UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BABCOCK & WILCOX
CONSTRUCTION CO., INC.

and **Case 28-CA-022625**

COLETTA KIM BENELI, an Individual

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Counsel for the Acting General Counsel (General Counsel) files the following Brief in Support of Exceptions to the Decision of Administrative Jay R. Pollack, [JD(SF)-15-12] (ALJD), issued on April 9, 2012, in the above captioned case. As set forth in the General Counsel's Exceptions, filed under separate cover, the General Counsel excepts to the Administrative Law Judge's (ALJ) decision:

- To defer the decision of the grievance/arbitration subcommittee upholding the suspension and discharge of the Charging Party Coletta Kim Beneli (Beneli);
- that Respondent did not violate the Act by issuing Beneli a the three day suspension because she engaged in union and protected concerted activities under a *Wright Line* analysis;
- that Respondent did not violate the Act by discharging Beneli because she engaged in union and protected concerted activities under a *Wright Line* analysis*;* and
- that Respondent did not violate the Act by discharging Beneli because she engaged in union and protected concerted activities under either an *Atlantic Steel* or *Burnup & Sims* analysis.
- The ALJ's failure to adopt a new framework in Section 8(a)(1) and (3) post-arbitral deferral cases and require the party urging deferral to demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutor

- y issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and also applied them in deciding the issue. If the party urging deferral makes that showing, only then should deferral be appropriate, unless the award is clearly repugnant to the Act.

In all other respects the ALJ's findings are appropriate, proper, and fully supported by the credible record evidence, including crediting the testimony of Beneli and Assistant Business Agent Shawn Williams.

I. OVERVIEW

Section 7 of the National Labor Relations Act provides employees with the fundamental right to raise concerns regarding their terms and conditions of employment. Beneli exercised her Section 7 rights when she, acting in her role as Union steward, raised issues with Respondent concerning matters contained in the parties' collective-bargaining agreement. These included Respondent's abrogating its obligation to hire employees though the Union hiring hall, its failure to pay employees the proper wage rate, and the imposition of unwarranted discipline upon employees. Because Beneli exercised her protected rights, she received a three-day unpaid suspension; when she vigorously questioned the suspension, she was discharged.

Beneli, in her role as a union steward, actively and effectively policed the contract. In early February 2009, Beneli discovered that Respondent had failed to follow contract provisions concerning the hiring of employees through the Union hiring hall, and advised Respondent of her discovery.[1] On February 16, Beneli was contacted by foreman and fellow union member Robert Alsop, who told her that he had not been paid properly. Beneli addressed this with Respondent, who initially challenged the matter, but later paid Alsop the wages he was due pursuant to the contract. On March 10, in her role as a Union steward,

[1] All dates are in 2009 unless otherwise stated.

Beneli again discovered that Respondent was not abiding by hiring hall procedures with respect to hiring new employees. The next day, Beneli addressed Respondent's continued disregard for the contract's hiring hall and pay provisions with Respondent, and also addressed the matter with a representative of Respondent's client, Arizona Public Service. Respondent was greatly displeased with Beneli's continued policing of the contract, and advised the Union Business Agent that it wanted to fire Beneli, and that she had been "sticking her nose" in business that was not of her concern.

Respondent's prophetic swift reaction to these concerns was nothing short of a complete repudiation of employee Section 7 rights. On March 11, the very same day Beneli confronted Respondent about its failure to abide by the parties' contract provisions, Beneli was issued a three-day unpaid suspension for allegedly failing to complete a safety form and eating a pastry at a safety meeting; these allegations had never been previously discussed with Beneli. When presented with this discipline, Beneli challenged Respondent, asking "are these the fucking games you are going to play?" Immediately Respondent discharged Beneli---for use of profanity---at a construction worksite.

This matter also exposes the broken nature of the parties' grievance procedure. While intended to effectively address disputes between the Union and Respondent, the use of the grievance procedure in this matter actually resulted in an arbitration decision that was palpably wrong and repugnant to the Act. Consistent with Board law, the arbitrator's decision left the Acting General Counsel with no choice other than having the facts in this case examined in the context of an unfair labor practice hearing. The Administrative Law Judge (ALJ) failed to properly address Beneli's discharge and to properly evaluate whether the subcommittee's decision was repugnant to the Act. The ALJ also erred by failing to adopt a

new framework, as urged by the General Counsel, with respect deferral. Accordingly, it is respectively requested that the ALJ's decision be reversed.

A review of the credible record evidence demonstrates that deferral to the subcommittee's decision was inappropriate, and that the reasons proffered by Respondent for its actions are threadbare, contrary to the overwhelming evidence, and simply not believable. Instead, the record evidence shows that Respondent would not tolerate Beneli's union activity, particularly her policing the contract, and challenging the disciplines issued to her. Respondent took whatever steps necessary to punish Beneli, and rid itself of an activist steward, who was "sticking her nose in business" matters that were not of her concern. By doing so, Respondent violated Section 8(a)(1) and (3) of the Act. Finally, as set forth more fully below, the General Counsel urges that the Board adopt a new standard for 8(a)(1) and (3) post-arbitral deferral cases.

II. FACTUAL BACKGROUND

A. Respondent's Business Operation

Babcock and Wilcox Construction Co., Inc. (Respondent), Delaware corporation, is a construction-industry contractor, providing field construction management and maintenance services throughout the United States, including work for Arizona Public Service (APS) at a coal plant in Joseph City, Arizona. (ALJD 2) Since 1996 Respondent and the International Union of Operating Engineers (the International) and its Local 428 (the Union) have been parties to the National Maintenance Agreement (NMA), which is currently in effect.[2] (GCX 5; ALJD 2) Since 2008, Respondent has also been signatory to a multi-employer

[2] In this brief, Counsel for the Acting General Counsel will be referred to as "General Counsel." Exhibits of the Acting General Counsel, and Respondent, will be designated as "GCX" and "RX" respectively, followed by the appropriate exhibit number(s). References to the transcript will be designated "Tr.", and to the Administrative Law Judge's Decision will be designated ALJD, followed by the appropriate page number(s) respectively.

association agreement (Agreement) between the Union and the Arizona Chapter of the Associated General Contractors of America, Inc. (GCX 2)

B. Background

On January 12, 2009, Beneli began working at Respondent's Cholla Generating Station (the jobsite) as a utility operator, operating a forklift and a crane. (ALJD 2) Beneli reported to Foreman Robert Alsop (Alsop), who in turn reported to Safety Representatives Ralph McDesmond (McDesmond) and Matt Winklestine (Winklestine). (ALJD 2) All of these individuals, including Office Manager/Timekeeper Rhonda Roberson (Roberson) reported to Project Superintendent Christopher Goff (Goff). (GCX 12) Alsop and Winklestine did not testify at the hearing. Prior to her suspension and subsequent termination, Beneli had only received one previous written warning, for driving a crane too close to a transformer; according to Goff, Beneli was a good operator. (GCX 4; 6; 7) The ALJ specifically credited the testimony of Beneli and Assistant Business Agent Williams. (ALJD 5)

1. Beneli's Union Activity.

There is no dispute that Beneli engaged in extensive Union activity. Shortly after Beneli started working for Respondent, she became the Union steward at the worksite. Part of her duties as Union steward included policing the contract, ensuring Respondent was following its contractual obligations. Beneli testified that on February 2, Respondent brought in a new operator, Ian Christianson, to work at the site. (Tr. 57; ALJD 2) Beneli called the Union and discovered that Christianson had not been dispatched through the Union hiring hall. As a result, Beneli spoke to Christianson and informed him that he needed a dispatch from the Union. Christianson told Beneli that he would speak to management and take care

of it. (Tr. 57) Later that day, Christianson told Beneli that he had spoken to Respondent's Timekeeper Roberson about the situation.[3] (ALJD 2)

On February 16, while in the breakroom after lunch, Union member and Foreman Alsop informed Beneli that he had not been properly paid for a full 40-hour week. (Tr. 64; ALJD 2) Beneli told Alsop that she would address the issue with Superintendent Goff, and did so. (Tr. 64; ALJD 2) Beneli told Goff that Respondent shorted Alsop 10 hours on his check. Goff asked why, and Alsop showed Goff the parties Agreement which guaranteed foremen 40 hours a week. (Tr. 64) Goff asked Beneli to tell Timekeeper Roberson to cut Alsop a check for a full 40 hours. (Tr. 65; ALJD 2) Beneli told Roberson about Goff's instructions. A short time later, APS Representative Bill Roberson entered the office; after a long discussion, Bill Roberson told his wife (Timekeeper Roberson) to pay Alsop the full 40 hours. (Tr. 65-66; ALJD 2)

On March 10, Beneli saw another new operator at the site. Alsop introduced Beneli to the operator, who informed Beneli that his name was Heath Riley (Riley). (Tr. 66; ALJD 2) Beneli asked Riley if he was referred from the Union's hiring hall; Riley said no, that Goff had called him directly for the job. (ALJD 2) Riley explained that he and Goff had been neighbors in Kentucky. Beneli asked Riley if he was a Union member, and Riley said yes. Beneli knew that under the Agreement the Union had 48 hours to dispatch an employee from the hiring hall before the employer could call-out an employee on its own. After Beneli called the Union dispatcher, Beneli informed Riley that, according to the dispatcher, Riley was going to have to pay the Union $15 a week for traveler fees. (Tr. 69) Beneli had Riley speak to the Union dispatcher directly, using her phone. After speaking with the dispatcher, Riley

[3] Timekeeper Roberson is married to APS representative's William "Bill" Roberson, who works in the same office. Rhonda Roberson did not recall this, or any other conversation.

told Beneli that, if he had known this was going to cause so much trouble, he would not have travelled from Kentucky to work for the company. Beneli explained to Riley that it would be okay, and that the Union and Respondent will make it work. (Tr. 68; ALJD 2)

On March 11, prior to the start of the workday, Alsop informed Beneli that Bill Roberson wanted to speak to her. (Tr. 69; ALJD 2) Beneli spoke with Bill and Rhonda Roberson, in Respondent's office. After a short discussion, Beneli stated that she had spoken to the Union hall and disagreed with their position that Respondent did not have to pay Alsop incentive pay. (ALJD 2) As she was getting ready to leave, Beneli told the Robersons that it would be a lot better if Goff wouldn't bring operators from Kentucky without using the Union hiring hall. (Tr. 69-70) Beneli explained that there are more than 400 employees on the Union's out of work of list and there were plenty of good backhoe operators to fill the job order. (Tr. 70; ALJD 2-3) As Beneli was finishing her conversation with the Robersons, Goff walked in and saw Beneli in the office. (Tr. 70)

2. Respondent Retaliatory Response.

On March 11, because of her meeting with Bill and Rhonda Roberson, Beneli was late to the morning's Job Safety Analysis (JSA) meeting, which was being held in the break trailer. (ALJD 3) As she was entering the trailer, Goff drove up in a pickup; Goff had passed by Beneli while she was walking from the office to the break trailer, which was about a quarter-mile away. In an angry tone, Goff told Beneli that he wanted to speak to her. When Beneli asked if he wanted to talk at that moment, Goff angrily responded, "I will take care of you later missy." (Tr. 70; ALJD 3) Present in the break trailer was Christianson, Alsop, Beneli and Goff. After the meeting, Beneli asked Alsop to stay, as she believed he was upset with her. Goff told Christiansen to leave. (Tr. 71)

After everyone left, with Alsop present, Goff asked Beneli what she had discussed with Bill Roberson earlier that morning. (GCX 10; Tr. 71; ALJD 3) Beneli explained that she had told Roberson about Riley not being dispatched from the Union hall, and about Alsop's pay. (ALJD 3) Goff asked Beneli why she had not discussed these matters with him. Beneli explained that Bill Roberson had asked her to stop in and talk with him. (ALJD 3) Goff told Beneli that she had earlier stated that the contract was with Respondent, and not with APS. (ALD 3) Beneli said that she had made a mistake, that she should have first gone to Goff, and that it would not happen again. (Tr. 71-72; ALJD 3) Beneli explained that she, and the entire work force, have been confused as to who truly was in charge at the work site. (Tr. 72) Beneli mentioned how, a week earlier, Bill and Rhonda Roberson jointly made the decision to pay Alsop the extra ten hours. Goff replied that he did not tell Beneli to go to the office and tell Rhonda Roberson to pay Alsop. (Tr. 72-73) Beneli disagreed, telling Goff where, and when, he had told her to do so. (ALJD 3) Beneli testified that Goff told her he did not care and that "it was none of [her] business." (Tr. 72-73; ALJD 3) Goff said, you don't need to be talking to APS about anything. Beneli stated that she made a mistake, but Bill Roberson had asked to speak to her. (Tr. 72) Goff replied, telling Beneli that she was sticking her nose where it does not belong and was asking questions that are none of her business. (Tr. 72-73; ALJD 3) Goff asked Beneli several questions, but would not let her answer them. (Tr. 72) Goff also questioned Beneli's qualifications to be a Union steward. (Tr. 72) During the meeting, before Beneli could answer one question, Goff peppered her with another. At some point Beneli asked Goff to allow her to answer the questions. (Tr. 72-73) Goff became more incensed, and angrily stated that Beneli was asking about things that were none of her business. (Tr. 72; ALJD 3) Goff told Beneli that she did not have the right

to have the information she requested, and that Beneli was not supposed to take care of union business on company time. (Tr. 72-73) After the meeting with Goff, Beneli called Union Assistant Business Manager Shawn Williams (Williams) and informed him of what had just transpired. (Tr. 74; ALJD 3)

3. Respondent's phone call to Shawn Williams.

Williams testified, as credited by the ALJ, that at about 8 a.m. on March 11, he received a phone call from Goff. (Tr. 112; ALJD 3) Employer Safety Representative McDesmond also participated on this call over a speaker phone. Goff told Williams that he wanted to terminate Beneli because she had overstepped her boundaries as the Union's steward and was crossing the line into management. (ALJD 3) Goff told Williams that Beneli was raising contractual issues and trying to tell Respondent what they are supposed to pay employees. (Tr. 113) Williams told Goff that, while it was Respondent's point of view that Beneli was crossing the boundary and taking on management issues, he believed Beneli was acting as a Union steward should. (Tr. 113; ALJD 3) Goff replied saying that Beneli should not be getting APS, Respondent's customer, involved by raising contractual issues with APS. (ALJD 3) Williams told Goff that, in the future, Beneli would directly raise contractual issues with Respondent's managers, and further told Goff that in the event Respondent discharged Beneli, the Union would fight the decision and file a grievance over the discharge. (Tr. 113; ALJD 3)

A short time after this phone call, Williams called Beneli and told her, in detail, about his call with Goff and McDesmond, including Goff's threat to fire her for overstepping her bounds as a steward. (Tr. 113-114) Later that day, Beneli called Williams and told him that

she had been suspended for eating a pastry and failing to complete a JSA form, and discharged for using profanity. (Tr. 114)

4. Beneli's suspension and subsequent discharge.

On March 11, sometime after 2:00 p.m., Alsop told Beneli that Goff had called him and wanted both of them to go to Respondent's office; this conversation occurred after Beneli had spoken with both Goff and Williams. (Tr. 76; ALJD 3) Alsop and Beneli went to Goff's office, where they found Goff, McDesmond and Winklestine waiting. (Tr. 76; ALJD 3) Winklestine told Beneli that she was being suspended for violating two safety policies earlier that day. (ALJD 3) Specifically, Winkelstine said Beneli had been observed eating a pastry during the JSA meeting, and that she failed to fill out a separate JSA form. Beneli laughed and asked Winkelstine where in the policy it stated that she could not eat a pastry during a JSA meeting. (Tr. 76; ALJD 3) At first Winklestine said that he did not have the policy in writing, but then said that he would have to look for it. Beneli again asked to see the policy and whether it was in writing. Winklestine obstinately responded that he did not have to show Beneli anything. (Tr. 76; ALJD 3) Winklestine then told Beneli that she was being suspended for three days without pay for the two safety violations.[4] (Tr. 77; ALJD 3)

Beneli turned to McDesmond and said, "so this is the fucking game you guys are going to play?" (Tr. 77: 7-8; ALJD 3) Almost simultaneously Winklestine and McDesmond pointed their fingers at Beneli and stated that she was terminated, with McDesmond saying that Beneli had threatened them. Beneli replied that she did not threaten anyone, but said, "is this fucking game you are going to play?" (Tr. 77:13; ALJD 3) McDesmond responded, "there you go again" (Tr. 77:14; ALJD 3), once more accusing Beneli of threatening them,

[4] Respondent has a progressive disciplinary policy. However, it appears that Respondent chose to characterize the suspension as a "Second Offense," even though there was no previous offense. (GCX 13)

which Beneli again denied. At that point McDesmond asked Rhonda Roberson, who was sitting in the next room, to bring in the termination papers and to cut Beneli a check. (ALJD 3) Beneli refused to sign the termination papers, which stated that she was being terminated for "inappropriate conduct."[5] (ALJD 3)

McDesmond testified that Goff may have been aware of the suspension, because Winklestine reports everything to Goff and McDesmond. (Tr. 214) However, McDesmond did not testify about any having any discussions with Goff regarding Beneli's suspension. Goff admitted that he knew that Beneli was to be issued a three day suspension, prior to her coming into the office on March 11. Specifically, he testified that he had previously discussed the suspension with Winklestine, and consulted with Crichton, along with talking to McDesmond via speakerphone; Crichton corroborated his conversation with Goff. (Tr. 240-241; 259; 172) Goff testified that Crichton advised Goff and McDesmond to issue Beneli a three day suspension. (Tr. 240-241)

Goff admitted that Beneli was a good operator. (Tr. 234) Goff testified that, while he had discussed various issues with Crichton in support of issuing Beneli a three-day suspension, included her cell phone use while at work, being late for JSA meetings five to eight times, operating a crane without a spotter, and operating a crane near a transformer, he admitted that the decision to issue Beneli a three day suspension was based on her failing to complete a JSA form and eating a pastry during a JSA meeting. (Tr. 266; GCX 7; ALJD 4). Goff further testified that the only reason Beneli was terminated was because of her use of profanity. (Tr. 263; ALJD 4) Goff testified that he was not specifically aware of employees using profanity, but was sure that it occurred. (Tr. 259, 267)

[5] Although Beneli asked for a copy of the safety violations, Winklestine refused to provide them to her and said they were null and void since she no longer worked for Respondent. (Tr. 77)

While Timekeeper Roberson testified that Respondent had a rule against the use of profanity, she could not indicate what policy contained that rule.[6] (Tr. 33; GCX 3; 13; 10) Moreover, Roberson admitted that profanity has been used before at the jobsite, including in front of her. (Tr. 50-51) According to Roberson, when this has occurred in the past, someone would make a comment, and the profanity would cease. (Tr. 51) Roberson is aware of only one person being terminated for using profanity, Beneli. (Tr. 51)

Beneli and Williams both credibly testified that profanity is used at the jobsite, and that supervisors themselves have used profanity. (Tr. 81; 114-115) Crichton initially testified that Respondent has a rule regarding profanity that is contained in Respondent's harassment and discrimination policy. (Tr. 135) However, Crichton then admitted that the rule in question does not specifically mention profanity. (Tr. 135) Crichton also admitted that there is no specific rule regarding eating a pastry at a safety meeting. (Tr. 136)

In his Subpoena Duces Tecum, the General Counsel requested documents showing any employees disciplined or terminated for the same reasons as Beneli; Respondent presented no documents in response, except those related to Beneli herself. (GCX 14; Tr. 133) Respondent also provided no records showing that other employees had been disciplined for failure to complete a JSA form, for eating a pastry at a JSA meeting, or for using profanity.[7] Similarly, there was no testimony showing that anyone, other than Beneli, had been disciplined or terminated for these reasons.

[6] Although Respondent attempted to demonstrate, through its Superintendent's Guide, it had a number in policies in place regarding safety violations, Goff admitted that such policies are not available to rank and file employees. (RX 15; Tr. 255)

[7] It should be noted that the Union requested similar information, but also received nothing from Respondent. (GCX 8)

5. The grievance and Step 4 decision.

On March 19, the Union filed a grievance over Beneli's suspension and discharge**.** (GCX 5; R 9) The grievance moved through the contractual grievance procedure to Step 4, which calls for a hearing before the Grievance Review Subcommittee (Subcommittee). (ALJD 4) A quorum of five representatives, consisting of at least two management representatives, two labor representatives, and one NAMPC staff representative, considers and decides a grievance at Step 4. (RX 10) All Subcommittee determinations are based upon the facts presented, both written and oral, and any decision rendered is final, binding, and not subject to any appeal. (ALJD 4)

On their Step 4 grievance fact form, the Union asserted that Beneli's termination was in violation of the "National Maintenance Agreement, NLRA Section 7 . . . and decisions made by the NLRB." (RX 6:7; ALJD 4) Additionally, the Union contended that "While engaged in a representational capacity as a Union steward [Grievant] made the following statement '. . . so this is the fucking game you guys are going to play.'" She was immediately terminated without further discussion or due process." (RX 6:7; ALJD 4)

On October 8, the Step 4 hearing was conducted before the Subcommittee panel. Both Respondent and the International provided the Subcommittee with position statements and documentary evidence.[8] (ALJD 4) Respondent's position statement stated, in part, that Beneli "was terminated due to the inappropriate conduct which she engaged in when the Company Supervisor informed her of their intent to administer a ... three day disciplinary suspension for safety violations." (RX 7:10; ALJD 4) Respondent also asserted that a supervisor had complained that "the Steward was disruptive in terms of the amount of time

[8] For its part, the International also submitted a statement of position and provided various documents in support of the grievance, including a three-page report setting out a detailed timeline of Beneli's extensive union and concerted activities in the month and half before her suspension and discharge. (RX7:7-9; ALJD 4)

being spent on Union duties, and had frequently evidenced a poor attitude toward safety on the job." (RX 7:10; ALJD 4) Additionally, attached to Respondent's position statement were statements prepared by Respondent's witnesses who were present at the March 11 disciplinary meeting, alleging that Beneli abused "her position as Union Steward by taking an inordinate amount of time during working hours involved on Union business," always being on her cell phone talking to the Union Business Agent, and going "to all other trades and talking to their [stewards] instead of being at our safety meetings." (RX 7:10; ALJD 4)

By letter dated October 8, the Subcommittee denied the grievance and upheld Beneli's discharge. (ALJD 5) The Subcommittee noted the "issue was the Union's contention that [Respondent] violated Article XXIII Management Clause of the National Maintenance Agreement by terminating the grievant, without just cause, for the grievant's use of profanity." and that the Subcommittee "review[ed] all the information submitted, both written and oral" and determined that "no violation of the National Maintenance Agreements occurred and therefore, the grievance was denied." (RX 5; ALJD 5)

III. ARGUMENT

A. The ALJ Erred by Deferring to the Subcommittee's Disposition

The ALJ erred by failing to find that the Subcommittee's decision was palpably wrong and repugnant to the Act. More specifically, the ALJ found that, although not stated in its decision, the subcommittee rejected the assertion that Beneli was discharged because of her duties as a steward. (ALJD 5) The ALJ also found that while he credited both Beneli and Williams, the subcommittee could have credited Respondent's witnesses. (ALJD 5) The ALJ

further found that while he would have reached a different result, he did not find that the subcommittee's decision was repugnant to the Act. (ALJD 6)

1. Deferral Is Inappropriate under Spielberg/Olin Standards.

Board law supports a finding that deferral to the Subcommittee's decision upholding Beneli's termination is inappropriate because that decision is clearly repugnant to the purposes of the Act. Under the current *Spielberg*/*Olin* standards, the Board defers to arbitral awards and final dispositions of joint employer-union committees when: (1) all parties agreed to be bound by the decision of the arbitrator; (2) the proceedings appear to have been fair and regular; (3) the arbitrator adequately considered the unfair labor practice issue; and (4) the award is not clearly repugnant to the purposes and policies of the Act. *Spielberg Mfg. Co.*, 112 NLRB 1080,1082 (1955); *Olin Corp.*, 268 NLRB 573, 574 (1984). See also, *K-Mechanical Services, Inc*, 299 NLRB 114, 117 (1990) (applying *Spielberg/Olin* deferral standards to determinations by joint employer-union committees that are final dispositions of a grievance). An award is "clearly repugnant" if it is "palpably wrong," i.e., not susceptible to any interpretation consistent with the Act; it is not necessary, however, for an arbitrator's award or joint employer-union committee disposition be totally consistent with Board precedent. *Aramark Services, Inc.*, 344 NLRB 549, 549 (2005); *Olin Corp.*, 268 NLRB at 574.

Here, there is no dispute that the proceedings were fair and regular and all parties agreed to be bound. In addition, the contractual issue presented was factually parallel to the unfair labor practice issue and the Subcommittee was presented generally with the facts relevant to resolving the unfair labor practice. The only criterion under dispute is whether the Subcommittee's disposition was clearly repugnant.

In examining the repugnancy of arbitral or grievance panel awards under the *Spielberg*/*Olin* framework, the Board generally finds deferral inappropriate when an award upholds discipline based upon an employee's protected activity in the course of performing union representational functions. See, e.g., *Key Food Stores*, 286 NLRB 1056, 1056-57, 1071-72 (1987) (Board upheld ALJ finding that arbitration decision was repugnant where arbitrator sustained discharge based on employee's protected activities, including his activities as shop steward) For example, in *The Union Fork and Hoe Company*, the Board refused to defer to an arbitral award which upheld the termination of a union steward based on standards of conduct to which the arbitrator believed union stewards must conform. 241 NLRB 907 (1979). There, a union steward was suspended and then discharged for alleged insubordinate conduct while he was engaged in presenting and processing the grievance of a fellow employee. The Board determined that the arbitrator failed to consider well-established Board law that a steward is protected by the Act when fulfilling his representational role and therefore his decision was clearly repugnant to the Act. *Id.* at 908. *See also Richmond Tank Car Company,* 264 NLRB 174, 175 (1982) (finding arbitral award repugnant where steward was discharged for leading walkout protected under Section 502 and profanity in the course of that conduct), enf. denied 721 F.2d 499 (5th Cir. 1983).

Also, in *Garland Coal & Mining Co.*, 276 NLRB 963 (1985), the Board refused to defer to an arbitrator's decision upholding the discharge of a union president who was fired for refusing to obey a supervisor's order to sign a memo setting forth the employer's position on an issue relevant to the union. Although the arbitrator found his refusal to be insubordination, the Board agreed with the judge that the discriminatee "...was espousing a view and engaging in activity in support of the union's interpretation of the collective

bargaining agreement. To find that [the discriminatee] was insubordinate under these circumstances is not susceptible to any interpretation consistent with the Act." *Garland Coal*, supra at 965.

Likewise, in *110 Greenwich Street Corp.*, 319 NLRB 331 (1995), the Board refused to defer to an arbitrator's award upholding the discharge of an employee for engaging in concerted activities. More specifically, the employee was fired for posting signs in his car windows while the car was parked in front of the employer's building. The signs protested the fact that the employer was regularly late in paying the employees and that the employer to remedy this practice, should sell his expensive car and pay the employees in a timely manner. The arbitrator ruled that the "display of controversial placards' in front of the building justified the discharge of the employee. Id. at 335. The Board in affirming the administrative law judge, found that "...the arbitrator's finding that the display of controversial placards is a just basis for disciplinary action is similarly misguided; the award is not susceptible to an interpretation that is consistent with the employees' rights to engage in concerted activities under Section 7 of the Act" and was therefore repugnant to the Act.

Finally, in *Mobil Oil Exploration & Producing, U.S., Inc.*, 325 NLRB 176 (1997), the discriminatee had an ongoing dispute with the union president, alleging that the union president was working at another job while allegedly conducting union business, and the discriminatee reported the situation to his (and their) employer. The employer told the discriminatee that he would investigate the allegations, but that it was confidential, and that he was not to discuss it with anyone. A short time later, the discriminatee, was overheard discussing the investigation with fellow employees and he was fired for improper interference with the investigation and for insubordination. The arbitrator upheld the discharge finding

that the discriminatee was insubordinate by not complying with the instructions that he received to keep the investigation confidential. The Board, reversing the administrative law judge, refused to defer to the arbitrator's award:

> We agree with the General Counsel that the arbitration award is palpably wrong and repugnant to the Act because the precipitating event that caused Pemberton's termination was his exercise of protected concerted activities. Because the arbitration award upholds Pemberton's discipline based on his protected concerted activities, we find that deferral to the award is inappropriate and that the Respondent violated Section 8(a)(1) as alleged. *Mobil Oil,* supra at 177-178.

Here, the Subcommittee's decision upholding Beneli's termination is clearly repugnant to the purposes of the Act. As noted in Section III (B) below, Beneli's termination was a pretext for retaliation against her for engaging in protected activity as union steward. Respondent's own documentation submitted to the Step 4 Subcommittee panel specifically referred to alleged complaints from supervisors who "indicated that the Steward was disruptive in terms of the amount of time being spent on Union duties," and that she abused "her position as Union Steward by taking an inordinate amount of time during working hours involved on Union business[.]" (ALJD at 4) By concluding that the management rights' clause did not prohibit Respondent from terminating Beneli where that termination was motivated primarily by her protected activity as union steward, the Subcommittee reached a result which is palpably wrong and accordingly not susceptible to any interpretation consistent with the Act and therefore fails to satisfy the *Olin/Spielberg* deferral standard. See *110 Greenwich Street,* supra (deferral inappropriate when discipline attributable to conduct that was protected under the Act); *Garland Coal*, supra (deferral inappropriate when employee disciplined for "insubordinate" conduct that was protected activity under the Act). Accordingly, based on the credible record and extant Board law, the Board should reverse the

ALJ's findings. The Subcommittee's decision was repugnant to the Act, and deferral to that decision is therefore inappropriate under the existing *Olin/Spielberg* standards.

2. The Board Should Modify its Deferral Standards.

The General Counsel also respectfully requests that the Board to modify its approach to post-arbitral deferral cases to give greater weight to safeguarding employees' statutory rights in Section 8(a)(1) and (3) cases. Pursuant to Section 10(a) of the Act, the Board has a statutory mandate to protect individual rights and 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 dispute resolution agreement. 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. *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, 247 (D.C. Cir. 1974) (the arbitral tribunal must have clearly decided the unfair labor practice issue on which the Board is later urged to give deference).

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. *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). This precedent and its rationale

compelling in determining the appropriate degree of deference the Board should give arbitral awards.

Accordingly, the General Counsel asks that the Board adopt a new framework in Section 8(a)(1) and (3) post-arbitral deferral cases and require the party urging deferral to 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 them in deciding the issue.

Applying this new approach, the Board should not defer to the Subcommittee's decision upholding Beneli's discharge. The Subcommittee's summary decision does not articulate any statutory principles or give any indication that such principles were applied in consideration of Beneli's grievance. Moreover, the analysis and conclusion that the Subcommittee's decision is repugnant to the purposes of the Act is consistent under both the current and proposed standards. Accordingly, under the General Counsel's proposed new standards, existing Board policy, and extant Board law, the Joint Grievance Subcommittee's decision is not entitled to deference. Accordingly, the ALJ's decision should be reversed.

B. The ALJ Erred by not Finding that Respondent Violated the Act.

1. Respondent Discharged Beneli for Engaging in Protected Activity.

Although the ALJ did not reach the merits of the underlying unfair labor practice charge, the credible record demonstrates that Beneli was discharged for her union and protected activities. The Supreme Court long ago held that an individual's assertion of a right "grounded in a collective bargaining agreement" is protected concerted activity under Section 7. See *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829 (1984) Likewise, it is well established that a union steward engages in protected activity when administering the

collective bargaining agreement and that, accordingly, an employer violates Section 8(a)(3) by disciplining employees "because of their conduct as union stewards in processing grievances, policing the collective-bargaining agreement, or for engaging in other activities as union steward." *Pacific Coast Utilities Services*, 238 NLRB 599, 606 (1978), enfd. 638 F.2d 73 (9th Cir. 1980). See also *Garland Coal & Mining Co.*, 276 NLRB 963, 965 (1985) (employer violates the Act by disciplining employees "for engaging in protected activity as union representatives").

Here, the evidence demonstrates that Respondent discharged Beneli because of her aggressive policing of the contract as steward. In her short tenure as steward, she successfully challenged Respondent's failure to properly pay Alsop and repeatedly called attention to Respondent's failure to use the contractual hiring-hall procedures. Immediately after she spoke to Respondent's timekeeper Rhonda Roberson and her husband, Bill Roberson, an APS representative, about these matters, Respondent reprimanded Beneli for sticking her nose where it did not belong and for asking questions that were none of her business. That same day, Respondent's Superintendent Goff informed the Union Assistant Business Manager Williams that he wanted to terminate Beneli because she had overstepped her boundaries as steward. Then, later that afternoon, Goff called Beneli in for discipline on obviously pretextual matters – eating a pastry during a meeting and failing to fill out a safety form. When she challenged Respondent's representatives McDesmond and Winklestine on this discipline, stating "[s]o this is the fucking game you guys are going to play," she was immediately terminated on the grounds that she had uttered a threat. Given Goff's announcement earlier that day that he intended to discharge Beneli because of her protected union activities as steward, the relatively benign nature of her alleged "threat" in an industry

where profanity is commonplace, and the triviality of the supposed grounds for her discipline, Respondent's asserted reasons for her termination were clearly a pretext for unlawful retaliation. See *The Union Fork and Hoe Company*, 241 NLRB 907, 911-12 (1979) (Board adopting ALJ finding that the employer used the relatively minor incident involving the steward's refusal to return a grievant's timesheet as a pretext to rid itself of an aggressive steward); Cf. *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1537-38 (10th Cir. 1995) ("In the real world of construction work, profanity and vulgarity are not perceived as hostile or abusive. Indelicate forms of expression are accepted or endured as normal human behavior.") Moreover, the documents submitted by Respondent to the Subcommittee, referring to her performance of steward duties, make clear that the real reason for her termination was her activities as Union steward.

2. Beneli's discharge was unlawful an Atlantic Steel analysis.

a. Legal Standard

When an employee is disciplined for conduct that is part of the res gestae of protected concerted activities the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. *Stanford Hotel*, 344 NLRB 558, 559 (2005) citing *Aluminum Co. of America*, 338 NLRB 21 (2002). In making this determination, the Board examines the following four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). The credible record evidence establishes that Beneli, acting not only as a rank and file employee, but also as a Union steward, did not lose the protection of the Act in her use of profanity.

b. Analysis

Regarding the first factor, the meeting took place at the workplace, where profanity had been used in the past, in the presence of two supervisors, McDesmond and Winklestine, and Union foreman Alsop. Timekeeper Roberson allegedly overheard the conversation, and testified that employees had used profanity her present before, but Beneli was the only one terminated for doing so. Given the record evidence showing that other employees used profanity at the workplace in the past, and had not been disciplined, the first factor weighs in favor of finding that Beneli's conduct was not so opprobrious to cause her to lose the protection of the Act.

As to the second factor, the subject matter of the conversation, at the time she used profanity Beneli was discussing her suspension, and was involved in the discussion not only as a rank and file unit employee, but as a steward. Beneli was protecting her own contractual rights when it appeared that Respondent was suspending her for a reason, as set forth further below, that was pretext, eating a pasty at a safety meeting, and failing to complete a JSA form. It is undisputed that her questioning the appropriateness of the suspension and asking for Respondent's written policies to support the suspension, pertained to the contractual provisions relating to discipline, matters pertinent to her duties as a Union steward. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984); *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966). As such, the second factor weighs heavily in favor of finding that Beneli's conduct and remarks were protected. *Stanford Hotel*, 344 NLRB at 559.

Regarding the third factor, the evidence does not support a finding that Beneli's comments were so outrageous as to lose protection under the Act. Specifically, Beneli's conduct consisted of a brief verbal outburst of profane language, unaccompanied by any

threat or physical gestures or contact. Respondent did not present any credible evidence to support a finding that Beneli threatened anyone. Beneli, a woman, was in a supervisor's office with in the presence of three men.

The record evidence, including testimony from Beneli, Williams, Groff, and Roberson, clearly show that profanity is used at the job site, and no other employee had ever being disciplined for using profanity. Cf. *Becker Group, Inc*., 329 NLRB 103 (1999) ("Moreover this record is replete with evidence that profanity between employees, and even between supervisors and employees, is rampant in the facility"). The Act allows a certain degree of latitude to employees when engaged in other protected conduct, even when employees express themselves intemperately. *Winston-Salem Journal*, 341 NLRB 124, 126 (2004); See also *CKS Tool & Engraving*, 332 NLRB 1578, 1586 (2000) (finding protected accusatory language that is stinging and harsh). The Board gives some leeway to union stewards when they are zealously representing the interests of unit employees; what might be considered offensive remarks in some settings are permissible in the context of a grievance meeting or other similar setting. See *Dreis & Krumpf Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976). The nature of Beneli's outburst does not weigh in favor of her losing the protection of the Act.

As to the fourth factor, whether Beneli's remarks were in, any way, provoked by Respondent's unfair labor practice, the evidence strongly weighs in favor of Beneli not losing the protection of the Act. More specifically, her remarks were provoked by Respondent informing her that she was suspended for three days for reasons that amounted to pretext, eating a pastry and failing to fill out a form.

Applying the *Atlantic Steel* factors, the evidence clearly shows that Beneli did not lose the protection of the Act. Accordingly, Respondent's termination of Beneli violated Section 8(a)(3) of the Act. *Felix Industries*, 331 NLRB 144 (2000), enf. denied and remanded, 251 F.3d 1051 (D.C. Cir. 2001) on remand 339 NLRB 195 (2003) enfd. 2004 WL 1498151 (D.C. Cir. 2004) (applying the *Atlantic Steel* factors, the Board finds an employee who called a supervisor a "fucking kid" did not lose the protection of the Act, and his termination was a violation); *Kingsbury, Inc*. 355 NLRB No. 195 (2010) (a line must be drawn between situations where employees exceed the bounds of lawful conduct in a moment of exuberance or in a manner not activated by improper motives and those flagrant cases in which misconduct is violent or of such serious character as to render the employees unfit for further service).

3. Beneli's suspension and discharge were unlawful using a Wright Line analysis.

In the event the Board finds that *Atlantic Steel* is not the proper framework to analyze Beneli's discharge, Respondent's conduct still violates Section 8(a)(3) of the Act under *Wright Line*. As Beneli was suspended before using any profanity, *Wright Line* is the proper standard to use in analyzing her suspension.

a. Legal Standard

As set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F. 2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), the General Counsel has the initial burden of making a prima facie showing that anti-union animus "contributed" to Respondent's decision to discharge an employee.[9] Once the General Counsel satisfies this burden, Respondent has

[9]In determining whether the General Counsel has established a prima facie showing of unlawful animus, the Board will not "quantitatively analyze the effect of the unlawful motive." The existence of such is sufficient to make a discharge a violation of the Act. *Wright Line*, 251 NLRB at 1089 n. 14.

the burden of showing that it would have taken the same action even if the employee had not engaged in protected activities.

In meeting this burden of persuasion, the General Counsel must establish that the discriminatee had engaged in protected or union activity, that Respondent had knowledge of that activity, and that Respondent carried out the adverse employment action because of such activity. Id.; *NLRB v. Transportation Management Corp*., 462 U.S. 393, 395 (1983).

If the General Counsel establishes the initial elements of a violation, the examination turns to Respondent's actual motive behind the decision. *Schaeff Incorporated*, 321 NLRB 202, 210 (1996). Respondent must prove that it would have taken the same adverse action even in the absence of the protected activities. *Wright Line*, 251 NLRB at 1089. However, the Board has held that a finding of pretext or false reasons, "necessarily means that the reasons advanced by Respondent either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *International Carolina Glass*, 319 NLRB 171 (1995); *Limestone Apparel Corporation*, 225 NLRB 722, 736 (1981) *enfd.* 704 F.2d 799 (6th Cir. 1982). "Shifting explanations for discharge may, in and of themselves, provide evidence of unlawful motivation," and strengthens the inference that the true reason for Respondent's decision was for union activity. *United States Coachworks, Inc.*, 334 NLRB 118, 122 (2001); *NLRB v. Henry Colder Co., Inc.*, 907 F.2d 765, 769 (7th Cir. 1990); *Sound One Corp.*, 317 NLRB 854, 858 (1995); *Aluminum Technical Extrusions*, 274 NLRB 1414, 1418 (1985).

Under certain circumstances, an inference of animus and discriminatory motivation may be appropriate even without direct evidence. *Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO,* 324 NLRB 1183 (1997). Such

indirect evidence includes timing, false reasons proffered in defense, and the failure to adequately investigate the alleged misconduct. Id. at 1188. Animus can be shown through direct evidence, or it can be imputed from circumstantial evidence and the record as a whole. *Tubular Corp. of America,* 337 NLRB 99, 99 (2001); *Sawyer of Napa*, 300 NLRB 131, 150 (1990) (timing of discharges, coming two working days after Respondent learned about employee union activity, supports an inference of animus).

b. Analysis

The record evidence conclusively establishes that the General Counsel met his burden to show that Beneli's protected conduct was a motivating factor in Respondent's decision to suspend and terminate her, and Respondent has failed to establish that it would have taken the same action absent Beneli's protected conduct. This is especially true in view of the strength of General Counsel's strong prima facie case.[10]

Beneli, engaged in union activities almost immediately after being hired by Respondent until the time of her discharge on March 11. Specifically, Beneli challenged Respondent's disregard for the hiring hall provisions in the contract, challenged Respondent in regard to Alsop's pay, and robustly questioned her almost comedic discipline for eating a pastry at a JSA meeting, and failing to complete a JSA form. These actions clearly constitute union activity as defined under Act.

Respondent knew of Beneli's activities, and was clearly hostile towards them. Although Goff claimed not to recall any specific conversation with Beneli regarding contractual issues, and denied telling Williams that he intended to terminate Beneli, evidence of Respondent's animus and knowledge of union activity was established by both Beneli and

[10] In *Vemco, Inc.*, the Board stated that an employer has a "particularly heavy burden" establishing a *Wright Line* defense when General Counsel establishes a strong prima facie case. 304 NLRB 911, 911-912 (1991), enfd. in part and denied in part, 989 F. 2d 1468 (6th Cir. 1993)

Williams. Beneli credibly testified that Goff was clearly upset when he discovered she had a conversation with Bill Roberson regarding Respondent's failure to follow contractual hiring hall rule provisions. In addition, Williams testified that, the very same day, Goff and McDesmond called and threatened to terminate Beneli for sticking her nose in matters that were not of her concern. Not surprisingly, that same day, Goff's threat became a reality. Respondent first issued Beneli a three day unpaid suspension for two alleged safety violations, one of which involved eating a pastry. Faced with the ludicrous nature of the suspension, Beneli responded with profanity to Respondent's provocation. Incredibly, Respondent would like everyone to believe that profanity isn't was used at the jobsite. However, the evidence shows otherwise; profanity is used at the jobsite, but Beneli was the only one terminated for using such language. *Passaic Crushed Stone Company, Inc.*, 206 NLRB 81, 85 (1973) (the Board has long recognized the fact that the use of profane, obscene and vulgar language is not uncommon in the industrial sphere). Respondent used this excuse as pretext, to mask its displeasure for employing a Union steward who actively policed the contract. *Roadway Express, Inc.*, 327 NLRB 25, 26 (1998) ("where Respondent's proffered non-discriminatory motivational explanation is false even in the absence of direct motivation the trier of fact may infer unlawful motivation"); *J.S. Troup Elec.*, 344 NLRB 1009, 1015 (2005) (the Board will infer an unlawful motive where Respondent's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive").

The abrupt nature of Respondent's conduct is further evidence of animus. *Daniel Construction Company*, 264 NLRB 569, 578 (1982), enfd. 731 F. 2d 191 (2d Cir. 1984) ("abruptness," along with timing, are often relied upon as indicia of an employer's discriminatory conduct). Also, Respondent's shifting defenses further demonstrates that it

unlawfully suspended and terminated Beneli because of her union activities. As mentioned above, Beneli was told that she was being suspended for eating a pastry at a JSA meeting and failing to complete a JSA form. Beneli was further told that she was being discharged for her use of profanity. However, during the grievance procedure, Respondent proffered additional reasons for Beneli's suspension and discharge: being late to JSA meetings, using the cell phone while at work, and spending too much time on Union business. The evidence clearly shows that the real reason for Beneli's discharge was her union activity. *Rose Hill Co.*, 324 NLRB 406 (1997) (discharge of two union supporters unlawful, despite their poor work performance, where employer gave shifting reasons, had union animus, and failed to uniformly follow its progressive disciplinary policy).

Moreover, even if Respondent's reasons are not viewed as shifting, Respondent's argument that Beneli was suspended for eating a pastry at a JSA meeting, and failing to complete a JSA form, and discharged because she used profanity is pretext. *State Equipment*, 322 NLRB 631(1996) (employer's evidence of alleged poor work performance, mentioned at hearing but not at time of discharge, is pretext) No other employee had ever been suspended for eating a pastry, or discharged for using profanity at the jobsite, despite evidence that such language occurs.

Frustrated that Beneli vocally raised concerns that Respondent failed to abide by hiring hall contract provisions, failed to properly pay employees, and issued improper discipline, Respondent opportunistically provoked Beneli, and immediately discharged her. Under the Board's "provocation doctrine," an employer may not provoke an employee to the point where he commits an indiscretion, and then rely on it for dismissal.[11] *NLRB v. M&B*

[11] The more extreme an employer's wrongful provocation the greater the employee's justified sense of indignation and the more likely its excessive expression. *M & B Headwear Co.*, supra. The Board compares the

Headwear Co., 349 F. 2d 170, 174 (4th Cir. 1965). See also *NLRB v. Tennessee Packers, Inc.*, 339 F. 2d 203 (6th Cir. 1964).

The fact that Respondent failed to present any credible evidence that it conducted an investigation into whether Beneli failed to complete the JSA form, is further evidence of pretext. Beneli testified that she had a form in her pocket, but did not have the chance to submit it because she had been called into the office before the work day concluded. Finally, Respondent did not bother to question or inform Beneli, or any other employee, regarding the ramifications of eating a pastry at a JSA meeting. The allegations were not discussed with Beneli before her suspension, and Respondent offered no explanation for its failure to confront Beneli about her failure to complete the JSA form, or eating a pastry until after a decision had already been made to suspend her. *Johnson Freightliners,* 323 NLRB 1213, 1222 (1997) (Board has considered an employer's failure to conduct a fair investigation and to give employees the opportunity to explain their actions before imposing disciplinary action, to be significant factors in finding discriminatory motivation). Beneli was terminated without any prior warning that her conduct would subject her to suspension or discharge. See *Colt Industries,* 263 NLRB 812 (1982) (discharge of an employee who had never been previously warned of possible discharge or discipline indicates illegal motive despite attendance record). The record clearly shows that the only reason Beneli was suspended and subsequently terminated was because of her union activities, in violation of Section 8(a)(3) of the Act. *International Carolina Glass, supra.*

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seriousness of Respondent's unlawful conduct with the extent of the employee's reaction. *Blue Jean Corp.*, 170 NLRB 1425 (1968); *NLRB v. Mueller Brass Co.*, 501 F. 2d 680, 685-686 (5th Cir. 1974).

4. Beneli's suspension and discharge were unlawful under the Act under a Burnup & Sims analysis.

In the event the Board finds that *Wright Line* is not the proper framework from which to analyze Beneli's suspension and discharge, Respondent's conduct still violates Section 8(a)(3). Despite Respondent's claims that Beneli allegedly failed to complete a JSA form, ate a pastry at a JSA meeting, and used profanity in a threatening manner, the record evidence shows that the real reason Respondent suspended and discharged Beneli, is that it wanted to silence her, and by doing so Respondent has violated Section 8(a)(3) of the Act. Even if the Respondent was not motivated by animus, its suspension and discharge of Beneli still violated the Act pursuant to *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

a. Legal Standard

Under the principles set forth in *Burnup & Sims*, when an employer disciplines an employee for misconduct arising out of a protected activity, Respondent has the burden of showing that it held an honest belief that the employee engaged in serious misconduct. Id. at 23. Once Respondent establishes that it had such an honest belief, the burden shifts to the General Counsel to affirmatively show that the misconduct did not in fact occur.

b. Analysis

Here, Respondent failed to show that it had an honest belief that Beneli engaged in any misconduct—eating a pastry at a JSA meeting, failing to complete a JSA form, or using profanity in a threatening manner. Respondent never discussed Beneli's eating a pastry or failing to complete a JSA form. Importantly, Respondent never provided any credible evidence that these actions constituted safety violations—thus neither of these alleged offense are safety violations or misconduct.

While Beneli used profanity in the course of her challenging Respondent's improper discipline, she Beneli did not threaten anyone. As with its alleged reasons for Beneli's suspension, Respondent failed to provide any credible evidence to establish that Beneli engaged in any alleged misconduct that resulted in her discharge. Accordingly, even when analyzed under a *Burnup & Sims*, the finding of a violation is still warranted.

IV. CONCLUSION

It is respectfully submitted that the record amply demonstrates that Respondent has violated Sections 8(a)(3) of the Act as alleged, and that the ALJ should be reversed accordingly. The General Counsel urges the Board to issue an appropriate remedial order requiring Respondent to: (1) reinstate Beneli immediately to his previous positions or, if such position no longer exists, in a substantially equivalent position, without prejudice to her seniority or other rights and privileges to which she may have been entitled; (2) make Beneli whole, with interest computed on a compound quarterly basis, for any loss of earnings and other benefits they may have suffered as a result of Respondent's discrimination against her; (3) post an appropriate notice at its Arizona facilities; (4) and provide whatever other relief the Board deems just and necessary to remedy Respondent's violations of the Act.

The General Counsel also urges that the Board to adopt a new framework in Section 8(a)(1) and (3) post-arbitral deferral cases requiring the party urging deferral to 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 them in deciding the issue.

Dated at Phoenix, Arizona, this 11th day of May 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in Babcock and Wilcox Construction Co., Inc., Case 28-CA-022625, was served by E-Gov, E-filing, and by overnight delivery, on this 11th day of May 2012 on the following:

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