OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 11-05 January 20, 2011

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) cases

I. Introduction

In Memorandum OM 10-13(CH) "Casehandling Regarding Application of Spielberg/Olin standards," issued under former General Counsel Meisburg on November 3, 2009, we recognized that "a new approach to cases involving arbitral deference may be warranted," particularly given certain recent opinions of the Supreme Court and the Court of Appeals for the D.C Circuit. Regions were instructed to submit post-arbitral deferral cases to the Division of Advice to provide the basis for a case-by-case review in order to develop that new approach. Based on our consideration of these cases and the underlying legal issues, we will urge the Board to modify its approach in post-arbitral deferral cases to give greater weight to safeguarding employees' statutory rights in Section 8(a)(1) and (3) cases, and to apply a new framework in all such cases requiring post-arbitral review. This memorandum explains that framework and the reasons for adopting it as well as guidance on handling cases that implicate these issues.

II. The Statutory Scheme of the NLRA Requires a Balance between Protecting Individual Rights and Encouraging Private Dispute Resolution within Collective Bargaining

Congress charged the National Labor Relations Board with the responsibility of protecting the Section 7 right of employees to engage in concerted activity for mutual aid and protection. Sections 8(a)(1) and (3) of the NLRA make it an unfair labor practice for an employer to discriminate against or otherwise interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Section 10(a) of the NLRA empowers the Board "to prevent any person from engaging in any unfair labor practice" and further provides that the Board's powers "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or

otherwise . . ."[1] (Emphasis added.) Thus, the Board has a statutory mandate under Section 10(a) to protect individual rights and protect employees from being discharged or otherwise discriminated against in retaliation for their protected activities, and that mandate cannot be waived by private agreement or dispute resolution arrangement.

At the same time, Section 1 of the NLRA and Section 203(d) of the Labor Management Relations Act favor collective bargaining and the private resolution of labor disputes through the processes agreed upon by the employer and the employees' exclusive representative. Section 203(d) provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." (Emphasis added). Thus, there is a potential conflict, or at least a tension, between the statutory policies protecting individual rights and the Board's enforcement of the Act, and the policy encouraging collectively-bargained dispute resolution.

To reconcile the different emphases of these statutory policies, "the Board has considerable discretion to . . . decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act" to foster collective bargaining.[2] As is evident from the language in Section 10(a) itself, however, the Board is not required to stay its hand just because an employer and a union representing its employees have resolved a dispute through an agreed-upon grievance arbitration process.[3]

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[1] As the D.C. Circuit has recognized, Section 10(a) "is intended to make it clear that although other agencies may be established by code, agreement, or law to handle labor disputes, such other agencies can never divest the National Labor Relations Board of jurisdiction which it would otherwise have." Hammontree v. NLRB, 925 F.2d 1486, 1492 (D.C. Cir. 1991) (en banc) (quoting Staff of Senate Comm. on Education and Labor, 74th Cong., 1st Sess., Comparison of S. 2926 (73d Congress) and S. 1958 (74th Congress) at 3 (Comm. Print 1935) (emphasis supplied by the court).

[2] International Harvester Co., 138 NLRB 923, 926 (1962), affd. sub. nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir. 1964).

[3] Spielberg Mfg. Co., 112 NLRB 1080, 1081-1082 (1955), citing NLRB v. Walt Disney Productions, 146 F.2d 44 (9th Cir. 1944), cert. denied 324 U.S. 877 (1945).

III. Supreme Court Precedent in Non-NLRA Individual Rights Cases Allows Private Parties to Waive Access to a Statutory Forum in Favor of Arbitration Only if the Arbitrator Decides the Statutory Issue

An important source of guidance for striking an appropriate balance between the protection of employees' statutory rights and giving effect to arbitration awards is how the Supreme Court envisions the role of arbitrators deciding statutory rights in cases where federal courts have jurisdiction to decide those statutory rights. In the context of Title VII and other individual rights cases, the Court allows parties to waive their use of the statutorily-established forum, i.e., the courts, where such waivers are consistent with applicable law, but has required that an arbitrator must resolve the rights at issue consistent with the applicable statutory principles. Thus, in Gilmer,[4] the Court held that employees can waive the judicial forum for resolving a substantive right, i.e., a right guaranteed under a statute, but they cannot prospectively waive the substantive right itself. In Pyett,[5] the Court held that a union, as well, can waive employees' rights to a particular forum, as long as the waiver is expressed in clear and unmistakable terms, but the Court emphasized that such a waiver is enforceable only if the collective-bargaining agreement gives the arbitrator the authority to decide the statutory 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.[6] The Court further highlighted this requirement by noting that judicial review of arbitration awards, while limited, enables courts to "ensure that arbitrators comply with the requirements of the statute."[7] Thus, the Court clarified that it would cede jurisdiction to arbitrators only if the arbitrator is authorized to decide the statutory issue, and does so consistent with applicable statutory principles.

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[4] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

[5] 14 Penn Plaza, LLC v. Steven Pyett, 129 S. Ct. 1456, 1469-1471 (2009).

[6] Pyett, 129 S.Ct. at 1469-1471.

[7] Id., 129 S.Ct. at 1471 fn. 10, citing Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 232 (1987).

To be sure, the Pyett/Gilmer line of cases is merely instructive to the Board as an indication of the Supreme Court's view of the role of arbitration in resolving statutory rights -- it does not directly control the parameters of the Board's deferral policy. For, as discussed above, the Board's policy is an exercise of discretion in choosing to stay its hand, rather than being ousted of jurisdiction as are the courts -- the NLRA expressly provides in Section 10(a) that the Board does not lose jurisdiction even if private parties agree that it should.[8] Nevertheless, we believe the principles articulated by the Court have applicability under the NLRA statutory scheme.

IV. Olin's Standards for Deferral Do Not Adequately Protect Employees' Statutory Rights; Therefore, We Will Urge the Board to Change its Framework for Post-Arbitral Deferral

Viewed against this backdrop, the Board's current post-arbitral deferral policy is distinctly at odds with that which prevails in other areas of employment law. The Court clearly envisions that employees will receive full consideration of their statutory rights in arbitration; both Pyett and Gilmer emphasize that no waiver of statutory rights is entailed in having those rights considered by an arbitrator. The only difference at issue is whether an arbitrator or a judge applies the statute.[9]

Although, as discussed above, the Board's deferral policy is one of discretion rather than an ouster of jurisdiction, this difference only heightens the Board's obligation to ensure the protection of employees' statutory rights prior to exercising its discretion to defer to an arbitrator's award, rather than providing an even lower standard of protection of statutory rights, as does the current deferral framework. As the Board has recently reiterated in a different context, "[a]s an administrative agency establishing rules to govern a particular field of law (within the limits of the statute it administers), the

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[8] See also, e.g., Bill's Electric, Inc., 350 NLRB 292, 296 (2007) (mandatory arbitration policy violated the Act, as it would reasonably be read as substantially restricting, if not totally prohibiting, employees' access to the Board's processes); U-Haul Co. of California, 347 NLRB 375, 377-378 and fn. 11 (2006), enfd. mem. 255 F. Appx 527 (D.C. Cir. 2007) (same).

[9] Pyett, 129 S.Ct. at 1469; Gilmer, 500 U.S. at 26.

Board has a different role than the courts, operating 'on a wider and fuller scale' that 'differentiates . . . the administrative from the judicial process.'"[10] The Board's "wider and fuller" role should cause the Board to more zealously guard its mandate to protect statutory rights, in contrast to the courts, whose jurisdiction over statutory claims is more limited.

In contrast to the Court's vision of ensuring the actual arbitral consideration of the rights afforded by Title VII and other employment statutes, the Board's Olin[11] standards for accepting an arbitral award as the resolution of NLRA rights -- that the contract and statutory issues were "factually parallel" and the arbitrator was "presented generally with the facts relevant to resolving the unfair labor practice" -- do not require such consideration. In addition, the Board's Olin standards tolerate substantive outcomes from arbitrators that differ significantly from those that the Board itself would reach if it considered the matter de novo. Such outcomes can result in the denial of substantive Section 7 rights -- if the overly deferential Olin standards are met, the Board may dismiss the administrative charge even if the statutory issue has never been considered.

Viewed solely under NLRA principles, this result has long struck some courts as at least in need of further explanation and justification by the Board.[12] Some have found an actual abdication of the Board's statutory responsibilities.[13] In the intervening years, the

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[10] Kentucky River Medical Center, 356 NLRB No. 8, slip op. at 2-3 (2010), citing NLRB v. Seven-Up Bottling Co. of Miami, Inc., 344 U.S. 344, 349-350 (1953).

[11] Olin Corp., 268 NLRB 573, 573-574 (1984).

[12] See Darr v. NLRB, 801 F.2d 1404 (D.C. Cir. 1986).

[13] See Taylor v. NLRB, 786 F.2d 1516, 1521-22 (11th Cir. 1986) ("By presuming, until proven otherwise, that all arbitration proceedings confront and decide every possible unfair labor practice issue, Olin Corp. gives away too much of the Board's responsibility under the NLRA."). See also Banyard v. NLRB, 505 F.2d 342, 347 (D.C. Cir. 1974) (the arbitral tribunal must have clearly decided the unfair labor practice issue on which the Board is later urged to give deference); Stephenson v. NLRB, 550 F.2d 535, 538 and n. 4 (9th Cir. 1977) ("Merely because the arbitrator is presented with a problem which involves both contractual and unfair labor practice elements does not necessarily mean that he will adequately consider the statutory issue . . . The "clearly decided" requisite is designed to enable

development of more demanding standards for the arbitration of statutory employment rights, spurred by Gilmer, has only served to heighten the need for the Board to provide a more convincing explanation to the courts and to the public for its apparent lesser valuation of NLRA rights than is the norm for statutory employment rights. This need for further explanation and justification is accentuated where Olin deferral is granted even though the collectively-bargained grievance arbitration procedures do not expressly authorize the arbitrator to resolve statutory NLRA claims or require that the arbitrator apply statutory principles, as is often the case.

We note that these considerations only apply to cases alleging violations of employee rights arising under Section 8(a)(1) and 8(a)(3) of the Act, not to cases solely alleging violations of Section 8(a)(5). In bargaining cases, as the Board has recognized, the "[r]esolution of the ultimate issue . . . [does] not rest solely on interpretation of the statute, but turn[s] on contract interpretation."[14] In such cases, given the close identity of the statutory rights and contract interpretation issues, the current deferential Olin standards adequately safeguard the statutory enforcement scheme.

Accordingly, we have decided to urge the Board to adopt a new approach. Specifically, in Section 8(a)(1) and 8(a)(3) statutory rights cases, the Board should no longer defer to an arbitral resolution unless it is shown that the statutory rights have adequately been considered by the arbitrator. This includes not only cases involving Section 8(a)(1) and 8(a)(3) discipline and discharge, but also all other cases involving Section 8(a)(1) conduct that is subject to challenge under a contractual grievance provision.

Further, we will urge the Board to change Olin's allocation of the burden of proof for deferral. We believe that the party urging deferral should have the burden of showing that the deferral standards articulated above have been met. This will ensure that the statutory issues have indeed been considered by the arbitrator, as well as encourage parties seeking deferral to establish an evidentiary record that will give the Board a sounder basis for reviewing arbitral awards and deciding whether to defer. Thus, the

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the Board and the courts to fairly test the standards applied by the arbitrator against those required by the Act").

[14] Mt. Sinai Hospital, 331 NLRB 895, 898 (2000), enfd. mem. 8 Fed. Appx. 111 (2d Cir. 2001).

party urging deferral must demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue 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 should, as now, defer unless the award is clearly repugnant to the Act. The award should be considered clearly repugnant if it reached a result that is "palpably wrong," i.e., the arbitrator's decision or award is not susceptible to an interpretation consistent with the Act. Such a framework would provide greater protection of employees' statutory rights while, at the same time, furthering the policy of peaceful resolution of labor disputes through collective bargaining.[15]

This is not a novel approach. Prior to Olin, the Board, with widespread contemporary court approval, required consideration of the statutory issue as a condition for deferral and placed the burden of persuasion on the party seeking deferral.[16] Thus, as early as 1963,

[15] We note that this approach would also directly respond to the D.C. Circuit's challenge to the Board to explain the theory underlying its deferral policy (see, e.g., Darr v. NLRB, 801 F.2d at 1408-1409; Plumbers & Pipefitters Local Union No. 520 v. NLRB, 955 F.2d 744, 755-757 (D.C. Cir. 1992)), as well as to that court's "contractual waiver" approach to Board deferral cases, which does not so much balance the two competing statutory goals of the NLRA as hold that one completely trumps the other (see, e.g., American Freight System, Inc. v. NLRB, 722 F.2d 828, 832-833 (D.C. Cir. 1983); Plumbers & Pipefitters Local Union No. 520, 955 F.2d at 755-756; Titanium Metals Corp. v. NLRB, 392 F.3d 439, 448-449 (D.C. Cir. 2004)).

[16] See, e.g., Bloom v. NLRB, 603 F.2d 1015, 1020 (D.C. Cir. 1979) ("If the record contains substantial and definite indications that the unfair labor practice issue and its supporting evidence were expressly presented to the arbitration panel, and the panel's decision reflects its reliance on that evidence, then the Board and a court can determine whether the panel clearly decided the statutory issue"); Pioneer Finishing Corp. v. NLRB, 667 F.2d 199, 202-203 (1st Cir. 1981) ("Where the arbitrator has no duty to consider the statutory issues, it would undermine the purpose of the Act to require the Board to defer merely on the speculation that he must have considered an employee's rights under the statute"); NLRB v. Magnetics Intern., Inc., 699 F.2d 806, 811 (6th Cir. 1983) ("we will examine the arbitrator's award itself and the degree of congruence

the Board held that the party urging deferral must show that the unfair labor practice issue was presented to and acted upon by the arbitrator.[17] That is, the Board would consider an unfair labor practice issue resolved only if the statutory issue was actually litigated and decided in the arbitration proceeding.[18] While the Board deviated from this policy for a period,[19] it subsequently reinstated the requirement that the party seeking deferral show that the statutory issue was "presented to and considered" by the arbitrator.[20] The Board explained that acting otherwise "derogates the [ ] important purpose of protecting employees in the exercise of their rights under Section 7 of the Act," and had been criticized "as an unwarranted extension of the Spielberg doctrine and an impermissible delegation of the Board's exclusive jurisdiction."[21]

Returning to a requirement that statutory issues be considered as a condition for deferral to an arbitral award would also require revising the standards for deferral to pre-arbitral grievance settlements. Thus, the Olin deferral standard was the express basis for the Board's decisions in

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between the award and the charges brought under the statute . . . any doubts regarding the propriety of deferral will be resolved against the party urging deferral"); Servair, Inc. v. NLRB, 726 F.2d 1435, 1441 (9th Cir. 1984) ("The arbitrator's determination . . . in no way disposes of the statutory issue . . . Thus, we hold that the Board properly refused to defer to the arbitrator's decision").

[17] Raytheon Co., 140 NLRB 883, 886-887 (1963), enf. denied on other grounds, 326 F.2d 471 (1st Cir. 1964).

[18] See Yourga Trucking Inc., 197 NLRB 928, 928 (1972); Airco Industrial Gases, 195 NLRB 676, 676-677 (1972).

[19] See Electronic Reproduction Service Corp., 213 NLRB 758, 762-764 (1974).

[20] Suburban Motor Freight, Inc., 247 NLRB 146, 146-147 (1980).

[21] Ibid. See also Professional Porter & Window Cleaning Co., 263 NLRB 136, 137 (1982), enfd. 742 F.2d 1438 (2d Cir. 1983) ("The election to proceed in the contractually created arbitration forum provides no basis, in and of itself, for depriving an alleged discriminatee of the statutorily created forum for adjudication of unfair labor practice charges").

Alpha Beta[22] and Postal Service.[23] As a result, these cases similarly provide for deferral to pre-arbitral grievance settlements that lack reference to, or other indication that the parties considered, the statutory issues. It would be inconsistent to continue to defer to pre-arbitral-award grievance settlements that the parties themselves did not intend to resolve the unfair labor practice issues. Instead, we will urge the Board to adopt a rule that gives no effect to a grievance settlement unless the evidence demonstrates that the parties intended to settle the unfair labor practice charge as well as the grievance. If the evidence does so indicate, the Board should apply current non-Board settlement practices and procedures in deciding whether to accept the non-Board settlement, including review under the standards of Independent Stave.[24]

V. Instructions for Processing Future Cases Involving Deferral to Arbitration

Providing a more thorough post-arbitral review of deferred cases necessitates certain other changes in Regional Office investigation procedures. We recognize that a full investigation and conclusive determination of merit prior to pre-arbitral deferral is not the best use of limited Agency resources. Nonetheless, because substantial time may pass while the arbitration process proceeds when a case is deferred under Collyer and United Technologies,[25] investigation of the alleged unfair labor practices at the end of the process is more difficult. To prevent any such difficulties in future cases raising allegations of Section 8(a)(1) and 8(a)(3) that will be deferred under Collyer, particularly as a heightened

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[22] 273 NLRB 1546, 1547-1548 (1985).

[23] 300 NLRB 196, 198 (1990).

[24] Independent Stave Co., 287 NLRB 740, 743 (1987) (the Board will examine all the surrounding circumstances including, but not limited to: (1) whether the parties have agreed to be bound and the General Counsel's position; (2) whether the settlement is reasonable in light of the alleged violations, risks of litigation, and stage of litigation; (3) whether there has been any fraud, coercion, or duress; and (4) whether the respondent has a history of violations or of breaching previous settlement agreements).

[25] Collyer Insulated Wire, 192 NLRB 837 (1971); United Technologies Corp., 268 NLRB 557 (1984). These instructions also apply to cases deferred under Dubo Mfg. Corp., 142 NLRB 431 (1963).

standard would likely make at least some additional arbitral awards inappropriate for deferral, Regions should take affidavits from the Charging Party, and from all witnesses within the control of the Charging Party, before they make their "arguable merit" determination in considering Collyer deferral.[26] Only then, if the Region determines there is arguable merit to the charge and the other Collyer requirements are met, should the Region defer the charge.[27] If the Region concludes the charge is without merit, of course, it should dismiss the charge, absent withdrawal.

In all pending and future cases where the Region has deferred a charge to arbitration under Collyer, when the arbitral award issues, the Region must review the award to determine whether post-arbitral deferral is appropriate. The Region should determine if the party urging deferral can demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue; and (3) the arbitral award is not clearly repugnant to the Act. Upon making its determination, the Region should submit the case to the Division of Advice, along with the Region's recommendation as to whether to defer.[28]

VI. Conclusion

To summarize, we will urge the Board to modify its approach in Section 8(a)(1) and (3) post-arbitral deferral cases as follows:

1. The party urging deferral should have the burden of demonstrating that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory

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[26] At the Region's discretion, it may wish to undertake a more complete investigation before deciding whether to defer.

[27] In light of the modified post-arbitral framework proposed herein, Regions should substitute the language of the attached pattern for Collyer deferral letter for that found in the Casehandling Manual Section 10118.5.

[28] An exception to this instruction occurs when the arbitral award grants full backpay and reinstatement and the charging party requests withdrawal of the charge. In this situation, as with non-Board settlements discussed above, the request for withdrawal can be approved. If the charging party does not seek withdrawal in this situation, the Region should contact the Division of Advice.

issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue.

2. If the party urging deferral makes that showing, the Board should defer unless the award is clearly repugnant. The award should be considered clearly repugnant if it reached a result that is "palpably wrong," i.e., the arbitrator's award is not susceptible to an interpretation consistent with the Act.

3. The Board should not defer to a pre-arbitral-award grievance settlement unless the parties themselves intended the settlement to also resolve the unfair labor practice issues. Where the evidence demonstrates that the parties intended to settle the unfair labor practice charge, the Board should continue to apply current non-Board settlement practices and procedures, including review under the standards of Independent Stave.

In processing future cases raising allegations of Section 8(a)(1) and 8(a)(3), Regions should proceed as follows:

1. Prior to Collyer deferral, Regions should take affidavits from the Charging Party, and from all witnesses within the control of the Charging Party, before they make their arguable merit determination.

2. If there is arguable merit to the charge, and the other Collyer requirements are met, the Region should defer the charge. If there is not arguable merit, the Region should dismiss, absent withdrawal.

3. When the arbitral award issues, the Region should determine if the party urging deferral has met the burden set forth above to demonstrate that deferral to the arbitrator's award is appropriate. Upon making its determination, the Region should submit the case to the Division of Advice, along with the Region's recommendation as to whether to defer.

Please make this memorandum a subject on the agenda for your next staff meeting. Any questions regarding the implementation of this memorandum should be directed to the Division of Advice.

/s/
L.S.

cc: NLRBU
Release to the Public

Collyer Deferral Letter

[Regional Office Letterhead]

[Date letter issues]

Charging Party Legal Rep (or Charging Party if no legal rep)

Charged Party Legal Rep (or Charged Party if no legal rep)

Re: [Case name]
Case [Case number]

Salutation:

The Region has carefully considered the charge alleging that [Charged Party name] violated the National Labor Relations Act. As explained below, I have decided that further proceedings on the the charge should be handled in accordance with the deferral policy of the National Labor Relations Board as set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp.*, 268 NLRB 557 (1984). This letter explains that deferral policy, the reasons for my decision to defer, further processing of the charge, and the Charging Party's right to appeal my decision.

Deferral Policy: The Board's deferral policy provides that the Board will postpone making a final determination on a charge when a grievance involving the same issue can be processed under the grievance/arbitration provisions of the applicable contract. This policy is partially based on the preference that the parties use their contractual grievance procedure to achieve a prompt, fair, and effective settlement of their disputes. Therefore, if an employer agrees to waive contractual time limits and process the related grievance through arbitration if necessary, the Board's Regional office will defer the charge.

Decision to Defer: Based on our investigation, I am deferring further proceedings on the charge in this matter to the grievance/arbitration process for the following reasons:

1. The Employer and the (Charging Party name or insert name of the Union if charge filed by an individual) have a contract currently in effect that provides for final and binding arbitration.

2. The [insert description of each issue being deferred] as alleged in the charge (is or are) encompassed by the terms of the contract.

3. The Employer is willing to process a grievance concerning the issues in the charge, and will arbitrate the grievance if necessary. The Employer has also agreed to waive any time limitations in order to ensure that the arbitrator addresses the merits of the dispute.

4. Since the issues in the charge appear to be covered by provisions of the contract, it is likely that the issues may be resolved through the grievance/arbitration procedure.

Further Processing of the Charge: As explained below, while the charge is deferred, the Regional office will monitor the processing of the grievance and, under certain circumstances, will resume processing the charge.

Charging Party's Obligation: Under the Board's *Collyer* deferral policy, the Charging Party has an affirmative obligation to file a grievance, if a grievance has not already been filed. If the Charging Party fails either to promptly submit the grievance to the grievance/arbitration process or declines to have the grievance arbitrated if it is not resolved, I will dismiss the charge.

Union/Employer Conduct: If the Union or Employer fails to promptly process the grievance under the grievance/arbitration process; declines to arbitrate the grievance if it is not resolved; or if a conflict develops between the interests of the Union and the Charging Party, I may revoke deferral and resume processing of the charge.

Charged Party's Conduct: If the Charged Party prevents or impedes resolution of the grievance, raises a defense that the grievance is untimely filed, or refuses to arbitrate the grievance, I will revoke deferral and resume processing of the charge.

Monitoring the Dispute: Approximately every 90 days, the Regional office will ask the parties about the status of this dispute to determine if the dispute has been resolved and if continued deferral is appropriate. However, at any time a party may present evidence and request dismissal of the charge, continued deferral of the charge, or issuance of a complaint.

Notice to Arbitrator Form: If the grievance is submitted to an arbitrator, please sign and submit to the arbitrator the enclosed "Notice to Arbitrator" form to ensure that the Region receives a copy of an arbitration award when the arbitrator sends the award to the parties.

Review of Arbitrator's Award or Settlement: If the grievance is arbitrated, the Charging Party may ask the Board to review the arbitrator's award. The request must be in writing and addressed to me. Under current Board law, the request should analyze whether the arbitration process was fair and regular, whether the unfair labor practice allegations in the charge were considered by the arbitrator, and whether the award is consistent with the Act. Further guidance on this review is provided in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955) and *Olin Corp*., 268 NLRB 573 (1984). These Board decisions are available on our website, www.nlrb.gov. However, the current standard for review may change. The General Counsel's position is that the Board should modify its approach in Section 8(a)(1) and (3) cases and should not defer to an award unless the party urging deferral demonstrates that: (1) that the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) that the arbitrator correctly enunciated the applicable statutory principles, and applied them in deciding the issue. The General Counsel is also taking the position that the Board should not defer to a pre-arbitral-award grievance settlement in Section 8(a)(1) and (3) cases unless the parties intended the settlement to also resolve unfair labor practice issues.

Note: SAME APPEAL LANGUAGE as now.