

## PRACTITIONERS' NOTES

### THE NLRB'S DEFERRAL POLICY UNDER FIRE: THE D.C. CIRCUIT'S CRITICISM AND THE FUTURE OF THE DEFERRAL POLICY

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In recent years, the National Labor Relations Board's ("NLRB" or "Board") deferral policy has been called into question by the D.C. Circuit. This article will provide an overview of the Board's deferral policy, discuss the D.C. Circuit's criticism of the policy, examine the potential conflict between the D.C. Circuit's approach and Supreme Court precedent, and finally, describe what steps the General Counsel's office has taken to address these issues.

#### I. OVERVIEW OF THE BOARD'S DEFERRAL POLICY

The Board follows two policies on deferral—one at the pre-arbitral phase and one at the post-arbitral phase. At the pre-arbitral phase, the Board will withhold making a final determination on certain, arguably meritorious, unfair labor practice ("ULP") charges when a grievance involving the same issue can be processed under the grievance-arbitration provisions of the applicable contract.<sup>1</sup> This policy is consistent with the National Labor Relations Act's ("NLRA" or "Act") goal of promoting the resolution of disputes under the parties' collective bargaining agreements. At the post-arbitral phase, the Board will decide whether it should defer to an arbitration award or grievance-settlement.

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1. The Board's deferral policy is set forth in *Collyer Insulated Wire*, 192 N.L.R.B. 837, 839-43 (1971), and *United Techs. Corp.*, 268 N.L.R.B. 557, 557-61 (1984).

The pre-arbitral deferral policy is set forth in *Collyer Insulated Wire*.<sup>2</sup> The post-arbitral policy is set forth in *Spielberg Manufacturing Co.*<sup>3</sup> and clarified in *Olin Corp.*<sup>4</sup> This article will focus on the post-arbitral deferral standard under *Spielberg* and *Olin*.

Under *Spielberg/Olin*, the Board will defer to an arbitral award or settlement if four factors are met:

1. The arbitration proceedings were fair and regular;
2. The parties agreed to be bound;
3. The arbitrator's decision is not clearly repugnant to the Act; and
4. The arbitrator considered the ULP issue.<sup>5</sup>

The D.C. Circuit Court has challenged the Board's deferral policy, particularly criticizing Factor 3 of the *Spielberg/Olin* framework. The court's criticism of the Board's deferral policy is discussed in the following part.

## II. D.C. CIRCUIT CRITICISM OF THE BOARD'S DEFERRAL POLICY AND THE IMPLIED WAIVER DOCTRINE

In two recent cases, the D.C. Circuit considered, and called into question, the Board's deferral policy under *Spielberg/Olin*.<sup>6</sup> In a harshly-worded opinion, the D.C. Circuit stated that the Board had an "apparent lack of a coherent theory for its . . . deference policy."<sup>7</sup> It urged "the Board to give serious consideration to the logical flaws in its current policy and to attempt to develop a comprehensible theory of deference."<sup>8</sup> The D.C. Circuit said its "patience with the Board's failure

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2. See 192 N.L.R.B. 837, 839-43. The *Collyer* standard, which focuses on pre-arbitral deferral, is beyond the scope of this article.

3. See 112 N.L.R.B. 1080, 1082, 1090 (1955).

4. See 268 N.L.R.B. 573, 573-74 (1984).

5. *Spielberg*, 112 N.L.R.B. at 1082 (setting the first three factors); *Olin*, 268 N.L.R.B. at 573-574 (reaffirming the first three factors and adding the fourth).

6. See *Plumbers & Pipefitters Local Union No. 520 v. NLRB*, 955 F.2d 744, 755-57 (D.C. Cir. 1992); *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 446-47 (D.C. Cir. 2004). In its decisions, the court discussed both *Spielberg/Olin* and post-arbitral awards, as well as pre-arbitral grievance settlements under *Alpha Beta Co.* See *Plumbers & Pipefitters*, 955 F.2d at 749-50, 755-57 (citing *Alpha Beta Co.*, 273 N.L.R.B. 1546, 1547-48 (1985)); *Titanium Metals*, 392 F.3d at 444-47 (citing *Alpha Beta Co.*, 273 N.L.R.B. at 1546-47). In *Alpha Beta Co.*, the Board expanded the *Spielberg/Olin* deferral policy beyond post-arbitral awards to pre-arbitral grievance settlements. See 273 N.L.R.B. 1546, 1547 (1985).

7. *Plumbers & Pipefitters*, 955 F.2d at 755.

8. *Id.* at 757.

to develop a coherent theory of deference is not limitless, and the Board's continued recalcitrance may well result in reversal in future cases."<sup>9</sup> These strong words from the D.C. Circuit are significant, because any party may seek review of a Board decision in the D.C. Circuit.<sup>10</sup>

The Court's criticism is directed squarely at Factor 3 of the *Spielberg/Olin* framework. Factor 3 requires that the arbitrator's decision or the grievance settlement award not be "clearly repugnant" to the Act.<sup>11</sup> The Board clarified the meaning of "not clearly repugnant" in *Olin*, explaining that the arbitrator's award must not be "palpably wrong."<sup>12</sup> In the grievance settlement context, the Board deems this factor met if both parties to the settlement make concessions.<sup>13</sup>

In *Plumbers & Pipefitters Local Union No. 520*,<sup>14</sup> the D.C. Circuit found the so-called "concessions test" redundant, because any time two parties enter into a settlement, it logically follows that one or both parties make concessions, thereby satisfying the concessions test.<sup>15</sup> Thus, the D.C. Circuit argued that Factor 3 is entirely unnecessary.

In addition to criticizing Factor 3 for its redundancy, the D.C. Circuit said this factor was a "veritable recipe for arbitrary action."<sup>16</sup> Specifically, the court stated that the "palpably wrong" criterion lacks standard application and predictability, and allows the Board to defer when it likes the result of an award or settlement, and intervene when it does not.<sup>17</sup> Despite its criticism of the Board's deferral policy, the D.C. Circuit, nevertheless, upheld the Board's decision to defer to the settlement in *Plumbers & Pipefitters*.<sup>18</sup> The reason it upheld the decision was because the court found that deferral could have been justified under the implied waiver doctrine.<sup>19</sup>

Under the implied waiver doctrine, if the Union can waive the statutory right in question and it validly waives such right in the contract or in the course of settling a grievance, deferral is not only appropriate,

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9. *Id.*

10. See National Labor Relations Act, 29 U.S.C. § 160(f) (2006).

11. *Plumbers & Pipefitters*, 955 F.2d at 756-57.

12. See *Olin Corp.*, 268 N.L.R.B. at 574 (1984).

13. See *Plumbers & Pipefitters*, 955 F.2d at 756; *Alpha Beta Co.*, 273 N.L.R.B. at 1547-48; *U.S. Postal Service*, 300 N.L.R.B. 196, 197-98 (1990).

14. 955 F.2d 744 (D.C. Cir. 1992).

15. See *id.* at 756-57.

16. *Id.* at 757.

17. See *id.* at 756-57.

18. See *id.* at 746.

19. See *id.* at 756-57.

but also required.<sup>20</sup> In such cases, the D.C. Circuit would make deferral mandatory unless the proceedings were not fair or regular, or the Union breached its duty of fair representation in its handling of the grievance.<sup>21</sup> In the D.C. Circuit Court's view, when a Union waives an employee's statutory right in favor of a contractual right, the statutory issue merges with the contractual issue and there is no statutory issue left for the Board to decide.<sup>22</sup>

According to the D.C. Circuit, mandatory deferral under the implied waiver doctrine would avoid leaving deferral up to the "whim of the Board."<sup>23</sup> However, the implied waiver doctrine appears to conflict with the 2009 Supreme Court decision in *14 Penn Plaza v. Pyett*.<sup>24</sup> The conflict between the D.C. Circuit and Supreme Court decisions is discussed in the following part.

### III. SUPREME COURT—REJECTION OF THE IMPLIED WAIVER DOCTRINE

Like the D.C. Circuit, the Supreme Court recently addressed the issue of whether unions can waive their member employees' statutory rights. However, instead of adopting the D.C. Circuit's implied waiver doctrine, the Supreme Court reiterated the need for a "clear and unmistakable" waiver of rights.<sup>25</sup>

In *Pyett*, the Supreme Court held that in order to waive a statutory right, the union must "clearly and unmistakably" waive such right in the contract.<sup>26</sup> In that case, the contract prohibited discrimination based on age, among other reasons, provided that all such claims be arbitrated "as the sole and exclusive remedy for violations," and required that the

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20. *See id.* at 756. A union can waive certain rights of its unit members, but is prohibited from waiving other rights. For example, the Board has deemed the right to strike a "waivable" right, while preserving the right to choose a bargaining representative as "non-waivable." *See id.*; *see also* *Energy Coop., Inc. v. Sako*, 290 NLRB 635, 636 (1988). Although the courts do not explicitly refer to the implied waiver doctrine, it is implicit in their view that the union representative can waive the members rights through an ambiguous contract clause or through the course of dealings.

21. *Plumbers & Pipefitters*, 955 F.2d at 756.

22. *See id.*

23. *See* *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 449 (D.C. Cir. 2004).

24. 129 S. Ct. 1456 (2009).

25. *See id.* at 1463 (citing *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998)). In *Wright v. Universal Mar. Serv. Corp.*, the Supreme Court adopted the "clear and unmistakable" standard as applied "to a union-negotiated waiver of employees' statutory right[s]." *See* 525 U.S. 70, 80 (1998).

26. *Pyett*, 129 S. Ct. at 1474.

arbitrator apply statutory law in resolving those claims.<sup>27</sup> There, the Supreme Court explained that because the contract clearly and unmistakably required union members to arbitrate age discrimination claims, the Union waived that statutory right in the contract, thereby precluding the members from pursuing their statutory age discrimination claim in court.<sup>28</sup>

The Court distinguished *Pyett* from *Alexander v. Gardner-Denver Co.*,<sup>29</sup> where the Court came to the opposite conclusion years earlier. There, the Court did not find a waiver of the union members' statutory right to litigate discrimination claims in court, despite a prior adverse arbitration award.<sup>30</sup> *Gardner-Denver* was found to be distinguishable because the underlying contract did not clearly and unmistakably waive employee statutory rights.<sup>31</sup> Rather, the contract in *Gardner-Denver* contained a no-discrimination clause, required that discharges be for just cause, and provided for final and binding arbitration of differences "as to the meaning and application" of contract provisions and "any trouble arising in the plant."<sup>32</sup>

The "clear and unmistakable" standard reiterated in *Pyett* appears to be directly at odds with the D.C. Circuit's implied waiver doctrine. The D.C. Circuit would hold that so long as a union includes language about a statutory right in the contract and requires arbitration of contract disputes, the statutory right is automatically waived.<sup>33</sup> However, under the Supreme Court's decision in *Pyett*, a waiver of statutory rights is not so easily established. Rather, the Supreme Court would require the contract to clearly and unmistakably waive an employee's right to litigate that particular statutory right before it would find a waiver.

#### IV. THE GENERAL COUNSEL'S REACTION TO THESE COURT DECISIONS

Under Memorandum OM 10-13, regions were instructed to submit to Advice any cases where deferral was not appropriate.<sup>34</sup> The Division

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27. *See id.* at 1461.

28. *See id.* at 1464.

29. 415 U.S. 36 (1974).

30. *See id.* at 49.

31. *See Pyett*, 129 S. Ct. at 1468-69.

32. *See Gardner-Denver*, 415 U.S. at 39-40.

33. *See, e.g., Plumbers & Pipefitters Local Union No. 520 v. NLRB*, 955 F.2d 744, 756 (D.C. Cir. 1992). The D.C. Circuit's holding is limited to the category of rights that can properly be waived by a Union.

34. Memorandum from Richard A. Siegel, Assoc. Gen. Counsel, NLRB Div. of Operations Mgmt., on Casehandling Regarding Application of Spielberg/Olin Standards to All Reg'l Dirs.,

of Advice is the office through which the General Counsel decides significant legal and policy issues in ULP cases. This memorandum was issued in response to the D.C. Circuit cases and the Supreme Court's *Pyett* decision, discussed in part II and III above. Because the General Counsel and the Board have not had a chance to consider, and possibly refine, the Board's approach to deferral in light of the D.C. Circuit's criticism and the *Pyett* decision, the Office of the General Counsel has more recently directed regions to submit only meritorious cases to Advice for guidance on the appropriate arguments to make on the deferral question.<sup>35</sup> If the case is not meritorious, regions were instructed to dismiss those cases on the merits, instead of determining whether any award or settlement reached under the grievance procedure is subject to deferral under our current standards.

This last instruction may not significantly alter the determination made in these cases. Even in cases where deferral is not deemed appropriate, regions will consider the evidence submitted to an arbitrator and will independently assess whether that evidence supports dismissal of the charge. If, for example, the evidence submitted is sufficient to establish that the employer's action was based on legitimate business considerations, the region will dismiss the charge. Moreover, the region will also dismiss a charge if the evidence presented provides an objective basis for an administrative resolution of credibility issues. For example, a charge will be dismissed where the grievant's version of the facts is contradicted by neutral witnesses or documentary evidence. In some cases, it may, nevertheless, be necessary to conduct a supplementary investigation before making a determination on the merits.

General Counsel, Ron Meisburg, addressed the question of deferral and implied waiver in a recent case submitted to Advice. Notwithstanding the D.C. Circuit's criticism of Factor 3, the General Counsel concluded that deferral to the settlement agreement negotiated in this case was not appropriate because it was "repugnant" to the Act. In that case, the employer had suspended a number of employees who refused to wear t-shirts displaying the union logo.<sup>36</sup> Refusing to wear

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Officers-In-Charge, and Residential Officers, NLRB 2 (Nov. 3, 2009) available at <http://www.ilr.cornell.edu/law/events/upload/OM-10-13-CH-Casehandling-Regarding-Application-to-Spielberg-Olin-standards.pdf>.

35. *See id.*

36. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, NLRB, to Ronald K. Hooks, Reg'l Dir., Region 26, NLRB 1-2 (Mar. 29, 2010) (on file with author).

union insignia is an activity protected under section 7 of the Act.<sup>37</sup> The union and employer settled the grievances without providing any remedy, such as back pay, for the time the employees were suspended.<sup>38</sup> The General Counsel refused to defer to the settlement, labeling it repugnant, because by providing no remedy for employees, the settlement penalized the employees for engaging in activities protected by the Act.<sup>39</sup> The General Counsel referred to the D.C. Circuit's implied waiver doctrine in its decision, but concluded that its application was erroneous in light of *Pyett* and that any waiver of statutory rights must be "clear and unmistakable."<sup>40</sup>

General Counsel Meisberg also addressed the genesis of the Board's deferral policy in light of section 10(a) of the Act. Section 10(a) empowers the Board to adjudicate unfair labor practice issues without regard to "any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise."<sup>41</sup> Simply put, section 10(a) gives the Board full discretion to determine the extent to which it wishes to defer.<sup>42</sup> Once it decides to defer, the Board applies the *Spielberg/Olin* standards to ensure that the settlement or award does not undermine the basic values of the Act.<sup>43</sup> It is anticipated that the Acting General Counsel Lafe Solomon will be issuing guideline memoranda addressing these issues in the near future.

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37. *Id.* at 3.

38. *Id.*

39. *Id.* at 1.

40. *See id.* at 10. In addition to finding that the union did not clearly and unmistakably waive statutory rights in the contract, the General Counsel also found that the right to refuse to wear union insignia is a non-waivable right altogether. *See id.* at 9-10. Specifically, based on *NLRB v. Magnavox* and its progeny, a members' free expression of support of, or opposition to, a union is a non-waivable right. *See id.* (citing *NLRB v. Magnavox*, 415 U.S. 322, 326 (1974)). Thus, the General Counsel argued that the union would not be able to waive its members' right to refuse to wear union insignia at all. *See id.* at 10. Therefore, even under the D.C. Circuit's implied waiver doctrine, deferral would be inappropriate. *See id.* at 9-10.

41. National Labor Relations Act, 29 U.S.C. § 160(a) (2006).

42. Memorandum from Barry J. Kearney, *supra* note 36, at 6 (on file with author) (noting that deferral is not an abdication of power, but rather, an exercise of its power under section 10(a)).

43. *See Olin Corp.*, 268 N.L.R.B. 573, 574 (1984).