UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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 REQUEST FOR SPECIAL PERMISSION TO APPEAL AND APPEAL OF ADMINISTRATIVE LAW JUDGE'S RULING

Counsel for the General Counsel William F. LeMaster respectfully submits this Opposition to Respondent's Request for Special Permission to Appeal and Appeal of Administrative Law Judge's Ruling in the above-captioned case.

On December 20, 2013, by telephone conference call with the parties, Administrative Law Judge Melissa Olivero ruled that the January 7, 2014 hearing scheduled in the above-captioned case would not be limited to evidence relevant solely to the appropriateness of deferral, and instead, would include both presentation of evidence concerning (1) the appropriateness of deferral to the arbitrator's decision and (2) the merits of the underlying unfair labor practice at issue in this matter. Respondent, who argues that the Administrative Law Judge is required to bifurcate the hearing to hear the deferral and merits evidence separately, filed a request for a special appeal on December 23, 2013, arguing that Judge Olivero's decision was

erroneous and prejudicial to Respondent. For the reasons set forth below, the General Counsel supports Judge Olivero's ruling.

As a basis for her ruling, Judge Olivero cited to *Sheet Metal Workers International Association Local #18 – Wisconsin (Everbrite, LLC)*, 359 NLRB No. 121 (May 13, 2013), for support that it is within her judicial discretion to hear evidence on both the issue of deferability and the merits of the instant case in one hearing. Contrary to Respondent, the General Counsel concurs with Judge Olivero and believes that the Board's language set forth in *Everbrite* is directly applicable in this matter. In *Everbrite*, the Board found that the administrative law judge erred in deciding the merits of the case before deciding whether deferral was appropriate. *Id.* at slip op. 3. Neither Judge Olivero, nor the General Counsel dispute that the first step in the instant matter is for Judge Olivero to decide whether it is appropriate to defer to the arbitrator's decision. However, it is also appropriate, and within the Judge's discretion, to conduct one hearing to take evidence on whether the deferral is appropriate, as well as the merits of the case. In support of this position, the Board said as much in *Everbrite,* citing *L.E. Meyers Co.,* 270 NLRB 1010, 1010 fn. 2 (1984) when it wrote, '"The Board has long held that while a deferral defense and the merits 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.*

Respondent argues that the Board's decision in *BCI Coca-Cola Bottling Company of Los Angeles*, 359 NLRB No. 110 (April 30, 2013), mandates that a bi-furcated hearing "*must*" be held. The Board's finding in *Everbrite* clearly indicates that is not the case, and that instead, the administrative law judge has the discretion to hear evidence in its totality on both the deferral and merits. Furthermore, it should be noted that the same three member Board panel decided

Everbrite **after** its decision in *BCI Coca-Cola.* Hearing both the deferral issue and the merits of the underlying unfair labor practice in one hearing is not a novel concept, as years of *Speilberg*[1] litigation before the Board has established. The reason for hearing both the deferral evidence and the merits evidence in one hearing is clear – while allowed and within a judge's discretion, a bifurcated approach inherently contradicts the goal of judicial efficiency.

Respondent asserts that one hearing to decide deferral and the merits would cause it "significant additional costs and the hearing will be unnecessarily prolonged." Respondent's argument is not rational. The reality is that a forced bifurcated approach will cause an inordinate delay on both parties that is utterly unnecessary and significantly damaging to a discriminatee who was terminated over 18 months ago. Bifurcation will require a separate hearing to determine the deferral issue, followed by time for the administrative law judge to issue her decision. In response to that decision, more time will pass awaiting a determination by the Board following the filing of exceptions and potentially cross-exceptions. Furthermore, the General Counsel intends to argue at the hearing that the Board should modify its approach to deferral in post-arbitral cases. The Board will need time to consider the appropriateness of deferral under its current standard, but also additional time to consider the alternative argument that will be presented by the General Counsel. If the Judge, or the Board on review, decides that deferral to the arbitration award is inappropriate, which the General Counsel believes will be the result, then a hearing will need to be scheduled on the merits. This scenario, occasioned by restricting judicial discretion and requiring a bifurcated record, would result in a substantial delay before the General Counsel would be able to create a record on the merits in this matter. All the while, the harm to the discriminatee continues. Contrary to Respondent's position, there would be

[1] *Speilberg Manufacturing Co.*, 112 NLRB 1080 (1955).

minimal burden on the parties, including Respondent, for a full hearing on both the deferral issue and the merits where the hearing is expected to last no more than two days. The argument is clear that upholding judicial discretion, the necessity of judicial economy, efficient use of resources, and avoidance of unwarranted delay for a decision on the merits in this case greatly support the need for creating a complete record in one hearing.

For the foregoing reasons, Respondent's Request for Special Permission to Appeal and its Appeal of Administrative Law Judge's Ruling should be denied.

Respectfully Submitted,

Dated: December 26, 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 Request for Special Permission to Appeal and Appeal of Administrative Law Judge's Ruling 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: December 26, 2013

William F. LeMaster
Counsel for the General Counsel

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