

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BCI COCA-COLA BOTTLING
COMPANY OF LOS ANGELES

and

Case 28-CA-022792

WAYNE ABRUE, An Individual

Sandra Lyons, Esq., for the General Counsel.
Douglas M. Topolski and Sabrina Beldner, Esqs., (*McGuire Woods, LLP*), of Baltimore,
Maryland, for the Respondent.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Phoenix, Arizona, on September 13, 2012. Wayne Abrue filed the charge on November 23, 2009, and the General Counsel issued the complaint on May 31, 2012. The complaint alleges that BCI Coca-Cola Bottling Company of Los Angeles (Coca-Cola) violated Section 8(a)(1) by threatening its employees with unspecified reprisals and layoff because of their union and other concerted activities and informed employees that it would be futile for them to select the Union as their collective-bargaining representative. The complaint also alleges that Coca-Cola violated Section 8(a)(3) and (1) by laying off Abrue, James Conway, Othon Garcia, Heath Gessner, Chris Langley, Craig Stephenson, Tony Peden, and Donell Winston because those employees “formed joined, or assisted” the United Industrial Service, Transportation, Professional, and Government Workers of North America, Seafarers International Union of North America, Atlantic, Gulf, Lakes, and Inland Waters District/NMU, AFL-CIO (Union) or because Coca-Cola “believed” that those employees had done so. Coca-Cola filed a timely answer that admitted the allegations of the complaint concerning the filing and service of the charge, interstate commerce and jurisdiction, and labor organization status; it denied that it had committed any unfair labor practices. Coca-Cola pled a number of affirmative defenses, including that it laid off the employees in the manner required by the collective-bargaining agreement it had with the Union covering those employees and that a grievance concerning the layoffs was processed and resulted in a settlement between Coca-Cola and the Union.

On the entire record, and after considering the arguments made by the General Counsel and Coca-Cola, I make the following

FINDINGS OF FACT

I. JURISDICTION

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Coca-Cola, a corporation, is engaged in the manufacture and distribution of beverage products at its facility in Tempe, Arizona, where it annually purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Arizona. Coca-Cola admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

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The issues presented by this case include whether the charge should have been deferred to the grievance-arbitration process under *Collyer Insulated Wire*, 192 NLRB 837 (1971), instead of under *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), and if so, whether a union's failure to pursue a *Collyered* case to arbitration results in the dismissal of the charge instead of the resumption of the processing of the charge by the General Counsel. For reasons set forth in the Bench Decision, attached as Appendix A, and further explained below, I conclude that this charge should have been deferred under *Collyer* and I do so now. Furthermore, I indicate that absent circumstances so far not apparent in this case, if the Union again fails to take the case to arbitration, then the charge should be dismissed.

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The Union had represented a unit of employees based on a certification issued by the Board in Case 28-RM-305. Coca-Cola and the Union's last contract ran from February 1, 2005, through January 31, 2010.¹ That contract has a nondiscrimination provision under which:

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Both parties acknowledge their respective obligations under . . . federal statutes and agree that neither will discriminate, as defined in applicable federal statute . . . against any employee . . . because of . . . membership in the Union.

The contract also specifies a grievance-arbitration procedure that results in binding arbitration.

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On December 28, 2009, the Regional Director deferred the charge in this case under *Dubo*. In doing so the Regional Director noted that there was a grievance pending that covered the allegations of the charge. On January 31, 2012, the Union and Coca-Cola finalized a settlement of that grievance. Among other things, that settlement indicated that Abrue had filed the charge in this case containing allegations that the layoffs violated the Act; it provided that Coca-Cola pay each of those employees \$3000. In return, the Union agreed to withdraw the grievance. Furthermore, in the settlement:

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The Union acknowledges that its investigation of the Grievance revealed no evidence to support any allegation that the Company . . . interfered with, restrained, coerced, and

¹ On March 12, 2010, the Regional Director issued a certification of results of election that decertified the Union as the bargaining representative of the employees.

discriminated against employees in the exercise of their rights under Section of the Act by discharging any one or more of the Grievance Payees because of their Union membership and other concerted activity . . . as alleged in Charge 28-RC-22792 (sic).
 5 The Union further acknowledges that its agents with personal knowledge of Union's investigation of the of the grievance will so testify in any hearing or other proceeding to collect evidence in Case No. 28-RC-22792 (sic).

On March 29, 2012, the Regional Director notified that parties that he was revoking the deferral and resuming the investigation of the charge; the complaint issued 2 months later.

10 III. ANALYSIS

The Union and Coca-Cola were parties to a contract that provided for final and binding arbitration; it also contained a specific provision forbidding discrimination by Coca-Cola against employees based on union membership. Coca-Cola agreed to waive any timeliness defenses it may have to the processing of the grievance and it affirmed its legal obligation to process such grievance notwithstanding the expiration of the contract because such grievance arose under an existing contract. There is no history of employer hostility to the Section 7 rights of employees. And the interests of the Union are in substantial harmony with the interests of Abrue, the individual charging party. Thus, all conditions are met for deferral of the charge to the grievance-arbitration process. *Collyer*, supra; *United Technologies Corp.*, 268 NLRB 557 (1984).

As described above, the parties in this case were advised that this case was being deferred under the principles underlying *Dubo*, supra. However, as has been the policy for nearly four decades and as the General Counsel has described in his seminal memorandum concerning deferral procedures, cases that are deferrable under *Collyer* should be done under the *Collyer* principles; only if the case is *not* deferrable under *Collyer* should consideration be given to whether or not the case is nonetheless deferrable under *Dubo*. GC Memorandum 73-31. Arbitration Deferral Policy Under *Collyer*—Revised Guidelines, p. 38, fn. 63 and cases cited therein. This is not just a matter of theoretical consistency; it has consequences. If a case deferred under *Dubo* does not get to arbitration, deferral is revoked and processing of the charge is resumed. GC Memo, p. 39, fn. 65. However, under *Collyer*, if the Union fails to submit the case to arbitration, the charge is dismissed. GC Memo p. 45. Of course, to do otherwise would make deferral under *Collyer* not a requirement but merely a request that a Union was free to reject.

Under the *Collyer* policy, in the exercise of its discretion, the Board **requires** (emphasis added) a charging party to resort to the available grievance arbitration procedures under the contract. Under the *Dubo* policy, the *Board does not require* (emphasis in original) such a resort to these procedures; rather, it defers because one or the other party to the contract is pressing the dispute to arbitration and the Board is unwilling to provide a second forum for the litigation of the same dispute.

45 GC Memo, p. 40, fn. 66.

I recognize that the Union and Coca-Cola have already reached an amicable settlement of the grievance. But because there may have been some confusion of the respective rights and obligations of the parties resulting from the deferral under *Dubo* instead of *Collyer*, I will allow the parties another opportunity to handle the matter under the *Collyer* doctrine.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The complaint is dismissed, provided that: jurisdiction of this proceeding is hereby retained for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision and Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.

Dated, Washington, D.C. September 28, 2012

William G. Kocol
Administrative Law Judge

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Appendix A

5 I'm going to issue a bench decision now. And I'll issue a fuller decision once I get the transcript. But it's my decision now that I am going to defer this case under *Collyer*. In order to do so I need a stipulation from the Respondent: (1) that it will waive any defensive timeliness as far as processing the underlying grievance, and (2) that that grievance arose under the prior contract and that Respondent is willing to arbitrate that grievance.

MR. TOPOLSKI: So stipulated, Your Honor.

10 JUDGE KOCOL: All right. That stipulation is received. It's not actually a stipulation but an agreement.

MR. TOPOLSKI: So agreed, Your Honor.

JUDGE KOCOL: Okay. We we'll -- so we have that agreement on the record. The issue as I see it has been sharpened I think as to one, whether this case should have been properly deferred under *Collyer* instead of *Dubo*, and that's one issue.

15 And the second issue is assuming it was properly deferred under *Collyer* despite the fact that it's an 8(3) allegation and filed by an individual. If the case was not promptly submitted to arbitration existing Board law requires a dismissal. And that's the issue where I think there is some disagreement with the General Counsel and there may be some desire on the part of the General Counsel to look at those issues again.

20 And I think the most efficient way, given the fact that I'm bound by existing law, is to go ahead and as I've indicated defer this under *Collyer*. And then this will allow time for the General Counsel to decide what it wants to do, if anything, and we'll proceed in that fashion.

25 If the Board either concludes that I was wrong that this was properly deferred under *Collyer* and not *Dubo*, or that I was wrong in the conclusion that a failure to arbitrate under *Collyer* results in a dismissal, not a resumption of the processing of the case, or the Board will tell me. And of course the Board may change existing law, they're not -- they can do so. In which case, of course I'll follow Board law.

30 So with that that's my decision, my bench decision. And as I indicated, once I get back to the office and look at the transcript I'll issue a more formal written decision, which is essentially what I just said maybe with a case cite or two. And then of course you'll have an opportunity to appeal that bench decision. You would I would expect, would do that if you so desire. And I think that's the most orderly way to proceed in this matter. If I'm correct, well we've saved 4 or 5 days of hearing.

35 So anything further at this point, Ms. Lyons?

MS. LYONS: No, Your Honor.

JUDGE KOCOL: Anything from Respondent?

MR. TOPOLSKI: No sir, Your Honor.

JUDGE KOCOL: All right. The hearing is now closed.

40 **(Whereupon, the hearing in the above-entitled matter closed at 2:34 p.m.)**