Derr and Gruenewald Construction Co. *and* David Newell *and* Ricky G. Bryant *and* Douglas Calkins. Cases 27–CA–12065, 27–CA–12065–2, and 27–CA–12065–3

September 30, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

On September 23, 1993, Administrative Law Judge Clifford H. Anderson issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a cross-exception and brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[2] and conclusions, and to adopt the recommended Order.

The issue in this case is whether an arbitration panel, in reviewing and sustaining the grievance of the Charging Parties and five other employees adequately considered the unfair labor practice issue that is now before the Board. The judge dismissed the consolidated complaint, finding that the arbitration panel had considered the unfair labor practice and that deferral to the arbitral award was otherwise appropriate under the standards set forth in *Spielberg Mfg. Co.*, 112 NLRB 1980 (1955), and *Raytheon Co.*, 140 NLRB 883 (1963). We agree, noting that the record in this matter presents a rather unusual set of circumstances in that the contractual grievance and the unfair labor practice issues precisely coincide with each other.

Facts

The dispute in this case originated on February 3, 1992,[3] when the Respondent refused to hire employees Casey Hall and Matthew (Mac) McDonald, who had been dispatched to the Respondent by the Union.[4] On that day, the Respondent transmitted to the Union a letter identifying eight employees, including Hall and McDonald and the Charging Parties, whom it deemed ineligible for hire. Previously, on January 21, all eight employees named in the letter had participated to varying degrees in a demonstration to protest unsafe conditions and other related activities following a crane accident the day before at the Respondent's jobsite at Denver International Airport (DIA). In formulating the letter, the Respondent invoked article I of the applicable collective-bargaining agreement which reserves solely to employers the determination of an applicant's qualifications for employment.[5] The letter did not specify why the Respondent deemed the eight men unqualified.

On February 6, the same day that Douglas Calkins was dispatched to the Respondent and rejected for employment, the eight employees who were designated by the Respondent as ineligible for hire, delivered a letter to Union Business Manager Howard Rathe, signed by all of them, that requested the Union to file a grievance. The letter stated in pertinent part:

> Derr & Gruenewald's interpretation of the terms of the [collective-bargaining agreement] and application of, [sic] is out of context with the Purpose of Agreement. By refusing to hire the Local #24 members listed in the 2–3–92 declaration [the Respondent is] discriminating against [the eight employees] because of their local union membership, union activity, or other [S]ec. 7 N.L.R.A. protected group activity.

On February 7, 1991, Rathe filed a formal grievance, with the Respondent's and the employees' letters attached. The grievance summarized Rathe's efforts to resolve the dispute, explained that the Respondent had agreed to delete two names on the list, but refused to dissolve the list as a whole.[6] Neither the grievance nor the employees' letter specifically mentioned the employees' underlying involvement in the safety protest.

In early March, a hearing on the grievance was held before the board of adjustment. Rathe elicited testimony from the affected employees about their qualifications and work records. Rather than cross-examine the employees or present evidence in support of its position, the Respondent elected to rely on its interpretation of the language in article I of the collective-bargaining agreement. No evidence was presented about

[1] The Respondent's motion to dismiss the instant case because of the inadequacy of the General Counsel's exceptions is denied, because the exceptions sufficiently comply with Sec. 102.46(b) of the Board's Rules and Regulations.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Except where otherwise indicated, all dates are in 1992.

[4] The Union is International Association of Bridge, Structural and Ornamental Ironworkers, AFL–CIO, Local Union No. 24.

[5] Art. I, entitled Purpose of Agreement, provides in pertinent part:

> The contractor shall be the sole judge of any applicant's qualification. The contractor may exercise his right to hire and to reject applicants for employment without regard to union membership or non-membership, race, color, national origin, creed, sex, or religion. Employer and Union agree to abide by all laws applicable to this contract, including executive orders and the Civil Rights Act of 1964, as amended.

[6] On February 3 or 6, Rathe contacted the Respondent's vice president, William Gruenewald, who agreed to delete only Ricky Bryant and Steve Hamilton from its rejection list.

the employees' involvement in postaccident activities. On March 6, the board of adjustment issued a decision in the matter which stated, without elaboration, that:

> 1) The ''List'' of February 3, 1992 by Derr & Gruenewald is dissolved and retracted.
> 2) The three (3) persons referred by the Local Union, to wit, Mac McDonald, Casey Hall and Doug Caulkings [sic], are to be paid by Derr & Gruenewald Construction Co. four (4) hours minimum working time at the applicable wage and benefit rate.

Discussion

As the judge noted, the Board will defer to an arbitration award when the arbitration proceedings are fair and regular, all parties agree to be bound, and the decision is not repugnant to the Act.[7] *Spielberg Mfg. Co*., supra. An additional condition for deferral is that the arbitral forum must have considered the unfair labor practice issue. *Raytheon Co*., supra. The Board deems the unfair labor practice issue to have been adequately considered if (1) the contractual issue is factually parallel to the unfair labor practice, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Olin Corp*., 268 NLRB 573 (1984).[8]

On the basis of the foregoing, we agree with the judge that the board of adjustment (the panel) considered the unfair labor practice issue, notwithstanding that evidence concerning the employees' postaccident activities was not presented to it, and that the award lacks an express rationale. Article I of the collective-bargaining agreement expressly, and unambiguously, gives employers unilateral authority to determine whether applicants (i.e., hiring hall referents) are qualified for employment. That authority, however, is limited by the further provision which expressly, and unambiguously, prohibits an employer deeming an applicant unqualified because of his union membership or nonmembership (including, as the judge found, union activity), and certain other specific reasons. See footnote 5, above. Here, the employees' February 6 letter, which was submitted to the arbitral forum as an attachment to the Union's grievance—indeed it formed the crux of the grievance—specifically questions the Respondent's application of article I and avers, as the only ground for the Respondent's action under the contract, that the employees were declared ineligible for employment because of their Section 7 ''group'' activity or other union activity—the very allegations contained in the instant unfair labor practice complaint.

Because the contractual violation alleged by the grievance (as elucidated by the attachment of the employees' February 6 letter) was limited to a claim that the Respondent had discriminated against the grievants on the basis of union and group activity that is squarely protected by Section 7 of the Act and discrimination which is squarely prohibited by Section 8(a)(1) and (3), the panel—if it *upheld* the grievance—could not decide the contractual issue without deciding the unfair labor practice issue as well. Put another way, given the limited constraints imposed by article I of the contract on an employer's authority to refuse to accept referred employees for hire and the fact that the only one of those constraints invoked by the grievance coincided with prohibitions of the Act, the only possible basis for the panel's ruling against the Respondent was discrimination of the kind alleged by the General Counsel in this case. The failure of the Union to present the arbitral panel with evidence of the ''union activity or other [S]ec. 7 N.L.R.A. protected group activity'' alluded to in the grievance does not foreclose this conclusion. In view of the uncontradicted and objective evidence of the employees' experience and qualifications which the Union presented to it, the panel must have concluded that the Respondent could have deemed the employees unqualified only if it was motivated by the reasons complained of in their letter attachment to the grievance—i.e., their Section 7 activity or other union activity. Because these are the elements required to prove the allegations in the complaint, we are left with the inescapable conclusion that the panel considered the essential unfair labor practice issue even though details of the employees' protected activity were not specifically presented to it.[9]

Accordingly, we find that deferral to the arbitral award in the instant matter is appropriate.

[7] The parties agree that the proceedings were fair and regular and that they agreed to be bound by the arbitrators' decision. For reasons set forth in the judge's decision, we agree that the award is not repugnant to the Act despite the fact that it is not coextensive with the Board's remedy in unfair labor practice cases such as the instant one.

[8] Chairman Gould does not adhere to *Olin* and does not view that doctrine to be a viable one.

[9] We note, too, that under the collective-bargaining agreement, each party to the arbitration proceeding appoints two representatives to the arbitration panel, and that the Union did so here. Although the record is silent on the point, as a practical matter it may well have been the case that the parties' representatives were generally cognizant of the facts underlying the grievance. In this regard, the record establishes that the construction work at DIA constituted a major project in the region, that the crane accident was reported in the local news, and that the subsequent demonstration was well attended by employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and the consolidated complaint is dismissed.

Michael Patton, Esq., for the General Counsel.
Robert R. Miller, Esq. (Stettner, Miller & Cohn), of Denver, Colorado, for the Respondent.
Douglas Calkins, of Brighton, Colorado, pro se.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on April 27, 1993, in Denver, Colorado, pursuant to an order consolidating cases, consolidated complaint and notice of hearing issued by the Regional Director for Region 27 of the National Labor Relations Board (the Board) on November 13, 1992. The consolidated complaint is based on three separate charges filed by individuals against Derr and Gruenewald Construction Company (Respondent): Case 27–CA–12065 filed by David Newel on February 4, 1992; Case 27–CA–12065–2 filed by Ricky C. Bryant on February 5, 1992; and Case 27–CA–12065–3 filed by Douglas Calkins on February 6, 1992.

The complaint alleges that Respondent on or about February 3, 1992, and thereafter refused to hire eight named hiring hall referents because they had:

> joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective-bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purposes of collective bargaining or other mutual aid or protection.

The complaint alleges this conduct violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

Respondent admitted its initial determination not to hire the individuals at issue, but denied either that the individuals' activities were protected or that its actions were impermissible under the Act. Further, Respondent contended the dispute underlying the complaint allegations had been resolved under the applicable collective-bargaining agreement and the case should therefore be deferred and the complaint be dismissed on that ground as well.

All parties were given full opportunity to participate at the hearing; to introduce relevant evidence; to call, examine, and cross-examine witnesses; to argue orally; and to file posthearing briefs. Posthearing briefs were due on June 23, 1993.

On the entire record here, including helpful briefs from the General Counsel and Respondent, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

At all material times, Respondent has been a corporation with an office and place of business in Henderson, Colorado, where it has been engaged in business as a contractor in the construction industry. In the course of its business operations at relevant times, Respondent annually purchased and received goods, materials, and services valued in excess of $50,000 directly from points and places outside the State of Colorado.

Accordingly, it is undisputed, and I find, that Respondent has at all times material been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Structural Ironworkers, AFL–CIO, Local Union No. 24 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Overview of Events*

1. Background

Respondent and Trujillo Steel, a separate entity not charged in this proceeding, are construction contractors engaged in steel erection. Each, at all relevant times, had a contractual relationship with the Union respecting ironworker employees. At relevant times, each contractor engaged in steel erection at the Denver International Airport construction site (airport) located in Denver, Colorado, a major project which had involved very substantial construction over a considerable time.

At relevant times, Respondent's vice president was William C. Gruenewald and its superintendent was Kenneth L. Conter. Respondent's collective-bargaining agreement with the Union contains both hiring hall, grievance, and arbitration provisions. The contract states, in part, at article 1:

> Employers recognize all outside erection local unions in the Rocky Mountain Area as a source of skilled manpower and they will, therefore, use it as a source when in need of workmen. . . . The contractor shall be the sole judge of any applicant's qualifications. The contractor may exercise his right to hire and to reject applicants for employment without regard to union membership or non-membership, race, color, national origin, creed, sex or religion. Employer and Union agree to abide by all laws applicable to this contract.

2. The events of January 20 and 21, 1992

Respondent had been working on a particular job at the airport for about a month when an accident occurred on January 20, 1992,[2] involving a crane which resulted in serious injury to an employee. Various ironworker employees of Trujillo working on a job a short distance away came over and undertook certain postaccident activities. Mark Calkins,

[1] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Further, the evidence offered at the hearing was not at significant variance respecting the greater part of the events involved. Where not otherwise noted, the findings are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

[2] All dates hereinafter refer to 1992 unless otherwise indicated.

Casey Hall, Steve Hamilton, Matthew McDonald, and Charles O'Neil were involved.

The morning of the following day, January 21, a demonstration and subsequent meetings with Respondent and other site officials occurred. Doug Calkins, Rick Bryant, and Dave Newell as well as the five named immediately above and others were involved in varying degrees.

3. The hiring hall events

Following their layoffs by Trujillo and subsequent signup on the Union's out-of-work list, Hall and McDonald were dispatched to Respondent's airport job on the morning of February 3 pursuant to Respondent's call for referents. Each was refused employment based on the contract language, quoted supra, that Respondent was the sole judge of applicant qualifications.

Later that day the Union received, by facsimile transmission, a letter from Respondent dated February 3 again repeating the contract language quoted above and concluding: ''Therefore we are exercising our right to reject employment of the following'' and naming the eight individuals in contest. Newell filed his charge on February 4; Bryant on February 5.

On February 6, Doug Calkins was referred to Respondent and refused employment on the same ground. He filed his charge thereafter. Union Business Manager Howard Rathe spoke to Gruenewald the same day about the list of eight. Gruenewald agreed in that conversation or one held on February 3 to delete the names of two individuals, Ricky Bryant and Steve Hamilton, from the list, but refused to otherwise change or cancel the list.

4. The grievance process

On February 6, the eight named on Respondent's February 3 letter delivered to Rathe a joint letter asserting that the parties could not reach a settlement on their dispute and requesting that the grievance procedures be invoked by the Union. Such a letter was required under the contract's dispute resolution procedures. The letter asserted in part:

> Derr & Gruenewald's interpretation of the terms of the AGREEMENT and application of, is out of context with the Purpose of Agreement [capitalization in original]. By refusing to hire the Local #24 members listed in the 2–3–92 declaration they are discriminating against them because of their local union membership, union activity, or other sec. 7 N.L.R.A. protected group activity.

By letter dated February 7, to the Colorado Steel Erectors Association, with enclosed copies of both Respondent's letter of February 3 and the eight employees' letter of February 6 and with an explanation of Respondent's oral agreement to delete the two names on the list, the Union formally filed a grievance under the contract-grievance process challenging Respondent's actions.

Pursuant to the contractual procedures, a hearing was held before a board of adjustment on March 4. The board of adjustment considered the above-described letters of February 3, 6, and 7 and evidence given at the hearing. Rathe testified that he initially presented the Union's side to the board of adjustment generally exclaiming the experience and skills of the eight employee applicants and asking the seven employee applicants attending the board of adjustment to testify concerning their skills, experience, good conduct, and absence of discipline. Rathe testified that there was no discussion of the unfair labor practice charges underlying the instant case which had been filed on February 4, 5, and 6. Rathe further testified that, on the completion of the Union's case, Respondent through Gruenewald in essence relied on the contract language and the rights it gave employers to refuse referents and said he would abide by the collective-bargaining agreement.

Under cross-examination, Rathe was asked about notes which he identified as made before the board of adjustment hearing in preparation for his argument in rebuttal. He testified the notes were not used because he felt that Respondent had not offered any evidence in response to his initial case, which needed rebuttal. Those notes recited arguments to have been made by Rathe at the board of adjustment hearing: (1) that the job referents were active in union affairs; (2) that Respondent's list of people who were to be refused hire included individuals because of their union activities or other protected activity; and (3) that such actions by Respondent were improper because the employees' union activities or other activities were protected by law.

The board of adjustment issued its decision in the matter on March 6. It stated in part:

> 1) The ''List'' of February 3, 1992 by Derr & Gruenewald is dissolved and retracted.
>
> 2) The three (3) persons referred by the Local Union, to wit, Mac McDonald, Casey Hall and Doug Caulkings, are to be paid by Derr & Gruenewald Construction Co. four (4) hours minimum working time at the applicable wage and benefit rate.

B. *Analysis*

1. The order of consideration of issues

Two independent sets of issues were litigated in the instant proceeding. The first and more obvious group of issues involved the conventional litigation of the failure-to-hire complaint allegations presenting the traditional areas of contest in an 8(a)(1) and (3) discrimination case. Thus, the parties litigated whether the referents had engaged in union or protected concerted activity and whether Respondent's actions were undertaken because of that activity.

The second, more specialized, group of issues arose around the question of whether the complaint should be deferred to the parties' contractual resolution. Board policy is clear that deferral issues are to be addressed initially, prior to any determination of the merits of the underlying complaint allegations.

2. Should the instant case be deferred to the board of adjustment award

a. *The legal standards for deferral*[3]

The Board in *Spielberg Mfg. Co*., 112 NLRB 1080 (1955), adopted a policy of deferral to arbitral decisions in order to encourage voluntary settlement of labor disputes. In deciding whether deferral is appropriate in a given case, the Board in *Spielberg* considered: (1) whether the proceedings were fair and regular; (2) whether all parties agreed to be bound; and (3) whether the decision is repugnant to the purposes and policies of the Act. In *Raytheon Co*., 140 NLRB 883 (1963), the Board declined to defer to an arbitration award based on a determination that the arbitrator had considered only the contract-grievance issue and not the statutory questions underlying the unfair labor practice change and complaint. The Board required as a precondition to deferral that the arbitral forum had ''considered'' the unfair labor practice issue.

This ''considered'' requirement has evolved over the course of time. The Board in *Olin Corp*., 268 NLRB 573, 574 (1984), again addressed the issue announcing the following standard for deferral to arbitration awards:

> We would find that an arbitrator had 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., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

The Board held further in *Olin* that the party seeking to have the Board ignore the determination of the arbitrator bore the burden of affirmatively demonstrating the defects in the arbitral process or award.

The Board has since applied this newer standard to withhold deferral to arbitration decisions: see, e.g., *Wheeling-Pittsburgh Steel Corp*., 277 NLRB 1388 (1985), enfd. 821 F.2d 342 (6th Cir. 1987); *Ryder/P.I.E. Nationwide*, 278 NLRB 713 (1986), enfd. in relevant part 810 F.2d 502 (5th Cir. 1987), as well as to defer to appropriate awards, see, e.g., *United Parcel Service*, 305 NLRB 433 (1991).

b. *Application of the deferral standard to the instant case*

There is no dispute that the parties had agreed to be bound by the contractual proceedings or that the proceedings were fair and regular. Rather, the *Olin* standard quoted above concerning arbitral consideration of the unfair labor practice issues was the focal point of the parties' arguments. It is appropriate to apply the separate steps of the *Olin* test to the instant case.

(1) Is the contractual issue factually parallel to the statutory issue?

In determining if the statutory and contractual issues involved here are factually parallel, they must first be identified. The General Counsel's complaint alleges that the eight employees were denied employment because they had

> joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purposes of collective bargaining or other mutual laid or protection.

The contractual issue before the board of adjustment was whether or not Respondent's action in barring the eight hiring hall referents from employment was proper under the following contractual provision:

> The contractor shall be the sole judge of any applicant's qualifications. The contractor may exercise his right to hire and to reject applicants for employment without regard to union membership or non-membership, race, color, national origin, creed, sex or religion. Employer and Union agree to abide by all laws applicable to this contract.

The General Counsel's complaint asserts that the eight were refused hire by Respondent because of their union and protected concerted activities. The unambiguous meaning of the contract provision quoted above is that, under its terms, an employer may act with impunity to reject applicants it judges unqualified unless the rejection is for certain specific, listed reasons—one of which is union membership. I read the contractual term ''union membership'' to fairly include union activities in the same way that the term ''membership'' in Section 8(a)(3) of the Act has been interpreted to include such activities. *Radio Officers Union v. NLRB*, 347 U.S. 17, 65–66 (1954). I find therefore that the contract provision that was invoked by the parties at the board of adjustment protected job applicants from rejection by employers, including Respondent, based on their union activities.

The factual question presented under both the contractual and statutory standards described above as litigated at the board of adjustment hearing and in the instant case are identical: what was Respondent's reason for declaring the eight ineligible for hire? If Respondent declined to hire the eight individuals as a result of its opinions about their job qualifications, it was entitled to do so irrespective of others' opinions regarding those qualifications under both the contract and the Act. If Respondent declined to hire the eight because of their union activities, it acted improperly under both the contract and the Act. I find, therefore, that the statutory and contractual issues involved were factually parallel within the meaning of *Olin.*

[3] The parties were well aware of the applicable doctrine in this area and filed scholarly briefs on the issue.

(2) Was the board of adjustment presented generally with facts relevant to resolving the unfair labor practice?

(a) *The arguments of the parties*

The General Counsel argues on brief at 10–11:

> Although the employee letter attached to the grievance alleged discrimination based on Section 7 activity, neither the Union nor the Respondent presented any evidence regarding that activity at the Panel hearing. There was no recording or transcription of the proceedings, however, the facts regarding the proceeding are not in dispute. The evidence establishes that no evidence of the employees' protected concerted activities were presented to the Panel. Thus, no evidence of the events following the accident on January 20, the demonstration on January 21, or the employee meetings with management officials at [the Airport] were presented to the Panel. There was no discussion of the National Labor Relations Board or the ULP charges that were then pending against Respondent. There was no discussion of the concern of employees had expressed about safety or hiring practices. Rathe presented only evidence of the high qualifications, good work habits, and employment history the eight had with Respondent. The Respondent presented no evidence and the Panel asked no questions. The Respondent merely relied upon the contractual language of Article I. Under these circumstances, the contractual question is not parallel to the statutory issue, and the facts relevant to the resolution of the statutory issue were never presented to or decided by the Board of Adjustment. The General Counsel has established [a case] demonstrating that the standards for deferral have not been met. *Olin* deferral is not warranted.

Respondent argued at the hearing and on brief that the board of adjustment award dissolving Respondent's do-not-hire list makes it clear that the board of adjustment had been presented with the facts necessary to resolve the unfair labor practice as *Olin* requires. In effect, Respondent argues that, if the board of adjustment had not received and considered such evidence, how could Respondent have lost the board of adjustment decision given an employer's clear contractual right to be the sole judge of applicant job qualifications?

Counsel for Respondent also notes that Rathe for the Union came to the arbitration armed with notes showing he had intended to specifically raise before the board of adjustment the fact of the eight job applicants' union activities and the fact that employers cannot enforce disciplinary action, if the true reason for the discipline is the employee's union or other activities protected by law. Rathe did not, in the actual event, make those assertions because he believed them to be unnecessary as a result of Respondent's failure to challenge the Union's case-in-chief at the board of adjustment hearing. Thus, Respondent argues: (1) even if not explicitly stated orally at the hearing, the unfair labor practice theory based on employer discrimination because of the job applicants' union, and other protected activity claim was raised by the Union to the board of adjustment in the joining documents; (2) the Union managed its litigation with the unfair labor practice discriminatory conduct claim as the factual basis for its claim of a contract violation; and (3) the Union, in fact, prevailed in its argument.

(b) *Analysis and conclusion*

Applying the teaching of *Olin* that ''unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer,'' 268 NLRB at 574, I find the board of adjustment was in fact presented with, did consider and relied on facts relevant to resolving the unfair labor practice case. I reach this result even though I accept the factual assertions respecting the board of adjustment hearing made in the portion of the General Counsel's brief quoted supra. How can it be that I find the arbitral body was presented with, considered, and relied on evidence which was before it only in the form of an allegation in a joint employee grievance letter sent to the Union and included with the Union's grievance in the documentary submission to the board of adjustment panel?

Relying on the essentially uncontradicted testimony of Rathe respecting what occurred in the board of adjustment hearing as well as the Board's specific assignment of the legal burden on the General Counsel to prove deferral is inappropriate, I find that the parties litigant as well as the board of adjustment panel members well knew the grievance before them dealt with the Union's contention that the employees were being discriminated against impermissibly because of their union activities. I make this finding for the following reasons.

First, I rely on the presumption that the parties and the board of adjustment members were reasonably competent, experienced members of the construction industry, and were familiar with labor relations matters sufficient that the contract and the contentions of the parties would be understood and the entire record considered in resolving the issue. In effect I am presuming that the participants were competent to perform the tasks assigned them. Generally competence is properly presumed. Further, both the Board and the courts have often favorably commented on the voluntary dispute resolution mechanisms utilized in labor relations, so that the efforts and competence of the participants in such processes is not unreasonable presumed.

Given the presumption of competence and experience, I find that all the parties and board of adjustment participants realized from the state of the record at the commencement of the board of adjustment hearing that the Union was contending that Respondent had acted impermissibly by punishing employees for their union activities. The employees followed the dispute resolution procedure in reducing their dispute to writing in their February 6 letter, quoted supra. That letter explicitly set forth the theory of the contract violation as discrimination against the eight ''because of their local union membership, union activity, or other sec. 7 N.L.R.A. protected group activity.'' and refers to the terms of the contract dealing with union membership.

From Respondent's letter of February 3 the board of adjustment also knew before any testimony was received at the hearing that Respondent was defending its actions as permissible under the same contract provisions, i.e., that Respondent was refusing to hire the eight individuals based on its view of the applicants' qualifications independent of their union activities. The parties and the board of adjustment

members were surely well aware of the long-held tradition in the construction industry as specifically set forth in the contract, that an employer could refuse to hire a hiring hall referent based on a view that the individual's skills were insufficient—so long as that assertion was not simply pretext for discrimination on other, improper grounds.

The above-described positions of the parties and apparent contract issues were known to all as the board of adjustment hearing commenced on March 4. The three letters from Respondent, the eight applicants and the Union, quoted supra, had earlier been provided the board of adjustment panel members and were the primary documents informing the body of what issues had been joined in the grievance. The state of the record at that time is important to an understanding of the way in which the hearing was conducted thereafter.

The Union presented its case first and, not unlike a typical prosecution of pretext cases in Board unfair labor practice proceedings, attempted to show that the reason implicitly asserted by Respondent for refusing to hire the eight applicants in its letter of February 3, i.e., their insufficient job qualifications, was not Respondent's true reason for refusing to hire them because the individuals were in fact objectively very well qualified. When the Union put on testimony in its case-in-chief tending to establish the apparent bona fides of the grievants' qualifications, Rathe's testimony indicates he believed, although he did not put it in these terms, that the Union had met its initials burden of showing that Respondent was not in fact refusing to employ the referents because of their lack of job qualifications. Thus, the Union in limiting its evidence to the question of job qualifications had attempted to shift the burden of going forward to Respondent, withholding the Union's direct arguments and evidence respecting the group of eight's union activities and the Union's direct arguments that Respondent was acting on antiunion animus until it observed the evidence Respondent would put on in its defense in chief.

When Respondent, in effect, offered no evidentiary defense in response to the Union's case-in-chief, rather relying on the bare language of the contract, the Union concluded that Respondent had not rebutted its earlier evidence that the referents were qualified and determined it need not put on evidence of either the job applicants' union activities or Respondent's animus toward those activities. Rathe's testimony respecting the notes he had prepared in anticipation of making arguments to the board of adjustment concerning the referents' union and other legally protected activities, Respondent's discrimination against them because of those activities and Rathe's determination during the board of adjustment not to raise those issues when Respondent did not answer the Union's case-in-chief was unambiguous and unchallenged.

I find that the Union's approach to the board of adjustment hearing as it progressed as well as the Union's theories of argument and its presentation of evidence was or should have been self evident both to Respondent and the board of adjustment panel members. The Union had adduced evidence sufficient to raise—as often occurs in Board unfair labor practice cases—a permissible inference, which the Rathe for the Union believed the board of adjustment members would draw even without explicit evidence or argument on the issue, that the discriminatory actions of Respondent against the eight applicants—not having been undertaken for the asserted permissible reasons initially offered by Respondent—were rather undertaken for an impermissible reason, the groups' union and other protected activities.

I specifically find that in this sequence of events the parties and the board of adjustment panel members either knew or should have known the true underlining issues of the proceeding irrespective of the actual evidence introduced. In board of adjustment hearings as in other litigation, burdens, presumptions, and inferences may in appropriate circumstances substitute for evidence and may constitute the basis for a ruling. So it was in this case. In the board of adjustment hearing the critical issue was the identification of the true reason for Respondent's actions which were, depending on the factual resolution of the issue, either (1) contractually permissible and legal or (2) contractually prohibited and an unfair labor practice. Respondent's failure to meet the Union's evidence that the reason asserted by Respondent in refusing to hire the eight job applicants was not the true reason for Respondent's refusal to hire them and the Union's reliance on that failure to adduce evidence in resting its case is legally equivalent to an actual a presentation of evidentiary facts to the board of adjustment relevant to resolving the unfair labor practice case.

The fact that the board of adjustment decision sustained the Union and the eight applicants grievance further supports this view.[4] The Union's litigation tactics prevailed. The board of adjustment decision at least implicitly sustained the Union and the Charging Parties argument that Respondent could not take the action it did under the contract and directed Respondent to dissolve its list of the eight referents as not eligible for hire. Further the decision awarded modest backpay to those three of the eight who had actually been referred to and rejected by Respondent. It seems clear and I find that the Union could not have prevailed under the contract provision invoked in support of its grievance unless the board of adjustment had determined as part of its decision-making process that Respondent's true reason for not hiring the eight individuals—as was claimed by the eight in their letter of February 6—was their ''local union membership, union activity and other section 7 N.L.R.A. protected group activity.'' Put more simply, if the board of adjustment had not been presented with and considered evidence relevant to the parallel unfair labor practice issues, the Union would not, indeed could not, have won its grievance.

Based on all the above and the record as a whole and guided by the *Olin* decision and the subsequent cases cited above, I find that the board of adjustment was presented generally with facts relevant to resolving the unfair labor practice allegations at issue here.

(3) Is the board of adjustment repugnant to the Act?

As noted supra, the Board requires that any award it will defer to not be repugnant to the purposes and policies of the

[4] Unlike the far more common case, the General Counsel herein is not seeking to set aside an adverse arbitral award, i.e., an award seemingly in contradiction to the General Counsel's theory of a violation. Here, the General Counsel seeks that the Board not defer to an award favorable to the Charging Parties and the Union which, consistent with the General Counsel's complaint, holds that Respondent acted improperly.

Act. The board of adjustment award in the instant case is attacked by counsel for the General Counsel at footnote 5, page 11 of his brief:

> Since the record clearly establishes deferral is not warranted for this reason it is not necessary to decide whether the award is also clearly repugnant under *Spielberg*, however, it is noted that the award is not consistent with the usual Board remedy. Thus, the award does not address the issues of reinstatement of Hall, Calkins or McDonald, it does not insure the eight are qualified to be called by name, and provides only nominal backpay for Hall, McDonald and Doug Caulkins, while the evidence demonstrates they are due substantial backpay [citations to transcript omitted]. [See *Cone Mills Corp*., 298 NLRB 661 (1990). Cf. *Postal Service*, 288 NLRB 500, 504 fn. 13 (1988).]

Respondent cites the case of *Combustion Engineering*, 272 NLRB 215 (1984), in which the Board quoted *Olin*, supra at 574:

> 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'' [footnote omitted], i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

The Board held in *Combustion Engineering*, supra, that an arbitration decision awarding reinstatement without backpay where such backpay would have been included in any Board directed remedy was not palpably wrong and was susceptible to an interpretation consistent with the Act.

Initially it is valuable to compare the board of adjustment award with what might reasonably be obtained in a successful prosecution of the unfair labor practice case. In both an unfair labor practice case and in the board of adjustment award the improper ''do not hire list'' would be retracted. As the General Counsel argues, a proper unfair labor practice case remedy for the allegations in the instant complaint would normally also include reinstatement and backpay for any of the eight individuals who, but for Respondent's illegal conduct, would have been hired by it. These individuals would most likely have included at least the three who were dispatched to and refused employment by Respondent. The board of adjustment remedy simply provides these three individuals, and no others, with 4 hours' wages and benefits. No reinstatement order was included in the remedy. The difference in remedies is not necessarily so large as may be initially apparent. Since each of the eight individuals obtained employment using the Union's hiring hall dispatch system, being refused employment by Respondent presumably did not lose the job applicant his place on the dispatch roster thus making subsequent employment more likely in a shorter period than if a high place of the dispatch register was not then held. Further, it is not apparent what, if any, employment harm was suffered by those of the eight who were never eligible for dispatch during the period of February 3 through mid-March when the ''do not hire'' list was in effect.

Relying on the cited cases, I find in agreement with Respondent that the board of adjustment award is not repugnant to the Act. The dissolution of the ineligible for hire list and the nominal backpay for the three referents who were dispatched and refused employment by Respondent is, as discussed above, not all that the General Counsel might obtain in a completely successful prosecution of the complaint in this case. The award does, however, end Respondent's refusal to hire the named hiring hall referents which may fairly be considered to be the heart of the alleged violations of the Act. Indeed it did so in a relatively short period of time. Further, there is nothing in the rationale of the decision or award which is inconsistent with the Act. Under *Combustion Engineering*, supra, *Olin*, supra, 268 NLRB 573, and the cases cited therein, I find the board of adjustment award is not so insufficient as compared to a Board directed remedy in an unfair labor practice case as to be, for that reason alone, repugnant to the Act. The General Counsel's cited case *Cone Mills Corp*., 298 NLRB 661 (1990), is not to the contrary. In that case the arbitrator's remedy was less than would have been obtained in a successful unfair labor practice prosecution because the arbitrator made a determination that protected activity constituted insubordination in a manner ''plainly contrary to the Act,'' 298 NLRB at 667, and which reduced the award. The Board found the arbitrator's insubordination findings impossible to harmonize with the Act and therefore rendered the award clearly repugnant to the Act and prevented deferral. It was not the fact that the arbitrator's remedy differed from an unfair labor practice remedy which defeated deferral, but rather the fact that the arbitrator reduced the amount the ''insubordinate'' employee would receive in the remedy on grounds incompatible with the Act.

C. *Summary and Conclusion*

I have found, supra, that the board of adjustment award meets the Board's standards for deferral established in *Spielberg*, Supra, 112 NLRB 1080 *Olin*, supra and other cases. Accordingly, I find that it is appropriate to defer the instant matter to that award. It follows that the complaint should therefore be dismissed in its entirety.

On the basis of the above findings of fact and on the entire record, I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged commerce within the meaning of Section 2(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. The board of adjustment issued an award on March 6, 1992, concerning which:

(a) Respondent and the Union had agreed to be bound by the award.

(b) The procedures resulting in the award were fair and regular.

(c) The board of adjustment had been presented with evidence concerning and had considered the unfair labor practice issues here.

(d) The award is not repugnant to the Act.

4. It is appropriate to defer the instant complaint to the award.

5. Further proceedings are unwarranted.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The complaint shall be and it is dismissed.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.