

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28**

**BCI COCA-COLA BOTTLING  
COMPANY OF LOS ANGELES**

**and**

**Case 28-CA-022792**

**WAYNE ABREU, An Individual**

**ACTING GENERAL COUNSEL'S BRIEF  
IN SUPPORT OF EXCEPTIONS**

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Counsel for the Acting General Counsel (General Counsel), pursuant to Section 102.46(a) of the Board's Rules and Regulations, files the following Brief in Support of Exceptions to the bench decision issued by Administrative Law Judge William Kocol (ALJ) issued on the record at the hearing in this matter on September 13, 2012 (Tr. 31-33), and his subsequent written decision dated September 28, 2012 [JD(SF)-48-12] (ALJD).<sup>1</sup> The ALJ erred by deferring this matter to arbitration before allowing for a full-evidentiary hearing, and refusing to analyze the parties' grievance settlement under the *Olin/Spielburg* standard,<sup>2</sup> as required by established Board law, including *Alpha Beta Co.*, 273 NLRB 1546 (1985).

Here, regardless of whether the grievance was deferred under *Dubo Mfg. Corp.*, 142 NLRB 431 (1963) or *Collyer Insulated Wire*, 192 NLRB 837 (1971), the ALJ should have analyzed the grievance settlement, reached prior to arbitration. under the *Olin/Spielberg* standards, and rejected the settlement if deferral to it was repugnant to the policies of the Act,

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<sup>1</sup> BCI Coca-Cola Bottling Company of Los Angeles, will be referred to as "Respondent." Reference to the trial Exhibits of the Acting General Counsel, and Respondent will be designated as "GC," and "R" respectively, and references to the trial transcripts will be designated as "Tr."

<sup>2</sup> See *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984).

as the General Counsel asserts. Accordingly, the ALJ's decision is contrary to extant Board law and should be overturned; the case remanded to the ALJ for a full hearing on the merits of the unfair labor practices as alleged.

## **I. BACKGROUND**

The Employer manufactures and distributes beverage products.<sup>3</sup> The Charging Party, Wayne Abreu (Abreu or Charging Party) began working at Respondent's facility in Tempe, Arizona in 1997. In about 2000, Abreu became an active Union steward; Respondent's Tempe employees were represented by the United Industrial, Service, Transportation, Professional and Government Workers of North America, Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters (Union). In early 2007, Respondent opened a new facility in Glendale, Arizona. In June 2007 a complaint was issued against Respondent, based upon charges filed by the Union, alleging that Respondent refused to hire at its new Glendale facility 19 employees from its Tempe Facility, including Abreu; in July 2007, the parties reached a non-Board settlement. Thereafter, Abreu was again rejected for a position at the Glendale facility, the Union filed a charge, and another complaint was issued alleging the refusal to hire was unlawful. Again the parties reached a non-Board settlement.<sup>4</sup>

In November 2009, Respondent permanently laid off from its Tempe facility eight Union members, including Abreu and another Union steward. Later that month the Union filed a grievance on behalf of the discriminatees, and Abreu filed the instant unfair labor practice charge, alleging in pertinent part, that all eight employees were discriminatorily

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<sup>3</sup> Because the ALJ deferred the matter, and closed the hearing without taking any testimony, or other substantive evidence, the facts set forth herein are based upon what the Acting General Counsel expects to produce at hearing.

<sup>4</sup> Later in 2008, another complaint issued alleging that Respondent engaged in bad-faith bargaining, withdrawal of recognition at the Glendale facility, and failure to process grievances and unilateral changes at the Tempe facility. The case ended mid-trial with a non-Board settlement and the Union disclaimed interest with respect to the Glendale facility.

selected for layoff. (GC. (1)(a)) In December 2009, the charge was deferred to the grievance process pursuant to *Dubo Mfg. Corp.*, 142 NLRB 431 (1963). In March 2010, the employees voted to decertify the Union. (GC. 4) After the decertification, the Union ceased having a presence in Arizona; all the Union's offices have since been located to California. For the next two years, Abreu and the other discriminatees continued to contact the Union and inquire as to the status of the grievance. However, the Union either evaded their telephone calls, or gave them false information, telling them that the Union would process the grievance through arbitration.

On January 31, 2012, without taking the grievances to arbitration, the Union signed a settlement agreement with Respondent, over the unanimous opposition of the discriminatees, resolving the pending grievance regarding the permanent layoffs (Agreement). (GC. 6) In the Agreement, the Union "acknowledges" that its investigation of the grievances "revealed no evidence to support any allegation that the Company . . . interfered with, restrained, coerced, and discriminated against employees in the exercise of their rights under Section 7 of the Act by discharging any one or more of the Grievance Payees because of their Union membership and other concerted activity, and without giving notice and the opportunity to bargain . . . ." (GC. 6, p. 2) In resolution of the grievance, the Employer agreed to pay to each discharged employee the gross sum of \$3,000 and the Union agreed to withdraw its grievance. The Agreement does not provide for reinstatement. The Agreement further provides that it is the parties' express intent to resolve all unfair labor practice issues raised by the unfair labor practice charges. (GC. 6)

Having been notified that the underlying grievance had been resolved, at the request of the Charged Party, in March 2012, the investigation into the charge allegation was resumed.

(GC. 5) After completing the investigation, which included an analysis of the grievance settlement agreement under the established Board precedents of *Olin Corp.*, *Spielberg Mfg. Co.*, and *Alpha-Beta Co.*, 273 NLRB 1546 (1984), on May 21, 2012, the Regional Director revoked deferral, and issued the Complaint in this matter, concluding that deferral was not appropriate because the Agreement is repugnant to the Act.<sup>5</sup> (GC. 1(c)) It is estimated that, if the Acting General Counsel prevails in the unfair labor practice complaint, each discriminatee would be entitled to reinstatement, and backpay of between \$70,000 to \$100,000.

The hearing opened on September 13, 2012. After preliminary discussions, the ALJ decided to defer the allegations in the complaint pursuant to *Collyer Insulated Wire*, notwithstanding the Agreement resolving the grievance. (Tr. 31-32; ALJD at 4)

## **II. ANALYSIS**

### **A. The ALJ Erred by Deferring the Matter to Arbitration.**

The ALJ erred by deferring this matter to arbitration before allowing for a full evidentiary hearing, and analyzing whether the grievance settlement is repugnant to the Act, as asserted by the General Counsel, under established Board precedent. Regardless of whether the grievance was deferred under *Collyer Insulated Wire* or *Dubo Mfg. Corp.*, the ALJ should have analyzed the Agreement under the *Olin/Spielberg* standards and deferred to the Agreement only if it is not repugnant to the policies of the Act. See *Alpha Beta Co.*, 273 NLRB 1546 (1985). By refusing to hear evidence on the issue of deferral, the ALJ precluded a fair determination as to whether the Agreement violates the policies of the Act, and whether the General Counsel has met his burden of showing that the Agreement is repugnant to the Act. Cf. *Dayton Power & Light Co.*, 267 NLRB 202, 202 (1983) (ALJ erred by refusing to

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<sup>5</sup> Over the objections of the General Counsel, the Associate Chief Administrative Law Judge granted Respondent's request for a postponement in the hearing and the hearing was rescheduled for September 13, 2012.

hear evidence regarding the issues of deferral or the underlying merits, and dismissing the complaint, concluding the matter should have been deferred to the parties' contractual grievance process)

1. Deferral is Not Appropriate.

The Board's deferral principles apply equally to settlements arising from the parties' contractual grievance/arbitration procedures, as well as arbitration awards, because they further the national labor policy which favors private resolutions of labor disputes. *Alpha Beta, Co.*, 273 NLRB 1546, 1547 (1985) These standards should be applied where a grievance is settled short of arbitration, and even where the grievant objects to the terms of the grievance settlement agreement. See, *U.S. Postal Service*, 300 NLRB 196 (1990); *Catalytic Inc.*, 301 NLRB 380 (1991). Under the current *Olin/Spielberg* standard, the Board defers to arbitral awards when: (1) all parties agreed to be bound by the decision; (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 at 1082; *Olin Corp.*, 268 NLRB at 574. The "clearly repugnant" standard requires that the award not be "palpably wrong," i.e., not susceptible to any interpretation consistent with the Act. *Aramark Services, Inc.*, 344 NLRB 549, 549 (2005).

Here, there is no dispute that the proceedings were fair and regular and that all parties agreed to be bound.<sup>6</sup> However, the evidence will show that the agreement was repugnant to the Act because it was palpably wrong. Under the *Spielberg/Olin* framework, an arbitrator's award is clearly repugnant to the Act when it permits an employer to discipline an employee

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<sup>6</sup> See *U.S. Postal Service*, 300 NLRB at 197 (even without employees' own separate consents, the employees were bound by the terms of the settlement agreement negotiated by their bargaining representative).

solely for engaging in protected concerted activities. See, e.g., *Mobil Oil Exploration & Producing*, U.S., 325 NLRB 176, 177-179 (1997) (no deferral to award upholding grievant's discharge for failing to keep confidential employer investigation after he was overheard complaining to coworkers of his fears of employer retaliation for internal union activity; by the time of the discharge, employer's confidentiality concerns could no longer take precedence over the grievant's protected right to elicit support from his coworkers), *enfd.* 200 F.3d 230 (5th Cir. 1999); *Key Food Stores*, 286 NLRB 1056, 1057 (1987) (no deferral to "clearly repugnant" award that expressly relied upon grievant's post discharge picketing, his dissident internal union activities and critical attitude toward union representatives, and his investigation of grievances in upholding his discharge for insubordination). Under *Olin*, "the facts presented to, and found by, the arbitrator are central to determining repugnancy." *Cone Mills Corp.*, 268 NLRB 661, 666, fn. 16 (1990).

Here, because there is no arbitration award, the General Counsel's argument that the Agreement is palpably wrong rests on the facts as they existed at the time of the Agreement. The General Counsel asserts that there is strong *prima facie* evidence that the permanent layoffs were discriminatorily motivated and that they were part of the Employer's ultimate goal of ridding itself of the Union. This evidence includes the extensive Union activities by the Charging Party and the other Union steward; Respondent's departure from past practices regarding layoffs and seniority, resulting in a disproportionate impact to Union members and activists; management statements evidencing animus against the Union shortly before the layoffs; a supervisor's statements confirming Respondent's ultimate plan to eliminate the Union by first ridding the workplace of the stewards, whom Respondent viewed as Union "troublemakers;" and evidence that employees and supervisors continued to perform the work

previously performed by the permanently laid-off employees during Respondent's extremely busy period.

Furthermore, the General Counsel believes that the Respondent cannot meet its burden under *Wright Line*, 251 NLRB 1083 (1980), that it would have taken the same action but for the employees' Section 7 activities and that its purported justification for selecting those employees for permanent layoff – that it was the result of a reduction in work and that the layoffs were by classification seniority – is pretextual. Based on these findings, the Union's "acknowledgment" in the Agreement that there was "no evidence to support any allegation that the Company . . . interfered with, restrained, coerced, and discriminated against employees in the exercise of their rights under Section 7 of the Act by discharging any one or more of the Grievance Payees because of their Union membership and other concerted activity" is palpably wrong. Therefore, the Agreement is repugnant to the Act because it upholds the Respondent's unlawful decision to permanently lay off eight employees for engaging in protected concerted activities.

Furthermore, the Agreement's failure to provide any meaningful relief to the discriminatees is also not susceptible to an interpretation consistent with the Act. The Board has consistently found an award or settlement repugnant to the Act if the grievant was solely engaged in protected activity and the award or settlement did not provide a full remedy, including backpay. See, e.g., *Cone Mills Corp.*, 298 NLRB at 663-64. Deferral to such an award would have the effect of "penalizing [the employee] for engaging in those protected activities that the arbitrator found precipitated her discharge, a result that is plainly contrary to the Act." *Id.* at 667. See also, e.g., *Garland Coal & Mining Co.*, 276 NLRB 963 (1985) (arbitrator's award of reducing termination to a three-week suspension was clearly repugnant

because the arbitrator found employee's protected activity was only reason for discipline); *Valley Material Co.*, 316 NLRB 704 (1995) (parties' grievance settlement of reinstatement without backpay repugnant because settlement agreement states that employee was suspended because of his union activity). Compare *Catalytic Inc.*, 301 NLRB at 381-82, 386 (grievance settlement not repugnant even though it provided for reinstatement without backpay where employee allegedly engaged in "gross insubordination" by countermanding the employer's orders regarding reporting times); *Combustion Engineering*, 272 NLRB 215, 216-17 (1984)(deferral where arbitrator denied backpay based on one employee's "poor attitude towards improving his performance" and another employee's "obdurate attitude towards improving his attendance").

Here, if the General Counsel prevails against Respondent, it is presently estimated that each discriminatee would be entitled to reinstatement and to backpay of between \$70,000 to \$100,000. By contrast, the parties' Agreement denies any reinstatement to the discriminatees and limits their backpay to a gross payment of \$3,000 each (or about 3% of their potential backpay award). Under these circumstances, deferral to the Settlement Agreement is inappropriate because it is not susceptible to any interpretation consistent with the Act and therefore fails to satisfy the *Olin/Spielberg* standard.

2. The ALJ Erred by Refusing to Take Record Evidence.

The ALJ erred by deferring the matter before allowing the General Counsel to present any meaningful evidence, or witness testimony. As such, due process requires that the Board remand this matter back to the ALJ for a full hearing in connection with both the merits of the case and the question of deferral. *Dayton Power & Light Co.*, 267 NLRB 202 (1983).

In *Dayton Power & Light Co.*, prior to the presentation of any evidence on the merits, the employer moved to dismiss the complaint on the basis that the allegations should be deferred to the parties' contractual grievance procedure. *Id.* The ALJ concluded that the employer's position had merit, and except for a single witness whose testimony was curtailed, he refused to accept any evidence with respect to either the merits of the charge or whether deferral to arbitration was appropriate, and closed the hearing. *Id.* While a special appeal was pending, the ALJ issued his decision dismissing the complaint.<sup>7</sup> *Id.*

On review, the Board noted that while the issue of deferral "raises a question of law . . . since the law frequently turns on the facts . . . the parties have a right to litigate this question." *Id.* at 202. Furthermore, the Board noted that, because the ALJ refused to hear evidence regarding both the issues of deferral and the merits, the Board was precluded from making a fair determination of whether the General Counsel has established a *prima facie* case. Accordingly, in the interest of due process, the Board remanded the matter for a hearing in connection with both the merits and the question of deferral. *Id.*

As in *Dayton Power & Light Co.*, the ALJ's decision here to defer the matter, without taking any substantive evidence, precludes a fair determination of whether the General Counsel has met his burden of showing that the Agreement is repugnant to the Act. Because such a determination will turn on the facts, the Board should remand this matter for a hearing in connection with both the merits of the complaint and the issue of deferral.<sup>8</sup>

### 3. The ALJ Erred in Relying Upon General Counsel Memo 73-31.

The ALJ erred in relying upon General Counsel Memorandum 73-31, which is dated May 10, 1973, in deciding to defer this matter, as this memorandum was issued before the

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<sup>7</sup> Here, unlike *Dayton Power & Light*, the ALJ issued an initial bench decision on the day of the hearing deferring the matter, thereby warranting the General Counsel's exceptions, in lieu of a special appeal.

<sup>8</sup> No party seeks the recusal of the current ALJ

Board's decision in *Alpha Beta Co.*, 273 NLRB 1546 (1985).<sup>9</sup> The Board's prior policy, as discussed in *Roadway Express*, 246 NLRB 174 (1979), was essentially to give no deference to pre-arbitral settlement agreements because it did not elevate them to the same status as arbitration decisions. *Alpha Beta* reversed the sentiment expressed in *Roadway Express* by deciding to give the pre-arbitral settlements deference and decided to use *Spielberg/Olin* standards, as utilized to assess arbitration decisions, in determining whether to defer to the agreements. Thus, when GC 73-31 was written, review of settlement agreements to assess whether they were "clearly repugnant" did not occur.

#### IV. CONCLUSION

For the reasons set forth herein, the General Counsel respectfully requests that the Board to overrule the ALJ's decision to defer this matter, and further asks that this matter be remanded for a full evidentiary hearing.

Dated at Phoenix, Arizona, this 26<sup>th</sup> day of October 2012.

Respectfully submitted,

/s/ Sandra L. Lyons

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<sup>9</sup> Also, General Counsel Advice Memoranda do not constitute Board precedent. See *Kysor Industrial Corp.*, 307 NLRB 598, 602 fn. 4 (1992).

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS in BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, Case 28-CA-022792 was served by E-Gov, E-Filing and by E-mail, on this 26<sup>th</sup> day of October 2012, on the following:

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

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