THE CONTINUING CONTROVERSY OVER LABOR BOARD DEFERRAL TO ARBITRATION — AN ALTERNATIVE APPROACH*

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In the interest of avoiding the disruptions of commerce associated with labor disputes, a significant portion of the National Labor Relations Act (NLRA) protects the statutory rights of private sector employees to choose the labor organizations that represent them in collective bargaining with their employers.[1] Section 8(a) of the

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1. National Labor Relations Act (NLRA), 29 U.S.C. § 151 (1988), which states:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees. . . .

NLRA[2] makes these protections operational by prohibiting a number of employer practices, including the refusal to bargain with properly designated unions.[3] Although the NLRA grants the National Labor Relations Board (NLRB) authority to protect these rights by administering the NLRA's unfair labor practice machinery, the NLRA has also been interpreted as placing a premium on the *voluntary* resolution of labor disputes by the parties themselves.[4] Over the years, the federal courts and the NLRB have recognized grievance arbitration as the preeminent vehicle for voluntary dispute resolution, and they have declared a national policy favoring arbitration for this procedure.[5]

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.*

Id. (emphasis added).

2. NLRA, 29 U.S.C. § 158(a) (1989), which provides:

> It shall be an unfair labor practice for an employer
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [providing the right of employees to self-organize and bargain collectively];
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> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ;
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> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;
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> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;
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> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title [providing for employee representatives and their elections].

Id.

3. *Id*. § 158(a)(5).

4. *Id*. §§ 151, 153. Section 151 states the purpose of the NLRA as encouraging the free flow of commerce by protecting collective employee bargaining power; section 153 of the NLRA provides for the creation and administration of the National Labor Relations Board's power.

5. United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). These cases are collectively known as the *Steelworkers Trilogy*. The United States Supreme Court established that contractually agreed procedures for grievance arbitration will be upheld in federal courts as part of a national policy favoring arbitration as the method for voluntary dispute resolution.

The policies of protection of statutory rights by the NLRB and resolution of labor disputes by arbitration serve the ultimate statutory objective of avoiding labor disputes that may disrupt commerce.[6] However, instances arise when these two policies potentially clash, raising questions concerning the NLRB's primary jurisdiction.[7] In unfair labor practice cases involving related questions of labor contract interpretation, who should proceed first, the agency or the arbitrator? And if the arbitrator proceeds first, what weight, if any, should the agency accord the arbitrator's award when deciding the unfair labor practice charges? These questions are likewise present and equally vexatious in the public sector, where grievance arbitration plays at least as prominent a role in the federal and state collective bargaining schemes. For example, under the Illinois Educational Labor Relations Act (IELRA), parties to collective bargaining agreements are statutorily mandated to include in their contracts grievance provisions culminating in final, binding arbitration.[8]

This Article concentrates on a labor law controversy persisting for over twenty-five years: the extent to which a labor relations agency should defer to an arbitrator's decision when the agency decides related statutory issues raised in an unfair labor practice proceeding. The NLRB has vacillated between two different approaches to this problem, neither of which addresses whether the arbitrator's factual findings and contractual interpretations actually enable the NLRB to resolve the unfair labor practice. Rather, under the NLRB's competing tests, the arbitration award is deemed to "resolve" the statutory issues if: (1) the statutory issue was both presented to and considered by the arbitrator,[9] or (2) the contractual and statutory issues were factually parallel and the arbitrator was generally presented with the facts relevant to resolving the statu-

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6. NLRA, 29 U.S.C. § 151 (1989).

7. GERALD E. BERENDT, COLLECTIVE BARGAINING 289–300 (1984) (discussing tension between labor board's objectives of encouraging arbitration and upholding its statutory jurisdiction).

8. ILL. ANN. STAT. ch. 115, para. 5/10(c) (Smith-Hurd 1993).

9. Suburban Motor Freight, Inc., 247 N.L.R.B. 146 (1980), *overruled by* Altoona Hosp., 270 N.L.R.B. 1179 (1984). "In specific terms, we will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator." *Suburban Motor Freight*, 247 N.L.R.B. at 146–47.

tory issue.[10]

This Article proposes an approach which differs from both of the doctrines alternatively employed by the NLRB. The alternative policy proposed was recently developed and employed by the Illinois Educational Labor Relations Board (IELRB) in its 1992 *University of Illinois* decision.[11] Under the IELRB approach, the administrative agency defers to the arbitrator's findings of fact and interpretations of the contract, but the agency independently decides the statutory questions before it.[12]

This Article maintains that the IELRB approach better advances the goals of a deferral policy: to fulfill the agency's dual statutory mandates to protect statutory rights and resolve disputes while making the most efficient use of the agency's limited financial resources.[13] Moreover, under the IELRB approach, an agency can meet its statutory obligation to interpret and apply the statute without ceding that responsibility to an arbitrator. Significantly, the IELRB test is more consistent with the national policy favoring voluntary resolution of labor disputes through arbitration.[14]

This Article initially sets forth the types of issues that arise when employer conduct allegedly violates both a collective bargaining agreement and the applicable labor relations act. It then reviews and analyzes the NLRB's attempts to formulate a doctrine governing deferral to an arbitration award. Next, this Article discusses and explains the IELRB's formulation. It then discusses the practical and policy advantages of the IELRB's approach. Finally, this Article anticipates potential issues associated with the application of the IELRB approach in cases involving agency determination of mandatory subjects of bargaining and withheld evidence.

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10. Olin Corp., 268 N.L.R.B. 573 (1984). The NLRB stated:

> Accordingly, we adopt the following standard for deferral to arbitration awards. We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.

Id. at 574.

11. Board of Trustees of the Univ. of Ill. (Chicago Campus), 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1035, at 155 (IELRB 1992); *see infra* pp. 187–97.

12. *University of Ill.*, 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1035, at 157.

13. See *supra* notes 1–2 for the policy and text of the NLRA.

14. See *supra* notes 1 & 4 for the NLRA's policy statement.

I. THE OVERLAP OF CONTRACTUAL AND STATUTORY CLAIMS

The question of labor agency deferral to an arbitrator's award arises when a labor dispute raises issues grievable under the parties' collective bargaining agreement and also actionable under an applicable labor relations statute.[15] An allegation of an unlawful unilateral change in terms and conditions of employment provides a commonly encountered example of such a situation.[16] Both the NLRA and the IELRA have been interpreted to prohibit employers from taking unilateral action on terms and conditions of employment over which bargaining is required, unless the employer has first bargained to impasse or agreement with the employees' exclusive bargaining representative.[17] Such allegations often turn on the scope of the parties' contractual obligations or past practices on the subject at issue.[18]

Labor boards confront the interplay between statutory and contractual procedures in two situations.[19] First, unfair labor practice charges may have been filed even though the parties have yet to utilize the contractual grievance and arbitration procedures.[20] Second, the parties may have proceeded to an arbitration award and the prevailing party may seek to bar further litigation of the unfair labor practice charge.[21]

The IELRB has held that "in those cases alleging conduct which may constitute both contract breach and statutory violations, we . . . [will] refer the matter to arbitration, but retain jurisdiction over the case to insure that any statutory rights at stake are protected."[22]

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15. *See* BERENDT, *supra* note 7, at 289 (discussing concurrence of jurisdiction between labor boards and arbitrators and their appropriate relationships to contracting parties).

16. Collyer Insulated Wire, 192 N.L.R.B. 837 (1971).

17. NLRB v. Katz, 369 U.S. 736, 743–47 (1962) (concluding that employer violated § 8(a)(1) and (5) of NLRA when employer changed wage increase schedules, merit increases, and sick leave provisions without first reaching impasse in collective bargaining); Vienna Sch. Dist. No. 55 v. IELRB, 515 N.E.2d 476, 478 (Ill. App. Ct. 1987).

18. *Katz*, 369 U.S. at 744–47 (analyzing contractual agreement between parties).

19. *See* BERENDT, *supra* note 7, at 290–300 (discussing occasions and treatments of arbitration by labor boards).

20. *Id.*

21. *See* Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955).

22. West Chicago Sch. Dist. No. 33, 5 Pub. Empl. Rep. Ill. (LRP) ¶ 1091, at 214,

When a case is referred to the grievance and arbitration process, jurisdiction is retained "for the purpose of entertaining appropriate and timely motions that the dispute has not been promptly submitted to arbitration, *that the dispute has not been resolved* or that the grievance or arbitration procedures have not been fair and regular or have reached a result repugnant to the Act."[23] The IELRB uses the term "referral" to describe suspension of the statutory process pending the outcome of grievance and arbitration proceedings.[24] "Deferral" is reserved for post-award review of the statutory issues.[25] These processes are also often referred to as "pre-arbitration deferral" and "post-arbitration deferral," respectively.[26]

Such concepts are not unique to the IELRB.[27] The NLRB has utilized referral and deferral doctrines for a number of years.[28] The Illinois State Labor Relations Board and Local Labor Relations Board have similar policies under the Public Labor Relations Act in Illinois.[29] Research and a survey conducted by the Authors of other federal, state, and local labor relations agencies disclose that nearly all have some referral and deferral policy. Most agencies follow one of the two NLRB approaches without extensive discussion.[30]

The policies employed by the NLRB and other labor agencies have similar rationales. In *West Chicago School District No. 33*, the IELRB, relying on a prior NLRB decision,[31] identified two important objectives of a referral and deferral policy.[32] Such a policy pro

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220 (IELRB 1989), *aff'd*, 578 N.E.2d 232 (Ill. App. Ct.), *appeal denied*, 584 N.E.2d 141 (Ill. 1991). The referral issue was not the subject of the appeal in that case.

23. *Id*. at 221.

24. *See id*. at 220 n.16.

25. *Id*. at 221.

26. *Id*.

27. *See* Charles B. Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. 571, 607, 616 (1990).

28. *Id*.

29. Laborers Local 1092 v. City of Chicago, 563 N.E.2d 1080 (Ill. App. Ct. 1990) (holding local labor relations board deferral to arbitration award invalid when local board changed standard for deferral after award issued); City of Mount Vernon, 4 Pub. Empl. Rep. Ill. (LRP) ¶ 2006, at 45, 46 (ISLRB 1988) (discussing referral issue); Chicago Transit Auth., 1 Pub. Empl. Rep. Ill. (LRP) ¶ 3004, at 17, 18–19 (ILLRB 1985) (discussing referral issue in light of policies).

30. The results of this survey will be included in a subsequent article building upon this one.

31. Collyer Insulated Wire, 192 N.L.R.B. 837 (1971).

32. West Chicago Sch. Dist. No. 33, 5 Pub. Empl. Rep. Ill. (LRP) ¶ 1091, at 214, 221 (IELRB 1989), *aff'd*, 578 N.E.2d 232 (Ill. App. Ct.), *appeal denied*, 584 N.E.2d 141

tects statutory rights by insuring that the IELRB's processes remain available to adjudicate statutory issues not "resolved" by the arbitration proceeding.[33] In addition, a referral policy

> accommodate[s] the public policy favoring voluntary settlement of labor disputes through the arbitral process. . . . "The long and successful functioning of grievance and arbitration procedures suggests to us that in the overwhelming majority of cases, the utilization of such means will resolve the underlying dispute and make it unnecessary for either party to follow the more formal and sometimes lengthy, combination of administrative and judicial litigation provided for under our statute. At the same time, by our reservation of jurisdiction . . . we guarantee that there will be no sacrifice of statutory rights if the parties' own processes fail to function in a manner consistent with the dictates of our law."[34]

Other theoretical justifications for these policies have been articulated. Judge Harry Edwards of the Circuit Court of Appeals for the District of Columbia has posited that referral and deferral are actually the product of the exclusive bargaining representative's decision to "waive" the statutory rights at issue in favor of resolving the dispute under the grievance and arbitration procedure.[35] That view recently won judicial approval in a decision authored by Judge Edwards.[36]

(Ill. 1991).

33. *Id*.

34. *Id*. (quoting *Collyer Insulated Wire*, 192 N.L.R.B. at 837).

35. Harry T. Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L.J. 23 (1985). Judge Edwards has stated:

> I believe that when the parties negotiate a collective bargaining agreement and stipulate that they will arbitrate disputes arising under it, they have waived many of their statutory rights under the NLRA. The parties' agreement, in essence, supplants the statute as the source of many employee rights in the context of collective bargaining.

Id. at 28.

36. Plumbers & Pipefitters Local Union No. 520 v. NLRB, 955 F.2d 744 (D.C. Cir.), *cert. denied*, 113 S. Ct. 61 (1992) (holding that the NLRB's policy of deferring to pre-arbitration settlement was a permissible interpretation of the NLRA). Judge Edwards stated in *Plumbers & Pipefitters*:

> Pre-arbitration grievance settlements . . . represent a consensual resolution of labor-management disputes through the collective bargaining process. By recognizing the validity and finality of settlements, the Board promotes the integrity of the collective bargaining process, thereby effectuating primary goals of the

Referral and deferral policies have presented a number of thorny and contentious issues. The NLRB currently allows referral in cases involving alleged discrimination for union activities under § 8(a)(3) of the NLRA.[37] The District of Columbia Circuit Court approved this rule in *Hammontree v. NLRB*.[38] However, Chief Judge Mikva issued a blistering dissent, arguing that the NLRB should not refer charges alleging discriminatory violations of individual employee rights, as opposed to charges alleging violations of collective rights due to unilateral changes in terms and conditions of employment.[39]

Similarly, Professor Charles Craver has argued that "[i]f grievance-arbitration procedures are viewed as a continuation of the collective bargaining process, it becomes apparent that [referral] is appropriate in refusal-to-bargain cases, but not in cases concerning individual employee rights."[40] In brief, the basis for this dichotomy is that (1) refusal-to-bargain cases implicate "collective and organizational interests"[41] that the union will diligently pursue, in which there is a great congruence between the statutory and contractual issues,[42] while (2) unfair labor practice charges involving individual rights "differ significantly from collective bargaining rights"[43] in that they encompass important statutory policy objectives not protected

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> national labor policy. . . . [Therefore,] at least where a grievance implicates only "waiveable" rights, we find nothing in the NLRA that prevents the Board from showing deference to a pre-arbitration grievance settlement.

Id. at 752.

37. United Technologies Corp., 268 N.L.R.B. 557 (1984). In *United Technologies*, an employee filed a § 8(a)(3) charge with the NLRB alleging that her supervisor threatened disciplinary action if she pursued a grievance. *Id*.

38. 925 F.2d 1486, 1500 (D.C. Cir. 1991) (en banc). In *Hammontree*, the court held that the NLRB can require a claimant to exhaust contractual grievance remedies before the Board hears a § 8(a)(3) discrimination claim, reasoning that such a policy is a permissible construction of the Board's statutory obligation. *Id*.

39. *Id*. at 1505–06 (Mikva, C.J., dissenting). Chief Judge Mikva emphasized that in *Hammontree*, the individual employee was forced to complain about alleged violations of his rights to a grievance committee composed equally of management and union representatives. He likened the employee's situation to forcing a new kid at school to work things out with two boys who beat him up rather than having the principal intervene to discipline the boys. *Id*. at 1506.

40. Craver, *supra* note 27, at 612.

41. *Id*.

42. *Id*.

43. *Id*. at 614.

by most collective bargaining agreements.[44]

The issue upon which this Article focuses has been equally contentious: how to determine when the grievance and arbitration procedure has in fact "resolved" the statutory issues raised, either in an unfair labor practice proceeding referred to the arbitration process or in a charge filed after the arbitration process has been completed.

II. THE NLRB AND POST-ARBITRATION DEFERRAL

The genesis for deferral standards was the NLRB's decision in *Spielberg Manufacturing Co.*[45] The NLRB held that it would defer to the results of an arbitration award if those "proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act."[46] The NLRB in a later case added that the arbitrator must have considered the unfair labor practice issue, thus implementing the referral requirement that jurisdiction be retained to determine whether the dispute is resolved in arbitration.[47]

The progeny of *Spielberg* have split into two sharply divided camps over how to determine whether the grievance and arbitration procedure has "resolved" the statutory issue. The current NLRB standard is stated in *Olin Corp.*:[48]

> [W]e adopt the following standard for deferral to arbitration awards. *We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.* In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act. And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e.,

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44. *Id.*
45. 112 N.L.R.B. 1080 (1955).
46. *Id.* at 1082.
47. Raytheon Co., 140 N.L.R.B. 883, 886 (1963).
48. 268 N.L.R.B. 573 (1984).

> unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.
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> . . . .
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> . . . [T]he party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award.[49]

Olin revised the prior NLRB standard enunciated in *Suburban Motor Freight, Inc.*[50] *Suburban Motor Freight* had itself overruled *Electronic Reproduction Service Corp.*,[51] which the *Suburban Motor Freight* Board characterized as having allowed deferral, except in "`unusual circumstances' . . . even where no indication existed as to whether the arbitrator had considered, or had been presented with, the unfair labor practice issue involved."[52]

The *Suburban Motor Freight* Board had instituted the following standard to determine whether the arbitration proceeding had in fact resolved an unfair labor practice issue:

> In specific terms, we will no longer honor the results of an arbitration proceeding under *Spielberg unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator.* In accord with the rule formerly stated in *Airco Industrial Gases*, we will give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue of discrimination in determining the propriety of an employer's disciplinary actions. In like accord with the corollary rule stated in *Yourga Trucking*, we shall impose on the party seeking Board deferral to an arbitration award the burden to prove *that the issue of discrimination was litigated before the arbitrator.*[53]

Olin dramatically increased the number of cases in which deferral was possible, since it allowed deferral even when the arbitrator had not actually "considered" the statutory issue.[54] The decision set off a storm of controversy, beginning with a strong dissent by one

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49. *Id.* at 574 (citations omitted) (emphasis added).

50. 247 N.L.R.B. 146 (1980), *overruled by* Altoona Hosp., 270 N.L.R.B. 1179 (1984).

51. 213 N.L.R.B. 578 (1974), *overruled by* Suburban Motor Freight, Inc., 247 N.L.R.B. 146 (1980).

52. *Suburban Motor Freight*, 247 N.L.R.B. at 146.

53. *Id.* at 146–47 (emphasis added); *see* Yourga Trucking, Inc., 197 N.L.R.B. 928 (1972); Airco Indus. Gases, 195 N.L.R.B. 676 (1972).

54. Olin Corp., 268 N.L.R.B. 573, 574 (1984).

of the NLRB members[55] and continuing in the various federal courts of appeals.[56]

However, both NLRB tests share an inherent problem. Neither test actually ascertains whether the arbitrator's findings and contractual interpretations enable the labor relations agency to resolve the statutory issue pending before it. The *Olin* standard does not even require that the arbitrator make any findings as to the statutory issue.[57] Rather, "adequate consideration" under *Olin* only requires that the arbitrator be "presented generally with the facts relevant to resolving the unfair labor practice" and that the contractual and statutory issues be "factually parallel."[58] Under *Olin*, the "adequate consideration" standard may be satisfied even if the arbitrator does not expressly resolve any of the factual issues relevant to the statutory claim.[59] It is enough that the facts of the unfair labor practice case were presented to the arbitrator.[60]

Professor Craver offers this telling criticism of *Olin*:

> The revised *Olin Corp.* criteria ignored the critical distinction between arbitration and Labor Board proceedings. Labor arbitrators are merely empowered to interpret and apply pertinent contractual provisions. The labor arbitrators derive their authority exclusively from the bargaining agreement and are not usually authorized to apply external legal doctrines. Even when contractual issues and unfair labor practice issues may overlap, arbitrators are obliged to focus primarily upon the bargaining agreement terms. There will thus be many instances in which arbitral awards involving disputes that are "factually parallel" to unfair labor practice charges, arising from the same operative circumstances, will be not be determinative of the external [statutory] issues.[61]

Suburban Motor Freight also failed to distinguish between contractual and statutory dispute resolution, although the NLRB's mistake was one of underinclusion, rather than overinclusion as in

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55. *Id.* at 577–81 (Zimmerman, Member, dissenting in part).
56. *See* Craver, *supra* note 27, at 618–20.
57. *Olin*, 268 N.L.R.B. at 574.
58. *Id.*
59. *Id.*
60. *Id.*
61. Craver, *supra* note 27, at 620.

Olin.[62] *Suburban Motor Freight* relied on the presence or absence of "magic words" to determine if deferral is appropriate.[63] In order for deferral to be appropriate under *Suburban Motor Freight*, the arbitrator must affirmatively state that he or she has "ruled on the statutory issue."[64] However, many arbitrators are not likely to make this type of statement.

As Professor Craver points out, grievance arbitrators perform a "limited role."[65] He cites the following description of that role by the United States Supreme Court: "[T]he arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the `industrial common law of the shop' and the various needs and desires of the parties."[66]

Accordingly, most arbitrators view their authority with restraint, confining themselves to interpreting the parties' labor contract. Unless the contract expressly incorporates external law, an arbitrator simply has no reason to decide whether the employer has violated a statute in addition to the collective bargaining agreement. While the statutory and contractual issues may overlap, the arbitrator need not determine whether an employer violated its statutory duty to bargain in good faith, for example, in order to ascertain if the employer unilaterally changed a term of the contract.

Furthermore, as the Supreme Court pointed out in *Alexander v. Gardner-Denver Co.*, statutory law is a thicket in which most arbitrators avoid entanglement.[67] Enforcement of the award can be placed at risk if the arbitrator relies too heavily on statutory law in

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62. Suburban Motor Freight, Inc., 247 N.L.R.B. 146, 147 (1980), *overruled by* Altoona Hosp., 270 N.L.R.B. 1179 (1984); *see Olin Corp.*, 268 N.L.R.B. at 574.

63. *Suburban Motor Freight*, 247 N.L.R.B. at 147 (stating that NLRB "will give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue").

64. *Id*.

65. Craver, *supra* note 27, at 620.

66. *Id*. at 622 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974)). In *Alexander*, the Court stated that the arbitrator is "`part of a system of self-government created by and confined to the parties'" and "`serves their pleasure only to administer the rule of law established by their collective agreement.'" *Alexander*, 415 U.S. at 52–53 n.16 (quoting Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1015 (1955)). The *Alexander* Court also stated that "the arbitrator's task is to effectuate the intent of the parties" with his "source of authority . . . the collective bargaining agreement." *Id*. at 53.

67. *Alexander*, 415 U.S. at 53.

reaching a decision under the contract.[68] Thus, in addition to being unnecessary, resolving ultimate statutory liability may not be prudent for an arbitrator.[69]

Nevertheless, *Suburban Motor Freight* ignored a plain truth. While arbitrators are not likely to "rule on the statutory issue,"[70] they can and do make factual findings and contractual interpretations that may assist the labor relations agency in resolving the pending issue of law.[71] Simply put, arbitrators do not need to *decide* ultimate statutory issues in order for their factual findings and contractual interpretations to help the labor relations agency *resolve* those same issues.

III. THE IELRB'S UNIVERSITY OF ILLINOIS *APPROACH*

The IELRB's approach to deferral proceeds from an entirely different perspective than either approach used by the NLRB.[72] Because statutory and contractual issues often overlap, the IELRB recognizes that an arbitrator's findings and contractual interpretations can easily be employed by the agency when it makes its ultimate statutory conclusions, even when the arbitrator expressly dis-

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68. *Id*. The Court stated:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Id. (quoting United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

69. *Id*. (stating that arbitration awards will not be enforced if arbitrator relies on interpretation of laws rather than interpretation of collective bargaining agreement).

70. Suburban Motor Freight, Inc., 247 N.L.R.B. 146, 146 (1980), *overruled by* Altoona Hosp., 270 N.L.R.B. 1179 (1984).

71. *See* Kansas City Star Co., 236 N.L.R.B. 866, 867–69 (1978) (Truesdale, Member, concurring). In *Kansas City Star Co.*, concurring Member Truesdale articulated a deferral approach similar to that utilized in *University of Illinois*. *Id*. Truesdale advocated NLRB deferral to an arbitrator's decision where the arbitrator had ruled on every factual and legal issue necessary to the resolution of an issue, even if the arbitrator had not passed on the issue itself, as long as the arbitrator's findings involved no "irregularities," "facial errors," or inconsistency with NLRB law. *Id*. at 869. Truesdale asserted that this approach would prevent the arbitrator from becoming "a hearing officer who merely takes evidence from which the Board draws its own conclusions" and would prevent diminution of the integrity of the arbitral process. *Id*. at 868–69.

72. *See* Board of Trustees of the Univ. of Ill. (Chicago Campus), 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1035, at 155, 156–57 (IELRB 1992).

claims any intention to "rule on the statutory issue."[73] In such cases, the labor board can still perform the statutory analysis.[74] However, the board can also apply those statutory standards to the arbitrator's factual findings and contractual interpretations to determine if the contractual grievance and arbitration procedure has "resolved" the statutory issues.[75]

Under any of the deferral theories, if the arbitrator's factual findings and contractual interpretations resolve the statutory issue once the statutory standard is applied, deferral is appropriate if the result is dismissal of the statutory charge.[76] Under the IELRB's approach, if the arbitration proceedings have been fair and regular, the agency will adopt the arbitrator's factual findings and interpretations of the contract. There is little issue as to whether the award is "repugnant" to statutory policies and purposes, however, since the labor board has actually applied its statutory standards to determine if the award resolves the statutory issues. Under those circumstances, the labor board would be assured that the award has effectuated statutory policies and purposes.

Moreover, this approach properly apportions arbitral and agency authority. Appropriate respect is accorded the arbitrator as the parties' chosen contract reader, and the agency reserves to itself the responsibility of interpreting and applying the statute. The board would defer to the factual findings and contractual interpreta-

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73. *Suburban Motor Freight*, 247 N.L.R.B. at 146.

74. *University of Ill.*, 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1035, at 156. As the IELRB noted:

> [W]e said that we would retain jurisdiction over a matter referred to arbitration, where a statutory violation was also alleged, "for the purposes of entertaining appropriate and timely motions that the dispute has not been promptly submitted to arbitration, *that the dispute has not been resolved* or that the grievance procedures have not been fair and regular or *have reached a result repugnant to the Act*."

Id. (quoting West Chicago Sch. Dist. No. 33, 5 Pub. Empl. Rep. Ill. (LRP) ¶ 1091, at 214, 220 (IELRB 1989), *aff'd*, 578 N.E.2d 232 (Ill. App. Ct.), *appeal denied*, 584 N.E.2d 141 (Ill. 1991)) (emphasis added by Authors).

75. *Id*. at 156–57 (using arbitrator's findings of fact to determine whether facts constituted unilateral change during bargaining, statutory violation).

76. Of course, due process precludes the labor board from finding a violation of the statute without conducting an administrative proceeding under the statute. See, e.g., § 15 of the IELRA, which requires the IELRB to "hold a hearing" on an unfair labor practice complaint issued after an administrative investigation and to allow the respondent to "present evidence in defense against the charges." ILL. ANN. STAT. ch. 115, para. 5/15 (Smith-Hurd 1993).

tions of the arbitrator, but it would not cede its authority to determine if a statutory violation had occurred.

Deferral under such circumstances also conserves scarce administrative agency resources. There would be no reason to issue a complaint and hold a hearing if, when the arbitrator's factual findings and contractual interpretations are viewed through statutory lenses, the result is a statutory conclusion by the labor board that no violation occurred.

A. The *University of Illinois* Decision

The IELRB's decision in *University of Illinois* employed the above approach.[77] In *University of Illinois*, the union filed a charge with the IELRB, alleging that the employer had unilaterally substituted a floating holiday in lieu of Columbus Day for bargaining unit employees.[78] The union contended that the employer had unilaterally changed a prevailing term and condition of employment in violation of section 14(a)(5) of the IELRA.[79] The IELRB issued a complaint, thus initiating the administrative hearing process.[80]

After the complaint was issued, the parties agreed to arbitrate whether the employer had violated the collective bargaining agreement by changing the holiday in question.[81] The IELRB then referred the matter to arbitration.[82] It therefore dismissed the statutory complaint, while retaining jurisdiction under an earlier, but functionally equivalent, formulation of the *West Chicago* standard.[83]

The arbitrator denied the union's grievance, concluding that the employer did not violate the collective bargaining agreement by not recognizing Columbus Day as a holiday.[84] However, the arbitrator also explicitly stated that he had *not* considered the criteria for good faith bargaining under the IELRA.[85]

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77. Board of Trustees of the Univ. of Ill. (Chicago Campus), 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1035, at 155, 156–57 (IELRB 1992).

78. *Id*.

79. *Id*.; *see* ILL. ANN. STAT. ch. 115, para. 5/14(a)(5) (Smith-Hurd 1993).

80. *University of Ill.*, 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1035, at 155.

81. *Id*.

82. *Id*.

83. *Id*. See *supra* text accompanying notes 32–34 for discussion of the *West Chicago* case.

84. *University of Ill.*, 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1035, at 155.

85. *Id*.

The employer then urged the IELRB to "defer" to the arbitration ruling and *not* to reopen the administrative proceeding.[86] The union countered that the IELRB should not defer to the arbitration ruling since that contractual decision did not "resolve" the unfair labor practice issue.[87]

The parties presented the IELRB with a choice between the respective standards in *Olin* and *Suburban Motor Freight*.[88] The IELRB chose neither standard. Rather, the IELRB reviewed the arbitration ruling to determine whether the arbitrator's factual findings and contractual interpretations in fact answered the statutory questions posed by the IELRB complaint.[89] The IELRB stated: "The arbitrator specifically stated that he had not considered whether the University had violated its obligation under the Act to bargain in good faith. In making his findings of fact, however, he considered all of the evidence necessary to resolve the unfair labor practice issue."[90] The IELRB held:

> [T]he critical unfair labor practice issue here is whether the University's substitution of a floating holiday for the Columbus holiday constituted a unilateral change during bargaining in the prevailing terms and conditions of employment, or whether it was an action permitted by the parties' agreement. . . . Here, however, the arbitrator found that the parties had agreed in the contract that the University could set the holiday schedule unilaterally in accordance with "Policy and Rules — Nonacademic." Furthermore, the arbitrator found that there was no past practice of having a Columbus Day holiday.
>
> Given these findings of fact by the arbitrator, the University had contractual discretion to substitute a floating holiday for the Columbus Day holiday. Similarly, the arbitrator found that Columbus Day was a holiday only during a particular period of time and that after that time the University was free to modify the holiday schedule. That is, the issue of the Columbus Day holiday had been fully bargained. These conclusions are consistent with the statute and our case law, and not repugnant to the purposes and policies of

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86. *Id*.

87. *Id*. at 155–56.

88. Olin Corp., 268 N.L.R.B. 573 (1984); Suburban Motor Freight, Inc., 247 N.L.R.B. 146 (1980), *overruled by* Altoona Hosp., 270 N.L.R.B. 1179 (1984).

89. *University of Ill.*, 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1035, at 155.

90. *Id*. at 156.

the Act.[91]

Having determined that the arbitrator's factual findings and contractual interpretations allowed the NLRB to "resolve" the unfair labor practice issues presented in the IELRB complaint, the IELRB concluded that "the result reached in arbitration is not repugnant to the Act under either a unilateral change theory or a mid-term modification theory."[92] In so holding, the IELRB stated that it was "unnecessary" to consider the *Olin* standard, upon which the Acting Executive Director had relied in dismissing the complaint.[93] Rather than relying on *Olin*'s surrogate factors, the IELRB actually determined that the arbitrator's findings and contractual interpretations enabled it to resolve the statutory issue without further administrative proceedings.[94]

In addition, it bears reiteration that the arbitrator in *University of Illinois* had used the "magic words" that would have precluded deferral under *Suburban Motor Freight*. The arbitrator had stated that he had *not* "considered the criteria for good faith bargaining under the IELRA."[95]

The NLRB's *Olin* and *Suburban Motor Freight* approaches differ as to which party has the burden of proof on the deferral issue. In *Olin*, the NLRB placed on the party resisting deferral the burden of proving the existence of defects in the arbitration proceeding or the award.[96] In *Suburban Motor Freight*, the NLRB placed on the party seeking deferral the burden to prove that the unfair labor practice issue was litigated before the arbitrator.[97]

In *University of Illinois*, the IELRB did not expressly resolve the burden of proof dispute between *Olin* and *Suburban Motor*.[98] However, the IELRB analysis presumed that the party seeking deferral, in this case the employer, had the burden of demonstrating that the

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91. *Id*. at 156–57.

92. *Id*. at 157.

93. *Id*. at 157 n.1.

94. *Id*. at 157. See *supra* text accompanying notes 48–50 for discussion of the *Olin* standard.

95. *University of Ill.*, 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1035, at 155. See *supra* text accompanying notes 51–53 for discussion of the *Suburban Motor Freight* standard.

96. Olin Corp., 268 N.L.R.B. 573, 574 (1984).

97. Suburban Motor Freight, Inc., 247 N.L.R.B. 146, 147 (1980), *overruled by* Altoona Hosp., 270 N.L.R.B. 1179 (1984).

98. *See University of Ill.*, 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1035, at 156–57.

arbitrator's factual findings and contractual interpretations enabled the IELRB to resolve the statutory issues in its favor.[99]

University of Illinois appears consistent with Professor Craver's approach.[100] He recommends:

> Post-arbitration deferral should not be viewed as a right, but rather a privilege. Under section 10(a) [of the NLRA], it is legislatively presumed that unfair labor practice questions will be resolved by the [NLRB]. In any case in which it is clear that a previous arbitral determination thoroughly and appropriately disposed of a pending unfair labor practice charge, the NLRB should consider deferral. The party requesting such deferral should be obliged to demonstrate that: (1) the arbitral proceedings were fair and regular and the parties had agreed to be bound by the result; (2) the facts relevant to the unfair labor practice case were presented to and fully considered by the arbitrator; (3) *the arbitral decision has effectively resolved the dispute underlying the pending unfair labor practice charge;* and (4) the arbitral conclusions are not repugnant to the policies embodied in the NLRA.[101]

B. Advantages of the *University of Illinois* Approach

The IELRB approach has several advantages. First, it determines whether the arbitration award in fact enables the agency to resolve the unfair labor practice issue in any given case, and thus, it better implements the goal of the referral and deferral policy. For those concerned that *Olin* dismisses statutory claims without a thorough analysis of their merits, this case-specific approach has much value.[102]

Second, under the IELRB approach the administrative agency never cedes its authority to interpret and apply its own statute.[103] The issue of whether the arbitration award helps to resolve the statutory questions demands a statutory analysis that only the agency should perform. Conversely, under either *Olin* or *Suburban Motor*

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99. *Id*.

100. Craver, *supra* note 27, at 620–21.

101. *Id*. (emphasis added); *see* Kansas City Star Co., 236 N.L.R.B. 866, 867–69 (Truesdale, Member, concurring).

102. *See* Olin Corp., 268 N.L.R.B. 573, 574 (1984).

103. *See id*.

Freight, the NLRB effectively relinquishes its responsibility to interpret and apply the statute.[104] Under *Olin*, the NLRB only requires that the factual issues be parallel and that the relevant facts be generally presented to the arbitrator.[105] Under *Suburban Motor Freight*, the NLRB defers when the arbitrator has expressly considered the unfair labor practice issue, thus effectively inviting arbitrators to assume statutory responsibility.[106] Both NLRB tests are subject to the caveat that the award must not be clearly repugnant to the purposes and policies of the NLRA.[107] However, that an arbitrator's statutory analysis is not clearly repugnant does not guarantee that it is a *correct* interpretation of the statute. In other words, agency review to determine if the award is palpably wrong is not a substitute for the agency's own statutory analysis.

Third, the IELRB approach avoids the confusion created by the continuing controversy over whether to utilize the *Olin* or the *Suburban Motor Freight* standard. As Judge Edwards has observed, the issue of deferral has become politicized.[108] Under the IELRB approach, however, it is not necessary to choose between the competing NLRB standards that have come to represent the polarized positions of labor and management.[109]

Fourth, the IELRB approach provides a more precise method for determining whether deferral is appropriate in cases alleging violations of individual statutory rights. For example, if the parties' contract prohibits discrimination for union activity, then an arbitrator's determination on that issue might provide the basis for resolving the statutory issues present in an analogous statutory claim. In *West Chicago*, the IELRB did not determine whether it was appropriate to defer to an arbitration award in a case arising under section 14(a)(3) of the IELRA.[110] Under the *University of Illinois* approach,

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104. *See id*.; Suburban Motor Freight, Inc., 247 N.L.R.B. 146, 147 (1980), *overruled by* Altoona Hosp., 270 N.L.R.B. 1179 (1984).

105. *Olin*, 268 N.L.R.B. at 574.

106. *Suburban Motor Freight*, 247 N.L.R.B. at 146–47.

107. *Olin*, 268 N.L.R.B. at 573; *Suburban Motor Freight*, 247 N.L.R.B. at 146.

108. Judge Edwards states: "[R]ecent sharp critiques of current [NLRB] policies are neither unusual nor surprising. Political turmoil and revision are nothing new to the NLRB, for the Board historically has responded to, and reflected the philosophies of, the administrations that have appointed its members." Edwards, *supra* note 35, at 23.

109. *See* Board of Trustees of the Univ. of Ill. (Chicago Campus), 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1035, at 155, 156–57 (IELRB 1992).

110. West Chicago Sch. Dist. No. 33, 5 Pub. Empl. Rep. Ill. (LRP) ¶ 1091, at 214,

however, deferral could be appropriate in such a case.

Fifth, the IELRB approach is consistent with the predisposition of many arbitrators — including the arbitrator in *University of Illinois* — to avoid resolving statutory issues when deciding whether a contract has been violated.[111] The IELRB approach is thus more compatible with the doctrine of arbitration than are the NLRB standards. Indeed, the IELRB test utilizes arbitral expertise in a more meaningful manner than either *Olin* or *Suburban Motor Freight*, because it is a meaningful deferral to the *arbitral process,* and thus, it more fully implements the national labor policy favoring voluntary resolution of labor disputes through arbitration.[112]

Sixth, the IELRB approach preserves increasingly scarce agency resources. If the IELRB had adopted the rule of *Suburban Motor Freight*, for example, it could *not* have deferred to the arbitration award in *University of Illinois*, since the arbitrator had not "considered" the statutory issue.[113] The IELRB would have had to reactivate the administrative proceeding with the attendant and costly hearing and appeal procedure, even though the arbitrator's factual findings and contractual interpretations had clearly enabled the IELRB to resolve the statutory issues.

C. The Application of the IELRB Deferral Standard When the Duty to Bargain Is at Issue

In *University of Illinois*, the parties did not dispute that the determination of holidays was a mandatory subject of bargaining.[114] Accordingly, the IELRB was not called upon to apply its statutory test for identifying mandatory subjects of bargaining.

In *Central City Education Ass'n v. IELRB*, the Illinois Supreme Court prescribed a three-part test to determine if a particular item is a mandatory bargaining subject:

> [The first part of the test] requires a determination of whether the matter is one of wages, hours and terms and conditions of employ-

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223 n.15 (IELRB 1989), *aff'd*, 578 N.E.2d 232 (Ill. App. Ct.), *appeal denied*, 584 N.E.2d 141 (Ill. 1991).

111. *University of Ill.*, 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1035, at 156.

112. See *supra* notes 1–2 for the policy and text of the NLRA.

113. *See* Suburban Motor Freight, Inc., 247 N.L.R.B. 146, 147 (1980), *overruled by* Altoona Hosp., 270 N.L.R.B. 1179 (1984).

114. *See University of Ill.*, 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1035, at 155.

> ment. . . . If the answer to the first question is yes, then the second question is asked: Is the matter also one of inherent managerial authority [under section 4 of the IELRA]? . . . If the answer is yes, then the . . . IELRB should balance the benefits that bargaining will have on the decision-making process with the burdens that bargaining imposes on the employer's authority. Which issues are mandatory, and which are not, will be very fact-specific questions, which the IELRB is eminently qualified to resolve.[115]

The United States Supreme Court has developed a similar statutory test for identifying mandatory subjects of bargaining in the private sector.[116] That approach culminates in a balancing test, utilizing factors that differ somewhat from those identified by the Illinois Supreme Court.[117] With respect to management decisions concerning the scope and direction of the enterprise that directly affect employment, the United States Supreme Court declared that companies subject to the NLRA should be required to bargain "only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of business."[118]

The need to apply such a balancing test complicates application of the *University of Illinois* standard.[119] In practice, deferral may be less likely if the statutory question involves the issues of whether the item is a mandatory subject of bargaining, and, in particular, if a fact-specific balancing test is implicated. The IELRB's decision in *Macomb Community Unit School District 185*[120] was such a case. There, the IELRB's Executive Director had deferred to an arbitration award holding that the district did not violate the contract by unilaterally implementing a building security program, under which bargaining unit members were required to occasionally monitor a school entrance during planning periods.[121] The Executive Director

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115. Central City Educ. Ass'n v. IELRB, 599 N.E.2d 892, 898 (Ill. 1992) (citations omitted).

116. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 679 (1981).

117. *See id*. at 678–79 (reasoning that management must be free from bargaining process constraints to extent essential for operation of profitable business).

118. *Id*. at 679.

119. Board of Trustees of the Univ. of Ill. (Chicago Campus), 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1035, at 155 (IELRB 1992).

120. 9 Pub. Empl. Rep. Ill. (LRP) ¶ 1095, at 331 (IELRB 1992) (*Macomb II*), *aff'd*, No. 4-93-0546 (Ill. App. Ct. June 29, 1994).

121. Macomb Community Sch. Dist. 185, 9 Pub. Empl. Rep. Ill. (LRP) ¶ 1041, at

used the *University of Illinois* standard in deciding on deferral.[122]

On appeal, the IELRB reversed as to the issue of deferral, holding that the arbitrator's factual findings and contractual interpretations did not enable the agency to "resolve" the statutory issue because the arbitrator did not reach the "benefits and burdens" issue.[123] The arbitrator had stated that he was not determining whether the change was an unlawful unilateral change in a mandatory subject of bargaining.[124] In addition, the parties did not submit evidence to the arbitrator of the benefits and burdens of bargaining the matter in dispute.[125]

If the arbitration record does not contain evidence as to the benefits and burdens of bargaining and factual findings on that issue are required to resolve the statutory issue, then deferral is not possible. In any given hearing, one of the parties may wish to submit evidence on the statutory issue at the arbitration. Whether that evidence is admitted into the hearing record is another question, however. The other party to the arbitration might object to its inclusion on the grounds that the arbitrator does not need such evidence to decide the contractual issue.

This possibility dramatically illustrates the divergent responsibilities of the agency and the arbitrator. The arbitrator need not decide whether the disputed contract term is a mandatory bargaining term under the statute, since the term is already within the scope of the parties' agreement. Given arbitral reluctance to decide issues outside the contract, an arbitrator may decide that evidence proffered for purposes of applying a statutory test is not admissible. Even if an arbitrator were inclined to admit such evidence, that might not end the inquiry. Such evidence might require lengthy testimony and numerous exhibits. The arbitrator might therefore decide that addressing the benefits and burdens issue would overly extend the record in the arbitration case.

On the other hand, the parties and the arbitrator could agree to include the benefits and burdens evidence in order to provide a stipulated record that would expedite subsequent unfair labor prac-

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132, 136 (IELRB 1991) (*Macomb I*), *rev'd*, *Macomb II*, 9 Pub. Empl. Rep. Ill. (LRP) ¶ 1095, at 331, *aff'd*, No. 4-93-0546 (Ill. App. Ct. June 29, 1994).

122. *Id*. at 135.

123. *Macomb II*, 9 Pub. Empl. Rep. Ill. (LRP) ¶ 1095, at 332.

124. *Id*.

125. *Id*.

tice proceedings before the labor board. This is particularly likely to occur if the dispute has already been referred to arbitration.

This was the approach used in *Community College District No. 508*.[126] In that case, the IELRB referred a statutory unilateral change complaint to the contractual arbitration procedure.[127] The arbitrator determined that the employer did not violate the contract by unilaterally canceling seven hundred classes for the fall of 1992.[128] When the Executive Director declined to defer to the resulting arbitration award, the statutory proceedings were reinstated.[129] However, the parties then agreed that the record before the IELRB would consist of the IELRB's procedural documents, the arbitration transcript and exhibits, and the arbitrator's award.[130] The parties also waived their rights to an evidentiary hearing before the IELRB, thus effectively agreeing that the IELRB would accept the arbitrator's findings of fact, credibility resolutions, and contractual interpretations.[131] The Administrative Law Judge held that the arbitration award enabled him to resolve the unilateral change issue. Based upon this stipulated record, the judge reasoned that since the arbitrator had found that the employer did not act inconsistently with the parties' established practices, no unilateral change had occurred.[132]

This approach to arbitration evidence benefits both the parties and the agency. Ordinarily, only one hearing is required (e.g., the arbitration), the parties and the agency avoid additional costs, and the agency's decisionmaking process is expedited.

The statutory burdens and benefits tests do not affect cases like *University of Illinois*, where there was no issue as to whether the Columbus Day holiday was a mandatory subject of bargaining.[133]

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126. 9 Pub. Empl. Rep. Ill. (LRP) ¶ 1068, at 241 (IELRB 1993) (*District No. 508 II*).

127. Community College Dist. No. 508 (Chicago City Colleges), 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1085, at 316 (IELRB 1991) (*District No. 508 I*).

128. *District No. 508 II*, 9 Pub. Empl. Rep. Ill. (LRP) ¶ 1068, at 245. The arbitrator refused to address these issues even though the parties had devoted considerable energy to arguing the benefits of bargaining and burdens of negotiations, reasoning that such consideration was appropriate only to resolve the unfair labor practice issues. *Id*.

129. *Id*. at 242.

130. *Id*.

131. *Id*.

132. *Id*.

133. Board of Trustees of the Univ. of Ill. (Chicago Campus), 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1035, at 155, 156–57 (IELRB 1992).

There, the statutory issues centered on the employer's contractual discretion to change the holiday, whether the employer's actions were consistent with the parties' practice, and whether the holiday issue was fully bargained.[134] The statutory and contractual issues in such cases are fully congruent.

D. Acquiring Administrative Experience with the IELRB Standard for Deferral

As previously discussed, the NLRB has experimented with arbitration deferral standards for many years. As a result, the NLRB has acquired considerable administrative experience while applying the several divergent tests for deferral.[135] Administrative experience notwithstanding, the NLRB and the federal courts have not yet chosen a single test for determining when to defer.[136] The IELRB just marked its tenth year of existence administering the IELRA, and it has only recently addressed deferral standards.[137] Like the NLRB, the IELRB is likely to encounter intricate issues associated with the application of its *University of Illinois* standard. The ultimate test of that standard's viability will be the IELRB's ability to deal with those issues in a principled way.

Some of the issues associated with implementation of the IELRB's standard may be anticipated based on the NLRB's experience in applying its divergent approaches in the private sector. For example, when applying the *Suburban Motor Freight* test, the NLRB has grappled with the problem presented when evidence relevant to resolving an unfair labor practice charge is not presented to the arbitrator.[138] In a dissenting opinion in *Suburban Motor Freight,* Board Member Penello identified a further problem with that ap-

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134. *Id*.

135. *See* Olin Corp., 268 N.L.R.B. 573 (1984); Suburban Motor Freight, Inc., 247 N.L.R.B. 146 (1980), *overruled by* Altoona Hosp., 270 N.L.R.B. 1179 (1984).

136. *See* Plumbers & Pipefitters Local Union No. 520 v. NLRB, 955 F.2d 744 (D.C. Cir.), *cert. denied*, 113 S. Ct. 61 (1992); Hammontree v. NLRB, 925 F.2d 1486 (D.C. Cir. 1991).

137. The IELRA took effect January 1, 1984. *See* ILL. ANN. STAT. ch. 115, para. 5/1 (Smith-Hurd 1993).

138. In Yourga Trucking, Inc., 197 N.L.R.B. 928 (1972), the NLRB attempted to deal with this problem by imposing on the party seeking deferral the burden of proving that the unfair labor practice issue was litigated before the arbitrator. *See Suburban Motor Freight*, 247 N.L.R.B. at 148.

proach:

> Prior to the decision in *Electronic Reproduction,* it had been the Board's practice in cases involving alleged discrimination in employment not to defer to an arbitration award under *Spielberg* unless the unfair labor practice issue had been both presented to and considered by the arbitrator. Experience led the Board to conclude, however, that its practice invited parties to withhold evidence of discrimination during arbitration about disciplinary action in order to gain a second opportunity to challenge the same action during an unfair labor practice proceeding.[139]

Withheld facts may also be anticipated under the IELRB's *University of Illinois* standard, since the IELRB relies upon the arbitrator's findings of fact when independently determining the statutory unfair labor practice issue. If facts relevant to the statutory issue are missing from the arbitration decision, the IELRB would presumably be forced to reinstate the administrative proceedings in order to acquire the missing evidence, thus vitiating the various benefits of employing a deferral policy in the first place.

To date, the IELRB has not encountered a case in which missing facts have led it to decline deferral and to order an unfair labor practice hearing. Indeed, it would seem risky for a grievant and union to intentionally omit relevant evidence before an arbitrator simply to preserve a "second bite at the apple" before the administrative agency. What is the value of having two bites if one must jeopardize the efficacy of the first bite in order to preserve the second bite? Moreover, the problem that the NLRB encountered arose in discrimination cases, and the IELRB has yet to determine the applicability of its deferral policy in such cases.

Assuming, however, that the problem of withheld evidence occurred in a unilateral change situation or another setting in which the IELRB has previously considered deferral, the IELRB might solve the problem by employing burden of proof devices. For example, in an unfair labor practice case where a union alleges that an employer has made a unilateral change concerning a mandatory subject of bargaining, the arbitrator's findings of fact may not be

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139. *Suburban Motor Freight*, 247 N.L.R.B. at 148 (Penello, Member, dissenting); *see* Electronic Reproduction Serv. Corp., 213 N.L.R.B. 578 (1974).

sufficient or may omit evidence needed to decide the unfair labor practice issue. In such a situation, the IELRB could place on the party opposing deferral the burden to establish that it had no opportunity to present the missing facts to the arbitrator due to an arbitral ruling excluding the proffered evidence. Alternatively, the party seeking to ignore the arbitrator's award could prove that it did in fact proffer the missing evidence, but that the arbitrator omitted that evidence from the arbitration decision and award. Using such burden of proof devices, the IELRB should be well-equipped to handle the problem of missing facts in arbitration decisions and other issues that may materialize as the IELRB implements its *University of Illinois* standard for deferral.

IV. CONCLUSION

The overlap arising when the same employer conduct arguably gives rise to an unfair labor practice charge and a grievance has generated considerable conflict over the standards that labor relations boards should apply when referring charges to the arbitration process and deferring to the results of that process.[140] The NLRB has vacillated between requiring that the arbitrator expressly consider and rule on the unfair labor practice issue as a condition for deferring to the arbitrator's award, and deferring whenever the contractual issue is factually parallel to the statutory issue and the arbitrator was presented generally with the facts relevant to the unfair labor practice.[141]

The IELRB's alternative deferral standard reflects a healthy concern for the proper apportionment of administrative and arbitral authority. The IELRB approach requires deferral to the arbitral decision whenever the agency determines that the arbitrator's factual findings and contractual interpretations enable the agency to resolve the unfair labor practice charge. The agency itself, however, decides the statutory issues. Thus, the agency does not cede to the arbitrator its authority to interpret and apply the governing labor statute.

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140. See *supra* text accompanying notes 15–23 for discussion of the jurisdictional overlap between arbitrators and labor boards when employees file complaints alleging both contractual breach and unfair labor practices.

141. See *supra* text accompanying notes 45–64 for discussion of cases in which the NLRB developed its deferral policy.

As discussed, the IELRB solution offers several advantages over the NLRB's *Olin* and *Suburban Motor Freight* approaches. The IELRB approach[142] is recommended as a model for other labor boards for use in resolving deferral controversies.

142. *See* Board of Trustees of the Univ. of Ill. (Chicago Campus), 8 Pub. Empl. Rep. Ill. (LRP) ¶ 1035, at 155 (IELRB 1992).