

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: March 15, 2012

TO: Peter S. Ohr, Regional Director  
Region 13

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Imperial Crane Services  
13-CA-046488

The Region submitted this Section 8(a)(1) and (3) case for advice as to whether, under *Olin Corp./Spielberg Manufacturing*,<sup>1</sup> and/or the General Counsel's proposed new standards in GC Memo 11-05,<sup>2</sup> it should defer to an arbitral award dismissing a termination grievance. We conclude that both standards for consideration of the statutory issue have been met, i.e., under *Olin/Spielberg*, (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; and under GC Memo 11-05, (1) the contract incorporated the statutory right and that issue was placed before the arbitrator, and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the case. We further conclude the arbitrator's award is subject to an interpretation consistent with Act and that it is not clearly repugnant.

The Employer is in the business of renting cranes and other related construction equipment, and has a contract with the International Union of Operating Engineers, Local 150 (the Union) which contains a hiring hall provision.

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<sup>1</sup> 268 NLRB 573, 574 (1984); 112 NLRB 1080 (1955)

<sup>2</sup> See "Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases," GC Memorandum 11-05, dated January 20, 2011.

The relevant contract terms include:

ARTICLE II  
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**Section 5**

No Discrimination - It is understood and agreed that the Employer shall not discriminate against any member of the Union, any of its Officers, its Stewards, or any member serving as a member of a committee authorized by the Union....

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ARTICLE V

**Section 3 - Show-Up Time**

The Employer shall pay a full day's pay to all employees operating such heavy equipment if they report on the job before starting time each day. The Employee shall remain on the job for the full eight (8) hours, doing whatever small repairs that may be necessary to their equipment if their equipment is not in operation. This provision shall apply only to operators operating heavy equipment as listed below:  
**MECHANICS, . . . .(emphasis added)**

**Section 4**

....If the services of any employee are no longer required, he shall be so notified and paid off before quitting time, otherwise he shall report for work as usual.

This case involves the Employer's termination of a mechanic who had worked for the Employer since 2008 on a permanent basis. The Employer asserts it laid him off because of insufficient work, and the Union asserts he was discharged.

Briefly, On December 7,<sup>3</sup> the Employer's General Manager told the Grievant to stay home on the next day, December 8, due to a lack of work. The Grievant complied with that request without comment. On December 8, the General Manager's assistant called the Grievant and told him to report to work the following day, December 9. On December 9, the Grievant performed the work he was assigned in the morning and then asked the General

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<sup>3</sup> All dates are in 2010 unless otherwise noted.

Manager's assistant why he was told to stay home the day before and whether he was going to be paid for the day. The Grievant asked the assistant to ask the General Manager whether he would be paid for that day.

In the interim, after learning that the Grievant wanted to be paid for December 8, the General Manager called the Vice President of Operations to find out if he would have the pay the Grievant for the prior day. The VP told the General Manager that the Grievant would have to be paid for the day inasmuch as it could not be presumed he had voluntarily taken the day off. The VP then said unless the Grievant was willing to take voluntary days off when there is no work available, he would have to be laid off.

A few hours later, the assistant told the Grievant to go to the General Manager's office. Once he arrived in the General Manager's office, the Grievant alleges that the conversation got heated and the General Manager asked "What's your fucking problem, you don't fucking like the way we're running this place?" He then told the Grievant that he decides who works, not the contractor or the Union. The Grievant responded that he needed to know if he was going to get paid. The General Manager then asked, "What are you going to do, run to the fucking hall?" the Grievant said, "It depends on if you are going to pay me or not." The Employer notes the Grievant specifically stated, "I'm not going to be taking any voluntary days off." The General Manager responded, "Yes, I'll fucking pay you for yesterday, and I'm fucking laying you off today. You get your shit together. I'll have your fucking money for you. You're fucking done."

The Employer explains that it was required to pay the Grievant eight hours of "Show-Up" pay, if he showed up before start time each day pursuant Article V. Section 3 of the contract. Furthermore, under Article V. Section 4, in the absence of the employee's agreement to take "voluntary time off," the employee was required to report to work each day (thereby invoking the Employer's obligation to pay him under Section 3 of that Article)- unless the Employer formally laid him off and returned him to the hiring hall. The Employer contends that on December 7, the General Manager asked the Grievant to take off December 8 because there was no work for him—two days before he threatened to file a grievance for not being paid for December 8. On December 8, when the Grievant complied with the Employer's request to stay home, the Employer took that compliance as an agreement to take "voluntary time off." The Employer argues that it was only after it learned that the Grievant would not be willing to forego show up pay, that the Employer exercised its right under the contract to lay him off for legitimate economic reasons.

The Union filed a grievance regarding the discriminatee's termination/layoff. The Region deferred the instant Section 8(a)(1) and (3) charge to arbitration pursuant to *Collyer Insulated Wire*,<sup>4</sup> and *United Technologies Corp.*<sup>5</sup> On December 9, 2011,

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<sup>4</sup> 192 NLRB 837 (1971).

<sup>5</sup> 268 NLRB 557 (1984).

the Arbitrator issued his Opinion and Award. The Arbitrator considered three issues: (1) As a threshold issue, whether the Employer discharged the Grievant or in the alternative laid him off ; (2) if he was terminated, it must then be determined whether that action was for just cause; and (3) If, on the other hand, the Grievant was laid off, then it must be determined whether the layoff was in violation of the agreement.

After considering all of the evidence, including witness testimony, the Arbitrator first concluded that “in light of the Employer’s denial that the Grievant was discharged,” the evidence before the Arbitrator that he was discharged was not convincing, particularly because the Grievant acknowledged that he was not told that he was fired, and on the very same day that Grievant was let go, the General Manager told the Union Business Agent that the Grievant had been laid off and not discharged for cause. Moreover, the statement “you’re done” could indicate a layoff as well as it could indicate a discharge for cause. Next, the Arbitrator found that the Employer was not really concerned about the Grievant’s threat to file a grievance. Rather, the Employer was concerned that by expressing his intent to file the grievance, the Grievant was also stating his intent to exercise his rights under contract for show up pay, as opposed to taking voluntary leave. Thus, the Arbitrator concluded, “All the evidence suggests that the [Employer’s] real annoyance was at the thought of having to continue to pay [the Grievant] after December 9 despite the fact that the Company did not have work for Grievant five days a week.” Absent the Grievant’s agreement to take voluntary leave, the Employer had no choice but to lay him off, and that is precisely what it did under Article V section 4 of the contract. Thus, the Arbitrator concluded that “the Grievant’s layoff was not retaliation for anything in connection with December 8, but, rather, to prevent additional expense in the future” which the Arbitrator found was “legitimate basis for laying off an employee.”

We agree with the Region that the Employer has satisfied the first two prongs of both the *Olin/Spielberg* standard and the General Counsel’s proposed new standards for deferral in Section 8(a)(1) and (3) cases. The remaining factor under both standards is whether the award is clearly repugnant to the Act.

We conclude that the award is not clearly repugnant to the Act. First, with regard to his determination that this was a layoff under the contract, rather than a discharge, the Grievant himself notes he was never told he was discharged, and in fact, the Employer notified him on December 7-- two days before he asserted his contractual right for show up pay on December 9-- that it did not have enough work for him and that he should take the next day off. And, as the Arbitrator also noted, the term “you’re ...done” is ambiguous and could equally apply to a lay off as well as a discharge. While it is true, as the Region notes, that it was only after the Grievant asserted his rights under the contract, that it laid him off, nonetheless, his assertion of his rights under the contract also presented the Employer with a monetary loss, i.e., having to pay him for a full week, despite not having enough work for him during that period. In these circumstance and in the absence of the Grievant

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forgoing his contractual rights by taking voluntary time off, the Employer decided to exercise its rights under the contract to lay the Grievant off and return him to the hall, a result the Employer was, no doubt, trying to avoid because of the Greivant's experience and tenure with the Employer. We therefore conclude that the Arbitrator's decision is not clearly repugnant and instead is susceptible to an interpretation consistent with the Act.<sup>6</sup>

Accordingly, the Region should defer to the arbitral award and dismiss the instant charge, absent withdrawal.

/s/  
B.J.K.

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<sup>6</sup> See *Olin Corp.*, 268 NLRB 573, 574 (1984).