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IAP World Services, Inc. and Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166. Case 31–CA–29505

February 24, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES
AND GRIFFIN

On July 19, 2011, Administrative Law Judge William G. Kocol issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief. The Respondent filed a brief in support of the judge's decision and an answering brief to the Acting General Counsel's exceptions.

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

The Board has considered the judge's decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 24, 2012

Mark Gaston Pearce,	Chairman
Brian E. Hayes,	Member
Richard F. Griffin, Jr.,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Michelle Scanlon, Esq., for the General Counsel.
James G. Brown, Esq. (Ford & Harrington, LLP), of Orlando, Florida, for the Respondent.
George A. Pappy, Esq. (Reich, Adell & Cvitan), of Los Angeles, California, for the Union.

¹ The Acting General Counsel requests that the Board adopt a new framework for considering post-arbitration deferral cases. Because, in our view, the proposed framework would not lead to a different result in this case, we decline to consider that request at this time.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. The Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166 (herein the Union) filed the charge on November 19, 2009¹ and on December 29 the Regional Director deferred the case to arbitration. After the arbitration award issued the General Counsel issued the complaint on March 29, 2011. The complaint alleges that IAP World Services, Inc. (herein IAP) discharged Larry Treen in violation of Section 8(a)(3) and (1) of the Act. IAP filed a timely answer that admitted the allegations in the complaint concerning the filing and service of the charge, interstate commerce and jurisdiction, the Union's labor organizations status, agency and supervisory status, and of its collective-bargaining agreement with the Union. IAP denied that it unlawfully discharged Treen. As affirmative defenses IAP alleged that Treen was fired for misconduct, that his discharge had been submitted to arbitration, and that arbitrator had issued a decision, and that the Board should defer to that decision.

I. JURISDICTION

IAP, a corporation, is a government contractor providing services at the United States Army's Fort Irwin, California, training center where it annually purchases and receives goods valued in excess of \$50,000 directly from points located outside the State of California. IAP admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Legal Standards

The issue presented in this case is whether the Board should defer to a decision issued by Arbitrator Joseph E. Grabuskie. On June 20, 2011, IAP filed a motion to adopt the record in the arbitration hearing as the record in this case, to defer to the factual findings of the arbitrator, and to cancel the hearing scheduled in this case. On June 22, 2011, the General Counsel filed a motion opposing IAP's motion. I granted IAP's motion and accepted the record in the arbitration proceeding to determine whether arbitration award is in accord with *Olin Corp.*, 268 NLRB 573 (1984) and *Spielberg Mfg. Co.*, 112 NLRB1080 (1955).² Under the *Spielberg* doctrine, the Board will defer to

¹ All dates are 2009 unless otherwise indicated.

² A review of case law informs me that in cases such as this the Board goes through a two-step process. First it determines whether the arbitrator's decision is repugnant to the Act. It makes this assessment based record and decision in the arbitration process. *Olin Corp.*, supra at 574; *Atlanta Steel Co.*, 245 NLRB 814 (1979). See also the late Chairman John Truesdale's concurring opinion *Kansas City Star Co.*, 236 NLRB 866, 868 (1978). If the arbitrator's decision is not repugnant, the complaint is dismissed. If the Board determines that the decision is repugnant, then the Board will not consider that decision and will instead decide the case on its merits after a full hearing. *Pincus Brothers*, 237 NLRB 1063, 1065-66 (1978), enf. denied *NLRB v. Pincus Brothers*, 620 F.2d 367 (3rd Cir. 1980).. On occasions the hear-

an arbitration award where “the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act.” The General Counsel concedes that the arbitration proceedings were fair and regular, and the parties agreed to be bound, so the only issue that remains is whether the decision is clearly repugnant to the Act. In that regard the Board does not require an arbitrator’s award to be totally consistent with Board precedent. Rather, the inquiry is whether the award is “palpably wrong.” Unless the arbitrator’s decision is not susceptible to an interpretation consistent with the Act, the Board will defer. Also, the party seeking to have the Board reject deferral and consider the merits of the unfair labor practice matter has the burden of showing that the standards for deferral have not been met. *Olin Corp.*, supra at 574. In *Olin* the Board added that the requirements that (1) the contractual issue be factually parallel to the unfair labor practice issue and (2) the arbitrator be presented generally with the facts relevant to resolving the unfair labor practice. The factual setting of the complaint allegations in this case present the issue of whether Treen lost the protection of the Act by conduct and remarks he made while engaged in protected, concerted activity. In the arbitration hearing the parties directly presented the unfair labor practice issue to the arbitrator, briefed the issue, and generally presented the same evidence to the arbitrator as would be presented in an unfair labor practice hearing. Moreover, as described more fully below, the arbitrator applied the same legal standard that I would apply and specifically resolved the unfair labor practice issue.

Arbitrator’s Decision

The following facts are as described by the arbitrator. IAP has a collective-bargaining agreement with the Union that runs from October 1, 2008 through September 30, 2013. On March 17 IAP sent a memo to all employees that began:

Attached is your new copy of the CBA. The Company is implementing the new language only in the new CBA effective Monday, March 23, 2009. The Company is still waiting on approval of the CBA by the Contracting Officer, hence, all economic issues such as wages, shift differential changes, insurance co-pay, etc. remain in effect from the old CBA until such approval time. Also, the Company is further waiting for the approval of the retroactive pay.

The memo ended:

When approval of the CBA is made by the Contracting Officer, you will immediately be notified of such approval of the economic issues and implementation processes.

ing on the merits takes place before a decision is made on whether to defer to the arbitrator’s award. See, for example, *Dries & Krump*, 221 NLRB 309 (1975). In those cases it appears that no pretrial motion was filed that raised the issue of deferability. In any event, there is no requirement that a hearing be held when the issue can be resolved by a ruling on a properly filed motion. Rather, I conclude this is a matter left in the first instance to the discretion of the judge. In this case I exercise that discretion and first determine whether the arbitrator’s decision is repugnant to the Act.

Treen worked for IAP as a boiler operator; he worked there since 2004. Treen was fired for his behavior in three separate incidents. The first occurred on March 19, two days after the March 17 memo. On that day David Dearman, Treen’s supervisor, was conducting a safety meeting. During that meeting Treen asked Dearman when IAP was going to sign the contract and pay backpay. Dearman replied that he believed the contract would take effect on March 23. Treen then uttered phrases such as “Fuck the Company and this job.” Treen then was suspended for 2 days. A grievance was filed and IAP and the Union settled the grievance. The settlement reduced the suspension to a reprimand, gave Treen backpay for the 2 days, and required that Treen go to anger management class.

The second incident occurred during a weekend shift on July 26; Treen’s hours that day were 7 a.m.– 3:30 p.m. Treen complained that he was sweating too much and it was too hot in the boiler room so he left the area, drank some ice tea and worked on paperwork. Treen’s replacement R.J. Steele arrived. Treen complained to Steele about the heat. At some point Treen put his tools away and went to the gym to shower. Steele then reported the matter to the weekend supervisor, Andy Uraire. Uraire in turn called Treen on Treen’s mobile phone, but Treen did not answer because he was apparently in the shower. When Treen did return the call, Uraire asked if Treen needed any medical attention but Treen laughed and said no. Uraire then completed a disciplinary action form recommending that Treen be discharged for insubordination because Treen was supposed to report his medical condition to his supervisor rather than abandon his post. The arbitrator indicated that although Treen was not provided with due process concerning this incident, he concluded that Treen was obligated to notify his supervisor of his condition so that appropriate precautions could be taken. And he concluded that Treen was not entitled to use an hour before the end of his shift to shower. The arbitrator also concluded that Treen falsely reported the time he spent working that day.

The third incident occurred on July 31 during a division-wide meeting conducted by General Manager Jeff Williamson; about 130–140 employees attended. The main topic of the meeting was safety, but Williamson said he would entertain questions after the safety discussion. At this meeting Treen again interjected the subject of backpay. Treen said that he did not work for the government, he worked for IAP. The arbitrator noted that Treen had options other than interrupting the safety meeting; Treen could have spoken with management away from the meeting, he could have consulted with the Union, he could have filed a grievance, or he could have written his congressman. The arbitration award described the testimony of the witnesses concerning what Treen said and did at the safety meeting. Those descriptions included that Treen spoke in a loud angry voice about the backpay, that Treen was insubordinate and disrespectful, that Treen was very agitated, and that Treen was loud and aggressive. The arbitration decision then described Treen’s version of the events. The arbitrator concluded:

It is clear that the Grievant’s attitude was argumentative and disruptive and completely out of place in that type of meeting.

All witnesses confirmed that out of frustration, Williamson asked the Grievant to leave the room.

After this meeting Treen was suspended and then fired. In the termination notice IAP referenced the March 20 and July 26 incidents as well as the July 31 incident.

The arbitration award noted that Treen had filed a charge with the Board alleging that his termination was unlawful and that the Regional Director had deferred the case to arbitration. It then described the issues as whether Treen's termination violated the "just cause" provision in the contract and noted that the decision would also address Treen's charge with the NLRB. The award described the positions of the parties, including IAP's contention that Treen's discharge did not violate the Act. IAP's position in that regard, as described by the arbitrator, was that while the Act protected employees who engage in protected concerted activity, employees who do so could lose the protection of the Act if their conduct is "egregious or flagrant." The award then mentions *Atlantic Steel*, supra and lists the four criteria the Board considers in resolving the issue of whether conduct loses the protection of the Act and recites how IAP applies those criteria. The Union's position is also portrayed in the arbitration award; it asserts that the Act protects certain activity and that attempting to enforce the contract is an activity protected by the Act. The Board and the courts have found discharges to be unlawful even when the employee interrupts management, becomes aggressive, insistent, and contains some name-calling.

The arbitrator concluded that IAP did not take any action against Treen because of any activity protected by the Act; he noted:

While the Grievant's back pay question was appropriate, even if misplaced, his demeanor was disruptive, disrespectful, argumentative, and he refused to accept Williamson's answer given in good faith.

Based on all of the above, the arbitrator held that IAP properly terminated Treen and IAP's decision was not "arbitrary, capricious or discriminatory." The decision ended:

Due to the facts outlined above, it is concluded that in terminating the Grievant the Company did not violate the National Labor Relations Act as charged by the Union.

Analysis

As indicated above, the General Counsel shoulders the burden of establishing that arbitration decision was clearly repugnant to the Act and was palpably wrong. The General Counsel begins by citing cases where the Board held that an employee's attempt to enforce a collective-bargaining agreement is activity protected by the Act. But none of those cases deal with the peculiar fact setting presented in this case. In one sense Treen was attempting to enforce the collective-bargaining agreement. But in another sense he was attempting to disrupt the understanding between IAP and the Union, common under government contractors, that an appropriate government official or agency first had to approve the increased monetary items in the contract before they could be implemented. Treen was informed of this process in the March 17 memo, yet he continued to press for immediate money. In this sense Treen's conduct

was not an attempt to enforce the contract; rather it was an attempt to undermine it.

Assuming Treen's conduct was for the purpose of enforcing the contract, the General Counsel presents no case directly on point with the fact pattern in this case. Indeed, it is unlikely that the General Counsel could do so because cases of this type are fact intensive and require the balancing of the factors described in *Atlantic Steel*, supra. For example, although Treen's conduct was not prompted by any unfair labor practice, the setting in which it occurred was at the lower end of protection. That is, Treen's conduct did not occur at the bargaining table or during the grievance process where an employer and union are in an equal position. Rather, they took place during work meetings involving other employees and they to some extent disrupted those meetings. Although the Board could find Treen's conduct during these meeting still protected, it would depend on the nature of Treen's conduct. Here the arbitrator assessed all the evidence and concluded that Treen's conduct was disruptive, argumentative, and disrespectful. Remember, this was in the context where in March Treen had raised the same matter and had said, according to the arbitrator, "Fuck the Company and this job." A conclusion that Treen's conduct at the July 31 meeting, in this context, could be sufficient to strip an employee of the protection the Act otherwise would provide is not palpably wrong. *Aramark Services*, 344 NLRB 549 (2005). I conclude that the General Counsel has not established that the arbitrator's decision is clearly repugnant to the Act.

In his latest brief the General Counsel concedes that the only issue left under *Spielberg* and *Olin* is whether the award is repugnant to the Act. More specifically he again concedes that the arbitrator considered and resolved the unfair labor practice issue. But yet later in that brief he inconsistently argues that the arbitrator should have applied *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). This argument fails for several reasons. First, it is directly contrary to *Olin*, supra. Second, if adopted it would allow a union to get two bites at the apple by allowing it to litigate one theory in arbitration (*Atlantic Steel*) but withhold another theory to litigate in an unfair labor practice hearing (*Wright Line*). Just as the charge in this case would have been dismissed if the Union failed to take the case to arbitration, so too is must be dismissed if the Union failed to present all its evidence and legal theories at arbitration. To do otherwise would undermine the very reasons the Board has adopted its current deferral policy. Finally, the General Counsel indicates that incident that should be subject to a *Wright Line* analysis is July 26 discipline stemming from overheated/early shower matter. But this discipline is not alleged as an unfair labor practice in the complaint and I likely would not allow the General Counsel to litigate the matter in the absence of such an allegation. The General Counsel asserts he would present evidence with respect to IAP's "past practice with respect to employees showering during working time." But this shows the General Counsel is merely seeking to relitigate the finding of the arbitrator that Treen took a 1-hour shower and that a shower of that length was certainly improper.

The General Counsel next argues that the Board should modify its approach under *Olin*. Of course, I can not modify existing

Board law. But I consider and comment on the General Counsel's arguments in the event the Board considers that useful. The General Counsel urges the modifications are necessary to provide a "greater weight to safeguarding employees' statutory rights in Section 8(a)(3) and (1) case, such as the case herein." This is entirely understandable because, as this case may show, the current deferral scheme allows for the possibility that a claim involving discriminatory discipline that might have been meritorious if litigated in an unfair labor practice proceeding could be lost in an arbitration proceeding. Stated differently, in such a case the statutory rights are not vindicated. Of course, the Board has held that other considerations outweigh the vindication of these statutory rights.

The new standard proposed by the General Counsel is

[T]he party urging deferral 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 applied them in deciding the issues. Then, if the party urging deferral makes that showing, the Board should, as now, defer unless the award is clearly repugnant to the Act.

The General Counsel does not seek modification of the deferral standards or procedures under *Collyer Insulated Wire*, 192 NLRB 837 (1971).

What the proposed standards do is challenge the concept that a "just cause" provision in collective-bargaining agreement implicitly prevents employers from discriminating against employees because of conduct protected by the Act. This in turn undermines the basis for deferring Section 8(a)(3) cases that resulted from the progeny of *United Technologies*, 268 NLRB 557 (1984). There are practical problems with the new standard. It would require continued deferral of those cases in which there is no clause in a collective-bargaining agreement that matches Section 7 or Section 8(a)(3). What would the incentive be under those circumstances for a union to present the arbitrator with the unfair labor practice issue? It would be better off not to do so because if it lost in arbitration under the "just cause" standard the Board would not defer to the award because the arbitrator did not set forth the correct legal standard. The union could then try again to overturn the discipline in an unfair labor proceeding. Meanwhile, the unfair labor proceeding is held in limbo while the grievance is processed through arbitration. What is the judicial and resource economy in such a process? The application of the second point in the proposed standard poses difficulties in this case. The arbitrator

here described the correct *Atlantic Steel* standard only in the sense that he described it IAP's position. Although implicitly he took that standard into account, he did not go through each of the four elements and then weigh them as was done in *Atlantic Steel*.³

It seems to me that a better approach would be to modify *United Technologies* to require deferral in Section 8(a)(3) cases only where the collective-bargaining agreement explicitly and clearly contains language that affords employees the same protection that they would have under the Act, i.e., language that mirrors Section 7 and/or Section 8(a)(3). This would enhance the collective-bargaining process by letting the parties themselves decide in the first instance whether or not they want to arbitrate matters that otherwise might be litigated in an unfair labor practice proceeding. This would also directly and more efficiently rescind the judicial construct, undermined by stealth in the proposed standard, that the resolution of the whether discipline was for "just cause" also resolves the issue of whether the discipline was discriminatory under the Act. And it would achieve the General Counsel's goal of better protecting the statutory rights of employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 19, 2011

³ In his brief the General Counsel argues that under the proposed standard deferral to the arbitration award in this case would be inappropriate because the arbitrator "did not correctly enunciate and apply" the applicable statutory standard. To the extent that this comment suggests that under the proposed standards the arbitrator must "correctly apply" the law, it is incorrect. The proposed standard preserves the repugnancy standard; it does not require that the arbitrator correctly apply the legal standards.

⁴ 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.