

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

DATE: February 8, 2013

TO: Gary Muffley, Regional Director
Region 9

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

SUBJECT: United States Postal Service
Case 09-CA-075357

This Section 8(a)(3) and (1) case was submitted for advice as to whether deferral to an arbitration award upholding the discharge of the alleged discriminatee is inappropriate where the Arbitrator was not presented with a piece of evidence relevant to resolving the unfair labor practice. We conclude that the Arbitrator's conclusion that the alleged discriminatee was discharged for engaging in unprotected conduct is susceptible to an interpretation consistent with the Act and is not clearly repugnant, and that there is no reason to believe that the outcome of the arbitration would necessarily have been different if the Arbitrator had been presented with that additional piece of evidence. In these circumstances, deferral to the award is appropriate under the standards set forth in *Spielberg* and *Olin*¹ as well as under the proposed new deferral standards set forth in GC Memorandum 11-05.² The Region should therefore dismiss the charge, absent withdrawal.

Background and Facts

The alleged discriminatee (herein "Grievant") worked for the Employer from 1980 up until his discharge on February 23, 2012. He has been a Union official since 1986, and became the Union president in February 2011. In May 2011, the Employer began transporting employees daily, by van, from the processing center in Huntington, West Virginia to Charleston, West Virginia to perform certain work. At that time, employees complained that they were not afforded the opportunity to use the

¹ *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955); *Olin Corp.*, 268 NLRB 573 (1984).

² 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, at 6-7.

restroom while riding in the Postal Service vans, leading the Union to research OSHA bathroom-useage regulations and inform Huntington employees of their rights. About December 22, 2011, the shuttling of employees expanded to include the Ashland, Kentucky facility, which was the Grievant's home facility.

On about December 24, 2011, the former Union president/current Union benefits official went to the Grievant's house, where they discussed the issue of Ashland employees being shuttled to and from Charleston and the bathroom-usage issue.³ At some point, the former Union president asserts that he used the Grievant's email account to send the following email to employees, without the Grievant's knowledge:

"Subject: Fwd: FROM PRESIDENT [GRIEVANT'S NAME]
Date: Sat, 24 Dec 2011 02:03:39 -0500 (EST)

IN CASE WE DON'T STOP EM I WANT YOU TO KNOW THE DANGERS AND WHO IS ALLOWED TO DRIVE YOU IN A 15 PASSENGER VAN.

ATTACHED IS A GOVERNMENT BOOKLET WITH THE 15 PASSENGER VAN REQUIREMENTS.

I HAVE NOT HAD TIME TO READ ALL OF IT YET, BUT I'M SURE SOME OF YOU WILL IF YOU NOTICE ANYTHING THAT MIGHT BE OF PARTICULAR INTEREST PLEASE TELL ME.

THE 15 PASSENGER VAN IS ONE OF THE MOST DANGEROUS VEHICLES ON THE ROAD WITH A LARGER CHANCE OF ROLLOVER.

ALSO, I HAVE ATTACHED AN OSHA REGULATION THAT MAKES IT CLEAR THEY MUST PULL OFF THE ROAD EACH TIME SOMEONE NEEDS A REST ROOM BREAK. NO EXCEPTIONS. IF 15 PEOPLE TAKE DIFFERENT REST ROOM BREAKS A DIFFERENT TIME GOING TO AND FROM CHARLESTON THE VAN COULD BE ON THE ROAD A LONG TIME AND THINK OF THE OVERTIME. YUM, YUM.

PASS THIS INFO ON TO YOUR CO WORKERS AS I DON'T HAVE EVERYONES EMAIL ADDRESSES. HAVE A MERRY CHRISTMAS AND HAPPY NEW YEAR OR HAPPY HOLIDAYS.

³ The former Union president had been the president earlier in 2011 when the Employer began transporting employees between Huntington and Charleston, and he had been involved in the bathroom-break issues involving the Huntington employees.

Two employees were apparently upset at having received the email. One of them, Employee A, approached the Grievant on December 26 and told him that he was mad about the email from the Union calling for extending the van transportation period into overtime with bathroom breaks. Employee A and his wife were among the employees required to take the van, and he was upset because they did not like overtime and needed to get home to their children. The Grievant asserts that he was unaware of what email Employee A was talking about, but that he nevertheless addressed the employee's questions by informing him that OSHA laws required the Postal Service to pull over if someone needed to use the bathroom during the drive. The Grievant did not deny having sent the email. Employee A then contacted a supervisor and advised him about the December 24 email and that it encouraged the slowing of the van as much as possible with alternating restroom breaks. Another employee, Employee B, called the National Union office after receiving the December 24 email to say that she wished to resign from the Union because of the encouragement of a slowdown.

On January 10, 2012,⁴ the Employer began questioning employees about the December 24 email. There is no evidence that employees increased their requests for the van to stop for restroom breaks. On January 11, the Grievant filed a grievance and an OSHA complaint on behalf of an employee who had been denied the opportunity to use the restroom on January 3 while traveling from Ashland to Charleston. The Grievant served the grievance directly to a supervisor and notified him of the OSHA complaint.

Later in the day on January 11, the Postmaster and a labor-relations representative called the Grievant into a meeting. They told him that the Employer was investigating an email that he had sent about a work slowdown or work stoppage. The Grievant stated that he was invoking his "Garrity Rights" to not incriminate himself because he knew that it was unlawful to slow down the mail.⁵ They handed the Grievant a copy of the email, but the Grievant informed them that he couldn't read it without his glasses. After they read him the email, the Grievant told them that he didn't see anything wrong with the email. The Postmaster asked him if there was anything wrong with the comment concerning overtime, specifically how it said, "think of the overtime, yum, yum," and the Grievant responded no, that it sounded like good information that people are putting out about OSHA regulations. When the

⁴ All subsequent dates are in 2012 unless otherwise noted.

⁵ This term comes from a case called *Garrity v. New Jersey*, 385 U.S. 493 (1967), where the Supreme Court determined that public employees could not be forced, under clear threat of discipline, to violate the principles of compulsory self-incrimination when being questioned by their employer during a criminal investigation.

Employer told him that the email came from his email address, the Grievant informed them that the account was actually a Union email account to which all Union officers, including the former Union president, have access.

The Grievant asserts that right after the interview, he called the former Union president and asked him if he had recently sent any emails from that particular Union email account. The former Union president confirmed that he had sent the email in question. The Grievant then printed off the AOL account information page showing that the Union email accounts are registered to the former Union president, and quickly presented this to the Employer along with a prepared letter stating that the former Union president had sent the email.

On January 24, the Employer called the Grievant in for a second interview about the email. The Grievant once again invoked his “Garrity Rights,” asked if the Employer had contacted the former president, and said that the former president had sent the email.

On February 14, the Postmaster issued the Grievant a 30-day Notice of Removal effective March 25. This was the first discipline ever taken against him. The Grievant asked if the Postmaster had called the former Union president, and the Postmaster replied that they did not feel that it was necessary. The removal letter set forth in detail various information that the Employer had received from employees (including Employees A and B) during its investigation, as well as the details of the January 11 and 24 interviews with the Grievant and his denials that he had been the one to send the email. It stated that, based on the evidence, they found the Grievant’s responses to be “less than truthful” and in violation of the prohibition against fraud or false statements in a government matter. The letter stated that, contrary to the Grievant’s assertion during the investigatory interviews, the conversation between the Grievant and Employee A on December 26 shows that the Grievant was aware of the email prior to the January 11 interview. It also notes that the immediacy with which the Grievant came up with an explanation after refusing to comply during the first investigatory interview caused the Employer to further doubt his credibility. The letter stated that the content of the email was clear in its intent to incite a work slowdown that would disrupt operations, and that such conduct was in violation of the no-strike provision and of such significance as to warrant removal.

The Union filed the instant charge on February 27, alleging that the Employer violated Section 8(a)(3) and (1) of the Act by issuing the Notice of Removal in retaliation for the Grievant’s Union activities. During the Region’s investigation, the Employer provided the Region with the Postmaster’s documentation form, dated February 8, concerning the Grievant’s removal. This included a “Supervisor’s ‘Just Cause’ Fact Sheet,” in which the Postmaster stated that the Grievant “intended to cause a work slowdown” and that this is a removable offense. One of the questions on the form was, “[c]ould a lesser form of disciplinary action correct the deficiency and if

not, why?” The Postmaster’s response was, “[n]o, President [Grievant’s last name] is a diehard Union employee with constant intentions of undermining the United States Postal Service.”

The Grievant also filed a grievance over his removal, and on May 30, the arbitration on that grievance was held. The Union presented the statutory issue to the Arbitrator, arguing that the Grievant’s removal was in retaliation for his Union activity, including the initial grievance the Grievant filed regarding the transport of employees and the January 11 OSHA complaint. The Union was not aware of, and the Employer did not present, the Postmaster’s “Just Cause Fact Sheet,” and so the Arbitrator was unaware of this document.

On July 23, the Arbitrator issued his decision denying the grievance. The Arbitrator concluded, based on all of the evidence presented (including his assessment of the credibility of the witnesses and the lack of corroboration of various aspects of the former Union president’s testimony), that the Grievant sent the December 24 email and was untruthful in his denials about sending it, that he was clearly instigating a work slowdown, and that he was not retaliated against for his Union activities. The Arbitrator found that there was “no evidence of any type alleging discriminatory intent on the part of the Employer,” noting that the investigative process that led to the Notice of Proposed Removal began before the Grievant filed the grievances and complaints regarding the transporting of employees. He therefore concluded that the Employer had just cause to discipline the Grievant for his misconduct. He further concluded that discharge was the appropriate discipline given the seriousness of the misconduct, which included sending the email calling for a slowdown, failing to retract or disavow the language in the email after being advised that at least one employee (Employee A) and the Employer interpreted it as calling for a slowdown, and his untruthfulness during the Employer’s subsequent investigation. In finding that the discharge was the proper penalty for such misconduct, the Arbitrator considered and rejected the Union’s evidence of disparate treatment, finding the case relied on by the Union to be distinguishable.

Action

We conclude that the Arbitrator’s conclusion that the Grievant was discharged for engaging in unprotected conduct is susceptible to an interpretation consistent with the Act and is not clearly repugnant, and that there is no reason to believe that the outcome of the arbitration would necessarily have been different if the Arbitrator had been presented with that additional piece of evidence. In these circumstances, deferral to the award is appropriate under the standards set forth in *Spielberg* and *Olin*⁶ as well as under the proposed new deferral standards set forth in GC

⁶ *Spielberg Mfg. Co.*, 112 NLRB at 1080; *Olin Corp.*, 268 NLRB at 573-574.

Memorandum 11-05.⁷ The Region should therefore dismiss the charge, absent withdrawal.

Under the current *Olin/Spielberg* standard, the Board defers to arbitral awards when: (1) all parties agreed to be bound by the decision; (2) the proceedings appear to have been fair and regular; (3) the arbitrator adequately considered the unfair labor practice issue; and (4) the award is not clearly repugnant to the purposes and policies of the Act.⁸ The "clearly repugnant" standard requires that the award not be "palpably wrong," i.e., not susceptible to any interpretation consistent with the Act.⁹

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.¹⁰

Applying the above principles here, we conclude that the Region should defer to the arbitral award. We agree with the Region that the Employer has satisfied the first two prongs of both the *Olin/Spielberg* standard and the General Counsel's proposed new standards for deferral in Section 8(a)(1) and (3) cases. The question is whether the remaining factor under both standards—that the award not be clearly repugnant—is met here where the Arbitrator was not presented with a piece of evidence relevant to resolving the unfair labor practice issue.

We conclude that the award is not clearly repugnant to the Act. After considering all of the evidence presented by both parties, including witness testimony, the Arbitrator concluded that the Grievant was not retaliated against for his Union activities and had not been treated disparately, but rather was properly discharged for instigating a work slowdown and being untruthful during the Employer's subsequent investigation. Thus, the record established, and the arbitrator concluded, that the Grievant was discharged for engaging in unprotected conduct. The Arbitrator was not presented with the Postmaster's "Just Cause Fact Sheet," in which

⁷ GC Memorandum 11-05 at 6-7.

⁸ *Spielberg Mfg. Co.*, 112 NLRB at 1082; *Olin Corp.*, 268 NLRB at 574 (1984).

⁹ *Aramark Services, Inc.*, 344 NLRB 549, 549 (2005).

¹⁰ GC Memorandum 11-05 at 6-7.

the Postmaster stated that a lesser form of disciplinary action could not correct the deficiency because the Grievant “is a diehard Union employee with constant intentions of undermining the United States Postal Service.” In the context of the Grievant’s unprotected conduct (which was the subject matter of the form on which the statement was made), the Postmaster’s statement about the Grievant’s intentions to “undermine the United States Postal Service” could easily be interpreted to mean his unprotected conduct in seeking to instigate a work slowdown and his repeated dishonesty during the subsequent investigation. So there is no reason to believe that even if the Arbitrator had been presented with this additional piece of evidence, he could not have concluded that the Grievant would have been discharged in any event due to the seriousness of his misconduct. We therefore conclude that the Arbitrator’s decision is not clearly repugnant and instead is susceptible to an interpretation consistent with the Act.¹¹

Accordingly, the Region should defer to the arbitral decision and dismiss the charge, absent withdrawal.

/s/
B.J.K.

¹¹ See *Olin Corp.*, 268 NLRB at 574.