

**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 REPLY BRIEF**

William Mabry III  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 28  
2600 North Central Avenue, Suite 1400  
Phoenix, AZ 85004-3099  
Telephone: (602)640-2118  
Facsimile: (602)640-2178  
Email: William.Mabry@nlrb.gov

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**I. INTRODUCTION**

Counsel for the Acting General Counsel (General Counsel) submits the following Reply Brief to the Answering Brief (Answering Brief) filed by Respondent Babcock & Wilcox Construction Co., Inc., on June 1, 2012.<sup>1</sup> Respondent’s Answering Brief, which is primarily a restatement of its brief to the Administrative Law Judge (ALJ), misses the mark. It fails to rebut the critical facts and law summarized by the General Counsel, and further fails in large measure to specifically address the issues and arguments raised in the General Counsel’s Exceptions and supporting Brief, filed on May 11, 2012.

It is respectfully submitted that the record as a whole, including the ALJ’s credibility resolutions, findings, and conclusions, as described in the General Counsel’s Exceptions, support a finding that Respondent violated Section 8(a)(1) and (3) of the Act as described in General Counsel’s Exceptions.

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<sup>1</sup> All dates herein are 2009, unless otherwise noted. 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.

## II. ANALYSIS AND DISCUSSION

### A. The ALJ Erred by deferring to the decision of the grievance/arbitration subcommittee upholding the suspension and discharge of the Charging Party Coletta Kim Beneli (Beneli)

#### 1. Deferral is inappropriate

Contrary to the Respondent's assertions, the ALJ erred by concluding that the arbitration award is susceptible to an interpretation consistent with the Act under the *Olin/Spielberg* repugnancy standard. Instead, the credible record evidence demonstrates that the Subcommittee's disposition was palpably wrong and thus clearly repugnant to the Act.<sup>2</sup>

In examining whether an arbitration or grievance panel award is repugnant 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).<sup>3</sup>

While Respondent's Answering Brief attempts to distinguish cases cited by the General Counsel, Respondent ignores the credited record evidence that demonstrates Beneli was engaged in union and protected activity, and that Beneli's termination was a pretext; it

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<sup>2</sup> *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 to be totally consistent with Board precedent. *Aramark Services, Inc.*, 344 NLRB 549, 549 (2005); *Olin Corp.*, 268 NLRB at 574.

<sup>3</sup> *The Union Fork and Hoe Company*, 241 NLRB 907, 908 (1979); *Richmond Tank Car Company*, 264 NLRB 174, 175 (1982), enf. denied 721 F.2d 499 (5<sup>th</sup> Cir. 1983); 110 *Greenwich Street Corp.*, 319 NLRB 331, 335 (1995) *Mobil Oil Exploration & Producing*, 325 NLRB 176,177-178 (1997), enf. 200 F. 3d 230 (5<sup>th</sup> Cir. 1999); *Garland Coal & Mining Co.*, 276 NLRB 963, 964-65 (1985).

was retaliation against her for engaging in protected activity as union steward. Notably, 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. The Subcommittee's decision is not susceptible to any interpretation consistent with the Act, and therefore fails to satisfy the *Olin/Spielberg* deferral standard.

Although Respondent cites *IAP World Services, Inc.*, 358 NLRB No.10 (2012), and *Teledyne Industries*, 300 NLRB 780, 781-82 (1990), enf'd mem., sub nom., *Goodwin v. NLRB*, 979 F.2d 854 (9th Cir. 1992) in support of its position that deferral is appropriate, both cases are readily distinguishable from the present case. Specifically, in *IAP World Services* the Board affirmed the ALJ's deferral to an arbitrator's decision which found an employee was discharged for conduct that was disruptive, argumentative, and disrespectful. In *IAP World Services*, the employee's conduct was not in response to an alleged unfair labor practice; the case was decided based upon an analysis of the employee's conduct under *Atlantic Steel*,<sup>4</sup> and also contained an assessment of witness credibility.

Notably, unlike *IAP World Services*, here Respondent submitted statements in support of Beneli's discharge that not only referred to her use of profanity, which was prompted by Respondent alleged unfair labor practice (suspension), but also negatively referred to her

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<sup>4</sup> *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

union activity, and her role as a union steward. Also in the present case, unlike *IAP World Services*, the Subcommittee's decision only summarily addressed Beneli's discharge, and provided no explanation as to how it reached its decision, and did not contain any credibility assessments, or an analysis of Beneli's conduct under any Board law.

Respondent's reliance on *Goodwin* is also misplaced. In *Goodwin*, the Circuit Court affirmed the Board's deferral of an arbitration decision in which a union steward, with a well documented poor disciplinary record, was discharged. Specifically, it was determined that the reason for the union steward's discharge was not his union activity, but his violation of the conditions of the union steward's voluntary reinstatement agreement which he had entered into as a result of his poor disciplinary record.

Unlike *Goodwin*, the record evidence as credited by the ALJ demonstrates that Beneli, who Respondent admitted was a good operator and did not have a poor disciplinary record, was engaged in union and protected concerted activity, and the Subcommittee's decision was wholly devoid of any detail or analysis addressing Beneli's protected activity. (RX 5; ALJD 5; Tr. 234:14; 241:2) Accordingly, Respondent's reliance on *IAP World Services* and *Goodwin* is misplaced, and deferral in this case is inappropriate.

2. The Board Should Modify its Deferral Standards.

Because a modified deferral standard in post-arbitral deferral cases would give greater weight to safeguarding employee statutory rights in Section 8(a)(1) and (3) cases, the General Counsel also respectfully requests that the Board modify its deferral standards accordingly. In its Answering Brief, Respondent inaccurately cites *IAP World Services* as supporting its contention that the Board should not modify its deferral standards because of some unarticulated "practical problems" in applying a modified standard. However, the Board did

not state this as its reason for declining to adopt the proposed modified deferral standards. Instead the Board stated that “[b]ecause, 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.” *IAP World Services*, supra slip op. at 1 fn. 1. Support for the modification of the Board’s deferral standards can be found in recent Supreme Court and federal circuit court decisions which present compelling rationale in determining the appropriate degree of deference the Board should give arbitration awards.<sup>5</sup>

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

In this case, if the Board applies the proposed framework, it would not defer to the Subcommittee’s summary decision, and would conclude that the Subcommittee failed to correctly enunciate, articulate, or apply the statutory principles that have long been applied by the Board in similar factual situations. Specifically, the Subcommittee’s decision did not correctly articulate the nature of Section 7 protections, failed to directly address or balance the *Atlantic Steel* factors, ignored the applicability of *Burnup & Sims*,<sup>6</sup> and completely neglected to consider the *Wright Line*<sup>7</sup> principles applicable to dual motive discharges. Accordingly, the Subcommittee’s decision is repugnant to the purposes of the Act under both the current and

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<sup>5</sup> *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). *E.g.*, *Taylor v. NLRB*, 786 F. 2d 1516, 1521-22 (11th Cir. 1986) (“by presuming, until proven otherwise, that all arbitration proceedings confront and decide every possible unfair labor practice issue, *Olin Corp.* gives away too much of the Board’s responsibility under the NLRB”); *Baynard v. NLRB*, 505 F. 2d 342, 347 (D.C. Cir. 1974) (the arbitral tribunal must have clearly decided the unfair labor practice on which the Board is later urged to give deference).

<sup>6</sup> *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964).

<sup>7</sup> *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F. 2d 899 (1<sup>st</sup> Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

proposed standards. Accordingly, General Counsel requests the ALJ's decision be reversed, and that the Board adopt the proposed new standards.

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

1. Beneli engaged in union and protected concerted activity

Although the ALJ credited the testimony of Beneli and Assistant Business Agent Shawn Williams, the ALJ did not reach the issue of whether Beneli engaged in union and protected activity. Despite Respondent's acrobatic attempts to claim otherwise, the credited record evidence demonstrates that Beneli actively engaged in union and protected activity during her two months of employment, and that Respondent had animus toward Beneli because of her protected activity. *Interboro Contractors*, 157 NLRB 1295, 1298 fn.7 (1966) (Board has recognized that a complaint made by a single employee for the purpose of enforcing a collective-bargaining agreement is concerted activity protected by Section 7 of the Act).<sup>8</sup>

2. Respondent harbored animus against Beneli and her union and protected activity

The record evidence does not support Respondent's untenable position that it had bore no animus towards Beneli for engaging in protected conduct.<sup>9</sup> Contrary to Respondent's assertions, the record evidence demonstrates that Respondent had animus towards Beneli when she was reprimanded for "sticking [her] nose where it does not belong," and "asking questions that are none of [her] business."<sup>10</sup> Other evidence of animus includes Respondent calling Williams and informing him of its intent to terminate Beneli because she had

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<sup>8</sup> The Supreme Court approved the Board's *Interboro* doctrine in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984) where the Supreme Court held that an individual's assertion of a right "grounded in a collective bargaining agreement" is protected concerted activity under Section 7. *Id.* at 829.

<sup>9</sup> Respondent did not, nor could it, deny that Respondent had knowledge of Beneli's activity.

<sup>10</sup> Tr. 73:16-25

overstepped her boundaries as steward, issuing Beneli a suspension on obviously pretextual matters (eating a pastry during a meeting and failing to fill out a safety form) later that same afternoon, and then terminating Beneli when she vigorously challenged the suspension. (ALJD 3). Accordingly, there is overwhelming credible record evidence of animus. *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).

3. Respondent suspended and discharged Beneli because of her protected activity.

As the credited record evidence demonstrates, issuing Beneli a suspension for eating a pastry and failing to complete a safety form was a pretext for unlawful retaliation.<sup>11</sup> This pretext, when viewed with the documents submitted by Respondent to the Subcommittee which negatively referenced her performance of steward duties, establishes that Respondent terminated Beneli because of her activities as Union steward.<sup>12</sup> Since Respondent's conduct was pretextual, it would not have any *Wright Line* defense.<sup>13</sup> However, even if its conduct is found not to have been pretextual--under *Wright Line*, *Atlantic Steel*, or *Burnup & Sims*, the record credible evidence demonstrates that Respondent unlawfully violated Section 8(a)(3) of the Act when it discharged Beneli.

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<sup>11</sup> See *The Union Fork*, supra at 911-12 (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).

<sup>12</sup> *Pacific Coast Utilities Services*, 238 NLRB 599, 606 (1978), enfd. 638 F.2d 73 (9th Cir. 1980) (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.>").

<sup>13</sup> 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).

Under *Wright Line*, Respondent violated Section 8(a)(3) of the Act by suspending and subsequently discharging Beneli. As outlined above, the credited record evidence establishes a prima facie case. Moreover, Respondent failed to present evidence that it would have taken the same action against Beneli even in the absence of her union and protected activity.

Alternatively, viewing the record evidence under *Atlantic Steel*, as detailed in General Counsel's Brief in Support of Exceptions, Respondent violated the Act. In Respondent's Answering Brief (at page 18), Respondent erroneously relies on the discredited testimony of its witnesses as it characterizes Beneli's use of profanity as "veiled threats of retaliation." (ALJD 1:fn. 1). However, the credited record evidence demonstrates that under an *Atlantic Steel* analysis, Beneli did not lose the protection of the Act when she robustly questioned the validity of a three day no pay suspension based on her failing to complete a safety form and eating a pastry at a safety meeting. *Atlantic Steel*, supra, 245 NLRB at 816.

Finally, under *Burnup & Sims*, Respondent, failed to prove it had an honest belief that Beneli engaged in serious misconduct by using profanity in a threatening manner in the course of challenging her suspension.<sup>14</sup> Because Beneli, who was credited by the ALJ, denied threatening anyone, and was engaged in protected activity while challenging the suspension, Respondent violated the Act when it discharged Beneli.

#### **IV. CONCLUSION.**

It is respectfully requested that, based on the record as a whole, and as discussed above and in General Counsel's Exceptions and Brief in Support, that the Board find that Respondent violated the Act. The General Counsel urges the Board to issue an appropriate remedial order

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<sup>14</sup> 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. 379 U.S. 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.

requiring Respondent to: (1) reinstate Beneli immediately to her 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 15<sup>th</sup> day of June 2012.

Respectfully submitted,

/s/ William Mabry III  
William Mabry III  
Counsel for the General Counsel  
National Labor Relations Board  
Region 28  
2600 North Central Avenue, Suite 1400  
Phoenix, AZ 85004-3099  
Telephone: (602) 640-2118  
Facsimile (602)-640-2178  
E-Mail: William.Mabry@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF in Babcock and Wilcox Construction Co., Inc., Case 28-CA-022625, was served by E-Gov, E-filing, and by e-mail, on this 15<sup>th</sup> day of June 2012 on the following:

***Via E-Gov, E-Filing:***

Lester Heltzer, Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street N.W., Room 11602  
Washington, D.C. 20570-0001

***One Copy via e-Mail:***

Dean E Westman, Attorney at Law  
Kastner Westman & Wilkins, LLC  
3480 West Market Street, Suite 300  
Fairlawn, OH 44333-3369  
*Email: dwestman@kwwlaborlaw.com*

Ms. Coletta Kim Beneli  
PO Box 2527  
Show Low, AZ 85902  
*Email: kbee@starband.net*

Helen Morgan, Deputy General Counsel  
International Union of Operating Engineers  
11225 Seventeenth Street, NW  
Washington, DC 20036  
*Email: hmorgan@iuoe.org*

/s/ William Mabry III

William Mabry III  
Counsel for the General Counsel  
National Labor Relations Board  
Region 28  
2600 North Central Avenue, Suite 1400  
Phoenix, AZ 85004-3099  
Telephone: (602) 640-2118  
Facsimile (602)-640-2178  
E-Mail: William.Mabry@nlrb.gov