

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9**

In the Matter of

OVATIONS FOOD SERVICES, L.P.

and

NADINE WEAVER, AN INDIVIDUAL

Case 9-CA-046264

**RESPONDENT’S REPLY BRIEF IN SUPPORT OF ITS MOTION TO
DISMISS COMPLAINT AND NOTICE OF HEARING, OR,
ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT**

Respondent, Ovarions Food Services, L.P. (“Ovarions” or “Respondent”), hereby submits its Reply Brief in support of its Motion to Dismiss Complaint and Notice of Hearing, Or, Alternatively, Motion for Summary Judgment (“Motion to Dismiss”). Board precedent is clear that deferral to the arbitration award is necessary unless the Acting General Counsel can show that the award is repugnant to the Act. (Motion to Dismiss.) Although the Acting General Counsel has since submitted a Memorandum in Opposition to Respondent’s Motion to Dismiss Complaint (“Memorandum in Opposition”), the Acting General Counsel has failed to satisfy his burden in this dispute.

The mere fact that the Acting General Counsel may disagree with the arbitration award is not grounds for declining to defer to the award, and the Acting General Counsel’s inaccurate portrayal of the award and related evidence does not trump the plain facts: (1) the parties submitted their dispute to arbitration; (2) the parties were represented by competent counsel at the arbitration; and (3) the arbitrator considered the evidence presented by the parties, enunciated and applied the relevant law, and made a reasonable determination in light of the facts and circumstances of the dispute. These are the facts. (*See* Motion to Dismiss.)

Indeed, on June 7, 2012, the day before the Acting General Counsel opposed Ovations' Motion to Dismiss, the Board summarily dismissed Charging Party's unfair labor practice charge against her former Union and held the following: "The Arbitrator, after a hearing held on two dates, denied your grievance. This decision is final and binding on the parties." (Letter from Board to Nadine Weaver, Case No. 09-CB-073966, Jun. 7, 2012 (attached hereto as Exhibit A).) The Board's decision to dismiss Charging Party's unfair labor practice charge against her former Union is based on the same Arbitrator's decision in this case, which the Board now claims is repugnant to the National Labor Relations Act. (*Compare* Exh. A, *with* Motion to Dismiss and Memorandum in Opposition.)

Despite Board precedent and its recent position that the Arbitrator's decision in this case was binding – at least against Weaver and the Union – the Acting General Counsel has refused to defer to the Arbitrator's decision as it relates to Ovations. The fact remains, however, that Board precedent requires the Acting General Counsel to defer to the arbitration award and Respondent's Motion to Dismiss must be granted.

A. The Acting General Counsel Must Satisfy A Heavy Burden Before Refusing To Defer To An Arbitration Award Merely Because He Disagrees With The Result.

The Acting General Counsel's Memorandum in Opposition essentially re-hashes the facts and re-argues the merits of the underlying dispute.¹ His arguments ignore the fact that the Acting General Counsel is not entitled to disregard an arbitration award merely because he does not agree with the result. *See Verizon New Eng., Inc.*, 2011 NLRB LEXIS 630 (NLRB, Nov. 15, 2011). The Acting General Counsel bears the burden of proving that the award is "clearly repugnant to the purposes and policies of the [National Labor Relations] Act." *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082 (1955); *Olin Corp.*, 268 NLRB 573, 574 (1984). In

¹ Indeed, the Acting General Counsel's implication that the evidence was so clear in this case that only one rational result was possible necessarily begs the question why the Region deferred to arbitration in the first place.

other words, the applicable standard here is not *de novo* review of the arbitration award, and the fact that the Acting General Counsel (or the Board, for that matter) might have reached a conclusion different from that of Arbitrator Hayford is of no consequence. *See, e.g., Verizon New Eng., Inc.*, 2011 NLRB LEXIS 630 (“although the Board, upon hearing this case *de novo* might have reached a different conclusion than that reached by the arbitrator, . . . the arbitrator's decision was neither repugnant to the Act nor was it palpably wrong.”).

As explained more fully in Respondent's Motion to Dismiss, the Acting General Counsel has not and cannot satisfy his heavy burden of proving that the arbitration award is repugnant to the Act, and therefore deferral to the arbitration award is necessary and the complaint must be dismissed.

B. The Acting General Counsel's Inaccurate Assessment Of The Arbitration Award Is Not Supported By The Record And Does Not Satisfy His Burden Of Proof.

Arbitrator Hayford found that (1) Ovation's terminated Weaver with just cause as a result of her repeated time-card violations and (2) there was no causal relationship between Weaver's Union activities and her termination:

What the record does not reveal is any concrete nexus between Ms. Weaver's union activities and the Company's decision to terminate her employment. That the Grievant at times behaved in an aggressive or abrasive manner in the course of fulfilling her union duties, and occasionally filed grievances does not demonstrate that the Company's decision to terminate her for what has been determined to have been repeated intentional time card violations was somehow a result of her actions as a Union Steward.

. . . Because the Company has proven just cause for the Grievant's termination and because **Ms. Weaver and the Union have not adduced concrete probative evidence demonstrating that her otherwise justified discharge resulted from or was linked to her union activities**, the Arbitrator can only conclude that the Company did not violate Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act when it discharged Nadine Weaver.

(Arbitration Award, at p. 18 (emphasis added).)

Despite these clearly enunciated findings of fact and conclusions of law, the Acting General Counsel asserts that the Arbitrator concluded something different. He asserts the following (notably, without any citation to the arbitration award):

The arbitrator found that the Respondent failed to prove that the alleged inappropriate steward conduct was a just cause for [Weaver's] discharge. Thus, the arbitrator implicitly found Weaver's activities as steward were appropriate and a reason for her discharge but nonetheless concluded that her discharge did not violate the Act. In upholding a discharge that was motivated primarily by Weaver's protected activity as a union steward, the arbitrator reached a result that is not susceptible to an interpretation consistent with the Act and therefore fails to satisfy the *Spielberg/Olin* deferral standards.

(Memorandum in Opposition, at p. 3) This purported summary of the Arbitrator's decision is simply inaccurate. (*Compare* Arbitration Award, at p. 18, *with* Memorandum in Opposition, at p. 3.) The Arbitrator did not find what the Acting General Counsel claims he found. (*Id.*)

Additionally, the Acting General Counsel seems to rely on a purported letter dated January 24, 2011 that was not introduced at the arbitration by the Union's counsel or Weaver's personal counsel who was also in attendance at the arbitration. The Acting General Counsel claims this document "informed the Union . . . that [Ovations] planned to discharge [Weaver] because of her conduct as a union steward." (Memorandum in Opposition, at 3 and Exh. H.) The Acting General Counsel's description of this document, however, is inconsistent with the document's actual contents and the factual conclusions reached by the Arbitrator following his analysis of all relevant witness testimony and documentary evidence, as well as his credibility assessments. (*Compare* Memorandum in Opposition, *with* Arbitration Award.) .)

The January 24, 2011 document does not set forth Ovations' reasons for terminating Weaver as the Acting General Counsel appears to suggest. (Memorandum in Opposition, p. 3 and Exh. H.) As the Arbitrator found, the reasons for Weaver's termination were articulated in

the February 17, 2011 letter from Ovarions to Weaver – namely, Weaver was terminated for repeated intentional time card violations. (Arbitration Award, at pp. 13-19.) Any assertion to the contrary is inaccurate. Further, Weaver’s Union attorney and her private attorney at the time did not present this document to the Arbitrator for consideration. (See Arbitration Award.) Logically, they must not have presented it to the Arbitrator because they deemed it to be irrelevant or inadmissible.

The Acting General Counsel’s mischaracterization of the facts of this dispute and the factual and legal conclusions reached by the Arbitrator does not warrant his refusal to defer to the Arbitrator’s award.

C. The Acting General Counsel Cannot Show That Arbitrator Hayford Incorrectly Enunciated or Applied The *Wright Line* Analysis.

The Acting General Counsel additionally argues that his decision to ignore the arbitration award was appropriate because he alleges that a genuine issue of fact exists regarding whether Arbitrator Hayford correctly applied the *Wright Line* analysis. (Memorandum in Opposition, at p. 3.) Like his other arguments, this argument lacks merit.

As Ovarions previously has explained, Arbitrator Hayford correctly enunciated the four-part *Wright Line* standard. (Motion to Dismiss, at pp. 10-11.) After determining that the first three elements were met, Arbitrator Hayford turned his attention to the fourth element, whether there existed a causal nexus between Weaver’s Union activities and her termination. (*Id.*) While the parties disagreed as to the burden of proof relating to causation, the burden to prove a link between an employee’s union activities and an adverse employment action always lies with the General Counsel or (in the case of grievance and arbitration proceedings) the Union. See *Sunrise Health Care Corporation*, 334 NLRB 903 (NLRB 2001). See also *NLRB v. Transportation*

Management Corp., 462 U.S. 393 (1982); *Wright Line*, 1251 NLRB 1080 (1980), *enfd.*, 662 F.2d 899 (1st Cir.), *cert den.*, 455 U.S. 989 (1982).

Arbitrator Hayford acknowledged the parties' disagreement, looked at the facts of this case, and found no causal relationship between Weaver's Union activities and her termination. (*See, e.g.*, Arbitration Award at p. 18 ("What the record does not reveal is any concrete nexus between Ms. Weaver's union activities and the Company's decision to terminate her employment.")) Absent such a causal relationship, Arbitrator Hayford was correct in ruling that Ovation's did not violate the National Labor Relations Act when it terminated Weaver.² Thus, Arbitrator Hayford's application of the *Wright Line* analysis was correct and does not justify the Acting General Counsel's decision to decline deferral.

D. Conclusion

For all of the foregoing reasons, Respondent, Ovation Food Services, L.P., respectfully requests that the Board grant its Motion to Dismiss Complaint and Notice of Hearing, Or, Alternatively, Motion for Summary Judgment.

Dated: June 12, 2012.

² To the extent the Acting General Counsel alleges that the Arbitrator's failure to expressly decide which party bore the burden of proof constitutes grounds for declining to defer, his argument is once again misguided. As noted above, Arbitrator Hayford determined that the evidence did not support a causal relationship between Weaver's Union activities and her termination. (*See* Arbitration Award, at p. 18.) The question of who bore the burden of proof on that point, therefore, is entirely irrelevant.

Respondent,

OVATIONS FOOD SERVICES, L.P.

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CERTIFICATE OF SERVICE

This is to certify that on June 12, 2012, a copy of the foregoing Reply Brief in Support of its Motion to Dismiss Complaint and Notice of Hearing, or, Alternatively, Motion for Summary Judgment was served, via electronic mail where possible and first class mail, postage prepaid upon the following:

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NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
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June 7, 2012

NADINE Y WEAVER
1631 REPUBLIC STREET #5
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Re: CHICAGO AND MIDWEST JOINT
BOARD, UNITE HERE AND ITS
AFFILIATED LOCAL 12
(Ovations Food Services, L.P.)
Case 09-CB-073966

Dear Ms. Weaver:

Your appeal in the captioned matter has been carefully considered and included a thorough review of the Regional Office's investigative files as well as all additional documents that you provided on appeal. The appeal is denied.

Contrary to the assertions on appeal, the Regional Director's decision to dismiss this charge was proper. Here, the evidence revealed that the Union did submit your discharge grievance to arbitration. The Arbitrator, after a hearing held on two dates, denied your grievance. This decision is final and binding on the parties. While you make a number of criticisms regarding the Union's representation of you at the hearing before the Arbitrator, the National Labor Relations Board does not require a Union representing an employee to exercise every possible option or advocate the employee's case in a perfect manner. *Truck Drivers, Local 355 (Monarch Institutional Foods)*, 229 NLRB 1319, 1321 (1977). Further, a grievant has no special right to dictate what arguments are to be made or what testimony is to be sought. *Teamsters Local No. 542 (Golden Hill Convalescent Hospital)*, 223 NLRB 533 (1976). In this regard, it was noted that you were represented at the arbitration hearing and you and your witnesses were allowed to testify and present evidence. Moreover, evidence indicated that before and after the conclusion of the arbitration hearing the Union continued to seek your reinstatement through settlement discussions. However, you rejected several options presented by the Employer. The fact that the Union was unable to achieve results that were satisfactory to you does not provide a basis to conclude that the Union failed to properly represent you, as alleged. The evidence in its entirety failed to show that the Union was motivated by any hostility

Exhibit A

CHICAGO AND MIDWEST JOINT
BOARD, UNITE HERE AND ITS
AFFILIATED LOCAL 12
(Ovations Food Services, L.P.)
Case 09-CB-073966

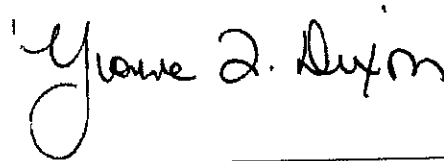
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toward you or by arbitrary or discriminatory considerations. Thus, it was determined that the burden could not be met of establishing the Union breached its duty to represent you fairly in violation of the National Labor Relations Act, as alleged. Accordingly, further proceedings are unwarranted.

Sincerely,

Lafe E. Solomon
Acting General Counsel

By:



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Exhibit A