

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

RALPHS GROCERY COMPANY

and

Case 21-CA-039867

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 324

COUNSEL FOR THE ACTING GENERAL COUNSEL'S LIMITED
CROSS-EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION
AND ARGUMENT IN SUPPORT OF LIMITED CROSS-EXCEPTION

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I. INTRODUCTION

On April 30, 2013, Administrative Law Judge Jeffrey D. Wedekind (ALJ) issued his Decision in this case, making findings of fact and conclusions of law that:

- The arbitrator's decision that Ralphs Grocery Company (Respondent) had just cause to terminate employee Vittorio Razi (Razi) for insubordinately refusing to immediately submit to a drug and alcohol test without first consulting with a representative of the United Food and Commercial Workers (the Union), was clearly repugnant to the Act, and deferral to the decision was therefore inappropriate;
- By requiring Razi to immediately submit to such a test as part of an investigation into his behavior, notwithstanding his request to exercise his rights under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) to consult with his Union representative beforehand, Respondent violated Section 8(a)(1) of the Act; and
- By suspending and subsequently terminating Razi because of his refusal to submit to said test without first consulting with his Union representative, Respondent violated Section 8(a)(1) of the Act.

On May 28, 2013, Respondent filed its exceptions to the ALJ's Decision and brief in support of those exceptions, and Counsel for the Acting General Counsel's (General Counsel) answering brief to these exceptions is filed concurrently herewith.

II. LIMITED CROSS-EXCEPTION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel hereby files the following limited cross-exception to the ALJ's Decision:¹

To the ALJ's failure to address General Counsel's alternative argument that the *Olin* post-arbitral deferral standard should be modified to shift the burden to the party seeking deferral. (ALJD p. 10 fn. 21)

The ALJ found that the Arbitrator's Award upholding the termination of Razi was repugnant to the Act under established Board precedent as established *Spielberg Mfg.* 112 NLRB 1980 (1955); and *Olin Corp.*, 286 NLRB 573 (1984). However, he declined to address an alternative argument propounded by General Counsel that the standard should be modified, inasmuch as he felt it would not have led to a different result in his Decision.

III. PROCEDURAL HISTORY AND FACTS

Vittorio Razi was a long-time employee of Respondent and a member of the bargaining unit represented by the Union who was suspended on May 18, 2011, and subsequently terminated on May 19, 2011, for refusing to submit to a drug test without first consulting with his Union representative. The Union's unfair labor practice charge was deferred by Region 21 of the National Labor Relations Board under *Collyer Insulated Wire*, 192 NLRB 837 (1971) pending pursuit of the Union's grievance to arbitration, despite the Union's appeal of the deferral to the Acting General Counsel. On about February 1, 2012, the grievance was arbitrated and Razi's termination was

¹ All citations to the ALJ's Decision will be referred to as "ALJD," followed by the page and line number.

upheld, whereupon the Union requested that the Region not defer to the Arbitrator's Award because it was repugnant to the Act. Consequently, the Region issued complaint against Respondent alleging violations of Section 8(a)(1) and (3), and the parties entered into a joint motion to waive a hearing before an ALJ and have a decision issue based solely on the Arbitrator's Award, the transcript of the arbitration hearing, and the briefs of the parties.

The salient facts from the above are summarized as follows:

On May 18, 2011, after working many overtime hours, Razi was summoned by Store Director Henselman (Henselman) to her office as a result of reports to her and her own investigation into his behavior earlier that day. (Tr. 51; 53-7; 68-9).² Henselman had already been directed by her superiors to ask Razi to submit to a drug test "for cause," based on his observed behavior, but when she advised Razi of this, he insisted on speaking to his Union representative. (Tr. 59; 85-60; 88) Henselman responded that he had no right to consult with the Union, and informed him that his refusal to take the test would be considered an "automatic positive" and that he could be fired for insubordination. (Tr. 60; 88; 93; 225-6)

After finally agreeing to allow Razi make a phone call to the Union, where he was unable to reach anyone, Razi was again instructed to submit to a drug test or be terminated for insubordination; but Razi continued to insist on speaking with a Union representative first. (Tr. 61, 105-6; 226-231; 255-7; 264) After some back-and-forth in

² As noted above, facts summarized herein are contained in the Transcript and Exhibits of the Arbitration hearing stipulated to by the parties, and citations to the Transcript are referred to as "Tr.," followed by the page number. Citations to the Arbitrator's Award, which was attached to the parties' stipulation as Exhibit 11, are referred to herein as Exhibit 11, followed by the page number.

this vein, Henselman again consulted with her superiors, who advised her to just suspend Razi and then terminate him. (Tr. 63; 92-6). The following day, May 19, 2011, Razi was terminated for insubordination and refusal to take a drug test, which refusal was considered an automatic “positive” result. (Tr. 236-8)

The Arbitrator concluded the May 18, 2011 meeting was not “investigatory,” and thus Razi had no right to consult with a Union representative because Henselman did not ask him any actual questions other than whether he would submit to the drug test. (Ex. 11 at p.9) Thus, he concluded, the sole purpose of the meeting was to ask whether Razi would comply with Respondent’s directive to submit to the test. (Ex. 11 at p.19-20) The Arbitrator further concluded that Respondent was not obligated to wait “indefinitely” for Razi to attempt to reach a Union representative, particularly inasmuch as Respondent had a reasonable suspicion that Razi was impaired and was therefore entitled to require his timely submission to a drug test. (Ex. 11 at p. 24) Based thereon, the Arbitrator concluded that Razi was properly terminated for insubordination for failing to follow a direct, clear, and reasonable order, specifically his “persistently, repeatedly, and adamantly” refusing to submit to the drug test. (Ex. 11 at pp. 24-6)

The Union requested that the Region not defer to the above Award, and, after issuance of complaint by the Regional Director, the parties subsequently stipulated the record to the ALJ for a decision based thereon.

In his decision, the ALJ first addressed the threshold issue of whether the Board should defer to the Arbitrator’s Award upholding Razi’s termination. In applying the Board’s established standards in *Spielberg Mfg. Co., supra*, and *Olin Corp., supra*, the

ALJ concluded that there was no dispute that the proceeding met the first three standards for deferral set out in *Olin*: that the parties agreed to be bound by the decision of the Arbitrator; that the proceedings appeared to be fair and regular; and that the arbitrator adequately considered the unfair labor practice issue. Moreover, the ALJ concluded that the contractual issue presented was factually parallel to the unfair labor practice issue. However, for the reasons set out in his decision, the ALJ found that the Arbitrator's Award upholding Razi's termination was clearly repugnant to the Act. (ALJD p.2 at 30-33) In this regard, the ALJ concluded that deferral to the Arbitrator's Award was inappropriate, and then found that the meeting of May 18, 2011, was an investigatory meeting at which an employee's *Weingarten* rights attached, and that Respondent violated the Act when it terminated Razi for refusing to submit to the drug test without being able to first consult with his Union representative. (ALJD p. 7 at 15-17; p. 10 at 3-4; p. 10 at 29 – p. 11 at 2)

In light of the foregoing conclusion, the ALJ found it was unnecessary to address General Counsel's alternative argument that the *Olin* post-arbitration deferral standards should be modified to shift the burden to the party seeking deferral, implying that addressing the proposed new deferral framework would not lead to a different result. (ALJD p. 10 at fn. 21)

IV. ARGUMENT

General Counsel urged in his brief to the ALJ that the Board consider modifying its approach to post-arbitral deferral and adopt a new standard designed to give greater weight to safeguarding employees' statutory rights in Section 8(a)(1) and (3) cases. As

noted above, the ALJ did not address this proposed new approach inasmuch as he had already rejected the Arbitrator's Award under the existing *Olin* standard.

In declining to specifically address General Counsel's alternative standard, the ALJ cited two recent Board cases where this issue arose: *IAP World Services*, 358 NLRB No. 10 (2012), (declining to address the General Counsel's proposed new deferral framework as it would not have led to a different result); and *Shands Jacksonville Medical Center*, 359 NLRB No. 104 (2013)(finding that the arbitrator was not "palpably wrong" in declining to award a reinstated employee backpay because of misconduct during the arbitration hearing). Neither of these cited cases discusses the merit of the proposed alternative standard, however.³

Pursuant to Section 10(a) of the Act, the Board has a statutory mandate to protect individual rights and to protect employees from discharge of other forms of discrimination in retaliation for their protected activities, and that mandate cannot be waived by private agreement or dispute-resolution agreement. Although portions of the Act favor the private resolution of labor disputes through processes agreed upon through collective bargaining, the Board should not abdicate its obligation to protect individual rights whenever employees and unions agree to a grievance-arbitration process.⁴

³ In *IAP World Services*, *supra*, ALJ Kocol considers and comments on the proposed modified deferral standard, but the Board declined to consider the modification inasmuch as it would not lead to a different result in the case. 358 NLRB No. 10, Slip Op. at p. 1

⁴ E.g., *Taylor v. NLRB*, 786 F.2d 1516, 1521-2 (11th Cir. 1986) ("by presuming, until proven otherwise, that all arbitration proceedings confront and decide every possible unfair labor practice issue, *Olin Corp.* gives away too much of the Board's responsibility under the NLRB."); *Bayard v. NLRB*, 505 F.2d 342, 347 (D.C. Cir. 1974) (the arbitral tribunal must have clearly decided the unfair labor practice issue on which the Board is later urged to give deference.)

Recent Supreme Court precedents concerning federal court jurisdiction over statutory claims that are also subject to arbitration agreements hold that courts are ousted of jurisdiction only where the arbitrator is authorized to decide the statutory issues and actually adjudicates such issues in a manner consistent with applicable statutory principles and precedent. *14 Penn Plaza, LLC v. Pyett*, 129 S.Ct. 1456, 1469-71 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). General Counsel argues that this precedent and its rationale are compelling in determining the appropriate degree of deference that the Board should give arbitral awards.⁵

Under this proposed new approach, 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, as under the *Olin/Spielberg* standard, defer to the arbitrator's award unless it is clearly repugnant to the Act.

In the instant case, it is clear based upon the stipulated record that the Arbitrator failed to correctly enunciate the applicable statutory principles set forth in *Weingarten*, and did not apply those principles in upholding Razi's termination.

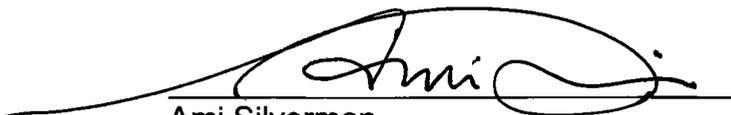
V. CONCLUSION

Based upon the foregoing, General Counsel respectfully requests that the Board adopt a new framework for considering post-arbitral deferral cases in accordance with

⁵ General Counsel respectfully requests that the Board take administrative notice of General Counsel Memorandum 11-05 dated January 20, 2011, entitled *Guidelines Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3)*, and the comprehensive arguments set forth therein.

GC Memorandum 11-05, and modify the ALJ's decision to include this analysis, as well as the extant analysis under *Olin*, supra, to conclude that the Arbitrator's Award was repugnant to the Act and should not be deferred to.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ami Silverman", is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Ami Silverman,
Counsel for the Acting General Counsel
National Labor Relations Board, Region 21

DATED at Los Angeles, California, this 11th day of July, 2013.

STATEMENT OF SERVICE

I hereby certify that a copy of **Counsel for the Acting General Counsel's Limited Cross-Exception to the Administrative Law Judge's Decision and Argument in Support of Limited Cross-Exception** was submitted by e-filing to the National Labor Relations Board on July 11, 2013.

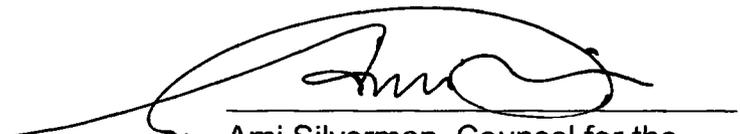
The following parties were served with a copy of said documents by electronic mail on July 11, 2013.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ami Silverman", is written over a horizontal line. The signature is fluid and cursive.

Ami Silverman, Counsel for the
Acting General Counsel
National Labor Relations Board

Dated at Los Angeles, California this 11th day of July, 2013