UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES

and **Case 28-CA-022792**

WAYNE ABREU, an Individual

ACTING GENERAL COUNSEL'S REPLY BRIEF

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I. INTRODUCTION

On October 26, 2012, the Counsel for the Acting General Counsel (General Counsel) filed Exceptions and a Brief in Support, to the decision issued by Administrative Law Judge William Kocol (ALJ) on September 28, 2012, in the above captioned case (ALJD). On November 9, 2012, Respondent filed an Answering Brief to the General Counsel's Exceptions. Respondent argues that the General Counsel did not except to the actual rulings of the ALJ, that the exceptions apply the wrong legal standard, and that the ALJ did not err by failing to take evidence and erroneously applying General Counsel Memo 73-31. Respondent's assertions are baseless, not supported by the law, and should be rejected by the Board.

II. THE GENERAL COUNSEL EXCEPTIONS AND RESPONDENT'S ARGUMENTS

A. Exceptions Regarding the ALJ's Deferral to Arbitration.

The General Counsel argued in its exceptions that the ALJ erred by deferring this matter to arbitration before allowing for a full evidentiary hearing and analyzing whether the grievance settlement is repugnant to the Act. Respondent argues that the General Counsel: (a) failed to identify exactly what evidence the ALJ should have allowed and for what

purpose; (b) did not except to the ALJ's deferral decision; (c) set forth the wrong legal standard (whether the grievance settlement is repugnant to the purposes and policies of the Act); and ignored "fundamental issues" in this case. Respondent's arguments have no merit.

Respondent argues that General Counsel did not except to the ALJ's decision to defer the case. This is not accurate as the first exception filed by General Counsel is to that very action by the ALJ—deferring the case without a full hearing. The ALJ simply refused to hear any evidence and determined that the case should be deferred under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and then proceeded to rule in accordance with that mistaken belief. As argued in the General Counsel's exceptions, it is immaterial whether the grievance was deferred by the Regional Director under *Collyer Insulated Wire* or *Dubo Mfg. Corp.*, 142 NLRB 431 (1963); the ALJ had an obligation to allow evidence, to analyze the grievance settlement reached prior to arbitration pursuant to that evidence, under the *Olin/Spielberg* standards, and reject the settlement if deferral to it was repugnant to the policies of the Act. The General Counsel argued that deferral by the ALJ was not appropriate. Respondent is just plain wrong by arguing that General Counsel did not except to the ALJ's deferral decision.

General Counsel attempted to discuss the parties' settlement agreement, and the Region's determination that it was repugnant to the Act, yet the ALJ would not allow General Counsel to go into that information, finding it was immaterial because the case should have been deferred under *Collyer*. (Tr. at 27-28) Therefore, the facts supporting the exceptions are properly set forth in the General Counsel's exceptions, and supporting brief, and properly state that these would be the facts adduced at a full evidentiary hearing.

The General Counsel then argued that the ALJ should have analyzed the grievance settlement reached by Respondent and the Union, which Charging Party objected to, under the

standards in *Alpha Beta, Co.*, 273 NLRB 1546, 1547 (1985). Respondent argues that the *Alpha Beta* standard does not analyze grievance settlements under the *Olin/Spielberg* test. This is simply not true. The Board held specifically that "the deferral principles apply equally to settlements arising from the parties' contractual grievance/arbitration procedures because they further the national labor policy which favors private resolutions of labor disputes. These deferral principles of *Collyer Insulated Wire* and *Spielberg Mfg., Co.*, 112 NLRB 1080 (1955), were recently reaffirmed in *Olin Corp*., 268 NLRB 573 (1984), and *Metropolitan Edison Co., v. NLRB,* 460 U.S. 693 (1983)." Id. at 1547. The Board then analyzed the grievance settlement under the *Olin/Spielberg* standard. One of the primary reasons that the Board found the grievance settlement in *Alpha Beta* was not repugnant to the Act was because all parties, including the affected employees, had agreed to be bound by the settlement. Further, all the parties, including the employees, were involved in the negotiations and the main goal of the grievance—to return the employees to their jobs, was achieved.

Respondent argues that the analysis stops after only one of the *Olin/Spielberg* standards are met—the proceedings appear to have been fair and regular. Respondent simply ignores the other three standards: (1) all parties agreed to be bound by the decision; (2) the arbitrator adequately considered the unfair labor practice issue; and (3) the award is not clearly repugnant to the purposes and polices of the Act. *Spielberg Mfg. Co*., 112 NLRB at 1082; *Olin Corp,* 268 NLRB at 574. In this case, the employees vehemently opposed the settlement, there was no consideration of the unfair labor practice issue, the award failed to return 8 employees to their jobs, and threw a mere pittance of monetary restitution to employees who had worked for Respondent as much as 38 years. (GCX 6)

B. Exception Regarding the ALJ's Reliance on General Counsel Memorandum 73-31.

The General Counsel excepted to the ALJ's reliance on General Counsel Memorandum 73-31, as that memorandum was issued prior to the Board's decision in *Alpha Beta, Co.* As stated in the exception, the Board's prior policy, as discussed in *Roadway Express*, 246 NLRB 174, (1979), was essentially to give no deference to pre-arbitral settlement agreements, as they were not elevated to the same status as arbitration decisions. *Alpha Beta* reversed the sentiment expressed in *Roadway Express* by deciding to give pre-arbitral settlements the same deference as arbitration decisions, and to use *Spielberg/Olin* standards in determining whether to defer to those agreements. As argued in the exceptions, GC 73-31 was written prior to *Alpha Beta* and prior to the Board's decision to conduct *Spielberg/Olin* reviews of pre-arbitral grievance settlements.

Respondent argues that the ALJ's decision had nothing to do with *Roadway Express*. That is exactly the point. The ALJ failed to properly apply Board law, as enumerated in *Alpha Beta*, and failed to conduct a *Spielberg/Olin* review of the pre-arbitral grievance settlement. The ALJ merely stated that the case should have been deferred under *Collyer*, end of story. Herein lies his error—his error in relying solely on a GC memo that was written years before *Alpha Beta*, at a time when the Board did not review the propriety of pre-arbitral grievance settlements.

Finally, a GC Memo is not Board law, and does not constitute Board precedent, *Kysor Industrial Corp.*, 307 NLRB 598, 602 fn. 4 (1992), enfd. 9 F.3d 108 (6th Cir. 1993), and does not substitute for the exercise of discretion by the ALJ or the Board. In 2004, the Board enumerated the list of factors it will consider in deciding whether to exercise its discretion in favor of deferral to the arbitration process, the operative word being "discretion." See

Wonder Bread, 343 NLRB 55 (2004). It held that: "Deferral is appropriate when the following factors are present: the dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity to the employees' exercise of protected statutory rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution." Id. at 55, citing *United Technologies,* 268 NLRB 557, 558 (1984). See also, *United Cerebral Palsy of New York City*, 347 NLRB 603 (2006).[1] The Board went on to state that "… we retain jurisdiction pending issuance of the arbitrator's decision, which has not yet been rendered, our processes may always be reinvoked if the arbitral award is not susceptible to an interpretation consistent with the Act or if it is inconsistent with the standards of *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955)." *Wonder Bread*, 343 NLRB at 56. The ALJ's insistence that the only avenue for the Complaint is to defer to *Collyer*, based upon a 1973 General Counsel Memorandum, does not comport with current Board law, nor are the provisions of the Act effectuated by this decision. Eight employees who are alleged in the Complaint to have been discriminatorily laid off in violation of Section 8(a)(3) of the Act, cannot be denied their day in court because a decertified union entered into a repugnant settlement agreement over those employee' objections.

[1] The Board in *United Cerebral Palsy of New York City*, 347 NLRB 603, rejected deferral, finding that deferral was not appropriate. Id. at 606.

III. CONCLUSION

It is respectfully requested that the Board accept the General Counsel's exceptions, overrule the ALJ's decision to defer this matter, and further asks that this matter be remanded for a full evidentiary hearing.

Dated at Phoenix, Arizona, this 21st day of November 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF in BCI Coca-Cola Bottling Company of Los Angeles, Case 28-CA-022792 was served by E-Gov, E-Filing and by E-mail, on this 21st day of November 2012, on the following:

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