

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BCI COCA-COLA BOTTLING COMPANY *
OF LOS ANGELES d/b/a COCA-COLA
BOTTLING COMPANY OF ARIZONA *

Employer and Respondent *

and *

Case: 28-CA-022792

WAYNE ABRUE, an Individual *

Petitioner *

* * * * *

**RESPONDENT BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES’
MOTION TO STRIKE ACTING GENERAL COUNSEL’S EXCEPTIONS TO BENCH
DECISION OF ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46 of the National Labor Relations Board’s Rules and Regulations, Respondent BCI Coca-Cola Bottling Company of Los Angeles (“Respondent”) hereby moves to strike the Exceptions filed by the Acting General Counsel (the “AGC”) to the September 28, 2012 Decision and Order (the “Decision”) issued by Administrative Law Judge William Kocol (the “ALJ”) in Case No. 28-CA-22792 (“Exceptions”).¹ As set forth below, the AGC’s Exceptions fail to satisfy the minimum requirements with which exceptions must comply in order to merit consideration by the Board, and they fail to put in issue any findings by the ALJ. Accordingly, Respondent’s Motion to Strike should be granted and the ALJ’s Decision and Order should be adopted by the Board in its entirety. *See* Section 102.48(a).

¹ A true and correct copy of the ALJ’s Decision is attached hereto as **Exhibit A**, and a true and correct copy of the hearing transcript is attached hereto as **Exhibit B**.

I. FACTUAL BACKGROUND.

A. An Unfair Labor Practice Charge Was Filed Over Respondent's November 2009 Driver Layoffs And The Region Deferred The Charge Under the *Dubo* Standard.

This case arises from an unfair labor practice charge filed by Charging Party Wayne Abreu ("Abreu"), alleging that the November 2009 layoff of Abreu and seven other drivers by Respondent violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the "Act") (hereafter, the "Charge"). A grievance was also filed regarding the driver layoffs by the drivers' then-bargaining representative, 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 (the "Union") (the "Layoff Grievance"). On December 28, 2009, as a result of the pending Layoff Grievance, the Region deferred the Charge to arbitration pursuant to *Dubo Manufacturing Corporation*, 142 NLRB 431 (1963) ("*Dubo*"). See AGC Tr. Exh. 2.

B. After The Respondent And The Union Settled The Driver Layoff Grievance, The Region Revoked Deferral Of The Charge And Issued The Complaint.

On January 31, 2012, Respondent and the Union settled the Layoff Grievance. See AGC Tr. Exh. 6. Although the Region was notified that the parties had settled the Layoff Grievance, the Region revoked deferral and issued the Complaint against Respondent.

C. The ALJ Concluded That The Region Improperly Deferred The Charge Under The Wrong Standard And Re-Deferred The Case Under *Collyer*.

On September 13, 2012, the hearing on the Complaint proceeded before the ALJ. The ALJ issued a bench decision at the hearing, and the written Decision on September 28, 2012, framing the issues as follows:

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.

See Exh. A at 2:15-19.² In ruling on these two stated issues, the ALJ held:

For the 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 absence 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.**

See Exh. A at 2:19-23 (emph. added).

D. The ALJ Filed The Instant Exceptions.

On October 26, 2012, the AGC filed Exceptions and a Brief in Support of Exceptions (the "Supporting Brief") to the ALJ's Decision. The AGC purported to except to three findings of the ALJ in its Exceptions, as follows:

1. The ALJ's erroneous decision to defer this matter before allowing for a full evidentiary hearing.
2. The ALJ's failure to analyze the existing grievance settlement pursuant to established Board precedent.
3. The ALJ's reliance upon General Counsel Memorandum 73-31.

The AGC's Exceptions did not cite any grounds for each of the exceptions, and did not cite any transcript pages, other record evidence, or specific portion of the ALJ's Decision to which exception was taken. Instead, each of the foregoing exceptions states only that it "relies upon the arguments set forth in the accompanying brief in support, the arguments adduced during the hearing, and the existing record exhibits."

² The issues were similarly framed at the hearing. *See* Exh. B at 32:9-33:20.

II. THE AGC'S EXCEPTIONS FAIL TO COMPLY WITH SECTION 102.46 AND SHOULD BE STRICKEN.

A. The Minimum Requirements Of Section 102.46.

It is well-settled that “Section 102.46(b) of the Board’s Rules and Regulations sets forth the *minimum requirements* with which exceptions to an administrative law judge’s decision *must* comply in order to merit consideration by the Board.” *See Howe K. Sipes Co.*, 319 NLRB 30 (1995) (emph. added); *Rocket Indus., Inc.*, 304 NLRB 1017 (1991) (same).

The Board’s Rules & Regulations states that *each exception* filed by an excepting party:

- (i) shall set forth *specifically* the questions of procedure, fact, law, or policy to which exception is taken;
- (ii) shall *identify that part of the administrative law judge’s decision* to which objection is made;
- (iii) shall *designate by precise citation of page the portions of the record relied on*;
and
- (iv) shall *concisely state the grounds for the exception*.

See Section 102.46(b)(1) (emph. added). “Any exception which fails to comply with the foregoing requirements may be *disregarded*.” *See* Section 102.46(b)(2) (emph. added). Additionally, “[a]ny exception to a ruling, finding, conclusion, or recommendation which is not *specifically urged* shall be deemed to have been *waived*.” *Id.* (emph. added).

The Board has held that “[i]t is the excepting party’s duty to frame the issues and present its case to the Board.” *See Troutman & Assoc.*, 299 NLRB 120, 121 (1990). Indeed, Section 102.46 obligates an excepting party to “set forth with specificity those portions of the judge’s decision to which it excepts.” *Rocket Indus., supra*, 304 NLRB at 1017; *Howe K. Sipes, supra*, 319 NLRB at 30. The Board has discussed this requirement as follows:

It must be possible for the Board to understand from a reading of the exceptions why the excepting party believes that the judge erred and what significance the purported error has on the outcome of the case. If the Board is unable to determine the grounds on which a party believes the judge’s findings should be overturned, *the Board cannot be required to search the record as an advocate for the excepting party.*

Troutman, supra, 299 NLRB at 121 (emph. added). The Board has stated that its “minimal requirements for the filing of exceptions are not so burdensome that they are an inappropriate prerequisite to the Board’s complete examination of the record in [a] proceeding.” *See Ditch Witch of Cent. Ill., Inc.*, 248 NLRB 452, 453 (1980). Accordingly, the Board has routinely granted a party’s motion to strike exceptions that fail to meet the minimum requirements of Section 102.46. *See, e.g., Howe K. Sipes, supra*, 319 NLRB at 30 (granting a respondent’s motion to strike); *Rocket Indus., supra*, 304 NLRB at 1017; *Troutman, supra*, 299 NLRB at 121; *Worldwide Detective Bureau*, 296 NLRB 148 (1989); *Ditch Witch, supra*, 248 NLRB at 453; *Fiesta Publishing Co.*, 268 NLRB 660 (1984).³

B. The AGC’s Exceptions Fail To Comply With The Minimum Requirements Of Section 102.46 And Should Be Stricken.

The AGC’s Exceptions fail to meet the minimum requirements of Section 102.46(b)(1). Specifically, each “exception” proffered by the AGC: (1) fails to identify with specificity the portion of the ALJ’s decision to which objection is made; (2) fails to designate any portion of the record relied upon; and (3) fails to concisely state the grounds for the exception. Instead, the

³ Though a majority of these decisions address and grant the General Counsel’s motions to strike non-compliant exceptions, the minimum requirements of Section 102.46(b)(1) apply with equal force and effect to exceptions filed by the General Counsel. Indeed, the AGC’s deficient and non-compliant Exceptions are not entitled to greater deference by the Board, and must be measured by the same standard as exceptions filed by a respondent and stricken where, as here, they fail to meet those standards.

AGC merely refers the Board to “the arguments set forth in the accompanying brief in support, the arguments adduced during the hearing, and the existing record exhibits.”⁴

Here, the AGC proffers nothing more than vague and non-compliant accusations that purport to except to unspecified portions of the ALJ’s Decision, without identifying any portions of the ALJ’s Decision, the hearing transcript or the record evidence as the basis for those exceptions, and without even stating the *grounds* for those “exceptions.” These “exceptions” are insufficient to place in issue any findings of the ALJ and must be rejected and/or stricken as requested by Respondent. Indeed, by merely referring the Board to the *entire record* in the proceedings, the AGC is effectively asking the Board to search the record for evidence establishing some error, problem, or oversight within the ALJ’s Decision. Where, as here, a party’s exceptions lack the specificity and particularity required under Section 102.46(b)(1), the Board has repeatedly refused to “engage in a fishing expedition to determine what, if any, problems or irregularities might be found in the Administrative Law Judge’s decision.”⁵ *See Ditch Witch, supra*, 248 NLRB 452 (excepting party “failed to narrow the issues for review” when it did not include “stated specific exceptions to any part of the Administrative Law Judge’s decision”); *see also Worldwide Detective Bureau, supra*, 296 NLRB at 148 (holding that a list of “various rulings and findings of the judge that [the excepting party] contends are in error” was insufficient, because the excepting party “would have the Board engage in its own attempts to determine what if any problems, errors, or irregularities are possibly presented by the judge’s decision. *We have consistently refused to do this.*”) (emph. added, cit. omitted). In fact, the

⁴ The AGC’s presentation of non-compliant Exceptions which ignore the minimum requirements of Section 102.46 is wholly unjustified, particularly given the abbreviated record (33 pages of hearing transcript, a five-page ALJ decision, and eight exhibits). In these circumstances, the AGC’s utter disregard for Board procedure cannot and should not be countenanced.

⁵ The Supporting Brief also is devoid of specific citations to the portions of the ALJ’s decision and the hearing transcript/record evidence which would support the Exceptions.

Board has concluded that exceptions that do not cite transcript pages or other record evidence and fail to allege with particularity the grounds for overturning the judge’s purportedly erroneous findings – like the Exceptions presented by the AGC here – are “*so deficient as to warrant striking*,” stating “[t]he Board has neither the obligation nor the resources to engage in . . . a fishing expedition.” *Troutman, supra*, 299 NLRB at 121 (emph. added).

In conclusion, each of the AGC’s purported “exceptions” fails to comply with the minimum requirements of Section 102.46(b)(1) and, therefore, fails to put in issue any findings of the ALJ. As such, Respondent’s motion to strike those exceptions should be *granted*, and the ALJ’s Decision and Order should be adopted. *See* Section 102.48(a).

III. THE AGC’S EXCEPTIONS FAIL TO PUT IN ISSUE ANY FINDING OF THE ALJ AND MUST BE STRICKEN.

A. Exceptions #1 And #2 Do Not Involve Issues Presented To The ALJ At The Hearing And Do Not Challenge Any Finding Of The ALJ.

The AGC’s Exception #1 challenges the ALJ’s purported “decision to defer this matter before allowing for a full evidentiary hearing.” However, this “exception” goes beyond both the scope of the issues addressed at the hearing *and* the findings of the ALJ to advance a *new argument* that was never raised by the AGC, much less “decided” by the ALJ. Of course, this is precisely why Exception #1 fails to cite any portion of the hearing transcript or the ALJ’s Decision addressing (much less rejecting) any argument that an evidentiary hearing on the merits should have proceeded in lieu of deferral – the AGC cannot cite to an argument that *was not made* or an ALJ finding that *did not occur*.

The same is true of Exception #2, wherein the AGC purports to except to the ALJ’s “failure to analyze the existing grievance settlement pursuant to established Board precedent.” Once again, the AGC never even asserted at the hearing that the ALJ was *required* to analyze the grievance settlement agreement. Rather, the AGC’s *only* argument was that it believed the

Charge had been properly deferred pursuant to *Dubo* and that the Region could therefore resume the processing of the Charge despite the grievance settlement between Respondent and the Union. *See* Exh. B at 26:2-28:10. Moreover, when the ALJ explicitly stated at the hearing that he was not deciding the issue of whether deferral *to the settlement agreement* was proper, the AGC voiced *no objection* to that decision.⁶ *See* Exh. B at 31:5-15 (ALJ stated he was accepting the grievance settlement agreement into the record “not for the purpose of deciding whether deferral to the settlement agreement’s proper, but simply for the purpose of giving a broad picture.”).

Neither Exceptions #1 nor #2 put in issue any specific finding by the ALJ. The issues decided by the ALJ at the hearing were explicitly limited to: (1) whether the Region incorrectly deferred the Charge under *Dubo* instead of *Collyer*; and (2) if the Charge should have been deferred under *Collyer*, whether the Union’s failure to pursue the case to arbitration results in dismissal of the Charge or the resumption of processing of the Charge. *See* Exh. A at 32:9-33:20; Exh. B at 2:15-23.

Instead of excepting to the ALJ’s explicit rulings on these two issues, the AGC instead challenges a “decision” that was never actually decided (Exception #1) and a purported failure to conduct a repugnancy “analysis” that was never requested by the AGC during the proceedings before the ALJ (Exception #2).⁷ Both of these Exceptions seek to litigate new and different

⁶ In fact, the ALJ’s decision to re-defer the Charge pursuant to *Collyer* for further processing by the Union and Respondent foreclosed any need for the ALJ to decide this secondary issue. Moreover, since the AGC has not excepted to and has therefore waived its ability to challenge the ALJ’s finding that the Region incorrectly deferred the Charge under *Dubo* as opposed to *Collyer*, the exception mechanism cannot be used to challenge this secondary issue that was not decided as part of the ALJ’s Decision.

⁷ Though the General Counsel’s Supporting Brief contends that the ALJ “refus[ed] to analyze the parties’ grievance settlement” (*see* Supporting Brief at p. 2), it conspicuously fails to cite any portion of the hearing transcript or the ALJ’s decision where such a “refusal” can be located. Of

arguments and issues that were not presented to or decided by the ALJ in the underlying Decision. Since they “do not challenge any specific portion of the judge’s decision,” they are not proper exceptions and must be stricken. *See Fiesta Publishing, supra*, 268 NLRB at 660 (granting motion to strike and rejecting exceptions that sought to recant testimony by witnesses because this “exception” did not put into issue any findings of the judge); *Weldment Corporation*, 275 NLRB 1432, n.1 (1985) (granting motion to strike exceptions that relied on factual representations that “were not presented as evidence at the hearing or subject to cross examination and, therefore, they are not part of the record in this proceeding”); *Today’s Man*, 263 NLRB 332, 333 (1982) (rejecting exception based on grounds not asserted by the excepting party in the underlying proceeding, holding that the excepting party “may not now claim to have a meritorious exception to this ruling on [new] grounds”).

B. Exception #3 Does Not Challenge Any Finding Of The ALJ.

The AGC’s Exception #3 purports to challenge the ALJ’s “reliance upon General Counsel Memorandum 73-31” (hereafter, “GC 73-31”). However, this “exception” is based solely on legal argument that does not refer at all to the ALJ’s Decision, but instead argues that GC 73-31 issued before *Alpha Beta Co.*, 273 NLRB 1546 (1985), which the AGC claims compels a finding that the grievance settlement agreement is “repugnant” to the Act and not entitled to deference. *See* Supporting Brief at pp. 10-11.

This “exception” does not challenge any *finding* in the ALJ’s Decision and must be stricken. *See Howe K. Sipes, supra*, 319 NLRB at 30 (exception that fails to identify any finding of the ALJ and which does not refer to ALJ’s decision but instead follows a narrative disagreeing with the ALJ’s dismissal of the complaint is stricken for “not put[ting] in issue any of the judge’s

course, this is because no request for such an analysis was ever presented to the ALJ, and no refusal ever occurred.

findings”). Instead, Exception #3 contends that grievance settlements are entitled to a different standard of deference under current Board precedent than when GC 73-31 was issued. *See* Supporting Brief at pp. 10-11. Even if there is merit to this argument (which Respondent disputes and denies), it is *not* a proper subject of an exception under Section 102.46 and cannot be considered by the Board, since it fails to address any portion of the ALJ’s Decision and the issue is not part of the underlying record. Indeed, both the hearing transcript and the ALJ’s Decision reflect that the ALJ did not “defer” to the grievance settlement agreement. Rather, the ALJ concluded that the Region deferred the *Charge* under the incorrect legal standard, and the ALJ re-deferred it under *Collyer* to “allow the parties *another* opportunity to handle the matter under the *Collyer* doctrine.” *See* Exh. A at 4:1-4 (emph. added); Exh. B at 31:5-15. The AGC has not excepted to either of these conclusions. Similarly, the AGC has not challenged or excepted to the ALJ’s underlying findings that: (1) “all conditions are met for deferral of the charge to the grievance-arbitration process” pursuant to *Collyer*; (2) “cases that are deferrable under *Collyer* should be done under the *Collyer* principles,” and/or (3) “only if the case is *not* deferrable under *Collyer* should consideration be given to whether or not the case is nonetheless deferrable under *Dubo*.” *See* Exh. A at 3:13-22, 3:27-29 (emph. in orig.).⁸ Accordingly, because Exception #3 does not identify any specific rulings or findings of the ALJ that are allegedly in error, it fails to put in issue any findings of the ALJ and must be stricken. *See, e.g., Rocket Indus., supra*, 304 NLRB at 1012.

⁸Because these findings and conclusions are not excepted to by the AGC, they “automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes.” *See* Section 102.48(a); *see also Ditch Witch, supra*, 248 NLRB at 452-53 (“[I]n the absence of exceptions thereto, the findings, conclusions, and recommendations of the Administrative Law Judge as contained in his Decision shall automatically become the Decision and Order of the Board.”).

IV. CONCLUSION.

WHEREFORE, for all the foregoing reasons, Respondent BCI Coca-Cola Bottling Company of Los Angeles requests that the Board grant its Motion to Strike the Acting General Counsel's Exceptions to the Bench Decision of the Administrative Law Judge for failing to comply with Section 102.46(b)(1) and failing to put in issue any of the findings of the ALJ, and instead adopt the September 28, 2012 Decision and Order of the ALJ in accordance with Section 102.48(a).

Respectfully submitted this 9th day of November, 2012,

/s/ Douglas M. Topolski

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EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGESBCI 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.

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:

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). 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.

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.

GC Memo, p. 40, fn. 66.

5 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

10 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.

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

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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.)

EXHIBIT B

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 28

In the Matter of:

BCI COCA-COLA BOTTLING COMPANY
OF LOS ANGELES d/b/a COCA-COLA
BOTTLING COMPANY OF ARIZONA,

Employer,

and

WAYNE ABREU, an Individual,

Petitioner.

Case No. : 28-CA-022792

The above-entitled matter came on for hearing pursuant to Notice, before **WILLIAM G. KOCOL, Administrative Law Judge**, at the National Labor Relations Board, 2600 North Central Avenue, Phoenix, Arizona, on Thursday, September 13, 2012, 12:55 p.m.

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I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RE CROSS</u>	<u>VOIR DIRE</u>	<u>CRT EXAM</u>
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None

OPENING STATEMENTS

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None

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6	General Counsel		
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P R O C E E D I N G S

JUDGE WILLIAM G. KOCOL: This is the formal hearing before the National Labor Relations Board in the matter of BCI Coca-Cola Bottling Company, Case 28-CA-022792. My name is William G. Kocol, I'm the Administrative Law Judge.

Let's have appearances first. First, for the General Counsel.

MS. LYONS: Yes, Your Honor. It's Sandra Lyons, Region 28 National Labor Relations Board.

JUDGE KOCOL: All right. Thank you, Ms. Lyons. Will the Charging Party be making an appearance Ms. Lyons, do you know?

MS. LYONS: I think he's going to sit in for some of the case and not for other parts of it.

JUDGE KOCOL: Well, Mr. Abreu -- am I pronouncing that correctly?

MR. ABREU: No, Your Honor. It's Abreu.

JUDGE KOCOL: Abreu.

MR. ABREU: Yes.

JUDGE KOCOL: Mr. Abreu, you have a right to make an appearance here and by doing so you'd -- you're allowed to examine witnesses, cross-examine the witnesses, present your own evidence, that sort of thing. Very often individuals rely on the General Counsel, and that's fine if you want to do that. But nonetheless, I want to tell you you can enter an appearance and join in the proceedings if you'd like.

1 MR. ABREU: Thank you, Your Honor. But, I'll let Sandra
2 take care of everything.

3 JUDGE KOCOL: All right. Very good. And for the
4 Respondent.

5 MR. TOPOLSKI: Douglas M. Topolski, Your Honor,
6 McGuireWoods.

7 MR. TOPOLSKI: Sabrina Beldner, for Respondent from
8 McGuireWoods as well.

9 JUDGE KOCOL: All right, thank you Ms. Belkner (sic) is
10 it?

11 MR. TOPOLSKI: Yes.

12 JUDGE KOCOL: And Mr. Topolski. Thank you both.

13 All right the -- let's get the formal papers.

14 MS. LYONS: Yes, Your Honor. General Counsel would submit
15 General Counsel's Exhibits 1(a) through 1(v), 1(v) being an
16 index and description of formal documents.

17 JUDGE KOCOL: Any --

18 MS. LYONS: I'm handing two copies to the court reporter.

19 **(General Counsel Exhibit 1(a) through 1(v) marked for**
20 **identification)**

21 JUDGE KOCOL: Any objection to the formal papers?

22 MR. TOPOLSKI: I do have objections, Your Honor. I think
23 they're incomplete for purposes of issues that are likely to
24 arise at this hearing.

25 JUDGE KOCOL: What would you like to add?

1 MR. TOPOLSKI: I would like to add just a few documents.
2 One of which -- and I don't know if the court wants to take
3 administrative notice of these as an alternative, but one is a
4 December 28th, 2009 letter deferring this matter to
5 arbitration.

6 JUDGE KOCOL: No. Let's -- we'll get to that quickly,
7 because I am interested in that. But let's mark that at some
8 appropriate time of Respondent's Exhibit, that's not part of
9 the formal papers.

10 MR. TOPOLSKI: Okay. Thank you.

11 JUDGE KOCOL: But, I'm interested in seeing that early on.

12 MR. TOPOLSKI: Right, thank you.

13 JUDGE KOCOL: So, when we get to it at some point when we
14 discuss the deferral issue then mark that as one of your
15 exhibits.

16 MR. TOPOLSKI: The sooner the better.

17 JUDGE KOCOL: The sooner, yes. All right.

18 MR. TOPOLSKI: Thank you.

19 JUDGE KOCOL: And anything else?

20 MR. TOPOLSKI: And then I had a couple of other documents
21 that related to that. A February 1st, 2012 letter indicating
22 that an investigation was going to commence, notwithstanding
23 settlement of the grievance.

24 JUDGE KOCOL: Yes. I'll mark all of those when we get to
25 that point.

1 MR. TOPOLSKI: Okay.

2 JUDGE KOCOL: Technically they're not part of the formal
3 papers, but they go to your defense and so certainly I want to
4 see them.

5 MR. TOPOLSKI: Great. Thank you, Your Honor.

6 JUDGE KOCOL: Now, I don't see the -- I under -- all
7 right. So, let's stay with this for a second. Any other
8 objections to the formal papers?

9 MR. TOPOLSKI: Other than what I'd like to supplement this
10 with, no sir.

11 JUDGE KOCOL: All right. So I'm going to receive into
12 evidence the formal papers.

13 **(General Counsel Exhibit 1(a) through 1(v) received into**
14 **evidence)**

15 JUDGE KOCOL: Now, preliminary matters.

16 MS. LYONS: Yes, Your Honor. The General Counsel has a
17 couple of amendments to the complaint.

18 JUDGE KOCOL: All right. Let's get the complaint in front
19 of us. All right.

20 MS. LYONS: The first amendment would be at paragraph 4.
21 We would like to add the name Cliff Peck, P-E-C-K, as a
22 supervisor under 211 and 213. And his title would be
23 Merchandising Supervisor.

24 JUDGE KOCOL: Any objection to the motion to amend the
25 complaint in this respect?

1 MR. TOPOLSKI: Apparently Your Honor, this person's never
2 been a Merchandising Supervisor. So yes, I would have to
3 object.

4 JUDGE KOCOL: Well, it's just a -- I'll give you a chance
5 to deny it. I'm just asking whether you object to amending the
6 complaint. And then the next thing I'm going to do is ask what
7 your answer is, and you'll deny or whatever you like.

8 MR. TOPOLSKI: If I can deny, she can amend.

9 JUDGE KOCOL: Okay. That motion to amend is granted. So
10 Cliff Peck, Merchandising Supervisor's alleged to be a 211 and
11 213 representative of Respondent. And now Mr. Topolski, your
12 answer?

13 MR. TOPOLSKI: My answer would be, as you know Your Honor,
14 we have a problem with the way paragraph 4 is phrased
15 generally. So at this point not knowing anything about this
16 gentleman, I would have to deny that he's a 211 supervisor or
17 213 agent.

18 JUDGE KOCOL: All right.

19 MR. TOPOLSKI: I may want to amend my answer tomorrow
20 morning when I figure out who this gentleman is.

21 JUDGE KOCOL: Of course. I understand.

22 MR. TOPOLSKI: But again, to the extent that the paragraph
23 4 states for all relevant purposes these people are --

24 JUDGE KOCOL: But, let me --

25 MR. TOPOLSKI: -- I'm going to maintain my objection.

1 JUDGE KOCOL: But, we'll revisit this when I get to the
2 subpoena.

3 MR. TOPOLSKI: Right.

4 JUDGE KOCOL: But, the manner in which the General Counsel
5 has pleaded this at all material times has been done for
6 decades. And it's never been a problem in any of the dozens
7 and dozens, even more than that, complaints that I've reviewed
8 and handled.

9 So, when you make that objection to all material times you
10 invite the General Counsel to subpoena these records, because
11 she thinks it's not a clean admission and you think it is a
12 clean admission. But, you don't want to get trapped into
13 something that happened in 1962 or something, you know.

14 MR. TOPOLSKI: Exactly, Your Honor.

15 JUDGE KOCOL: But the -- that's never happened. And if --

16 MR. TOPOLSKI: Well, it --

17 JUDGE KOCOL: -- and if it ever got to that point, I would
18 certainly allow you to revisit your admission and say "that's
19 not a material time" or "I'm being tricked" and I'd let you do
20 it.

21 MR. TOPOLSKI: Well --

22 JUDGE KOCOL: But, I have never in 40 years with the NLRB
23 having seen hundreds of these cases, ever ever saw that to be a
24 problem.

25 MR. TOPOLSKI: Well, we can talk about that as a

1 stipulation --

2 JUDGE KOCOL: Yes.

3 MR. TOPOLSKI: -- when we get to the subpoena, Your Honor.

4 JUDGE KOCOL: Yes.

5 MR. TOPOLSKI: But, I will mention there's a time barred
6 allegation in here, and that's why it's particularly important
7 in this case that we make sure that there's no admission with
8 respect to "all relevant times" when obviously the General
9 Counsel and the Respondent have a completely different idea
10 what that is.

11 JUDGE KOCOL: You wouldn't -- you aren't waiving any 10(b)
12 argument with respect to that. That 10(b) argument is going to
13 be something completely different. That's going to be based
14 upon red eye is it?

15 MS. LYONS: Yes, Your Honor.

16 JUDGE KOCOL: Whether the allegations in the charge
17 alleging the unlawful layoff, whether the 8(1) allegations are
18 related to that allegation. I can tell you now case law tells
19 me that they are. So, I'm just signaling you when we get to
20 that point. So I don't see a 10(b) issue, but you'll be able
21 to raise to this -- in the brief, etcetera. So, I'm just
22 telling what I know from my years of experience here. But, the
23 -- all right so.

24 The allegation concerning Mr. Peck is denied. We're still
25 with you, preliminary matters.

1 MS. LYONS: Yes, sir. The only other amendment would be
2 paragraph 6(a), and that's merely the date. It says November
3 9th, it should be November 13th.

4 JUDGE KOCOL: November 13th. Any objection to amending
5 the complaint in that manner?

6 MR. TOPOLSKI: No objection there, and that's submitted.

7 JUDGE KOCOL: All right, very good. So the amendment is
8 allowed and the -- that amended allegation is admitted.

9 We're still with you, preliminary matters, Ms. Lyons.

10 MS. LYONS: Yes, Your Honor. I believe we need to take up
11 the matter of the subpoena documents.

12 JUDGE KOCOL: Yes.

13 MS. LYONS: I haven't received any of them at this point
14 so.

15 JUDGE KOCOL: All right. Let's -- I'd like to have this
16 discussion on the record. And let's mark if you don't mind the
17 Petitioner's Exhibit, I'm sorry, respondent's petition to
18 revoke subpoena, let's mark that as ALJ Exhibit 1. And if you
19 don't mind, Mr. Topolski, supply two copies to the court
20 reporter. Mine is -- you don't have to do it right now, but at
21 some point mark them as ALJ Exhibit 1.

22 And then Ms. Lyons, if you don't mind, your response to
23 that we'll mark that ALJ Exhibit 2. And if you don't mind,
24 supply two copies of that. Mine are marked up.

25 **(Administrative Law Judge Exhibits 1 and 2 marked for**

1 **identification)**

2 JUDGE KOCOL: So with that in mind, any objection to
3 receipt into evidence of those two documents?

4 Hearing no objection, ALJ Exhibit 1 and 2 are received.
5 **(Administrative Law Judge Exhibits 1 and 2 received into**
6 **evidence)**

7 JUDGE KOCOL: All right.

8 MR. TOPOLSKI: Just one clarification on the record, I'm
9 sorry. Ms. Lyons, did you indicate you wanted to amend
10 paragraph 6(a) of the complaint? Is that what it was?

11 MS. LYONS: Let me look again to make sure.

12 MR. TOPOLSKI: Is that what it was?

13 MS. BELDNER: That's what I had.

14 MR. TOPOLSKI: Okay. I just wanted to make sure that I
15 had that right. I had that wrong in my notes.

16 JUDGE KOCOL: That's what she indicated.

17 MS. LYONS: Yes, 6(a).

18 MR. TOPOLSKI: That's -- okay, we're good then. Thank
19 you.

20 JUDGE KOCOL: All right. Here we go on the petition to
21 revoke. The -- with regard to any privileges, Mr. Topolski
22 prepare, of course, a privilege log describing in general the
23 document. Give the date of the document. Describe the
24 privilege you assert covers that document. And provide that
25 log to Ms. Lyons.

1 And Ms. Lyons, of course, if you challenge anything on
2 that log bring that to my attention. And then, Mr. Topolski,
3 I'll examine the document in camera and resolve any issues. So
4 that takes care of the privilege matters.

5 I'm going to grant the petition to revoke concerning all
6 documents related to the Glendale facility. I will tell you
7 this Ms. Lyons, it appears to me that that's a fishing
8 expedition and that the -- regarding information that would go
9 to motive. And in any event, it would be too attenuated to
10 have any impact on this case.

11 And lastly, I'm fearful that it would get us entangled in
12 litigating either an 8(5) or an 8(3) concerning that facility.
13 So, for those reasons I'm granting the petition to revoke so
14 far as the subpoena requests any information in any paragraph
15 concerning the Glendale facility.

16 Now, I will say this though. If Respondent bring into
17 evidence of the Glendale facility, well, you know, of course
18 I'll hear you again and I'll reconsider. Because I don't want
19 you to get trapped by having Respondent bring something up
20 about Glendale and then you not being able to answer that and
21 rebut that.

22 MS. LYONS: Your Honor, if just may be heard for a moment.

23 JUDGE KOCOL: Yes.

24 MS. LYONS: The purpose of the Glendale facility request
25 is that these eight individuals continue to apply -- at least

1 five of them continue to apply for open positions with the
2 Employer at both Tempe and Glendale, and were denied all --
3 those jobs. And so, I think that goes to the whole issue of
4 whether the layoff was due to a legitimate reason, or whether
5 it was due to the reason we allege in the complaint.

6 JUDGE KOCOL: I don't see that connection at all. There's
7 -- if they had been unlawfully denied an opportunity to apply
8 at Glendale, that's a separate A3. Get a charge and, you know,
9 issue a complaint if you have any support of that. And this
10 reinforces what I -- my ruling, because I'm fearful that this
11 is just what I'd be doing here, litigating an unalleged A3.
12 And that's my fear, and that's what I won't allow. So, that
13 takes care of that.

14 But, anything else on this, Ms. Lyons? I didn't mean to
15 cut you off.

16 MS. LYONS: That's fine, Your Honor.

17 JUDGE KOCOL: All right. I'm going to deny the petition
18 to revoke concerning the time periods. I know 2008 is a long
19 time, but it's not so long that I'm going to cut the General
20 Counsel off. So it's denied with regard to that.

21 I'm going to grant the petition to revoke insofar as the
22 subpoena gives instructions as to how the documents are to
23 produce. Mr. Topolski, the Respondent is to produce those
24 documents in a fashion it sees best fit in a reasonable manner.
25 And if there's some objections to that, you know, if they're

1 all scattered around again, Ms. Lyons, I'm sure that won't
2 happen. But if it does happen, you'll bring that to my
3 attention.

4 Now, let's get to the supervisory allegations. Will you
5 stipulate that at all times material herein, take it from there
6 Ms. Lyons, you'll have to help me with this.

7 MR. TOPOLSKI: How about if I offer a stipulation?

8 JUDGE KOCOL: Okay. That's fine.

9 MR. TOPOLSKI: Thank you, Your Honor.

10 JUDGE KOCOL: Either one of you.

11 MR. TOPOLSKI: We will stipulate, all right, that the --
12 that with the exception of Mr. Peck, I think it was, who I
13 don't know anything about. And there's a Dan Sisler that's at
14 issue, which we'll talk about in just a minute.

15 JUDGE KOCOL: Okay.

16 MR. TOPOLSKI: I'm assuming -- well, I had to guess who
17 this Dan person was.

18 JUDGE KOCOL: All right. But, we know Dan and Mr. Peck
19 are out.

20 MR. TOPOLSKI: Right. And with respect to the other
21 folks, we will stipulate that as a general matter they're 211
22 supervisors. And we will stipulate that as a general matter
23 that they can act as agents of the Employer when acting in the
24 supervisory capacities. With Your Honor's powdiarth (phonetic)
25 that I can object if somebody tries to claim that that

1 stipulation says something I -- it's time, that I think it's
2 time barred, it's not because of that specific stipulation.
3 That I can stipulate that they're 211 supervisors and 211
4 agents. Unless of course, the allegation is one of the people
5 murdered somebody on the street and they're trying to pin that
6 on the company as an agent.

7 JUDGE KOCOL: Yes. All right. Is that acceptable to you?

8 MS. LYONS: Yes, Your Honor.

9 JUDGE KOCOL: All right. That stipulation is received.
10 So are you withdrawing --

11 MR. TOPOLSKI: 1 through 7.

12 JUDGE KOCOL: -- 1 through 7?

13 MS. LYONS: Well, we need to talk about the --

14 JUDGE KOCOL: Oh, no. It's --

15 MS. LYONS: -- Dan Sisler and --

16 MR. TOPOLSKI: And we can talk about Dan Sisler.

17 JUDGE KOCOL: All right.

18 MR. TOPOLSKI: Okay. I believe that Dan Sisler at one
19 point in time was a driver's supervisor. Is that correct, Mr.
20 Monaghan? We have documents we're willing to produce that is -
21 - from personnel that shows all of his various positions and
22 the periods he held them. So I think that satisfies General
23 Counsel's -- Counsel for General Counsel's request that we
24 identify Mr. Sisler and what he did at various points of time.
25 Because, now he's not a supervisor anymore. I understand now

1 he's a driver.

2 JUDGE KOCOL: But in any event, you'll provide those
3 documents?

4 MR. TOPOLSKI: Yes. We have them here to provide.

5 JUDGE KOCOL: All right. So that takes care of that. And
6 --

7 MR. TOPOLSKI: Does the General Counsel know --

8 **(Question trail off)**

9 MS. LYONS: I don't know his last name, or it would have
10 been alleged.

11 MR. TOPOLSKI: Thank you.

12 JUDGE KOCOL: All right. And so lastly, the petition to
13 revoke is denied with regard to everything else except, of
14 course, Ms. Lyons with regard to paragraph 27. You don't --
15 you're not asking for a copy of the First Amendment to the
16 Constitution or Section 8(c) of the Act?

17 MS. LYONS: No, sir.

18 JUDGE KOCOL: Obviously.

19 MR. TOPOLSKI: Which we have provided, Your Honor.

20 JUDGE KOCOL: All right. So, any questions about the
21 subpoena? I think I've covered everything.

22 MR. TOPOLSKI: I do want to -- let me see if I have any
23 particular questions about that.

24 JUDGE KOCOL: Let's go off the record a moment.

25 **(Off record)**

1 JUDGE KOCOL: On the record. Mr. Topolski?

2 MR. TOPOLSKI: Thank you, Your Honor. We were having a
3 discussion as to what we brought with us to court today. And
4 we did bring somewhere around 3,000 pages of documents for
5 Counsel or General Counsel to look at. What we did not do is
6 go all the way back to 2008. It was our position and it
7 remains our position -- and we will if we have to it's just
8 going to take more time.

9 JUDGE KOCOL: I see.

10 MR. TOPOLSKI: That this individual layoff concerned
11 events that happened pretty much in the summer and fall of
12 2009, that's what the company was looking at. They may have
13 gone back and checked the trend as much as a year. So
14 therefore, certain statistical data that we had is from the
15 summer and fall of 2009 forward. Now we have the volume
16 numbers for 2008 and 2009. And I don't --

17 JUDGE KOCOL: What I suggest is we do this. Break at some
18 point. Give the General Counsel what you have. And Ms. Lyons,
19 if that covers it, you know, fine. If you need more, work it
20 out with Mr. Topolski to get it here. You know my ruling.
21 You're entitled to it all. And if there's some problem, you
22 can't get it. Well, you'll bring that to my attention and I'll
23 make sure you get it.

24 MS. LYONS: Yes, sir.

25 JUDGE KOCOL: All right. So we're still with you Ms.

1 Lyons, preliminary matters.

2 MS. LYONS: Other than those, I have no further ones.

3 JUDGE KOCOL: All right. Preliminary matters, Mr.
4 Topolski?

5 MR. TOPOLSKI: Your Honor, I'm still trying to sort
6 through the subpoena. I want to make sure that in light of
7 your ruling, we have everything that's responsive. I think we
8 brought a lot of stuff, particularly with respect to the things
9 that really relate to this -- why the layoff occurred, that
10 kind of thing.

11 The thing I do want to address is the -- is the Santos
12 issue. The Santos allegation, Your Honor. And that's why I
13 want to take a look at -- put some of these documents in,
14 whether we do that now or later. The name Lou Santos never
15 came up in the two and a half years this charge is pending
16 until May of 2012. And that was after the Region had finished
17 its investigation of the charge.

18 JUDGE KOCOL: Yeah.

19 MR. TOPOLSKI: And not only allowed it from Pop Med School
20 but it related to settlement. So, I don't see how they can
21 possibly bring a timely claim when it was -- it's certainly not
22 in the charge. It's certainly not in the investigation.

23 JUDGE KOCOL: But, as I said the elite case is red eye and
24 it says -- I take into a number of factors. The key factor is
25 whether the alleged violations are substantially related to the

1 allegations made in the charge. And this case the allegations
2 in the complaint, namely 8(1) statements I'm going to conclude
3 are related to the allegations in the charge. And so
4 therefore, there won't be a 10(b).

5 MR. TOPOLSKI: Well, Your Honor. Let me say two things
6 about that.

7 JUDGE KOCOL: Yes.

8 MR. TOPOLSKI: And knowing that that's the ruling, we can
9 deal with that how we deal with it.

10 JUDGE KOCOL: Yes.

11 MR. TOPOLSKI: But, there are two other concerns with
12 respect to the subpoena. We don't know what those 8(1)
13 statements are. Because like I said, they were never
14 investigated and they were never brought to our attention.

15 JUDGE KOCOL: Well, but the complaint gives you sufficient
16 notice.

17 MR. TOPOLSKI: No it doesn't. It doesn't tell us what
18 these statements were. It only alleges that they were made.

19 JUDGE KOCOL: Okay. But, okay.

20 MR. TOPOLSKI: And we don't know what they are. And Mr.
21 Santos isn't an employee anymore.

22 JUDGE KOCOL: Okay.

23 MR. TOPOLSKI: So to the extent there are documents, we're
24 going to have to reserve the right to figure out if any such
25 documents exist until such time as we know exactly what the

1 statements are.

2 JUDGE KOCOL: No. The allegations in the complaint are
3 sufficient. They comply with the rules. And they tell you
4 what the rules require and what Board law requires. They give
5 you the date, they give you the person who did it, they give
6 you the location, and a general description of the statements
7 made and why they're violations. And I'm looking at both of
8 those, those are common allegations that fit comfortably within
9 General Counsel's obligation to provide you with due process.

10 MR. TOPOLSKI: I understand that much, Your Honor. But
11 what I'm saying is, because we don't know what the specific
12 allegations are. I just want everybody here to understand, I
13 don't know if any documents exist because one --

14 JUDGE KOCOL: Well, there may not if they're --

15 MR. TOPOLSKI: -- it's November 2009, I guess, I don't
16 know. And the other thing is until I find out what the
17 substance of the allegations are I can't stand here and tell
18 Ms. Lyons or the court documents exist or don't exist.

19 JUDGE KOCOL: I'm not that -- we'll get to that point when
20 things ripen, but I'm not persuaded. Because, if there's some
21 allegation -- if you have any documents that refer to a
22 statement by Mr. Santos on or about November 19th outside
23 Respondent's facility, dealing with something that might be
24 construed with and a threat to employees with unspecified
25 reprisals because they're Union activities, and you don't turn

1 that over there's going to be a problem.

2 MR. TOPOLSKI: I can represent that no such documents
3 exist.

4 JUDGE KOCOL: Well, then we'll get to point.

5 All right, so we're still with you Mr. Topolski,
6 preliminary matters.

7 **(Long pause)**

8 JUDGE KOCOL: All right.

9 MR. TOPOLSKI: Well, there's obviously Your Honor, you
10 know, there's an issue with the catchall number 33 I believe it
11 is. But, I think we've taken care of that. I think we're fine
12 on the subpoena.

13 JUDGE KOCOL: Okay. All right. Now, I do want to start
14 out with -- now I'm going to turn my focus to you and Ms. Lyons
15 if you don't mind. In reviewing the petition to revoke, Mr.
16 Topolski gave a little bit of the background in this case. And
17 one thing that jumped out at me is the deferral argument, and I
18 wonder why the charge was not dismissed when the Union failed
19 to take the case to arbitration.

20 And let me just talk about this a minute so you'll
21 understand my reasoning. Because I under -- as I understand
22 the law under Collyer -- I'll need documents and we'll get to
23 that in a minute. Let's make sure I've got the facts right.
24 But under Collyer, you know, Collyer requires of course that
25 even 8(3) cases be deferred to arbitration. And even

1 individually filed charges be deferred to arbitration. And if
2 for whatever reasons, with certain exceptions not here or
3 apparent to me, the Union fails to take that case to
4 arbitration the charge is dismissed. Otherwise, what's the
5 point of the Collyer deferral, if a Union can say "I'm not
6 taking it to arbitration" and it comes back. Well, you know,
7 what's the point. The Union's not going to do it.

8 So that's my understanding, and that has been my
9 understanding of the law since the Collyer -- the famous
10 Collyer memo came out in sometime -- 35 years ago or whatever
11 that was.

12 So, I put that to you now. And in the meantime, I don't
13 expect you to address it now unless you're ready or you might
14 want to consult or give it some thought. Are you ready to
15 reply?

16 MS. LYONS: I can reply to you now.

17 JUDGE KOCOL: Okay.

18 MS. LYONS: At this point, Your Honor. First of all, I
19 believe it was deferred under Dubo because there was a
20 grievance filed. However, after --

21 JUDGE KOCOL: Let's stop right there. Your -- if that's --
22 -- may I mark that as, mark your exhibit however you like. Let
23 me see the letter.

24 MR. TOPOLSKI: Make sure I hand you the right one.

25 MS. LYONS: Your Honor, I made copies of these letters --

1 JUDGE KOCOL: Oh, good.

2 MS. LYONS: -- as well so.

3 JUDGE KOCOL: So, whoever has one handy. If you've got an
4 extra for Respondent.

5 MS. LYONS: I made seven copies so.

6 JUDGE KOCOL: Oh, wonderful.

7 MS. LYONS: We can mark them. I already have them as GC
8 Exhibits. If you're fine --

9 MR. TOPOLSKI: Okay. That would be great.

10 JUDGE KOCOL: Oh, that's fine. That's fine.

11 MS. LYONS: -- with that.

12 JUDGE KOCOL: That's great.

13 MS. LYONS: I'm just marking them, Your Honor. Your
14 Honor, this is General Counsel's Exhibit 2. It's a December
15 28th, 2009 letter to Mr. Topolski and Mr. Abreu from Region 28.
16 **(General Counsel Exhibit 2 marked for identification)**

17 JUDGE KOCOL: All right. Any objection to receipt into
18 evidence of General Counsel's 2?

19 MS. LYONS: No, sir. Your Honor.

20 JUDGE KOCOL: All right. General Counsel's 2 is received.
21 Let's go off the record a moment.

22 **(General Counsel Exhibit 2 received into evidence)**

23 **(Off record)**

24 JUDGE KOCOL: On the record. Mr. Topolski, when you said
25 this was deferred under Collyer you might have --

1 MR. TOPOLSKI: My mistake, Your Honor. Dubo.

2 JUDGE KOCOL: It was deferred under Dubo. And of course
3 if it's deferred under Dubo that triggers others things.

4 But, let me ask you this now. I'm going to stay with you.
5 Why wasn't this deferred under Collyer?

6 MS. LYONS: It wasn't deferred under Collyer --

7 JUDGE KOCOL: Why wasn't it deferred under Collyer?

8 MS. LYONS: -- because there was a grievance filed and
9 that generally would be deferred under Dubo.

10 JUDGE KOCOL: No. If it -- no, the Collyer memo's quite
11 clear. If it's deferrable under Collyer you defer under
12 Collyer. It's only if it's not deferrable under Collyer and a
13 grievance is filed you defer under Dubo.

14 MS. LYONS: Right. Well, Your Honor, it was deferred
15 under Dubo because my understanding was a grievance was pending
16 at the time --

17 JUDGE KOCOL: No. But the --

18 MS. LYONS: -- the charge was filed.

19 JUDGE KOCOL: But why wasn't it properly filed under
20 Collyer, is my question? And again, I'm not trying to trap
21 you. I don't -- you know, people object. I don't have all the
22 answers immediately or anything. Think about things that, you
23 know, I don't know everything. You may want to consult at a
24 certain point with your superiors. But -- and correct me if
25 I'm wrong of course, it wouldn't be the first time I got

1 something confused. Right, so. But my understanding of the
2 law as I sit here now is that this case should have been
3 deferred under Collyer. And therefore, under Collyer it should
4 have been dismissed.

5 MS. LYONS: Your Honor, our understanding is that when a
6 case is deferred under either Collyer or Dubo, the grievance
7 procedure proceeds. And it stays in deferral until such time
8 as either arbitration happens or the Union drops the grievance
9 or there is a settlement.

10 JUDGE KOCOL: No. But that's clearly not correct. Why
11 would a grievance -- why would a Union even take the case? Why
12 would the Union -- what would be the purpose of deferral saying
13 to the Union "take this to arbitration" if the Union simply
14 says "never mind." It's a waste of time. If the Union wanted
15 to take it to arbitration it voluntarily could. There'd be no
16 need for Collyer, there'd be just Dubo to defer.

17 Collyer says "take it to arbitration or else." And if you
18 don't, you know, unless there's a lack of community of interest
19 between the Union and the Grievants, there may be one or other
20 -- two other exceptions. But the answer is, if you don't take
21 it to arbitration charge dismissed. Otherwise, it's not a --
22 no, there's no deferral, it's a waste of time.

23 MS. LYONS: Your Honor, I mean that is not my
24 understanding of the law with regard to it. But, I can look
25 that up.

1 JUDGE KOCOL: Yes.

2 MS. LYONS: But, what happened is once the Union and the
3 Employer reached a settlement we contacted the Charging Party.

4 JUDGE KOCOL: But that's different. That's a -- that's
5 whether you defer under settlement. That's a whole different
6 standard and I understand that. But, if this case was properly
7 deferrable under Collyer, and if it was not taken to
8 arbitration this charge must be dismissed.

9 MS. LYONS: That's not how I understand the law, Your
10 Honor.

11 JUDGE KOCOL: All right. So let's -- before we go off the
12 record. Do you have a copy of the Collyer memo? I didn't
13 bring it with me.

14 MS. LYONS: No. I do not.

15 JUDGE KOCOL: Well, does any -- do you have a copy?

16 MS. LYONS: Because this --

17 JUDGE KOCOL: Does anyone have a copy of the Collyer memo?

18 MS. LYONS: I'm looking at the General Counsel's memo with
19 regard to deferral that was -- I do have that memo.

20 JUDGE KOCOL: All right.

21 MS. LYONS: That was dated January 20th, 2011, Guideline
22 Memorandum Concerning Deferral to Arbitral Awards and Grievance
23 Settlements.

24 JUDGE KOCOL: Oh. I know that very well. That's the most
25 recent one where the General Counsel wants to tweak the

1 standards for deferring under Spielberg and --

2 MS. LYONS: Correct.

3 JUDGE KOCOL: -- right. And that doesn't address that
4 issue, nothing whatsoever that I'm aware of. Again, I may have
5 missed something. So, does anyone have that Collyer memo?

6 MR. TOPOLSKI: Unfortunately, Your Honor, we don't access
7 to being online. Maybe we need to pull that up and have
8 everybody take a look at it.

9 JUDGE KOCOL: All right. So let's go off the record, and
10 we'll just take 15 minutes and see what we can dig up. And
11 talk to someone Ms. Lyons, I'm not meaning to trap you --

12 MS. LYONS: Thank you, Your Honor.

13 JUDGE KOCOL: -- or anything like that. So, if you come
14 back you have another argument, fine I'll listen to it or --

15 MR. TOPOLSKI: Well, Your Honor, and then there's --

16 JUDGE KOCOL: -- if it's something I haven't considered.

17 MR. TOPOLSKI: -- and I don't know if you want to pick
18 this up and look at all of it together or now. Because if we
19 get past the Collyer issue, which I tend to agree with you on,
20 we've got the independent status.

21 JUDGE KOCOL: Well, but let's take them one at a time.

22 MR. TOPOLSKI: One at a time, great. Thank you.

23 JUDGE KOCOL: One at a time, so we can stay focused. So
24 let's -- can you help them get online so they can dig up the
25 Collyer memo?

1 MR. TOPOLSKI: We've got it.

2 JUDGE KOCOL: Oh, you've got it?

3 MR. TOPOLSKI: Now it may take a few minutes, Your Honor,
4 but we'll get there.

5 JUDGE KOCOL: Okay. All right, so let's take a break.

6 **(Recess from 1:24 p.m. to 2:29 p.m.)**

7 JUDGE KOCOL: Ms. Lyons, you're offering some exhibits?

8 MS. LYONS: Yes, Your Honor. The General Counsel would
9 offer General Counsel 3, which is a copy of the collective
10 bargaining agreement between the Respondent and the Union, and
11 it is dated February 1st, 2005 through January 31st, 2010.

12 JUDGE KOCOL: All right. Hearing no objection, General
13 Counsel's 3 is received.

14 **(General Counsel Exhibit 3 marked for identification and
15 received into evidence)**

16 MS. LYONS: Your Honor, next we would offer General
17 Counsel's Exhibit 4, which is a certification of results of
18 election in case 28-RD-994, it's dated March 12th, 2010.

19 JUDGE KOCOL: Hearing no objection, General Counsel's 4 is
20 received.

21 **(General Counsel Exhibit 4 marked for identification and
22 received into evidence)**

23 MS. LYONS: General Counsel Exhibit 5 is a March 29th,
24 2012 letter from Region 28 to Mr. Topolski and Mr. Abreu
25 discussing that the investigation will be -- the case is coming

1 out of deferral and an investigation will pursue.

2 JUDGE KOCOL: Hearing no objection, GC 5 is received.

3 **(General Counsel Exhibit 5 marked for identification and**
4 **received into evidence)**

5 MS. LYONS: Your Honor, General Counsel Exhibit 6 is a
6 settlement agreement between the Respondent and the Union, it
7 is dated January 24th, 2012 and January 31st, 2012. There's
8 two different signatures. With a letter accompanying it dated
9 January 19th, 2012 that discusses several cases that are in the
10 grievance procedure.

11 JUDGE KOCOL: All right. Hearing no objection, General
12 Counsel's 6 is received. And I'm receiving 6 not for the
13 purpose of deciding whether deferral to the settlement
14 agreement's proper, but simply for the purpose of giving a
15 broad picture.

16 **(General Counsel Exhibit 6 marked for identification and**
17 **received into evidence)**

18 And I will say on the record that we've had extencia (sic)
19 -- extensive off the record discussions about several issues.
20 And I thank the Region for their active participation in their
21 sharpening these issues.

22 I'm going to issue a bench decision now. And I'll issue a
23 fuller decision once I get the transcript. But it's my
24 decision now that I am going to defer this case under Collyer.
25 In order to do so I need a stipulation from the Respondent: 1)

1 that it will waive any defensive timeliness as far as
2 processing the underlying grievance, and 2) that that grievance
3 arose under the prior contract and that Respondent is willing
4 to arbitrate that grievance.

5 MR. TOPOLSKI: So stipulated, Your Honor.

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

8 MR. TOPOLSKI: So agreed, Your Honor.

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

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

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

25 If the Board either concludes that I was wrong that this

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

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

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

17 MS. LYONS: No, Your Honor.

18 JUDGE KOCOL: Anything from Respondent?

19 MR. TOPOLSKI: No sir, Your Honor.

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

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

23

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25

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this **RESPONDENT BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES' MOTION TO STRIKE ACTING GENERAL COUNSEL'S EXCEPTIONS TO BENCH DECISION OF ADMINISTRATIVE LAW JUDGE** was filed electronically and that an original was sent on November 9th, 2012 by Federal Express to the National Labor Relations Board, 1099 14th Street N.W., Washington, D.C., 20570-0001, and service copies were sent by E-Mail and Federal Express to:

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