JD(ATL)-25-13
Highland, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

UNITED STATES POSTAL SERVICE

and **CASE 13-CA-078058**

CATHERINE BODNAR, an Individual

Helen I Gutierrez, Esq.,
for the Acting General Counsel.
Roderick D. Eves, Esq.,
for the Respondent.
Ms. Catherine Bodnar,
for the Charging Party.

DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge. The Acting General Counsel argues that the Board should not defer to an arbitrator's decision which ordered the Respondent to reinstate the Charging Party with backpay, but which did not require the backpay to include overtime. Concluding that the arbitral award is not "palpably wrong," I recommend that the complaint be dismissed.

Preliminary Matters

The parties submitted this case by stipulated record, waiving a hearing. After receiving the stipulation, I issued an Order setting an August 30, 2013 deadline for receipt of briefs. The Acting General Counsel filed a timely brief. The Respondent moved that its brief, not submitted before the deadline, nonetheless be received. The Acting General Counsel opposes this motion, which I deny. On the merits of this case, I am ruling in Respondent's favor. Should the Acting General Counsel appeal, Respondent will have the opportunity to brief the case before the Board.

Based on the parties' stipulation, I find the following facts:

The Respondent, the United States Postal Service, is subject to the Board's jurisdiction by virtue of Section 1209 of the Postal Reorganization Act of 1970. The Charging Party, Catherine Bodnar, works for Respondent and is an employee in the bargaining unit represented by the National Association of Letter Carriers and its Branch No. 580 (the Union), which is a labor organization within the meaning of Section 2(5) of the Act.

On about February 27, 2012, Bodnar attended a meeting with, and in the office of, Sharon Swart, a supervisor and agent of Respondent within the meaning of Sections 2(11) and 2(13) of the Act, respectively. Bodnar had reasonable cause to believe that this interview would result in disciplinary action being taken against her, and requested that a union representative be present. Swart denied this request for union representation, but then asked Bodnar questions, which Bodnar refused to answer.

On March 22, 2012, Respondent issued a notice of removal to terminate Bodnar's employment effective April 27, 2012, because Bodnar had refused to answer questions in the absence of union representation. The parties expressly stipulated that this action violated Section 8(a)(1) of the Act. I so find.

On April 3, 2012, Bodnar filed an unfair labor practice charge against Respondent, alleging that her discharge violated the Act. She also filed a grievance under the procedure established in the collective-bargaining agreement. Pursuant to the Board's policy in *Collyer Insulated Wire*, 192 NLRB 837 (1971), providing for the deferral of certain unfair labor practice charges while the parties tried to resolve the same underlying matter through a contractual grievance procedure, the Regional Director deferred further processing of the charge on June 4, 2012.

On October 11, 2012, the Union, Respondent. and Bodnar litigated the case before Arbitrator Karen H. Jacobs, who issued her decision on November 27, 2012. It concluded:

> The Postal Service did not carry its burden of proof. It did not have just cause to issue discipline to Grievant for not participating in Manager Swart's official Postal Investigation on February 27, 2012. The charges in the March 21, 2012, Notice of Removal are dismissed, and shall be expunged from grievant's record. Grievant shall be restored to her former position and made whole with full back pay and benefits. The remedy requested included overtime pay. There is no evidence that Grievant would have been working overtime had she been working during this time. Overtime is not included in this award.

The Acting General Counsel does not allege that Respondent has failed or refused to comply with the arbitrator's award, and nothing in the stipulation indicates any failure to satisfy its requirements. Accordingly, I conclude that Respondent has restored the Charging Party to her former position, expunged the notice of removal from her record, and paid her full back benefits and full backpay based upon the regularly-scheduled hours she would have worked.

Nonetheless, the Acting General Counsel, by the Regional Director for Region 13, issued a complaint against Respondent on May 14, 2013, and amended that complaint on July 9, 2013. Although the Board defers to arbitrators decisions which meet the standards set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and subsequent cases, the government argues that the decision of Arbitrator Jacobs does not.

The sole issue to be decided here concerns whether the arbitrator's decision meets the Board's *Spielberg* standards. If it does, the complaint should be dismissed.

Analysis

Under the *Spielberg* precedents, the Board will defer to an arbitrator's decision if (1) all parties had agreed to be bound by the decision of the arbitrator; (2) the proceedings were 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. In the present case, no one disputes, and I find, that all parties had agreed to be bound by the arbitrator's decision that the proceedings were fair and regular, and that the arbitrator adequately considered the unfair labor practice issue.

The sole issue concerns whether the arbitrator's decision meets the fourth requirement. The Acting General Counsel argues that it was clearly repugnant to the Act. The following principles will guide my consideration of this issue.

The party opposing the award has the burden to show that deference to an arbitration decision is inappropriate. *Turner Construction Co.*, 339 NLRB 451 (2003). This burden is a heavy one, and the Board will not lightly set aside an arbitrator's resolution of an unfair labor practice issue where the contractual issue was factually parallel, and the arbitrator was presented generally with the facts relevant to the unfair labor practice issue. *Kvaerner Philadelphia Shipyard*, 346 NLRB 390 (2006)

The Board will find deferral inappropriate under the clearly repugnant standard only when an arbitrator's award is "palpably wrong," i.e., is not susceptible to an interpretation consistent with the Act. *Motor Convoy, Inc.*, 303 NLRB 135 (1991); *Olin Corp.*, 268 NLRB 573 (1984).

Here, the Acting General Counsel opposes the award and therefore bears the heavy burden of showing that deference to the arbitrator's decision is inappropriate. In urging such a conclusion, the Acting General Counsel's brief argues as follows:

> The Board has found an award or settlement is repugnant to the Act if the grievant was solely engaged in protected activity and the award or settlement did not provide for a full remedy, including backpay. See, e.g., *Cone Mills Corp.*, [291 NLRB 661, 663-664 (1990)]. Deferral to such an award would have the effect of penalizing employees for engaging in those protected activities that the arbitrator found precipitated her discharge, a result which is plainly contrary to

> the Act. Id at 667. By denying Ms. Bodnar the overtime that she would have earned but for Respondent's unlawful discharge of her, the arbitration award does not make her whole, and is thus repugnant to the Act.
>
> Here, although the arbitrator found that the Respondent had no just cause for issuing discipline to Ms. Bodnar for refusing to participate in a postal investigation and ordered Respondent to reinstate Ms. Bodnar to her former position and that she be made whole with full back pay and benefits, the Arbitrator allowed Respondent to continue to penalize Ms. Bodnar by denying her overtime. The determination that Ms. Bodnar was not entitled to overtime was based solely on the fact that the union requested overtime as part of its remedy but presented no evidence to substantiate to the arbitrator that she would have worked overtime. The arbitrator fashioned her own reasoning for continuing to penalize Ms. Bodnar by denying her overtime as the local practice was not to present evidence of overtime eligibility at the arbitration. The Arbitrator's award is not susceptible to an interpretation consistent with the Act and thus fails the *Olin/Spielberg* deferral standard supra. Based thereon, General Counsel urges that the Administrative Law Judge not defer to the Arbitrator's award.

In this instance, I must quibble with the following words in the argument quoted above: "The determination that Ms. Bodnar *was not entitled* to overtime." (Emphasis added.) From Arbitrator Jacobs' decision, it is not clear that she never made a determination concerning whether the Charging Party was or was not entitled to overtime. Rather, the arbitrator, noting the absence of evidence that the grievant would have worked overtime, stated that overtime "is not included in this award."

The phrase used by the arbitrator–"was not entitled"–does not necessarily mean the same thing as "is not included." Although the phrase could represent a decision on the merits that the grievant wasn't entitled to overtime pay, it also could signify that the arbitrator did not reach the issue of overtime, leaving open the possibility of further proceedings to resolve that issue later, if necessary.

The stipulated record does not resolve this question. For example, it is unclear whether, and to what extent, a party may petition the arbitrator to resolve a disagreement about what constitutes compliance with a previous award. The stipulation does include the following sentence: "No evidence of Ms. Bodnar's overtime eligibility was presented at the arbitration hearing . . . as the local practice is to determine overtime eligibility after the arbitrator's decision issues."

However, that sentence is somewhat unrevealing. On the one hand, it might suggest that after the arbitrator's decision, the parties tried unsuccessfully to reach agreement on that amount of overtime which the grievant would have worked and for which she receive compensation. This interpretation follows logically if the arbitrator's statement that "overtime is not included" simply meant that she left that issue for the parties to work out.

On the other hand, it is possible that the "local practice" of determining "overtime eligibility after the arbitrator's decision" wasn't followed this time. What if the Respondent took the position that there was no overtime eligibility to determine because the arbitrator had not included overtime in her decision?

This case, of course, must be decided on the stipulated record and not a speculated record, so I reach no conclusions about what may have happened when the subject of overtime arose after the arbitrator's award, or whether further proceedings before the arbitrator were possible. However, the arbitrator's phrase "is not included"–rather than "was not entitled"–has further relevance. It signifies a distinction between the arbitration decision under consideration here and the arbitral decision which the Board found repugnant to the Act in *Cone Mills Corp.*, above, cited by the Acting General Counsel.

In that case, the arbitrator analyzed the facts under both the standard established by the collective-bargaining agreement and under the standards set by the Board enforcing the Act. Applying the contractual standard, he concluded that the grievant, Darr, had been insubordinate and penalized her for that supposed misconduct by denying her backpay. The Board held that the arbitrator's decision was inherently inconsistent:

> Most importantly, the arbitrator's conclusion that Darr's refusal to leave the plant constituted insubordination warranting disciplinary action simply cannot be reconciled with his findings that that conduct was provoked by the Respondent's own wrongful actions and was condoned by the Respondent. Given those findings, the conclusion is inescapable that the refusal to leave the plant cannot properly be the basis for discipline.
>
> Thus, we find nothing in the arbitrator's opinion and award that provides a rational basis for the Respondent's discharging Darr, apart from her union activities, or that recounts misconduct that would justify withholding her backpay. Absent such misconduct, the arbitrator's refusal to award Darr backpay has the effect of penalizing Darr for engaging in those protected activities that the arbitrator found precipitated her discharge, a result that is plainly contrary to the Act. Consequently, the award is clearly repugnant to the Act and we shall not defer to it.

298 NLRB at 666-667 (footnotes omitted). The Board expressly held that the arbitrator's award was not susceptible to *any* interpretation consistent with the Act and therefore not appropriate for deferral.

However, the *Cone Mills* decision must be read in light of a recent, somewhat similar case, which reached the opposite conclusion.

In *Shands Jacksonville Medical Center,* 359 NLRB No. 104 (2013), the Board again considered the deference to be given the decision of an arbitrator who denied a full make-whole remedy to punish a grievant for misconduct. In this instance, the misconduct involved two lies. Because of the circumstances, one of the lies fell within the scope of the Act's protection but

the other (while testifying before the arbitrator) did not.

The arbitrator did not make clear whether he was penalizing the employee for the protected or unprotected lie. Nonetheless, the Board held that the award was worthy of deference:

> Our established policy, however, is to defer to arbitration decisions unless they are "not susceptible to an interpretation consistent with the Act." *Olin*, 268 NLRB at 574. Because the arbitrator's award can be interpreted in a way consistent with the Act (i.e., that backpay was denied because Palmer lied under oath), we find that the arbitrator's denial of backpay and credit for time lost does not make the award repugnant to the Act. See *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352, 354-355 (9th Cir. 1979). See also *Combustion Engineering*, 272 NLRB [215] at 217 [(1984)].

359 NLRB No. 104, slip op. at 2.

In the present case, the arbitrator's decision that overtime pay was "not included" could be interpreted simply as meaning that the evidence before her did not support a finding that the grievant would have worked overtime. Such an interpretation certainly is consistent with the Act.

Further, it should be stressed that the present factual situation is quite different from that presented in *Cone Mills* and in *Shands Jacksonville Medical Center*. Here, it seems quite clear that the arbitrator was not withholding an overtime remedy to punish the grievant for any kind of wrongdoing. The arbitrator did not find that the Charging Party had done anything wrong. Moreover, read closely, the arbitrator's decision left me with the impression that Respondent not only treated the Charging Party unlawfully– as Respondent now admits in the stipulation– but with an adolescent pettiness which does not endear. Therefore, it would surprise me if the arbitrator intended to deny an innocent grievant a full remedy.

Arbitrator Jacob did not include overtime because there was no evidence to support a conclusion that the grievant would have worked overtime. Far from being "palpably wrong," such reasoning is not wrong at all. Any arbitrator or judge must decide a case based on the evidence.

Although I see no wrongness, palpable or otherwise, in how the arbitrator ruled based on the evidence before her, the government invites me to judge her decision based on hindsight informed by additional evidence. The parties' stipulation places before me evidence that the Charging Party had made herself available to work overtime and would have been assigned overtime hours. Presenting the evidence at this point results in a somewhat awkward procedural problem which may be illustrated by analogy to the Board's process for determining backpay.

If the Board has ordered a respondent to reinstate and make whole an employee, and if the parties then cannot agree on the amount of backpay which would be a full remedy, the

Board directs an administrative law judge to conduct a compliance hearing and issue a decision setting forth an exact amount. Suppose that, during the hearing, the government did not present any evidence on the discriminatee's interim expenses. If it had done so, those interim expenses would have reduced the amount of interim earnings to be deducted from gross backpay, and thereby increased the net backpay to the discriminatee.

Further suppose that the government appeals the judge's backpay decision to the Board, and seeks to place before the Board evidence about the interim expenses. Such a proffer would be untimely.

The stipulation states that because of the parties' local practice the overtime evidence "was not presented." Those words suggest that the evidence was then available and could have been presented. Moreover, neither the stipulation itself nor the Acting General Counsel's brief claims that this evidence was "newly discovered" or previously was unobtainable.

Even though Respondent has stipulated this evidence into the record, I believe it would be inappropriate to use it at this point. Therefore I do not.

As the Board stated in *Kvaerner Philadelphia Shipyard*, above, the burden borne here by the Acting General Counsel is a heavy one. The government has not carried that burden. Therefore, I recommend that the Board defer to Arbitrator Jacobs' award and dismiss the complaint.

The Acting General Counsel's Alternative Argument

The **Acting** General Counsel also argues, alternatively, that the Board should overrule precedent and adopt a new standard for when deferral to an arbitral award is appropriate. Obviously, I have no authority to take such an action and therefore reject the invitation to do so.

Conclusions of Law

1. The Board has jurisdiction over the Respondent, United States Postal Service, pursuant to Section 1209 of the Postal Reorganization Act, 39 U.S.C. § 1209.

2. The Union, the National Association of Letter Carriers, Branch No. 580, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Respondent and the Union have been parties to a collective-bargaining agreement covering Respondent's employees in the bargaining unit represented by the Union. This agreement establishes grievance-resolution procedures culminating in binding arbitration.

4. At all material times, the Charging Party, Catherine Bodnar, has been an employee of Respondent in the bargaining unit represented by the Union.

5. On March 22, 2012, the Respondent issued a notice of removal to terminate the Charging Party's employment effective April 27, 2012, because the Charging Party had refused to answer questions in the absence of a union representative during an interview which reasonably might lead to discipline. Respondent thereby violated Section 8(a)(3) and (1) of the Act.

6. To contest the Respondent's action described in paragraph 5, above, the Charging Party filed the unfair labor practice charge in this case and also filed a grievance, which resulted in an arbitration before Arbitrator Karen H. Jacobs, who issued a decision on November 27, 2012.

7. Respondent and the Union had agreed to be bound by the arbitrator's decision described in paragraph 6, above, the procedures resulting in the decision were fair and regular, and the arbitrator considered the unfair labor practice issue.

8. The arbitrator's decision described in paragraph 6, above, is not repugnant to the Act.

9. It is appropriate to defer the present complaint to the arbitrator's decision.

10. Further proceedings are unwarranted.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[1]

ORDER

The complaint is dismissed.

Dated Washington, D.C. September 25, 2013

Keltner W. Locke
Administrative Law Judge

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these 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.