UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES

and **Case 28-CA-022792**

WAYNE ABREU, an Individual

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS

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Counsel for the Acting General Counsel (General Counsel), pursuant to Section 102.46(a) of the Board's Rules and Regulations, files the following Brief in Support of Exceptions to the supplemental decision issued by Administrative Law Judge William Kocol (ALJ) dated August 29, 2013 [JD(SF)-43-13] (ALJD).[1] The ALJ erred by: (a) failing to properly follow the remand order from the Board in *BCI Coca-Cola Bottling Company of Los Angeles*, 359 NLRB No. 110 (April 30, 2013) (Remand Order), an order the ALJ clearly points out is erroneous in his mind; (2) failing to properly analyze the parties' grievance settlement under the *Olin/Spielberg* standard,[2] as required by established Board law, including *Alpha Beta Co.*, 273 NLRB 1546 (1985), (3) limiting the evidence allowed to be presented on remand; (4) including various factual errors in the ALJD, which are unsupported by the record evidence; and (5) refusing to analyze the parties' grievance settlement under the provisions of *Independent Stave*, 287 NLRB 740 (1987), as requested by the General Counsel.

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[1] BCI Coca-Cola Bottling Company of Los Angeles, will be referred to as "Respondent." Reference to the trial Exhibits of the Acting General Counsel, and Respondent will be designated as "GC" respectively, and references to the trial transcripts will be designated as "Tr," for the hearing on September 13, 2012, and "Tr. 2," for the hearing on July 23, 2013.

[2] See *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984).

The ALJD evinces the ALJ's disdain and disregard for the Board's authority as well as the decisions made by the General Counsel which are within his authorized discretion. Given the ALJ's disapproval of the Board's Remand Order, the ALJ merely created the outcome he wanted—a situation where he could once again dismiss the Complaint, ignore the real damage that his decision will inflict upon the Charging Party and his fellow discriminatees who were discharged, and insist that the Board's Remand Order was incorrect. Accordingly, the ALJ's decision is contrary to extant Board law; it should be overturned and the case once again remanded to the ALJ for a full hearing on the merits of the alleged unfair labor practices.

I. BACKGROUND

A. Factual Background

Respondent manufactures and distributes beverage products.[3] The Charging Party, Wayne Abreu (Abreu or Charging Party) began working at Respondent's Tempe, Arizona facility in 1997. In about 2000, Abreu became an active Union steward; Respondent's Tempe employees were represented by the United Industrial, Service, Transportation, Professional and Government Workers of North America, Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters (Union). In early 2007, Respondent opened a new facility in Glendale, Arizona. In June 2007, based upon charges filed by the Union, a complaint issued alleging that Respondent refused to hire 19 of its Tempe based employees, including Abreu, at the new Glendale facility; in July 2007, the parties reached a non-Board settlement. Thereafter, Abreu was again rejected for a position at the Glendale facility, the

[3] Because the ALJ limited the record evidence allowed to be presented and closed the hearing, some of the facts set forth herein are based upon the evidence that the General Counsel expects to produce at hearing.

Union filed a charge, and another complaint was issued alleging the refusal to hire was unlawful. Again the parties reached a non-Board settlement.[4]

In November 2009, Respondent permanently laid off eight Union members, including Abreau and another Union steward, Heath Gessner (Gessner), from its Tempe facility. Later that month the Union filed a grievance on behalf of the laid off employees, and Abreu filed the instant unfair labor practice charge, alleging in pertinent part, that all eight employees were discriminatorily selected for layoff. (GC (1)(a)) In December 2009, the charge was deferred to the grievance process pursuant to *Dubo Mfg. Corp.*, 142 NLRB 431 (1963). In March 2010, the employees voted to decertify the Union. (GC 4) After the decertification, the Union ceased having a presence in Arizona; all the Union's offices were relocated to California. (Tr. 2 at 93) In fact, the Union business representative for the Arizona employees, Stacey Sanchez, was laid off as well; there were no longer any union contracts in Arizona. (Tr. 2 at 93) For the next two years, Abreu and the other discriminatees continued to contact the Union and inquire as to the status of the grievance. (Tr. 2 at 116-123) However, the Union either evaded their telephone calls or gave them false information, telling then that the Union would process the grievance through arbitration. (Tr. 2 at 116-123)

On January 31, 2012, without taking the grievances to arbitration, the Union signed a settlement agreement with Respondent, over the unanimous opposition of the discriminatees, resolving the pending grievance regarding the permanent layoffs (Agreement). (GC 6) In the Agreement, the Union "acknowledges" that its investigation of the grievances "revealed no evidence to support any allegation that the Company . . . interfered with, restrained, coerced,

[4] Later in 2008, another complaint issued alleging that Respondent engaged in bad-faith bargaining, withdrew at the Glendale facility, and failure to process grievances and unilateral changes at the Tempe facility. The case ended mid-trial with a non-Board settlement and the Union disclaimed interest with respect to the Glendale facility.

and discriminated against employees in the exercise of their rights under Section 7 of the Act by discharging any one or more of the Grievance Payees because of their Union membership and other concerted activity, and without giving notice and the opportunity to bargain . . . ." (GC 6, p. 2) In resolution of the grievance, Respondent agreed to pay to each discharged employee the gross sum of $3,000 and the Union agreed to withdraw its grievance. The Agreement does not provide for reinstatement. The Agreement further provides that it is the parties' express intent to resolve all unfair labor practice issues raised by the unfair labor practice charges. (GC 6)

B. Procedural Background

Having been notified that the underlying grievance had been resolved, at the request of the Charged Party, in March 2012, the investigation into the charge allegation was resumed. (GC 5) After completing the investigation, which included an analysis of the grievance settlement agreement under the established Board precedents of *Olin Corp.*, *Spielberg Mfg. Co.*, and *Alpha-Beta Co.*, 273 NLRB 1546 (1984), on May 21, 2012, the Regional Director revoked deferral and issued the Complaint in this matter, concluding that deferral was not appropriate because the Agreement is repugnant to the Act.[5] (GC 1(c)) It is estimated that, if the Acting General Counsel prevails in the unfair labor practice complaint, each discriminatee would be entitled to reinstatement and backpay of between $70,000 to $100,000, plus interest, and Respondent would be subject to undertaking other traditional Board remedies, including a Notice.

[5] Over the objections of the General Counsel, the Associate Chief Administrative Law Judge granted Respondent's request for a postponement in the hearing and the hearing was rescheduled for September 13, 2012.

The hearing opened on September 13, 2012. After preliminary discussions, the ALJ decided to defer the allegations in the complaint pursuant to *Collyer Insulated Wire*, notwithstanding the Agreement resolving the grievance. (Tr. 31-32; ALJD at 4) General Counsel filed exceptions to the ALJ's decision. (GC 1(z) and (bb)) On April 30, 2013, the Board issued a Remand Order, directing the ALJ to determine whether the settlement agreement was appropriate under the *Olin/Spielberg* standard. (GC 1(mm)) Additionally, the Remand Order required the ALJ to take evidence on the Section 8(a)(1) allegations of the Complaint. Respondent filed a Motion for Reconsideration of the Remand Order, and the Board subsequently denied the Motion for Reconsideration. (GC 1(uu)) In that denial, the Board stated that the ALJ must hear and decide the merits of the Section 8(a)(1) of the Complaint but also stated that the parties could argue that the Section 8(a)(1) allegations of the Complaint were subsumed in the parties grievance settlement. (GC 1(uu))

C. July 23, 2013 Remand Hearing

On July 23, 2013, the hearing opened on the Remand Order. The ALJ immediately stated that he would hear no evidence on the merits of the allegations in the Complaint and that he would hear evidence on the deferral only. (Tr. 6-8) General Counsel objected, arguing that the ALJ needed to hear some facts of the merits of the case to determine whether the grievance settlement agreement was repugnant to the Act, not to necessarily decide the case on the merits. (Tr. 6-8) Nevertheless, the ALJ limited the evidence to what occurred with the grievance and the settlement of the grievance. (Tr. 6-8)

General Counsel gave an opening statement and asked the ALJ to take the opening statement as an offer of proof as he would not hear facts on the merits. (Tr. 2 146-147) The ALJ replied that the General Counsel has "preserved [the] record in that regard." (Tr. 2 at 147)

Respondent argued that the Section 8(a)(1) allegations in the Complaint were subsumed into the grievance settlement and the ALJ agreed, not allowing evidence to be presented concerning the Section 8(a)(1) violations. (Tr. 2 at 141-145) The ALJ limited the scope of the hearing to what occurred after the discriminatees were discharged with regard to the grievance and the settlement agreement. The ALJ allowed Respondent to present its evidence initially, stating that Respondent had the burden to show that the grievance settlement met the *Olin/Speilberg* standards. General Counsel was not allowed to present any evidence on the merits and was held to the same restriction as was Respondent. The General Counsel did present an offer of proof as to what the evidence would show if allowed to present evidence on the merits to include the Section 8(a)(1) statements alleged in the Complaint. (Tr. 2 146-47)

The ALJ then allowed 21 days for briefs and limited the briefs to the specific issues regarding the deferral and the *Olin/Speilberg* standards. (Tr. 2 at 147-149) It its brief, the General Counsel urged the ALJ to apply the *Independent Stave*[6] standards to the grievance settlement to avoid a severe injustice to the employees. See Exhibit A. The ALJ refused to do so, erroneously stating that the General Counsel made no such argument as to why he should do so. He then, again, dismissed the Complaint, showing throughout his decision that his mind was made up, he disagreed with the General Counsel' theory, with the Board's analysis of the law and its Remand Order, and harbored a disdain for both.

[6] 287 NLRB 740 (1987)

II. ANALYSIS

A. The ALJ Erred by Rejecting the General Counsel's *Dubo* Deferral

The ALJ erred by continuing to determine that the General Counsel wrongly deferred this matter originally pursuant to *Dubo Mfg. Corp.*, as opposed to *Collyer Insulated Wire*, stating that not only the General Counsel but the Board has "flippantly ignored" long-standing deferral policies. (ALJD at 1). The ALJD cites a recent case where the ALJ alleges that the Board confirmed its support for the *Collyer* deferral policies. See *Sheet Metal Workers, Local 18 (Everbrite LLC)*, 359 NLRB No. 121 (2013). However, *Sheet Metal Workers* has no factual relevance to the case at hand. It involves an expired collective-bargaining agreement and an allegation that the respondent had repudiated the agreement, and, most importantly, there was no allegation that the respondent had animosity toward the Section 7 rights of employees. Id. The ALJ in that case found that the respondent had repudiated the collective-bargaining agreement as the main reason he would not defer the case. Id. The Board overruled that decision, stating that there was no repudiation of the collective-bargaining agreement and, although it was concerned about the delay that would be caused by the deferral, nonetheless overruled the ALJ and deferred the dispute to the grievance-arbitration procedure under *Collyer*. Id.

The facts of *Sheet Metal Workers* are inapposite. The case at hand is an analysis of the grievance settlement agreement, not whether at the outset a case should be deferred. This case was deferred, a deferral that the General Counsel in his discretion, revoked, finding the settlement agreement repugnant to the Act. In fact, the Board specifically noted that it applies the *Spielberg/Olin* factors regardless as to whether the underlying case "was deferred under *Collyer*, deferred under *Dubo*, or never deferred. *BCI Coca-Cola Bottling Co. of Los Angeles*,

359 NLRB No. 10 slip op. at 2. There has been no "ignoring" of long-standing deferral policies in this case and the ALJ was incorrect when he stated that both the Board and the General Counsel ignored deferral policies.

B. The ALJ Erred When He Stated the Union Agreed with Respondent

The ALJ erred when he stated that "the Union ultimately agreed with Coca-Cola's interpretation of the contract and concluded it could not convince an arbitrator that Coca-Cola breached the contract." (ALJD at 1) The provision at issue is a provision in the collective-bargaining agreement regarding layoffs. (GC 3 at page 22) The record evidence shows that the layoffs in this case were done by classification seniority as opposed to department seniority. All individuals that were laid off were in the Distribution Department and drove various types of trucks to deliver Coca-Cola products throughout the Phoenix metropolitan area. (Tr.2 at 44) The three driver classifications at issue are the Bulk, OFS, and Utility. (Tr. 2 at 42-43) Bulk drivers are the most senior employees at Respondent's facility and are highly sought after and coveted. (Tr. 2 at 66-68) In fact, James Conway, one of the laid off drivers, had worked for Respondent for 38 years. OFS drivers are the next level of drivers. (Tr. 2 at 67) Both Bulk and OFS drivers have a set route, generally. Finally, the newest and lowest paid drivers are the Utility Drivers. (Tr. 2 at 43) These drivers are used as fill-in drivers whenever someone calls in sick, is on vacation, or there is an increase in work. (Tr. 2 at 43)

For a layoff to be done by department seniority, all the drivers would be laid off by the date they joined the distribution department. (Tr. 2 at 45-46) In other words, it would generally be seniority based on when an employee started work as a driver for Respondent. If a layoff is done by classification seniority, it would be done by how long a particular driver

has been a bulk, OFS, or utility driver. (Tr. 2 at 45-46) The result could be that a very senior employee, such as Conway, who had just transferred to the Bulk classification, could be laid off first over a utility driver who had just been hired by Respondent. (Tr. 2 at 46)

The disputed contract provision indicates that for layoffs of less than five days, layoffs will be conducted by classification seniority. (GC 3 at page 22) If the layoffs are to be more than five days and that is known at the outset of the layoffs, they will be done by departmental seniority. (GC 3 at page 22)

Respondent asserts that the language regarding departmental seniority only applies to the production department and not the distribution department. (Tr. 2 at 70) The Union alleged from the outset that it applied to the distribution department as well. (Tr. 2 at 71) Logically, that makes sense. For a layoff that is going to last more than five days, it is only logical that an agreement reached would protect the most senior drivers over recently-hired drivers in the utility classification.

Despite the Union's, from the outset, as well as the Charging Party's arguing that departmental seniority should have been used for this permanent layoff, the ALJ determined that the Union suddenly changed positions and agreed with Respondent that classification-seniority was the proper way to interpret the collective-bargaining agreement (Tr. 2 at 82; ALJD at 1) There is no evidence that this is so. In fact, Herb Perez testified that he disagreed with Respondent's interpretation. (Tr. 2 at 82) Although he testified that the contract provision was open to interpretation, there is no indication that the Union "ultimately agreed" with Respondent. (Tr. 2 at 87) Perez merely stated that they had to "go with it" referring to National Director's decision to settle the case. Perez' testimony was often rambling and difficult to understand. He testified that the Union's discussions went back and forth on

whether to take the case to arbitration and that the Union might have a hard time arguing its position. (Tr. 2 at 87) In fact, Perez stated that he wanted to go forward with arbitration but he was overruled by the National Director John Spadaro. (Tr. 2 at 91) The decision was made ultimately that they would not have success at arbitration. (Tr. 2 at 93) There was no record evidence that the Union ultimately agreed with Respondent's interpretation of the collective-bargaining agreement.

Therefore, the ALJ's statement is an incorrect statement based on the record evidence.

C. The ALJ's Refusal to Hear Evidence on the Section 8(a) (1) Allegations

The Board, in its Remand Order, directed the ALJ to hear evidence on the merits of the Section 8(a)(1) allegations in the Complaint as they were not a part of the deferral action. (GC 1(mm)) Respondent filed a Motion for Reconsideration, a Motion denied by the Board. (GC 1(qq) and (uu)) The Board stated in its denial that "nothing in the April 30 Order forecloses the Respondent from arguing to the judge that the 8(a)(1) allegations in fact were resolved by the settlement and thus should be dismissed if the settlement warrants deferral under *Spielberg*, supra, and *Olin Corp.*, supra." (GC 1(uu))

This is exactly what Respondent argued in front of the ALJ. As the ALJ notes in his decision, he is directed to decide the merits of the Section 8(a)(1) allegations of the Complaint. (ALJD at 3) He states, however, that the Board lacks the "intellectual integrity" to conclude that the remand order instructing him to decide the Section 8(a)(1) allegation on the merits without first determining whether they were subsumed by the grievance settlement was erroneous. (ALJD at 3) The ALJ's statements are evidence of the disregard he gives the Remand Order.

There is no evidence that the Section 8(a)(1) statements alleged in the Complaint were considered in the deferral action. As Perez testified, he was unaware of such statements, and only heard gossip stuff that was heard through the grapevine. (Tr. 2 at 88). The Union could not have included the Section 8(a)(1) statements if the Union was not aware of their existence[7] There is absolutely no evidence to support the ALJ's ruling.

The General Counsel was barred from presenting any evidence on the Section 8(a)(1) statements and was only allowed to give an offer of proof as to what the evidence consisted of as a basis for the allegations. (Tr. 2 at 147) General Counsel informed the ALJ that it had employee witnesses as well as former supervisor witnesses that would testify that the union stewards, Abreu and Gessner, were put on a "list"—a list to get rid of the Union and how this was discussed at supervisor meetings and the layoff was the only way to accomplish this. (Tr. 2. At 147) There is no record evidence that the Union was even aware of these statements, that the Union talked to the employees that heard these statements, and that these statements were in any way considered during the decision to settle the grievance. Therefore, the ALJ was incorrect in failing to hear evidence on the Section 8(a)(1) allegations as directed to do so by the Board, and his decision should be overruled.

D. The ALJ Erred by Limiting the Record Evidence

Although the Board stated in its Remand Order, that the ALJ was not required to decide the merits of the Section 8(a)(3) allegations, the Board did order the ALJ to determine whether the grievance settlement agreement was repugnant to the Act. The ALJ determined this meant that no evidence of what occurred prior to the layoff and the filing of the grievance

[7] When Perez was asked to explain further what he meant, he stated that the statements were something to the effect about the Union not doing anything for you in the middle of a decertification campaign. (Tr. 2 at 89-90) Those are not related to the Section 8(a)(1) statements alleged in the Complaint.

could be presented, and limited the evidence to only what happened after the filing of the grievance and why the Union and Respondent settled the grievance.

By doing this, there is no way for the ALJ to make a determination that the grievance settlement agreement was repugnant to the Act. This layoff was predicated by long-standing animus against the Union by Respondent as evidenced by the previous unfair labor practices cases, and in the midst of a decertification campaign that the Union ultimately lost. Two of the laid off employees, Abreu and Gessner, were active union stewards. Furthermore, they were senior employees, having worked for Respondent for over ten years each. In order to get rid of them during a decertification campaign, Respondent instituted a permanent classification layoff that was arguably in violation of the collective-bargaining agreement. The ALJ refused to allow any evidence of antiunion animus into the record, the long-standing unfair labor practice history, and the evidence that would have shown that the only individual hired back as a driver after the layoff was a driver who was on a last-chance agreement at the time of his layoff. This is the evidence that General Counsel would have presented to the ALJ, showing that the grievance settlement agreement entered into was repugnant to the Act. By limiting General Counsel's ability to present evidence showing Respondent's anti-union animus, the ALJ was able to reach the conclusion he wanted from the outset—to show the Board that its Remand Order was a waste of time and he was correct in dismissing the case from the outset. The ALJ achieved the result he wanted by manipulating the evidence he would or would not allow into the record. Therefore, the ALJ was incorrect and should be overruled.

The ALJ erred by dismissing the matter before allowing the General Counsel to present any meaningful evidence, or witness testimony. As such, due process requires that the Board once again remand this matter for a full hearing in connection with both the merits of the case and the question of deferral. *Dayton Power & Light Co.*, 267 NLRB 202 (1983).

In *Dayton Power & Light Co.*, prior to the presentation of any evidence on the merits, the employer moved to dismiss the complaint on the basis that the allegations should be deferred to the parties' contractual grievance procedure. Id. The ALJ concluded that the employer's position had merit, and except for a single witness whose testimony was curtailed, he refused to accept any evidence with respect to either the merits of the charge or whether deferral to arbitration was appropriate, and closed the hearing. Id. While a special appeal was pending, the ALJ issued his decision dismissing the complaint.[8] Id.

On review, the Board noted that while the issue of deferral "raises a question of law . . . since the law frequently turns on the facts . . . the parties have a right to litigate this question." Id. at 202. Furthermore, the Board noted that, because the ALJ refused to hear evidence regarding both the issues of deferral and the merits, the Board was precluded from making a fair determination of whether the General Counsel has established a *prima facie* case. Accordingly, in the interest of due process, the Board remanded the matter for a hearing in connection with both the merits and the question of deferral. Id.

As in *Dayton Power & Light Co.*, the ALJ's decision here to dismiss the matter, without taking any substantive evidence besides what occurred with the grievance settlement agreement, precludes a fair determination of whether the General Counsel has met his burden of showing that the Agreement is repugnant to the Act. Because such a determination will

[8] Here, unlike *Dayton Power & Light*, the ALJ issued an initial bench decision on the day of the hearing deferring the matter, thereby warranting the General Counsel's exceptions, in lieu of a special appeal.

turn on the facts, the Board should remand this matter for a hearing in connection with both the merits of the complaint and the issue of deferral.

E. The ALJ's Was Incorrect in His Factual Determinations Regarding the Union's Motives and Actions

The ALJ states in his decision that the Union agreed with Respondent's interpretation of the contract, that the contract allowed Respondent to lay off employees the way it did, that the Charging party was among those selected for layoff, and that the layoffs were expected because of the declining business. (ALJD at 1 and 3) As stated above, the ALJ is incorrect in this ruling. The Union repeatedly stated, through Perez, that it believed the contract required the layoff to be done by departmental seniority not by job classification. It was only after the Union had been decertified that the National Union decided that the contract provision was open to interpretation and it might not win at arbitration. Therefore, again, the ALJ's statements that the Union agreed with Respondent's interpretation of the collective-bargaining agreement are not supported by the evidence and is incorrect.

F. The ALJ Erred When He Stated that the Parties Stipulated that There was No Evidence that the Union Breached its Duty of Fair Representation

The ALJ in his decision states that the parties stipulated that a charge in Case 28-CB-074569 that alleged that the Union breached its duty of fair representation by its handling of the grievances at issue resulted in there being no evidence that the Union had breached its duty of fair representation in settling the grievances as it did. (ALJD at 4) To be clear, the only thing the General Counsel stipulated was a charge that was filed in Case 28-CB-074596, and that it was withdrawn by the Charging Party after an investigation. (Tr. 2 at 30) No other stipulation was reached.

The Charging Party testified that he did not know why he was asked to withdraw the charge by a Board Agent, only that the Board Agent told him it was better to go forward with the charge against Respondent. (Tr. 2 at 139) Abreu testified as such despite repeated efforts of Respondent's counsel to get Abreu to state that the reason he withdrew the charge against the Union was because it had no merit. First of all, what a Board Agent told the Charging Party is hearsay and not evidence. Second, there was no stipulation from General Counsel regarding why the charge was withdrawn, only that it was. Therefore, the ALJ was in error when he implied in his decision that no evidence of a failure in the Union's duty of fair representation was found. (ALJD at 4)[9]

G. The ALJ Erred When He Found The Settlement Agreement was Not Repugnant

The ALJ found that the grievance settlement agreement was not repugnant to the Act. He concluded the proceedings were fair and regular, the parties agreed to be bound by the agreement including the Charging Party and the other alleged discriminatees, the Union adequately considered the unfair labor practices, and the Union determined that the grievance lacked merit. The ALJ makes several incorrect conclusions—there is no evidence that the Charging Party and other alleged discriminatees agreed to be bound by the agreement. The facts are completely the opposite. None of them agreed with the settlement agreement and the mere fact that they wanted the Union to file the grievance and take the grievance to arbitration, does not indicate, as a matter of law, that they have entered into an agreement to be bound by the grievance settlement agreement. Further, the Union did not adequately consider the unfair labor practices. In fact, as has been stated earlier, the Union only looked at the contract interpretation and did not consider the Section 8(a)(1) statements. The Union

[9] A charge against the Union filed by Abreu is still pending investigation at this time. (Case 28-CB-0105080)

was concerned with the decertification only. Finally, because the merits of the unfair labor practices were not considered by anyone, there can be no finding that the resulting grievance settlement agreement is not repugnant to the Act.

The Board has held that the deferral standards of *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp*., 268 NLRB 573 (1984), would be applied where a grievance is settled, pre-arbitration, and where the grievant objects to the terms of the settlement agreement. *Catalytic Inc*., 301 NLRB 380 (1991); *U.S. Postal Service*, 300 NLRB 196 (1990). Under the current *Spielberg* /*Olin* standard, the Board defers to arbitral awards if all of the following requirements are met: (1) all parties agree to be bound by the decision; (2) the proceedings appear to have been 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 polices of the Act. *Spielberg*, supra at 1082; *Olin*, supra at 573. The "clearly repugnant" standard requires that the award not be "palpable wrong," i.e., not susceptible to any interpretation consistent with the Act. *Aramark Services, Inc*., 344 NLRB 549, 549 (2005).

The seminal case in this area is *Alpha Beta, Co.*, 273 NLRB 1546 (1985). In *Alpha Beta*, an unfair labor practice charge filed by eight discharged discriminatees, was deferred under *Collyer* to the grievance-arbitration procedure set forth in the collective-bargaining agreement between the union and the employer. Prior to arbitration, the parties entered into a private settlement agreement. Although the discriminatees agreed to the settlement agreement, they were displeased that the agreement did not provide for back pay and they requested that the Board's Regional Office review the settlement agreement. The Regional Office reviewed the settlement agreement and, although it found the agreement sufficient, it

outlined its position with regard to a review of a private settlement agreement short of arbitration in a *Collyer* deferral.

The Board found that it was proper for the Regional Office to conduct a *Spielberg* review even though the discharge grievances were settled prior to arbitration. In making this determination, the Board found former Member Penello's dissent in *Roadway Express*, 246 NLRB 174, 177 (1979), to be instructive. Specifically, Member Penello stated:

> Deferral in general will encourage parties ... to negotiate rather than to litigate their differences. The establishment of grievance-arbitration procedures has been a major factor in promoting and achieving industrial stability and peace, encouraging parties to use such procedures will further the fundamental purposes of the Act. I believe that the *Spielberg* tests for deferral apply to grievance settlements as well as arbitration awards....

The Board in *Alpha Beta* agreed with former Member Penello's reasoning, reversed *Roadway Express*, supra, and ruled that deferral principles apply equally to settlements arising from the parties' contractual grievance/arbitration procedures, as well as arbitration awards, because they further the national labor policy which favors private resolutions of labor disputes. *Alpha Beta, Co.*, 273 NLRB at 1547. Additionally, the Board referred to the ruling of *Olin Corp*, wherein the Board stated its commitment to a policy of full, consistent, and evenhanded deference to the deferral process where appropriate safeguards for statutory rights are satisfied.

Here, on January 31, 2012, the Union and Respondent executed a grievance settlement agreement to resolve the Union's pending grievance regarding the permanent layoffs. (GC 6) In resolution of the grievance, Respondent agreed to pay to each discharged employee the gross sum of $3,000 and the Union agreed to withdraw its grievance. (GC 6) The Union signed an "acknowledgment" in the Agreement that "there was 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 7 of the Act by discharging any one or more of the Grievance Payees because of their Union membership and other concerted activity." The Agreement does not provide for reinstatement. The Agreement further provides that it is the parties' express intent to resolve all unfair labor practice issues raised by the unfair labor practice charges. (GC 6) The Union and Respondent executed the Agreement despite the unanimous opposition of the discriminatees. (ALJD at 4)

The Region has calculated that if it prevails in its unfair labor practice complaint, each discriminate would be entitled to reinstatement, and to back pay estimated at about $70,000 to $100,000, plus interest. (ALJD at 4) Applying *Alpha Beta, Co.*, to the Agreement, the agreement is repugnant to the Act. There is no dispute that the proceedings were fair and regular and that the Union and Respondent agreed to be bound. However, the Charging Party and the discriminatees did not agree to be bound by the agreement. Moreover, the Agreement was repugnant to the Act because it was palpably wrong. Under the *Spielberg/Olin* framework, an arbitrator's award is clearly repugnant to the Act when it permits an employer to discipline an employee solely for engaging in protected concerted activities. See, e.g., *Mobil Oil Exploration & Producing,* U.S., 325 NLRB 176, 177-179 (1997) enfd 200 F. 3d 230 (5th Cir. 1999); *Key Food Stores*, 286 NLRB 1056, 1057 (1987). Under *Olin*, "the facts presented to, and found by, the arbitrator are central to determining repugnancy." *Cone Mills Corp.*, 268 NLRB 661, 666, fn. 16 (1990). Here, since there is no arbitration award, the conclusion that the Agreement was palpably wrong is based on the examination of the facts, explicitly or implicitly relied upon by Respondent and the Union in reaching settlement. Although the record is incomplete, due to the limitations placed on what could be presented into the record, the offer of proof along with the Section 8(a)(1) allegations, indicate that the

manner in which the layoffs were conducted was discriminatorily motivated, and it was part of the Respondent's ultimate goal of ridding itself of the Union. Supervisors informed employees that they were on a "list" due to their union and concerted activities, and after the layoff the employees were told that the reason they were selected for the layoff was because they were on the "list." Based on this evidence, the Union's "acknowledgment" in the Agreement that there was "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 7 of the Act by discharging any one or more of the Grievance Payees because of their Union membership and other concerted activity" was palpably wrong. Therefore, the Agreement is repugnant to the Act because it upholds Respondent's unlawful decision to permanently lay off eight employees for engaging in union and other protected concerted activities.

The Agreement's failure to provide any meaningful relief to the discriminatees is also not susceptible to an interpretation consistent with the Act. The Board has consistently found an award or settlement repugnant to the Act if the grievant was solely engaged in protected activity and the award or settlement did not provide a full remedy, including backpay. *Cone Mills Corp*., 268 NLRB at 663-664. Deferral to such an award would have the effect of "penalizing [the employee] for engaging in those protected activities that the arbitrator found precipitated her discharge, a result that is plainly contrary to the Act." Id at 667. See also, e.g., *Garland Coal & Mining Co*., 276 NLRB 963 (1985) (arbitrator's award of reducing termination to a three-week suspension was clearly repugnant because the arbitrator found employee's protected activity was only reason for discipline); *Valley Material Co*., 316 NLRB 704 (1995) (parties' grievance settlement of reinstatement without backpay repugnant

because settlement agreement states that employee was suspended because of his union activity). Here, if General Counsel prevails against Respondent, each discriminate would be entitled to reinstatement and to backpay presently estimated between $70,000 to $100,000, plus interest. By contrast, the parties' Agreement denies any reinstatement to the discriminatees and limits their backpay to a gross payment of $3,000 each (or about 3% of their potential backpay award). Under these circumstances, deferral to the Agreement is inappropriate because it is not susceptible to any interpretation consistent with the Act and therefore fails to satisfy the *Olin/Spielberg* standard.

H. The ALJ Erred When He Said his Only Recourse was to Dismiss the Complaint

The ALJ erred when he stated that his only recourse was to dismiss the Complaint. (ALJD at 6) As has been discussed above and further in these Exceptions, the ALJ made several errors and jumped to several conclusions that allowed him to reach the outcome he wanted—to show the Board that its Remand Order was incorrect and that his original decision was correct. The ALJ failed to allow relevant evidence to be put in the record, failed to allow evidence on the Section 8(a)(1) allegations in the record, incorrectly held the Charging Party and the other alleged discriminatees to a settlement agreement that they objected to, and failed to look at the overall statutory purposes of the Act—to protect employees' Section 7 rights. The ALJ's dismissal was incorrect and should be overruled.

I. The ALJ Erred When He Refused to Consider the *Independent Stave* analysis to the Grievance Settlement Agreement

The ALJ erred when he failed to analyze properly the request of the General Counsel for the ALJ and the Board to modify its approach to pre-arbitral deferral cases by applying current non-Board settlement practices, including review under *Independent Stave*,

287 NLRB 740 (1987). (See Exhibit A) This approach is urged for several reasons. First, the Act requires a balance between protecting individual rights and encouraging private dispute resolution within collective bargaining. Section 10(a) of the Act empowers the Board "to prevent any person from engaging in any unfair labor practice" and further provides that the Board's powers "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise…" Thus, the Board has a statutory mandate under Section 10(a) to protect individual rights and protect employees from being discharged or otherwise discriminated against in retaliation for their protected activities, and that mandate cannot be waived by private agreement or dispute resolution arrangement.

On the other hand, the Board encourages and favors collective bargaining and the private resolution of labor disputes through the processes agreed upon by the employer and the employees' exclusive representative. Therefore, there is tension between these two policies.

"The Board has considerable discretion…to decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act" to foster collective bargaining. *International Harvester Co.*, 138 NLRB 923, 926 (1962), affd. sub. nom. *Ramsey v. NLRB*, 327 F. 2d 784 (7th Cir. 1964). The Board is not, however, required to stay its hand just because an employer and a union representing its employees have resolved a dispute through an agreed upon grievance arbitration process. See *Speilberg Mfg. Co*., 112 NLRB at 1081-1082, citing *NLRB v. Walt Disney Productions*, 146 F. 2d 44 (9th Cir. 1944), cert denied 324 U.S. 877 (1945).

As the Board's deferral policy is one of discretion rather than an ouster of jurisdiction, the Board must fulfill its obligation to ensure the protection of employees' statutory rights prior to exercising its discretion to defer to an arbitrator's award or grievance settlement agreement. The current deferral standard provides a low standard of protection of employees' statutory rights. As the Board has recently reiterated in a different context, "[a]s an administrative agency establishing rules to cover a particular field of law (within the limits of the statute it administers), the Board has a different role than the courts, operating 'on a wider and fuller scale' that "differentiates…the administrative from the judicial process." *Kentucky River Medical Center*, 356 NLRB No. 8, slip op. at 2-3 (2010), citing *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 349-350 (1953) The Board's "wider and fuller" role should cause the Board to more zealously guard its mandate to protect statutory rights, in contract to the courts, whose jurisdiction over statutory claims is more limited.

The Board's *Speilberg/Olin* standards as well as *Alpha-Beta* application to settlement agreements tolerate substantive outcomes from arbitrators and settlement agreements that differ significantly from those that the Board itself would reach if it considered the matter de novo. Such outcomes can result in the denial of substantive Section 7 rights—if the overly deferential *Olin* standards are met, the Board may dismiss the administrative charge even if the statutory issue has never been considered.

The General Counsel urges the Board to adopt a new approach specifically in Section 8(a)(1) and (3) statutory rights cases, not Section 8(a)(5) cases that rely closely on contract interpretation as opposed to statutory interpretation. *Mt. Sinai Hospital*, 331 NLRB 895, 898 (2000), enfd. mem. 8 Fed. Appx. 111 (2d Cir. 2001). Specifically, in Section 8(a)(1) and 8(a)(3) statutory rights cases, the Board should no longer defer to an arbitral resolution or

a grievance agreement unless it shows that that statutory rights have been adequately considered by the arbitrator or by the parties involved.

General Counsel also urges the Board to adopt a rule that gives no effect to a grievance settlement unless the evidence demonstrates that the parties intended to settle the unfair labor practice charge as well as the grievance. If the evidence does so indicate, the Board should then apply current non-Board settlement practices and procedures in deciding whether to accept the non-Board settlement, including review under the standards of *Independent Stave*. The reasons for this request cry out in the facts of this case. Here, the charge was filed by an individual employee on behalf of eight employees. Although the Union filed a grievance over the discharge, the Union soon abandoned those employees after it was decertified. It failed to address the Section 8(a)(1) violations in the case and, as it no longer had a representation presence in the State of Arizona, settled the grievance without the concurrence of any of the parties that were affected. The Union no longer had an interest in what happened with the grievance and did not consider that the statutory rights of those employees had not been considered. Given the facts of this case, the individual rights of the eight discriminatees were tossed aside by a Union which had been decertified and no longer had an interest in those employees. There was no private dispute resolution within a collective-bargaining relationship to speak of. The Union merely settled the grievance after it was decertified for no other reason than it might lose at arbitration. Under *Independent Stave*, the Board will examine all the surrounding circumstances including, but not limited to: (1) whether the parties have agreed to be bound and the General Counsel's position; (2) whether the settlement is reasonable in light of the alleged violations, risks of litigation, and stage of litigation; (3) whether there has been any fraud, coercion, or duress; and (4) whether

the respondent has a history of violations or of breaching previous settlement agreements. Id. at 743. Applying those *Independent Stave* factors, it is clear that deferral is not appropriate.

First, the Charging Party, the other discriminatees, and the General Counsel oppose the grievance settlement, do not agree to be bound by its terms, and clearly do not intend for it to resolve the Section 8(a)(3) layoff allegations. Nor could the Union and Respondent have agreed between themselves to resolve those allegations because the discriminate, and not the Union, is the Charging Party. Thus, unlike a grievance settlement where the Union and the Respondent resolve a dispute pertaining to their contract, this grievance settlement purports to resolve a dispute pertaining to an unfair labor practice charge for which the discriminatee, and not the Union, is the Charging Party. Thus, although the grievance settlement may have resolved a Section 8(a)(5) allegation that Respondent failed to bargain with the Union, it could not have resolved the Charging Party's and fellow discriminatees' Section 8(a)(3) allegations.

Second, the grievance settlement is not reasonable in light of the nature of the alleged violations and the risks of litigation. There is strong evidence, including Section 8(a)(1) violations, that Respondent discharged the eight employees because of their Union activities in violation of Section 8(a)(3), and also that Respondent will not be able to meet its burden under *Wright Line* that it would have taken the same action but for the employees' Section 7 activities. If General Counsel is allowed to present evidence on the merits of the allegations and prevails against Respondent, each discriminatee would be entitled to reinstatement and backpay—an amount of over $50,000, plus interest, for almost each discriminate as compared to a gross payment of $3,000 and no reinstatement under the grievance settlement. Thus, the grievance settlement is not reasonable in light of the severity of the violations, the likelihood

of prevailing before the Board, and the relatively trivial amount of the grievance settlement award.

Finally, there is a history of unfair labor practices with Respondent. At least two previous Complaints have been issued against Respondent that were resolved with settlement agreements. Respondent has shown a disdain for its employees' Section 7 rights.

IV. CONCLUSION

For the reasons set forth above, the General Counsel respectfully requests that the Board overrule the ALJ's decision to dismiss this matter; find the grievance settlement agreement to be repugnant to the Act, based not only on an *Olin*, *Spielberg*, and *Alpha Beta* review, but also by applying an *Independent Stave* analysis to the settlement agreement; and remand this matter for a full evidentiary hearing.

Dated at Phoenix, Arizona, this 26th day of September 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS in BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, Case 28-CA-022792 was served by E-Gov, E-Filing and by E-mail, on this 26th day of September 2013, on the following:

Via E-Gov, E-Filing

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Exhibit A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES-SAN FRANCISCO BRANCH OFFICE

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES

and **Case 28-CA-022792**

WAYNE ABREU, An Individual

ACTING GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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any interpretation consistent with the Act and therefore fails to satisfy the *Olin/Spielberg* standard.

C. Deferral is Not Appropriate under *Independent Stave*

General Counsel would also urge the ALJ and the Board to modify its approach to pre-arbitral deferral cases by applying current non-Board settlement practices, including review under *Independent Stave*, 287 NLRB 740 (1987). Under *Independent Stave*, the Board will examine all the surrounding circumstances including, but not limited to: (1) whether the parties have agreed to be bound and the General Counsel's position; (2) whether the settlement is reasonable in light of the alleged violations, risks of litigation, and stage of litigation; (3) whether there has been any fraud, coercion, or duress; and (4) whether the respondent has a history of violations or of breaching previous settlement agreements. Id. at 743.

Here, the grievance settlement specifically provides that it is intended to fully resolve both the grievance and the unfair labor practice charge. Therefore, General Counsel urges the ALJ and the Board to also review deferral under the standards of *Independent Stave*. Applying those *Independent Stave* factors, it is clear that deferral is not appropriate.

First, the Charging Party and the other discriminatees oppose the grievance settlement, do not agree to be bound by its terms, and clearly do not intend for it to resolve the Section 8(a)(3) layoff allegations. Nor could the Union and Respondent have agreed between themselves to resolve those allegations because the discriminate, and not the Union, is the Charging Party. Thus, unlike a grievance settlement where the Union and the Respondent resolve a dispute pertaining to their contract, this grievance

settlement purports to resolve a dispute pertaining to an unfair labor practice charge at which the discriminatee, and not the Union, is the Charging Party. Thus, although the grievance settlement may have resolved the Section 8(a)(5) allegation that Respondent failed to bargain with the Union, it could not have resolved the Charging Party's section 8(a)(3) allegations.

Second, the grievance settlement is not reasonable in light of the nature of the alleged violations and the risks of litigation. There is strong evidence, including Section 8(a)(1) violations, that Respondent discharged the eight employees because of their Union activities in violation of Section 8(a)(3), and also that Respondent will not be able to meet its burden under *Wright Line* that it would have taken the same action but for the employees' Section 7 activities. If General Counsel is allowed to present evidence on the merits of the allegations and prevails against Respondent, each discriminatee would be entitled to reinstatement and backpay—an amount of over $50,000 for almost each discriminate as compared to a gross payment of $3000 and no reinstatement under the grievance settlement. Thus, the grievance settlement is not reasonable in light of the severity of the violations, the likelihood of prevailing before the Board, and the relatively trivial amount of the grievance settlement award.

D. Section 8(a)(1) Violations

In its April 30, 2013 decision, the Board held upon ordering a remand that "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". 359 NLRB No. 110 slip op. at 2 (April 30, 2013) In its Order Denying Motion for Reconsideration, the Board rejected Respondent's arguments that the Board erroneously remanded the 8(a)(1)