

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN CIVIL LIBERTIES UNION, INC.

and

CASES 05-CA-300367  
05-CA-302762

NONPROFIT PROFESSIONAL EMPLOYEES  
UNION (NPEU), INTERNATIONAL FEDERATION  
OF PROFESSIONAL & TECHNICAL ENGINEERS  
(IFPTE) LOCAL 70 A/W INTERNATIONAL  
FEDERATION OF PROFESSIONAL & TECHNICAL  
ENGINEERS, AFL-CIO, CLC

**REQUEST FOR SPECIAL  
PERMISSION TO APPEAL**

Rarely does a case cry out for the intervention of the full Board at an early stage of the proceedings as loudly as this one. Respondent, the American Civil Liberties Union, Inc. (the “ACLU”), by its attorneys, Kauff McGuire & Margolis LLP and William B. Gould IV, pursuant to Section 102.26 of the Board’s Rules and Regulations, respectfully requests Special Permission to Appeal an Order of Administrative Law Judge Michael A. Rosas (the “Order”) denying the ACLU’s Pre-Hearing Motion to Defer Board Action (the “Motion”) to the pending grievance and arbitration proceedings involving the ACLU and the Charging Party, Nonprofit Professional Employees Union (NPEU), International Federation of Professional & Technical Engineers (IFPTE) Local 70 a/w International Federation of Professional & Technical Engineers, AFL-CIO, CLC. The ACLU further urges that, upon granting such permission, the Board should grant

the Motion and order the deferral of further proceedings before this agency.<sup>1</sup>

We respectfully refer the Board to the ACLU's Reply in Support of its Motion to Defer Board Action to the Pending Grievance and Arbitration Proceedings (attached hereto as Exhibit 1), which largely sets forth the legal principles compelling deferral in the circumstances of this case. For context, subsequent to the voluntary recognition of the Charging Party, and while the collective bargaining process is ongoing, the parties have mutually undertaken the arbitration procedures at issue to resolve the current dispute. Those procedures<sup>2</sup> provide an extraordinary degree of protection to the ACLU's employees. Among other things, those procedures provide that: (1) employees (other than a small number in the organization's most senior executive ranks) "may not be terminated in the absence of just cause"; (2) the existence of just cause is severely limited to circumstances where an employee commits "misconduct" or "inadequate job performance"; (3) an employee claiming to have been terminated in violation of the Policy can appeal the termination to the Executive Director and then to a mutually-agreed upon neutral arbitrator; (4) the arbitrator is tasked with rendering a "final and binding" determination on the validity of the termination; (5) if the termination is found to be invalid, the arbitrator is empowered to award reinstatement and back pay; (6) the burden of proof in the arbitration rests at all times upon the ACLU; and (7) the ACLU is solely responsible for the arbitrator's fees.

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<sup>1</sup> In the event the Board fails to intervene at this stage and order deferral, an appeal to the Board on exceptions after the money was spent and the resources consumed on the Board proceedings would be an entirely hollow act.

<sup>2</sup> The procedures currently under way originated in an ACLU policy, referred to as Policy 527, which the parties have undertaken to resolve the instant dispute.

The arbitration at issue here involves the termination of a bargaining unit member, Katherine Oh, and the arbitration has been brought, and is being prosecuted by, the Charging Party. The arbitration, already well underway, is being heard by Alan Symonette, one of the country's leading labor arbitrators, the President-Elect of the National Academy of Arbitrators (the preeminent association of expert arbitrators), and a former Field Attorney with the Board. Again, the arbitration proceedings are well underway: two arbitration sessions have been held and the scheduling of further sessions is in process addressing the very issues that are before the Board in this complaint. Again, the Charging Party's counsel represents both Ms. Oh and the Charging Party in the arbitration.

Respondent's Motion, and this Special Appeal, turn fundamentally on two issues: (1) whether the arbitration process in which the parties are engaged is capable of addressing and resolving the relevant public law issues under the Act (protected concerted activity and refusal to bargain); and (2) whether the procedures in which the parties are engaged in this case (while they are in the process of negotiating a full-fledged collective bargaining agreement), are of the nature contemplated by *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955) and *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971) and their progeny, to which it is appropriate for the Board to defer. The answer to both questions is resoundingly in the affirmative, compelling reversal of the ALJ's Order.

**The ALJ's Order Failed to Recognize the  
Fundamental Role of Arbitrators to  
Resolve Issues of Public Law  
Under the Act**

The ALJ gave short shrift to (indeed, he ignored) the principle that the Board's deferral authorities rest upon a recognition of the ability of arbitrators to address and resolve issues of public law under the Act. *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB 1127, 1131 (2014) (noting the "central role of arbitration in promoting industrial peace and stability.") The confidence rightly placed by the Board in the arbitral process is the very foundation of deferral policy because without it deferral would not and could not exist under the Act. Moreover, disputes over discipline or discharge of an employee subject to just cause protection are particularly well-suited to resolution through the arbitration process in a manner that supports and protects the policies of the Act. Simply put, a properly-crafted just cause provision, such as the one applicable in the arbitration underway in this case, cannot allow for the discharge for reasons protected by the Act and an arbitrator is compelled to determine the existence of just cause in light of the principles and policies of Section 7 of the Act. It can never be just cause, for example, to dismiss or discipline an employee for engaging in protected activity, including protest and collective representation, and the arbitration process which the parties have entered upon here is entirely consistent and supports that principle.

All of this is particularly true in a case such as this one.

It is difficult to imagine a more fundamental policy of labor law than that an employee cannot be terminated in retaliation for protected concerted activity (or

unilaterally where bargaining was legally required). Here, those statutory issues are unavoidably posed in the ongoing arbitration. This is because any arbitration award finding just cause where the termination was occasioned by protected concerted activity (or was carried out unilaterally where a duty to bargain existed) would be inconsistent with public policy and wholly unenforceable, as would any agreement or policy that permitted such a result. *See, e.g., Grace & Co. v. Local 739*, 461 U.S. 757, 766 (1983) (“a court may not enforce a collective bargaining agreement that is contrary to public policy”). *United Paperworkers International Union v. Misco*, 484 U.S. 29, 42 (1987) (“A court’s refusal to enforce an arbitrator’s award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.”)<sup>3</sup>. Indeed, this Board’s position is consistent with the view that arbitrators are well equipped to address and safeguard public law principles such as Section 7 of the Act and that a just cause clause such as the parties are engaged in in this case is an appropriate vehicle in which to do so.<sup>4</sup>

In the circumstances of this case, moreover, it is inconceivable that the arbitrator selected by the parties – President Elect of the National Academy of Arbitrators and a former Board attorney – could issue an award that would reach such

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<sup>3</sup> *See Black v. Cutter Laboratories*, 351 U.S. 292, 301 (Douglas, J., dissenting, joined by Warren, C.J. and Black, J. (“The Court says that the parties to a collective bargaining agreement may make Communist Party membership ‘just cause’ for discharge of an employee, that discharge for that reason is merely a matter of contract between the union on the one hand and the employer on the other, and that when the contract is enforced no federal right is infringed. I disagree with that doctrine. It is a dangerous innovation to meet the exigencies of the present case. It violates First Amendment rights of citizens.”) *See generally W. Gould, Labor Arbitration of Grievances Involving Racial Discrimination*, 118 Penn. L. Rev. 40, 41 (1969) (rejecting the viewpoint that there is “a sharp demarcation between public and private labor law.”).

<sup>4</sup>W. Gould, *Non-Governmental Remedies for Employment Discrimination*, 20 Syr L. Rev 865 (1969).

an outcome, one that would fly in the face of rights under the Act. *See Mobil Oil Exploration & Producing*, 325 NLRB 176, 180 ( (concurring opinion of Chairman Gould (“[i]n order to obtain deference under this statute, arbitrators should consider-and be competent to consider-the unfair labor practice controversy which would otherwise be adjudicated by this Agency.”) The mandate of the procedures simply does not allow for it: just cause exists if, *and only if*, the arbitrator finds that the employee committed either “misconduct” or “inadequate job performance” -- nothing else constitutes “just cause” and it is therefore impossible for the arbitrator to sustain a termination arising from activity protected under the Act.

In sum, due regard for the role of arbitrators in enforcing federal labor policy as both contemplated and encouraged by the Board — a policy entirely overlooked by the ALJ — strongly supports deferral to the pending proceedings.

**The Arbitration Procedures Voluntarily Undertaken Constitute a Proper Instrument for Deferral**

In opposition to the Motion, the General Counsel cited cases referring to deferral to arbitration proceedings “under a collective bargaining agreement” but cited no case that actually supported her sweeping argument: that the existence of a full-blown collective bargaining agreement is an absolute pre-requisite to deferral. Nor does she cite any case in which the Board has declined to defer to a dispute resolution procedure similar to the one in which the parties currently are engaged — under which a mutually selected neutral arbitrator, with the burden of proof on the employer, issues a final and binding determination and is empowered to order reinstatement and full backpay. These extraordinary provisions of the procedure cause it to fit comfortably

within the confines of Board deferral law.

Indeed, further supporting deferral here is that significant attributes of the procedures make them even more protective of the rights of employees than do the standards and processes under the Act.<sup>5</sup> The Act places the burden of proof solely on the General Counsel; under the arbitration procedures at issue, the burden of proof of just cause (and hence of the absence of reasons for termination violative of the Act) is at all times on the ACLU. The Act permits a finding that a termination was unlawful only if the General Counsel proves that the employer's conduct constituted restraint and coercion in the exercise of Section 7 rights; under the Policy, a termination may be sustained only if the ACLU meets an exacting burden of proving that the employee's conduct constituted "misconduct" or "inadequate job performance" – a standard that flatly prohibits discharge for reasons that would violate Section 7 of the Act. In short, the current arbitration process is even more compatible with the protection of employees' statutory rights than the process under the Act itself.

Deferral to the arbitration procedures the parties currently are voluntarily pursuing also would be consistent with the Board's position that "public policy supporting labor-management contracts extends beyond traditional collective-bargaining agreements." *Lexington House*, 328 NLRB 894, 897 (1999). That public policy supports giving full play to the Charging Party's invocation of the remedy of final

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<sup>5</sup>The current arbitration arises in the context of a vigorous, active collective bargaining relationship. The Charging Party was voluntarily recognized by the ACLU in 2021. The ACLU and the Charging Party previously negotiated a comprehensive Memorandum of Understanding governing all issues arising out of the post-pandemic return to office issues and they are actively engaged in negotiations over a complete collective bargaining agreement.

and binding arbitration under the agreed upon procedures.

Indeed, dispute resolution procedures promoted and enforced by virtue of *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) and the Steelworkers Trilogy (*United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960))– the rulings which constitute a bedrock for the Board’s deferral decisions – reach considerably beyond the procedures involved in this case. For instance, contract provisions promoting neutrality entered into long before recognition and collective bargaining negotiations (unlike this case where negotiations are in progress), as are first contract arbitration procedures prior to a CBA are similarly favored and enforced. *E.g.*, *South Bay Management v. Unite Here, Local 26*, 587 F. 3d 35 (1<sup>st</sup> Cir. 2009) (enforcing obligation under a neutrality and recognition agreement to arbitrate the terms of a first collective bargaining agreement); *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union v. Trimas Corporation*, 531 F.3d 531 (7<sup>th</sup> Cir. 2008) (compelling arbitration under a neutrality agreement over coverage of the agreement). Here, where recognition was granted some two years ago, and the collective bargaining relationship is well established, deferral to the arbitration process the parties have voluntarily undertaken should flow as a matter of course. The arbitration procedures entered into here, subsequent to recognition and the commencement of the collective bargaining process, fit comfortably within these authorities.

In *William E. Arnold v. Carpenters District Council*, 417 U.S. 12, 17 (1974)



the Supreme Court recognized that “the Board's position [in *Collyer*] harmonizes with Congress' articulated concern that, ‘(f)inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes.” And, the case law under Section 301, which is the underpinning of the Board’s deferral doctrine goes much further than proposed by the ACLU here in serving that Congressional concern.<sup>6</sup> In short, the General Counsel’s contention that the absence of a full collective bargaining agreement is fatal to deferral overlooks that, consistent with the Board’s view in *Lexington House*, the absence of any collective bargaining relationship *whatsoever* is no bar to enforcement of undertakings such as those to arbitrate the terms of a first collective bargaining agreement or arising under a neutrality agreement.

Further, the Board has never held that express language authorizing the arbitrator to consider statutory issues must be present in order to defer. *E.g.*, *Babcock & Wilcox*, 361 NLRB 1127, 1131 (2014). It is sufficient to show that the parties have authorized the arbitrator to do so. *Id.* at 1132. Such authority undeniably was granted here when the Charging Party expressly argued to the arbitrator that “Ms. Oh was terminated in May 2022 for making statements and complaints about working conditions within her department at the ACLU” and “Certainly under labor standards it won't constitute just cause. ·In fact, it would be protected activity.” See Reply in Support

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<sup>6</sup> See, e.g., *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962) (Section 301 jurisdiction over “suits for violation of contracts between an employer and a labor organization” is not limited to collective bargaining agreements but permits enforcement of a strike settlement agreement); *Time Warner Cable of New York City LLC v. International Brotherhood of Electrical Works, AFL-CIO, Local Union No. 3*, 170 F. Supp.3d 392 (E.D.N.Y. 2016) (Union required to arbitrate dispute regarding work stoppage under limited separate arbitration agreement even if the parties' collective bargaining agreement governing such disputes was not in effect), *aff'd*, 684 Fed.Appx. 68 (2d Cir. 2017) (summary order); *Verizon Information Systems*, 335 NLRB 558 (2001) (neutrality and card check agreement held to bar representation petition).

of its Motion to Defer Board Action to the Pending Grievance and Arbitration Proceedings, at Exhibits 2, 3

Finally, the arbitration procedure currently underway is ideally suited to address the statutory issues inherent in the just cause determination as defined in the Policy. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 (1974), the Supreme Court enumerated the factors that call for great deference to the decisions of arbitrators addressing issues of public law – in that case, Title VII:

Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators.

Without doubt, the agreed upon procedures here “conform substantially” with the Act in that its carefully crafted and strictly limited definition of “just cause” does not admit of the possibility that a discharge for protected activity would be sustainable. There is no question about the degree of fairness of the forum, nor the adequacy of the record on alleged role of protected, concerted activity in the arbitration – counsel for the Charging Party has expressly injected that issue into the case when, as previously observed, he argued in the opening that “Ms. Oh was terminated for “protected activity” under the Act -- and the arbitrator agreed upon by the ACLU and the Charging Party is uniquely competent to address the question of just cause against the standards imposed by Section 8(a)(1) of the Act. In a case such as this one, the Supreme Court would mandate that “great weight” be accorded to the arbitrator’s award<sup>7</sup> and the Board should

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<sup>7</sup> While aspects of the *Gardner Denver* reasoning have been undermined by *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) and *Wright v. Universal Maritime Services*, 525 U.S. 70 (1998) the policy

promote this policy through the application of its deferral doctrine <sup>8</sup>

While largely ignoring these attributes of the arbitration procedures in progress the ALJ cited three grounds for the denial of the Motion, and every one of them is wrong. The Order states:

First, Oh sought recourse for her termination through Policy No. 527 and agreed to pursue arbitration after the Executive Director denied her internal appeal. Although representing Oh in that process, the Charging Party is not a party. Second, the Respondent and Oh do not agree on the issue before the arbitrator, including the issues in this unfair labor practice proceeding—the Respondent proposed that the arbitrator determine whether it had “grounds for termination,” while Oh proposed a determination based on “just cause” to terminate. So, it is not clear what the arbitrator’s basis for a decision will be. Finally, the statutory issues in this proceeding relating to Oh’s alleged protected concerted activities and the failure to bargain with her legal representative before terminating her are not before the arbitrator.

First, the ALJ’s statement that “the Charging Party is not a party” to the arbitration is belied by Union counsel’s declaration on the arbitration record that “My name is Rick Bialczak and I represent the grievant *and the union* in this process” See Reply in Support of its Motion to Defer Board Action to the Pending Grievance and Arbitration Proceedings, at Exhibit 1. Not only is Mr. Bialczak the regular counsel for the Union but, as he stated, he represents *the Union in the arbitration*.

Second, the ALJ’s statement the parties “do not agree on the issue before

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promoting arbitration of public law issues by arbitrators who are trained and competent to hear such issues has not been effect.

<sup>8</sup> Counsel for the General Counsel has stated that the General Counsel is currently urging the Board to return to the *Babcock & Wilcox* standard which was overturned in *United Parcel Service*, 369 NLRB No. 1 (2019). Respondent would submit here that the Board, as it reviews *Babcock* anew, should explicitly take demonstrated arbitral expertise into account in deferral cases.

the arbitrator” is misleading and, in the circumstances of this case, immaterial.<sup>9</sup> As previously discussed, the procedures the parties are currently pursuing, after stating that an employee “may not be terminated in the absence of just cause,” sets forth two, and only two, narrow circumstances that constitute just cause: “misconduct” or “inadequate job performance.” This rigorous language unalterably imposes the standards of Section 7 of the Act upon the arbitrator’s evaluation of whether just cause existed. Simply put, there is absolutely no room under these procedures for an arbitrator to find just cause when an employee is terminated for engaging in protected conduct.

Third, for the same reasons, the ALJ errs again when the Order states “the statutory issues in this proceeding relating to Oh’s alleged protected concerted activities and the failure to bargain with her legal representative before terminating her are not before the arbitrator.” As demonstrated above, the plain language of the voluntarily undertaken procedures does not permit those issues to be divorced from the standard of just cause as defined in the procedures and to be excluded from the arbitration; the Policy compels the arbitrator to address the question of concerted activity and the alleged role it played in the termination in order to decide the case. In like fashion, the arbitrator would equally be precluded from finding just cause were he to conclude that the termination was carried out without fulfilling bargaining duties under the Act. The

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<sup>9</sup> The ACLU proposed that the arbitrator determine whether the ACLU it had “grounds for termination” while the Charging Party proposed a determination “based on ‘just cause’ to terminate.” The language of the procedures could not be clearer, however, and the mandates of the Act trump the differences in the precise language of the issues proposed by the parties. Regardless of the differences in precise wording of the proposed issue, under no circumstances could a termination for engaging in conduct protected by the Act be sustained.

statutory issues are unalterably before the arbitrator.

## Conclusion

Leaving the ALJ's Order unreversed would be a dangerous precedent. Refusing to defer to an arbitration policy with the extraordinary safeguards contained in the procedures at issue here would be inconsistent with the pre-eminent role played by arbitrators in advancing federal labor policy. A failure by the Board to intervene and reverse the ALJ's Order would force the ACLU to expend untold time and resources defending duplicative, parallel proceedings rather than pursuing its singular mission of protecting civil rights and civil liberties, while also consuming, perhaps for no purpose whatsoever, the scarce resources of the Board at a time of exploding caseloads<sup>10</sup>. Deferring to the ongoing arbitration proceedings, subject to post-arbitration review, would honor the Board's deferral policies and constitute a far wiser allocation of resources. As the Supreme Court observed in *Carey v. Westinghouse*, 375 U.S. 261, 272 (1964), recognizing the value of the "therapy of arbitration":

By allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent; and those conciliatory measures which Congress deemed vital to 'industrial peace' (*Textile Workers v. Lincoln Mills*, *supra*, 353 U.S. at 455, 77 S.Ct. 917) and which may be dispositive of the entire dispute, are encouraged.

For all of these reasons, the ACLU respectfully urges that the Special Appeal be granted, and the ALJ's Order overturned.

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<sup>10</sup> See *Unfair Labor Practices Charge Filings Up 16%, Union Petitions Remain Up in Fiscal Year 2023*, NLRB Office of Public Affairs (April 7, 2023) ("This increase of 3,778 cases [filed in Fiscal Year 2022] is the largest single-year increase since Fiscal Year 1976 and the largest percentage increase since Fiscal Year 1959. If the pace continues, Fiscal Year 2023 would have the second-largest percentage increase in NLRB filings since Fiscal Year 1959.")

Dated: August 10, 2023

Respectfully submitted,

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# Exhibit 1

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5

AMERICAN CIVIL LIBERTIES UNION, INC.

and

CASES 05-CA-300367  
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NONPROFIT PROFESSIONAL EMPLOYEES  
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(IFPTE) LOCAL 70 A/W INTERNATIONAL  
FEDERATION OF PROFESSIONAL & TECHNICAL  
ENGINEERS, AFL-CIO, CLC

**REPLY IN SUPPORT OF PRE-HEARING  
MOTION TO DEFER BOARD ACTION TO  
THE PENDING GRIEVANCE AND  
ARBITRATION PROCEEDINGS**

Respondent, the American Civil Liberties Union (“ACLU”), submits this  
Reply in Support of its Motion to Defer Board Action to the Pending Grievance and  
Arbitration Proceedings.

For all the bluster expressed by the General Counsel and the Charging  
Party over the fact that the parties have not yet negotiated a full collective bargaining  
agreement, they fail to cite a single case in which the Board declined to defer to a  
procedure such as ACLU Policy 527: a procedure that culminates in final and binding  
arbitration before a neutral arbitrator. As set forth in the ACLU’s motion, Board cases  
that have declined to defer to “unilaterally adopted” employer policies have no  
application here, as they involved policies fundamentally different than Policy 527. *E.g.*,  
*Pontiac Osteopathic*, 284 N.L.R.B. 442, 466 (1987)(resolution of disputes by an  
employer’s “internal review board” rather than a neutral arbiter, with no employee right



to independent counsel); *The American League of Professional Baseball Clubs*, 180 N.L.R.B. 190, 191 (1969) (“arbiter” not a neutral but was appointed solely by participating employers). In contrast, with its provision for a neutral, mutually selected arbitrator,<sup>1</sup> tasked with issuing a “final and binding” determination, Policy 527 is directly analogous to arbitration under a collective bargaining agreement and is equally deserving of deferral.

It is not surprising that the Board cases the General Counsel and Charging Party cite refer to deferral to arbitration “under a collective bargaining agreement” – not because the presence of a complete collective bargaining agreement is a legal “threshold” and pre-requisite to deferral, but because the right to arbitration normally only *exists* under a collective bargaining agreement. To be sure, it is unusual that an employer extends the right of neutral, final and binding arbitration to employees not covered by a collective bargaining agreement, but the fact that the ACLU chose to accord that extraordinary protection is no basis for treating an arbitration under Policy 527 differently than one pursuant to a collective bargaining agreement (particularly because the Charging Party has requested and agreed to arbitrate the issue of Ms. Oh’s termination under the Policy).

Further, while the Policy was *originally* adopted unilaterally by the ACLU, that ancient history is entirely irrelevant at this juncture. *In the instant case* the

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<sup>1</sup> The Charging Party makes the ludicrous assertion that under the Policy the ACLU “controls” the selection of the arbitrator. And yet, its own submission demonstrates that the arbitrator was selected “by mutual agreement” – precisely as the Policy itself provides. Charging Party Exhibit 1 shows that the ACLU *proposed* Arbitrator Symonette, to which counsel for the Charging Party replied “Symonette is fine.”

Charging Party has embraced and elected to proceed under Policy 527, through two sessions of hearings so far, without objection of any kind. That election – confirmed when the Charging Party’s counsel stated in his opening that “My name is Rick Bialczak and I represent the grievant *and the union* in this process (Exhibit 1) -- is binding upon it no less than if incorporated in a collective bargaining agreement. After all, nothing in labor law<sup>2</sup> adopts the exceedingly wooden approach suggested by the General Counsel that only a magical document entitled “Collective Bargaining Agreement” can constitute an obligation binding on an employer and a union. In a variety of contexts, the opposite is true. *See, e.g., Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962) (Section 301 jurisdiction over “suits for *violation* of contracts between an employer and a labor organization” is not limited to collective bargaining agreements but permits enforcement of a strike settlement agreement); *South Bay Management v. Unite Here, Local 26*, 587 F. 3d 35 (1<sup>st</sup> Cir. 2009) (enforcing obligation under a neutrality and recognition agreement to arbitrate the terms of a first collective bargaining agreement); *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union v. Trimas Corporation*, 531 F.3d 531 (7<sup>th</sup> Cir. 2008) (compelling arbitration under a neutrality agreement over coverage of the agreement); *Time Warner Cable of New York City LLC v. International Brotherhood of Electrical Works, AFL-CIO, Local Union No. 3*, 170 F. Supp.3d 392 (E.D.N.Y. 2016)

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<sup>2</sup> The teaching of *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) and the Steelworkers Trilogy (*United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960)), relating to federal labor policy strongly promoting arbitration under Section 301, has been the basis for the Board’s policies of deferral articulated in *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955) and *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971). Nowhere has this policy been more emphatically accepted by the Board than in *Collyer*, which seeks to integrate the principles of *Spielberg* and its progeny into circumstances before arbitration is invoked or completed.

(Union required to arbitrate dispute regarding work stoppage under limited separate arbitration agreement even if the parties' collective bargaining agreement governing such disputes was not in effect), *aff'd*, 684 Fed.Appx. 68 (2d Cir. 2017) (summary order); *Verizon Information Systems*, 335 NLRB 558 (2001) (neutrality and card check agreement held to bar representation petition). As the Board has acknowledged, “public policy supporting labor-management contracts extends beyond traditional collective-bargaining agreements.” *Lexington House*, 328 NLRB 894, 897 (1999), and that public policy supports giving full play to the Union’s invocation of the remedy of final and binding arbitration under Policy 527.

The General Counsel and the Charging Party also make much of the fact that the ACLU and the Charging Party have not agreed on the precise wording of the issue to be determined by the Arbitrator. This is another red herring. Policy 527 provides in pertinent part that an employee may be terminated for “just cause,” which it defines as “misconduct or inadequate job performance based upon a rule or standard that was known or which should have been known by the employee.” The Policy also provides that “The sole issue in the arbitration shall be whether grounds for termination under this policy exist.” While the Charging Party has resisted stating the issue in accordance with the specific mandate of the Policy, insisting that traditional just cause language be the stipulated issue, there is no substantive disagreement: “grounds for termination” exist when there is “just cause” as the Policy defines it. This difference in the parties’ proposed issues provides no reason for denying deferral.

Simply put, Policy 527 itself, and both versions of the proposed issue in arbitration, incorporate the concept of “just cause,” which compels application of the

Act's protections and prohibitions, especially under the circumstances of this case. Under either version of the proposed issue, Arbitrator Symonette undeniably has the authority to look to the precedent under Section 8(a)(1) of the Act in deciding whether Ms. Oh's employment was terminated in accordance with Policy 527 and the "just cause" construct it contains. *See Steelworkers v. Enterprise Car*, 363 U.S. 593, 597 (1960) (an arbitrator "may, of course, look for guidance from many sources" including the law, in framing a decision). Indeed, the Charging Party has already invoked the protections of the Act in support of its position in the arbitration, when its counsel argued in the opening that "Ms. Oh was terminated in May 2022 for making statements and complaints about working conditions within her department at the ACLU" (Exhibit 1) and "Certainly under labor standards it won't constitute just cause. In fact, it would be protected activity." (Exhibit 2). Thus, Arbitrator Symonette not only has the authority but the present circumstances actually mandate that he consider the statutory protections against discharges triggered by concerted protest of working conditions and other prohibitions contained in the Act; he surely is empowered to decide, and can be expected to decide (as the Charging Party has invited him to do), whether retaliation prohibited by Section 8(a)(1) motivated the discharge and, if so, that the termination was inconsistent with the just cause standard of Policy 527. In short, in the arbitration, the Charging Party contends that public law under the Act is quite relevant to determining whether the termination was consistent with Policy 527; the ACLU agrees, making this the ideal case for deferral under either *United Parcel Service*, 369 NLRB No. 1 (2019) or *Babcock & Wilcox*, 361 NLRB 1127 (2014).

To be sure, "[i]n order to obtain deference under this statute, arbitrators

should consider-and be competent to consider the unfair labor practice controversy which would otherwise be adjudicated by this Agency.” *Mobil Oil Exploration & Producing*, 325 NLRB 176, 180 (concurring opinion of Chairman Gould). As a former NLRB attorney and now President-Elect of the National Academy of Arbitrators, Arbitrator Symonette combines long and varied experience as an arbitrator with a high degree of familiarity with the principles of the Act. As such, he is not merely competent to but is ideally suited to evaluate the termination in light of the legal standards under the Act, and he has already been asked by the Charging Party to do exactly that. Such an evaluation will most certainly justify deferral under either *United Parcel Service*, 369 NLRB No. 1 (2019) or *Babcock & Wilcox*, 361 NLRB 1127 (2014).<sup>3</sup>

### **Conclusion**

For the foregoing reasons, in order to give full play to the policy of the Act to encourage voluntary means of settlement of disputes and to avoid an egregious and unnecessary waste of the resources of the parties and the Board through duplicative, parallel proceedings, the ACLU’s motion to defer processing of this case to the ongoing arbitration proceeding should be granted.

Dated: August 7, 2023

Respectfully submitted,

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By: Kenneth A. Margolis

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<sup>3</sup> It also is undisputed that the arbitration proceeding does not encompass within its four corners the distinctly secondary issues of the alleged denial of a transfer and an alleged refusal to bargain. But once again, the General Counsel cites no authority that would limit deferral to situations where every issue in the case is subject to arbitration. Where, as here, arbitration will indeed resolve what is manifestly the most significant aspect of the dispute, making it exceedingly likely that the remaining narrow issues will be resolved (or, if not, swiftly and inexpensively decided by the Board) deferral is appropriate.

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## **EXHIBIT 1**

1       My name is Rick Bialczak and I represent the  
2 grievant and the union in this process. Ms. Oh was  
3 terminated in May 2022 for making statements and  
4 complaints about working conditions within her  
5 department at the ACLU. They do not constitute  
6 harassment, let alone racial harassment and cannot  
7 serve as just cause for termination.

8       I would note, and commend Ken for spending 40  
9 minutes explaining why three discreet comments over a  
10 multi-month period of time constitutes serious harm to  
11 the ACLU members, black employees at the ACLU. What he  
12 fails to mention is that in late 2019 Ms. Oh filed a  
13 formal complaint with human resources at the ACLU  
14 alleging that the director of her department, of her  
15 department, Ronnie Newman fostered a bullying  
16 atmosphere and discriminated on the basis of sex.  
17 Human resources investigated it and ultimately agreed  
18 in early 2020 that the atmosphere in the department was  
19 adversarial, harsh and non-inclusive and that the  
20 problem was widespread across that department. Indeed  
21 human resources concluded that the problem was so  
22 widespread that it couldn't be concluded, that it was  
23 targeted specifically at Ms. Oh. And, thus, declined  
24 to find that there was discrimination against Ms. Oh in  
25 particular. But they promised -- this is in January of



## **EXHIBIT 2**

1 heart this case is about the fact that Ms. Oh was  
2 complaining about her treatment at the ACLU for years.  
3 Those complaints were validated when the ACLU finally  
4 removed Mr. Newman from his position as head of Ms.  
5 Oh's department.

6 Now, shortly within months after removing Mr.  
7 Newman, Ms. Oh, who, yes, had been complaining about  
8 Mr. Newman's behavior for years, was terminated. Why?  
9 The employer acknowledges it's because of her  
10 statements, complaints about your managers, stating  
11 that you're afraid to talk to your manager about  
12 workplace issues simply cannot be the basis of a  
13 termination. Certainly under labor standards it won't  
14 constitute just cause. In fact, it would be protected  
15 activity. But here we acknowledge there was no  
16 contracted issue. The ACLU's policy adopts just cause  
17 as the standard for termination.

18 Ms. Oh complained about her supervision at the  
19 ACLU. Many of those complaints were substantiated and  
20 then later the ACLU sought to terminate her. This  
21 cannot constitute just cause for termination. We ask  
22 the arbitrator to find that so. Thank you.

23 ALAN SYMONETTE/ARBITRATOR: All right. Thank you.  
24 All right. Is the employer ready to present evidence?

25 MR. MARGOLIS: Yes, but I -- maybe we could cease

## **CERTIFICATE OF SERVICE**

Kenneth A. Margolis, an attorney duly admitted to practice before the courts of the State of New York, affirms that on August 7, 2023 he caused a copy of the foregoing Reply to be served by e-mail upon the following:

Katherine Leung  
Counsel for the General Counsel  
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Rick Bialczak  
Counsel for the Charging Party  
[rickbial@gmail.com](mailto:rickbial@gmail.com)

*Kenneth A. Margolis*  
Kenneth A. Margolis

## **CERTIFICATE OF SERVICE**

Kenneth A. Margolis, an attorney duly admitted to practice before the courts of the State of New York, affirms that on August 10, 2023 he caused a copy of the foregoing Request for Special Permission to Appeal to be served by e-mail upon the following:

Michael A. Rosas  
Administrative Law Judge  
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*Kenneth A. Margolis*  
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