

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

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

and

Case No.: 28-CA-022792

WAYNE ABRUE, An Individual,

**RESPONDENT BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES'
ANSWERING BRIEF TO THE ACTING GENERAL COUNSEL'S EXCEPTIONS
AND BRIEF IN SUPPORT OF EXCEPTIONS**

Respondent BCI Coca-Cola Bottling Company of Los Angeles¹, through undersigned Counsel and pursuant to Section 102.47 of the Rules and Regulations of the National Labor Relations Board, respectfully submits this Brief in Answer to the Acting General Counsel's (AGC) Exceptions and Brief in Support of those Exceptions. For the reasons discussed below, as well as those set out in Respondent's Motion to Strike Acting General Counsel's Exceptions To Bench Decision of Administrative Law Judge², the decision of Administrative Law Judge

¹ For consistency, BCI Coca-Cola will be referred to as Respondent. The Acting General Counsel will be referred to as the AGC. Reference to trial exhibits of the Respondent and the AGC shall be referred to as Respondent Exhibit and AGC Exhibit respectively. References to the trial Transcript shall be designated as Tr. The ALJ's Decision shall be referred to as ALJ Dec. with lines being designated as Ln. The Brief in Support of the AGC's Exceptions shall be referred to as the AGC's Brief.

² Respondent is filing on this date a Motion to Strike Acting General Counsel's Exceptions to Bench Decision of Administrative Law Judge on the grounds that the AGC's Exceptions fail to comply with the Board's Rules and Regulations and fail to put at issue any findings of the ALJ. Granting this Motion would leave no timely Exceptions upon which the ALJ's decision could be

William G. Kocol (the ALJ) should be adopted, this matter should be deferred under the Board's Collyer doctrine, and this matter should be dismissed as recommended by the ALJ.

I. STATEMENT OF THE CASE

The record³ establishes the following. On November 13, 2009 Respondent conducted a layoff of eight drivers over three classifications at its Tempe, Arizona facility (the Tempe facility). Tr. 13. These drivers 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 District/NMU, AFL-CIO (hereinafter the Union). The Union filed grievances challenging the manner in which the layoffs were conducted (the Grievances). See AGC Exhibit 2, p.2.

On or about November 23, 2009 individual Charging Party Wayne Abreu filed the instant matter (the Charge), contending in relevant part that the eight drivers were laid off because of their membership in the Union. See Complaint, Paragraph 1 and AGC Exhibit 2.

The Regional Director issued a letter on December 28, 2009 erroneously deferring the Charge under Dubo Mfg., 142 NLRB 431 (1963). AGC Exhibit 2. As the ALJ correctly concluded without exception by the AGC, the matter was deferrable under Collyer Insulated

challenged. In any event, Respondent does not waive or withdraw any of the sound arguments in support of its Motion to Strike by filing this Brief.

³ A significant portion of the AGC Brief is spent making and relying upon bare allegations that were never raised at the hearing. They are not supported by any admissible evidence or any proffer of admissible evidence. E.g. AGC's Brief at 3-5; Tr.1-33. Further, the AGC purports to rely on allegations related to Respondent's Glendale, Arizona facility which the ALJ expressly ruled were not relevant, a ruling to which the AGC took no exception. Compare AGC Brief at 3 with Tr. at 14; see also AGC's Exceptions. These superfluous arguments should be rejected for at least two reasons. First, they are not raised properly under the Board's Rules and Regulations. See e.g. 29 CFR Sec. 102.46(b) (requiring that Exceptions be based upon specific citations to the record). Second, and in any event, they are irrelevant to the issues raised by the ALJ's rulings. Infra at 4-15.

Wire, 192 NLRB 837 (1971) instead of Dubo. ALJ Dec. p.3 Ln. 24 -45 and p. 4 Ln. 1-18. Therefore, the Charge should have been deferred under Collyer.

At the hearing, the ALJ examined the Region's deferral letter and settlement agreement resolving the Grievances. The ALJ also examined the collective bargaining agreement that was entered into the record prior to issuing the written bench decision. See generally ALJ Dec.

The ALJ made several relevant findings and conclusions. First, the ALJ found that the Charge was deferrable under Collyer. ALJ Dec. p. 3. Ln. 24-45. The AGC did not except to this finding. Second, the ALJ concluded that because the matter was deferrable under Collyer, it should not have been deferred under Dubo. Id. The AGC did not except to this finding. Third, the ALJ concluded that because the Charge must be deferred under Collyer, and the parties might have been unclear about their rights and obligations under a Collyer deferral, the Charge was to be deferred under Collyer. Id. at p. 4, ln 1-4. If the Union declined to bring the matter to arbitration, then the Charge would be dismissed. Id. at ln 10-17. Finally, the ALJ stated that this result was mandated by existing Board law and invited the AGC to challenge it if so inclined. See Tr. 31-33.

As noted above, the AGC does not except to any of the findings upon which the ALJ's decision is based. Instead, the AGC baldly asserts that it does not matter whether or how the Charge was or should be deferred. AGC Brief at 1 and 5. After dismissing without addressing the only issue that matters, the AGC goes on to try its case with innuendo and allegation. The AGC then declares that the settlement agreement entered into by the parties is "repugnant" to the Act by using the wrong legal standard. This approach clearly is inconsistent with and unacceptable under applicable law. As a result, the Exceptions should be rejected even if it can

be determined that they were brought properly and the ALJ's recommendations should be adopted in their entirety.

II. ARGUMENT

A. This Matter Was Properly Deferred Under Collyer

The gravamen of the AGC's vague Exceptions appears to be the contention that the AGC is entitled to a hearing on the issue of whether the agreement reached to settle the Grievances is "clearly repugnant" to the purposes and policies of the Act because it is "palpably wrong," regardless of how the Charge in this matter should have been deferred and regardless of whether the AGC excepted to the ALJ's rulings on this subject. See AGC Brief at 5-9⁴. It is difficult to respond to the AGC's contention for at least two reasons. First, the exceptions are not made in the manner prescribed by the Board's Rules and Regulations (that is by objection to the record by page and line number). Thus, it is not all clear as to what specific portions of the ALJ Decision the AGC excepts. Second, the AGC ignores the key findings of the ALJ in an effort to make an argument that deferral is improper. The argument, in turn, is both not applicable to the issues addressed by the ALJ and is based upon the wrong legal principles. When these errors are unraveled and the issues actually raised by the Exceptions are placed in their proper context, it is clear that the AGC's Exceptions are without merit and should be rejected.

It is important to understand at the outset exactly what the ALJ did in this case. The ALJ made four key findings relevant to the AGC's contentions. First, the ALJ found that the parties settled the underlying grievance by executing a written agreement stating that the Union investigated the allegations at issue in this matter, found them to be without merit, and agreed to

⁴ To the extent relevant, the AGC concedes that the other Spielberg/Olin factors have been satisfied. AGC Brief at 6.

provide testimony to that effect if need be. ALJ Dec. 2 at Ln. 37-45 and 3 Ln. 1-7. The AGC did not except to this finding. Second, the ALJ found both parties compromised in this settlement to the extent that Respondent agreed to pay each of the laid off drivers \$3,000 and the Union agreed to withdraw the layoff (and other) grievances⁵. Id. at Ln 37-40; see also AGC Exhibit 6. The AGC did not except to this finding. Third, The ALJ found that this matter was deferrable under Collyer. ALJ Dec. at 3 Ln. 13-22. The AGC did not except to this finding. Finally, the ALJ found that it was error for the Regional Director to try to defer this matter under Dubo in December 2009 because the Charge could only be deferred under Collyer. Id. Ln. 24-45. The AGC did not except to this finding either.

These ALJ findings and the AGC's failure to except to them are dispositive of this matter. As discussed above, and as emphasized by the ALJ, a Collyer deferral has consequences. If the Union does not bring the grievance to arbitration promptly, then the Charge must be dismissed. See ALJ Dec. at 3 Ln. 24-45 and authorities cited therein. By failing to except to the finding that the Charge was deferrable only under Collyer, the AGC cannot as a matter of law reach the issue of whether any resolution under the grievance and arbitration procedures satisfies the Spielberg/Olin standards or the correct standards applied to settlement agreements reached through the collective bargaining process. See infra at 7-10. If the Union declines to bring the grievances to arbitration, then the only remedy under Collyer deferral is dismissal of the Charge.

The AGC did not except to the finding that this matter was deferrable because it could not do so. As the ALJ found without exception, this matter satisfies every element for Collyer

⁵While the ALJ made these factual findings in the Decision, the ALJ also made it clear during the hearing that that AGC Exhibit 6 was not being received to determine whether deferral to the settlement agreement was proper. Tr. 31 Ln. 11-15. Instead, AGC Exhibit 6 was received to give the record a "broad picture". Id. There was no Exception by the AGC to receiving AGC Exhibit 6 on this limited basis.

deferral. Instead, the AGC takes the completely untenable position that over 55 years of Board precedent does not matter. AGC Brief at 5. The AGC argues that regardless of how the matter should have been deferred, an evidentiary hearing must be held to determine whether the settlement agreement met the Spielberg/Olin standards applicable to arbitration awards. Id. at 5-10. There is so much wrong with this argument that it is difficult to know where to begin to refute it.

First, the argument puts the cart before the horse. As explained above, it matters a great deal how a charge is deferred. The AGC cannot avoid a dismissal under Collyer simply by deciding not to except to a finding that the Charge should have been deferred under Collyer and then claiming this deferral does not matter.

Second, the AGC cannot avoid the consequences of failing to except to a finding that this matter should be deferred under Collyer by arguing that the Board will not defer to arbitration awards that permit discipline against employees solely for engaging in protected activity. AGC Brief at 6-9. To the extent it is possible to reach this issue at all in light of the AGC's failure to except to the finding that this matter should be deferred under Collyer and dismissed, the AGC's argument amounts to little more than an attempt to mischaracterize and improperly supplement the record in this matter in a transparent effort to apply inapplicable legal theories. AGC Brief at 6-7.

This is not a discipline case nor does it involve an arbitrator's decision⁶. The AGC does not allege that any protected conduct of Mr. Abreu or the other shop steward or anyone else

⁶ Thus, the cases cited by the AGC are inapposite. In Mobil Oil Exploration and Producing U.S. Inc., 325 NLRB 176 (1997), the Board overturned deferral to an arbitration award because the discharge was based solely the charging party's protected conduct. In Key Food Stores Cooperative, Inc., 286 NLRB 1056 (1987), the Board again refused to defer to an arbitration

resulted in discipline. To the contrary, the AGC concedes that there were six laid off drivers who engaged in no protected conduct at all other than union membership. See AGC Brief at 7.

Instead, this is a layoff case. The issue in the Grievances and the Charge is whether the layoff was conducted according to the terms of the parties' collective bargaining agreement. See e.g. AGC Exhibits 2 and 6. In this context, "The employer and union are the parties to the collective bargaining agreement and only they - not individual employees - determine how to interpret and enforce the agreement." Titanium Metals Corp. v. NLRB, 392 F.3d 439, 448 (D.C. Cir. 2004). As the representative of all the drivers including Mr. Abreu, the Union had the right to waive members' statutory claims to resolve the grievance, enter into a settlement agreement with which they disagreed, or indeed reach an agreement about which they knew nothing at all. Id. at 447-48 (quoting, inter alia, Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 705 (1983)("This Court long has recognized that a union may waive a member's statutorily protected rights...").

Additionally, the Grievance in this case was not decided by an arbitrator. It was settled by written agreement between the Respondent and the Union utilizing the parties' grievance and arbitration procedures contained in their collective bargaining agreement. See AGC Exhibits 2 and 6.

The Board's approach to analyzing a settlement agreement produced through the collective bargaining process to determine whether its terms are clearly repugnant to the

award because the just cause determination considered directly protected concerted activity such as picketing and internal union activities. In Cone Mills Corp., 298 NLRB 661 (1990) the Board declined to defer to an arbitrator's decision in a discharge matter where the arbitrator concluded that the conduct that led to the discharge was protected by the Act. Here there is no discharge for conduct, no arbitrator's award and no protected conduct resulting in a discipline discharge. This is a layoff case where the Union and the Respondent negotiated a settlement to their contractual language dispute.

purposes and policies of the Act is different than the Spielberg/Olin analysis applicable to an arbitration award. Alpha Beta Co., 273 NLRB 1546 (1985); United States Postal Service, 300 NLRB 196 (1990). In this regard, the Board recognizes that the settlement is negotiated by the Union as the collective bargaining agent of its members to resolve a contractual dispute. Alpha Beta, 273 NLRB at 1547. In this capacity, the Union is free to waive the statutory rights of employees to reach an agreement. Id., citing Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983). Thus, it does not matter whether employees agree with the settlement or are even aware of it. E.g. Titanium Metal Corp. v. NLRB, 392 F.3d at 448.

A settlement agreement is not clearly repugnant to the purposes or policies of the Act where the settlement was reached as the result of negotiations between the union and the employer within the context of an agreed upon grievance and arbitration procedure, both parties compromised, and there is no breach of duty of fair representation by the Union. Alpha Beta, 273 NLRB at 1547; United States Postal Service, 300 NLRB at 197; See also e.g. Titanium Metals Corp. at 447 (Board erred in declining to defer case where settlement reached pursuant to parties' lawful grievance procedures, the employee had no contractual right to approve the settlement and there is no claim that the union breached its duty of fair representation; "It is legally irrelevant" that [the employee] was not notified of the settlement of his claims).

Furthermore, it is improper for the AGC to urge the Board to interject its judgment as to whether the settlement reached by the union and the Respondent is satisfactory. "In other words, since a union has broad discretion to alter or modify employees' "waiveable" rights through collective bargaining, see Metropolitan Edison Co., 460 U.S. 693 at 705-07[], we see no basis upon which the Board legitimately could intervene merely because the settlement reached by the union and the employer was not to the Board's liking. As the courts have recognized in the

refusal to bargain context, the Board has no generalized authority to command settlements or force parties to agree to contractual terms that meet with the Board's approval. See H.K Porter v. NLRB, 397 U.S. 99,106 (1970) (other cites omitted).” Plumbers and Pipefitters Local No. 520, 955 F. 2d 744, 756 (D.C Cir. 1992).

Thus, if the AGC can reach the issue of whether the grievance settlement is clearly repugnant to the purposes and policies of the Act at all, the question must be answered under the standards set forth in Alpha Beta, United States Postal Service, and their progeny. The question does not turn, then, on the alleged “facts” as they existed at the time of Agreement as suggested by the AGC without citation to legal authority or record evidence. AGC Brief at 7. The question does not turn on whether the AGC thinks that the Respondent can or cannot meet its alleged burden under Wright Line. AGC Brief at 8. The question does not turn on whether the laid off drivers or the AGC think the amount of the settlement is “meaningful.” Id.

Instead, the AGC must show that the settlement agreement was not reached as the result of negotiations between the union and the employer within the context of an agreed upon grievance and arbitration procedure, that both parties did not compromise, or that there was a breach of duty of fair representation by the Union. Alpha Beta, 273 NLRB at 1547; United States Postal Service, 300 NLRB at 197. The ALJ found that the parties reached an agreement through the grievance and arbitration procedure and that both parties compromised. ALJ Dec. 2 ln. 37-45 and 3 ln. 1-7. The AGC did not except to these findings so they are conceded. The AGC also does not allege that the Union breached its duty of fair representation.⁷ Analyzed

⁷ To the contrary, it allowed Mr. Abreu to withdraw his unfair labor practice charge against the Union in Case No. 28-CB-074596, thereby conceding that the Union did not act in any improper fashion concerning the manner in which it handled processing the grievance. Had the opposite been true, one would have expected the Regional Director to amend the charge to include any

under the proper standards set out in Alpha Beta and United States Postal Service and their progeny, then, the AGC must concede that it has no basis for contending that the settlement agreement resolving the Grievance is repugnant to the purposes and policies of the Act⁸. As a result, there is nothing over which to conduct a hearing.

For all of these reasons, as well as those discussed below, it was not error to defer this matter under Collyer without a hearing. The Exceptions should be rejected and the ALJ's recommendations should be adopted in their entirety.

activity that violated the Act rather than permit the Charge to be withdrawn. The Board may take administrative notice of its own proceedings. See Farmer Bros. Co., 303 NLRB 638, 638 n.1 (1991); Metro Demolition Co., Inc., Phantom Demolition Corp., Circle Interior Demolition, Inc., World Class Demolition Corp., Alter Egos & Local 813, Int'l Bhd. of Teamsters, 348 NLRB 272, 273 n.3 (2006) (citing Westwood One Broad. Servs., 323 NLRB 1002, n.2 (1997).

⁸ Thus, the AGC's naked assertions that it has "strong prima facie evidence" that the layoffs were discriminatorily motivated adds nothing to the arguments addressed above. See AGC Brief at 7-8. First, there was no effort to make any kind of proffer of this alleged evidence on the record. The argument should be disregarded for this reason alone. Second, and absent a claim of breach of duty of fair representation not present here, judgments as to how layoffs impact shop stewards, activists and other members are exactly the kind of judgments the union is charged with making as bargaining representative of all the employees covered by the collective bargaining agreement. Alpha Beta, *supra*; United States Postal Service, *supra*; Titanium Metals, *supra*.

B. The ALJ Did Not Err By Refusing to Take Record Evidence.

To the extent this can be considered an Exception, the AGC next argues that the ALJ erred by deferring this matter before evidence was taken. The sole support for this contention is a citation to Dayton Power and Light Co., 267 NLRB 202 (1983). See AGC Brief at 9-10. There are at least four reasons why this contention should be rejected.

First, the AGC failed to identify on the record exactly what evidence the ALJ should have allowed and for what purpose. Indeed, the AGC did not make any proffer at all. Absent any record argument about what evidence should have been heard and on what subject, it literally is impossible to respond to the substance of any contention that specific evidence for a specific purpose should have been taken.

Second, this argument also puts the cart before the horse. The ALJ found that this matter should have been deferred under Collyer. The AGC did not except to this finding. Under Collyer, grievances must be brought promptly to arbitration or the deferred Charge is dismissed. Given the AGC's failure to except to the key finding in this matter, there is nothing to litigate.

Third, to the extent the AGC contends that an evidentiary hearing must be held on the issue of whether a grievance resolution is clearly repugnant the purposes and policies of the Act whenever a hearing is demanded by the AGC, any such assertion is wrong as a matter of law. The Board can and has decided the issue of whether grievance resolutions are clearly repugnant to the purposes and policies the Act without a hearing. See e.g. Dennison National Company, 296 NLRB 169 (1989)(summary judgment granted concluding that arbitrator award was not clearly repugnant to the purposes and policies of the Act; "The Board's involvement at this stage, however, is not in the nature of an appeal by trial de novo.")

Dayton Power and Light does not require a hearing in this matter as the AGC suggests. In that case, the ALJ ended a hearing on the grounds that charge at issue should have been deferred to arbitration. The specific charge at issue was a refusal to bargain charge that included a claim of failure to provide information.

The Board in Dayton considered three important factors not present in this case. First, the charge involved a refusal to furnish information claim which generally is not subject to deferral. Second, the Board observed that the ALJ's decision was based in large part on the conclusion that it was enough that the union received the information at issue. Dayton Power and Light, 267 NLRB at 202. The Board held specifically, "To the extent the Administrative Law Judge's ruling is grounded on Respondent's ultimate compliance with the Union's request for information, the Administrative Law Judge erred as a matter of law. Id. (citation omitted)." Third, the Board concluded that the ALJ appeared predisposed to rule for deferral. Indeed, to that end, the Board granted the request to have the matter remanded to a different judge. Id. at 202-03. None of these factors are present in this case.

This matter concerns a layoff under the terms of a collective bargaining agreement, clearly an issue subject to deferral. Second, The ALJ has not made any errors of law nor has the AGC excepted to any such alleged errors. Third, no party contends that the ALJ is any way predisposed to rule in any manner.

Finally, and again, the AGC's contention ignores the fundamental issues in this case. The ALJ concluded that the Charge should have been deferred under Collyer. The AGC did not except to this finding. As a result there is nothing to litigate. Alternatively, the ALJ observed that this matter was settled by compromise in the absence of animus to employee rights. The AGC did not except to this finding either. Thus, any claim of repugnancy to the purposes and

policies of the Act must be premised upon an analysis under Alpha Beta and United States Postal Service criteria. As demonstrated above, The AGC does not even pretend to be able to challenge the settlement agreement under the correct standards as there is no claim that the Union breached its duty of fair representation. As a result, the AGC cannot obtain a hearing to litigate issues that necessarily are irrelevant. Moreover, there is no validity to the position that the AGC is entitled to a trial merely because it demands one. Dennison National Co., supra. This Exception should be rejected and the recommendations of the ALJ should be adopted in their entirety.

C. The ALJ Did Not Err By Relying Upon General Counsel Memo 73-31

Finally, the AGC argues that the ALJ erred by relying on GC Memo 73-31 because the Memo was released before Alpha Beta, supra. AGC Brief at 10-11. The AGC appears to be contending that because Alpha Beta reversed the “sentiment” that the Board should not defer to pre-arbitration settlement agreements expressed in Roadway Express, 246 NLRB 174 (1979) and applied deferral standards to these settlement agreements, it was error to rely on GC Memo 73-31 because GC Memo 73-31 did not address review of pre arbitration settlement agreements under the “clearly repugnant” standard. AGC Brief at 11. This argument is completely without merit.

The ALJ’s Decision had nothing to do with Roadway Express, supra. To the extent the ALJ relied on GC Memo 73-31, it was used to support the conclusion that Board law requires that pre arbitration matters be deferred under Collyer in all cases where Collyer was applicable even if a matter might also be deferrable under Dubo. ALJ Dec. at 3 In. 24-45. Neither Roadway Express nor Alpha Beta addressed, much less changed, this legal principle. Alpha Beta, in relevant part, merely adopted the view of the dissent in Roadway Express and held that the Board’s deferral principles should be applied to pre arbitration settlement agreements. Alpha

Beta, 273 NLRB at 1573-74. It says nothing about the manner in which charges should be deferred in the first instance, which was the purpose for which the ALJ cited GC Memo 73-31.

Therefore, this argument is both substantively flawed and irrelevant. This Exception should be rejected and the ALJ's recommendations should be adopted in their entirety for these reasons as well.

III. CONCLUSION

For the reasons set forth above, the AGC's Exceptions should be rejected, the ALJ's recommendations should be adopted in their entirety, and this matter should be dismissed as recommended by the ALJ.

Respectfully submitted this 9th day of November, 2012,

/s/ Douglas M. Topolski

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this **RESPONDENT BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES' ANSWERING BRIEF TO THE ACTING GENERAL COUNSEL'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS** 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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