

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

**NATIONAL AUTOMATIC SPRINKLER
INDUSTRY WELFARE FUND**

Case 5-CA-97998

and

**OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 2**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Counsel for the Acting General Counsel (Acting General Counsel) hereby opposes the Motion for Partial Summary Judgment, (the Motion) filed by National Automatic Sprinkler Industry Welfare Fund (Respondent). On June 17, 2013, Respondent filed a Motion for Partial Summary Judgment with the Board, arguing that Paragraphs 6, 6(a)-(c), 11(a)-(f), 12, 13(a)-(c), 14, and 15 in the above captioned-case are subject to deferral and thus should be dismissed, and further requesting that Paragraphs 7, 8, 9, and 10 proceed to a hearing before an Administrative Law Judge (ALJ).

I. INTRODUCTION

The Motion for Partial Summary Judgment filed by Respondent is misleading in asserting that the instant charge involves Respondent's March 28, 2012 discharge of its employee, Lakishia Thomas (Thomas) and its arbitration of that discharge. Complaint issued on April 26, 2013, alleging sixteen violations of Section 8(a)(1), (3), and (5) of the Act that include threats, interrogation, surveillance, imposition of onerous working conditions, multiple disciplines issued to Thomas, and unilateral changes in cell phone and internet usage. All of the allegations involve what is alleged as retaliatory conduct that occurred after the December 26, 2012, reinstatement of Thomas. While it does not dispute the authenticity of the Respondent's

disciplinary memoranda dated January 11, 2013 and February 4, 2013, the Acting General Counsel disputes Respondent's bases for the disciplines identified in the Complaint allegations. The bases of Thomas' disciplines are genuine and material issues of fact. The Arbitrator never considered Respondent's warnings to or suspension of Thomas, unilateral changes, threats, surveillance, interrogation, or the resulting grievances, all of which post-dated Thomas' arbitration and reinstatement. The Acting General Counsel is seeking an NLRB notice posting, among other things, to remedy Respondent's pervasive conduct, which the evidence will show has discouraged employees from seeking recourse through the grievance provisions of the currently expired collective-bargaining agreement.

Acting General Counsel does not dispute that Thomas was discharged on March 28, 2012, and later reinstated on December 26, 2012, pursuant to Arbitrator Andrew M. Strongin's Decision and Award (the Arbitration). The Arbitration solely addressed the March 28, 2012 discharge of Thomas. The day after Thomas' reinstatement, the attorney for Office and Professional Employees International Union, Local 2 (the Union), sent an email to Arbitrator Strongin requesting that Strongin exercise his retained jurisdiction over the interpretation and application of the award and direct Respondent to return Thomas to a clerical position that is substantially equivalent to her previous position of receptionist. On Wednesday, February 6, 2013, Strongin issued a two-sentence Supplemental Remedial Order stating that Thomas should be reinstated to her receptionist position "effective immediately." Respondent did not comply until Monday, February 11, 2013. No evidence was heard by an arbitrator regarding the Union's contention that Thomas was interrogated, threatened, subjected to surveillance, given more onerous tasks, and subjected to numerous changes in terms and conditions of employment after December 26, 2012, and no remedy was ordered for this new, retaliatory conduct.

In its Motion, Respondent makes several arguments urging deferral, but fails to acknowledge that the Complaint alleges conduct unrelated to the 2012 discharge arbitration. The Paragraphs of the Complaint that Respondent seek to defer are not subject to post-arbitration deferral because they are not related to the facts heard by the arbitrator regarding Thomas' March 28, 2012 discharge; the facts that will be presented in the instant case are all regarding post-reinstatement, retaliatory conduct. Evidence adduced at hearing will establish that Respondent engaged in the conduct described in the Complaint Paragraphs it seeks defer so that Respondent could retaliate against Thomas due to the Union's successful arbitration regarding her March 28, 2012 discharge, and so that it could coerce unlawfully employees. Deferral of the allegations for which grievances have been filed under the expired contract is untenable in the instant case because factual evidence adduced at hearing will show that Respondent's conduct was motivated by the successful arbitration and reinstatement of Thomas. Contrary to Respondent's assertions, there are many disputed, material facts that should be presented to an ALJ.¹ Finally, Respondent's assertion that this case should be partially deferred and partially litigated before an ALJ is contrary to Board policy and law. The Acting General Counsel respectfully requests that the Motion be denied.

II. LEGAL ANALYSIS

A. The Arbitrator was not presented with nor considered the facts underlying the unfair labor practice allegations found in Paragraphs 6, 6(a), 6(b), 6(c), 11(a) 14 and 15 of the Complaint.

Contrary to Respondent's assertions, the Arbitrator did not consider any evidence concerning allegations of Respondent's January 2013 interrogation and threats, January 2013 and February 2013 surveillance incidents, and the nearly two-month failure to comply fully with the

¹ Indeed, Respondent's Answer denies all of the relevant facts alleged in the Complaint, all of which are material facts that have not been heard by a trier of fact.

arbitration award of reinstating Thomas to her former position, because each of these incidents occurred after the December 10, 2012 issuance of the arbitration decision. In *Olin Corp.*, 268 NLRB 573-574 (1984), the Board reaffirmed its commitment to the standards set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), holding that it would “defer to an arbitration award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act.” The *Olin Corp.* Board adopted a standard for deferral to existing arbitration awards, which includes, “the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.” *Supra*, at 574. Here, the unfair labor practices as alleged in the Complaint all post-date the arbitration hearing and award and not only were not but really could not have been presented to the arbitrator as they had not yet occurred.

Respondent’s reliance on *Andersen Sand & Gravel, Co.*, 277 NLRB 1204 (1985); *Chemical Leaman Tank Lines*, 270 NLRB 1219 (1984); and *Martin Redi-Mix*, 274 NLRB 559 (1985), in contending that the Arbitrator considered the unfair labor practice issues, is misplaced. Those cases, by contrast with the instant one, involve unfair labor practice issues and contractual claims that were presented fully for arbitral review. In each of those cases, an arbitrator examined witnesses, made credibility determinations, and reviewed actual evidence. In the instant case, Complaint Paragraphs 6, 6(a), 6(b), 6(c), 11(a) 14 and 15 involve conduct that occurred more than two months after Thomas’ arbitration. The Arbitrator never examined Thomas or any other witness, never made credibility determinations, and never made any findings of fact as to these particular Complaint Paragraphs. In its Motion, Respondent even concedes that the Arbitrator never considered evidence concerning Respondent’s threats and that the Arbitrator’s supplemental decision does not address those threats. Yet, Respondent contends

that the parties' email exchanges about Respondent's retaliatory conduct towards Thomas after her reinstatement, and the Arbitrator's two-sentence supplemental decision instructing Respondent to put her in a receptionist position, constitute the kind of in-person examination of witnesses and evidence by a trier of fact contemplated by *Andersen Sand & Gravel, Co.*, *Chemical Leaman Tank Lines*, and *Martin Redi-Mix*, supra. Clearly they do not constitute such evidence.

As to Complaint Paragraphs 11(a) and 15, Respondent specifically urges deferral because it asserts that the February 6, 2013 supplemental decision addressed Respondent's failure to properly reinstate Thomas. Deferral is unwarranted where an employer demonstrates a propensity to retaliate against an employee for grievance filing activity. Where a respondent engages in repeated reprisals for grievance activity the, "pattern of hostile conduct is fundamentally at odds with the Act and the policy behind deferral." *Postal Service*, 290 NLRB 120 (1988). In the instant case, evidence adduced at hearing will demonstrate that Respondent's repeated and unrelenting threats and other acts were in response to Thomas' successful arbitration. Respondent's chronic conduct prompted the Union to seek the supplemental decision to effectuate fully Thomas' reinstatement remedy from the earlier arbitration of the discharge grievance. The retaliatory conduct that is alleged in the Complaint including all the paragraphs Respondent would have deferred has by no means been remedied by the Arbitrator, nor could it be, since it involves conduct far outside the grievance that was arbitrated. The supplemental decision followed over a month and a half of threats, interrogation and the filing of post-contract expiration grievances, and only addressed the definition of what the Arbitrator meant by "grievant shall be reinstated to her former position." The supplemental decision in no way referenced, relied on, or remedied the retaliation that occurred subsequent to Thomas'

reinstatement to work or to her former position. The Union's only alternative under such circumstances was to turn to the Board processes, when, as here, the arbitrator was not presented with the facts or issues that are raised in the current Complaint. *National Linen Service*, 293 NLRB 992, 994 (1989) (deferral is not appropriate when the arbitration did not resolve the factual issues raised in the complaint).

B. Respondent Committed Unlawful Conduct after the Collective-Bargaining Agreement Expired.

The Acting General Counsel agrees that the collective-bargaining agreement expired on December 31, 2012. What Counsel for the Acting General Counsel disputes is that the conduct alleged in the Complaint occurred during the life of the contract; it did not. Two of the grievances were filed on February 5, 2013 and one was filed on February 8, 2013, after the expiration of the agreement. Of her disciplines, the only incident that happened before the contract expiration was Thomas' December 27 discipline, which she was unaware of until January 11, 2013 when she received a written warning.

In its argument that the arbitration provision of the collective-bargaining agreement survived expiration, Respondent primarily relies on holdings in *United Chrome Prods., Inc.*, 288 NLRB 1176 (1988) and *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987). Respondent claims the Complaint allegations concern a dispute that arose during the life of the collective-bargaining agreement. In *Indiana & Michigan Electric Co.*, the Board clarified the scope of the postexpiration duty to arbitrate grievances within the meaning of *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977) by stating, "[u]nder *Nolde*, the parties are bound to arbitrate such disputes if they are over rights 'arising under' the expired contract, and the contract does not negate expressly or by clear implication the presumption favoring postexpiration arbitration of such disputes." *Indiana & Michigan Electric Co.*, supra, at 60. *United Chrome Prods. Inc.*

involved seniority rights, which were “accrued over the life of the contract.” *Indiana & Michigan Electric Co.* is factually similar to the instant case in that the grievances in that case and in the instant case did not arise under the expired contracts. There, the Board noted that certain rights, such as “the right to be [disciplined or] discharged for just cause, does not ‘arise under’ [the] expired agreement.” *Id.*, citing, *Teamsters v. C.R.S.T.*, 795 F.2d 1400, 1403-1404 (8th Cir. 1986). In the instant case, evidence will be adduced at hearing to establish that the post arbitration incidents that gave rise to the Complaint Paragraphs Respondent seeks to defer occurred after the December 31, 2012 expiration of the collective-bargaining agreement and after Thomas’ December 26, 2012 return to work. They do not relate to Thomas’s arbitration for her discharge except in one significant respect: evidence adduced at hearing will show that Thomas’s arbitration activity motivated Respondent’s conduct. Deferral of any of the Complaint Paragraphs would be inappropriate because since the collective-bargaining agreement is now expired, there is nothing to which the parties can defer the pending grievances.²

C. Partial Summary Judgment should not be granted due to Respondent’s open hostility to Thomas’ arbitration activity and the existence of genuine issues of material fact in Complaint Paragraphs 11(b) through (f), 12, 13(a) through (c), and 15.

The Acting General Counsel strongly disputes Respondent’s claim that Respondent has shown no animosity to employees. The Acting General Counsel will present evidence of pervasive Employer animus toward employees, as well as evidence that Respondent’s post-reinstatement conduct is independent of the factual issues underlying the arbitration that led to Thomas’ December 26, 2012 reinstatement. In the instant case, genuine issues of material fact do exist. Respondent asserts as “undisputed facts” that its Administrator’s version of the conduct

² In addition, contrary to the Respondent’s assertion that it eventually complied with the 2012 discharge arbitration grievance award, demonstrating its willingness to arbitrate existing grievances, its pattern of retaliation subsequent to reinstatement tells a different story.

resulting in Thomas' discipline and suspension is not in contention. Counsel for the Acting General Counsel disputes Respondent's versions of events, and these events go to the heart of the retaliatory conduct alleged. Thus, contrary to Respondent's assertions, there are material facts in dispute, which should be heard and decided by an Administrative Law Judge, who can assess the credibility of witnesses. These contested material facts, including interrogation, threats and discipline, all occurred post-reinstatement and have never been presented to any trier of fact.

D. The Board will not defer one issue if it is closely related to another issue that is not deferrable.

In its Motion, Respondent improperly seeks to defer Complaint Paragraphs 6, 6(a)-(c), 11(a)-(f), 12, 13(a)-(c), 14, and 15, but proceed to hearing on Complaint Paragraphs 7, 8, 9, and 10, even though the Complaint Paragraph it seeks to defer are related to the ones on which it suggests the parties go to hearing. Under Board precedent it is well-settled that deferral of one allegation that is closely related to another allegation that is not being deferred should not be granted. The Board has followed this precedent based on that notion that litigation of related issues in two forums would be imprudent. See *Clarkson Industries*, 312 NLRB 349, 352 (2012). Here, as described above, there is no doubt that the allegations are closely related and that separating them for litigation in two forums "makes no economic sense." *Id.*

In its argument that the partial summary judgment can be granted while deferring some of the allegations and going to trial on yet others, Respondent relies on *General Dynamics Corp.*, 271 NLRB 187, 190 (1984). That case is factually distinguishable from the instant case. *General Dynamics Corp.* involved a shop steward's grievances concerning his two suspensions, during the life of the contract. There, the shop steward filed two grievances concerning his suspension and filed a charge with the NLRB, which the Region deferred to the parties' grievance-arbitration procedure. The union grieved the suspensions through the first four steps, and

ultimately, the parties decided to arbitrate the matter. The shop steward subsequently chose to withdraw his grievances in order to pursue an unfair labor practice claim through the NLRB in conjunction with its case on other pending allegations. In finding deferral was appropriate solely as to the suspension allegations, the *General Dynamics* Board noted that the shop steward's attempt to end his grievance pre-arbitration was improper and inconsistent with the purpose and intent of Board's deferral doctrine. *Supra*, at 187-189. In the instant case, the Region did not find deferral appropriate, and Thomas has not attempted to withdraw any grievances. The Union sought recourse through the Board processes due to Respondent's repeated hostility to Thomas' grievance and arbitration activities regarding her March 2012 discharge, and the allegations are closely related to those that Respondent agrees should be litigated through the Board's processes. Although Respondent asserts that it is willing to extend the arbitration procedure for some of the 16 allegations contained in the Complaint, if fails to acknowledge that such a piecemeal approach would separate out interrelated allegations that must be heard together.

For all of these reasons, the Board should dismiss the Motion for Partial Summary Judgment and allow the case to proceed to hearing so an ALJ can hear the facts, assess witness credibility, and make findings of fact and law.

III. CONCLUSION

Respondent has not provided a sufficient basis on which to dismiss or defer Paragraphs 6, 6(a) through (c), 11(a) through (f), 12, 13(a) through (c), 14, or 15. Respondent's arguments are based on a flawed premise in which Respondent fails to acknowledge that the Complaint Paragraphs for which Respondent seeks deferral are alleged to have involved threats, interrogation, discipline, and other post-arbitral conduct motivated by the Union's success in obtaining an arbitration remedy for Thomas. There are substantial and material facts in issue,

and no arbitrator has heard them or issued an opinion and award on said evidence. Accordingly, as genuine issues of material fact exist, Respondents Motion for Partial Summary Judgment should be denied.

Dated at Washington, D.C. this 24th day of June 2013.

Respectfully submitted,

/s/ Synta E. Keeling

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CERTIFICATE OF SERVICE

I hereby certify that ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT in National Automatic Sprinkler Industry Welfare Fund, Inc., Case 5-CA-097998, was served via E-Mail on this 24th day of June 2013, on the following:

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