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# Deferring Unfair Labor Practice Charges To Pre-existing Arbitration Awards

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By Steven H. Heisler

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A controversial area in the field of labor law is the National Labor Relations Board policy of deferring unfair labor practice charges to pre-existing arbitration awards. This article traces the history of the Board's policy from the *Spielberg* doctrine to the *Olin* policy.

The National Labor Relations Act was enacted by Congress in 1935 with the aim of eliminating industrial unrest caused by the denial of collective bargaining rights to workers. Section 1 of the Act states:

Experience has proved that protection-by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of difference as to wages, hours or other working conditions, and by restoring quality of bargaining power between employers and employees.<sup>1</sup>

Section 7 of the Act provides that "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 purpose of collective bargaining or other mutual aid or protec-

tion..."<sup>2</sup> Section 8(a) (1) of the Act states that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."<sup>3</sup> Section 8(a) (3) of the Act makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization..."<sup>4</sup> Section 8(a) (5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."<sup>5</sup>

Congress, in Section 3 of the Act, created the National Labor Relations Board to administer the Act. Section 10(a) of the Act grants the Board the power "to prevent any person from engaging in any unfair labor practice."<sup>6</sup> Thus, Congress established a forum for workers to seek redress of violations of their Section 7 and 8 rights. When an individual believes he is the victim of an unfair labor practice he may file a charge with one of the Board's regional offices. The case is assigned to a Board agent who investigates the matter and decides whether or not to recommend that a complaint be issued against the charged party. The Board has the power to serve orders requiring charged parties to cease and desist from such unfair labor practices as well as ordering reinstatement

of illegally discharged employees with back pay.<sup>7</sup> If a complaint is issued the charged party has the right to request that the case be brought before an administrative law judge for a hearing. Either party can appeal an ALJ decision to the full five person Board.

Section 6 of the Act states that "the Board shall have the authority from time to time to make . . . such rules and regulations as may be necessary to carry out the provisions of [the] Act."<sup>8</sup> The Board has been accorded wide discretion since its inception in promulgating policy without judicial interference provided it has a rational basis for the policy.<sup>9</sup> One such example is the Board's policy of deferral of unfair labor practice charges to pre-existing arbitration awards.

In *Spielberg Manufacturing Company* (1955)<sup>10</sup> the union and the company agreed on arbitration as a method of resolving the status of four employees who were discharged for picket line misconduct during a strike. A three-member arbitration panel found that the grievants were discharged for just cause. The union subsequently filed an unfair labor practice charge with the Board. The Board first stated that it is not bound by an arbitration award. The Board quoted the Ninth Circuit in *NLRB v. Walt Disney Productions* (1944) which stated, "Clearly agreements between private parties cannot restrict the jurisdiction of the Board. We believe the Board may exercise jurisdiction in any case of an unfair labor

practice when in its discretion its interference is necessary to protect the public rights defined in the Act.”<sup>11</sup> Nevertheless, the Board deferred to the arbitration panel’s decision, commonly referred to as the *Spielberg* doctrine. The Board declared that where the arbitration proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act, it would defer.<sup>12</sup> The Board stated that deferring in those circumstances would best serve the “desirable objective of encouraging the voluntary settlement of labor disputes.”<sup>13</sup> The Board declined to answer whether it would have decided the strike misconduct issue the same way as the arbitrator decided.

In *Raytheon Company* (1962)<sup>14</sup> the Board ruled that it would not defer where the record indicated that the arbitrator did not consider the unfair labor practice issue brought before him.<sup>15</sup> In *Raytheon* the grievant was discharged for allegedly inciting a walkout. The case proceeded to arbitration where the termination was upheld. The Board refused to defer, citing three reasons: a) in opening argument at the arbitration hearing, counsel for the union specifically limited the scope of the arbitrator’s jurisdiction to the contractual issue; b) no evidence of the grievant’s union activity establishing that the grievant was fired for protected or union activity was disclosed at the arbitration; and c) the company official who discharged the grievant and who testified at the unfair labor practice hearing in which the ALJ determined that the company violated section 8(a) (1) and (3) of the Act, did not appear at the arbitration. The Board, refusing to defer to the arbitrator’s decision, concluded that the arbitrator limited his decision to the contractual issue.

The dissent in *Raytheon* claimed that both the statutory and contractual issues were factually the same. “The underlying factual issue in both the arbitration and the unfair labor practice proceedings was whether the discharges engaged in a walkout or in conduct inciting a walkout.”<sup>16</sup> The majority disagreed stating that the only factual issue presented to the arbitrator was whether the discharge violated the no-strike clause of the contract. The arbitrator received no evidence of the grievant’s union activities or whether the discharge by *Raytheon* was motivated because of the grievant’s union activity. Thus, the arbitrator did not pass upon the facts of the statutory issue.<sup>17</sup> The *Raytheon* decision is important because the Board added a fourth criterion to the *Spielberg* doctrine. Now for the Board to defer, it

has to be satisfied that the arbitrator purported to consider the unfair labor practice issue.

The Board further elaborated on the *Raytheon* standard in *Airco Industrial Gases* (1972).<sup>18</sup> In *Airco*, the grievant was discharged for negligence in his duties as a leadman in the trailer maintenance department. In the arbitration proceeding the union stated that the issue to be decided was whether the grievant was fired in violation of the collective bargaining agreement. The agreement contained a clause prohibiting discrimination against any employee for union affiliation or activity. The grievant contended that his discharge was motivated by the fact that he had filed over 200 grievances in the previous two years of his employment; however, no evidence of this issue was presented at the arbitration hearing. The arbitrator ruled that the discipline was for just cause but reduced it to a suspension. In upholding the ALJ’s decision not to defer, the Board

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“... the Board deferred to the arbitration panel’s decision ... the *Spielberg* doctrine.”

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maintained that there was no indication in the arbitrator’s decision that he considered the issue of whether the grievant was fired for his union activity.<sup>19</sup> The Board refuted the dissent’s argument that the contract contained a clause prohibiting discrimination for union activity or affiliation and that therefore the individual was precluded from bringing the unfair labor practice charge:

Apparently our dissenting colleague is of the same view (that the arbitrator did not consider the unfair labor practice issue), since he relies not only on the tenuous evidence that the unfair labor practice issue was in fact litigated, but on a wholly new *res judicata* doctrine, under which he would hold that there was a duty to litigate it before the arbitrator. We do not accept this doctrine, which amounts to be an absolute abdication of the Board’s responsibility simply because of a pious protestation in the contract that

the Company will not discriminate against employees because of their union activities or affiliation.<sup>20</sup>

In *Yourga Trucking* (1972)<sup>21</sup> the Board held that the burden of proving that the unfair labor practice issue had been adequately presented to and considered by the arbitrator rests with the party raising the affirmative defense.<sup>22</sup> “That party may be presumed to have the strongest interest in establishing that the issue has been previously litigated, if that is the case.”<sup>23</sup>

Two years later, the Board overruled *Airco* and *Yourga* in *Electronic Reproduction Service Corporation* (1974).<sup>24</sup> In that decision the Board stated that in discharge and discipline cases, absent unusual circumstances, it would defer to an arbitration decision where the grieving party had an opportunity to present evidence of an unfair labor practice to the arbitrator.<sup>25</sup> The Board stated that the purpose of *Spielberg* was to encourage the resolution of disputes between unions and management with the mechanism they voluntarily created — the grievance and arbitration procedure. When the fact of a contractual dispute present an unfair labor practice issue as well, the Board stated that *Spielberg* dictated that the parties must resolve both issues in the arena upon which they mutually agreed provided that the arbitration proceeding is fair and regular, both parties agree to be bound, and the arbitrator’s decision is not clearly repugnant to the Act. According to the Board, arbitration as a means of settling disputes discourages forum shopping and dual litigation and reduces the possibility that the individual will receive ‘two bites of the apple.’ The Board commented:

If . . . we are to continue to encourage, require and generally honor the use of available grievance and arbitration procedures to achieve dispute settlement, we ought not encourage either party to withhold from those voluntary procedures full information or relevant evidence on issues scheduled for discussion in the grievance procedure or for hearing by an arbitrator.<sup>26</sup>

Thus, the Board reasoned that in discipline and discharge cases evidence showing that the grievant was disciplined in violation of the Act would have a bearing on the contractual issue and help determine whether the grievant was disciplined for just cause. The Board therefore concluded that absent a bona fide reason (such as unusual circumstances) it would defer to an arbitrator’s decision if the grievant is given the opportunity to present the unfair labor

practice issue even if the statutory issue was not actually presented. A scenario in which the Board would not defer is one where the arbitrator specifically refused to pass on the statutory issue, or where both parties agreed to exclude statutory issues from the arbitration proceeding.

The dissent argued that the majority's ruling eliminated the *Raytheon* requirement that before deferring, the arbitrator must consider the unfair labor practice issue.

This means, of course, that the Board for all practical purposes will no longer decide any part of a case which has been or could have been decided by an arbitrator who has issued an award. It also apparently means that the Board will defer to an arbitrator cases which have not yet been, but could be the subject of an award. Adding the two together means that the Board will not henceforth decide any statutory violations by a union or an employer where they have an arbitration clause in their collective bargaining agreement. That is, unions and employers can agree to contract themselves out of the Act by inserting an arbitration clause into the agreement.<sup>27</sup>

*Electronic Reproduction* represented a differing interpretation of *Spielberg*. *Airco*, adopting the *Raytheon* criterion, ruled that it would be an unwarranted extension of *Spielberg* to permit the Board to defer where there was no evidence that the arbitrator did not consider the unfair labor practice issue. *Electronic Reproduction*, however, stated that *Spielberg* embraced arbitration as the preferred method of dispute resolution and that it would defer to that process when an unfair labor practice issue could be resolved there. While the *Electronic Reproduction* Board stated that it would not defer where the arbitrator specifically refused to pass on the unfair labor practice issue, it was silent regarding its position towards an award where the arbitrator receives evidence of the statutory issue but does not consider it in his decision.

The *Airco* proponents struck back in *Suburban Motor Freight* (1980).<sup>28</sup> In *Suburban Motor Freight*, the grievant was terminated twice by the company. Both times the grievant was reinstated with a reduced discipline by the arbitrator. The grievant then filed an unfair labor practice charge with the Board claiming he was discharged in violation of 8(a) (1) and (3). The company, relying on *Electronic Reproduction*, argued that deferral was appropriate. It maintained that evidence of the alleged

unfair labor practice was not presented by the grievant at either of the arbitration hearings. The Board refused to defer stating that it had basically abandoned the *Electronic Reproduction* doctrine. "Our experience with *Electronic Reproduction* has led to the conclusion that it promotes the statutory purpose of encouraging collective-bargaining relationships, but derogates the equally important purpose of protecting employees in the exercise of their rights under Section 7 of the Act."<sup>29</sup> Thus, the Board stated that it would not defer unless the unfair labor practice issue was both presented to and considered by the arbitrator. "In accord with the rule formerly stated in *Airco Industrial Gases*, we will give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue of

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discrimination in determining the propriety of an employer's disciplinary's actions."<sup>30</sup> Furthermore, the Board in *Suburban Motor Freight* stated that it would return to the *Yourga* standard and impose on the party seeking deferral the burden of proving that the statutory issue was litigated before and decided by the arbitrator.<sup>31</sup>

However, the *Suburban Motor Freight*, rule was short-lived. The Board again reversed its position regarding deferral in *Olin Corporation* (1984).<sup>32</sup> *Olin* is the current Board position on deferral. Today, the Board will defer to an existing arbitration award and find that an arbitrator has adequately considered an unfair labor practice issue if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. The Board will weigh any differences between the contractual and statutory standards of review by the *Spielberg* "clearly repugnant" standard. Furthermore, the Board will not require an arbitrator's decision to be totally consistent with Board precedent

when deferring. The Board will defer unless the arbitrator's decision is "palpably wrong" and not susceptible to an interpretation consistent with the Act. Finally, the Board will require the party arguing against deferral to show that the above criteria have not been met.<sup>33</sup>

In *Olin*, the grievant, the Union President, was discharged for his part in encouraging a "sick out" at work. At the arbitration hearing, the arbitrator found that the grievant partially caused and participated in the "sick out" and failed to stop it after it had occurred. The arbitrator ruled that the grievant's actions violated the No-Strike clause of the collective-bargaining agreement and his discharge was for just cause. Addressing the unfair labor practice issue the arbitrator stated that there was no evidence that the grievant was discharged for his legitimate union activities. The regional director issued a complaint after investigating the grievant's unfair labor practice charges. Though the ALJ refused to defer, he dismissed the charges on the merits. The Board, applying *Olin*, refused to review the case on its merits and deferred. First, the Board stated that the contractual and statutory issues were factually parallel.

Indeed, the arbitrator noted that the factual questions that he was required to determine were '1) whether or not there was a sick out and 2) whether the grievant caused, participated in or failed to attempt to stop the sick out, i.e., whether the grievant failed to meet the obligation imposed upon him by Article XIV.' These factual questions are co-extensive with those that would be considered by the Board in a decision on the statutory question — i.e., whether the collective-bargaining agreement clearly and unmistakably prescribed the behavior engaged in by Union President Spatorico on 17 December, 1980.<sup>34</sup>

Next, the Board stated that the General Counsel did not meet the burden of proving that the arbitrator was not presented with the facts necessary to determine the unfair labor practice issue. Finally, the Board ruled that the decision was not clearly repugnant to the Act because there was a reasonable basis to conclude that the grievant violated the No-Strike clause as well as an additional clause which prohibited officers from encouraging similar activity.

In dissent, member Zimmerman stated: under *Electronic Reproduction* and

under the rule adopted today the result is the same: The Board will now defer to an arbitrator's award on a presumption that an unfair labor practice issue has been resolved, without actually knowing if the issue was presented to or considered by the arbitrator.<sup>35</sup>

Zimmerman first argued that the *Olin* standard is an abdication of the Board's statutory obligations under Section 10(a) of the Act.

Nowhere in the Act itself, its legislative history, or in its judicial interpretation is there authority for the proposition that the federal labor policy favoring arbitration requires or permits the Board to abstain from effectuating the equally important federal labor policy entrusted to the Board under Section 10(a).<sup>36</sup>

Secondly, Zimmerman cited several Federal Circuit Court of Appeals decisions upholding the *Suburban Motor Freight* doctrine that the Board has no authority to defer if it has no proof that the arbitrator was presented with and considered the unfair labor practice issue. In *Stephenson v. NLRB* (1977) the Ninth Circuit stated:

Merely because the arbitrator is presented with a problem which involved both contractual and unfair labor practice elements does not necessarily mean that he will adequately consider the statutory and merely because he considers the statutory issue does not mean that he will enforce the rights of the parties pursuant to and consistent with the Act.<sup>37</sup>

Thus, the Ninth Circuit declared that the arbitrator must "clearly decide" the unfair labor practice issue before the Board may defer. Similarly, in *United Parcel Service v. NLRB* (1983) the Third Circuit ruled that "for the Board's deferral policy not to be one of abdication, the Board must be presented with some evidence that the statutory issue has actually been decided."<sup>38</sup> Third, Zimmerman criticized the overruling of *Yourga* and the new requirement that the party arguing against deferral must show that the *Olin* standard has not been met. According to Zimmerman, the party seeking deferral almost always has ready access to testimony and relevant records of the arbitration hearing and is in a better position to establish whether the statutory issue was addressed by the arbitrator. Furthermore, Zimmerman argued that it is improper to place the burden of proving an affirmative defense on any par-

ty other than the party raising the defense.

To invoke a presumption and shift the burden of disproving a naked defense claim to the General Counsel amounts to an abuse of the Board's discretion. In effect, once the existence of an arbitration award has been proved by a respondent, the majority will transform an affirmative defense into part of the General Counsel's *prima facie* case.<sup>39</sup>

Fourth, Zimmerman contended that the *Olin* standard, in reality, discourages parties to arbitrate their differences. According to Zimmerman, the frequency of deferrals will strain the resources of involved parties and arbitrations will soon resemble unfair labor practice hearings as unions comply with their duties to fairly represent their members.

While the Board in *Olin* departs from the *Electronic Reproduction* standard that deferral is appropriate where the grieving party could have brought evidence of the unfair labor practice issue before the arbitrator, it is similar to *Electronic Reproduction* in that it permits deferral without requiring proof that the arbitrator actually considered the statutory issue in his decision. The Board in *Olin* states that it must adhere to a "limited application" of

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*"[the standard] permits deferral without requiring proof that the arbitrator actually considered the statutory issue."*

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*Raytheon* to remain consistent with the *Spielberg* policy favoring the voluntary settlement of disputes.<sup>40</sup> Thus, while the Board states that adequate consideration of the unfair labor practice issue by the arbitrator is a criterion in judging the appropriateness of deferral, it defines adequate consideration as a factual parallelism of the contractual and statutory issue and the presentation of the facts of the unfair labor practice issue to the arbitrator. As long as the arbitrator's decision is not "palpably

wrong" the Board will defer.

A consensus has not been reached by the circuits concerning *Olin*. In *Taylor v. NLRB*, (1986)<sup>41</sup> the eleventh circuit refused to uphold the Board's ruling to defer, stating that the *Olin* standard "gives away too much of the Board's responsibility under the NLRA."<sup>42</sup> The eleventh circuit takes the position of the ninth circuit in *Stephenson*, supra, and the third circuit in *United Parcel*, supra, that for the Board to fulfill its statutory responsibility to prevent unfair labor practices under 10(a) of the NLRA it cannot defer unless it has fully considered and resolved the statutory issue. The problem with *Olin*, according to the court, is that the standard cannot guarantee that all arbitration proceedings will address and resolve every unfair labor practice issue.<sup>43</sup> While contractual and statutory issues may be factually parallel, the issues may also "involve distinct elements of proof and questions of factual relevance."<sup>44</sup> The court asserts that the failure of an arbitrator to fully examine and decide an unfair labor practice issue is an abandonment of the *Spielberg* doctrine's first requirement, that the arbitration proceedings have been fair and regular.<sup>45</sup> Additionally, the court also contends that the Supreme Court's decision in *Alexander v. Gardner-Denver Co.* (1974),<sup>46</sup> that an employee may assert a Title VII claim independent of a grievance brought to arbitration under a collective bargaining agreement, stands for the proposition that deferral is not appropriate unless the arbitrator addressed and resolved the statutory issue.<sup>47</sup>

However, the second circuit in *Nevins v. NLRB* (1986)<sup>48</sup> stated that the Board's right to defer an unfair labor practice charge to a pre-existing arbitration decision is discretionary and absent abuse it will defer.<sup>49</sup> Thus, the court asserts that while it is not called upon to decide the issue of whether *Olin* sufficiently protects employee rights under the NLRA as was reached in *Taylor*, it does not challenge the *Olin* standard.<sup>50</sup> Furthermore in *Lewis v. NLRB*, (1985)<sup>51</sup> the sixth circuit ruled that where there is evidence that the unfair labor practice issue was presented to and considered by the arbitrator it will find the *Olin* standard satisfied despite the fact that "the arbitration panel could have dealt more fully with the [statutory] issues presented at the hearing."<sup>52</sup> The sixth circuit's apparent willingness to permit deferral where the unfair labor practice charge was not fully dealt with by the arbitrator confirms the eleventh circuit's main fear that under *Olin*, the Board presumes that all arbitration proceedings confront and decide every possible statutory issue when that

actually is not the case.

The D.C. Circuit has previously affirmed Board deferral where the statutory and contractual issues were factually similar and the arbitrator decided the statutory issue. *Bloom v. NLRB* (1979)<sup>53</sup>. However, in *Darr v. NLRB*, (1986)<sup>54</sup> the court refused to affirm Board deferral where the arbitrator's decision contradicted clear Board precedent. The court stated that while the arbitrator decided both the contractual and statutory issues the arbitrator considered the statutory issue in a "tentative fashion" and did not attempt to "reconcile the different bodies of applicable law."<sup>55</sup>

The eleventh circuit commented:

We have profound doubts that the Board may defer to an arbitrator's award merely because the award is roughly analogous to that which the Board would grant - a sort of "Kentucky Windage" approach without explicitly articulating its view of the interrelationship between the law of a particular collective bargaining agreement and the NLRA.<sup>56</sup>

### Conclusion

The Board's policy of deferring unfair labor practice charges to pre-existing arbitration awards has not been consistent. In *Electronic Reproduction* the Board revised it's policy set forth in *Raytheon* and *Airco* that in order to defer it had to be proved that the arbitrator actually dealt with the statutory charge. Under *Electronic Reproduction* the Board would defer where, absent unusual circumstances, the grievant had the opportunity to present the statutory issue to the arbitrator. With the exception of where the parties agreed to exclude the statutory issue from the arbitrator's consideration or where the arbitrator specifically refuses to deal with the statutory issue, the Board was not concerned with whether the arbitrator actually considered the issue. *Suburban Motor Freight* reestablished the Board's pre-*Electronic Reproduction* policy of the arbitrator's duty to consider the unfair labor practice charge. *Olin* now states that the Board will find that the arbitrator has adequately considered the statutory issue when the contractual issue is factually parallel to the statutory issue and the arbitrator was presented with the facts relevant to resolving the unfair labor practice charge.

The foregoing can be divided into two basic schools of thought on Board deferral. The first, represented by *Raytheon* and *Suburban Motor Freight*, requires that the Board actually consider the statutory issue before deferring. In contrast, the latter school of thought, endorsed by the Board

in *Electronic Reproduction* and *Olin* does not necessarily demand actual consideration to justify deferral. This has been criticized as an abdication of the Board's duty under Section 10(a), of the NLRA, to prevent unfair labor practices. The proponents of the *Electronic Reproduction* and *Olin*, however point to Section 203(d) of the Labor Management Relations Act,<sup>57</sup> which amended the NLRA, declaring that "final adjustment by a method agreed upon by the parties is...the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."<sup>58</sup> It is the Board's position that if the parties agree on arbitration as the preferred method of resolving disputes deferral is appropriate provided it is not repugnant to the Act.

Whether *Olin* will continue to be the Board policy on deferral depends on whose administration replaces President Reagan's in January 1989. If the Republicans remain in office it is most likely that George Bush will seek confirmation of conservative, pro-management appointees. A Republican dominated Board will likely wish to maintain the status quo (*Olin*). However, a Democratic administration, headed by Michael Dukakis, will likely appoint members who believe that workers statutory rights cannot be subordinated to the arbitration process and who subscribe to the *Raytheon - Suburban Motor Freight* line of cases.

Finally, in *Alexander v. Gardner - Denver* the Supreme Court declined to defer and declared that a worker has a right to have his Title VII claim adjudicated regardless of whether he pursued a similar contractual claim through the arbitration process. The court extended the *Alexander v. Gardner - Denver* holding to the Fair Labor Standards Act in *Barrentine v. Arkansas Best Freight System*.<sup>59</sup> If and when the court is confronted with a case dealing with the Board's deferral of a Section 7 or 8 claim to a pre-existing arbitration award, it will be interesting to see if the court similarly holds that a worker's statutory rights preclude the Board from deferring to the arbitration process.

### NOTES

- <sup>1</sup> National Labor Relations Act 29 U.S.C. § 151-169 (1935) (amended 1947, 1951, 1958, 1959, 1975) (current version at 29 U.S.C. (198\_\_)).
- <sup>2</sup> *Id.*
- <sup>3</sup> *Id.*
- <sup>4</sup> *Id.*
- <sup>5</sup> *Id.*
- <sup>6</sup> *Id.*
- <sup>7</sup> *Id.*
- <sup>8</sup> National Labor Relations Act, supra.
- <sup>9</sup> *NLRB v. Hearst Publications*, 322 U.S. 111

- (1944).
- <sup>10</sup> *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).
- <sup>11</sup> *Id.* at 1080-81 quoting *NLRB v. Walt Disney Productions*, 146 F.2d 44 (9th Cir. 1944).
- <sup>12</sup> *Id.* at 1082.
- <sup>13</sup> *Id.*
- <sup>14</sup> *Raytheon Company*, 140 NLRB 883 (1963).
- <sup>15</sup> *Id.* at 884.
- <sup>16</sup> *Id.* at 890.
- <sup>17</sup> *Id.* at 885.
- <sup>18</sup> *Airco Industrial Gases*, 195 NLRB 676 (1972)
- <sup>19</sup> *Id.* at 676.
- <sup>20</sup> *Id.* at 676-77.
- <sup>21</sup> *Yourga Trucking*, 197 NLRB 928 (1972).
- <sup>22</sup> *Id.* at 929.
- <sup>23</sup> *Id.*
- <sup>24</sup> *Electronic Reproduction Service Corporation*, 213 NLRB 758 (1974).
- <sup>25</sup> *Id.* at 762.
- <sup>26</sup> *Id.* at 761.
- <sup>27</sup> *Id.* at 765.
- <sup>28</sup> *Suburban Motor Freight*, 247 NLRB 146 (1980).
- <sup>29</sup> *Id.*
- <sup>30</sup> *Id.* at 147.
- <sup>31</sup> *Id.*
- <sup>32</sup> *Olin Corporation*, 268 NLRB 573 (1984).
- <sup>33</sup> *Id.* at 574.
- <sup>34</sup> *Id.* at 576.
- <sup>35</sup> *Id.* at 579.
- <sup>36</sup> *Id.*
- <sup>37</sup> *Id.* at 580 quoting *Stephenson v. NLRB*, 505, F.2d 535 (9th Cir., 1977).
- <sup>38</sup> *Id.* quoting *United Parcel Service v. NLRB*, 706 F.2d 972 (1983).
- <sup>39</sup> *Id.*
- <sup>40</sup> *Id.* at 574.
- <sup>41</sup> *Taylor v. NLRB*, 786 F.2d 1516 (11th Cir. 1986).
- <sup>42</sup> *Id.* at 1521-22.
- <sup>43</sup> *Id.* at 1521.
- <sup>44</sup> *Id.* at 1522.
- <sup>45</sup> *Id.*
- <sup>46</sup> *Alexander v. Gardner - Denver Co.* 415 U.S. 36 (1974).
- <sup>47</sup> *Taylor v. NLRB*, at 1520.
- <sup>48</sup> *Neuins v. NLRB*, 796 F.2d 14 (2nd Cir. 1986).
- <sup>49</sup> *Id.* at 17.
- <sup>50</sup> *Id.* at 18 at n.1.
- <sup>51</sup> *Lewis v. NLRB*, 779 F.2d 12 (6th Cir. 1985).
- <sup>52</sup> *Id.* at 13.
- <sup>53</sup> *Bloom v. NLRB*, 603 F.2d 1015 (D.C. Cir. 1979).
- <sup>54</sup> *Dorr v. NLRB*, 801 F.2d 1404 (D.C. Cir. 1986).
- <sup>55</sup> *Id.* at 1408.
- <sup>56</sup> *Id.* at 1409.
- <sup>57</sup> 29 U.S.C. § 173(d) (1976).
- <sup>58</sup> *Id.*
- <sup>59</sup> 450 U.S. 728 (1981).

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