UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Ralphs Grocery Company	**Case No. 21-CA-039867**
and	
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 324	

Ralphs Grocery Company's Answering Brief to Acting General Counsel's Limited Cross Exception

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I.
INTRODUCTION

For nearly sixty years, the Board has deferred to arbitrators' decisions unless they are clearly repugnant to the National Labor Relations Act. *See, e.g.*, *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955); *see also Olin Corp.*, 268 NLRB 573 (1984); *United Parcel Serv.*, 305 NLRB 433 (1991) (even if the Board would not reach the same conclusions as the arbitrator, it still requires deferral unless the Arbitrator's conclusion was "palpably wrong as a matter of law"); *IAP World Services*, 358 NLRB No. 10, at *2 (2012) (applying "the *Spielberg* doctrine"). The Board has repeatedly explained that deferral is necessary to "recognize the arbitration process as an important aspect of the national labor policy favoring private resolution of labor disputes." *Olin Corp.*, 268 NLRB at 574.

The Counsel for the Acting General Counsel (the "AGC") now argues that the Board should adopt new standards and reverse decades of Board precedent. Importantly, under the AGC's proposed standards, the Board would essentially conduct a *de novo* review, in contravention of both the letter and spirit of long standing Board precedent requiring deferral.

The AGC raised the proposed standards before the Administrative Law Judge (the "ALJ"), but the ALJ declined to rule on this question after concluding that it was unnecessary to do so. (ALJ Decision at 10.) The AGC has filed a cross exception arguing that the ALJ should have addressed this argument that the deferral standards be modified. (Acting General Counsel's Limited Cross Exception at 3 (the "Cross Exception").)

The Cross Exception should be denied for three reasons. First, the ALJ was correct to decline to consider the issue.[1] Second, the proposed standards should be

[1] For the reasons stated in Ralphs Exceptions filed in this matter, the ALJ should have deferred to the Arbitrator's findings.

rejected as they would allow *de novo* review of an arbitrator's decision when the parties agreed to arbitrate the issues. And third, the AGC has made no argument as to why the proposed standards are necessary to protect rights under the National Labor Relations Act.

II.
RELEVANT FACTS

Ralphs' terminated Mr. Razi in May, 2011. The Union filed a Charge on July 1, 2011. The matter of Mr. Razi's termination was arbitrated on February 1, 2012, before Arbitrator Charles A. Askin. The Union lost the arbitration, with Arbitrator Askin concluding that Ralphs had just cause under the collective bargaining agreement to terminate Mr. Razi. (*See generally* Joint Stipulation of Facts ("Stip."), Exh. 11.) The parties stipulated to the facts before the ALJ, rather than holding an evidentiary hearing. (*See* Stip.) The ALJ refused to defer to the arbitrator under the Board's current standards. (ALJ Decision at 10.) In light of his refusal to defer under current standards, the ALJ concluded it was unnecessary to consider the AGC's proposed standards. (*Id.* at 10 n.21.) The AGC filed a Cross Exception challenging this conclusion.

III.
ARGUMENT

A. In Light Of The ALJ's Refusal To Defer, It Was Unnecessary To Reach The Issue Of The Proposed Standards.

The ALJ declined to consider the AGC's proposed standards because doing so would not result in a different outcome and was therefore unnecessary. (ALJ Decision at 10 n.21.) This was appropriate given that the Board itself has declined to consider different deferral standards when doing so would not lead to a different result in the case. *See IAP World Services*, 358 NLRB No. 10, at *2 n.1; *Shands Jacksonville Med. Ctr., Inc.*, 359 NLRB No. 104, at *4 n.3 (2013).

B. The Board Should Reject The AGC's Proposed "Deferral" Standards Because They Would Make Agreed-Upon Arbitration Meaningless.

The "deferral" standards proposed by the AGC would require Ralphs to show that the arbitrator correctly enunciated the applicable statutory principles and correctly applied them in deciding the issue. (*See* Cross Exception at 8; *see also* AGC Memorandum 11-05 (January 20, 2011).)[2] ("AGC Memo"). These are not "deferral standards" at all; the proposed standards do not require any deference and essentially allow *de novo* review. *See, e.g., Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1188 (9th Cir. 2011) (no deference is given to the lower court's determination in *de novo* review). If every arbitration award is subject to *de novo* review, the arbitration *that was agreed to by the parties* becomes completely meaningless and a waste of the resources of both employer and union. (Stip. Exhibit 10, Retail Food and Meat Agreement (Joint Exhibit 1 attached to Exhibit 10) (collective bargaining agreement containing agreement to arbitrate disputes).) This contravenes Board precedent enunciated in *Olin* and *United Parcel Services*, and undermines Board and United States Supreme Court precedent requiring respect of parties' agreement to arbitrate and the preference for arbitration in labor disputes. *See, e.g., American Express Co. v. Italian Colors Restaurant*, ___ U.S.___, No. 12-133, 2013 WL 3064410, at *4 (June 20, 2013); *Steelworks v. American Mfg. Co.*, 363 U.S. 564 (1960); *Collyer Insulated Wire*, 192 NLRB 837, 842-43 (1971) ("We believe it to be consistent with the fundamental objectives of Federal law to require the parties . . . to honor their contractual obligations rather than, by casting (their) dispute in statutory terms, to ignore their agreed-upon procedures.").

Cases cited by the AGC are not to the contrary. (Cross Exception at 8.) These cases, *Gilmer* and *Pyett,* stand only for the proposition that the arbitrator must have

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[2] AGC Memorandum 11-05 (January 20, 2011), of which the AGC seeks administrative notice, purports to contain two steps. First, the party urging deferral must make the showing discussed in the text. Second, if the first step is satisfied, the Board should defer unless the award is "clearly repugnant" to the Act. The award should be considered clearly repugnant if it reached a result that is "palpably wrong," i.e., the arbitrator's award is not susceptible to an interpretation consistent with the Act. As discussed in Ralphs' Exceptions, the award was not palpably wrong.

authority to consider the statutory claim, but they do not support an additional inquiry as to whether "the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue." (AGC Memo. 11-05, at 7.) Instead, neither opinion discusses the scope of review of arbitral decisions in any detail, and, in fact, *Pyett* refers to the scope of review as "limited." *See 14 Penn Plaza, LLC v. Pyett*, 129 S. Ct. 1456 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Further, the Supreme Court in *Pyett* held that an employer and union can agree to the mandatory arbitration of statutory age and other discrimination claims, and there is no logical basis on which to distinguish statutory claims arising under the Act. Indeed, as the Supreme Court more recently explained, courts must "rigorously enforce" arbitration agreements, and that principle holds "true for claims that allege a violation of a federal statute, unless the FAA's mandate has been 'overridden by a contrary "congressional command."'" *American Express Co.*, ___ U.S.___, 2013 WL 3064410, at *4 (citing *CompuCredit Corp. v. Greenwood*, 132 Sup. Ct. 665, 667 (2012)).

C. The AGC Does Not Explain Why Heightened Standards Are Necessary To Further Any Rights Protected By The Act.

The AGC does not explain why the heightened standards are necessary. The AGC argues in the Cross Exception that the Board "has a statutory mandate to protect individual rights" but fails to explain why these so-called deferral standards are necessary to effectuate the mandate. (Cross Exception at 7.) Nor does the AGC provide further guidance in Memorandum 11-05, in which the AGC argues that "the Board's *Olin* standards tolerate substantive outcomes from arbitrators that differ significantly from those that the Board itself would reach if it considered the matter de novo." (AGC Memo. 11-05 at 5.) But the AGC does not provide any examples of these outcomes where the current standards were insufficient to protect rights, despite the fact that *Olin* has been in place for decades and, if the statement is true, there should be dozens of examples readily available. In sum, the AGC has provided no reason to

believe that the current standards are inadequate to protect employees or that the proposed standards, lacking any deferral at all, are necessary to do so.

IV.
CONCLUSION

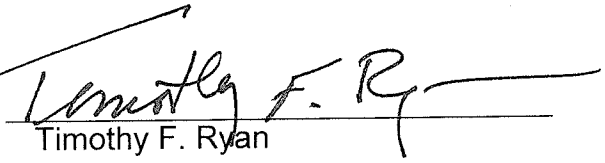
The Board should retain its decades-long precedent, respect the parties' agreement to arbitrate, and reject the Acting General Counsel's recommended "deferral" standard.

The AGC's Cross Exception should be denied.

Respectfully submitted,

Dated: July 25, 2013

MORRISON & FOERSTER LLP

By: 
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STATEMENT OF SERVICE

I hereby certify that a copy of

Ralphs Grocery Company's Answering Brief to Acting General Counsel's Limited Cross Exceptions

was served by electronic mail on July 25, 2013:

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Dated at Los Angeles, California this 25th day of July 2013