



NLRB Urged To Change Arbitration Deferral Policy

Process likely to become more cumbersome for employers

By JEFF MOGAN

The well-established “*Olin* standard,” used by the National Labor Relations Board since 1984 to determine whether to defer to an arbitration award as the resolution of an unfair labor practice charge under Section 8(a)(1) and (3) of the National Labor Relations Act, may soon undergo a drastic change. While questions as to the process and its effects remain, the likely result is that employers defending unfair labor practice charges will spend more time and effort prior to and after arbitral deferral, and fewer cases will be resolved by arbitrators and more cases returned to the board’s regional offices for a decision.

Current Deferral Policy

Pursuant to *Olin Corp.*, 268 NLRB 573 (1984), where the subject of an alleged unfair labor practice has been decided in an arbitration proceeding, the board defers to the arbitral award if: the contractual issue was “factually parallel” to the unfair labor practice issue; and the arbitrator was “presented generally with the facts relevant to resolving the unfair labor practice.”

If that standard is met, and the award is not “clearly repugnant” to the National Labor Relations Act, the arbitrator has adequately considered the unfair labor practice and the award constitutes resolution of the case. An award is clearly repugnant only where it is not susceptible to an interpretation consistent with the Act, i.e. “palpably wrong.” The award does not have to be totally consistent with the Act or with

board precedent and does not have to be the same conclusion that the board would have reached. Significantly, the burden is on the party objecting to deferral to prove that the standard has not been met.

The Proposed Changes

In 2009, former NLRB General Counsel Ronald Meisburg opined that a “new approach to cases involving arbitral deferral may be warranted” and asked the board’s regional offices to submit post-arbitral deferral cases for analysis in developing that new approach. The analysis has been completed and current General Counsel Lafe Solomon has urged the board to modify its approach and apply a “new framework” in cases requiring post-arbitral review. GC Guideline Memorandum 11-05 (January 20, 2011).

Stating that the current policy is “overly deferential” to arbitral awards and can result in the acceptance of awards that differ significantly from the decision that the board would reach, Solomon proposed a standard that he believes better balances the board’s responsibility to protect individual rights under the National Labor Relations Act and the Act’s desire to promote collective bargaining and private resolution of disputes. In doing so, the new approach aims to provide “greater weight to safeguarding employees’ statutory rights in Section 8(a)(1) and (3)” of the Act.

In support of the notion that the current post-arbitral deferral policy does not adequately safeguard employees’ statutory rights, Solomon cited two non-NLRA Supreme Court cases – *Gilmer v. Interstate/*

Johnson Lane Corp., 111 S. Ct. 1647 (1991) and *14 Penn Plaza LLC v. Steven Pyett*, 129 S. Ct. 1456 (2009).

In brief, in both cases the Court recognized that parties can waive the statutorily-established forum, in favor of arbitration where such waiver is in accordance with applicable law *and* where the arbitrator resolves the statutory rights at issue. “Thus, the Court made it clear that, for an arbitration agreement’s waiver of access to a statutory forum to be enforceable, the collective-bargaining agreement must give an arbitrator the authority to decide the statutory issue, and the arbitrator must in fact do so.”

While the cases do not “directly control” the board’s policy, Solomon found the Court’s view of the role of arbitration in resolving statutory rights to be instructive in developing a new approach under the Act. Significantly, current Board Chairman Wilma Liebman has previously argued in favor of abandoning the *Olin* standard on the basis that it does not adequately protect employees’ rights under the Act. *Kvaerner Philadelphia Shipyard Inc.*, 347 NLRB No. 36 (2006).

The specific changes proposed are significant. In Section 8(a)(1) and (3) cases, i.e. those involving allegations that the employer discriminated against or otherwise interfered with, restrained, or coerced employees in the exercise of their rights under Section



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7 of the National Labor Relations Act, deferral would not be appropriate unless it is shown that the arbitrator adequately considered and applied the statutory rights at issue. Moreover, the burden of proof would be reversed and the party *seeking* deferral would be required to prove that deferral is appropriate. Specifically, the party advocating deferral must demonstrate that: the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and the arbitrator correctly enunciated and applied the applicable statutory principles in deciding the issue.

Only then, and absent a finding that the award is clearly repugnant to the Act, would post-arbitral deferral be appropriate.

Practical Effects

The potential effects on practitioners defending cases arising under Section 8(a)(1) and (3) of the National Labor Relations Act are sizeable. For example, the new post-arbitral deferral standard will result in concomitant changes to pre-arbitral deferral, including under *Col-*

lyer Insulated Wire, 192 NLRB 837 (1971). Though no changes have been proposed to the *Collyer* pre-arbitral deferral standard (whether the charge has “arguable merit”), the process will likely become more cumbersome because a regional office cannot determine whether an arbitrator adequately addressed the statutory issues unless the region fully understands such issues prior to deferral.

As such, the general counsel directed regional offices to take affidavits from the charging party and all of their witnesses and noted that the regions “may wish to undertake a more complete investigation before deciding whether to defer” to arbitration. A “more complete” pre-arbitral investigation means committing additional time and resources to cases that would otherwise have been deferred to arbitration without so much as a second look.

The most direct effect is likely to be that more cases that were deferred and resulted in an otherwise valid arbitration award will be disregarded and decided by the Board. In fact, the general counsel acknowledged that

the new standard “would likely make at least some additional arbitral awards inappropriate for deferral.” As such, because the burden will be on the party seeking deferral to demonstrate that the statutory issues were adequately considered by the arbitrator, parties are advised to establish a more thorough evidentiary record at arbitration. An employer would not want to succeed in having the case deferred to arbitration and prevail at arbitration, only to have a regional office refuse to defer to the award because the evidentiary record was insufficient to determine whether the arbitrator correctly enunciated and applied the statutory principles.

Though the proposed changes are not entirely novel, given that a similar framework was employed prior to *Olin*, the *Olin* standard has guided post-arbitral deferral for almost 30 years. A change seems likely and employers should be aware that the new standard could have potentially significant impacts in the handling of unfair labor practice charges under Section 8(a)(1) and (3) of the National Labor Relations Act. ■