

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: June 2, 2011

TO : Robert Chester, Regional Director
Region 6

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: United States Postal Service
Case 6-CA-36441

The Region submitted this Section 8(a)(1) and (3) case for advice as to whether, under the General Counsel's proposed new standards,¹ it should defer to an arbitral award upholding the Employer's actions against the alleged discriminatee and finding that those actions did not constitute harassment or retaliation. We conclude that the Region should defer to the arbitral award and dismiss the charge, absent withdrawal.

Facts

Briefly, this case involves a charge filed by the American Postal Workers Union, Local 227 (the Union) alleging that the Employer took various actions against an employee (the Grievant)—including, among other things, repeatedly reposting his position for bid, rescinding approved time off, and requiring him to work through lunch breaks—because of his activities as Union president. The Union also filed several grievances over these actions pursuant to non-discrimination provisions contained in the parties' collective-bargaining agreement. The Region deferred the Section 8(a)(1) and (3) allegations of the charge pursuant to Collyer.²

In April and August 2010, an Arbitrator held hearings concerning the Union's grievances alleging that the Employer took retaliatory actions against the Grievant and created a hostile work environment because of his Union affiliation. The Arbitrator defined the issues to be determined as: (1) whether the Employer violated the Agreement by engaging in a course of harassment and retaliation toward the Grievant;

¹ See "Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases," GC Memorandum 11-05, dated January 20, 2011.

² Collyer Insulated Wire, 192 NLRB 837 (1971). At the same time, the Region dismissed Section 8(a)(4) allegations that the Employer had retaliated against the Grievant for filing charges or giving testimony under the Act.

and (2) whether the Employer's actions in reposting the Grievant's position constituted harassment and a violation of the contract.

On November 5, 2010, the Arbitrator issued her decision denying the Union's grievances and concluding that the Employer did not engaged in harassment as alleged by the Union. Specifically, she noted that the Union's allegations that the Grievant was the victim of harassment and retaliation by the Employer were "not sufficiently supported by the record," and that the Union had failed to meet the burden of proving a violation of the agreement. The Arbitrator quoted a statement from the grievance appeal form that the Employee Labor Relations Manual (Section 911.1) states that "each postal employee has the right, freely and without fear of penalty or reprisal, to form, join, or assist a labor organization or to refrain from any such activity." The Arbitrator referenced the instant deferred charge and stated that, "although there is evidence of a contentious labor-management relationship, the evidence does not establish that the Grievant was singled out for harassment or retaliation by Management." She noted that grievances were regularly resolved in the Grievant's favor by supervisors and manager's under the direct supervision of the alleged instigator of the harassment, and concluded that "this course of conduct was insufficient to establish harassment or intimidation directed toward the Grievant." After addressing each of the Union's contentions and considering the Employer's proffered defenses for each of those actions, the Arbitrator determined that "a careful review of all of the evidence presented provides insufficient support for the allegation that the Postal Service engaged in a course of harassment against the Grievant."

Action

We conclude that the Region should defer to the arbitral award and dismiss the instant charge, absent withdrawal.

Under the General Counsel's proposed new standards for deferral in Section 8(a)(1) and (3) cases, the party urging deferral must demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. If the party urging deferral makes that showing, the Board should defer unless the award is clearly repugnant to the Act.³

³ GC Memorandum 11-05 at 6-7.

We agree with the Region that deferral to the arbitral award is appropriate in this case. The Arbitrator was presented with the statutory issue and fully considered that issue. She analyzed the case consistent with statutory principles in determining whether the Employer's actions were discriminatorily motivated, and her conclusions are reasonable in light of the facts. After carefully considering and addressing each of the Union's contentions, the Arbitrator concluded that the Employer's actions were justified and would have occurred even in the absence of protected, concerted activity. Thus, the arbitral decision is not repugnant to the Act. Because the arbitration award satisfies the standards set forth in Spielberg/Olin⁴ as well as the proposed new standard set forth in GC 11-05, the Region should defer to the arbitral decision and dismiss the charge, absent withdrawal.

B.J.K.

⁴ Spielberg Mfg. Co., 112 NLRB 1080, 1081-1082 (1955); Olin Corp., 268 NLRB 573, 574 (1984).