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BCI Coca-Cola Bottling Company of Los Angeles and Wayne Abrue. Case 28-CA-022792

April 30, 2013

DECISION AND ORDER REMANDING

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On September 28, 2012, Administrative Law Judge William G. Kocol issued the attached bench decision. The Acting General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Acting General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order Remanding.

I.

This case arises from a charge filed by Charging Party Wayne Abrue in November 2009, alleging that the Respondent discharged eight employees because of their union membership and other concerted activities, and without giving the Union¹ notice and an opportunity to bargain over the discharges. The Union had grieved the discharges, however, and that grievance was still pending when Abrue filed his charge. In those circumstances, the Regional Director deferred processing of the charge under *Dubo Mfg. Corp.*, 142 NLRB 431 (1963).

On January 31, 2012, the Union and the Respondent finalized a settlement of the grievance.² Upon reviewing the settlement, the Regional Director notified the parties that he was revoking the deferral and resuming the investigation of the charge.

A complaint subsequently issued, alleging that the Respondent made threats of futility, layoffs, and other unspecified reprisals, in violation of Section 8(a)(1) of the Act, and that the layoff of the eight employees violated Section 8(a)(3) and (1). The Respondent filed a timely answer, denying that it had committed any unfair labor practices and pleading, as an affirmative defense, that a grievance concerning the layoffs was processed and re-

¹ 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).

² On March 12, 2010, the Regional Director issued a certification of results of election decertifying the Union as the employees' exclusive collective-bargaining representative.

sulted in a settlement between the Respondent and the Union.³

As the unfair labor practice hearing began, the judge expressed his view that the charge should have been deferred under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and not *Dubo*, supra. The judge recognized that the Union and the Respondent had already settled the grievance, but he decided to "allow the parties another opportunity to handle the matter under the *Collyer* doctrine." The judge then dismissed the complaint before any witnesses were called, but retained jurisdiction for the limited purpose of entertaining a motion for further consideration upon a proper showing that: (1) the dispute had not, with reasonable promptness, been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration; (2) the grievance or arbitration procedures had not been fair and regular; or (3) the grievance or arbitration procedures reached a result that was repugnant to the Act.

II.

The Acting General Counsel excepts to the judge's dismissal of the complaint, arguing that the judge should have held an evidentiary hearing and analyzed the existing settlement agreement pursuant to the postarbitral deferral standards laid out in *Spielberg/Olin*. See *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955); *Olin Corp.*, 268 NLRB 573, 574 (1984).⁴ The Acting General Counsel argues in particular that the evidence would show that the settlement agreement is repugnant to the Act because it permitted the Respondent to discipline Abrue solely for engaging in protected concerted activities and failed to award a full remedy.⁵ We agree that the judge should have held an evidentiary hearing to determine whether the settlement agreement is repugnant to the Act under *Spielberg/Olin*.

³ The settlement agreement does not purport to resolve any 8(a)(1) threat allegations.

⁴ Under *Spielberg/Olin*, the Board defers to an arbitration award when the arbitration proceedings were fair and regular, all parties agreed to be bound, the arbitral forum adequately considered the unfair labor practice issue, and the decision is not repugnant to the Act. See *Spielberg*, 112 NLRB at 1082; *Olin Corp.*, 268 NLRB at 574.

⁵ The Respondent argues that counsel for the Acting General Counsel did not object at the hearing to the judge's decision to defer under *Collyer* and did not make any offer of proof about what evidence should be allowed and for what purpose. We find no merit in this argument. Counsel for the Acting General Counsel clearly disputed the judge's *Collyer* interpretation multiple times on the record. The judge made it clear that he was not going to decide whether to defer to the settlement agreement and that he did not want to hear any arguments related to that issue. In those circumstances, a detailed offer of proof by the Acting General Counsel about evidence to be presented at the hearing was not necessary.

III.

The Board applies the *Spielberg/Olin* factors to decide whether deferral to a grievance settlement is appropriate, just as it applies those factors to arbitration awards. *Alpha Beta Co.*, 273 NLRB 1546, 1547 (1985), enfd. 808 F.2d 1342 (9th Cir. 1987); see also *Postal Service*, 300 NLRB 196, 197 (1990). This is true whether the unfair labor practice charge was deferred under *Collyer*, deferred under *Dubo*, or never deferred. See *Alpha Beta*, 273 NLRB at 1547 (finding deferral principles of *Collyer*, *Spielberg*, and *Olin* apply equally to all settlements and applying those principles to a settlement resolving an undeferred charge); *Postal Service*, 300 NLRB at 197 (applying *Spielberg/Olin* standard to settlement reached while charge was deferred under *Dubo*). Thus, contrary to the judge's suggestion, the basis for the initial deferral of a charge does not affect the standard governing the Board's review of an ensuing settlement agreement.

Moreover, when a respondent pleads deferral as an affirmative defense⁶ and the Acting General Counsel counters that the award or settlement is repugnant to the Act, the proper procedure is for the judge to hold an evidentiary hearing. This is not a hearing on the merits of the unfair labor practice charge, but is instead limited to taking evidence that will allow the judge to determine if the award or settlement is repugnant to the Act; that is, whether it is susceptible to an interpretation consistent with the Act. See *Texaco, Inc.*, 279 NLRB 1259, 1259 (1986) (inappropriate for judge initially to assess the merits of the case and decline to defer because result does not "replicate the Board's own findings, analytical framework, and remedial scheme"). If the award or settlement is not repugnant, and can be interpreted in a way that is consistent with the Act, the judge should defer to it. See, e.g., *Aramark Services*, 344 NLRB 549, 551–552 (2005); cf. *Earl C. Smith, Inc.*, 278 NLRB 664, 664 (1986).

IV.

In accordance with the foregoing principles, we shall remand this case to the judge to conduct a hearing and determine whether the settlement agreement warrants deferral pursuant to *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.* 268 NLRB 573 (1984).⁷

⁶ Deferral is an affirmative defense that is waived if not timely raised. See *SEIU United Healthcare Workers-West*, 350 NLRB 284, 284 fn. 1 (2007), enfd. 574 F.3d 1213 (9th Cir. 2009).

⁷ Because the deferral standard makes no material difference in this case, we do not pass on the accuracy of the judge's description of the consequences of the two deferral standards—*Collyer* or *Dubo*—with respect to revoking deferral and resuming processing of the charge.

We disavow the judge's characterization of a settlement agreement as a "failure to take the grievance to arbitration." Settlement is a le-

In addition, the judge shall decide the complaint allegations that the Respondent violated Section 8(a)(1) by making threats of futility, layoffs, and other unspecified reprisals. These allegations were not addressed by any party at the hearing or in the briefs, but they have not been dismissed.

ORDER

It is ordered that this proceeding is remanded to Administrative Law Judge William G. Kocol for further appropriate action as set forth above.

IT IS FURTHER ORDERED that the judge shall afford the parties an opportunity to present evidence on the remanded issues and shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. April 30, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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) of the Act (the Act) 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

gitimate resolution of a grievance and is not disfavored. See *Catalytic, Inc.*, 301 NLRB 380, 382 (1991), enfd. 955 F.2d 744 (D.C. Cir. 1992); *Alpha Beta*, 273 NLRB at 1547.

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 (the 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

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

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.

The Union had represented a unit of employees based on a certification issued by the Board in Case 28–RM–00305. 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:

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.

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 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

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.

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.]

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

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.

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

APPENDIX A

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

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.

the prior contract and that Respondent is willing to arbitrate that grievance.

MR. TOPOLSKI: So stipulated, Your Honor.

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.

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.

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.

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.

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.

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.

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