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

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES

and

Case No.: 28-CA-022792

WAYNE ABRUE, An Individual,

RESPONDENT BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES' ANSWERING BRIEF TO THE ACTING GENERAL COUNSEL'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS

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Respondent BCI Coca-Cola Bottling Company of Los Angeles, through undersigned Counsel and pursuant to Section 102.47 of the Rules and Regulations of the National Labor Relations Board, respectfully submits this Brief in Answer to the Acting General Counsel's Exceptions and Brief in Support of those Exceptions (the "GC's Second Exceptions Brief"). [1] For the reasons discussed below, the Supplemental Decision of Administrative Law Judge William G. Kocol (the "Judge") should be adopted, this matter should be deferred to the Settlement Agreement reached between the Union and Respondent under the Board's well-established and applicable deferral principles, and the Complaint should be dismissed completely and finally.

I. STATEMENT OF THE CASE

A. Introduction

This is the second time the GC has excepted to rulings of the Judge dismissing a Complaint which never should have been brought in the first instance.

This matter arises from an unfair labor practice charge ("Charge") filed against Respondent by an individual charging party, former driver Wayne Abrue ("Abrue"), challenging Respondent's November 13, 2009 layoff of Abrue and seven (7) other drivers at Respondent's Tempe, Arizona facility. The GC's theory is that these layoffs, which occurred in the worst

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[1] For consistency, BCI Coca-Cola will be referred to as "Respondent." The Acting General Counsel will be referred to as the "GC." Reference to trial exhibits of the Respondent and the GC shall be referred to as "Respondent Exhibit" and "GC Exhibit," respectively. References to the Trial Transcript shall be designated as "Tr." for the hearing conducted on September 13, 2012, and "Tr. 2" for the hearing conducted on July 23, 2013. The Judge's August 29, 2013 Supplemental Decision following the second hearing shall be referred to as "Supplemental Decision." The United Industrial, Service, Transportation, Professional, and Government Workers of North America, Seafarers International Union of North America, Atlantic, Gulf, Lakes, and Inland Waters District/NMU, AFL-CIO shall be referred to as "the Union."

economic times since the Great Depression, were not caused by business considerations as the Union concedes. Instead, the GC claims that Respondent laid off seven (7) other drivers solely to cover up its desire to terminate shop steward Abrue. The GC further contends that, after the Region deferred the matter to the grievance and arbitration process, the Union colluded with Respondent by settling, under terms repugnant to Act, the grievances challenging the same layoffs about which Abrue complains in his Charge. This assertion is advanced even though the unrefuted evidence shows that the Region's staff: (1) instructed Abrue to withdraw a failure to represent charge he filed against the Union regarding its handling and settling of his grievance; and (2) approved Abrue's request to withdraw that charge.

As discussed below, the GC's Second Exceptions Brief misstates, ignores, and disregards controlling law, much in the same manner that so frustrated the Judge and led to his admonishment of the GC in the Supplemental Decision. Indeed, the actual record and applicable law demonstrate that every exception advanced by the GC is without merit, and that the Board should defer to the parties' grievance Settlement Agreement. As a result, this matter should be dismissed in its entirety without further proceedings.

B. Procedural History

This case has already been dismissed once. At the first hearing on September 13, 2012, the Judge concluded that the Charge was improperly deferred by the Region under Dubo Mfg. Corp., 142 NLRB 431 (1963), and should have instead been deferred under Collyer Insulated Wire, 192 NLRB 837 (1971). Tr. at 26-29; September 28, 2012 Bench Decision ("Bench Dec.") at 2-4. The Judge then deferred the matter under Collyer and dismissed the Complaint. Tr. at 31-33; Bench Dec. at 3-4.

The GC filed exceptions and a supporting brief on October 26, 2012 ("GC's First Exceptions Brief"). On November 9, 2012, Respondent filed an Answering Brief and a Motion

to Strike the AGC's Exceptions. On November 21, 2012, the GC filed a Reply Brief and an Opposition to the Motion to Strike.

The Board ruled on the GC's Exceptions in BCI Coca-Cola Bottling Company of Los Angeles and Wayne Abrue, 359 NLRB No. 110 (April 30, 2013)("April 30 Order"). In the April 30 Order, the Board declined to rule on the question of whether the Collyer doctrine required this case to be deferred under Collyer and then dismissed for failure to timely bring the grievances to arbitration. April 30 Order, sl. op. at 2 fn. 7. Instead, the Board remanded the case for a hearing very limited in scope, stating "[t]his is not a hearing on the merits of the unfair labor practice charge, but is instead limited to taking evidence that will allow the judge to determine if the award or settlement is repugnant to the Act; that is, whether it is susceptible to an interpretation consistent with the Act." Id. sl. op. at 2 (emphasis added).

Respondent filed a Motion for Reconsideration and supporting Brief on May 24, 2013 (the "Brief in Support of Motion to Reconsider"). Respondent maintained that the Board erred when it remanded the 8(a)(1) allegations because the Board erroneously assumed that the Settlement Agreement at issue did not address the 8(a)(1) claims, despite the record evidence showing that the express terms of the Settlement Agreement covered all allegations of the Charge. Brief in Support of Motion to Reconsider at 6-7.[2]

On June 28, 2013, the Board denied the Motion to Reconsider, holding that it did not "…present 'extraordinary circumstances' warranting reconsideration under section 102.48(d)(1) of the Board's Rules and Regulations." June 28, 2013 Order at 2. The Board also "rejected" the

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[2] Respondent also asserted that this matter should be dismissed because the Board did not have a legal quorum to act when it issued its April 30 Order, citing inter alia, Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013) and NLRB v. New Vista Nursing and Rehabilitation Ctr., 719 F.3d 203 (3d Cir. 2013). Id. at 3-5.

argument that the 8(a)(1) allegations were erroneously remanded but explained further 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, supra." Id.

In the wake of these developments, the matter was reset for a hearing on July 23, 2013. Pursuant to the Board's April 30 Order, and consistent with well-established and long-standing Board precedent, the hearing was limited to obtaining evidence to determine whether deferral to the settlement between the Respondent and the Union was repugnant to the Act. See e.g. Sheet Metal Workers, Local 18 (Everbrite, LLC), 359 NLRB No. 121 (2013), sl.op. at 2, citing L.E. Myers Co., 270 NLRB 1010, 1010 fn. 2 (1984).

At the conclusion of the second hearing, the Judge stated, inter alia, that he wanted the parties to focus a portion of their briefs on the importance of the Union's decision not to arbitrate because the Union concluded that Abrue's discharge claims lacked merit. See Tr. 2 at 148-49. Respondent addressed the issue. See August 13, 2013 Respondent's Post Hearing Brief at 16-22, citing inter alia, Alpha Beta Corp., 273 NLRB 1546, 1547 (1985), Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) and Titanium Metals Corp. v. NLRB, 392 F.3d 439, 448 (D.C. Cir. 2004). The GC did not.

The Judge issued his Supplemental Decision on August 29, 2013. The Judge found, inter alia, that: (1) the Union agreed with Respondent that the CBA allowed for layoff by classification seniority; (2) the layoffs were expected by the Union because of the economy; (3) Abrue was properly included among those selected for layoff; (4) the Union refused to take the Grievances to arbitration because it reasonably concluded that the Grievances did not have merit; and (5) there was no evidence that the Union breached its duty of fair representation, in part

because the Region both solicited and approved the withdrawal of Abrue's failure to represent charge against the Union. Supplemental Decision at 3:42-4:2, 4:9-10, 4:29-33. Based upon these and other factual findings, the Judge held that the Settlement Agreement was not repugnant to the purposes and policies of the Act under the Spielberg/Olin standards the Board had instructed him to apply in its remand order. Id. at 4:36-5:31; April 30 Order at 2. As a result, the Judge dismissed the Complaint in its entirety. Supplemental Decision at 6:6.

C. The Record Evidence

1. Background Information

Charging Party Abrue was formerly employed by Respondent as a bulk driver at Respondent's Tempe, Arizona facility. At the time of the layoffs at issue, Abrue was a shop steward in the distribution department.[3] Abrue and all the drivers in the distribution department were represented by the Union. See GC Ex. 2, p.2. In addition to the bulk classification, the other driver classifications covered by the CBA in the distribution department were Order Fulfillment Service ("OFS") and Utility drivers. See e.g. Tr. 2 at 41-44 (Monaghan).

The Union's representative in Arizona in 2009 and 2010 was Stacy Sanchez. He reported to and was subordinate to West Coast Union Vice President Heriberto Perez, who in turn reported to and was subordinate to National Director John Spadaro. Tr. 2 at 134 (Abrue). It is undisputed that the Union's decision as to whether any particular matter proceeds to arbitration is not made solely by any of these individuals. Rather, the decision is made by the Union's

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[3] The GC contends that another laid off driver, Heath Gessner, was also a shop steward. GC's Second Exceptions Brief at 3. There is no evidence in the record to support this contention. Moreover, the statements set out in pp. 2 and 3 of the GC's Second Exceptions Brief regarding alleged unfair labor practices are mischaracterizations unsupported by any evidence in the record. These contentions were also previously deemed irrelevant by the Judge in his ruling on a motion to revoke the General Counsel's subpoena. See Tr. at 14-15. No exceptions were filed to this ruling. Therefore, these allegations should be stricken or disregarded.

President and legal department in Camp Springs, Maryland. Tr. 2 at 91-92 (Perez).

It is also undisputed that employment matters related to the drivers, including selection of route assignments and daily layoff, were addressed by classification seniority. Tr. 2 at 47, 49-50 (Monaghan). It was generally accepted that the bulk classification was the most desirable driver position, as it involved dropping off pallets of product at larger accounts without the need to further handle the deliveries. Id. at 45-47. OFS, by contrast, required the driver to unload smaller orders and stock them on shelves or in coolers in the establishments to which they were delivered. Id. Thus, it was not unusual for more senior drivers working in OFS positions to transfer to a bulk position in order to obtain a less physically-taxing job, even though by doing so they would relinquish their OFS classification seniority and move to the bottom of the bulk classification seniority list. See id. This was particularly true in and prior to 2009, as there had never been a long-term layoff of drivers in the distribution department at the Tempe facility. See Tr. 2 at 54-55, 57 and 76 (Monaghan).

Prior to the layoffs in 2009, there were 78 drivers at the Tempe facility. There are only 66 drivers there today. Tr. 2 at 63-64 (Monaghan).

2. Facts Related To Settling the Grievances At Issue In This Matter

A poor economy and dropping volume of products shipped throughout 2009 led to the decision to lay off eight (8) drivers. On November 13, 2009, three (3) bulk drivers and five (5) OFS drivers were laid off by classification seniority as required by the CBA. Tr. 2 at 53-56 (Monaghan) and Respondent's Ex. 4. The Union readily admitted that it was not surprised by these layoffs given the economic conditions at the time. Tr. 2 at 79-80 (Perez).

Each of the laid off drivers, including Abrue, filed a grievance on November 13, 2009, claiming that department seniority should have been used for the layoffs. Tr. 2 at 56 (Monaghan) and Respondent's Ex. 4. The Union also filed a grievance on behalf of all drivers on

November 20, 2009, claiming that less senior utility drivers should have been laid off. Id. None of these grievances ("Grievances") were ever withdrawn prior to the time they were settled by the Union and Respondent.

Abrue filed the Charge in this matter on November 23, 2009. The Charge alleged that Respondent violated sections 8(a)(1), (3), and (5), by discharging the laid off drivers "….because of their union membership and other concerted activity, and without giving notice and an opportunity to bargain over this decision, or its effects…." See Charge No. 28-CA-022792. No threats of any kind were alleged in the Charge. Id.

In direct contradiction to the allegations of the Charge that there was no bargaining about the layoffs, the layoffs (and later, the resulting Grievances) were discussed by the Union and Respondent both before and after they took place and into 2010, when collective bargaining negotiations were also being conducted. Tr. 2 at 56-61 (Monaghan), 79-84 (Perez) and Respondent's Exs. 6-7. At that time, the Union asserted that the layoffs should have been done by department seniority. Tr. 2 at 54, 57 (Monaghan), 81 (Perez). Respondent repeatedly asked the Union for any proof it had to support its position that the layoffs should have been done by department seniority. It is undisputed that the Union never offered any such proof. Tr. 2 at 54-55, 62 (Monaghan). In fact, Perez testified that he had no evidence of any layoffs that supported the Union's interpretation of the CBA. Tr. 2 at 81 (Perez):

> Q. Okay. Now were you able though to provide any support to the Company to support your position that it [the layoffs] should have been done on department seniority?
>
> A. Other than just the language that was on there, where we argued the interpretation of what it, what we believed it should have been.
>
> Q. Okay. Alright. Was there any evidence of formal layoffs, for example, in the distribution department?
>
> A. No, we had no such evidence to present.

See also Tr. 2 at 54-55 (Monaghan)(confirming that Respondent has not received any such evidence to this day).

The parties discussed ways to resolve the Grievances within the business realities being faced by Respondent. Tr. at 57-61 (Monaghan). Respondent suggested that the Union waive the guaranteed hours provision in the CBA so that available work could be spread among more drivers. Id. at 57-59. It was also suggested by Respondent that drivers could rebid routes and classification by department seniority so that more senior drivers could choose whether they wanted to remain laid off or opt into a more physically demanding mode to return to work. Id. at 59-60. Respondent further proposed that drivers be recalled by department seniority so that the senior drivers with low classification seniority would have the first chance to fill any open positions. Id.; Respondent's Ex. 5.

Perez explained that the Union did not want to accept any of these proposals, because members adversely affected by a change to layoff/recall methods might then bring claims against the Union. Tr. 2 at 82-84 (Perez); Respondent's Ex. 6. Thus, the Union took the position that all drivers must be recalled with full back pay. Id.

While discussions concerning the Grievances were ongoing, a merchandiser employee bargaining unit member filed a decertification petition on January 25, 2010 in Case No. 28-RD-994. The Union continued to discuss the grievances and their resolution during the decertification election process. On March 3, 2010, the Union lost the decertification election. The results of the election were certified without objection on March 12, 2010. See GC Ex. 4.

The decertification and the end of negotiations gave the Union the opportunity to focus on the merits of the Grievances. Following decertification, Sanchez and Perez were in regular contact with Abrue and other laid off drivers. See Tr. 2 at 90, 94, 103-04 (Perez), 118-122

(Abrue). The Union received nothing from the drivers that could be used to support either the Grievances or the Charge. See e.g. Tr. 2 at 88-92 (Perez). Thus, after deliberations at the highest level of the Union, and in large part because the Union could not produce any evidence to the contrary, the Union agreed with Respondent that the disputed language in Article 26 Section 2 of the CBA suggesting that layoffs were to be done by department seniority applied only to the production department and not to the distribution department. Tr. 2 at 81, 85-87 (Perez). Indeed, even though Abrue had spoken to both Perez and the Union's Counsel Stanford Dubin, neither Abrue nor anyone else ever produced anything upon which the Union could rely to suggest that there was any support for the Charge. Id. at 88-92.[4]

Given the lack of any evidentiary support to refute either the manner or reasons for the layoffs as challenged by the Grievances and the Charge, the Union decided to try to settle the Grievances. The Union eventually arrived at an agreement with the Respondent where each laid-off driver would receive $3,000 in exchange for the Union's withdrawal of these and other grievances. GC Ex. 6. The Union concluded that this was $3,000 more than the drivers would have received if the Grievances had proceeded to arbitration because it had no evidence from any source to support the allegations of the Grievances and the Charge. Tr. 2 at 88-93 (Perez).

The Settlement Agreement was finalized on January 31, 2012. GC Ex. 6. Each laid off driver received a check for $3,000, and every driver including Abrue cashed the check. GC Ex. 6; Tr. 2 at 100-01 (Perez), 137-38 (Abrue).

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[4] Tellingly, Abrue, who sat though Mr. Perez's testimony as a party to these proceedings, did not testify that he allegedly provided any information to the Union about previous layoffs by department seniority or his allegedly being targeted for termination because of his activities as a shop steward as alleged in the Complaint for the simple reason that no such information was ever provided. Tr. 2 at 108-140 (Abrue).

3. Additional Facts Related To The Settlement of the Grievances and Handling of the Related Unfair Labor Practice Charges

Abrue filed the Charge on or about November 23, 2009. Complaint, ¶ 1; GC Ex. 2. The Regional Director issued a letter on December 28, 2009 purporting to defer the Charge under Dubo Mfg., supra. GC Ex. 2.

The Grievances were processed through the contractual steps to arbitration. Tr. 2 at 105-06 (Perez), 118 (Abrue). Abrue testified that he stayed in touch with the Union and its representative regularly until the decertification in March 2010. Thereafter, he spoke with Sanchez "every time" he received a 90-day status letter from the Region. Tr. 2 at 118, 120 (Abrue). Abrue also testified that he talked to Perez in November 2010 and Union attorney Stan Dubin at some unspecified time. Abrue said that after that he stopped trying to contact the Union regularly. Id. at 121-22. Indeed, there is no evidence that Abrue made any effort to contact the Union from November 2010 until January 2012.

On or about January 6, 2012, Abrue sent letters to Perez and Dubin confirming his continued participation in the arbitration process. Tr. 2 at 130-31 (Abrue); GC Ex. 7. He apparently sent the identical letter (dated January 31, 2012, 2012) a second time to both Perez and Dubin, as well as Regional staff person Johannes Lauterborn. Tr. 2 at 131-32 (Abrue) and GC Ex. 8. Abrue said that he did not get any response from anyone. Tr. 2 at 132 (Abrue).

On February 1, 2012, the Region requested information from the Respondent about the bases for the layoffs. The Region's information request regarding the allegations of the Charge made no mention of any 8(a)(1) allegations or purported "threats" by Respondent.

On February 15, 2012, Abrue filed Charge No. 28-CB-074596 against the Union (the "CB Charge"). The CB Charge referenced the Grievances and alleged that the Union "failed and refused to process a layoff grievance to arbitration, after promising to take the grievance to

arbitration…."[5]

In mid-March 2012, while the CB Charge was still pending, Abrue cashed his settlement check. Tr. 2 at 137 (Abrue).[6] Less than two (2) weeks later, on March 26, 2012, Abrue withdrew the CB Charge. Id. at 138. Abrue's uncontroverted testimony is that he withdrew the CB Charge because Region 28 staff told him to do so. Id. at 138-39.

Three (3) days after Abrue withdrew the CB Charge at the direction of the Region, the Region notified Respondent that deferral was being revoked. GC. Ex. 5. The Complaint issued on May 31, 2012. Significantly, the Charge was never amended to include the 8(a)(1) allegations appearing in the Complaint. Indeed, Respondent did not learn about the specifics of these 8(a)(1) claims until after the hearing in this matter commenced in September 2012. Tr. at 21-22.

Finally, it is important to recall that following the first hearing in this matter, the Judge concluded that parties settled the Grievances by executing the Settlement Agreement, stating that the Union investigated the allegations at issue in this matter, found them to be without merit, and agreed to provide testimony to that effect, if need be. Bench Dec. at 2:37-3:7; GC Ex. 6 at ¶ 3. Second, it was also concluded that both parties compromised in the settlement to the extent that Respondent agreed to pay each of the laid off drivers $3,000 and the Union agreed to withdraw the layoff (and other) grievances. Bench Dec. at 2:37-40; GC Ex. 6. Third, it was concluded

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[5] Abrue filed a similar, but very untimely, charge against the Union on May 14, 2013, in Case No. 28-CB-105080 (the "Second Charge Against the Union"). The Second Charge Against the Union remains pending, with the Region apparently electing to disregard the processing guidelines normally applicable to unfair labor practice charges.

[6] While testifying, Abrue at first denied receiving and cashing the check in mid-March 2012, but he was forced to admit that this was the fact after being shown the cancelled check with his signature and the endorsement date from his bank. Tr. 2 at 137-38 (Abrue).

that this matter was deferrable under Collyer. Bench Dec. at 3:13-22. Nothing in either of the Board's Orders issued in this matter disturbs any of these findings.

II. ARGUMENT[7]

A. The Board's Deferral Principles

The cases defining the rules used by the Board when choosing to defer to the parties' grievance and arbitration procedures are easily identified. In Spielberg Mfg. Co., 112 NLRB 1080 (1955), the Board announced that it would defer to an arbitral award when: (1) all parties agreed 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. Id. at 1082; see also Olin Corp. 268 NLRB 573, 574 (1984). An award is not clearly repugnant to the purposes and policies of the Act unless it is "palpably wrong," that is not susceptible to any interpretation consistent with the Act. See e.g., Aramark Services, Inc., 344 NLRB 549, 551-52 (2005); Olin Corp., supra, 268 NLRB at 574.

In Dubo Mfg. Corp., 142 NLRB 431 (1963), the Board held that it would defer to the grievance and arbitration process in an 8(a)(3) case where the allegations of the charge were

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[7] In its Motion To Reconsider, Respondent asserted that the Board did not have a legal quorum to consider the merits of the original Judge's Bench Decision. See Motion to Reconsider at 3-5, citing inter alia Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013), cert. granted, NLRB v. Noel Canning. 2013 U.S. LEXIS 4876 (June 24, 2013); NLRB v. New Vista Nursing and Rehabilitation, LLC, 719 F.3d 203 (3d Cir. 2013) and New Process Steel L.P. v. NLRB, 130 S. Ct. 2635, 2644 (2010). The Board dismissed this argument without discussion. See June 28, 2013 Order at 2, citing Bloomingdale's, Inc., 359 NLRB No. 113 (2013). By submitting this Answering Brief, Respondent does not waive and expressly reserves its argument and position regarding the Board's lack of legal quorum (and all other jurisdictional issues), and incorporates by reference its previous arguments and authorities in support thereof as though set forth in full herein.

already a subject of the grievance and arbitration process. In Collyer Insulated Wire, 192 NLRB 837 (1971), the Board stated that it would apply the Spielberg standards to the parties' grievance and arbitration procedures in 8(a)(5) cases even though they had not yet been invoked. Similarly, in National Radio Co., 198 NLRB 527 (1972), the Board concluded that it would extend its deferral policy to cover 8(a)(1) and (3) cases even where the 8(a)(3) allegation presented an issue distinct from the 8(a)(5) contractual issue. See also United Technologies Corp., 268 NLRB 557 (1984).

In a Collyer deferral, the charging party must choose arbitration where available. See Higgins, The Developing Labor Law, 6th Ed. (2012), Ch. 18.II.D at 1621-22 ("The Developing Labor Law"). The Board retains jurisdiction solely for the purpose of entertaining a motion alleging that the dispute has not been promptly settled or arbitrated or that the arbitration has failed to meet the Spielberg/Olin standards. Id. at 162. The General Counsel is responsible for the administration of these standards in the absence of a complaint. Id. Enforcement of the deferral decision comes from the General Counsel by informing the charged party that failure to submit promptly to arbitration shall result in deferral being rescinded and/or that failure to take the case promptly to arbitration shall result in dismissal of the charge. Id. at 1621 and fn. 246 and 247 (citing, inter alia, Arbitration Deferral Policy Under Collyer – Revised Guidelines (May 10, 1973) at 43-45 (the "Revised Guidelines").

A Dubo deferral, by contrast, contemplates a different procedure. The charging party must select either arbitration or the Board processes. If the charging party wishes the General Counsel to issue a complaint, then the charging party must withdraw from the grievance procedure and not take any action inconsistent with that withdrawal. The Developing Labor Law at 1622. Any settlement or award reached through the deferral process can be reviewed upon

request under the applicable Spielberg/Olin standards.

The Revised Guidelines answer the question of when these two procedures should be used. If the matter can be deferred under Collyer, it must be deferred under Collyer. See e.g. April 30 Order, sl. op. at 3; Bench Dec. at 3:24-45 (citing Revised Guidelines at 38 n.63, 39 n. 65, 40. n. 66 and 45). Only if Collyer deferral is not applicable may Dubo be considered. Id.

Finally, in Spielberg, supra, the Board stated that it would defer to arbitration awards when, among other things, the award was not repugnant to the purposes and policies of the Act. 112 NLRB at 1082. In Inland Steel Co., 263 NLRB 1091 (1982), the Board made it clear that "[t]he test of repugnancy under Spielberg is not whether the Board would have reached the same result as an arbitrator, but whether the arbitrator's award is palpably wrong as a matter of law." The party who would have the Board reject deferral bears the burden of showing the settlement is "palpably wrong" and the Olin standards have not been met. U.S. Postal Service, 300 NLRB 196, 198 (1990). Here, that burden rests squarely with the GC, and it has not been met.

B. The Spielberg/Olin Standards As Applied To Settlement Agreements

In Alpha Beta Co., 273 NLRB 1546, 1547 (1985), the Board held that the deferral principles articulated in Collyer, Spielberg, Olin, and Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983), apply equally to settlements arising from the parties' grievance and arbitration procedures because such settlements further the national labor policy favoring private resolution of labor disputes.

In Alpha Beta, the Board declined to adopt the findings of an ALJ, and instead deferred to a pre-arbitration settlement agreement putting fifteen (15) strikers back to work without back pay because: (1) the proceedings were fair and regular; (2) the agreement was made under the contract's grievance and arbitration procedures; and (3) all parties agreed to be bound. Alpha Beta, 273 NLRB at 1547. Notably, the Board concluded that the GC failed to carry its burden of

proving that the results of the settlement were palpably wrong because the settlement of a dispute over the discharge of employees who failed to work in connection with a sympathy strike had resulted from negotiations between the union and employer within the agreed-upon grievance and arbitration procedures. Id. The Board held that, "[t]o resolve this contractual dispute, the Union could – if they felt it necessary – waive the employees' statutory rights." Id. at 1547, citing Metropolitan Edison, 460 U.S. 693 (1983). The Board also concluded it was significant that both the employer and the union made concessions in reaching settlement before deferring to the parties' settlement agreement and dismissing the complaint in its entirety. Id.

The Board expanded upon Alpha Beta in U.S. Postal Service, 300 NLRB 196 (1990), where it granted summary judgment without a hearing and dismissed a charge filed by a shop steward challenging the settlement of a grievance he filed. In its decision, the Board concluded that it should defer to the settlement agreement under the principles set out in Alpha Beta as affirmed by the Ninth Circuit in Mahan v. NLRB, 808 F2d. 1342 (9th Cir. 1987), and Metropolitan Edison, supra.

In U.S. Postal Service, the Board observed that, as is conceded in the instant matter, there was no evidence that the grievance proceedings were not fair and regular. 300 NLRB at 197. The Board also concluded that the settlement agreement satisfied the second criterion in that all parties agreed to be bound, even though the shop steward who filed the charge expressed his disapproval of the settlement. In this regard, the Board said:

> "Here, McCullough [the shop steward] expressed disapproval when the settlement was proposed. But the Union, as his collective bargaining agent, was, in the words of the Ninth Circuit's affirmance of Alpha Beta, empowered to bind him "wholly apart from [his] own separate consent". Further, we find that McCullough authorized the Union to settle the dispute when he invoked the contractual grievance procedure."

Id. (footnote omitted). The Board went on to hold that "the contractual provision, McCullough's position as a shop steward, and his familiarity with the grievance procedure are all circumstances

supporting a finding that the second criterion has been satisfied in this case." Id. at 197, fn. 11.

The Board further concluded that "the fact that McCullough did not receive all the relief to which he may have felt he was entitled does not render the settlement 'palpably wrong'" or otherwise repugnant to the purposes and policies of the Act." U.S. Postal Service, 300 NLRB at 198. The Board also held that a settlement was not repugnant merely because the parties reached a compromise on the issue. Id.

Finally, in examining whether the unfair labor practice issue was considered as part of the settlement, the Board held that "[t]he criterion is satisfied when the contractual issue and the unfair labor practice issue are factually parallel, and the parties were generally aware of the facts relevant to resolving the unfair labor practice." Id. at 198. The Board then concluded that the unfair labor practice had been adequately considered because the GC failed to meet its burden of raising a genuine dispute of material fact that it had not been considered by the parties. Id.

C. The Judge Correctly Concluded That This Matter Should Be Deferred And Dismissed Under Collyer

The Judge's conclusion that this matter should have been dismissed under Collyer is correct. As noted above, arbitration under Collyer is mandatory. If the grievance is not brought to arbitration promptly, then the proper sanction is dismissal of the Charge. See The Developing Labor Law, Ch. 18.II.D at 1621-22 and fn. 246-54, citing inter alia, Revised Guidelines at 43-45.

In this case, the Judge correctly concluded that Collyer deferral was applicable. Bench Dec. at 3. There is also no question that the Grievances were not brought to arbitration promptly. They were filed in November 2009, and were not settled until January 2012. This delay required dismissal under Collyer, and the Complaint should be dismissed for this reason alone.

D. The Board Should Defer To The Settlement Agreement and Dismiss The Complaint

Even if the Complaint should not be dismissed under Collyer for failure to arbitrate the Grievances promptly, the Judge was nevertheless correct in concluding in his Supplemental Decision that the Board should defer to the Settlement Agreement and dismiss the Complaint. This matter concerns a pre-arbitration settlement which means that the criteria of Alpha Beta and U.S. Postal Service apply. See Sec. II.B, supra, at 14-16 and cases cited therein. Second, it concerns a layoff - the same layoff about which Abrue complains in the Charge. It does not, as the GC persistently pretends, concern the disciplinary discharge of anyone solely for engaging in any union or other protected concerted activity. Therefore, deferral to the Settlement Agreement and dismissal of the Complaint in its entirety is required as long as: (1) the proceedings were fair and regular; (2) all parties agree to be bound; (3) the agreement is not clearly repugnant to the purposes and policies of the Act; and (4) the parties considered the unfair labor practice issue when settling the grievance. Alpha Beta; U.S. Postal Service; Olin.

There is no doubt that the Settlement Agreement was generated from fair and regular proceedings as the Judge found. Supplemental Decision at 4:38-43. Indeed, the GC has conceded this point not once, but twice in its briefing to the Board. GC's Exception Brief at 6 ("Here, there is no dispute that the proceedings were fair and regular and that all parties agreed to be bound"); GC's Second Exceptions Brief at 18 ("There is no dispute that the proceedings were fair and regular and that the Union and Respondent agreed to be bound.").

It is also clear that the Judge concluded correctly that all parties agreed to be bound. Supplemental Decison at 4:42-5:5. Indeed, the GC has also conceded this point. GC's Exception Brief at 6 (quoted supra); Second Exceptions Brief at 18 (quoted supra). Thus, the GC cannot be heard now to claim something different. Moreover, the Judge's conclusion that all parties agreed

to be bound because all of the alleged discriminatees invoked the grievance procedure to challenge the layoffs and never withdrew from that process (see Respondent's Ex. 4 and GC's Ex. 8) and because the Union had the right to speak for each of them as their collective bargaining representative is amply supported by the record facts and controlling law. Supplemental Decision at 4:42-5:5; see also Sec. II.B, supra, at 14-15 and cases cited therein. To this point, it does not matter whether Abrue or any of the other laid-off drivers agreed with the terms of the Settlement Agreement because the Union had the right as the collective bargaining representative of the drivers to settle the Grievances. Indeed, as the Board observed in U.S. Postal Service, "the Union, as [the] collective bargaining agent, was, in the words of the Ninth Circuit's affirmance of Alpha Beta, empowered to bind [the grievant/charging party] 'wholly apart from his own consent,'" and the grievant/charging party "authorized the Union to settle the dispute when he invoked the contractual grievance procedure." U.S Postal Service, 300 NLRB at 197; see also Titanium Metals Corp. v. NLRB, 392 F.3d at 447-48 (quoting, inter alia, Metropolitan Edison, supra, 460 U.S. at 705 ("[t]his Court long has recognized that a union may waive a member's statutorily protected rights…"); Dubo, supra (holding that individual charging party must opt out of the grievance procedure and take no action inconsistent with opting out before he or she can take advantage of the Board's unfair labor practice complaint procedures). Thus, as a matter of fact and law, the Judge correctly concluded that the laid-off drivers agreed to be bound to the terms of the Settlement Agreement.

Next, the Judge was correct in concluding that the Union considered evidence of any unfair labor practices. First, the Settlement Agreement specifically states that the Union considered the unfair labor practice allegations. See GC Ex. 6 at fourth WHEREAS clause and ¶¶ 3-4. Indeed, anticipating this very proceeding, the Union took the highly unusual step of

agreeing to provide a witness to testify regarding the terms of the settlement. Id. The Union provided Mr. Perez, who testified credibly (and without contradiction) about what he knew and was told about the unfair labor practice allegations by the laid off drivers. Tr. 2 at 88-92 (Perez).

The record clearly supports the Union's statement in the Settlement Agreement that the allegations of the Charge were without merit. The record is both clear and undisputed that the Union and Respondent had extensive discussions about the need for and manner of the layoffs at issue both before and after they occurred. Tr. 2 at 56-61 (Monaghan), 79-84 (Perez). It is undisputed that the Union admitted that it had no support for its argument that the layoffs should have been done by department seniority. Tr. 2 at 81 (Perez); Tr. 2 at 54-55 (Monaghan). It is also undisputed that Union Vice President Perez spoke to Abrue and other laid off drivers and found nothing to support either the claims in the Charge or the 8(a)(1) allegations raised for the very first time in the Complaint. Tr. 2 at 89-90.

Indeed, after sitting through Perez's testimony, Abrue made no effort during his own time on the witness stand to dispute Mr. Perez's testimony that neither Abrue nor the other laid-off drivers presented the Union with any meaningful information on which the Union could conclude the unfair labor practice allegations had merit. Tr. 2 at 108-33 (Abrue). Similarly, the GC never made any effort during cross-examination to demonstrate that Mr. Perez knew about yet ignored any alleged effort by Respondent to target Abrue or anyone else for layoff because of any ostensible protected conduct. Tr. 2 at 92-108. Given that the GC bears the burden of proof in these proceedings, the Judge was absolutely correct in concluding that, "[i]n the absence of evidence to the contrary, I conclude those employees [interviewed by Mr. Perez] told the Union much of the same things that those employees told the General Counsel during investigation of the Charge and [which] form the basis of the independent 8(a)(1) allegations." Supplemental

Decision at 5:12-15; U.S. Postal Service, 300 NLRB at 198 (holding that party asking the Board to reject deferral bears the burden of proving Olin standards have not been met and that summary judgment deferring to settlement agreement was proper where General Counsel fails to raise genuine issue of material fact as to whether criterion of considering unfair labor practice has been met).

Finally, the Judge was correct in concluding that the Settlement Agreement was not repugnant to the purposes and policies of the Act. Supplemental Decision at 5:15-24. An award or settlement is repugnant to the Act only if it is "not susceptible to an interpretation consistent with the Act." Olin Corp., 268 NLRB at 574; U.S. Postal Service, 300 NLRB at 197 -98. In concluding that the settlement agreement was not repugnant to the Act, the Judge rejected the GC's contention, pressed without any supporting authority, that the issue must be assessed as if the allegations of the Complaint were true. Compare GC's Second Exceptions Brief at 14-15 with Supplemental Decision at 5:14-22. Instead, the Judge followed the Board's Remand Order instructing that the Spielberg/Olin standards should be applied and concluded that the matter should be assessed in light of whether the Union considered the Complaint's allegations and found them to be without merit. Supplemental Decision at 5:5-22. Accordingly, following the second hearing, the Judge properly held that the Union justifiably concluded that both the Grievances and the Charge (which challenged the same layoffs as the Grievances) were without merit. This is particularly true considering the Union's uncontroverted testimony that it had nothing to support its argument that the layoffs should have been done by department seniority and no evidence to support the allegations in the Charge, Tr. 2 at 81 and 89-90 (Perez), as well as the fact there exists fewer driver slots today than when the layoffs occurred. Tr. 2 at 64 (Monaghan). Indeed, the GC, despite bearing the burden of proof, offered nothing to rebut the

Union's reasons or process for arriving at that conclusion, other than its subjective disagreement with the result.

Moreover, the GC's arguments to support its inaccurate claim that the Settlement Agreement is repugnant to the Act ignore the record evidence and contradict well-established law. Whether Abrue or any of the other drivers agreed with the terms of the Settlement Agreement is irrelevant as a matter of law, as the Union had full authority to settle their claims. See e.g., U.S. Postal Service, supra; Alpha Beta, supra; Metropolitan Edison, supra; Titanium Metals, supra. Similarly, whether the Settlement Agreement provided all the relief Abrue (or the GC for that matter) believed the laid-off drivers should receive is not legally relevant. Inland Steel Co., 263 NLRB 1091 (1982) ("[t]he test of repugnancy under Spielberg is not whether the Board would have reached the same result as an arbitrator, but whether the arbitrator's award is palpably wrong as a matter of law."); U.S. Postal Service, 300 NLRB at 198 ("[T]he fact that [Abrue] did not receive all the relief to which he may have felt he was entitled does not render the settlement "palpably wrong.").

Further, neither Abrue nor the GC can be heard to complain that the Union's conduct in settling the Grievances somehow breached the Union's duty of fair representation or obligations under the Act. See U.S. Postal Service, 300 NLRB at 197 fn.11. Abrue admits he accepted and cashed the check he received from Respondent as a result of the Settlement Agreement. Less than two weeks after accepting the financial consideration that was part of the Settlement Agreement, Abrue withdrew his unfair labor practice charge against the Union. His uncontroverted testimony is that he withdrew the CB Charge because Region 28 staff told him to withdraw it. Abrue's withdrawal of the CB Charge at the direction of and with the consent of the Regional Director is tantamount to an admission by Abrue, the Regional Director, and the GC

that the Union (and thus Respondent) did not violate the Act or act in any other improper fashion concerning the manner in which it processed and settled the Grievances.[8] It is the height of hypocrisy for the Region to instruct Abrue to abandon his failure to represent charge against the Union, approve withdrawal of that charge, and then accuse the Union of the very offense it told Abrue to cease pursuing, solely to advance an unfounded claim against Respondent. Thus, the GC cannot credibly contend that the Union somehow is guilty of the very claim the Region told Abrue to abandon.[9]

In summary, the Judge's conclusions in the Supplemental Decision were correct because they are supported by the record and consistent with the analysis set out in Alpha Beta, supra and U.S Postal Service, supra. In both of those cases, the Board concluded that the settlements at issue were not palpably wrong because – like here – they resulted from a negotiated compromise between the employer and the union over a contractual dispute. Alpha Beta, 273 NLRB at 1547; U.S. Postal Service 300 NLRB at 197-98. Here, the Settlement Agreement and the Charge disputed the same layoffs under the same contractual provision, and the Union had full authority to bind the laid-off drivers to the terms of the Settlement Agreement regardless of whether they approved. Id. This is particularly true in light of the fact that Abrue was a shop steward and, as such, was well aware of how the grievance process worked. See U.S. Postal Service, 300 NLRB

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8 The Board may take administrative notice of its own proceedings. See Farmer Bros. Co., 303 NLRB 638, 638 n.1 (1991); Metro Demolition Co., Inc., et al., 348 NLRB 272, 273 fn.3 (2006) (citing Westwood One Broad. Servs., 323 NLRB 1002, fn.2 (1997).

9 Indeed, if the Region and the GC truly believed there was evidence sufficient to show that Union breached its duty of fair representation in its handling of the Grievances, or that the Settlement Agreement was in some other way repugnant to the purposes and policies of the Act, the appropriate course of action would have been for the Region to issue a complaint on the CB Charge and consolidate it with this matter. Of course, this never happened. Instead, the Region chose to affirmatively solicit and approve Abrue's withdrawal of the CB Charge and then inappropriately encourage Abrue to pursue these very same withdrawn claims against Respondent only.

at 197 fn. 11. Try as they may, neither Abrue nor the GC has any right to substitute their interpretation of the CBA for that of the parties to the agreement. See e.g. Plumbers and Pipefitters Local No. 520, 955 F.2d 744, 756 (D.C. Cir. 1992). Thus, for all the reasons set forth above, the Board should adopt the recommendations of the Judge, defer to the Settlement Agreement and dismiss the Complaint without further proceedings.

E. Even If This Matter Was Properly Deferred Under Dubo, The Board Should Dismiss This Matter Without Further Proceedings

The GC has consistently taken the position that this matter was properly deferred under Dubo rather than Collyer. Even if the GC is correct (which he is not), the result is the same, as Dubo also requires dismissal of the Complaint in its entirety.

As noted above, Dubo deferral requires the charging party to choose between the arbitration process and the Board's processes. Deferral can be revoked only if the charging party withdraws from the grievance proceedings and takes no subsequent actions inconsistent with that withdrawal. See Sec. II.A, supra. Of course, neither Abrue nor any of the laid-off drivers ever withdrew from the grievance and arbitration process. Indeed, as late as January 31, 2012, the very date upon which the Settlement Agreement was fully executed, Abrue expressed his intent to continue his participation in the grievance and arbitration procedure. Tr. 2 at 129-32 (Abrue); GC Exs. 7-8. In these circumstances, "it would frustrate the intent expressed by Congress" and the Board's deferral policy as articulated in Dubo and its progeny if Abrue were allowed two bites at the apple. Dubo, 142 NLRB at 432.

Thus, if the matter was properly deferred under Dubo, as the GC contends, the GC never had the legal authority to revoke the deferral of the Grievances in the first place. Rather, the only recourse available to the Region was to assess whether the terms of the Settlement Agreement were repugnant to the purposes and policies of the Act which, as discussed above, they clearly

were not.

Because the GC has not carried his burden to establish repugnancy, and since deferral is not revocable under Dubo except in limited circumstances that do not apply here, the GC cannot attempt to litigate the independent 8(a)(1) allegations in these proceedings. Those 8(a)(1) allegations, which complain of conduct that occurred just prior to the layoffs in November 2009, were not included in the November 2009 Charge and were not identified by the Region in its revocation of the deferral or its February 2012 information request letter to Respondent. The Charge was never amended to include them. Indeed, they were never raised at all until they were inserted in the Complaint through vague allegations filed on May 31, 2012. Even then, Respondent was not made aware of the details of these false allegations until the first hearing in September 2012. Because these 8(a)(1) allegations regarding alleged statements in November 2009 were not raised until May 31, 2012 at the earliest, they are time-barred under Section 10(b) of the Act unless they are closely related to a timely-filed charge. See e.g., Redd-I, Inc. 290 NLRB 1115 (1988).

Here, the General Counsel contends that the only "timely-filed" charge to which the 8(a)(1) allegations could conceivably attach was deferred under Dubo, assuming Dubo is the correct deferral standard. Dubo deferral, however, requires dismissal of the charge in all cases where the charging party does not opt out of the grievance process. Abrue, of course, never opted out of grievance process. Therefore, the only recourse available to the GC in this case was to dismiss the charge and limit his review to the question of whether the terms of the Settlement Agreement are repugnant to the Act. Since the Charge must be dismissed, it cannot be used to bootstrap otherwise untimely claims like the 8(a)(1) charges the GC seeks to raise in this matter. Accordingly, the spurious and untimely 8(a)(1) allegations should be dismissed with the rest of

the Charge.[10]

F. Every Exception Asserted By The GC Is Without Merit And Should Be Rejected

Well-settled Board precedent, including Spielberg, Olin, United Technologies, Inland Steel, Alpha Beta, and U.S. Postal Service, all confirm the Judge's conclusion that the Settlement Agreement is not repugnant to the Act. Largely ignoring both the record and clear precedent, the GC offers nine exceptions, each of which is without merit and should be rejected.

1. The Judge Did Not Err By Objecting to the Dubo Deferral

The GC continues to contend that the matter was deferred properly under Dubo. GC's Second Exceptions Brief at 7-8. As discussed supra and as noted previously by the Judge, it has been Board law for decades that grievances that can be deferred under Collyer should be deferred under Collyer. See Sec. II.A, supra at 12-14 and authorities and record references cited therein. Only when Collyer deferral is improper should a matter be deferred under Dubo. See April 30, 2013 Oder, sl. op. at 4, Bench Dec. citing GC Memorandum 73-31. Arbitration Referral Policy Under Collyer – Revised Guidelines, p. 38 fn. 63 and cases cited therein. Notably, the GC does not take issue with this statement of the law in its Second Exceptions Brief despite the Judge's invitation to do so. See Supp. Dec. at 5:25-31, fn. 3. Instead, the GC embarks on an irrelevant attempt to distinguish the facts here from Sheet Metal Workers Local

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[10] Of course, if the Board concludes that the Judge correctly held that this matter should have been deferred under Collyer, then dismissal of the Complaint is warranted based on the Judge's conclusion that the Union failed to bring the Grievances to arbitration promptly after deferral. Thus, the Complaint should be dismissed under either deferral standard and the 8(a)(1) allegations should be dismissed as untimely under either standard, even if it could be assumed for the sake of argument that they were not considered by the parties in reaching the terms of the Settlement Agreement.

18, 359 NLRB No. 121 (2013),[11] and reiterates an assertion that the Spielberg/Olin standards are applicable regardless of how the underlying case was deferred. None of this provides any reason to disturb the Judge's conclusion that the matter should be dismissed.

The problem with this Exception is that it assumes the very issue in question rather than challenging or addressing it. There is no doubt that, once a matter is properly deferred and decided, the award or settlement agreement may be reviewed to determine whether deferral to such agreement is appropriate under the Spielberg/Olin standards. This is precisely what the Board said in its April 30, 2013 Order. See BCI Coca-Cola Company Of Los Angeles, 359 NLRB No. 110 at sl. op. 2. Obviously, if the matter is dismissed under Collyer because it was not brought to arbitration promptly, there is no valid award or settlement to examine. Here, the undisputed facts support that this is what happened in this case, but the GC simply ignores this issue and conclusion. Having failed to address it in its Exceptions, the GC has waived the matter. Indeed, this Exception should be disregarded for this reason alone.

Again, the GC incorrectly assumes that he has discretion to revoke deferral in a matter ostensibly deferred under Dubo when the individual charging party Abrue never withdrew from the arbitration process. In such circumstances, the only action that can be taken is using the applicable Spielberg/Olin standards to assess whether the award or settlement is repugnant to the Act.[12] Similarly, it is erroneous for the GC to claim that it may apply the deferral standards for

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11 The Judge cited this case for the proposition that the Board has confirmed that deferral standards generally have not changed. The GC did not challenge this observation.

12 The Regional Director and the GC are well-aware of the Board's position regarding deferral and their limited ability to act after a matter deferred under Dubo is resolved pursuant to that process. Region 28 previously argued for new deferral standards where, as here, the results of the deferral process did not comport with its agenda or preferred result. Indeed, after Region 28 deferred a Union steward's termination to arbitration pursuant to Dubo, and the termination decision was upheld by the arbitrator, the Region submitted the matter to the Office of the

evaluating an arbitration award in a case where a charging party has consented to let his union settle his grievance, as the standards of review are different. Compare Olin, supra, and U.S Postal Service, supra. In the latter case applicable to this matter, the Union has the right to both waive the employees' statutory rights and settle the grievance, even if it is on terms the employee and the Region would not accept. Alpha Beta, 273 NLRB at 1547; U.S Postal Service, 300 NLRB at 197-98; Inland Steel, 263 NLRB at 1091. Such a settlement is not repugnant to the Act as long as it reflects a negotiated compromise in the absence of a breach by the Union of its duty of fair representation. See e.g. U.S. Postal Service, 300 NLRB at 198.

This Exception really does nothing more than object to the manner in which the Judge expressed displeasure with the GC's continued refusal to address the issues raised by this litigation. As noted above, both Collyer and Dubo ultimately require either deferral to the Settlement Agreement and/or dismissal of the Complaint. As this Exception does not address any issue that might change this conclusion, it should be rejected.

2. The Judge Did Not Err when He Stated That the Union Agreed With Respondent

In this Exception, the GC misleadingly employs an exercise in semantics to claim that the Union did not agree that the layoffs at issue could be done by classification seniority. GC's Second Exceptions Brief at 8-10. This effort is misguided and unsupported by the contents of the record, which states:

> "After the parties were initially unable to resolve the matter through the grievance procedure, the Union was faced with the decision of whether to take the grievance to

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General Counsel ("OGC") for advice as to whether it was appropriate to utilize the proposed new deferral standards set forth in GC Memorandum 11-05. The OGC declined to utilize the proposed new standards, stated that the "decision is not clearly repugnant and instead is susceptible to an interpretation consistent with the Act," and it instructed the Region to "defer to the [] award and dismiss the instant charge." See Advice Memorandum, Safeway, Inc., Case No. 28-CA-22896 (July 8, 2011).

> arbitration. Perez consulted with his superiors concerning the matter; he argued in favor of arbitrating the grievances. His superiors, however, concluded that the Union would not prevail in the arbitration and therefore decided not to go to arbitration. They ultimately agreed with Coca-Cola's interpretation of the Contract."

Supplemental Decision at 3:34-39.

This is exactly what is stated by the Judge in the Supplemental Decision, and it is supported by the record testimony. Mr. Perez testified that the Union had no evidence to support its argument that the layoffs should have been done by department seniority, and that the contractual provision in question was designed to permit production employees, not distribution employees like the laid-off drivers, to be laid off by department seniority. Tr. 2 at 85-87 (Perez). Perez then testified:

> Q. I want to make sure I understand your testimony. You concluded that [the CBA provision at issue] applied only to Production and warehouse and not Distribution, right?
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> A. After we went through a series of discussions with our legal, we went back and looked at notes and we went back and, whether we go back where we did on that, there was determined by the collective, by the union, that, you know, we would have a hard time arguing that part with that and so it was determined that that's what it applied to based on notes that we had on discussions that we had from before.
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> …
>
> So we had to, I mean, I had to go with that obviously.

Id. Thus, the unrefuted evidence shows that the Union concluded that the CBA provision at issue was consistent with Respondent's interpretation following a detailed examination of the parties' negotiation history and internal discussion of the issue. Moreover, Mr. Perez was quite clear about why the Union settled:

> "We felt that the settlement at least would provide something for the, you know, those people who have been affected by the layoff on that and after discussing with, like I said, with my superiors and all that, we decided we were not going to have great success in trying to take it to arbitration, so tried to get something better than nothing." Tr. 2 at 93 (Perez).

The record clearly supports the Judge's finding that, in the absence of any proof to support its position that driver layoffs should have been conducted by department seniority, and after internally discussing the bargaining history regarding the contractual provision at issue, the Union ultimately agreed with Respondent that the CBA permitted layoffs in the distribution department by classification seniority. Accordingly, this Exception should be rejected.

3. The Exception to the Judge's Refusal to Hear Evidence on the Section 8(a)(1) Allegations Should be Rejected

In this Exception, the GC contends that the Judge should have conducted an evidentiary hearing on the untimely 8(a)(1) allegations of the Complaint. GC's Second Exceptions Brief at 10-11. Once again, the GC ignores the record and Board precedent to advance a position that cannot be sustained.

In its April 30, 2013 Order, the Board made it clear that the scope of the hearing on remand was quite limited. "This is not a hearing on the merits of the unfair labor practice charge, but instead is limited to taking evidence that will allow the judge to determine if the award or settlement is repugnant to the Act; that is whether it is susceptible to an interpretation consistent with the Act." April 30, 2013 Order, sl. op. at 2 (emphasis added). The Board then remanded the case to the Judge "…to conduct a hearing and determine whether the settlement agreement warrants deferral pursuant to [Spielberg and Olin]." Id. While the Board purported to instruct the Judge to "decide" the ancillary 8(a)(1) allegations, it did not order the Judge to conduct a hearing on these claims prior to making any decision about whether to defer to the Settlement Agreement. Moreover, in its June 28, 2013 Order, the Board stated only that it was remanding the 8(a)(1) claims for "consideration" - not a hearing on the merits. June 28, 2013 Order at 2. Indeed, the Board further clarified the statements in its earlier Order, stating that "…nothing in the 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 should be dismissed if the settlement warrants deferral …" Id.

Despite excepting to not being afforded a hearing on the merits of the 8(a)(1) allegations, the GC offers no authority for the proposition that he was entitled to try the 8(a)(1) claims on the merits before the deferral issue was decided. That is because well-established Board precedent states just the opposite. In Sheet Metal Workers Local 18, supra, the Board concluded that the ALJ erred by deciding the merits of an 8(b)(3) charge before determining whether deferral was appropriate "and, a fortiori, in basing his refusal to defer in part on his decision on the merits." 359 NLRB No. 121 sl.op. at 2. Although the Board held that such issues may be addressed in the same hearing and the same decision, "[w]hether deferral is appropriate is a threshold question which must be decided in the negative before the merits of the unfair labor practice allegations can be considered." Id. (emphasis added), quoting L.E. Myers, 270 NLRB 1010, 1010 fn. 10 (1984). Thus, it would have been error for the Judge to proceed as the GC proposes in this Exception since the Judge found deferral was in fact proper.

The GC goes on to argue that there is no evidence that the 8(a)(1) allegations were considered in the deferral action. GC's Second Exceptions Brief at 11. Once again, the GC's semantics are misleading at best. Mr. Perez's undisputed testimony was that he spoke to Abrue and other drivers while the Charge was pending and heard nothing that would sustain any unfair labor practice charges.[13] Tr. 2 at 88-90 (Perez). Neither Counsel for the GC nor Abrue cross-examined Perez on what he was told (or when and by whom), and the GC did not make any proffer as to when, how, and to what extent Abrue or anyone else conveyed any such allegations

[13] Indeed, the reality is that the Union would have been very interested in such details if they in fact existed, as such allegations would ostensibly have presented grounds for the Union to file a blocking charge and/or objections to the results of the decertification election.

to Perez. Because the burden of proof rests on the GC to show deferral is not proper, it is the GC's failure to present any evidence (as opposed to argument and innuendo) regarding what and when Perez knew of these supposed 8(a)(1) allegations that dooms the GC's claim. See U.S. Postal Service, 300 NLRB at 198[14]. This Exception ignores the record, the law, and common sense, and should be rejected.

4. The Judge Did Not Err By Limiting The Record Evidence

In this Exception, the GC argues that he should have been permitted to introduce a plethora of irrelevant innuendo as "evidence" of "union animus." GC's Second Exceptions Brief at 11-13. This Exception also ignores the record and the law and therefore is without merit.

First, the GC argues that it should have been allowed to introduce some unspecified history of other unfair labor practice cases. GC's Second Exceptions Brief at 11-12. Such vague and gratuitous contentions are wholly irrelevant as to whether the Settlement Agreement in this case is repugnant to the Act under the Spielberg/Olin and U.S. Postal Service standards. Moreover, the Judge has already decided that such evidence was not relevant. Tr. at 14-15. Since the GC did not except to this finding by the Judge in September 2012, the issue is waived.

Similarly, there was no proof or proffer of any evidence that the Union ignored any claim that Respondent tried to get rid of anybody during a decertification campaign. GC's Second Exceptions Brief at 12. Indeed, the evidence shows that the Union had nothing to support the argument that the layoffs should have been done by department seniority, and that it examined

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[14] To the extent that the GC might contend that substance of the 8(a)(1) claims were not raised to the Union by Abrue or anyone else prior to the Settlement Agreement being executed, this is tantamount to a waiver of untimely claims. The GC cannot seriously contend that Abrue has some right to hold allegations in reserve until he can determine whether the grievance process ends in a matter to his liking. This is exactly what the Board said it would not permit in Dubo. Dubo, 142 NLRB at 432.

the history of the contractual layoff provision at issue and concluded that it permitted driver layoffs by classification seniority. Tr. 2 at 81 (Perez); Tr. 2 at 54-55 (Monaghan). Thus, this Exception does nothing more than attempt to replace facts from the record with innuendo and hyperbole, and it should be rejected.

Additionally, the GC's continued reliance on Dayton Power & Light Co., 267 NLRB 202 (1983) is misplaced. First, and as previously noted, the GC is not entitled to an evidentiary hearing at all. See e.g. U.S. Postal Service, supra (complaint dismissed upon motion for summary judgment). Second, the Judge did hold a hearing on the merits of the deferral issue as required by the Board's Remand Order. Third, the GC cannot be heard to complain that there was not a fair chance to show that the Settlement Agreement was repugnant to the Act when he consciously facilitated the withdrawal of Abrue's CB Charge making this very claim and avoided asking Perez any specific questions about what he knew about the 8(a)(1) allegations and when he knew about them. Again, the GC has the burden of proof on this issue and failed to meet it. U.S. Postal Service, 300 NLRB at 198. Accordingly, this Exception should be rejected.

5. The Judge was Correct in His Factual Determinations Regarding The Union's Motives and Actions

In this Exception, the GC seems to contend that it was error for the Judge to conclude that the Union agreed that the layoffs were permissible as conducted by Respondent, intimating that the Union only agreed with Respondent because it lost the decertification election. GC's Second Exceptions Brief at 14. For the reasons stated above, the record unambiguously supports the Judge's findings in this regard. The Union admitted it had no evidence to support its argument that driver layoffs should be done by department seniority, and a detailed review of the history of the CBA provision at issue led the Union to conclude that driver layoffs could be done by classification seniority. Tr. 2 at 81; 85-92 (Perez); Tr. 2 at 54-55 (Monaghan).

In any event, this Exception is misdirected, as it alleges that the Union, not Respondent, abandoned its obligation to the laid-off drivers (including Abrue) because it lost the decertification election. Though an "exception" in form, this is really nothing more than an argument by the GC that the Union breached its duty of fair representation to Abrue and the other laid-off drivers in settling the Grievances. The GC cannot make such contentions now, as it is undisputed that Region personnel both solicited and approved Abrue's withdrawal of the CB Charge against the Union alleging this precise violation. Accordingly, this Exception should also be overruled.

6. The Judge Did Not State That The Parties Stipulated That There Was No Evidence That The Union Breached Its Duty Of Fair Representation

Yet again, the GC mischaracterizes the Judge's finding in an effort to create an Exception where none exists. The GC incorrectly asserts that "[t]he 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 their being no evidence that that the Union had breached its duty of fair representation in settling the grievance as it did." GC's Second Exceptions Brief at 14.

This "exception" blatantly misquotes the Judge, who actually said, "[t]he parties stipulated that the charge in case 28-CB-074569 alleged that the Union breached its duty of fair representation by its handling of the grievances at issue." Supplemental Decision at 4:29-30. The record clearly supports this stipulation and the Judge's related finding. Tr. 2 at 29-30. The Judge then went on to find that the General Counsel solicited and approved withdrawal of the CB Charge. Supplemental Decision at 4:30-33. The record clearly supports this factual finding, as Abrue testified without contradiction that he was "told" to withdraw the charge by Region 28 staff. Tr. 2 at 138-39 (Abrue). Based upon this factual testimony, and not any "stipulation" by

the parties as to the ultimate conclusion to be drawn from these facts, the Judge correctly found that there was no evidence that the Union breached its duty of fair representation in settling the Grievances as it did. Supplemental Decision at 4:32-33. Indeed, given the Region's instructions to Abrue to withdraw his CB Charge, it is disingenuous for the GC to even attempt to contend otherwise.[15] Accordingly, this Exception should be rejected.

7. The Judge Did Not Err In Finding That The Settlement Agreement Was Not Repugnant to The Act

This Exception asserts that the Settlement Agreement is repugnant to the Act. GC's Second Exceptions Brief at 15-20. For the reasons discussed both above and below, this Exception is without merit and should be rejected.

First, there is no support for the notion that the parties did not agree to be bound. The GC has already conceded this point. GC's First Exceptions Brief at 6; GC's Second Exceptions Brief at 16. The GC's attempt to change its position now and contend that Abrue did not agree to be bound (GC's Second Exceptions Brief at 15, 18) is legally irrelevant even if it was permissible. It does not matter that Abrue did not approve of the Settlement Agreement, or that

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[15] The GC's efforts to avoid this inescapable conclusion reveal the disingenuous nature of any attempt to claim that the Union breached its duty of fair representation. Abrue did not testify that he did not know why he was asked to withdraw the CB Charge, as the GC incorrectly claims. See GC's Second Exceptions Brief at 15. Abrue clearly understood the basis for the Region's directive and testified to that effect: "What they told me was it's because I had the existing complaint against the, the Board charge against Coca-Cola, that it was in advantageous [sic] for me to go against the Union." Tr. 2 at 139 (Abrue). In response to a direct question from the Judge, Abrue testified that "I do not remember who, at the time, who I talked to, but they did tell me not to go ahead with that [Charge against the Union] because it would conflict, they said the case was basically against Coca-Cola and that's where our best choice was. That's all they said." Id. Abrue further confirmed that the Union Charge was for "the lack of representation." Id. During Abrue's testimony to this effect, the GC did not assert any hearsay objection and, therefore, the GC's attempt to now dismiss the charging party's testimony in this regard is waived. If anything in this proceeding is "palpably wrong," it is the GC's misleading efforts to insinuate that the Union somehow violated its duty of fair representation when it specifically told Abrue to abandon his charge against the Union making that very claim.

it did not provide him with all the relief either he or the GC feels he should have received. See e.g. U.S. Postal Service, supra; Inland Steel, supra. What matters is that Abrue, as a shop steward, understood and availed himself of the grievance process and, in doing so, agreed to be bound by that process. U.S. Postal Service, 300 NLRB at 197 and fn. 11. The facts supporting this conclusion are irrefutable, and the law compelling this conclusion is well-settled.

Next, the Settlement Agreement is not palpably wrong. GC's Second Exceptions Brief at 18. The GC's continued contention that the Settlement Agreement is repugnant to the Act because it does not provide full relief under the GC's theory of the case is simply a misstatement of the law. See e.g. U.S. Postal Service, 300 NLRB at 197-98. The GC's continued reliance upon Cone Mills Corp., 298 NLRB 661 (1990), and similar cases to support this erroneous position only underscores the complete lack of merit to this argument. In Cone Mills Corp., the Board declined to defer to an arbitrator's decision in a discharge matter where the arbitrator concluded that the conduct that led to the discharge was protected by the Act. Every other case cited by the GC where deferral was rejected similarly involved an arbitral award finding that the employer had committed an independent violation of the Act.[16]

The GC's cited authorities bear no factual or legal resemblance to this case and thus do not support a finding of repugnancy. Here, unlike in the cases cited by the GC, there is no discharge for conduct, no arbitrator's award, and no protected conduct that was the sole cause of

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[16] See e.g., Mobil Oil Exploration and Producing U.S. Inc., 325 NLRB 176 (1997) (overturning deferral to an arbitration award because the discharge was based solely on the charging party's protected conduct); Key Food Stores Cooperative, Inc., 286 NLRB 1056 (1987) (refusing to defer to an arbitration award because the just cause determination considered directly protected concerted activity such as picketing and internal union activities); Garland Coal & Mining Co. 276 NLRB 963 (1985) (refusing to defer to the arbitrator's decision because the sole reason for discipline was refusal to sign a document in the employee's capacity as a union representative); Valley Material Co., 316 NLRB 704 (1995) (declining to defer where the sole basis for the conduct was union activity).

a disciplinary discharge. This is a layoff case involving a shop steward and seven other people where the Union and the Respondent negotiated a grievance settlement regarding a contractual language dispute that paralleled the allegations of the Charge filed by Abrue. Under applicable law, this is exactly the kind of case that should be deferred to the terms of the settlement and dismissed. See e.g. Alpha Beta, supra; U.S. Postal Service, supra.

Indeed, the evidence shows that the layoffs were expected by the Union and caused by terrible economic conditions. See Tr. 2 at 79-80; Supplemental Decision at 3:28-30. The drivers were selected for layoff based on classification seniority under the terms of the CBA, and though the Union initially disagreed with the manner of selection, it admits that it was unable to produce any evidence to support its argument that the layoffs should be done by department seniority, and that it had no evidence to support the allegations in the Charge. Tr. 2 at 81; 85-92 (Perez); Tr. 2 at 54-55 (Monaghan)**;** As a result, the Union settled the Grievances after internally conferring with senior Union leaders and counsel and determining that, based on the lack of evidence, it was unlikely to prevail in arbitration. In an attempt to substitute its judgment and preferred result for that of the negotiated compromise between Respondent and the Union, the GC has offered nothing but inadmissible innuendo to suggest that the Union had evidence to support the Grievances and the Charge. Of course, the actual record shows that the Union had no such information. Moreover, it is unconscionable and unjustifiable for the GC to claim Respondent allegedly entered into a "repugnant" settlement agreement with the Union, when it encouraged the dismissal of that very claim against the Union by Abrue. Indeed, by soliciting and approving the withdrawal of Abrue's CB Charge alleging a breach of the duty of fair representation by the Union in its resolution of the Grievances, the GC effectively conceded that the Settlement Agreement pertaining to those Grievances was not repugnant to the Act. Accordingly, this

Exception should likewise be rejected.

8. The GC's Contention That The Judge Erred When He Said His Only Recourse Was To Dismiss The Complaint Is An Improper Mischaracterization Of The Judge's Order

The GC contends that "The ALJ erred when he stated that his only recourse was to dismiss the Complaint." GC's Second Exceptions Brief at 20 (citing Supplemental Decision at 6). The short answer to this Exception is that the Judge said no such thing. The cited portion of the Supplemental Decision provides: "On the findings of fact and conclusions of law and on the entire record, I issue the following recommended **ORDER**, the complaint is dismissed." (emphasis in original, footnote omitted). This purported "exception" expresses nothing more than the GC's displeasure with the ultimate result of the Judge's findings. However, the Judge's Recommendation and Order is well supported by the record evidence and applicable law. Accordingly, the Board should adopt the Judge's Recommendation and reject this Exception.

9. The Judge Did Not Err When He Refused To Apply The Independent Stave Analysis To The Grievance Settlement Agreement

In this Exception, the GC asks the Board to reconsider decades of precedent in a last desperate attempt to salvage a claim where none exists. GC's Second Exceptions Brief at 20-25. This Exception is without merit and should be rejected.

In his Supplemental Decision, the Judge noted that, while the GC implicitly asked that the Judge and Board modify the long-standing approach to "pre arbitral deferral cases" by applying current non-Board settlement practices, including review under Independent Stave, 287 NLRB 740 (1987), the GC proffered no explanation or argument as to why the Judge should depart from long-standing Board precedent. Supplemental Decision at 5. Indeed, a review of the GC's post-hearing brief in the underlying proceedings (Exhibit A to the GC's Second Exceptions Brief) confirms the GC's failure to present any argument on this issue to the Judge. The GC's

failure to articulate any plausible basis for applying Independent Stave (other than to perhaps change the results of the deferral process with which the GC vehemently disagrees and did not follow) is grounds alone for overruling this Exception and adopting the Judge's finding.

In the Second Exceptions Brief, and for the first time in these proceedings, the GC now attempts to present a rationale for conducting a review of the Settlement Agreement under Independent Stave. However, the GC offers no persuasive reason why current law should be changed, other than that current law simply does not provide sufficient veto power over this Settlement Agreement and its end result in the wake of the GC's failure to follow existing precedent. GC's Second Exceptions Brief at 22-23.

The GC asks that a grievance settlement be disregarded unless the evidence shows that the parties intended to settle the unfair labor practice charges. Where it is concluded that the parties intended to settle the unfair labor practice charges, the GC then asks that the Board modify its long-standing approach for reviewing and deferring to a grievance settlement, and instead apply "non-Board" settlement practices and procedures, "including" review under Independent Stave. GC's Second Exceptions Brief at 23. There is no attempt to explain what else other than Independent Stave standards this proposed new analysis might require, and no reason proffered for the proposed change other than the GC's subjective disagreement with the terms of the resolution between Respondent and the Union.

Notably, Region 28 has previously attempted to apply Independent Stave to a grievance settlement reached during the deferral process between the union and an employer without success. See Nevada Power Co., 2008 NLRB LEXIS 87 (Mar. 26, 2008) (ALJ, McCarrick). In Nevada Power, and just like in this case, Region 28 refused to defer to a grievance settlement regarding an employee's suspension, instead issuing a complaint against the respondent

employer. At that hearing, and like here, Region 28 urged the ALJ to reject the parties' grievance settlement agreement under the Independent Stave analysis. 2008 NLRB LEXIS 87, *17-19. The respondent, like here, urged that the matter should be dismissed pursuant to the grievance settlement deferral policy set forth in Spielberg, Olin, Alpha Beta, and U.S. Postal Service. Id. at *20. In his decision, the ALJ rejected the GC's request, stating that "*Independent Stave* and [its progeny] apply to the consideration of non-Board settlements not deferral to the grievance-arbitration procedure under *Spielberg* and *Olin*." Id. at *22. The ALJ then concluded, "[i]n the instant case, I am guided by the *Spielberg* and *Olin* principles rather than the *Independent Stave* guidelines since this case arises in the grievance-arbitration context as opposed to a non-Board settlement." Id. at *23. Accordingly, he recommended that the Board defer to the settlement under the principles of Spielberg, Olin, and their progeny. Id. at *24.

Like the ALJ in Nevada Power, the Board should reject Region 28's continued efforts to apply Independent Stave to settlements reached through the grievance and arbitration process. The well-established and long accepted teachings of Dubo, Alpha Beta, and U.S. Postal Service strike the proper balance among the rights and obligations of employees, employers, and collective bargaining representatives, and respects the resolutions reached through the collective bargaining process, which furthers the policy favoring private resolution of disputes. U.S. Postal Service, 300 NLRB at 197.

Contrary to the contentions of the GC, this case provides an excellent example of why the deferral standards should not be changed. First, in a case such as this one, an individual charging party can elect to pursue his charge at the Board by opting out of the grievance process. Dubo, supra. On the other hand, a grievant who fails to opt out of the grievance process – as was the case with the charging party here – is expected to abide the results of that process, absent

irregularities in the process or a result repugnant to the Act. U.S. Postal Service, 300 NLRB at 197. Thus, this case provides no occasion to consider arbitrary changes in standards of review because the charging party individual (Abrue) at all times had complete control over the forum in which his claims were to be pursued. The GC, then, wants nothing less than to change the rules after the matter has been decided solely because he does not like the outcome of the charging party's choices in pursuing his claims.

Second, the GC has not articulated exactly what the contemplated changes might entail. The Board should not attempt to guess about what the GC really wants.

Third, and in any event, the parties here did in fact consider the unfair labor practices in the Charge and confirmed their review and analysis of those unsubstantiated allegations in writing as a part of the Settlement Agreement. The GC simply failed to raise any genuine issue challenging this conclusion. The GC cannot be heard to demand a change in the rules because it failed or declined to prove its case. See U.S. Postal Service, 300 NLRB at 198.

In this regard, it should be emphasized that it was only after a settlement was reached and the consideration paid that the Region and Abrue attempted to conveniently interject into this matter untimely allegations of a purported clandestine plot and threats to get rid of Abrue because of his purported protected activity. They now claim that these untimely allegations should provide a basis for declining to defer to the Settlement Agreement.[17] By requesting in this case that the Board impose new deferral standards and hold that the currently inapplicable non-Board

[17] If the Board were to accept the GC's notion that unproven and untimely allegations provide a basis for declining to defer to a settlement agreement reached following deferral, it would effectively render the deferral process illusory and render Dubo meaningless. Individuals could file charges, agree to have them deferred, and then concoct any wild 8(a)(1) assertion as a means to have a grievance settlement or decision voided if they do not like the outcome of the grievance process (which apparently is exactly what happened here). This is the antithesis of the purpose of the deferral process, and it flies in the face of decades of well-established Board law.

settlement review process set forth in Independent Stave should apply to grievance-arbitration settlements such as the one between Respondent and the Union after the matter has been pending for over two years[18], the GC attempts nothing less than an unwarranted manipulation of due process with the sole purpose of invalidating a result with which it does not agree to compensate for its failure to act as required under existing law. This request and tactic should not be countenanced, nor should well-settled Board law regarding the deferral analysis for grievance-arbitration settlements be disturbed.

For all the reasons set forth above, this Exception should be rejected.

III. CONCLUSION

For the reasons set forth above, the Complaint in this matter should be dismissed in its entirety for failure to promptly bring the Grievances to arbitration as required by the Collyer doctrine. Alternatively, and additionally, the Judge should overrule each of the GC's Exceptions, defer to the Settlement Agreement between the Respondent and the Union, and dismiss the Complaint in its entirety on those grounds as well.

Dated: October 18, 2013

Respectfully submitted,

/ s / Douglas M. Topolski

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this **RESPONDENT BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES' ANSWERING BRIEF TO THE ACTING GENERAL COUNSEL'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS** was filed electronically and that an original was sent on October 18, 2013 by Federal Express to the National Labor Relations Board, 1099 14th Street N.W., Washington, D.C., 20570-0001, and service copies were sent by E-Mail and Federal Express to:

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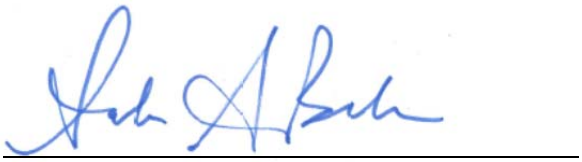

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