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

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

COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO TRANSFER AND MOTION FOR SUMMARY JUDGMENT

Respectfully Submitted by
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Counsel for the General Counsel William F. LeMaster respectfully files this Opposition to Respondent's Motion to Transfer the Case to the National Labor Relations Board (Board) and Motion for Summary Judgment seeking dismissal of the Complaint and Notice of Hearing in the above-captioned case. Respondent argues that (1) the Board should defer to the arbitrator's opinion and award involved in this matter; (2) the Board should adopt the D.C. Circuit's standard for arbitral review; and (3) the Acting General Counsel of the Board was not properly appointed and therefore lacked authority to issue the Complaint and Notice of Hearing. Counsel for the General Counsel opposes Respondent's motion for the reasons addressed below and requests that the Board deny Respondent's motion in its entirety.

I. Procedural Background

On September 5, 2012, October 5, 2012, and November 18, 2013, International Chemical Workers Union Council Local 188C, affiliated with United Food and Commercial Workers Union, AFL-CIO (the Union), filed the original, amended and second amended charges in Case 17-CA-088608, alleging that Respondent discriminated against its employee Chris Mayes by suspending him on May 10, 2012, and issuing him a written warning and terminating his employment on May 14, 2012, in violation of Sections 8(a)(1) and (3) of the Act. On October 9, 2012, the Regional Director for Region 14 deferred to the parties' grievance and arbitration procedure the allegations set forth in the original and amended charges. Thereafter, on October 24, 2012, an arbitration hearing was conducted concerning the deferred allegations. On December 21, 2012, the arbitrator assigned to the matter issued a decision denying the grievance.

By letter dated February 7, 2013, the Region informed the parties that the Union contended that the arbitrator's award failed to meet the standards set forth by the Board in *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955) and *Olin Corporation*, 268 NLRB 573 (1984), and solicited the parties' positions on deferral to the arbitrator's award. After review of the parties' positions, the Region determined that the arbitrator's decision failed to meet the *Spielberg/Olin* standards for deferral to arbitral awards. Accordingly, on September 30, 2013, a Complaint and Notice of Hearing issued scheduling the matter for a hearing before an Administrative Law Judge on December 10, 2013. On November 12, 2013, Respondent filed a Motion to Transfer the Case to the Board and Motion for Summary Judgment.

II. Respondent's Arguments

A. Summary Judgment is Not Appropriate

In its motion, Respondent asserts that the instant matter warrants dismissal based on the arbitrator's award that issued on December 21, 2012. Counsel for the General Counsel argues that Respondent's position is in error as material factual disputes and critical deficiencies with the arbitrator's decision exist in this case that necessitate a record be established before an Administrative Law Judge. Those facts and relevant legal arguments will support the General Counsel's position that (1) Respondent unlawfully disciplined, suspended and discharged Chris Mayes for engaging in protected concerted and union activity and (2) the arbitrator's decision failed to meet the Board's *Spielberg/Olin* standard because her award was "clearly repugnant" to the Act.

1. Factual Background

This case involves the suspension and subsequent write-up and discharge of Union Vice President Chris Mayes on May 10 and May 14, 2012, respectively. In

dispute is whether the discipline issued by Respondent constituted unlawful retaliation for Mayes engaging in protected concerted and union activity in violation of Sections 8(a)(1) and (3) of the Act. The underlying incident that ultimately led to Mayes' discipline and subsequent discharge occurred on May 9, 2012. Mayes, an employee of Respondent for 33 years, had served as a Union officer for 18 years. He held the position of Local President for four two-year terms and was in his third two-year term of serving as Local Vice President when he initiated a conversation with supervisor Troy Wright on the shipping dock of Respondent's facility. The record will establish that Mayes confronted Wright concerning what he viewed to be a variation in past practice under the parties' collective bargaining agreement with respect to a change made to bargaining unit employees' shift scheduling. Respondent subsequently disciplined, suspended and terminated Mayes over the May 9 incident.

2. Substantial and Material Factual Disputes Exist

Respondent's contention that no material factual discrepancies exist in this matter is not supported. There are factual differences at issue that are essential for consideration by the Administrative Law Judge in deciding whether Respondent unlawfully retaliated against Mayes on May 10 and May 14, 2012. An important disagreement between the parties exists with respect to the exchange that took place between Mayes and supervisor Wright on May 9, 2012. The content of this conversation is at the crux of Mayes' protected activity. At hearing, the General Counsel will present facts related to this conversation that contradict Respondent's position that Mayes was not engaged in protected concerted and union activity and factual evidence that challenges Respondent's position that it was not aware that Mayes was citing to a break in past practice under the

collective-bargaining agreement. Witness testimony will affirmatively contradict Respondent by establishing that Wright, in response to Mayes' complaints, directed Mayes to file a grievance over the alleged unilateral change. Additionally, not only is there a credibility dispute with respect to this verbal exchange, there is a dispute with respect to the existence of a hand written statement by Wright confirming his directive for Mayes to file a grievance under the collective-bargaining agreement. The Union requested this document in advance of the arbitration hearing. However, Respondent failed to furnish Wright's statement and although directly witnessed by two Union officers, Respondent denies its existence. Other important substantive details surrounding the discipline issued to Mayes include the shop floor environment in which the conversation took place, the past practice of shop talk permitted by Respondent (including Wright), and active discipline permissible for reliance by Respondent. With respect to all of these issues, there is a genuine issue of material fact, some of which was either not considered or misapplied by the arbitrator.

These factual discrepancies lie at the heart of the circumstances around the conversation between Mayes and Wright, determining whether Mayes was engaged in protected activity, and whether he lost the protection of the Act. This matter raises substantial and material factual disputes that are best resolved at a hearing before an administrative law judge. Consequently, Respondent's motion should be dismissed.

3. Arbitration Award was Repugnant to the Act

Notwithstanding the presence of material factual disputes, Respondent argues that the arbitral award that was issued on December 21, 2012, meets the current standards set forth in *Spielberg/Olin*. The standards set forth in *Spielberg/Olin* call for the Board to

defer to an arbitral award when (1) all parties agreed to be bound by the decision of the arbitrator; (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 policies of the Act. *Spielberg* at 1082; *Olin* at 574. Following the full presentation of all disputed facts in this case at hearing, the evidence will support the conclusion that the arbitrator's decision did not meet the fourth prong of *Spielberg/Olin.*

Within her December 21, 2012 decision, the arbitrator concluded that Mayes was not engaged in protected activity. The arbitrator made this conclusion because she felt Mayes (1) was complaining about an individual problem; (2) failed to identify any other employees affected by his expressed concern; and (3) only claimed to be performing union duties when it appeared discipline would soon follow, noting also that at no time did Mayes "take responsibility for his actions." The arbitrator further hypothesized that even if Mayes was partially engaged in protected activity, his behavior "exceeded the limits of workplace acceptability" due to his "argumentative conduct." Finally, the arbitrator found that Respondent had previously issued similar discipline for similar misconduct, referring to discipline Mayes had received years prior in 2006 and 2007, and had long fallen off of Mayes' record due to Respondent's discipline policies.

The question of whether Mayes was engaged in protected activity and whether the arbitrator's decision meets the *Spielberg/Olin* standards are litigable issues appropriate in this case to be addressed by the Administrative Law Judge. The arbitrator failed, in many ways, to analyze the appropriate Board standards in determining whether Mayes was engaged in protected activity. When an arbitrator issues an award that upholds an

employer's decision to discipline an employee on the basis of the employee's exercise of protected concerted activity, it is clearly repugnant to the Act. See *Mobile Oil Exploration & Producing, U.S.*, 325 NLRB 176, 179 (1997)(arbitral award upholding employee discharge repugnant where the employee was terminated for engaging in protected discussions with coworkers about an ongoing company investigation); *110 Greenwich Street Corp.*, 319 NLRB 331, 335 (1995)(arbitral award upholding employee discharge repugnant where employee was terminated for posting placards outside the workplace referencing the employer's precarious financial condition and protesting the employer's failure to pay him and other employees). The "clearly repugnant" standard requires that the award not be "palpably wrong," i.e., not susceptible to any interpretation consistent with the Act. *Aramark Services*, 344 NLRB 549, 549 (2005). The arbitrator's award fits this description.

First, the record will establish that Mayes was engaged in protected activity under the Board's doctrine set forth in *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), enfd. 388 F.2d 4985 (2d. Cir. 1969), approved in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). Under *Interboro*, an individual employee's attempt to enforce provisions of a collective-bargaining agreement qualifies as protected concerted activity. Id. *Interboro* protection can be found even if the employee does not explicitly reference the collective-bargaining agreement, but also when an employee attempts to enforce the parties' past practice under a collective-bargaining agreement. See *City Disposal Systems* at 839-841; *Yellow Transportation, Inc.*, 343 NLRB 43, 47 (2004)(employee protected when he filed a grievance asserting the employer had failed to follow past practice with the union under the CBA of hiring the most senior casual employee as a permanent

employee). The arbitrator failed to consider *Interboro* in reaching her conclusion that Mayes was not engaged in protected concerted activity. Once a formal record is established for consideration by the Administrative Law Judge, Mayes' protection under this doctrine will be clear.

Secondly, the arbitrator failed to analyze Mayes' discharge under the union steward functions doctrine. A union officer's obligation to enforce a collective-bargaining agreement constitutes protected concerted activity – including when pressing a complaint with management prior to actually initiating the contractual grievance-arbitration procedure. See *Goodyear Tire & Rubber Co.*, 271 NLRB 343, 345 (1984); *The Union Fork and Hoe Company*, 241 NLRB 907, 908 (1979); *Metropolitan Edison Co.*, 460 U.S. 693, 703 (1983)("[h]olding union office clearly falls within the activities protected by [Section]7 of the Act"). The facts set forth at hearing will establish that Mayes served as a Union officer for almost two decades and that Respondent had a history of resolving union-related issues with Mayes on the shop floor. As Union Vice President, part of Mayes' job was to take a stand on issues he believes are incorrect on behalf of the bargaining unit. Prior to his discipline in this matter, Mayes repeatedly informed Respondent that he viewed the scheduling shift as a Union issue. The disputed factual evidence will establish that Mayes was acting in his capacity as a Union officer and that Respondent, including Mayes' supervisor, was aware of this fact, supporting the General Counsel's position that Mayes was engaged in protected activity as a Union officer. Again, in reaching her determination, the arbitrator failed to analyze Mayes' activity and Respondent's actions under this doctrine.

Lastly, the record will establish that the arbitrator failed to utilize the appropriate standard to determine, when Mayes was engaged in protected activity, whether he then lost that protection. When considering whether an employee's actions were sufficiently egregious to remove the individual from the protections of the Act, the Board analyzes the factors set forth in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979): (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. The arbitrator did not analyze Mayes' actions under *Atlantic Steel*. She made the general observation that she believed Mayes to have acted inappropriately and that he "exceeded the limits of workplace acceptability." This conclusion was entirely inconsistent with the proper weighing of factors under *Atlantic Steel*. As will be addressed in greater detail by General Counsel following the close of the record by the Administrative Law Judge, the *Atlantic Steel* factors associated with Mayes' actions on May 9, 2012, weigh in favor of Mayes not losing the protections of the Act.

In addition to the need to address the material factual disputes that exist, the arbitrator's award was so clearly deficient that it would be wholly unreasonable to grant the Respondent's motion to dismiss the complaint and defer to her decision. The evidence that will be presented by the General Counsel at hearing will strongly support the conclusion that Mayes was engaged in protected activity on May 9, 2012; that he did not subsequently lose the protections of the Act; and Respondent's decision to discipline, suspend and discharge Mayes wear clear violations of Section 8(a)(1) and (3) of the Act. The arbitrator's decision was palpably wrong, and not susceptible to an interpretation consistent with the Act, where the discriminatee was a long time Union representative

that the Respondent was used to dealing with regarding work related complaints; where the preponderance of the evidence supports that Respondent's agents knew that Mayes was complaining not only on his own behalf; where the arbitrator failed to enunciate and consider whether the discriminatee was raising a contractual matter under *Interboro*; where the arbitrator misapplied Board law and held that because the alleged unilateral change by Respondent would impact the discriminatee, he was not speaking on behalf of others; where the arbitrator failed to enunciate and apply the standards set forth under *Atlantic Steel*; and where the arbitrator relied upon years old discipline (2006 and 2007) to support her decision, discipline which had fallen off the discriminatee's record years ago. The arbitrator's decision left too many considerations that require expansion through witness testimony at hearing and it is the General Counsel and Union's right to have a formal record established for application of the appropriate legal standards. For these reasons, Respondent's motion should be denied.

B. Respondent's Request to Modify the *Spielberg/Olin* Standard Is Not Appropriate

Respondent asserts, in the alternative, that if the Board finds the arbitrator's award to be repugnant under the Act, it should utilize this case to adopt the standard suggested by the Court of Appeals for the District of Columbia Circuit, that the Board should defer to an arbitrator's award where the evidence establishes (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. Citing *Plumbers & Pipefitters Local 520 v. NLRB*, 955 F.2d 744, 756 (D.C. Cir. 1992). The General Counsel encourages the Board

to deny Respondent's request and remand this matter for presentation to the Administrative Law Judge under the Board's current legal standards.

C. The Acting General Counsel Was Validly Appointed Under the Federal Vacancies Reform Act

Respondent makes two claims regarding the appointment of Acting General Counsel Lafe Solomon. First, Respondent argues that AGC Solomon could only be appointed validly under Section 3(d) of the Act, 29 U.S.C. §153(d), not under the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345, et seq. Next, Respondent makes a cursory alternative argument that Mr. Solomon was invalidly appointed under the FVRA. Both claims lack merit.

As an initial matter, Respondent's claim (Br. in Support, pp. 22-23) that the appointment of the Acting General Counsel was invalid because it was not in compliance with Section 3(d) of the Act, is incorrect.[1] To the contrary, the Board has held that although Section 3(d) provides one avenue to fill Board General Counsel vacancies, the subsequently-enacted FVRA clearly provides another. *Belgrove Post Acute Care Ctr.*, 359 NLRB No. 77, slip op. 1, n.1 (Mar. 13, 2013) (FVRA is valid alternative procedure to Section 3(d) of the Act). The express terms of the FVRA, with four immaterial exceptions, apply to all federal appointments requiring Senate confirmation. 5 U.S.C. § 3345(a).

In consequence, then, Section 3(d) of the Act is no longer the sole means of filling Board General Counsel vacancies, even though 5 U.S.C. § 3347(a)(1)(A) preserves the

[1] Section 3(d), enacted 40 years before the FVRA, authorizes the President to designate an individual to act as General Counsel during a vacancy, but prohibits an Acting General Counsel from serving "for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate." 29 U.S.C. § 153(d).

option of using Section 3(d).[2] The FVRA's legislative history confirms congressional intent to provide the President an additional means to fill vacancies. The Senate Report explains the relationship between the FVRA and the 40 specific statutes it retains, including Section 3(d) of the Act, and makes clear that the new statute provided the President with an alternative means of appointment. *See* S. Rep. No. 105-250, 105th Cong. 2d Sess. 16, 17 (1998). Accordingly, the President had the option of appointing an Acting General Counsel under either Section 3(d) of the Act or the FVRA. Here, he chose to appoint Mr. Solomon under the FVRA, and that appointment was lawful. *Accord Belgrove*, *supra* at 1, n.1.

In addition, Respondent's undeveloped assertion (Br. in Support, pp. 23-24) challenging the Acting General Counsel's appointment fails to provide the Board with reasonable notice of Respondent's argument, and the Board should deem it waived. As in the case of exceptions to an administrative law judge's decision, the burden is on Respondent to make its arguments; a cursory assertion that Mr. Solomon was improperly appointed under the FVRA is insufficient to put the Board on notice of Respondent's argument. *See* Sec. 102.46(b)(1)-(2) of the Board's Rules and Regulations ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived"). *See also* 29 U.S.C. § 160(e); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (holding that contentions merely mentioned in a party's opening brief are deemed waived); *Resolution Trust Corp.*

[2] The language of Section 3347(a) provides that the FVRA is "the exclusive means" for the President to appoint such an official in an acting capacity "unless—(1) a statutory provision expressly—(A) authorizes the President" to make such an appointment. Given that framework, the FVRA is the exclusive means for appointments only in the absence of independent statutory authority. Where, as here, there is independent statutory authority, the FVRA is not the "exclusive" means, but provides an option.

v. Dunmar Corp., 43 F.3d 587, 599 (11th Cir. 1995) (en banc) ("[T]he onus is upon the parties to formulate arguments"). In any event, the Board has already found that the Acting General Counsel was properly appointed under the FVRA. *See Belgrove Post Acute Care Ctr.*, 359 NLRB No. 77, slip op. at 1, n.1 (Mar. 13, 2013).

III. Conclusion

For these reasons, the Board should deny Respondent's Motion to Transfer and for Summary Judgment and the case should be remanded to the Administrative Law Judge for further proceedings.

Respectfully Submitted,

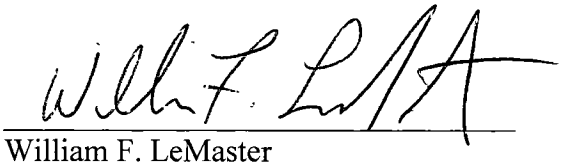
Dated: November 19, 2013

William F. LeMaster
Counsel for General Counsel

STATEMENT OF SERVICE

I hereby certify that I have this date served copies of the foregoing Counsel for the General Counsel's Opposition to Respondent's Motion to Transfer the Case to the National Labor Relations Board and Motion for Summary Judgment on all parties listed below pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Executive Secretary of the National Labor Relations Board and by electronic mail on the parties identified below.

Dated: November 19, 2013



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