

Sea-Land Service, Inc. and Al S. Cherry. Case 32-CA-142 (formerly 20-CA-12372)

March 2, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS,
PENELLO, AND TRUESDALE

Upon a charge filed on January 18, 1977, by Al S. Cherry, an Individual, and duly served on Sea-Land Service, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint and notice of hearing on January 25, 1978, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleged in substance that on January 12, 1977, Respondent reprimanded and then discharged Al S. Cherry because he engaged in protected activity for the purposes of collective bargaining or other mutual aid or protection. On February 2, 1978, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On June 26, 1978, Respondent filed directly with the Board a Motion for Summary Judgment. On July 10, 1978, counsel for the General Counsel filed a Motion for Summary Judgment. Attached to the General Counsel's motion was a stipulation which stated, *inter alia*, that on June 29 and July 5, 1978, the parties stipulated that for the purposes of their respective motions for summary judgment the parties would be bound by the factual findings contained in arbitrator John Kagel's award issued September 29, 1977. The parties further stipulated, for the same purposes that the arbitration proceedings appeared to have been fair and regular and that all parties had agreed to be bound. The parties specifically did not agree to whether the arbitrator's decision was or was not clearly repugnant to the purposes and policies of the National Labor Relations Act. Subsequently, on July 20, 1978, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why Respondent's and/or the General Counsel's Motion for Summary Judgment should or should not be granted. Respondent thereafter filed a response to the General Counsel's brief in support of

the Motion for Summary Judgment.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

As stated above, the facts have been stipulated to be those contained in the arbitrator's decision. The only *Spielberg*¹ criterion which has not been stipulated to is whether or not the arbitrator's decision is clearly repugnant to the Act. The General Counsel argues that the decision is repugnant to the Act and we should not defer to it. He also contends that, based on the facts as found by the arbitrator, and to which all parties have agreed to be bound, we should grant the General Counsel's Motion for Summary Judgment. Respondent submits that the decision is not repugnant to the Act; that all the *Spielberg* criteria have been met; and that consequently we should defer to the arbitration decision. Respondent also pleads that since the arbitrator's decision resolves all factual and legal issues we should grant its Motion for Summary Judgment.

The arbitrator found that Cherry, who had been castigated by Respondent for not following company procedures, had filed a grievance and requested an investigation. Respondent issued Cherry a written reprimand. The arbitrator found that the reprimand was a result of Cherry's having filed a grievance. A meeting was held among Respondent, Cherry, and his union representative; at this meeting Cherry used an obscenity. Respondent summarily discharged him. The arbitrator made the pivotal finding on page 12 of his decision.

In other words, the Company has tainted its own actions by using the filing of the grievance as one of the bases for [Cherry's] warning letter which was at least a contributing cause to his outburst.

This does not mean that the grievance filed by [Cherry] the day before had any merit. The point is that [Cherry] was entitled to have that matter heard under the grievance procedure and not be disciplined for so requesting. And, the action of the Company in discharging [Cherry] for his outburst where this question was inextricably involved is, therefore, not for just cause.

However, the arbitrator concluded that Cherry should not have used the offensive language and

¹ *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955). Under *Spielberg* the Board set forth the following criteria, all of which must be met, before the Board will defer to an arbitration award: (1) the proceedings must be fair and regular; (2) all parties must agree to be bound; and (3) the decision must not be repugnant to the purposes and policies of the Act.

that, while discharge was too severe, because the Company's action was tainted, he felt a suspension was justified.

The General Counsel contends that Cherry was engaged in protected activity when he uttered the obscenity and therefore the suspension is repugnant to the Act. Moreover, the General Counsel argues that the arbitrator did not grant a make-whole remedy and that, in and of itself, is repugnant. Respondent takes a contrary position on both points.

As the arbitrator found, the discharge was based, at least in substantial² part, on Cherry's filing of a grievance—conduct which is protected by Section 7 of the Act. Respondent disciplined Cherry for engaging in protected activity. The arbitrator ruled that discharge was too severe for engaging in that protected activity, however, that a suspension for an obscenity uttered in that connection would be an appropriate penalty. But that is not the true issue in this proceeding. The arbitrator specifically held that Respondent's discipline was tainted and that Cherry's obscenity was not the cause. Nor did Respondent suspend Cherry. It is no answer to conclude, as the arbitrator did, that Respondent might reasonably and lawfully have suspended Cherry for using an obscenity. It did not do so, and overreaction to a violation of a rule or accepted standard may itself be an indication of pretext.

The Board has long held that:

Any discharge predicated in whole or in part on the effort of an employee, representing himself and one or more other employees, to present such grievances, absent unusual circumstances not present here, would be a discharge for protected union and concerted activities and therefore a violation of the Act. The merit or lack of merit in the grievance that would be presented, if permitted, is immaterial.³

Accordingly, we find that the arbitrator's decision is clearly repugnant to the Act and, based on the stipulated facts, we grant the General Counsel's Motion for Summary Judgment.

Our dissenting colleague misconstrues the issue as well as our decision: we do not reach the remedial aspect of the award in this case.⁴ This case deals sole-

² Our dissenting colleague makes much of our use of the word "substantial." The relevant portion of the arbitrator's decision is quoted above. We have no difficulty with "substantial" where the arbitrator has chosen the phrase "inextricably involved." In any event, our characterization is hardly misleading, especially in light of the quotation.

³ *Top Notch Manufacturing Company, Inc.*, 145 NLRB 429, 432 (1963); *Aver Lar Sanitarium*, 175 NLRB 751 (1969), *enfd.*, 436 F.2d 45 (9th Cir. 1970).

⁴ The dissent finds undue support in the cases it cites for the proposition that less than a make-whole remedy is not clearly repugnant to the Act. It is true that in *Crown Zellerbach Corporation*, 215 NLRB 385, 387 (1974), a

ly with the punishment of an employee for exercising a Section 7 right. The dissent seeks to separate the cause of the suspension from the protected conduct with which it is "inextricably involved," as the parties have stipulated. It blithely dismisses, as a fictitious suspension, the arbitrator's substitution of what could have been a reasonable penalty only if Cherry had been punished for misconduct rather than protected activity. We concede the fiction.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Delaware corporation, with its principal place of business in New Jersey and with another place of business in Oakland, California, has been engaged in interstate and international transportation of freight by water and rail. In the course and conduct of its business operations during the past calendar year, Respondent received gross revenues in excess of \$50,000 from the transportation of goods in interstate commerce.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Office and Professional Employees Union, Local 29, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Since on or about January 12, 1977, Respondent by its officers, agents, and representatives has inter-

Board panel adopted the Administrative Law Judge's dismissal of a complaint where the arbitrator awarded less than full backpay, but "insubordination was the reason for the discharge," not an unfair labor practice. Likewise, *International Great Lakes Shipping Company*, 215 NLRB 701 (1975), dismissed a complaint based on *Spielberg* where the arbitrator ordered reinstatement without backpay, but once again the discharges were not for protected activity. *Ohio Ferro-Alloys Corporation*, 209 NLRB 577 (1974), at fn. 2, specifically disavowed the Administrative Law Judge's characterization of the arbitrator's award as a "compromise" and his rationale suggesting deferral to such an award. The decision was based on the fact that the employee had obtained his employment under false pretenses. To be sure in *Fikse Bros. Inc.*, 220 NLRB 1301 (1975), a panel majority stated that a lump-sum award in lieu of a "make-whole" remedy was insufficient to require ouster of an arbitrator's decision, but not without Chairman Fanning's dissent. More to the point is *Cessna Aircraft Co.*, 220 NLRB 873 (1975) (then-Chairman Murphy concurring on other grounds), where a panel held that reinstatement without a make-whole remedy is repugnant to the Act.

ferred with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act by certain acts and conduct including the following:

1. On or about January 12, 1977, Respondent issued a warning to employee Al S. Cherry in retaliation for his having engaged in protected concerted activity.

2. On or about January 12, 1977, Respondent discharged employee Al S. Cherry for engaging in protected concerted activity and, since that date, until on or about September 29, 1977, Respondent failed and refused to reinstate him to his former position. Accordingly, we find that Cherry was reprimanded and discharged because of his protected concerted activities, and by the said conduct Respondent violated Section 8(a)(3) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent reprimanded Al S. Cherry in violation of Section 8(a)(1) of the Act and discharged him in violation of Section 8(a)(3) and (1) of the Act, but has subsequently reinstated him without prejudice to his seniority or other rights and benefits previously enjoyed, we shall order that Respondent make him whole for any loss of wages or other benefits to which he may be entitled to as a result of the discrimination against him, with interest, as provided by *F.W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977),⁵ and expunge from his personnel record all reference to the discharge and/or suspension.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On January 12, 1977, Respondent, through its documentation manager, Kay Miller, interfered with, restrained, and coerced its employee Al S. Cherry, thereby committing an unfair labor practice within the meaning of Section 8(a)(1) of the Act, by issuing a reprimand to Cherry in retaliation for Cherry having filed a grievance.

4. Respondent, by discharging Al S. Cherry on January 12, 1977, until September 29, 1977, for having engaged in protected concerted activities, thereby discouraged membership in a labor organization, and thereby engaged in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Sea-Land Service, Inc., Oakland, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Reprimanding, discharging, or taking any other reprisals against its employees in retaliation for their engaging in protected concerted activities for their mutual aid or protection.

(b) Discouraging membership in a labor organization of its employees, by discharging its employees or by discriminating in any other manner in regard to their hire, tenure of employment, or any term or condition of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Rescind the discharge and/or suspension of Al S. Cherry and make him whole for any losses that he may have suffered as a result of the discrimination against him in accordance with the provisions of The Remedy section above.

(b) Expunge from the personnel record of Al S. Cherry any reference to his discharge on January 12, 1977, or his subsequent suspension.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

⁵ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

(d) Post at its Oakland, California, facility copies of the attached notice marked "Appendix."⁶ Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

MEMBER TRUESDALE, concurring:

I concur in the majority's finding that the arbitrator's decision is repugnant to the Act. I reach this result, however, only because the arbitrator himself found, on the facts presented to him, that one of the reasons for the Employer's disciplinary meeting with Cherry on January 12, 1977—which precipitated Cherry's "outburst" and which, in turn, led to his immediate discharge—was the fact that Cherry had filed a grievance against the Employer on the previous day. Thus, the arbitrator concluded that Cherry's "outburst" and use of profanity during a disciplinary meeting was triggered in part by the Employer's action in giving him a warning letter because, *inter alia*, he had filed a grievance. When Cherry protested what he considered an unfair warning letter, albeit he did so in an intemperate manner, he was promptly discharged for alleged insubordination. In this context, the arbitrator concluded that the discharge was caused, at least in part, by Cherry's filing a grievance. The arbitrator nevertheless concluded that some form of discipline short of a discharge (i.e., a 9-month suspension without pay) was warranted by the insubordination. This conclusion is contrary to Board law and, therefore, repugnant to the Act. The Board has consistently held that an employer may not lawfully discipline or discharge an employee for alleged insubordination where such insubordination was itself provoked by the employer's unfair labor practice.⁷ In my view, this principle is

⁶ In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁷ *Hawaiian Hauling Service, Ltd.*, 219 NLRB 765 (1975). Member Penello, in his dissent, asks what my position would be if Cherry, instead of using a profanity, had physically assaulted his supervisor during the grievance meeting. I would ordinarily prefer not to dignify a question that is so obviously intended to bait, but since asked, I will state that the difference be-

sufficiently well established that the arbitrator's contrary decision is clearly repugnant to the Act.

Nor does the foregoing analysis contradict the approach I embraced in *The Kansas City Star Company*,⁸ where I stated:

The majority reviews the record evidence, sees no irregularities in the proceedings and no facial errors in the arbitrator's factual findings, and then examines the arbitrator's legal conclusion to see if, on the facts he has found, it is consistent with Board law.

In this case, unlike *Kansas City Star*, the result reached by the arbitrator is not consistent with Board law. Accordingly, I do not believe that deferral to the arbitrator's decision is appropriate under *Spielberg Manufacturing Company*.⁹

MEMBER PENELLO, dissenting:

My colleagues in the majority have once again demonstrated that they are firmly committed to a policy which is clearly at odds with our congressional mandate to "encourag[e] the practice and procedure of collective bargaining."¹⁰ Their policy also undermines the public interest by unnecessarily adding to the Board's swollen docket of cases.

The legal issue presented is simply whether the arbitrator's decision is "clearly repugnant" to the Act under the Board's *Spielberg* doctrine.¹¹ If it is not clearly repugnant, then the Board will defer to the

tween a physical assault and a verbal one is a difference painted in black and white, not grays. Therefore, if Cherry had shot, bit, kicked, or hit his supervisor under the circumstances present in this case, I have no doubt but that I, and presumably all the Board Members, including Member Penello, would have found the conduct so far beyond the pale as to lose its protection under the Act. Thus, as the Board said in *Hawaiian Hauling*, *supra* at 766:

We recognize, of course, that an employee may engage in conduct during a grievance meeting which is so opprobrious as to be unprotected.

Cherry's outburst here, however, was a verbal one and, therefore, not so "opprobrious," as many Board and court decisions have made clear. See, e.g., *N.L.R.B. v. Mueller Brass Co.*, 501 F.2d 680 (5th Cir. 1974).

⁸ 236 NLRB 866 (1978). Member Penello erroneously suggests in his dissent that, because the result I reach here is different from the result I reached in *Kansas City Star*, my views concerning *Spielberg* have changed. This is simply not so, as a careful reading of my separate opinions there and here will readily reveal. Thus, in both cases I reviewed the record to determine if there were irregularities in the arbitration proceeding and in both cases I found no such irregularities. Similarly, in both cases I reviewed the arbitrator's decision to determine if there were facial errors in his factual findings. Again, in both cases I found no such errors. Finally, in both cases I examined the arbitrator's legal conclusions to see if, on the facts the arbitrator has found, it is consistent with Board law. Such an examination in *Kansas City Star* persuaded me that the arbitrator's conclusions were, indeed, consistent with Board law and, therefore, not repugnant to the Act. In this case, however, a similar examination persuades me, for the reasons stated above, that the arbitrator's legal conclusions are not consistent with Board law and, therefore, are repugnant to the Act. It is clear, therefore, that my view of what is and is not "repugnant to the Act" under the *Spielberg* standard has not changed.

⁹ 112 NLRB 1080 (1955).

¹⁰ Sec. 1 of the Act.

¹¹ *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

arbitration award in this case.¹² As discussed below, the award was not clearly at odds with the statute and reflected a legitimate recognition of the rights and obligations of the parties. Nevertheless, despite Board precedent to the contrary, my colleagues in the majority refuse to defer to the arbitral decision.

Although the majority opinion briefly recounts some of the pertinent facts, a more comprehensive recitation of the relevant events is necessary in order to appreciate fully the arbitrator's award.¹³ The Charging Party, Al S. Cherry, was employed by the Respondent Company in late 1976 in its traffic department. In early January 1977,¹⁴ a supervisor in that department informed the traffic department manager, Kay Miller, that Cherry was disturbing one of her employees, Jennie Jensen, with questions concerning tariff rates. Miller prepared an interoffice letter dated January 7 to Cherry's immediate supervisor, Debbie Pericola, which stated that the latter should tell Cherry that he should not make tariff inquiries of Jensen but rather to another individual designated to handle such questions. Pericola showed Cherry the January 7 letter from Miller and discussed the matter with him. However, he became belligerent and demanded to see Miller. Miller met with Cherry, who claimed that the January 7 letter was negative, derogatory, and unfair, and that he could talk to Jensen any time he wanted to despite Miller's instructions. Subsequently, Cherry wrote a letter dated January 11 to Miller protesting her January 7 letter, and attached to it a grievance concerning the matter. On January 12, Miller and Fred Davis, a personnel specialist, drafted a warning letter to Cherry, citing his verbal insubordination and letter dated January 11. Immediately thereafter, Miller and Davis met Cherry to discuss his grievance, at which time they handed him the warning letter. Cherry read it and then, in a voice which was loud, disrespectful, belligerent, and rude, stated:

. . . [T]he company must be crazy if they think that they can give [me] instructions like this. [I] can stand on the highest mountain shouting anything [I] want to about the President of the United States. . . . [I] could say anything [I] wanted to anybody anytime [I] wanted to, and, Kay Miller, you must be out of your fucking mind if you think you can change me.

¹² Under *Spiegelberg*, the Board will defer if (1) the proceedings appear to be fair and regular, (2) all parties had agreed to be bound by the arbitration award, and (3) the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. The parties stipulated that the first two criteria were met.

¹³ The parties stipulated to the factual findings of the arbitrator's decision.

¹⁴ All dates hereinafter are in 1977.

At that point, Davis terminated Cherry. Miller concurred in Davis' decision stating: "There's no way I can run a business and have an employee who will stand up and say that the company cannot tell him how he's going to do his job and in the process swear at me while he's doing it."

The arbitrator concluded that the warning was not for just cause because one of its bases was Cherry's January 11 letter, to which his grievance was attached. The arbitrator reasoned that Cherry was free to file grievances without being disciplined for asserting his rights.

The arbitrator also concluded that the discharge was not for just cause. He noted that the Company made no attempt to calm Cherry down or to see if he was going to adhere to his intended course of outright defiance of any company order, and failed to give consideration to whether Cherry's past work record was good, bad, or indifferent. In addition, the arbitrator stated that "the Company has tainted its own actions by using the filing of the grievance as one of the bases for the Grievant's warning letter which was at least a contributing cause to his outburst."

However, the arbitrator also discussed Cherry's obligations as an employee. He stated:

It does not require major analysis to underscore that the Grievant is under an obligation to carry out his job as directed by his Employer irrespective of his personal feelings. . . . A verbal expression of refusal to do so may cause the Company to discipline the Grievant. . . . Similarly, the use of words such as "fucking" when directed at Supervisors, especially, where, as here, there is no normal use of such terms as shop talk, is also a measure of disrespect for which discipline can occur.

While the Company's action is tainted as stated above, and the Grievant must be reinstated, his own actions on January 12 continued his course of self-help from the day before. He had read the warning letter . . . and [would have been] protected had he filed another grievance. He rather chose to act as he did and he is responsible for his actions. . . . A disciplinary suspension from January 12, 1977, to the date hereof is for just cause as is his reinstatement

. . . .
The General Counsel alleged that Respondent violated the Act by issuing a warning to Cherry and by discharging him. It is clear from the foregoing that the arbitrator considered those matters and found that the warning and discharge were not for just cause. Thus, the arbitrator ordered Cherry reinstated.

But the arbitrator also found that Cherry's own actions of refusing to carry out his job and using vulgar language to his supervisors breached his legitimate obligations to the Company. Accordingly, although the arbitrator reinstated Cherry, he denied him backpay by creating the fiction that Cherry should be "suspended" during the pendency of the grievance.

The rationale employed by the majority in finding the arbitrator's decision to be repugnant to the Act is quite confusing.¹⁵ Nevertheless, it appears as though the majority has taken issue with the arbitrator's fictitious "suspension" of Cherry in order to arrive at an equitable remedy. Thus, in essence, the majority is actually disputing the remedial aspect of the arbitration award, which it contends is clearly repugnant to the Act.

However, the Board has already addressed this issue of whether it should defer to an arbitration award which provides for the remedy of reinstatement without full backpay. The Board has concluded that such awards are not clearly repugnant to the Act, consequently, deferral is appropriate.¹⁶ Thus, not only is the majority's rationale puzzling, but its conclusion that the arbitrator's decision is clearly repugnant to the Act is also perplexing in light of Board precedent.¹⁷

The opinion of my colleagues in the majority once again demonstrates their predilection to defer to an arbitration award only when they happen to agree with the arbitrator's decision.¹⁸ This pretended appli-

cation of the *Spielberg* doctrine effectively serves to oust arbitrators of any real authority to issue final adjudications to disputes over provisions in collective-bargaining agreements, since my colleagues in the majority have now assumed for themselves the role of final arbiter for the parties over such matters. Thus, it is readily apparent that the majority seeks to change the third *Spielberg* criteria from "merely repugnant" to "merely erroneous," thereby substituting their judgment for that of an arbitrator. This result is patently at odds with the policies of the Act.¹⁹ As the Board has stated:

If complete effectuation of the Federal policy is to be achieved, we firmly believe that the Board . . . should give hospitable acceptance to the arbitral process as "part and parcel of the collective bargaining process itself," and voluntarily withhold its undoubted authority to adjudicate unfair labor practice charges involving the same subject matter, unless it clearly appears that . . . the award was clearly repugnant to the purposes and policies of the Act. . . .

* * * * *

To require more of the Board would mean substituting the Board's judgment for that of the arbitrator, thereby defeating the purposes of the Act and the common goal of national labor policy of encouraging the final adjustment of disputes, "as part and parcel of the collective bargaining process."²⁰

Contrary to the position he recently took in *Kansas City Star*, *supra*, Member Truesdale now also seeks to change the *Spielberg* standards. Thus, he does not defer because the award "is not consistent with Board law," a much looser standard than the *Spielberg* "clearly repugnant" test. In addition, as is apparent in his concurrence, Member Truesdale is merely substituting his factual judgment for that of the arbitrator. Contrary to Member Truesdale's contention, insubordination provoked by an unfair labor practice is not protected when accompanied by extreme behavior.²¹ Where an employee engages in

¹⁵ In addition, the majority opinion misreads the arbitrator's decision insofar as it states that the arbitrator found that Cherry's discharge was based at least in substantial part on his filing of a grievance. The arbitrator clearly stated that Cherry's filing of a grievance served as a partial basis for the warning letter, which in turn was a contributing reason for his outburst, which in turn served as a partial basis for his discharge. The majority's version of the arbitrator's decision is therefore misleading. Furthermore, Respondent did not "discipline Cherry for engaging in protected activity," as the majority contends. Rather, it disciplined him for his outburst and use of profanity. While the outburst may have been related to Cherry's grievance, the arbitrator's award properly recognized that Cherry went beyond the bounds of legitimately protesting his discipline and entered the area of insubordination. Thus, the majority's attempt to distinguish *Crown Zellerbach Corporation* 215 NLRB 385 (1974) (see fn. 4 of the majority opinion), is misplaced.

¹⁶ See *Crown Zellerbach Corporation*, 215 NLRB 385, 387 (1974); *International Great Lakes Shipping Company*, 215 NLRB 701, 703 (1974); *Ohio Ferro-Alloys Corporation*, 209 NLRB 577 (1974). See also *Fikse Bros., Inc.*, 220 NLRB 1301 (1975), enforcement denied on other grounds 550 F.2d 535 (1977). But see *Cessna Aircraft Co.*, 220 NLRB 873 (1975).

¹⁷ The majority's claim that "we do not reach the remedial aspect of the award in this case" is peculiar in light of the fact that they only disagree with the arbitrator insofar as the remedy is concerned.

¹⁸ See, e.g., *Douglas Aircraft Company Component of McDonnell Douglas Corporation*, 234 NLRB 578 (1978) (dissenting opinion of Member Penello); *Hawaiian Hauling Service, Ltd.*, 219 NLRB 765, 767 (1975) (dissenting opinion of Members Penello and Kennedy); *Dreis & Krump Manufacturing, Inc.*, 221 NLRB 309 (1975) (concurring opinion of Member Penello); *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1029 (1976) (dissenting opinion of Members Penello and Walther). See also *The Kansas City Star Company*, 236 NLRB 866 (1978) (concurring opinion of Member Truesdale); *Texaco, Inc. Producing Department, Houston Division*, 233 NLRB 375 (1977) (dissenting opinion of Member Penello).

¹⁹ If this matter had not proceeded to arbitration but instead had only been brought before the Board, I might have concluded that Cherry was entitled also to full backpay. However, once the parties submit a matter to arbitration, I am bound by *Spielberg* to defer to the arbitral award where it is not clearly repugnant to the Act—even if I would otherwise disagree with the result reached by the arbitrator.

²⁰ *International Harvester Company (Indianapolis Works)*, 138 NLRB 923, 927, 929 (1962), *enfd. sub nom. Thomas D. Ramsey v. N.L.R.B.*, 327 F.2d 784 (7th Cir. 1964), cert. denied 377 U.S. 1003.

²¹ Would Member Truesdale find Cherry's insubordination protected if Cherry, for example, had shot, bit, kicked, or hit his supervisor? The Board has long held that not only deeds, but also words, may remove an employee's conduct from the Act's protection. *T. W. Helper*, 7 NLRB 255,

Continued

physical violence the result is obvious. Where, as here, the abuse is verbal, the line dividing acceptable from unprotected behavior is not clearly demarcated but is a gray area in which all circumstances should be considered. This the arbitrator did in finding that Cherry crossed the line. That Member Truesdale would draw the line differently does not make the arbitration award repugnant to the Act.

It is also particularly disturbing to me that cases of this nature continue to congest the Board's overburdened resources. The Board has repeatedly advised the public that its caseload is now of crisis proportions, and the backlog of cases awaiting hearing continues to grow. Although other remedies have been suggested and the Board's budgetary resources continue to expand to battle the problem, the best remedy is to pare down the Board's docket of cases by permitting and encouraging parties to make final adjustments of grievances arising over the application of collective-bargaining agreements by resort to methods agreed upon by themselves. This policy of encouraging collective bargaining and private dispute resolution is firmly embedded in the Act,²² and has been embodied in the *Spielberg* doctrine for over two decades. The majority's failure to faithfully follow that policy results unfortunately in unwarranted

delay and increased resort to adversary and bureaucratic proceedings. Such results hardly foster the purposes of the Act. Thus, I dissent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT reprimand, discharge, suspend, or otherwise discriminate against our employees because they engage in protected concerted activity for their mutual aid or protection.

WE WILL NOT discourage membership in any labor organization, by discharging our employees or by discriminating in any other manner is regard to their hire, tenure of employment, or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL rescind the discharge and/or suspension of Al S. Cherry and make him whole for any losses he may have suffered, with interest, as a result of the discrimination against him.

WE WILL expunge from the personnel record of Al S. Cherry any reference to his discharge or subsequent suspension.

SEA-LAND SERVICE, INC.

264-265 (1938) an employee "roundly cursed" a floorboy; *Garcrest Division of United Mills Corporation*, 118 NLRB 158, 164-165 (1957) (use of "a four-letter synonym for excrement" concerning a supervisor); *Rockland Chrysler Plymouth, Inc.* 209 NLRB 1045, 1051 (1974) (mechanic told service manager to tell general manager "to go f---k himself").

²² Secs. 1 and 203(d).