UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 17

CARGILL, INCORPORATED

and **CASE 17-CA-088608**

INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL/UFCW LOCAL 188C, affiliated with UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO

RESPONDENT'S BRIEF IN SUPPORT OF MOTION TO TRANSFER AND MOTION FOR SUMMARY JUDGMENT

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Pursuant to Sections 102.24 and 102.50 of the Board's Rules and Regulations, Respondent Cargill, Incorporated ("Respondent"), by its undersigned counsel, respectfully submits the following Brief in Support of its Motion to Transfer and Motion for Summary Judgment:

I. STATEMENT OF UNDISPUTED FACTS

1. At all material times, Respondent has been engaged in the production and nonretail sale of salt at its Hutchinson, Kansas facility. (Complaint, Para. 2, a copy of which is attached as Exh. 1; Answer, Para. 2, a copy of which is attached as Exh. 2). At all material times Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act. (Exh. 1, Para. 2; Exh. 2, Para. 2).

2. International Chemical Workers Union Council/UFCW Local 188C, affiliated with United Food and Commercial Workers Union, AFL-CIO ("Union") at all material times has been a labor organization within the meaning of Section 2(5) of the Act. (Exh. 1, Para 3; Exh. 2, Para. 3).

3. At all material times, Respondent and the Union have been parties to a collective bargaining agreement ("CBA"), effective from May 1, 2009 to April 30, 2014, that contains a grievance procedure culminating in final and binding arbitration. A copy of the CBA is attached as Exh. 3.

4. On or about May 10, 2012, Respondent suspended employee Chris Mayes pending investigation into his conduct on May 9, 2012. (Exh. 1, Para. 5(a); Exh. 2, Para. 5(a)).

5. Following Respondent's investigation, on or about May 14, 2012, Respondent discharged employee Chris Mayes. (Exh. 2, Para. 5(c)).

6. On or about May 16, 2012, employee Chris Mayes (hereinafter referred to as "Grievant" or "Grievant/Alleged Discriminatee") filed a grievance alleging that he was unjustly terminated for performing his duties as Union Vice President. A copy of the grievance is attached as Exh. 4.

7. The charge and first amended charge in this proceeding were respectively filed by the Union on September 5, 2012 and October 5, 2012, and copies thereof were mailed to Respondent on those dates. (Exh. 1, Para. 1; Exh. 2, Para. 1). A copy of the charge is attached as Exh. 5. A copy of the first amended charge is attached as Exh. 6.

8. On October 9, 2012, the Regional Director for Region 17 deferred further processing of the unfair labor practice charge pursuant to the Board's Collyer/United Technologies pre-arbitration deferral guidelines. A copy of the deferral letter is attached as Exh. 7.

9. Following exhaustion of the grievance procedure set forth in the CBA, the grievance described in Paragraph 6 above proceeded to arbitration on October 24, 2012, before Arbitrator Elizabeth Simon. Following the hearing, both the Union and Respondent filed post-

hearing briefs. A copy of the Union's post-hearing brief, dated November 21, 2012, is attached as Exh. 8. A copy of Respondent's post-hearing brief, dated November 30, 2012, is attached as Exh. 9.

10. On December 21, 2012, Arbitrator Simon issued her Labor Arbitration Opinion and Award ("Arbitration Opinion & Award") denying the grievance described in Paragraph 6 above in its entirety. A copy of the Arbitration Opinion & Award is attached as Exh. 10.

11. On September 30, 2013, the Regional Director for Region 14, by the Officer-In-Charge of Subregion 17, issued the Complaint and Notice of Hearing herein. (Exh.1).

12. The Regional Director does not even mention the Arbitration Opinion & Award in the Complaint and Notice of Hearing, and at no time has explained how or why the Arbitration Opinion & Award allegedly fails to satisfy the Spielberg/Olin post-arbitration deferral guidelines.

13. On October 31, 2013, Respondent filed its Answer and Affirmative Defenses to the Complaint and Notice of Hearing. (Exh. 2).

14. In the Arbitration Opinion & Award, Arbitrator Simon was aware of and acknowledged that the Union had filed an unfair labor practice charge over the discharge of Grievant/Alleged Discriminatee Mayes, and that the charge had been deferred pending the outcome of the arbitration. (Exh. 10, p. 4). In the Arbitration Opinion & Award, the Arbitrator framed the issue as being whether the Company had "just cause to terminate the Grievant and, if not, what is the proper remedy?" (Exh. 10, p.2). In its post-hearing brief, the Union proposed that the issues before the Arbitrator be stated as follows:

> Did the Employer (Cargill Incorporated), by its officers, agents and representatives, discriminated (sic) against Union Vice President Chris Mayes by suspending him on or about May 10, 2012; issuing him a written reprimand dated May 14, 2012; and subsequently unjustly terminating his employment on May 14,

> 2012, for engaging in protected Union activity. If so what is the remedy? (Exh. 8, p.2).[1]

Based on the evidence presented during the hearing, the Arbitrator found that the Grievant/Alleged Discriminatee, Chris Mayes held the position of Union Vice-President and previously had served as Union President for four terms. On the afternoon of May 9, 2012, Grievant had an altercation with his supervisor, Troy Wright, on the shipping dock of the plant. Their discussion, which was not witnessed by any other employees, concerned a decision Wright had made earlier that day to move another employee to a different work shift. (Exh. 10, p. 3).

Supervisor Wright's version of the incident, as recounted by the Arbitrator, was as follows:

> Grievant accused him, "right off the bat" of being wrong about moving the other employee. Wright disagreed and tried to explain, but noticed that Grievant was becoming visibly upset. As the discussion continued, Grievant shifted in the forklift seat, looked right at him [Wright] and yelled, "G_damnit, that's not the way we've done it and that's not the way we do it." Wright said they were about a foot away from each other. He could feel the spit from Grievant on his face. (Exh. 10, p. 4).

The Grievant's version of the altercation, as recounted by the Arbitrator, was as follows:

> Grievant said he hollered at Wright because what Wright did [in assigning one of the third shift fork lift operators to a different shift] was wrong. At the time there was a vacancy for a forklift operator, and the agreement had always been not to move anyone's shift until the new employee actually came on. He added that he felt strongly because the move concerned past practice and he wanted to stop the issue coming up again. He acknowledged using the word "g-damn" but said he had (sic) was referring to the other forklift operator, who had never had a problem with his shift before. He hadn't been swearing at his supervisor. (Exh. 10, p. 6-7).

[1] Although the Arbitrator did not refer to the May 14, 2012 document titled "written reprimand" in the Arbitration Opinion & Award, the document was merely a written confirmation of the Grievant's suspension on May, 10, 2012, pending further investigation.

The Arbitrator also recounted that the Grievant claimed, beginning shortly after the incident, that he was immune from discipline because he was acting in his capacity as a Union representative at the time of the altercation with his supervisor. (Exh. 10, p.4).

Following the altercation, Supervisor Wright reported the incident to the Plant Superindendent, Evan Moodie, who took statements that same afternoon from both the Grievant and Supervisor Wright. (Exh. 10, p.3). The next day, Plant Manager Whitson met with the Grievant in the presence of the Union President, Dale Corley, and Supervisor Wright. During the meeting, the Grievant claimed that at the time of the altercation, he was conducting union business and had not sworn at his supervisor. (Exh. 10, p. 5). When asked by the Plant Manager why he believed he was conducting union business, the Grievant could not provide a satisfactory explanation. When also asked if anyone on the third shift had complained about the change in shift assignment, the Grievant acknowledged there had been no complaint. When the Plant Manager asked the Grievant what had made him mad enough to curse, he again could not explain. At the conclusion of the meeting, Plant Manager Whitson suspended the Grievant pending further investigation based on what occurred during the incident and the Grievant's past work record. (Exh. 10, p. 5).

On May 14, 2012, Plant Manager Whitson discharged the Grievant for violating Plant Rule # 6, which prohibits "any insubordination, include[ing] … threats or swearing directed at a supervisor," and Plant Rule # 7, which prohibits "any disorderly conduct, which includes fighting, threats, harassment, or intimidation directed toward any supervisor, fellow employee or member of the public on Cargill property." (Exh. 10, p.3). Before making the discharge decision, the Plant Manager checked with the Human Resources Department, and was informed that in the past four years seven employees had been disciplined for the same rule violations.

The discipline was based on the Company's belief that maintaining a professional, stable workforce was important, and that profanity, intimidation and other inappropriate behavior simply were not acceptable. (Exh. 10, p.5). Additionally, the Plant Manager concluded that under the Company's progressive disciplinary policy, discharge was the appropriate penalty for the Grievant's misconduct since he had received a two-day suspension during the previous year resulting from an incident in which the Grievant committed multiple rule violations when he was caught lighting a cigarette while driving a forklift with a propane fuel tank down a ramp approximately 30 feet from the plant's propane supply. Additionally, the Grievant's work record reflected that he had been disciplined on two prior occasions for aggressive behavior directed at a supervisor. (Exh. 10, p.6).

In summarizing the positions of the parties before making her award, the Arbitrator noted the Union's position was that this was a discrimination case against a Union vice-president who was unjustly terminated for speaking out against his supervisor for an action he believed violated the CBA. (Exh. 10, p. 7). In discussing the evidence, the Arbitrator also specifically addressed the issue of whether the Grievant was engaged in protected activity at the time of his argument with his supervisor. The Arbitrator expressly found that "a preponderance of the evidence supports a finding the Grievant was not engaged in protected activity on May 9." (Exh. 10, p. 7). In reaching this conclusion, she observed that "[b]oth arbitrators and the NLRB have upheld grievances where a union official became heated or swore at a grievance meeting. Context is critical and consideration is given to union officials engaged in zealous representation of their members." (citing several arbitration awards in which disciplinary actions for shouting and swearing during a grievance meeting were set aside.) (Exh. 10, p.8). The Arbitrator distinguished those cases, concluding instead:

> The critical difference here was that Grievant's actions and behavior were not those of someone advocating for one of his members. At no time before, during or immediately after the argument could Grievant clarify his concerns, other than say that what his supervisor had done was "wrong." "It's not the way things are done" is a partial description of the problem as Grievant saw it, but it is incomplete. Grievant could never identify anyone else who had come forward to complain of who had an issue with another forklift operator bidding back to one of his former shifts before a vacancy was filled. Nor could the plant manager find anyone when he did his investigation. (Exh. 10, p.8).

After rejecting the Union's argument that the Grievant was engaged in protected activity during the altercation with his supervisor, the Arbitrator found that disciplinary action was appropriate. She concluded:

> Significantly, Plant Manager Whitson personally handled the investigation. He interviewed the parties directly involved and afterwards made the decision to suspend Grievant pending further investigation. He spoke to the union president, reviewed prior disciplinary decisions and Grievant's work record. He also consulted with other members of management. His decision to discipline was based on the finding that Grievant's behavior towards his supervisor had been aggressive and intimidating, in violation of two plant rules which prohibit swearing, threats and intimidation against a supervisor or other employees. It was also consistent with other disciplinary actions taken for similar conduct over the prior five years. (Exh. 10, p. 9).

Significantly, after repeating her earlier determination that the facts did not support the Union's contention that the Grievant's suspension and termination were discriminatorily imposed in retaliation for the Grievant's representative status or conduct, the Arbitrator stated:

> Even if Grievant's efforts were at least partially serving a Union-related concern or interest, his behavior at the time of the incident with his supervisor was inappropriate and exceeded the bounds of workplace acceptability. The Company's consistent past practice was to discipline employees for aggressive and inappropriate conduct toward others. (citing arbitration awards) (Exh. 10, p. 9).

Concerning the severity of the disciplinary action imposed against the Grievant, the Arbitrator found that the Company followed its progressive discipline policy and that termination was dictated by the fact that that the Grievant had received a two-day disciplinary suspension during the previous year for a multi-count safety violation. (Exh. 10, p. 9-10).

In weighing whether there were any mitigating factors that may have warranted the imposition of a less severe disciplinary penalty, the Arbitrator noted that the Grievant at no time took any responsibility for his actions, and attempted to recast the argument with his supervisor as a "union issue," which it was not. The Arbitrator finally observed that the Grievant had a previous history of receiving discipline on two earlier occasions for being argumentative with supervisors. (Exh. 10, p. 10).

Ultimately, after concluding there were no mitigating factors sufficient to modify the Company's decision to terminate the Grievant, the Arbitrator issued an award denying the grievance in its entirely. (Exh. 10, p. 10).

II. ARGUMENT

A. STANDARD OF REVIEW:

The Board in its discretion may grant a motion for summary judgment where there is an absence of a genuine issue of material fact requiring a hearing before an Administrative Law Judge. Marble Polishers Local 47-T (Grazzini Bros.), 315 NLRB 520, 522 (1994); NLRB Rules and Regulations 102.24(b). Summary judgment is particularly appropriate where the parties' motions and supporting documents clearly indicate that they do not disagree as to the material facts in a particular case. Teamsters Local 579 (Chambers and Owen, Inc.), 350 NLRB 1166, 1168 (2007). Where, as here, there are no material facts in dispute, there is ample authority and support for the Board to decide whether the Spielberg/Olin deferral standards have been satisfied in the context of a motion for summary judgment. See, e.g. Southern California Edison Company, 310 NLRB 1229 (1993), enfd. sub nom Utility Workers Union, Local 246 v. NLRB, 39 F.3d 1210 (9th Cir. 1994); United Parcel Service of Ohio, 305 NLRB 433 (1991); Dennison National Company, 296 NLRB 169 (1989); United States Postal Service, 275 NLRB 430 (1985);

Atlantic Steel Company, 245 NLRB 814 (1979). Therefore, the Board should decide the case based on Respondent's motion for summary judgment and dismiss the case without the necessity of a remand to the Administrative Law Judge.

B. THE BOARD SHOULD DEFER TO THE ARBITRATOR'S AWARD UNDER THE SPIELBERG/OLIN STANDARDS:

Based on the undisputed facts, the Complaint in this case must be dismissed pursuant to the long-standing and well-settled deferral principles set forth in Spielberg Mfg. Co., 112 NLRB 1080 (1955), and Olin Corp., 268 NLRB 573 (1984). Congress, the Supreme Court, and the Board have long recognized that private resolution of labor disputes is one of the core principles upon which the Act is grounded. As the U.S. Court of Appeals for the District of Columbia has explained, the Board's post-arbitration deferral policy, first set forth almost six decades ago in Spielberg Mfg. Corp.:

> is motivated by an effort to conserve the Board's resources and, where possible, to abide by the resolutions arrived at by the private mechanisms that are the primary and preferred adjudicators of contractual labor disputes. *Arbitration is preferred for the simple reason that it is understood to be "a part of the continuous collective bargaining process" that lies at the heart of the NLRA.*

Utility Workers Local 246 v. NLRB, 39 F.3d 1210, 1216 (D.C. Cir. 1994) (emphasis added) (citing United Steelworkers v. Warrior & Gulf Navigation Co., 33 U.S. 573, 581 (1960)). The Board itself has stated time and again that national labor policy "strongly favors the voluntary resolution of disputes." Aramark Services, Inc., 344 NLRB 549, 550 (2005) (citing Olin, supra).

Pursuant to Spielberg/Olin, the Board defers to an arbitrator's decision where: (1) the proceedings were fair and regular; (2) the parties have agreed to be bound by the result of the arbitration; (3) the decision is not clearly repugnant to the Act; and (4) the arbitrator has considered the unfair labor practice issue. Id. at 550. The party opposing deferral also has a "heavy burden" to show that the arbitration decision does not satisfy the deferral standards. Id.

Recognizing the clear policy favoring arbitration and deference to the parties' choice of this means of dispute resolution, one court has stated, "it is an abuse of discretion for the Board to refuse to defer to an arbitration award where the findings of the arbitrator may arguably be characterized as not inconsistent with Board policy." NLRB v. Pincus Brothers, Inc. – Maxwell, 620 F.2d 367, 374 (3rd Cir. 1980). The Board itself has held "it is well established that an arbitrator, to satisfy the Olin/Spielberg requirements for deferral, need not decide a case the way the Board would have decided it or in a manner 'totally consistent with Board precedent'." Aramark Services, Inc., 344 NLRB at 549.

Here, the Arbitrator's award clearly satisfies the Spielberg/Olin standards and the Acting General Counsel simply cannot and will not be able to meet the "heavy burden" required to avoid deferral to the Arbitration Opinion & Award.

1. The Proceedings Were Fair And Regular.

In deciding whether this deferral factor has been satisfied, the Board looks to the relationship between the employee who has been disciplined and the advocacy of the Union on his or her behalf during the grievance-arbitration procedure. As stated by the Administrative Law Judge in Roadway Express, Inc., 355 NLRB 1, 7 (2010):

> Where the interests of the charging party grievant conflict with the interests of his or her union representative, the arbitral proceedings are not fair and regular, and the Board does not defer to arbitration. [citing cases].

Here, there is no indication whatsoever that the interests of the Grievant/Alleged Discriminatee Chris Mayes were not in harmony with those of the Union, which strongly advocated his position throughout the grievance-arbitration procedure. Moreover, an independent neutral arbitrator was chosen by the parties to hear the grievance over Mayes' termination, the hearing ran smoothly, the parties were afforded the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and both parties filed post-hearing briefs

with the Arbitrator. Indeed, the Union's post-hearing brief acknowledged that, "the parties have agreed the grievance is properly before the arbitrator with no issues relating to neither substantive nor procedural arbitrability" and "have stipulated to Ms. Simon's jurisdiction and authority to hear the case." (Exh. 8, p.2).

Accordingly, there can be no question that this deferral factor has been fully satisfied in this case. See Aramark Services Inc., 344 NLRB at 551.

2. All Parties Agreed To Be Bound By The Results Of The Grievance-Arbitration Procedure.

This factor clearly has been met since the parties' CBA provides for final and binding arbitration, and Grievant/Alleged Discriminatee Mayes agreed to be bound by the outcome of the Arbitrator's decision when he voluntarily filed a grievance protesting that he had been unfairly terminated by the Company.

3. The Unfair Labor Practice Allegations In The Unfair Labor Practice Charge Were Adequately Considered By The Arbitrator.

As the Board has stated, "in deciding a question of deferral, the Board will presume that the arbitrator adequately 'considered the unfair labor practice issue' if the contractual issue was 'factually parallel' and the arbitrator was 'presented generally' with the facts relevant to the former." See Aramark, 344 NLRB at 550 (quoting Olin). In determining whether the contractual issue resolved by the arbitrator is factually parallel to the unfair labor practice issue, "the presence of contractual authorization for the [employer's] action is determinative of the unfair labor practice allegation." Dennison National Company, 296 NLRB 169, 170 (1989) (deferring to arbitration award, granting employer's motion for summary judgment, and dismissing complaint).

Consistent with Olin, the Arbitration Opinion & Award need not mimic what the Board's analysis would have been. Instead, as the Board has repeatedly held:

> The Board's standard of review does not contemplate that the Board will substitute its judgment for that of the arbitrator in resolving contractual issues. Rather, we will inquire only into whether the arbitrator adequately considered the unfair labor practice issues.

Andersen Sand and Gravel Company, 277 NLRB 1204, 1205 (1985) (rejecting the General Counsel's argument that deferral is inappropriate where the General Counsel and the ALJ would have decided the issues differently). Indeed, the Board has made clear that it does not sit as an appellate review tribunal over arbitration awards and will not engage in second-guessing the wisdom of an arbitrator chosen by the parties to resolve their dispute:

> By adopting a broadly based deferral policy, as enunciated in Olin, the Board endorses the national labor policy favoring arbitration and achieves one of the primary objectives of the Act – to encourage collective bargaining. Deferral recognizes that the parties have accepted the possibility that an arbitrator might decide a particular set of facts differently than would the Board. This possibility, however, is one which the parties have voluntarily assumed through collective bargaining.

277 NLRB at 1205 n.6. See also Combustion Engineering, Inc., 272 NLRB 215, 216-17 (1984) ("As Olin Corp. suggests, the Board's decision whether to defer to an arbitration award does not hinge on whether we would reach the same result de novo. Rather, our concern is to ensure that the decision does not impinge upon the parties' rights under the Act.").

Here, the Region deferred the unfair labor practice charge to the parties' grievance-arbitration procedure, and the charge was before the Arbitrator during the arbitration hearing. The Arbitrator also considered and expressly decided the issues of whether Mayes was engaged in protected activity under the Act during his May 9, 2012 confrontation with Supervisor Wright and, if so, whether he lost that protection by his conduct and behavior during the altercation. Indeed, what this case boils down to is that the Union and Acting General Counsel are seeking a

"second bite of the apple," since if the case were tried before an Administrative Law Judge, essentially the same evidence and testimony would be presented and considered as that presented to and considered by the Arbitrator.

In rejecting the Union's argument that the Grievant/Alleged Discriminatee was discriminatory discharged for engaging in protected activity, the Arbitrator unquestionably considered and decided the statutory issue.

4. The Arbitrator's Award Is Not "Clearly Repugnant" To The Act.

As stated by the Board in Smurfit-Stone Container Corp., 344 NLRB 658, 660 (2005):

> The standard for determining whether an arbitral decision is clearly repugnant is whether it is "susceptible" to an interpretation consistent with the Act. Olin, 268 NLRB at 574; see The Motor Convoy, 303 NLRB 135 (1991). "Susceptible to an interpretation consistent with the Act" means precisely what is says. Even if there is one interpretation that would be inconsistent with the Act, the arbitral opinion passes muster if there is another interpretation that would be consistent with the Act. Further, "consistent with the Act" does not mean that the Board necessarily would reach the same result. It means only that the arbitral result is within the broad parameters of the Act. Thus, the Board's mere disagreement with an arbitrator's conclusion would be an insufficient basis for the Board to decline to defer to an arbitrator's award.

In Kvaerner Philadelphia Shipyard, Inc., 347 NLRB 390, 391-392 (2006), the Board further held:

> *If Board precedent exists that supports an arbitrator's decision, it cannot be said that the decision falls outside the broad parameters of the Act. Thus, such a decision is not palpably wrong or clearly repugnant to the Act, if other Board precedent is arguably contrary to the arbitral decision.* See Marty Gutmacher, Inc., 267 NLRB 528-533 (1983) (Board adopted judge's deferral to an arbitrator's finding despite existence of Board cases to the contrary, because other Board cases supported the finding. The judge concluded that "there is simply no way I could find that [the arbitrator's] award … was "palpably wrong as a matter of law"). (Emphasis added).

See also Cone Mills, 298 NLRB 661, 666 (1990).

Here, the Arbitrator's conclusion that employee Mayes was not engaged in protected activity within the meaning or the Act is not "palpably wrong" even though the Board may have reached a different result if it had made this determination in the first instance.

As the Board stated in Aramark Services, whether or not an individual's conduct is "protected" under the Act is not determinative in the deferral context. Rather, the key question is whether the arbitrator made a rational conclusion in that regard. 344 NLRB at 551 ("Even if the Board were to conclude that the instant conduct was protected [while the arbitrator did not], the arbitrator was acting reasonably and rationally to come out the other way, and thus deferral was warranted.").

Here, the Arbitrator's finding that the Grievant was not engaged in protected activity during the altercation that led to his discharge is not "clearly repugnant" to the Act. The Arbitrator found that the Grievant's actions and behavior were not those of someone advocating for one of his members, and Grievant could never identify anyone who had come forward to complain or who had issue with another forklift operator bidding back to one of his former shifts before a vacancy was filled. The Grievant's only explanation for approaching Supervisor Wright and complaining about the assignment was that what the supervisor had done was wrong; it was not the way things had been done in the past.

The Arbitrator's finding that the Grievant was not engaged in protected activity is not clearly or palpably incorrect. In Meyers Industries (Meyers II), 268 NLRB 493 (1984), the Board stated that an employee must be engaged with or on the authority of other employees, and not solely by or on behalf of the employee himself to constitute "concerted" activity. In determining the existence of concerted activity, the Board has considered such factors as whether the comments involved a common concern regarding conditions of employment and whether the

issue was framed as a common concern. See Air Contact Transport, Inc., 340 NLRB 688, 695 (2003); Neff-Perkins Co., 315 NLRB 1229, 1232 (1994). Here, neither of those elements is present. The Grievant could not identify any other employee who had complained and, as found by the Arbitrator, it was the Grievant himself who was most impacted by the action taken by the supervisor. Here, like in Piper Realty Company, 313 NLRB 1289, 1292 (1994), and K-Mart Corporation, 341 NLRB 702 (2004), the Grievant's personal objections to his supervisor's action did not rise to the level of concerted activity. The Grievant was acting on his own, not on behalf of other employees, in his protest. Moreover, the fact that the Grievant was a Union officer cannot transform a personal complaint into concerted activity in the absence of evidence, and here there was none, that the Grievant asserted or framed the issue as one of common concern among other employees. In sum, as the Sixth Circuit observed in Manimark Corp. v. NLRB, 7 F.3d 547 (6th Cir. 1993), the evidence is "too thin" to support a finding that the Grievant was engaged in protected concerted activity during his altercation with Supervisor Wright. Accordingly, the Arbitrator's finding in that regard is not "clearly repugnant" to the Act.

Aramark Services, supra, is particularly instructive in this case, noting the fine line between protected and unprotected activity and how even protected activity can be lost due to misconduct. See also Specialized Distribution Management, Inc., 318 NLRB 158, 161-162 (1995) (deferring to arbitration award of reinstatement without backpay because the grievant engaged in insubordination). Therefore, the Arbitrator's ruling that Grievant/Alleged Discriminatee Mayes was not engaged in protected activity during the altercation with his supervisor is entitled to deference by the Board.

In any event, the Arbitrator found that, "even if Grievant's efforts were at least partially serving a Union-related concern or interest, his behavior at the time of the incident with his

supervisor was inappropriate and exceeded the limits of workplace acceptability." (Exh. 10, p.9). The Arbitrator additionally found that the Company's consistent past practice was to discipline employees for aggressive and inappropriate conduct toward others. (Exh. 10, p. 9). In this respect, it is well-established that an employer is entitled to a "civil and decent work place" and "to adopt prophylactic rules banning" profane and abusive language. Adtranz ABB Daimler-Benz Transportation v. NLRB, 253 F.3d 19 (D.C. Cir. 2001) (adopted by the Board in Fiesta Hotel Corp., 344 NLRB 1363 (2005)); Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004). See also Trus Joist MacMillan, 341 NLRB 369, 371 (2004).

As the Board stated in Cellco Partnership d/b/a Verizon Wireless, 349 NLRB 640, 642 (2007):

> "Although employees are permitted some leeway for impulsive behavior while engaging in concerted activity, this leeway is balanced against an employer's right to maintain order and respect" in the workplace. Piper Realty Co., 313 NLRB 1289, 1290 (1994). The Board has found that even when an employee is engaged in protected activity, he or she may lose the protection of the Act by virtue of profane and insubordinate comments. See, e.g., Daimler-Chrysler Corp., 344 NLRB 1324, 1330-1331 (2005); Aluminum Co. of America, 338 NLRB 20, 21-22 (2002); Atlantic Steel Co., 245 NLRB 814, 816 (1979).

In Atlantic Steel Company, the Board spelled out four factors that must be weighed and analyzed in determining whether an employee who is otherwise engaged in protected activity loses that protection by engaging in inappropriate or opprobrious conduct: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. 244 NLRB at 816.

Even though there is certainly no Spielberg/Olin requirement that the Arbitrator must have applied the Atlantic Steel factors in her award, application of those factors clearly shows that even if the Grievant/Alleged Discriminatee was engaged in protected activity during the

May 9, 2012 altercation with his supervisor, he lost the protection of the Act by engaging in unwarranted and unprovoked yelling, cursing and getting in the face of his supervisor during that incident. The undisputed facts establish the following:

- **The place of the discussion**: The incident in this case took place during work time on the shipping dock of the plant. Although no other employees witnessed the altercation, this factor supports a finding that the Grievant lost the protection of the Act since the Grievant's conduct was disruptive of the work process. At worst, it is neutral.

- **The subject matter of the discussion**: This factor favors a finding that the Grievant lost the protection of the Act, since even if he was minimally engaged in a representative capacity in complaining about the supervisor's conduct in moving an employee to a different shift before backfilling a vacancy for an open position, the Grievant was acting more in a personal than a representative capacity, could not identify any other employee who had complained about the supervisor's conduct, and was unable to explain why this was a "union" issue or a violation of the collective bargaining agreement other than to complain it was contrary to the way things had been done in the past. The Acting General Counsel and Union therefore cannot meet their burden of proving that this factor supports a claim that the Grievant/Alleged Discriminatee did not lose whatever protection the Act may have afforded him during the confrontation with his supervisor.

- **The nature of the outburst**: This factor strongly supports a finding that the Grievant lost the protection of the Act. After listening to the testimony of both the Grievant and Supervisor Wright, the Arbitrator found that the Grievant became loud and aggressive during the conversation, to the point of getting in Wright's face and yelling "G-damnit, that's not the way we've done it and that's not the way we do it." At that point, immediately before ending the

conversation, saying they needed to talk to the plant manager, Wright actually could feel spit from the Grievant on his face.

The Arbitrator found, correctly so, that the Grievant's conduct violated both Plant Rule #6, which prohibits "any insubordination, include[ing] … threats or swearing directed at a supervisor," and Plant Rule #7, which prohibits "any disorderly conduct, which includes fighting, threats, harassment, or intimidation directed toward any supervisor, fellow employee or member of the public on Cargill property." (Exh. 10, p.9). Moreover, the evidence showed that the Grievant had been disciplined on earlier occasions for engaging in aggressive conduct directed at supervisors, and there had been seven incidents in the past four years in which the Company had disciplined other employees for engaging in similar conduct. Although Respondent is not claiming that the Grievant/Alleged Discriminatee should be held to a higher standard than other employees, because of his long history as a union officer and the earlier warnings he had received for aggressive and insubordinate behavior, he certainly should have known that he was subjecting himself to disciplinary action by yelling, cursing and challenging the authority of his supervisor. If the Grievant/Alleged Discriminatee believed that Supervisor Wright had violated the CBA or past practice, he should have simply filed a grievance. Instead, he verbally attacked his supervisor, which violated the Company's consistently enforced rules prohibiting swearing and intimidation directed at a supervisor.

This factor weighs strongly in favor of a finding that the Grievant lost the protection of the Act based on his intimidating and aggressive conduct during the altercation with his supervisor. In Atlantic Steel Company, the employee was discharged for calling his foreman a "lying S.O.B." while discussing a grievance. The employee made that comment on the production floor, within earshot of another employee and without any provocation, in a

workplace where such conduct normally was not tolerated. The Board, in rejecting the Administrative Law Judge's conclusion that the arbitrator's award in that case was repugnant to the Act, observed:

> The Administrative Law Judge cited no decisions, however, and we know of none, where the Board has held that an employee's use of profanity to a supervisor on the production floor, following a question concerning working conditions, is protected as would be a spontaneous outburst during the heat of a formal grievance proceeding or in contract negotiations. To the contrary, the Board and the courts have recognized (as did the Administrative Law Judge in passing) that even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act. 244 NLRB at 816.

The Board's seminal decision in Atlantic Steel clearly and unequivocally supports the Arbitrator's finding that even if the Grievant/Alleged Discriminatee was engaged in protected activity during the confrontation with his supervisor, he lost that protection by his unacceptable, profane and inappropriate conduct during that altercation. Accordingly, this factor clearly supports a finding that the Arbitrator's ruling in this regard was not palpably wrong. See also, Felix Industries, Inc., v. NLRB, 251 F.3d 1051,1055 (D.C. Cir. 2001) (holding the Board's application of the Atlantic Steel factors was arbitrary and capricious, and finding that "if an employee is fired for denouncing a supervisor in obscene, personally-denigrating, or insubordinate terms… then the nature of his outburst properly counts against according him the protection of the Act"); Plaza Auto Center, Inc. v. NLRB, 664 F.3d 286 (9th Cir. 2011) (rejecting the Board's application of the third Atlantic Steel factor and remanding based on employee's profane outburst at a manager during a meeting); Daimler Chrysler Corp., 344 NLRB 312 (2005) (employee lost protection of the Act by making repeated, extensive and personally derogatory comments to a supervisor); Aluminum Company of America, 338 NLRB 20 (2002) (employee lost protection of the Act based on profane outbursts, their comparative severity, and their occurrence in a stable labor relations environment free of any apparent employer opposition to

employee grievances); Foodtown Supermarkets, Inc., 268 NLRB 630, 631 (1984) ("Neither this Act nor any other federal law protects an employee from insubordinate conduct of the type engaged in by Smith," i.e. calling the company president an "SOB."); Southwestern Bell Telephone Company, 200 NLRB 667 (1972) (employer acted lawfully in requesting employees to remove "Ma Bell is a cheap mother" sweatshirts as a reasonable and necessary step to maintain discipline and harmonious employee-employer relations).

- **The presence of an unlawful provocation**: This factor likewise strongly favors a finding that the Grievant lost the protection of the Act if he was in fact even engaged in protected activity in the first place. It is undisputed that Supervisor Wright did not say or do anything whatsoever to provoke the Grievant's outburst, and the Grievant was unable to explain why he yelled and cursed at his supervisor. His only justification was that he was insulated from any discipline for his conduct while engaged in union business.

Application of the Atlantic Steel factors clearly support a finding that even if the Grievant/Alleged Discriminatee was arguably engaged in protected activity during the May 9, 2012 altercation with his supervisor, he lost that protection based on his misconduct during the course of the altercation. The Arbitrator's cogent and well-reasoned rationale for her findings and conclusions in this regard clearly was not "palpably wrong" and the Arbitration Opinion & Award is not "clearly repugnant" to the Act.

In sum, the Arbitration Opinion & Award satisfies all of the Spielberg/Olin standards and the Acting General Counsel cannot meet the "heavy burden" of proving that the award does not meet those standards. The Board therefore should defer to the Arbitration Opinion & Award and dismiss the complaint.

C. IF THE BOARD DETERMINES THAT THE ARBITRATOR'S AWARD DOES NOT COMPLY WITH THE CURRENT SPIELBERG/OLIN STANDARDS, IT SHOULD MODIFY THE STANDARDS CONSISTENT WITH THE APPROACH SUGGESTED BY THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA:

Over the years the Court of Appeals for the D.C. Circuit generally has approved the Board's Spielberg/Olin deferral policy. See, e.g. Bakery, Confectionery & Tobacco Wkrs. v. NLRB, 730 F.2d 812, 814-815 (D.C. Cir.1984); Associated Press v. NLRB, 492 F.2d 662, 667 (D.C. Cir. 1974). However, in a number of cases the Court very pointedly has questioned the theoretical basis for those standards, particularly the standard whether the arbitrator's award is repugnant to the Act. Darr v. NLRB, 801 F.2d 1404 (D.C. Cir. 1986) (remanding case to the Board due to inadequate justification for decision to defer to an award that did not include a make whole remedy); Plumbers & Pipefitters Local 520 v. NLRB, 955 F.2d 744, 746 (D.C. Cir. 1992*)* (denying petition for review and upholding deferral to a grievance settlement agreement but cautioning that "the Board will be well advised to reconsider the basis for its deference policy in order to avoid the need for remand in future cases"), cert. den., 506 U.S. 817 (1992); Utility Workers Union v. NLRB, 39 F.3d 1210,1215 (D.C. Cir. 1994) (denying petition for review and upholding deferral to arbitrator's award but questioning "the doctrinal basis that underlies the Board's deferral policy as well as its 'palpably wrong' limitation").

The repugnancy standard, and how it should be applied, obviously is critical to the outcome of this case. As previously argued, there is ample Board precedent to support the conclusions reached by the Arbitrator that employee Mayes was not engaged in protected activity during the May 9, 2012 altercation with Supervisor Wright and, even if he was, Mayes lost that protection based on his inappropriate and unprovoked behavior during the altercation. Therefore, under well-settled Board law, the Arbitration Opinion & Award cannot be said to be

"palpably wrong" or "clearly repugnant" to the Act, even if the current Board might decide these issues differently. However, if the Board is inclined, for whatever reason, to hold that the Arbitration Opinion & Award does not satisfy the repugnancy test, then this case may provide an appropriate vehicle for the Board to re-evaluate the Spielberg/Olin standards. If so, Respondent respectfully urges the Board to adopt the standard suggested by the Court of Appeals for the District of Columbia Circuit, namely that the Board should defer to an arbitrator's award where the evidence establishes that (1) the arbitration proceedings were fair and regular; and (2) the union did not breach its duty of fair representation during the grievance-arbitration procedure. See Plumbers & Pipefitters Local 520, supra, 955 F.2d at 756. That standard clearly is met here.

D. THE ACTING GENERAL COUNSEL ACTED ULTRA VIRES IN ISSUING THE COMPLAINT AND NOTICE OF HEARING IN THIS CASE:

Respondent recognizes that the Board normally does not rule on the merits of arguments concerning the validity of presidential appointments in an unfair labor practice proceeding. See, e.g. Lutheran Home at Moorestown, 334 NLRB 340 (2001). However, to preserve its position for a possible appeal to an appellate court, Respondent submits that Acting General Counsel Lafe Solomon was not lawfully holding office and the Regional Director, on behalf of the Acting General Counsel, therefore did not have the authority to issue the Complaint and Notice of Hearing in this case.

Under Section 3(d) of the Act, 29 U.S.C. §153(d), the President appoints an Acting General Counsel when there is a vacancy in the position of General Counsel. However, that section of the Act further provides that "no person or persons designated shall so act…for more than forty days when Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate…" Id.

President Obama appointed Lafe Solomon as Acting General Council on June 21, 2010, but never submitted a nomination to the Senate for that position within forty days of the appointment. In fact, it was not until January 5, 2011 when the President nominated Mr. Solomon to serve as General Counsel, well beyond the forty-day time limit. Therefore, the appointment did not comply with the statutory mandate set forth in Section 3(d) of the Act, and Acting General Counsel Solomon acted ultra vires when the Complaint and Notice of Hearing in this case was issued on his behalf on September 30, 2013.

In an attempt to circumvent this failure to comply with the Act, the Board has argued that Acting General Counsel Solomon was appointed under the Federal Vacancies Reform Act of 1998, 5 U.S.C. § 3345 et seq., an alternative method for filling temporary vacancies in certain presidential appointee positions. However, the Federal Vacancies Reform Act cannot be used to appoint an Acting General Counsel since there is an existing specific statutory provision that governs such appointments. While the Federal Vacancies Reform Act broadly applies to all offices within executive agencies that are filled by presidential appointment with Senate confirmation, and provides a longer 210-day period in which the temporary appointee is authorized to act, Section 3347 of the Federal Vacancies Reform Act specifically states the Federal Vacancies Reform Act may be used only for filling temporary vacancies for a covered position when there is not a more specific statutory position, such as Section 3(d) of the Act, which provides for such designation. 5 U.S.C. § 3347.

Additionally, the Federal Vacancies Reform Act only permits the appointment of persons under specific circumstances, 5 U.S.C. § 3345, none of which apply to Acting General Counsel Solomon. See Hooks v. Kitsap Tenant Support Services, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013).

Moreover, as the Court pointed out in Kitsap, the fact that Acting General Counsel Solomon's actions are exempted from the penalty provisions of the Federal Vacancies Reform Act does not grant him the authority to act pursuant to an appointment that was invalid from the outset.

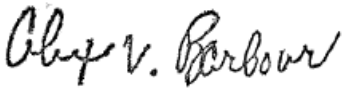
III. CONCLUSION

Based on the foregoing, Respondent respectfully submits that the Board should grant Respondent's Motion to Transfer and Motion for Summary Judgment and dismiss the Complaint and Notice of Hearing in this case in its entirety.

Respectfully submitted this 12th day of November, 2013.

CARGILL, INCORPORATED

By:



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CERTIFICATE OF FILING AND SERVICE

I, Alex V. Barbour, hereby certify that on November 12, 2013, I electronically filed the foregoing **RESPONDENT'S BRIEF IN SUPPORT OF MOTION TO TRANSFER AND MOTION FOR SUMMARY JUDGMENT** using the NLRB electronic filing system at http://www.nlrb.gov and, on the same date, mailed a copy of **RESPONDENT' BRIEF IN SUPPORT OF MOTION TO TRANSFER AND MOTION FOR SUMMARY JUDGMENT** to the following via the U.S. Postal Service first class mail:

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