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NLRB Makes Sweeping Changes to Arbitration Deferral Standards

By Bryan R. Bienias

On Monday of this week, the National Labor Relations Board (NLRB or Board) abandoned over 30 years of precedent and significantly modified the standards for the deferral of certain unfair labor practice charges to contractual arbitration procedures. This change likely will call into question the finality of arbitration awards in future cases involving allegations arising under Sections 8(a)(1) and (3) of the Act. (Notably, the Board did not address deferral in Section 8(a)(5) cases, since the General Counsel did not raise the issue.)

In *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), the Board made sweeping changes to its longstanding post-arbitral deferral standards, through which it determines whether underlying unfair labor practice allegations have been addressed sufficiently by the arbitrator. If the Board determines that the arbitrator adequately addressed the unfair labor practice issues, the Board will defer to the arbitrator's decision and not conduct an independent investigation.

Under the new standard, the burden of proof has shifted onto the party seeking deferral to show not only that that proceedings were "fair and regular" and the parties agreed to be bound, but also that (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue, (2) the arbitrator was presented with and considered the "statutory issue" or was prevented from doing so by the party opposing deferral, and (3) Board law "reasonably permits" the award.

The standard enunciated by the Board likely will pose many issues for parties seeking to avoid duplicative litigation and who believe that contractual arbitration is an efficient means of resolving their disputes.

First, the party seeking deferral now must show that the arbitrator was explicitly authorized to decide the unfair labor practice issue—either through incorporation of this authority into a collective bargaining agreement or through a case-by-case authorization. Employers and unions with existing contracts either will need to renegotiate their contracts to give arbitrators the authority to determine these "statutory issues," or agree to grant this arbitral authority in each individual case. Where one party refuses, the Board stated that it "is not [its] province to hold them to a choice they have not made."

Second, the Board held that a party can establish the arbitrator was "presented with and considered the statutory issue" if it can show that the "arbitrator identified the issue and at least generally explained why he or she finds that the facts presented either do or do not support the unfair labor practice issue." While the Board claims that it will not require the arbitrator to "engage in a detailed exegesis of Board law" nor does it seek to "turn arbitrators into administrative law judges," it offers little guidance as to how thorough an arbitrator's analysis must be. If an arbitrator simply fails to adequately address an unfair labor practice issue, the party seeking deferral may be out of luck. This is problematic, as the Board acknowledges that arbitrators "may not be attorneys trained in labor law."

Finally, the Board now will review each arbitration award to assure that Board law "reasonably permits the award." The Board claims that it will not require arbitrators to reach the same result the Board would reach, but will require the arbitrator's decision to constitute a "reasonable application of the statutory principles" that the Board would follow. The Board notes that it "will not simply assume . . . merely from the fact that an arbitrator [for example] upheld a discharge under a 'just cause' analysis, that the arbitrator understood the statutory issue and had considered (but found unpersuasive) evidence tending to show unlawful motive." In essence, a party seeking deferral must be prepared to show that not only does Board law "reasonably permit" the arbitrator's award, but that the arbitrator "understood the statutory issue" and considered whatever evidence that the Board ultimately determines did or did not tend to show unlawful conduct.

In reaching its decision, the Board dismissed concerns that the new standard would encourage unions to withhold evidence concerning unfair labor practice issues in arbitration proceedings in order to defeat deferral, noting that either party can raise the statutory issue before the arbitrator. The Board also rejected Member Phillip Miscimarra's concerns that new standard performs unwarranted "surgery" on "two venerable institutions—final and binding grievance arbitration and the collectively bargained requirement of "cause," in contravention of federal policies and the language of the Act itself.

In sum, besides requiring that parties either renegotiate their contractual grievance procedures or explicitly authorize the arbitration of unfair labor practice issues in each case, this standard likely will encourage parties to circumvent their grievance procedure by filing unfair labor practice charges whenever they believe they have a better chance of a favorable resolution before the Board. Moreover, arbitration proceedings themselves likely will become much more burdensome, as parties and arbitrators expend more time and energy addressing underlying unfair labor practice issues in an effort to avoid duplicative litigation.

Although the Board states that the new standards will avoid placing an undue burden on unions, employers, arbitrators or the arbitration system itself, it remains to be seen how this will play out in practice. Stay posted.

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