Oakland Scavenger Company *and* Joseph J. Jelencic, Jr. Case 32-CA-242

March 15, 1979

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

On October 23, 1978, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge as modified herein and to adopt his recommended Order.

We do not agree with the Administrative Law Judge's conclusion that deferral to the arbitration award is proper in this case. The record, which includes the record of the arbitration proceeding itself, clearly establishes that the unfair labor practice issue before the Board—whether Respondent unlawfully discharged the Charging Party, Joseph Jelencic, in violation of Section 8(a)(1) and (3) of the Act—was neither presented to nor considered by the arbitrator. Under such circumstances, we will not defer.[2]

The arbitrator did consider the statutory question of whether the work which Jelencic refused to perform constituted "abnormally dangerous conditions for work" within the meaning of Section 502 of the Act,[3] as interpreted by the Supreme Court in *Gateway Coal Co.* v. *United Mine Workers of America, et al.*, 414 U.S. 368 (1974). He concluded that the work in question did not come within the scope of that section. As indicated above, the Administrative Law Judge deferred to the arbitrator's conclusion on this question. However, in the alternative, if the Board disagreed with that deferral, the Administrative Law Judge also made an independent evaluation of the record evidence on this matter and concluded, in agreement with the arbitrator, that the work in question was not "abnormally dangerous." We adopt this conclusion of the Administrative Law Judge, set out at footnote 9 of his Decision, and thus find that Jelencic's refusal to handle the burlap sacks was not justified under Section 502.

Also, we agree with the Administrative Law Judge, for the reasons set out in section I,B,1, of his Decision, that Jelencic's refusal to handle the burlap sacks lost whatever protection it may have had under Section 7 of the Act when, without justifiable reason, he disrupted and interfered with the procedure for gradually eliminating the use of such burlap sacks which Respondent and the Union had previously agreed upon in resolving Jelencic's grievance. Accordingly, as Jelencic's conduct was neither protected by Section 7 nor justified under Section 502, we conclude that Respondent did not violate Section 8(a)(1) and (3) by discharging Jelencic for engaging in such conduct.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Adiministrative Law Judge: The hearing in this case was held on August 7, 1978, and is based upon an amended unfair labor practice charge filed by Joseph Jelincic, Jr., on June 28, 1977, and a complaint

[1] The Administrative Law Judge's Decision contains several inadvertent errors. In sec. I,A, the Administrative Law Judge states that Jelencic picked up trash on June 17, 1977, whereas the record establishes that Jelencic was discharged on that date prior to picking up any trash. In sec. I,B,1, the citation for *John Sexton & Co.* should be 217 NLRB 80. Also in sec. I,B,1, the Administrative Law Judge states that in August 1976 Respondent and the Union settled a grievance filed by Jelencic, whereas the record establishes that this grievance was settled in August 1975. Also in sec. I,B,1, the reference to Jackson School should be to Franklin School. In sec. I,B,2, the citation to *Gateway Coal Co.* v. *United Mine Workers of America, et al.*, should be 414 U.S. 368.

[2] *Raytheon Company*, 140 NLRB 883 (1963). Contrary to the understanding of the Adminstrative Law Judge, *Raytheon* has not been "overruled" by the Board's decision in *Electronic Reproduction Service Corporation*, 213 NLRB 758 (1974). As is apparent from a closer reading of *Electronic Reproduction*, the Board majority in that case in fact relied on *Raytheon* as its case in point for carving out an exception to the basic principle set forth in *Electronic Reproduction*. Moreover, the Board has continued to rely on *Raytheon* for refusing to defer to an arbitrator's award where, as here, the unfair labor practice issue was not considered in the arbitration proceedings. See, e.g., most recently *Varied Enterprises, Inc., d/b/a Private Carrier Personnel*, 240 NLRB No. 12 (1979); *Gould Inc., Switchgear Division*, 238 NLRB No. 88 (1978); *United Stanford Employees, Local 680, Service Employees International Union, AFL-CIO (The Leland Stanford Junior University)*, 232 NLRB 326 (1977). Cf. *Pincus Brothers, Inc.—Maxwell*, 237 NLRB 1063 (1978).

In any event, Member Jenkins and Member Murphy would not rely on *Electronic Reproduction*, inasmuch as they do not subscribe to its principle that deferral is essential where an arbitrator could have decided an issue even if "it was not in fact presented for determination." *The Mason and Dixon Lines, Inc.*, 237 NLRB 6 (1978).

Member Truesdale, who agrees that *Raytheon* is controlling here, finds it unnecessary to comment on the merits of *Electronic Reproduction*.

[3] Sec. 502 of the Act provides, in relevant part:

> [N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee be deemed a strike under this Act.

issued on May 23, 1978, on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Board's Regional Director for Region 32, alleging that Oakland Scavenger Company, herein called Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, herein called the Act, by discharging Jelincic on June 17, 1977, because of his union or protected concerted activities.[1] Respondent filed an answer to the complaint which denies the commission of the alleged unfair labor practices.

Upon the entire record, and having considered the post-hearing briefs submitted by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Briefly stated the basic facts involved in this case, which are not in dispute, are as follows:

Respondent picks up garbage from customers located in and around the city of Oakland, California. The International Brotherhood of Teamsters, Chauffeurs and Warehousemen, Local Union No. 70, herein called the Union,[2] represents Respondent's employees. Article 14 of the collective-bargaining agreement between Respondent and the Union, in effect during the times material to this case, provides that a grievance over an employee's discharge is subject to compulsory binding arbitration and that all other contractual grievances, although not subject to arbitration, must be processed through a four-step grievance procedure before the Union is allowed to exert any kind of economic pressure. The pertinent portions of article 14 are as follows:

> ARTICLE 14. GRIEVANCE PROCEDURE:
>
> Section 1. Conciliation: A grievance by any employee, the Union or the Company, shall be limited to any controversy, complaint or misunderstanding arising as to the interpretation or observance of any of the provisions of this Agreement.
>
> The employee may discuss any grievance with his Shop Steward, Chief Steward and Supervisor. If a settlement cannot be reached, the Business Agent of the Union and the Chief Steward and the Employer shall discuss said grievance. If it is not resolved at this point, it shall be reduced to writing and submitted to a formal grievance panel comprised of two (2) representatives of the Union, other than the Business Agent of the Terminal, and two (2) representatives of the Employer, other than the representative presenting the case. If, at this point, no settlement is reached, it will be submitted to a Panel to include two (2) representatives from the Union and one (1) selected by the Union, who is not an official of Teamsters Local No. 70, and two (2) representatives of the Company and a third party to be selected by the Employer.
>
> In the event of a deadlock, the Union and the Employer shall be allowed all legal economic recourse, including strike or lockout.
>
> In the event a discharge is deadlocked the matter shall be referred to an arbitrator as provided for in Article 14, Section 3 of this Agreement.

Article 17 of the applicable collective-bargaining agreement, in sections 15 and 17, provides, in pertinent part, that "[e]mployees are not required to lift unusually heavy loads . . . or in any other way required to do work that may be injurious to their health" and "the Employer will observe all State and Federal Safety regulations pertaining to . . . the health and safety of his employees."

Respondent picks up the trash from the approximately 100 public schools in Oakland, California. Initially, during the time material herein, the schools' trash was thrown into metal bins lined with burlap, in addition to the usual 30-gallon garbage cans. The front of the bins opened so Respondent's employees could grasp the four corners of the burlap and form a sack which was dragged from the bin to the garbage truck and lifted approximately 2-1/2 feet and dumped into the truck's hopper. These sacks weigh from 100 to 150 pounds. Together the three-man crew assigned to a route would haul a sack to the garbage truck. If a sack was too heavy for the three men to handle, some of the contents were removed by use of a pitchfork and deposited into a container carried for this purpose.

Early in 1975 Jelincic, an employee of Respondent, complained to the Union about the aforesaid burlap sacks. Jelincic complained that they were too heavy, often contained wet garbage, occasionally contained glass, and many times were rat infested. On March 20, 1975, pursuant to the terms of the contractual grievance procedure, the Union wrote to Respondent as follows:

> Local 70 is filing a grievance against your company for repeatedly refusing to correct an unsafe method of picking up garbage.
>
> The containers used at the Oakland schools are lined with burlap sacks. These sacks must be pulled out in order to be dumped and they often contain wet garbage and are rat infested. In addition, they are often excessively heavy.
>
> We have had some of your employees injured as a result of having to handle these unsafe containers and feel that this method of picking up garbage is in violation of Article 17, Sections 15 and 17 [of the collective-bargaining contract].
>
> This case shall be placed on the next agenda of the Grievance Committee for disposition.

This grievance was placed on the grievance agenda and discussed at the grievance meeting held August 6, 1975, at which time Respondent's representatives, in reply to the grievance, informed the Union's representatives that Respondent would remedy the complaint by using front-end loaders to dump the schools' garbage bins, thereby eliminating the need for employees to grapple with the burlap sacks, but indicated that this change in operations would not be effectuated immediately at all of the schools inas-

[1] The record establishes and Respondent admits that Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and meets the Board's applicable discretionary jurisdictional standard.

[2] The Union, which is not a party to this proceeding, is admittedly a labor organization within the meaning of Sec. 2(5) of the Act.

much as there were approximately 100 schools involved and because a similar problem existed at the several Oakland public housing projects, over which the Union had filed an identical grievance; and that since conditions were a lot worse at the housing projects, Respondent intended to give that situation priority over the schools. Respondent's response satisfied the Union which withdrew its grievance.

During the remainder of 1975, 1976, and 1977 Respondent gradually replaced the burlap sacks at the Oakland schools with drop boxes which were unloaded by an employee operating a front-end loader. By June 1977, when the events which resulted in Jelincic's discharge took place, of the approximately 100 schools, only 7 had not been converted to the new system. One of these schools, the Franklin School, had not been converted to the new system because of the inability of the Oakland school district and the Oakland recreation and park department to negotiate an easement for a driveway which a front-end loader could use. The Union was fully aware of the gradual manner in which Respondent was remedying the grievance concerning the burlap sacks being used at the schools. In fact, the Union was actively policing Respondent's compliance with the agreement which had resulted in the Union's withdrawal of the grievance and, prior to the events leading to Jelincic's termination, the Union's chief steward, Rose, had notified the Union's stewards and various employees that the employees should continue to handle the burlap sacks at the schools which still used them. Rose explained to the stewards and to the employees that it was up to Respondent and the Union to resolve this problem, not the employees by self-help. Specifically, in the case of the Franklin School, the school involved in this case, Rose visited the school and spoke to a representative of the school to make sure that Respondent's delay in replacing the burlap sacks there with the new disposal system was based on a legitimate excuse. In sum, the record establishes that the Union accepted the reasons offered by Respondent for the delay in fully implementing its agreement to replace the burlap sacks at all of the schools and, because of this, the Union voiced no complaints to Respondent concerning the delay, was satisfied that Respondent was complying with the terms of the agreement, and advised the Union's stewards and various employees that the employees were to continue to handle the remaining burlap sacks.

Jelincic, during the year following the Union's withdrawal of the burlap sack grievance, was assigned to pick up trash at several schools that still used burlap sacks; once, in the latter part of 1975, he was cut by a piece of glass while handling a sack. In due course, the sacks at these locations were replaced by drop bins which were unloaded by front-end loaders. Thus Jelincic, for over a year prior to the events which resulted in his discharge, was not assigned to a route which required that he handle burlap sacks at a school.

On June 10, 1977, Jelincic was assigned to a work route which included the Franklin School at which, as described *supra,* the burlap sacks had not been replaced. That day Jelincic performed all of the assigend work at the Franklin School including the dumping of two burlap sacks. At the end of the workday, he notified Union Representative Wright that he felt the use of the burlap sacks was unsafe and that if he was assigned to work at the Franklin School in the future, he did not intend to handle the sacks because they were unsafe. Wright told him "go ahead if that is what you are going to do," but told him that if he did refuse to perform this work to be sure and give Respondent prior notification "so that you don't get yourself boxed into a corner and subject yourself to whatever course of action the company might choose to take."

The following week Jelincic was again assigned to the route which included the Franklin School, and on June 13, 15, and 17, 1977, picked up the trash which was in the garbage cans at this school but refused to handle the trash in the two burlap bags. Jelincic's position, which he stated to the representatives of Respondent, was that the burlap sacks were unsafe and, in view of the disposition of his prior grievance on the subject, did not feel Respondent that could require him to perform that type of work.[3] The result of his refusal to perform this portion of his work at the Franklin School was that on June 17 he was notified by Respondent that he was discharged for "gross insubordination," specifically because of his refusal to comply with the Respondent's orders to perform this work.

On June 17, immediately after his discharge, Jelincic went to the Franklin School where his replacement and the two other employees assigned to the work crew were about to dump the burlap sacks into the truck. Jelincic asked his replacement, David Calegari, for his name and union card. When Calegari refused to give him this information, Jelincic stated "I'm not after you" but was "after" Armando Rossi, Respondent's representative who had discharged him earlier that day.

Soon after his discharge, Jelincic, pursuant to the grievance-arbitration provision of the applicable collective-bargaining contract, grieved that he had been unjustly discharged. The Union pressed this grievance to arbitration. A hearing on the grievance was held on July 18, 1977, and the arbitrator issued his decision on November 2, 1977, upholding the validity of the discharge.

B. *Analysis and Conclusions*

1. The contention that Jelincic's conduct which resulted in his discharge was protected by Section 7 of the Act

There is no contention or evidence that Respondent, in discharging Jelincic, retaliated against him for having engaged in protected concerted activity or union activity. In urging that Jelincic's discharge was proscribed by Section 8(a)(1) and (3) of the Act, the General Counsel at page 5 of his post-hearing brief advances the following theory:

> At the time of his discharge Jelincic was engaged in a

[3] On June 14, 1977, at the request of the Respondent, Union Chief Steward Rose met with Respondent's officials and Jelincic to discuss this matter. Rose's stated position was that he would have to look into the matter and determine what the situation was concerning the schools which still had burlap sacks, inasmuch as there had been a new collective-bargaining contract negotiated since the resolution of Jelincic's 1975 grievance. Rose also informed Jelincic that since he, Rose, intended to handle the matter it would be unnecessary for Jelicic to grieve about the matter. The question of whether Jelincic should perform the work in question was never directly addressed by Rose, inasmuch as when Rose asked whether Jelincic had received an order to perform the disputed work Jelincic answered in the negative.

protected activity in asserting a contract right (Article 17, Sections 15 and 17) which prohibited employees from performing work under unsafe conditions, that is, employees were excused from picking up burlap bags which under the contract the parties had previously agreed were unsafe. *John Sexton & Co.*, 217 NLRB 80; *Anaconda Aluminum Company*, 160 NLRB 35. By discharging Jelincic for his refusal to pick up the burlap sacks, Respondent was failing to honor a mutually agreed upon arrangement consistent with the collective bargaining agreement. *Newspaper Printing Corp.*, 221 NLRB 811, 824. See also, *Southwestern Bell Telephone Company*, 212 NLRB 43, wherein the facts bear a strong resemblance to those in the instant case.

I am of the opinion that Jelincic's refusal to handle the burlap sacks at the Franklin School, on its face, constituted an attempt to enforce the safety provision of the governing collective-bargaining agreement in the interest of all employees covered by the agreement and as such constituted protected concerted activity within the meaning of Section 7 of the Act.[4] *Roadway Express, Inc.*, 217 NLRB 278 (1975), and *John Sexton & Co., Division of Beatrice Food Co.*, 218 NLRB 80 (1975). However, it is my further opinion that Jelincic's conduct lost the protection of the Act because it was in derogation of his duly designated bargaining representative.

As described *supra*, the applicable collective-bargaining agreement herein precludes the Company's employees from refusing to work as a means of resolving grievances pertaining to unsafe working conditions[5] until their collective-bargaining agent, the Union, exhausts the contractual grievance procedure.[6] In August 1976 Respondent and the Union, using the grievance procedure, reached agreement over a grievance filed by Jelincic complaining about the use of burlap sacks in the Oakland schools. Respondent agreed to replace the sacks with a mechanized system of dumping the trash and agreed that this new system would be installed in all of the schools over an unspecified period of time. Pursuant to the agreement Respondent, by June 1977, had removed the burlap sacks from all but 7 of the approximately 100 schools involved. The Union was fully aware of the gradual manner in which Respondent was replacing the burlap sacks and, in particular, knew that the sacks were still being used at the Franklin School, yet was satisfied that Respondent was complying with their agreement. In fact, the Union instructed its stewards as well as some employees that the employees were to continue handling the burlap sacks at schools where the sacks were still being used, explaining that it was up to the Union's and Respondent's officials to resolve this problem, not the employees by self-help.

It is clear, as set forth above, that when Jelincic refused to handle the burlap sacks at the Jackson School there was an agreement between Respondent and the Union which had resolved Jelincic's previous grievance and permitted Respondent to continue using these sacks at that school until it could replace them. Jelincic expressly repudiated this agreement in favor of economic action, a course of conduct specifically rejected by the Union. Under these circumstances Jelincic's activity involved a "disagreement with, repudiation or criticism of, a policy or decision previously taken by the Union" (*N.L.R.B.* v. *R. C. Can Company*, 328 F.2d 974, 979 (5th Cir. 1964)), and, accordingly does not warrant the protection of the Act. I recognize that the ultimate objective of Jelincic's activity coincided with the Union's, however, the Board will nevertheless find his conduct unprotected if it is in contravention of a final and official union position. *Sunbeam Lighting Company, Inc.*, 136 NLRB 1248, 1253 (1962); *Lee A. Consaul Co., Inc., et al.*, 175 NLRB 547, 549 (1969). This is what occurred in this case. Jelincic's conduct was in derogation of the Union's agreement with Respondent which permitted Respondent to use burlap sacks at the Franklin School until it could replace them. Thus, it is plain that Jelincic's refusal to handle these sacks was contrary to the Union's "*final action*" on the grievance and "occurred in circumstances which indicate actual prejudice to the integrity of the collective-bargaining relationship." *Lee A. Consaul Co., Inc., supra* at 549. Contrary to the Union's good-faith effort to resolve the problem of the burlap sacks through the contractual grievance procedure, Jelincic chose to ignore this procedure and the agreement between the parties. Instead he chose to resort to economic self-help. I am of the opinion that to extend the protection of the Act to Jelincic's activity would be to seriously weaken the entire concept of orderly collective

[4] In view of my ultimate disposition of this case, I have not considered Respondent's contention that Jelincic acted in bad faith when he engaged in the conduct involved herein or the question of whether Jelincic's conduct lost the protection of the Act either because it was in derogation of a contractual no-strike clause or because it was a part of a plan of action wherein Jelincic sought to maintain the benefits of remaining in a paid employee status while refusing to perform all of the work he was hired to do.

[5] In concluding that employees' grievances concerning unsafe working conditions are covered by the contractual no-strike clause, I have considered that art. 17 of the contract states that "[e]mployees *are not required* to lift unusually heavy loads or in any other way *required to do* work that may be injurious to their health." [Emphasis added.] Nevertheless, I am of the opinion that this provision is insufficient to create an exception to the plain language of the general no-strike clause for this class of grievances. This conclusion is reinforced by the fact that art. 17 specifically excuses employees in only one type of situation from performing working assignments which they feel are unsafe. Art. 17 in this respect states that "[i]f a customer repeatedly refuses to conform to the weight limitations, the employee will be permitted to refuse to service that account, provided that he has first notified the employee in charge of the route." There is no language in this article or elswhere in the agreement which permits employees to otherwise refuse to perform work involving alleged unsafe or unhealthy conditions.

[6] In reaching this conclusion, I have considered *International Union of Operating Engineers, Local Union 18, AFL-CIO (Davis-McKee, Inc.), 238 NLRB No. 58 (1978) (Member Penello dissenting), and do not read this decision to mean that even where, as in the present case, a union has consented to an express contract provision banning strikes until the contractual grievance procedure is exhausted* that such a limited no-strike provision is insufficient to establish a waiver of the employees' right to engage in work stoppages during the period the parties are attempting to resolve a dispute peacefully through the contractual grievance machinery. An extension of *Operating Engineers, Local Union 18, AFL-CIO (Davis-McKee)*, to the instant situation would be contrary to the policy of the Act which seeks to encourage industrial peace through the full utilization of contractual grievance procedures. Sec. 203(d) of the Labor Management Relations Act, 1947, as amended. *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville and Vicinity, et al.*, 417 U.S. 12, 16-17 (1974). It is clear that the parties intent in including the instant no-strike provision in their contract was to allow the stipulated means of settling disputes, as set forth in the contractual grievance machinery, an opportunity to resolve a dispute before the employees used economic force. To hold that the instant limited no-strike provision does not preclude employees' work stoppages over a grievance while the grievance is being processed though the contractual grievance procedure would not only be contrary to the intent of the parties to the contract, but also would undermine the statutory policy which seeks to encourage industrial peace through the full utilization of contractual grievance procedures.

bargaining embodied in Section 9(a) of the Act. The policy underlying Section 9(a) is to encourage collective bargaining in the interests of promoting industrial peace and stability. *Medo Photo Supply Corp.* v. *N.L.R.B.*, 321 U.S. 678 (1944); *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332 (1944); *N.L.R.B.* v. *Allis-Chalmers Mfg. Co., et al.*, 388 U.S. 175, 180 (1967). Where, as here, the union and employer using the contractual grievance procedure have negotiated a peaceful solution to a problem, all interested parties—union, employer and employees—should be encouraged in every way to abide by the agreement and not to act in a manner which undermines its effectiveness and stabilizing influence. To hold otherwise would be to actively discourage collective bargaining.

It is for these reasons that I conclude that Jelincic's refusal to handle the burlap sacks at the Franklin School was conduct in derogation of his duly designated bargaining representative; hence, it is unprotected.[7]

2. The contention that the Board should defer to the decision of the arbitrator

The arbitrator, in upholding the validity of Jelincic's discharge, viewed the issue before him as "whether or not the discharge of Joseph J. Jelincic was in violation of the Agreement." In deciding this issue the arbitrator viewed the essential question to be whether the work which Jelincic refused to perform constituted an "abnormally dangerous conditions for work at the place of employment" within the meaning of Section 502 of the Act as interpreted by the Supreme Court of the United States in *Gateway Coal Co.* v. *United Mine Workers of America, et al.*, 414 U.S. 385 (1974). Upon reviewing the evidence he concluded that Jelincic's contention that handling the burlap sacks at the Franklin School would have been injurious to his health or hazardous "is not factually sustained as being reasonable based on this record." He also concluded that Jelincic's postdischarge statement that he was "after" management representative Rossi negated Jelincic's contention that his refusal to perform the disputed work was based upon a good-faith belief that the work was dangerous to his health or safety. Finally, based upon the lack of objective evidence to support a claim that the work in question was dangerous to Jelincic's health or safety, and the evidence that indicated Jelincic did not have a good-faith belief that this was the case, the arbitrator concluded Jelincic's real reason for refusing to handle the burlap sacks at the Franklin School was his desire to challenge what he believed was Respondent's failure to comply with the settlement of the 1975 grievance. Also, the arbitrator noted that the evidence indicated the Union was satisfied with the manner in which Respondent was implementing that agreement. In reaching his decision, the arbitrator did not consider whether Jelincic's conduct was protected by Section 7 of the Act, nor was this question raised. The only unfair labor practice issue considered by the arbitrator was whether Jelincic's conduct was "abnormally dangerous" as that term is used in Section 502 of the Act.

General Counsel, in opposition to Respondent's contention that the Board defer to the decision of the arbitrator, urges that the arbitrator's award was clearly repugnant to the Act within the meaning of *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), because it does not consider "the statutory principles involved in the protection of employees in presenting grievances."

Under the *Spielberg* doctrine the Board will defer to an arbitration award where "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the [Arbitrator] is not clearly repugnant to the purposes and policies of the Act."[8] In the present case the record reveals, and the parties do not dispute, that the proceedings before the arbitrator were fair and regular and that the parties were bound. Thus, the only issue before the Board is whether the arbitrator's award is repugnant to the Act. It is my opinion, for the reasons set forth herein, that the award is not repugnant to the Act.

The essential unfair labor practice issue in this case, and the central issue considered by the arbitrator, is the question of whether the working conditions which prompted Jelincic's refusal to work were "abnormally dangerous" within the meaning of Section 502 of the Act. If this was the case then Jelincic's conduct, which I have found lost its statutory protection, was protected by virute of Section 502 and his discharge was illegal. Under these circumstances, the fact that the other unfair labor practice issues which I have discussed, *supra,* were neither presented to nor considered by the arbitrator does not make the arbitrator's decision an inappropriate one for deferral, provided that the arbitrator's resolution of the question of whether the working conditions which prompted Jelincic's refusal to work were "abnormally dangerous" is not clearly repugnant to the Act. I am of the opinion that the arbitrator's evaluation of the evidence before him, which is essentially the same evidence before the Board in this unfair labor practice proceeding, is not clearly repugnant to the purposes of the Act. The arbitrator applied the correct legal standard in determining whether the working conditions in dispute were "abnormally dangerous" and his conclusion that the work was not "abnormally dangerous" was not palpably wrong ro unreasonable.[9]

[7] In the light of the June 14, 1977, instructions given Jelincic by Union Chief Steward Rose that Jelincic should forget his grievance because Rose would handle the matter, I am of the view that Union Representative Wright's June 10, 1977, comments to Jelincic, in response to his announcement that he intended to refuse to handle the burlap sacks, are not sufficient to establish that the Union adopted or sanctioned Jelincic's activity.

[8] 112 NLRB at 1082. There is also a requirement, later added, for the arbitrator to have considered the unfair labor practice issue and to have ruled on it. *Raytheon Company*, 140 NLRB 883 (1963). However, this requirement was apparently overruled in *Electronic Reproduction Service Corporation, et al.*, 213 NLRB 758 (1974) (Members Fanning and Jenkins dissenting), where a Board majority held that deferral is appropriate where an arbitrator could have decided an unfair labor practice issue even if it was not in fact presented for determination.

[9] In the event that under the circumstances of this case—the failure of the arbitrator to consider the several other unfair labor practice issues involved herein—I have erred in deferring to his award I shall consider whether the record in this proceeding reveals "ascertainable, objective evidence supporting [Jelincic's] conclusion that an abnormally dangerous condition for work exist[ed]" at the time Jelincic refused his work assignment. See *Gateway Coal Co.*, v. *United Mine Workers of America, et al.*, 414 U.S. 385. I think not. Jelincic did not look into the bins on the days in question to determine if the sacks posed any threat to his health or safety. There is no evidence which indicates that the sacks on those days posed any threat to his health or safety. During the several years burlap sacks were used at the schools, there

(Continued)

Based upon the foregoing, I find that the arbitrator's award is not repugnant to the policies of the Act; is, on its face, fair and regular; has decided issues within the competence of the arbitrator; and was reached by a procedure to which the parties have agreed to be bound. Accordingly, I conclude that it will effectuate the policies of the Act to give conclusive effect to the arbitration award and on that basis shall recommend that the complaint be dismissed in its entirety.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

The complaint is dismissed in its entirety.

is evidence of only two employees injuring themselves while handling sacks; Jelincic, who cut himself on a piece of glass, and employee Sanchez, who hurt his back while lifting a sack. Sanchez admitted that back injuries were a normal occupational hazard and that he had hurt his back "very many times" performing other work on the job. Finally, the Union's Chief Steward Rose testified, in substance, that the Union pressed Jelincic's initial grievance over the burlap sacks in 1975, not because the Union considered the situation as unsafe or unhealthy, but because the Union wanted the Company to use more modern methods so as to make work easier for the employees. Rose further testified that during the several years Respondent used burlap sacks at the schools and other locations, he had heard of only two instances where employees had injured themselves while handling the sacks.

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.