violation of a nonwaivable, statutory right.⁴⁵ The Court ruled that the statutory protections of title VII of the Civil Rights Act of 1964 constituted such nonwaivable rights.⁴⁶

The Third Circuit has been one of the courts most hospitable to Board deferral.⁴⁷ In *NLRB v. Pincus Bros. Inc.-Maxwell*,⁴⁸ the court in-

ner-Denver, the Supreme Court was faced with a case where the collective bargaining agreement barred discrimination on the basis of race and provided for arbitration of grievances. 415 U.S. at 39. An employee who was discharged for poor work challenged the discharge through the grievance procedure. *Id.* at 38-39. The issue of racial discrimination was presented to the arbitrator but he ruled that the dismissal was for just cause. *Id.* at 42. The question presented to the Court was whether a reviewing court should defer to the arbitrator's decision or consider the employee's claim de novo. *Id.* at 43.

45. 415 U.S. at 54. The Court distinguished between rights "conferred on employees collectively to foster the processes of bargaining," which may be waived by the union in order to gain economic benefits, and non-majoritarian rights, which cannot be waived. *Id.* at 51. The Court held that rights that cannot be waived by the bargaining agent are entitled to de novo review by the body charged with public protection of those rights. *Id.* at 50. Noting that deference to the findings of an arbitrator precludes a full hearing on the merits, the Court held that anything less than a full hearing on the merits amounted to an abridgment of litigants' statutory rights. *Id.* at 59. The Court noted the similarity between title VII and the NLRA in that both statutes may implicate both contractual and statutory rights; however, the Court failed to explain the significance, if any, of this comparison. *Id.* at 50. The Court explained that the employee's rights under the Civil Rights Act and under the labor contract were of a completely different nature. *Id.* at 49-50. It also noted that the arbitrator's task was to determine and effectuate the intent of the contracting parties and not to interpret statutory rights. *Id.* at 53. The Court felt that, though arbitrators might be well versed in the industrial law of the shop, there was no assurance that they would be qualified to deal with public law. *Id.* at 56-57. The Court also noted that arbitration procedures were informal and often lacking in due process guarantees common to civil trials, such as "discovery, compulsory process, cross-examination, and testimony under oath." *Id.* at 57-58.

46. *Id.* at 50. See Harper, *Union Waiver of Employee Rights Under the NLRA* (pt. 1), 4 INDUS. REL. L.J. 335, 347-54 (1981) (Congress did not intend that rights of women or certain ethnic minorities to equitable employer treatment could be sacrificed to collective improvement in conditions of employment). See also *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981). The *Barrentine* Court rejected a claim that a federal court with jurisdiction to protect the Fair Labor Standards Act (FLSA), 42 U.S.C. § 2000e (1982), should simply accept the results of a contractual dispute resolution procedure. 450 U.S. at 745-46. The Court stated that the individual employee's rights to a minimum wage and to overtime pay were nonwaivable. *Id.* at 740. The Court concluded that protection of these rights by the judicial process could not be compromised by collective bargaining agreements. *Id.* at 745.

47. See *NLRB v. Pincus Bros., Inc.-Maxwell*, 620 F.2d 367, 384 (3d Cir. 1980) (Gibbons, J., dissenting). Judge Gibbons suggested that the court was establishing guidelines mandating Board deference, a position he described as held by only one other court of appeals. *Id.* For a discussion of *Pincus* and the Third Circuit's standards for Board review as compared with those of the other courts of appeals, see *supra* notes 20, 40-43 and accompanying text. See also *Hammermill Paper Co. v. NLRB*, 658 F.2d 155, 160 (3rd Cir. 1981) (deference

structed the Board that it must defer to the outcome of arbitration as long as four requirements are met.⁴⁹ Those requirements are that (1) the arbitrator has decided the questions necessary to resolution of the statutory inquiry; (2) the proceedings were fair; (3) the parties agreed to be bound; and (4) the decision is not repugnant to the policies of the NLRA.⁵⁰

The court's decision in *Wolff & Munier* appears to be consistent with *Pincus*.⁵¹ The parties agreed to be bound by the arbitration process and although a potential problem existed, the proceedings appeared to be fair and regular.⁵² The court instructed the Board to determine, upon remand, if the committee had considered the statutory issue of whether the employees were supervisors as defined by the NLRA.⁵³ However, under *Pincus*, if an arbitrator's decision is ambiguous but subject to a permissible interpretation, the Board must choose that permissible interpretation.⁵⁴ Therefore, if the Board on remand can plausibly find that the arbitrator's decision that the employees were foremen is consistent with a conclusion that the arbitrators determined that the employ-

to arbitration approved even though no evidence that arbitrator considered statutory issue was provided), *cert. denied*, 460 U.S. 1080 (1983).

48. 620 F.2d 367 (3d Cir. 1980). In *Pincus*, an employee was fired for handing out leaflets concerning various job-related grievances. *Id.* at 370-71. An arbitrator found the employee was terminated for cause because she abused working time. *Id.* at 375. The NLRB declined to defer to the arbitrator's decision and held that the leafletting was a protected activity under the NLRA. *Id.* The Third Circuit reversed the Board and reinstated the arbitrator's decision. *Id.* at 370.

49. *Id.* at 371. For a discussion of the circumstances in which the Board need not defer, see *supra* notes 37-39.

50. 620 F.2d at 371-72. For a further discussion of NLRB deferral, see *supra* notes 20-25 and accompanying text.

51. See 620 F.2d at 371-72. *Pincus* established that the Board must defer to arbitration if certain requirements are met. *Id.* In *Wolff & Munier*, the court enforced this policy in two ways: It required the Board to defer or to explain, in light of applicable standards, why it chose not to defer; and it made clear that even questions of Board jurisdiction were deferrable to arbitration. 747 F.2d at 161. For further discussion of the requirements of deferral as outlined in *Pincus*, see *supra* notes 47-48 and accompanying text.

52. *Wolff & Munier*, 747 F.2d at 159-60. The court noted, without decision, that the arbitration committee's proceedings may have been lacking in equity since the record indicated that both union and management had a common interest in discharging the three men. *Id.* at 161 n.14. As pointed out by the Third Circuit, the Board often refuses to defer when there is evidence of hostility by either the tribunal or the union representative toward the grievant. *Id.* For a discussion of the Board's attitude toward proceedings lacking sufficient due process guarantees, see *supra* note 20.

53. 747 F.2d at 161. The court stated that if the statutory issue had been considered, the Board could only refuse to defer if one of its other standards had not been met. *Id.* For a discussion of the statutory issue, see *supra* notes 14-19 and accompanying text.

54. 620 F.2d at 373. For a discussion of the permissible/impermissible test, see *supra* note 20 and accompanying text.

ees were statutory "supervisors," the Board must choose that permissible interpretation of the record.⁵⁵ Although an arbitration decision that the foremen were not employees subject to NLRB jurisdiction might be questionable, such an interpretation is nevertheless plausible and therefore not clearly repugnant to the policies of the Act.⁵⁶ Thus, the three men in *Wolff & Munier* may very well lose NLRA protection because it is conceivable that the arbitrator decided that they were supervisors⁵⁷ and it is plausible that such a decision is correct.⁵⁸

The Third Circuit's requirement that the Board choose a permissible interpretation, if possible, is somewhat at odds with the policies espoused by the Supreme Court. The Court has stated that the NLRB's power to remedy unfair labor practices is superior to the arbitration process.⁵⁹ The Third Circuit, by allowing the Board to exercise its power

55. 620 F.2d at 373. See *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984). In *Olin*, the Board held that the requirement of deciding questions necessary to resolve the statutory inquiry is met if the arbitrator is presented with the facts generally relevant to resolving the issue. *Id.* Presumably, in *Wolff & Munier*, this requirement would be met as long as the arbitration committee considered whether the employees' status as foremen was at all dispositive of their claim. For a discussion of the men's arguable status as supervisors, see *supra* note 16. The Board also requires that the contractual issue be factually consistent with the statutory issue. *Olin*, 268 N.L.R.B. at 574. The two issues would seem to be consistent if the employer's right to discharge the men without cause resulted from their unprotected status as foremen, much the same way as supervisors who are not covered by the NLRA are unprotected. For a discussion of supervisors and NLRB authority, see *supra* notes 16 & 19. It appears to be a plausible interpretation of the arbitrator's vague opinion in *Wolff & Munier* that the employees were found to be unprotected supervisors. See *Wolff & Munier*, 747 F.2d at 160. For a discussion of the arbitration proceedings and the vagueness of the opinion, see *supra* notes 13-14. Therefore, upon remand the Board appears to be required to find that the men were supervisors within the meaning of the Act.

56. See *Pincus*, 620 F.2d at 371-72. For a discussion of "repugnancy to the Act," see *supra* note 20.

57. For a discussion of the statutory meaning of supervisor, see *supra* note 7. As Professor Gorman has noted, in order to evaluate supervisory status, the Board looks to see if an employee has authority to make judgmental personnel decisions. R. GORMAN, *supra* note 16, at 36. *Wolff & Munier* foremen were specifically assigned the task of assigning and overseeing the work of other plumbers. *Wolff & Munier*, 262 N.L.R.B. 333, 338 (1982). Whether this amounts to authority to make judgmental personnel decisions is ambiguous and under *Pincus* ambiguity is to be resolved in favor of the party urging deferral. 620 F.2d at 371. For a discussion of courts with precisely the contrary approach, see *supra* note 42. The Sixth Circuit has expressly required that all ambiguities be resolved against the party urging deferral. See *NLRB v. Magnetics Int'l, Inc.*, 699 F.2d 806, 811 (6th Cir. 1983). For a discussion of the current Third Circuit standard on whether the arbitrator has decided the statutory issue, see *supra* note 22.

58. This would amount to a severe dilution of the employees § 7 rights. For a discussion of such rights, see *supra* note 17. For a discussion of courts' and commentators' concern that Board deference is often the equivalent of abdicating statutory authority, see *supra* notes 38-43.

59. See *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 428 (1967) (Board has superior power to remedy unfair labor practices); *Carey v. Westinghouse Elec.*

only when an arbitrator is clearly wrong or has clearly not considered the relevant issue,⁶⁰ has sacrificed the Board's statutory mandate for the sake of promoting the arbitration process.⁶¹

Judge Sloviter's dissent argued that questions of NLRB jurisdiction are not a proper area for deference no matter what criteria are met.⁶² However, with limited exceptions, neither the Board nor the courts have identified particular types of statutory problems as unsuitable for Board deference.⁶³ In *Alexander*, the Supreme Court held that since title VII statutory rights are nonwaivable, alleged violations of those rights are entitled to de novo review by the body statutorily empowered to protect

Corp., 375 U.S. 261, 272 (1964). In *Carey*, which involved a question of work-place jurisdiction, the Court held that in case of a Board disagreement with the arbitrator, the Board's ruling takes precedence. The Court noted that Board deference to arbitration is a discretionary policy which advances industrial peace but that the Board may nevertheless invoke its superior authority at any time. *Id.* at 272. See also *Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d 318, 326 (2d Cir. 1981) (deference must not be invoked arbitrarily), *cert. denied*, 456 U.S. 973 (1982). The Third Circuit's policy under *Pincus* of resolving all ambiguities in favor of the party urging deference bears little similarity to a Board with unquestioned supreme power to remedy unfair labor practices and which may invoke this power at any time. See *C & C Plywood*, 385 U.S. at 428.

60. See *Pincus*, 620 F.2d at 374. The *Pincus* court felt that the societal rewards of arbitration outweighed the need for a correct resolution of every case. *Id.* The court claimed that this policy effectuated the intent of the parties to the bargaining agreement, avoided duplicative proceedings, and served the goals of achieving industrial peace and stability. *Id.* at 372, 374. For a discussion of the Supreme Court's views on deference to arbitration as explained in the *Steelworkers* trilogy, see *supra* notes 34-36 and accompanying text.

61. See *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 428 (1967) (Supreme Court unequivocally held that Board's power to remedy unfair labor practices is not outweighed by societal rewards of arbitration); *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964) (deference advances industrial peace because Board can invoke superior authority at any time). The only situations in which the Court has held that arbitration furthers industrial peace to such a degree that it, rather than judicial proceedings, is the preferred method of dispute resolution, are disputes which solely involve the interpretation of a collective bargaining agreement. See, e.g., *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). For a discussion of the *Steelworkers* cases, see *supra* notes 34-36 and accompanying text.

62. 747 F.2d at 168 (Sloviter, J., dissenting). Judge Sloviter indicated that Board deference is a matter of choice (though it must be applied evenhandedly) and that the Board is under no obligation to defer questions of its own jurisdiction. *Id.* For a discussion of Judge Sloviter's dissent, see *supra* notes 26-31 and accompanying text.

63. These areas each concern protection of the integrity of Board processes. See, e.g., *Servair Inc.*, 236 N.L.R.B. 1278, 1281 (1978) (questions of employer interference with union not deferrable); *Filmation Assocs.*, 227 N.L.R.B. 1721, 1722 (1977) (employee discharge for giving testimony not deferrable); *Commonwealth Gas Co.*, 218 N.L.R.B. 857, 858 (1975) (Board will not defer on issues concerning representation). However, as Judge Sloviter pointed out, perhaps the most important factor protecting Board processes is the threshold determination of whether the Board has jurisdiction. 747 F.2d at 168 (Sloviter, J., dissenting).

them.⁶⁴ Similarly the Court has held that certain rights protected by the NLRA cannot be waived.⁶⁵ It is submitted that charges alleging a violation of these rights should receive a complete, nondeferential review by the Board.⁶⁶ In particular, questions of Board jurisdiction should be protected by de novo review because the NLRA makes it clear that Board jurisdiction cannot be waived or altered by private agreement.⁶⁷

64. 415 U.S. at 42. For a discussion of *Alexander* and the Court's holding on the protection of statutory rights, see *supra* notes 44-45 and accompanying text.

65. See *NLRB v. Magnavox Co.*, 415 U.S. 322, 325-26 (1974). In *Magnavox*, labor contracts between the International Union of Electrical, Radio and Machine Workers (IUE) and Magnavox had routinely authorized the company to issue plant rules controlling distribution of literature and employee nonworking time. *Id.* at 323. When the employer's ban on these activities was challenged, the Board struck down the rules as unlawful. The court of appeals disagreed, reasoning that the contractual agreement constituted a waiver of the employees' rights. *Id.* at 324. The Supreme Court reversed, holding that the union had no right to waive the solicitation and distribution rights of the employees. *Id.* at 325-26. Though unions may waive majoritarian rights such as the right to strike, they may not waive an individual employee's statutory rights of free association or self-organization. *Id.* For a discussion of the means used by the Board to protect these rights, see *supra* note 17.

66. See *General American Transp. Corp.*, 228 N.L.R.B. 808 (1977). In *General American*, the Board refused to defer to an arbitration procedure when an employee claimed he was discharged because of his union activities. *Id.* at 819-20. In a concurring opinion, NLRB Chairman Murphy concluded that Board deferral is only proper when the dispute is between the contracting parties, such as a refusal-to-bargain situation. *Id.* at 810. In cases alleging violation of an employee's rights under § 7 of the NLRA, the Board would have no power to defer. *Id.* at 810-11. This is because the key issue in such cases is not whether a contractual right has been abridged but whether a statutory right has been violated. *Id.* at 812. Chairman Murphy pointed out that statutory rights cannot lawfully be reduced by a contractual agreement between the employer and the union. *Id.* at 813. This was the precise rationale used by the Supreme Court in *Alexander* when it held that alleged violations of title VII are entitled to a trial on the merits by a statutorily empowered body. 415 U.S. at 51. For a discussion of *Alexander*, see *supra* notes 44-45.

67. National Labor Relations Act § 10(a), 29 U.S.C. § 160(a) (1982). See *supra* note 33. In unfair labor practice cases, the Board is presented with a statutory mandate:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall . . . issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [subchapter]. . . .

29 U.S.C. § 160(c).

The Board must decide whether to dismiss or issue the complaint upon a preponderance of the evidence. *Id.* The policy favoring arbitration of contractual disputes may authorize the Board to give an arbitrator's findings of fact deferential weight when it determines the preponderance of the evidence in a case concerning a contractual issue. Labor Management Relations Act § 203(d), 29 U.S.C. § 173(d) (1982). For the applicable text, see *supra* note 32. However, there appears to be no statutory support for deferring to an arbitrator on ques-

This would also be consistent with Supreme Court precedent, as the only time the Court approved of NLRA deference was in relation to waivable rights.⁶⁸

The policy underlying Board deference to arbitration is based on the premise that the arbitrator will be an expert in the common law of the shop.⁶⁹ Yet, the common law of the shop has little relevance to questions of the Board's congressionally mandated jurisdiction.⁷⁰ It is submitted that there is no reason why the Board should defer to an arbitrator in an area completely outside his expertise.⁷¹

It is true that observers have distinguished title VII from the NLRA because enactment of the former stemmed from concern with individual rights⁷² while the NLRA was enacted to promote a general public policy encouraging peace in the workplace.⁷³ It is therefore maintained that

tions of law. Board jurisdiction is undoubtedly such a question. See *Wolff & Mumier*, 747 F.2d at 168 (Sloviter, J., dissenting). Also, the Supreme Court has rejected even deference to arbitral fact-finding when certain statutory, nonwaivable rights are in question. See generally *Alexander*, 415 U.S. 36; *Barrentine*, 450 U.S. 728. For a discussion of *Alexander*, see *supra* notes 44-45 and accompanying text. For a discussion of *Barrentine*, see *supra* note 46 and accompanying text.

68. See *Carey*, 375 U.S. at 270-72. See also *Pincus*, 620 F.2d at 387 (Gibbons, J., dissenting) (unfair labor practice cases are not appropriate for Board deferral but deference is proper in cases involving a dispute over workplace jurisdiction, work assignment, or representation); *General American*, 228 N.L.R.B. at 810-11 (Murphy, M., concurring) (workplace jurisdiction is type of issue that concerns contracting parties and is appropriate for Board deferral).

69. For a discussion of arbitration, industrial peace and the common law of the shop, see *supra* notes 34-36 and accompanying text.

70. See *Collyer Insulated Wire*, 192 N.L.R.B. 837, 846, 850 (1971) (Fanning, M., dissenting and Jenkins, M., dissenting). Member Fanning argued that arbitrators are employed only to interpret the collective bargaining agreement. *Id.* at 849 (Fanning, M., dissenting). He felt that they would generally try to avoid an issue of public law because of their own recognition that they had no expertise in that area. *Id.* Member Jenkins claimed that arbitration does not provide an adequate remedy for Act violations. *Id.* at 855 (Jenkins, M., dissenting). The remedies available to an arbitrator are much more limited than those at the disposal of the Board. See *id.* Also, arbitration can only be invoked by a union and not by an individual. See *id.* Member Jenkins felt there was a danger that unions and employers could contract themselves entirely out of the Act. *Id.* It is submitted that this is a very real danger if arbitrators are to be given the power to determine Board jurisdiction. See *Wolff & Mumier*, 747 F.2d at 168 (Sloviter, J., dissenting) (Board must not defer to arbitrator's determination of Board's own jurisdiction).

71. See *General American*, 228 N.L.R.B. at 813. In *General American*, Chairman Murphy argued that an arbitrator is authorized only to consider whether an employee is engaged in contractually proscribed conduct and whether the contract permits disciplinary action by the employer. *Id.* He noted that an arbitrator who attempted to resolve whether § 7 rights had been violated would be overstepping the power given him by the contract. *Id.* For a discussion of the Supreme Court's view of arbitral competence, see *supra* note 35 and accompanying text.

72. See *Harper*, *supra* note 46, at 347. (Congress did not intend rights protected by title VII to be sacrificed to collective improvement in conditions of employment).

73. See *International Harvester*, 138 N.L.R.B. 923, 925-26 (1962) (as re-

under the NLRA, the Board and the courts may promote broad public policy even when doing so impinges on the individual rights of employees.⁷⁴

Even if this argument is accepted and *de novo* review is found unnecessary, the standard of extreme deference exemplified by *Wolff & Munier* should be curtailed. The result of the present policy of broad deference is a severe dilution of employees' statutory rights.⁷⁵ It is submitted that this dilution is at odds with a policy promoting industrial peace. Industrial relations are likely to become increasingly unstable as employees recognize that they are receiving less statutory protection. Moreover, a policy of extreme deference does not encourage utilization of private arbitration procedures. As employees begin to realize that use of private arbitration results in dilution of their statutory rights, they will demand the exclusion of such procedures from collective bargaining agreements.⁷⁶

Wolff & Munier illustrates the dangers inherent in promoting a policy of extreme deference. The three foremen stand to lose NLRA protection because they *might* have been supervisors, and because an arbitrator with no known expertise in labor law *might* have decided the statutory issue.⁷⁷ If the men were employees rather than supervisors as defined by the NLRA, they will have lost the statutory protection Congress intended they should have.⁷⁸ The Supreme Court, by providing for *de novo* review, has safeguarded nonwaivable title VII rights from the potential abuse that can arise from private arbitrators' lack of expertise in dealing with statutory issues.⁷⁹ Since the Court has also identified many of the rights protected by the NLRA as nonwaivable and statutory questions involving unfair labor practices are similarly beyond an arbitrator's area of specialization, it is submitted that those rights should be

peatedly noted, NLRA is primarily designed to promote industrial peace and stability).

74. See *Pincus*, 620 F.2d at 374. In *Pincus*, Judge Rosenn concluded that "the national policy in favor of labor arbitration recognizes that the societal rewards of arbitration outweigh a need for uniformity of result or a correct resolution of the dispute in every case." *Id.* The court held that while title VII rights are nonwaivable, the provisions of the NLRA are waivable collective bargaining rights. *Id.* at 374 n.15.

75. For a discussion of *Wolff & Munier* and dilution of employee rights, see *supra* notes 51-58 and accompanying text.

76. See *Alexander*, 415 U.S. at 59 (suggesting employees might choose to bypass arbitration once they realize their rights are not being adequately protected).

77. 747 F.2d at 160-61.

78. See *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 428 (1967) (Board was given supreme power to remedy unfair labor practices).

79. See *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974). For a discussion of *Alexander*, see *supra* notes 44-45 and accompanying text.

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afforded equivalent protection.⁸⁰ However, should the NLRB and the courts conclude that de novo review is inappropriate, the present policy of extreme deference should still be curtailed. Only then will workers once again have the benefit of their congressionally mandated rights.

Jay Eisenhofer

80. For a discussion of arbitrator competence, see *supra* note 35 and accompanying text.