

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.**

IAP WORLD SERVICES, INC.

and

Case 31-CA-29505

TEAMSTERS, CHAUFFUERS,
WAREHOUSEMEN, INDUSTRIAL AND
ALLIED WORKERS OF AMERICA, LOCAL 166

**EXCEPTIONS OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO
THE DECISION AND RECOMMENDED ORDER OF THE
ADMINISTRATIVE LAW JUDGE AND BRIEF IN SUPPORT THEREOF**

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Pursuant to Section 102.46 of the Board’s Rules and Regulations, Counsel for the Acting General Counsel respectfully files these exceptions and brief in support of exceptions to the decision and order of Administrative Law Judge William G. Kocol.

EXCEPTIONS OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE¹

Exception	Page	Lines	Text
1	2	14-15 18-21 fn. 2	The ALJ erred in cancelling the unfair labor practice hearing and ruling solely upon the question of whether to defer to the arbitral award.
2	3	12-14	The ALJ erred in concluding that the arbitration award is not palpably wrong and is not repugnant to the Act’s purposes.
3	5	31-36	The ALJ erred in concluding that the Charging Party was attempting to disrupt an understanding between the Employer and the Union instead of seeking enforcement of the collective bargaining agreement.
4	6	6-9	The ALJ erred in concluding that the arbitrator’s decision to uphold the Charging Party’s discharge on the grounds that his July 31 conduct was “disruptive, argumentative, and disrespectful” was not palpably wrong.
5	6-7		The ALJ erred in rejecting the Acting General Counsel’s proposed modification of the <i>Olin/Speilberg</i> deferral standard.
6	6	23-27	The ALJ erred in concluding that a <i>Wright Line</i> analysis was not appropriate.

¹ The Acting General Counsel disagrees with certain factual statements in Administrative Law Judge Kocol’s Recommended Decision and Order regarding certain facts. However, since the statements are not factual findings by the Administrative Law Judge, but rather are referenced by the Administrative Law Judge as facts found or described by the arbitrator, they are not included in these exceptions.

7	1	N/A	The ALJ's typographical error in using the incorrect last name for Counsel for the Acting General Counsel.
8	1	N/A	The ALJ's typographical error in using the incorrect name for the law firm representing Respondent.

**BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL IN
SUPPORT OF EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

I. PROCEDURAL HISTORY

On March 29, 2011, Complaint and Notice of Hearing (“Complaint”) issued alleging that IAP World Services, Inc. (“the Employer”) unlawfully discharged employee Larry Treen (“Treen”) because he asserted a contractual right - a retroactive wage increase under the terms of a new collective bargaining agreement. A grievance was filed concerning Treen’s discharge on August 11, 2009, and the instant unfair labor practice charge, which was filed on November 18, 2009, initially was deferred by the Regional Director to the grievance and arbitration procedure in the collective bargaining agreement between the Union and the Employer. After the Arbitration Award (“Award”) issued on September 21, 2010, the Regional Director reviewed the Award and determined that deferral to that award would be inappropriate.

This case was decided by the Honorable William G. Kocol, Administrative Law Judge, hereafter ALJ or ALJ Kocol, on July 19, 2011. On June 20, 2011, prior to the unfair labor practice hearing scheduled to begin on June 27, 2011, Respondent filed its Motion to Adopt the Record in the Arbitration Hearing as the Record in Case 31-CA-29505; to Defer to the Factual Findings of the Arbitrator and to Cancel the

Unfair Labor Practice Hearing Scheduled for June 27, 2011. The Acting General Counsel (“AGC”) filed an Opposition to this Motion on June 22, 2011. By order dated June 23, 2011, ALJ Kocol cancelled the unfair labor practice hearing scheduled to begin on June 27, 2011, and granted Respondent’s motion to adopt the record developed in the arbitration hearing as the record in this case. In addition, ALJ Kocol stated in his June 23, 2011, Order that he would defer to the arbitration record and to the findings made by the arbitrator, “but only for the purpose of determining whether the matter was resolved in accordance with *Olin Corp.*, 268 NLRB 573 (1984) and *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).”

On June 28, 2011, Counsel for the AGC filed a Request for Special Permission to Appeal; Appeal from the June 23, 2011, Order of Administrative Law Judge Kocol and Request to Stay a Decision by ALJ Kocol on Deferral Pending the Board’s Resolution of this Special Appeal. This was denied by the Board on August 24, 2011.

On July 29, 2011, ALJ Kocol issued his Recommended Decision and Order (“ALJD”) deferring to the arbitration decision issued by Arbitrator Joseph E. Grabuskie and dismissing the unfair labor practice complaint. In doing so, ALJ Kocol found that the Award was not clearly repugnant to the Act and was not palpably wrong.

II. FACTS AND ARGUMENT IN SUPPORT OF EXCEPTIONS

Exception 1. The ALJ erred in cancelling the unfair labor practice hearing and ruling solely upon the question of whether to defer to the arbitral award.

The ALJ erred in deciding to bifurcate this proceeding and determine whether to defer to the arbitral award under *Olin/Spielberg*² before holding a hearing on the merits of the underlying unfair labor practice allegations. This bifurcation procedure would result in inordinate delays before Charging Parties could obtain relief if an ALJ or the Board were to determine it would be inappropriate to defer to an arbitration decision. In this case, the bifurcation procedure will result in an inordinate delay before the AGC could even make a record with respect to the merits of the alleged unfair labor practices if the Board sustains these exceptions and finds the arbitral award in this matter repugnant. On the other hand, following the standard practice of hearing the merits of the underlying unfair labor practice allegations before deciding the deferral question would have resulted in a minimal time burden given that the hearing is only expected to last one or two days. Moreover, by the time that the case is remanded for a hearing on the merits, the effect of the delay on the availability of witnesses and their ability to recollect the relevant facts may well make the development of an adequate record impossible.

² *Olin Corp.*, 268 NLRB 573 (1984); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1995).

Because considerations of administrative economy and the avoidance of undue delay in determining the merits of the case weigh heavily in favor of creating a complete record at the outset of the proceeding, ALJ Kocol erred in bifurcating the proceeding and canceling the hearing.

Exception 2. The ALJ erred in concluding that the arbitration award is not palpably wrong and is not repugnant to the Act's purposes.

The ALJ erred in concluding that the arbitration award is susceptible to an interpretation consistent with the Act under the *Olin/Spielberg* repugnancy standard. The Charging Party's termination notice, contained in the arbitration record, stated that the "primary reason" for the Charging Party's discharge was his activity on July 31, 2009- that is, his protected concerted activity of protesting the Employer's failure to pay a contractual wage rate.³ The arbitrator's award upholding this discharge therefore was palpably wrong and clearly repugnant under Board law. In *110 Greenwich Street Corp.*, 319 NLRB 331, 335 (1995), the Board found that an award was not susceptible to interpretation consistent with the Act where the arbitrator found just cause for employees' discipline based on protest against the employer for withholding wages. Similarly, in *Mobil Oil Exploration & Producing*, 325 NLRB 176, 177-178 (1997), enfd. 200 F. 3d 230 (5th Cir. 1999), the Board found that an arbitration award was palpably wrong where "the precipitating event" that caused the discriminatee's discharge "was his exercise of protected concerted activities." In

³ See Exh. 4 p. 111 of the AGC's Request for Special Permission to Appeal; Appeal from the June 23, 2011 Order of Administrative Law Judge Kocol and Request to Stay a Decision by ALJ Kocol on Deferral Pending the Board's Resolution of this Special Appeal.

Garland Coal & Mining Co., 276 NLRB 963, 964-65 (1985), the Board also found that an arbitrator's decision upholding discipline was repugnant where an employee's alleged insubordination was activity in support of the union's contract interpretation.

Exception 3. The ALJ erred in concluding that the Charging Party was attempting to disrupt an understanding between the Employer and the Union instead of seeking enforcement of the collective bargaining agreement.

The ALJ erroneously found that the Charging Party was attempting to disrupt an understanding between the Employer and the Union instead of seeking enforcement of the collective bargaining agreement.⁴ The arbitration record demonstrates that, to the contrary, the Charging Party was acting in support of the class-action grievance filed by the Union to obtain a retroactive wage increase for employees.⁵

Exception 4. The ALJ erred in concluding that the arbitrator's decision to uphold the Charging Party's discharge on the grounds that his July 31 conduct was "disruptive, argumentative, and disrespectful" was not palpably wrong.

The ALJ concluded that the arbitrator's decision to uphold the Charging Party's discharge on the grounds that his July 31 conduct was "disruptive, argumentative, and disrespectful" was not palpably wrong. Even if the Arbitrator correctly characterized the Charging Party's conduct, this was not sufficient to cause

⁴ A complaint made by a single employee for the purpose of enforcing a collective-bargaining agreement is concerted activity protected by Section 7 of the Act irrespective of the merits of the complaint. *Interboro Contractors*, 157 NLRB 1295, 1298 fn.7 (1966); The Supreme Court approved the Board's *Interboro* doctrine in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), stating that an employee's "honest and reasonable invocation" of a collective-bargaining contract is concerted activity "regardless of whether the employee turns out to have been correct in his belief that his right was violated." *Id.* at 1516.

⁵ See Exh. 4 p. 125 of the AGC's Request for Special Permission to Appeal; Appeal from the June 23, 2011 Order of Administrative Law Judge Kocol and Request to Stay a Decision by ALJ Kocol on Deferral Pending the Board's Resolution of this Special Appeal.

him to lose the protection of the Act. In *Severance Tool Industries*, 301 NLRB 1166, 1170 (1990), enfd. mem. 953 F.2d 1384 (6th Cir. 1992), the Board held that an employee's behavior in protesting a pay issue was "disrespectful, rude, and defiant" yet nevertheless remained protected. Similarly, in *Noble Metal Processing, Inc.*, 346 NLRB 795 fn.2, 800 (2006), an employee loudly challenged the employer during an employee meeting for making unilateral changes to a labor agreement. This employee's conduct remained protected. In *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007), an employee's brief outburst in a break room in front of other employees during a discussion of employee complaints about a seven-day workweek remained protected. Thus, the ALJ erred in failing to find the Arbitrator's decision repugnant to the Act.

Exception 5. The ALJ erred in rejecting the Acting General Counsel's proposed modification of the *Olin/Spielberg* deferral standard.

The Board should modify its approach to post-arbitral deferral cases to give greater weight to safeguarding employees' statutory rights in Section 8(a)(3) and (1) cases. Pursuant to Section 10(a) of the Act, the Board has a statutory mandate to protect employees from discharge or other forms of discrimination in retaliation for their protected activities, and that mandate cannot be waived by private agreement or a dispute resolution arrangement. Although portions of the Act favor the private resolution of labor disputes through processes agreed upon through collective bargaining, the Board should not abdicate its obligation to protect individual rights

whenever employees and unions agree to a grievance-arbitration process.⁶ Recent Supreme Court precedent concerning federal court jurisdiction over statutory claims that are also subject to arbitration agreements hold that courts are ousted of jurisdiction only where the arbitrator is authorized to decide the statutory issues and actually adjudicates such issues in a manner consistent with applicable statutory principles and precedent.⁷ This precedent and its rationale are compelling in determining the appropriate degree of deference the Board should give arbitral awards.

Accordingly, the Board should adopt a new framework in Section 8(a)(1) and (3) cases, under which the party urging deferral to an arbitration award or grievance settlement must demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and also applied those principles in deciding the issue. If the party urging deferral makes that showing, the Board should defer unless the arbitrator's award is clearly repugnant.

There is no reason to abandon the *Collyer/United Technologies*⁸ pre-arbitral deferral standard, as the ALJ suggested, and restrict such deferral in Section 8(a)(3) cases to those instances in which the collective-bargaining agreement contains language that mirrors Section 7 and/or Section 8(a)(3). Indeed, the current *Collyer*

⁶ *E.g.*, *Taylor v. NLRB*, 786 F. 2d 1516, 1521-22 (11th Cir. 1986) (“by presuming, until proven otherwise, that all arbitration proceedings confront and decide every possible unfair labor practice issue, *Olin Corp.* gives away too much of the Board’s responsibility under the NLRB”); *Baynard v. NLRB*, 505 F. 2d 342, 347 (D.C. Cir. 1974) (the arbitral tribunal must have clearly decided the unfair labor practice on which the Board is later urged to give deference).

⁷ *14 Penn Plaza, LLC v. Steven Pyett*, 129 S. Ct. 1456, 1469-71 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

⁸ *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies*, 268 NLRB 557 (1964).

policy serves an important purpose of resolving disputes through the parties' chosen mechanism where possible and should not be narrowed in this regard.

Further, the AGC disputes the ALJ's assertion that the proposed new framework provides a disincentive to unions to present the arbitrator with the unfair labor practice issue. Under the current *Collyer* deferral policy, where the underlying unfair labor practice charge involves an issue that can be processed under the grievance-arbitration provisions of the applicable contract, the charging party union must present that issue to grievance arbitration under penalty of dismissal of its unfair labor practice charge.⁹ Under the AGC's new deferral policy, the *Collyer* deferral letter expressly notifies the parties that the AGC will be arguing against post-arbitral deferral where the parties have not presented a statutory issue to the arbitrator.¹⁰ The charged party employer therefore has a strong incentive to present the statutory issues to the arbitrator, as the Employer in this case did.

In this case, if the Board applies the proposed framework, it should conclude that the arbitrator failed either to correctly enunciate or to apply the statutory principles that have long been applied by the Board in similar factual situations. Specifically, the arbitrator did not correctly articulate the nature of Section 7 protections, failed to directly address or balance the *Atlantic Steel*¹¹ factors, and completely neglected to consider the *Wright Line* principles applicable to dual motive

⁹ See NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings Section 10118.6.

¹⁰ See Memorandum GC 11-05, Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases, Attachment at 2.

¹¹ 245 NLRB 814 (1979).

discharges.¹² Moreover, for the reasons already stated, the arbitrator's decision is palpably wrong and repugnant to the purposes of the Act.

Exception 6. The ALJ erred in concluding that a *Wright Line* analysis was not appropriate.

The ALJ incorrectly concluded that a *Wright Line* analysis is inappropriate in this case because the AGC is not alleging the "July 26 discipline" for the shower incident as an unfair labor practice. The Employer concedes that Charging Party's protected conduct at the July 31 meeting was a motivating factor and was the primary reason for discharging the Charging Party. Contrary to the ALJ's conclusion, a *Wright Line* analysis is appropriate in this case to the extent that the Employer raises other reasons for discharging the Charging Party. To determine if the Employer would have taken the same action against Charging Party in the absence of his July 31, 2009, protected concerted activity, the Board would apply a *Wright Line* analysis. Based on the evidence in the record, the Employer will be unable to meet its *Wright Line* burden of showing that it would have terminated Charging Party notwithstanding his protected conduct.

Exception 7. The ALJ's typographical error in using the incorrect last name for Counsel for the Acting General Counsel.

The proper name is Michelle Scannell.

¹² 251 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Exception 8. The ALJ's typographical error in using the incorrect name for the law firm representing Respondent.

The proper name is Ford & Harrison, LLP.

III. CONCLUSION

Based on the foregoing, Counsel for the Acting General Counsel respectfully requests that the Board sustain these exceptions and remand this matter to the Administrative Law Judge for a *de novo* hearing on the merits.

Dated at Los Angeles, California, this 2nd day of September, 2011.

Respectfully submitted,

A handwritten signature in cursive script that reads "Nicole Pereira". The signature is written in black ink and is positioned above a solid horizontal line.

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Re: IAP World Services, Inc.
Case No.: 31-CA-29505

CERTIFICATE OF SERVICE

I hereby certify that I served the attached copy of the **EXCEPTIONS OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE AND BRIEF IN SUPPORT THEREOF** on the parties listed below on the 2nd day of September, 2011.

VIA E-FILE:

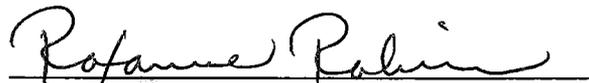
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