

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 19-03

December 28, 2018

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

FROM: Peter Robb, General Counsel /s/

SUBJECT: Deferral under *Dubo Manufacturing Company*

Introduction.

In *Babcock & Wilcox Construction Co.* (“*Babcock*”), the Board modified its post-arbitral deferral standard for Section 8(a)(3) and (1) cases, and extended this new standard to pre-arbitral deferrals under *Collyer Insulated Wire*¹ and *United Technologies Corp.*² In so doing, the Board stated that in future cases it would no longer defer to the arbitral process unless the parties had expressly authorized an arbitrator to decide the unfair labor practice issue, either in the collective-bargaining agreement or by agreement of the parties in a particular case.³ Shortly after issuance of *Babcock*, Memorandum GC 15-02 instructed Regions on how to implement the new deferral standards in all cases raising a deferral issue.⁴

The decision in *Babcock* did not mention or discuss deferral under *Dubo Manufacturing Corporation* (“*Dubo*”),⁵ -- i.e., where one or more of the parties has initiated the grievance-arbitration machinery before or during the course of filing an unfair labor practice charge on the underlying issue.⁶ In addition, in the section of the *Babcock*

¹ 192 NLRB 837, 841-42 (1971)(creating a pre-arbitral deferral standard in a Section 8(a)(5) case).

² 268 NLRB 557, 558 (1984) (extending the *Collyer* pre-arbitral deferral principles to Section 8(a)(1) cases and returning to the *National Radio Co.* standard extending these same principles to Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) claims).

³ 361 NLRB 1127, 1128, 1138-39 (2014) (modifying the post-arbitral deferral standard for Section 8(a)(1) and (3) cases to require that the party urging deferral demonstrate 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 arbitral award).

⁴ See, Memorandum GC 15-02, *Guideline Memorandum Concerning Deferral to Arbitral Awards, the Arbitral Process, and Grievance Settlements in Section 8(a)(1) and (3) cases*, dated Feb. 10, 2015.

⁵ 142 NLRB 431 (1963).

⁶ In the *Dubo* case, the union had successfully sought a district court order compelling arbitration of the grievances.; Memorandum GC 79-36, *Procedures for Application of the Dubo Policy to Pending Charges*, dated May 14, 1979.

decision discussing pre-arbitral deferral standards, the Board declined suggestions to dictate to the General Counsel the procedures and processes that should be pursued before deciding whether to defer an unfair labor practice charge to arbitration. The Board majority wrote:

The General Counsel has unreviewable discretion as to whether or not to issue complaints in unfair labor practice cases; it follows that the General Counsel's choice of procedures for processing unfair labor practice charges, including whether and under what circumstances to defer to arbitration before issuing complaints, are matters left to the General Counsel's discretion.

361 NLRB at 1139⁷.

Notwithstanding the Board's silence on extending its new standard to *Dubo* deferrals, and its explicit statements concerning General Counsel discretion in deferral matters, Memorandum GC 15-02 nevertheless found that the Board had extended *Babcock* to Section 8(a)(3) and (1) cases where *Dubo* deferral is raised.⁸ The current General Counsel believes that Memorandum GC 15-02 was incorrect in that regard and that, by its own terms, the *Babcock* decision does not apply to *Dubo* deferrals.⁹ Because *Babcock* did not modify *Dubo* deferral, which is supported by different rationales than those supporting *Collyer* deferral, the General Counsel wishes to reaffirm the role of *Dubo* in the administration of the Act, and to clarify the circumstances and procedures applicable to *Dubo* deferrals. Accordingly, contrary to the instruction set forth in Memorandum GC 15-02, Regions should continue to defer under *Dubo* Section 8(a)(1) and (3) cases meeting the standards for deferral set forth herein, and should otherwise consider *Dubo* deferral in any Section 8(a)(1), (3) and (5) and Section 8(b)1(A) and (3) case where the allegations of the charge fall within its scope and the Charging Party or individual grievant has previously filed a grievance in a contractual process leading to binding arbitration.

Dubo Deferral Policy

Memorandum GC 79-36 described the *Dubo* policy in the following language: "Simply stated, the *Dubo* policy is to defer the further processing of an unfair labor practice case, where the matter in dispute in that case is being processed through the grievance-arbitration machinery and there is a reasonable chance that the use of that machinery will resolve the dispute or set it at rest." The policy was described in similar language in Memorandum GC 15-02, issued in February 2015.

⁷ Citing *BCI Coca-Cola*, 361 NLRB 839, 843 fn. 11 (2014).

⁸ Memorandum GC 15-02, *Guideline Memorandum Concerning Deferral to Arbitral Awards, the Arbitral Process, and Grievance Settlements in Section 8(a)(1) and (3) cases*, dated Feb. 10, 2015, at 11 n. 47.

⁹ The current General Counsel also believes that *Babcock* was wrongly decided and should be reexamined by the Board.

The policy reasons for deferral under *Dubo* remain important to the mission of the Board. As prescribed by the Act, *Dubo* deferral encourages stability in labor relations and resolution of work disputes by allowing for the private disposition of claims through procedures adopted by the parties.¹⁰ It also recognizes the Board's long disfavor of allowing a party to force litigation in multiple forums, i.e., permitting it "two bites of the apple."¹¹ Further, by determining in the early stages of an investigation whether the allegations of the charge and the evidence submitted by the Charging Party in support of the charge establish an arguable violation of the Act, the Region will be in a position to render a prompt initial determination to defer an arguably meritorious charge where the Charging Party has already initiated the grievance-arbitration machinery and the Region believes that there is a reasonable chance that that machinery will resolve the dispute or set it at rest. In circumstances where the Charging Party elects to withdraw its grievance, the Region will consider whether a *Collyer* deferral would be appropriate, notwithstanding the Charging Party's preference for a Board determination. If the Region determines that a *Collyer* deferral would be inappropriate, it will complete a full investigation of the charge.

Further, where prospective deferral under *Collyer* might be deemed inappropriate, such as when parties do not have a long collective-bargaining history, the regional office may promptly defer under *Dubo* principles when the Charging Party or an individual has initiated and elects to process a grievance that the Region believes to have a reasonable chance of resolving the underlying dispute or setting it at rest.

No Right of Appeal

Because, under *Dubo*, the Charging Party will have voluntarily decided to pursue its case through the grievance procedure, the Charging Party is not entitled to appeal a deferral decision to the General Counsel.¹² The absence of appeal rights under *Dubo* is also consistent with the more preliminary nature of investigations and deferral decisions. *Dubo* deferral requires only that the charge allegations be facially proper and timely, and that the Region conclude on the initial evidence that "there is a reasonable chance that use of the [grievance] machinery will resolve the dispute or set it at rest." Memorandum GC 79-36 Procedures for Application of the *Dubo* Policy to Pending Charges, dated May 14, 1979, at p.1. Thus, the Region will usually make a *Dubo*

¹⁰ See generally, 29 U.S.C. §173(d) ("[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").

¹¹ See, e.g., *Electronic Reproduction Service Co.*, 213 NLRB 758, 761 (1974) (adopting a new post-arbitral deferral standard to prevent a party from pursuing a just cause determination in arbitration but holding back evidence regarding alleged discrimination in order to pursue a second litigation of the matter before the Board), *overruled in Suburban Motor Freight, Inc.*, 247 NLRB 146, 146-47 (1980); *The Timken Roller Bearing Company*, 70 NLRB 500, 501 (1946) (dismissing part of complaint where it was "evident that the Union concurrently utilized two forums" and the issue had already resulted in an arbitration award), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947).

¹² See *id.* at 38-41; Memorandum GC 79-36 at 1-3.

determination early on and without the need for significant investigation beyond the basic facts of the dispute and the related grievance.

CASEHANDLING INSTRUCTIONS:

In Section 8(a)(1), (3) and (5), or Section 8(b)(1)(A) or (3) cases in which a Charging Party or individual has filed a grievance challenging an action alleged also to violate the Act, the Region should promptly make a determination as to whether the case is deferrable under *Dubo*, applying the general concepts set forth in Memorandum GC 79-36 Procedures for Application of the *Dubo* Policy to Pending Charges, dated May 14, 1979, at pp. 2-4; and Memorandum GC 81-39, Deferral of Charges Under *Dubo Manufacturing Company*, 142 NLRB 431, p. 1, utilizing the procedural steps set forth below:

1) On the filing of an unfair labor practice charge alleging a violation of Section 8(a)(1),(3) and (5), or Section 8(b)(1)(A) or (3) of the Act, the Region should promptly determine whether the issue described in the charge is also the subject of a grievance filed pursuant to a contractual grievance-arbitration procedure leading to binding arbitration;

2) If, prior to filing of the charge or regional determination, a Charging Party or individual has filed a grievance over the issue described in the charge, the Region should ascertain whether the charge and any supporting statements or evidence indicate that the allegations set forth in the charge sufficiently overlap those set forth in the grievance such that there is a reasonable possibility that resolution of the grievance might resolve or set to rest the underlying controversy in a manner consistent with later review, anticipating application of the standards set forth in *Spielberg Manufacturing Co./Olin Corp.*, or *Alpha Beta Co.*;

3) If the Region determines after preliminary or additional investigation that deferral is appropriate, it should fully apprise the Charging Party and the Charged Party of its determination under *Dubo*, the standards that would apply to review of any award or settlement deriving from the grievance-arbitration process, and the Region's intention to seek an immediate decision from the Charging Party as to whether it will withdraw its grievance, and any objection to such a withdrawal by the Charged Party. For this purpose, the Region should utilize the sample letter attached hereto as Exhibit 1;

4) Upon withdrawal of the Charging Party's grievance in circumstances where the Charged Party objects to the withdrawal and is willing to waive procedural defenses and arbitrate the underlying issue, the parties should be informed that the charge will not then be deferred and that the Region retains the right, upon further investigation, to apply the Board's *Collyer* principles to require that the parties arbitrate the issues on appropriate waiver of procedural defenses by the Charged Party and agreement to arbitrate;

5) Where the Charging Party elects to remain in the grievance-arbitration procedure, investigation of the unfair labor practice charge should be deferred under *Dubo*. Where a Charging Party declines to pursue the grievance, the Region should proceed as in paragraph 4. In circumstances where a Charging Party declines to process a grievance after a *Dubo* election but the Region later determines to defer pursuant to a directive to the parties under *Collyer*, the Region should defer or dismiss the charge according to existing procedures.

6) Regions should continue to apply *Spielberg Manufacturing Co.*¹³ and *Olin Corp.*,¹⁴ and not *Babcock*, to arbitral awards in cases deferred under *Dubo*. In this regard, where the Charging Party has voluntarily chosen to have the statutory issue decided through grievance and arbitration rather than through Board processes, it has effectively authorized the arbitrator to decide the unfair labor practice claim and it is appropriate to defer to the award unless it is “palpably wrong.” Indeed, applying *Babcock’s* new requirements regarding post-arbitral deferral could annul parties’ chosen method for resolution of the dispute. For the same reasons, Regions should continue to apply *Alpha Beta Co.*,¹⁵ and not *Babcock*, to grievance settlements in cases deferred under *Dubo*.

Any questions regarding the implementation of this memorandum should be directed to your AGC/DAGC in Operations.

P.B.R

Attachment

cc: NLRBU
Release to the Public

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¹³ 112 NLRB 1080, 1082 (1955).

¹⁴ 268 NLRB 573, 574 (1984).

¹⁵ 273 NLRB 1546, 1547 (1985), *enforced sub nom. Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987).

Attachment

Dubo Deferral Letter

[Charging Party's and Charged Party's Attorneys – otherwise list
The party if not represented by an attorney]

Re: [Case Name]
[Case Number]

Appropriate Salutation:

The Region has reviewed the Charge filed against [Charged Party], alleging that it violated the National Labor Relations Act. As explained below, I have determined that further proceedings on the Charge should be deferred in accordance with the Board's policy under *Dubo Manufacturing Company*, 142 NLRB 431 (1963).

Deferral Policy: The Board's *Dubo* deferral policy provides that this Agency withhold making a final determination on certain unfair labor practice charges when a grievance has been filed by the Charging Party under the grievance/arbitration provisions of a relevant collective bargaining agreement, and there is a reasonable chance that use of the grievance/arbitration machinery will resolve or set at rest the dispute underlying the charge. This policy is based in part on encouraging stability in labor relations by deferring to the parties' chosen means of dispute resolution, as well as avoiding duplicative litigation in multiple forums. Therefore, if the grievance continues to be processed through the grievance/arbitration machinery, the Regional Office will defer the charge.

Decision to Defer: Based on the Region's investigation of this matter, I am deferring further proceedings on the charge or portion of the charge that alleges [Describe allegation(s) being deferred]. I am making this determination based on my belief that there is sufficient commonality between the facts and issues underlying the allegations of the charge and the facts and issues underlying the allegations of the grievance that there is a reasonable chance that the parties' resolution of the grievance through the grievance/arbitration machinery will resolve or set at rest the dispute underlying the charge.

No Right of Appeal: Because the *Dubo* policy is based on the Charging Party's having filed and voluntarily processed a grievance under the parties' contractual dispute resolution process, there is no right to appeal the Region's deferral decision to the Office of the General Counsel.

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

Charging Party's Conduct During Dubo Deferral: Because *Dubo* deferral is dependent on the Charging Party's processing of a grievance through the grievance/arbitration procedure, the Region will revoke deferral and resume processing of the charge if the grievance is withdrawn by the Charging Party or a third party in control of the grievance/arbitration process, without an intervening settlement or other resolution of the issues on which deferral was based. However, in the event that a Charging Party elects to withdraw a grievance in lieu

of *Dubo* deferral, and the Charged Party objects on the ground that deferral would be appropriate under the Board's separate, nonvoluntary deferral policy promulgated pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984), the Region will determine whether deferral under *Collyer* is appropriate and, if so, issue a separate notification to the parties addressing their obligations and rights under that deferral policy.

Charged Party's Conduct During Dubo Deferral: If the Charged Party prevents or impedes hearing and resolution of the grievance, raises a timeliness defense, or otherwise refuses to address the merits of the grievance in the grievance/arbitration process, I will revoke deferral and resume processing of the charge.

Inquiries and Requests for Further Processing: 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 whether continued deferral is appropriate. However, I will accept and consider at any time requests and supporting evidence submitted by any party to this matter for dismissal of the charge, for continued deferral of the charge or for 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 award is sent to the parties.

Review of Arbitrator's Award: If the grievance is arbitrated, the Charging Party may request that this office review the arbitrator's award. The request must be in writing and addressed to me. The request should discuss 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 clearly repugnant to the Act. Further guidance on the nature of this review is provided in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984).

Very truly yours,

Regional Director

Cc: Charging Party (unless unrepresented)
Non-Attorney Representative of any Party
Charged Party (unless addressed above because not represented)
Union Representative (unless Union is the Charged Party)
General Counsel, Division of Operations Management