POST ARBITRATION REVIEW BEFORE THE NATIONAL LABOR RELATIONS BOARD

Should arbitrators care about happens to their case after the issuance of a decision? I maintain that in certain situations, they should care. And, if they care, what if anything can or should they do?

Deferral under Section 8(a)(3) of the National Labor Relations Act

Issue

What, if anything should an arbitrator do if the processing of a ULP charge was deferred pending the outcome of the arbitration? What, if anything, should an arbitrator do if he or she is advised that the employer has been alleged to have engaged in discrimination based on the grievant's activities that may be protected by the NLRA?

NLRB Law

In 1955, in Spielberg Manufacturing Co., 112 NLRB 1080, the NLRB set forth specific criteria for deferral to arbitration awards. The Board established a three-pronged test for deciding when to defer to the award of an arbitrator and dismiss the Complaint: (1) the arbitration proceeding had to be fair and regular; (2) all parties had to have agreed to be bound to the award; and (3) the decision must not be repugnant to the Act.

Over the years, on rare occasions, I personally participated in cases that did not meet these tests. For example, deferral was not given to an award following an arbitration that was not considered fair and regular because only affidavits were presented in circumstances where there were significant credibility issues involved. In another case, the arbitrator stayed overnight at a hotel room provided free by the employer involved in that case. And, in a case where the arbitrator agreed with the employer that the filing of a non-meritorious grievance was grounds for discharge, deferral was not given the arbitrator's dismissal of the union's grievance over the discharge, as the Board concluded that the arbitrator improperly found that protected activity under the Act was grounds for discharge.

The more controversial basis for non-deferral involves a fourth criterion for deferral added in 1963 in Raytheon Co., 140 NLRB 883, set aside on other grounds, 326 F.2d 471 (1st Cir. 1964). There, the Board held that the issue involved in the unfair labor practice must have been presented to and considered by the arbitrator or a least that the contrary not be evident. The problem with the application of this test, of course, is that in the traditional discharge case, the issue before the arbitrator, i.e. did the employer have just cause for the discharge, is generally not the same as the issue before the NLRB i.e. did the employer have a discriminatory motive for the discharge. Under the test in Raytheon, deferral was rejected in cases where the arbitral award did not discuss the facts relevant to the statutory issue, did not draw any conclusions based on the ULP evidence presented, and made no determination as to the real reason for the employer's

actions. Thus, in a case where the grievant testified that he thought he was discharged because of his union activities, an arbitration panel, without commenting on this issue, found just cause for discharge. The Board refused to defer to the award under Spielberg concluding that the statutory issue was not resolved and an 8(a)(3) violation was found. Suburban Motor Freight, 247 NLRB 146 (1980). In General Warehouse Corp., 247 NLRB 1073 (1980), it appeared that the Board members did not all agree with the holding in Suburban Motor Freight regarding the evidence necessary to find that the arbitrator considered the statutory issue. In General Warehouse, as in Suburban Motor Freight, the employee testified before the arbitrator that he thought he was discharged for his union activities but the award did not specify whether the arbitrator considered the statutory issue and found just cause for discharge. The majority of the Board again refused to defer. Member Penello dissented stating that he would find that the finding of just cause for discharge was essentially a valid defense to the ULP and that the Board should defer to the arbitration award under Spielberg. The Board's decision was enforced by the Third Circuit. 642 F. 2d 965 (3rd Cir.1981). See also Koppel 251 NLRB 567 (1980) Member Penello again dissenting from a finding that the arbitration finding was not sufficient to resolve the ULP issues.

As the Board Members changed over the years and Republican Members gained a majority they were more inclined agree with Member Penello, consistent with its goal of encouraging the resolution of disputes in arbitration between parties to a CBA. Thus, in Olin Corp., 268 NLRB 573 (1984), a majority of the Board consisting of Republican appointments significantly relaxed the requirement that the arbitrator had to have specifically decided the ULP issue, holding that the requirement was satisfied if the contractual and statutory issues were "factually parallel" and the arbitrator was presented "generally with facts relevant to resolving the unfair labor practice." Under this test, the Board would defer to an arbitrator's award and dismiss the ULP complaint even if the arbitrator merely found that there was just cause for the discharge after having been told that a ULP charge was pending. Even if the arbitrator made no comment about the ULP and even if the question of alleged discrimination was not argued before the arbitrator, the Board applying the Olin standard would dismiss the Section 8(a)(3) complaint and hold that the arbitration resolved the ULP issue. The Board further stated that an arbitration decision would be considered repugnant to the Act only if it is "palpably wrong" and not susceptible to an interpretation consistent with the Act. While it is true that a finding by an arbitrator that there was just cause for discipline or discharge may be a valid defense to a ULP allegation, this is not always the case. There are cases where even a finding of just cause for discharge does not necessarily mean that the reason for discharge asserted by the employer was not discriminatorily motivated. It is clear, therefore, that in the application of Olin, in some cases no neutral body has determined whether or not the employee was discharged for activity protected by Act. Since the General Counsel has unreviewable discretion not to issue a complaint, many cases that were dismissed prior to the issuance of a complaint based on the Olin standard are not reported.

In Babcock & Wilcox Construction Co., 363 NLRB 132 (2014), a majority-Democratic Board revisited the Olin standard and held that this post-arbitral deferral test did not adequately balance the protection of employee rights under the Act and the national policy of encouraging arbitration of disputes over the application or interpretation of collective-bargaining agreements.

The Board reasoned that the existing standard created excessive risk that the Board would defer when an arbitrator had not adequately considered the ULP issue or when it was impossible to tell whether that issue had been considered. The Board therefore stated that in order to show that the arbitrator actually considered the statutory issue, it will require that the arbitrator "identified that issue and at least generally explained why the facts presented either do or do not support the unfair labor practice allegation." The Board noted that it will not require that an arbitrator conduct a "detailed exegesis" of Board law, since many arbitrators, as well as union and employer representatives in arbitral proceedings, are not trained in labor law. But the Board said that it will not assume that an arbitrator implicitly ruled on the statutory issue if the award merely upholds disciplinary action under a "just cause" analysis. Rather, it said, the arbitrator must make explicit that the action was not in retaliation for an employee's protected activities. Id slip op. at 8, 11. The Board noted that this test creates a disincentive against withholding evidence in an attempt to avoid an arbitral ruling on the statutory issue if a party initially authorized arbitration of the issue and the other party at least raised it in an arbitral proceeding.

The Babcock & Wilcox ruling, however, was not to last long. In United Parcel Service, Inc., 369 NLRB 1 (2019), a Republican majority on the Board overruled Babcock & Wilcox and returned to the Olin standard, which remains controlling to this day. A Democratic Board majority declined to reverse Olin in Phillips 66 Company, 373 NLRB 1 (2023), stating it was unnecessary to consider the General Counsel's request to overrule Olin because it concluded that deferral was not appropriate in that case because the arbitrator found that the employer had just cause to discharge employees for taking photographs with a purpose of avoiding potential disciplinary consequences, which under existing Board law was clearly protected activity. The Board therefore concluded it would not defer to the award because the award was not consistent with the Act. Because the current General Counsel at the NLRB and the majority for next several years will be Republican appointments, they will likely lean toward accepting the broad deferral standard in Olin and not seek to return to the holding in Babcock and Wilcox.

However, it is unknown whether the Third Circuit's enforcement of the Board's Decision in General Warehouse was merely a deferral to the discretion of the Board or constituted an expression of the law in that Circuit. Should the latter be the case, in light of the overruling of Chevron[1] in Loper[2], circuit courts will likely be split on the issue of whether the Olin standard is sufficient to satisfy the Board's obligation to resolve ULP allegation, which will only be resolved by the Supreme Court, a decision undoubtedly several years away.

Settlement Standards

It is not necessary for an arbitration settlement agreement to state that the ULP issue has been considered and resolved for the Board to accept the agreement and dismiss the charge or the Complaint if one has been issued. The Board's policy is set forth in Independent Stave 287 NLRB,

[1] Chevron U.S.A. v. National Resources Defense Council, 467 U.S..837 (1984)
[2] Loper Bright Enterprises v. Raimondo, 144 S.Ct 2244 (2024)

740 (1987); See also K & W Electric, Inc., 327 NLRB 70 (1998). In deciding whether to accept a settlement, the Board considers: (1) whether the charging party, the respondent, and any of the individual discriminatees have agreed to be bound by the settlement including the position taken by the General Counsel; (2) whether the settlement is reasonable in light of the nature of the violation alleged, the risk inherent in litigation, and the stage of the litigation, (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement, and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes. If these standards are met, the Board will dismiss the charge.

My Conclusions and Recommendations

While I have seen cases where an arbitrator insisted on addressing the ULP issue merely because the Board deferred processing the case under Collyer, such action is not required or even appropriate, in my opinion. The issue before the arbitrator is framed by the parties, not the NLRB, and going beyond the parties' submitted issue is not appropriate. However, if the arbitrator is informed that discriminatory motive may be present by way of a Collyer letter or by a mention by one of the parties, I recommend that the arbitrator ask the parties if they are asking that the employer's motive for the discipline be litigated and decided. If only one of the parties wishes the issue to be resolved in arbitration, it is up the arbitrator to resolve the issue to be decided noting that conclusion in the award. For the arbitrator to ignore the potential for a dismissal of a ULP charge based on the issue having been resolved in arbitration, where the arbitrator never considered the issue, leads potentially to an unjust result. While I recognize that this result stems from the application of the Olin deferral standard and arbitrators may not feel responsible for the Board's definition of its standards for deferral, nevertheless the Board is often interpreting the arbitrator's decision in a manner that is not intended. To avoid such a result it is appropriate, for the arbitrator to make clear what he or she is or is not deciding. Fairness, I believe, requires no less.

Deferral under Section 8(a)(5)

Issue

What, if anything should an arbitrator do if the processing of an 8(a)(5) charge was deferred pending the outcome of the arbitration?

NLRB Law

I would not reach the same conclusion in cases alleging a midterm modification of a CBA and a potential violation of Section 8(a)(5) of the Act.

When the Board considers whether to dismiss an 8(a)(5) duty to bargain complaint and accept an arbitration decision as dispositive of the allegations, it applies the same Olin standards applied under Section 8(a)(3). What findings by arbitrator are necessary for the Board to conclude that the statutory issue of alleged unilateral change has been resolved? The Board law has changed over the years with regard the standard to find a waiver of the right to bargain with the changes in administration but, I think, it is reasonable to conclude that for arbitrators it really doesn't matter.

It is well established that for an employer's mid-contract unilateral change to be lawful, it must be established that there was a clear and unmistakable waiver by the union of the right to bargain over that particular subject.[3] The issue arose whether this test must be specifically applied by the arbitrator for the Board to defer to the award under Spielberg and find that the statutory issue has been resolved.

At one time Board held that deferral to an arbitration award was not appropriate unless the arbitrator specifically applied the clear and unmistakable test for waiver. The D.C Circuit Court of Appeals rejected that view and remanded a case to the Board to consider whether the contract covered the action in question. If so, the Board should defer to that award. In 2019, a Republican majority at the Board, agreeing with the Court of Appeals in considering the case on remand, held that the Board would no longer insist that the arbitrator have applied the clear and unmistakable standard for waiver and as long as it was found that the contract covered the matter in question it would conclude that the union waived the right to bargain. M.V. Transportation 368 NLRB No. 66 (2019). A Democratic majority at the Board in Environmental Solutions, LLC , 373 NLRB No. 141 (Dec. 10, 2024) recently overruled M.V. Transportation and returned to the requirement that the clear and unmistakable waiver standard be applied, rejecting the view of the D.C. Circuit.

It is a reasonable prediction that Board Members appointed by the current President will decide to return to the contract coverage doctrine and reverse Environmental Solutions. An arbitrator's finding that the contract permitted the alleged unilateral change will likely be accepted as sufficient to satisfy the Olin test for deferral and the Board will dismiss the charge. Moreover, in light of the reversal of Chevron in Loper, the Board is no longer free to disregard the holdings of a Circuit Court, particularly the D.C. Circuit where appeals may go in every case.[4]

My Conclusions and Recommendations

I do not believe it is an obligation of the arbitrator to take any action to satisfy the potential for NLRB Spielberg deferral review regarding cases involving the issue of whether the union waived

[3] Metropolitan Edison Co. 460 U.S. 693. 708 (1983)

[4] Under the NLRA, a party aggrieved by a final decision of the Board may seek review in the circuit where the ULP is alleged to have been committed, where the party transacts business or in the D.C. Circuit

its right to bargain over a change made by the employer. The employer may wish to ensure that the record contains all elements of potential union waiver, but it is not the arbitrator's responsibility to do so, even if a Collyer deferral was made by the Agency. This is not a situation, as discussed above, where there is a possibility that the arbitrator's decision may be misconstrued to deny an employee their statutory rights. Here it is only a question of whether the issue decided by the arbitrator does or does not resolve the waiver issue. That, I believe, is solely an issue for the NLRB and the Courts on review.

Appellate Court Review

As noted above, in Chevron the Court held that if the statutory language was ambiguous, the courts should defer the an agency's interpretation if it is reasonable even if the court might have ruled differently. Now that this decision has been overruled in Loper, such deferral is no longer appropriate and each circuit court of appeals is now free to decide its view of the meaning of the statutory language and insist that its interpretation be applied in all cases in that circuit.

While at this writing it is too early to tell the long-term consequences of this major change in judicial review, it is clear that the standards for review will likely differ among the circuits. And, it is likely that circuit courts will require agencies to follow the law in that circuit if the case arose in that circuit.[5] While the Board has a policy of not filing for enforcement in a favorable circuit, the parties will surely look to a favorable circuit before filing for review. Since it not possible to know in which circuit the case will eventually be decided, there is little arbitrators can or should do in anticipation of such review except to decide the issue as presented.

Daniel Silverman
Member NAA

[5] Note, in Hammontree v. NLRB 925 F.2d 1486 (1991), the D.C. Circuit upheld the Board's deferral policy but rested on the Board's exercise of discretion and not on policies of the Act.