UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BABCOCK & WILCOX CONSTRUCTION
COMPANY, INC

and   Case 28-CA-022625

COLETTA KIM BENELI

NOTICE AND INVITATION TO FILE BRIEFS

On April 9, 2012, Administrative Law Judge Jay R. Pollack issued a decision in the above-captioned case, deferring to the determination of an arbitral panel upholding the Respondent's discharge of Charging Party Beneli. Excepting, the General Counsel asks the Board to adopt a new post-arbitral deferral standard in 8(a)(1) and (3) cases.

Under the existing standard, the Board defers to an arbitration award when (1) the arbitration proceedings are fair and regular; (2) all parties agree to be bound; and (3) the arbitral decision is not repugnant to the purposes and policies of the Act. *Spielberg Mfg. Co*., 112 NLRB 1080 (1955). Further, the arbitral forum must have considered the unfair labor practice issue. The Board deems the unfair labor practice issue adequately considered 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 issue. *Olin Corp*., 268 NLRB 573 (1984). The burden of proof rests with the party opposing deferral.

The General Counsel asks the Board to adopt a different standard. Under his proposal, the party urging deferral would bear the burden of demonstrating that (1) the collective-bargaining agreement incorporates the statutory right, or the statutory issue was presented to the arbitrator, and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. If the party urging deferral makes that showing, the Board would defer unless the award was clearly repugnant to the Act.

To aid in the consideration of this issue, the Board now invites the filing of briefs in order to afford the parties and interested *amici* the opportunity to address the following questions.

1. Should the Board adhere to, modify, or abandon its existing standard for post-arbitral deferral under *Spielberg Mfg. Co*., 112 NLRB 1080 (1955), and *Olin Corp*., 268 NLRB 573 (1984)?

2. If the Board modifies the existing standard, should the Board adopt the standard outlined by the General Counsel in GC Memorandum 11-05 (January 20, 2011) or would some other modification of the existing standard be more appropriate: e.g.,

shifting the burden of proof, redefining “repugnant to the Act,” or reformulating the test for determining whether the arbitrator “adequately considered” the unfair labor practice issue?

3. If the Board modifies its existing post-arbitral deferral standard, would consequent changes need to be made to the Board’s standards for determining whether to defer a case to arbitration under *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984); and *Dubo Mfg. Corp.*, 142 NLRB 431 (1963)?

4. If the Board modifies its existing post-arbitral deferral standard, would consequent changes need to be made to the Board’s standards for determining whether to defer to pre-arbitral grievance settlements under *Alpha Beta*, 273 NLRB 1546 (1985), review denied sub nom. *Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987); and *Postal Service*, 300 NLRB 196 (1990)?

In answering these questions, the parties and *amici* are invited to submit empirical and other evidence.

Briefs not exceeding 50 pages in length shall be filed with the Board in Washington, D.C. on or before March 25, 2014. The parties may file responsive briefs on or before April 8, 2014, which shall not exceed 25 pages in length. No other responsive briefs will be accepted. The parties and *amici* shall file briefs electronically at http://mynlrb.nlrb.gov/efile. If assistance is needed in filing through http://mynlrb.nlrb.gov/efile, please contact Gary W. Shinners, Executive Secretary, National Labor Relations Board.

Dated, Washington, D.C., February 7, 2014

By direction of the Board:

Gary W. Shinners
Executive Secretary