

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**CARGILL, INCORPORATED,
Respondent**

and

Case 17-CA-088608

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

**CHARGING PARTY UNION’S OPPOSITION TO RESPONDENT CARGILL
INCORPORATED’S REQUEST FOR SPECIAL PERMISSION TO APPEAL AND APPEAL
OF ADMINISTRATIVE LAW JUDGE’S RULING**

Now comes the Charging Party, the International Chemical Workers Union Council (“Union”), by and through its undersigned counsel, and hereby opposes the “Respondent’s Request for Special Permission to Appeal and its Appeal of Administrative While Judge’s Ruling,” for the reasons stated below.

1. On December 16, 2013, the Board denied Respondent Cargill, Incorporated’s motion for summary judgment in the above matter. The Union previously had filed on November 19, 2013, the “Charging Party Union’s Memorandum in Opposition to Respondent Cargill’s Motion to Transfer and Motion for Summary Judgment” (“Union Opposition”) with supporting exhibits, including the Affidavit of Kerry Phillips.¹ In its opposition, the Union showed why an evidentiary hearing was necessary to establish why deferral to the arbitration award relied on by Cargill was not appropriate

¹ While the Union is not attaching its Union Opposition hereto, it incorporates that document (with exhibits) herein by reference and requests that the Board take administrative notice of it.

both because the award was repugnant to the Act and because the arbitral proceedings were not fair and regular.

2. A hearing on the merits of this matter, as well as on Respondent's affirmative deferral defense, now is scheduled for January 7-8, 2014, in Hutchinson, Kansas.

3. On December 23, 2013, Respondent Cargill filed its special permission to appeal and its appeal of Judge Olivero's ruling that the January 7-8, 2014, hearing will encompass both Respondent's affirmative deferral defense as well as the merits of the case. (The Union notes that, during the telephonic conference with the judge, Judge Olivero acknowledged that, while she will hear testimony and consider evidence on both the affirmative defense and merit issues, when she writes her opinion, she will first decide whether to defer to the arbitration award and, if she so decides to defer, that should end the matter. However, if she decides not to defer, she will then go on and decide the merits issues. The Union concurs with that procedure).

4. On December 26, 2013, Counsel for the General Counsel filed his opposition to Respondent Cargill's request for special permission to appeal. The Union concurs in the General Counsel's opposition and his arguments contained therein and incorporates them by reference as though fully restated herein.

5. Additionally, the Union submits that, as argued more fully in its Union Opposition, which it incorporates by reference as though fully restated herein, it may attack the Respondent's affirmative deferral defense as not meeting the standards set forth by the Board in Spielberg Mfg. Co., 112 NLRB 1080 (1955) and Olin Corp., 268 NLRB 573 (1984) under both the repugnancy and "fair and regular hearing" bases.² As shown in the Union Opposition and the Phillips Affidavit, the

² By letter dated November 8, 2013, Regional Director Hubbel determined that, "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." (copy attached). The Union

Union has established – without factual opposition in the summary judgment record – that it was denied by Respondent Cargill an opportunity to fully and more effectively cross-examine the Grievant’s sole accuser, Supervisor Troy Wright, during the arbitration proceedings, even though it had been permitted during the grievance procedure to review Wright’s signed, handwritten statement (“Statement”). A copy of the Statement was requested at the grievance meeting and twice re-requested thereafter, but not provided, even though Cargill promised at the grievance meeting to provide a copy of the Statement to the Union. The Union also has shown in Union Opposition and in the Phillips Affidavit, that this Statement corroborated the Grievant’s assertion that Wright had directed him to “file a grievance,” though Wright’s testimony (and Cargill’s summary of its interview with Wright) failed to reflect this directive.

6. The Union has subpoenaed a copy of Wright’s Statement for the unfair labor practice hearing – and successfully opposed Cargill’s petition to revoke that subpoena. The Union intends to argue that this Statement is relevant to both prongs of the Spielberg/Olin standards. As to the repugnancy prong of these standards, this Statement establishes even more strongly that the Award is repugnant to the Act, since Arbitrator failed to acknowledge, understand, or even apply the appropriate Interboro standards. Under Interboro, the Board recognizes that, even if the Grievant were only concerned about how the collective-bargaining agreement was being inappropriately applied as to him, this still constitutes protected *concerted* activity. The Statement helps to establish that Wright recognized that the Grievant was attempting to enforce the CBA, when Wright directed him to “file a grievance.” That is a recognition by Wright that the Grievant was engaged in protected *concerted* activity. Yet, the Arbitrator in part held against the Grievant because she thought that he

intends to challenge Cargill’s affirmative defense under both prongs of these standards, *i.e.*, that the arbitration award is repugnant to the purposes of the Act and that the arbitral proceedings were not full, fair, and regular.

was not engaged in protected activity, because she thought (incorrectly) that he was only arguing about how the job vacancy was (incorrectly) filled as to how it affected only himself. Union Opposition, pp. 11 – 13 and note 8. While the Arbitrator was incorrect in her factual understandings as to whether the job vacancy (and how the Grievant believed it was improperly filled) primarily affected the Grievant, the more fatal part of her decision was her belief that the Grievant was not protected, because he was not acting for another union member. That is not the Interboro rule. So long as he was acting in a reasonable belief to enforce the CBA, he was engaged in protected concerted activity and to hold otherwise is repugnant to the Act. Mobil Oil Exploration, 325 NLRB 176, 177-78 (1997). The Union also intends to argue that there was not a full, fair, and regular arbitration proceeding, because it was denied the opportunity to fully and more effectively cross-examine Wright without use of his signed, handwritten statement, much as the courts have found that a violation of the Jencks rule is the basis to overturn a Board decision, and because Cargill blind-sided the Union by bringing up other purported disciplines at the arbitration, which it had not disclosed, though they were requested, during the grievance proceedings. Union Opposition, pp. 11 – 14.

7. Since evidence about the Statement is, or may be, relevant to both the repugnancy and merits arguments, it makes little sense to bifurcate these proceedings.

8. The Union does not anticipate that the evidentiary hearing in this matter will take more than 1 to 1½ days, if that long. Based on the telephonic conference calls between counsel, it appears that the other counsel do not disagree that an evidentiary hearing should not take more than the two-scheduled days of hearing on both the merits and the affirmative defense.

9. The Union submits that the Board has not, and should not, depart from the decades-long procedure that recognizes that it normally is for the judge, in the first instance, to exercise his or her

discretion in deciding whether to hold a hearing on both the deferral and the merits issues, though, after such a hearing, the judge will first decide whether to defer or not defer before (if necessary) deciding the merits issues. The Union doubts that the Board has precluded Judge Olivero from exercising such discretion by its decision in BCI Coca-Cola Bottling Co., 359 NLRB No. 110 (2013). That decision appears to have more to do with Judge Kocul's failure to even conduct a hearing at all, on either the deferral or merits issues, and more to do with the Acting General Counsel's arguments, that seem to mix the repugnancy issues with the merits issues, particularly once the Acting General Counsel's exceptions and brief in support thereof in that case are examined. Since there had been no hearing and no motion on the matter, the Board's decision seems more directed at Judge Kocul's failure to conduct any hearing, since he had not exercised his discretion to even conduct a hearing on the deferral issue. Certainly, if the Board were going to change its decades-old procedure of allowing judges, in the first instance, to exercise their discretion on whether to bifurcate the hearing, one would have expected a much more explicit analysis, explanation, and decision on why the old approach was being changed then is found in BCI. Instead, that decision can best be interpreted as a much more limited disagreement with how that judge exercised (or didn't exercise) his discretion on conducting a hearing (and the scope thereof) and an implied rejection of the Acting General Counsel's somewhat backwards approach of seeming to put the merits "cart" before the deferral "horse" (once his exceptions brief is reviewed).

10. Here, Judge Olivero has exercised her discretion appropriately and there is no good reason to consider at this point any appeal of whether that exercise was appropriate. Indeed, the Union has shown that there are good reasons to support her ruling.

WHEREFORE, Cargill's request and appeal should be denied.

Respectfully submitted,

s/Randall Vehar

Randall Vehar, Trial Counsel (Ohio Bar No. 0008177)

UFCW Assistant General Counsel/

Counsel for ICWUC Local 188C

1655 West Market Street

Akron, OH 44313

330/926-1444

330/926-0950 FAX

rvehar@icwuc.org

rvehar@ufcw.org

Robert W. Lowrey (Ohio Bar No.0030843)

UFCW Assistant General Counsel/

Counsel for ICWUC Local 188C

1655 West Market Street

Akron, OH 44313

330/926/1444

330/926-0950 FAX

rlowrey@ufcw.org

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December, 2013, I emailed the foregoing to:

Alex V. Barbour
Meckler Bulger Tilson Marick & Pearson LLP
123 North Wacker Drive
Suite 1800
Chicago, IL 60606
avbarb@sbcglobal.net

William LeMaster
National Labor Relations Board, Region 14, Subregion 17
8600 Farley Street, Suite 100
Overland Park, KS 66212-4676
William.LeMaster@nlrb.gov

Melissa Olivero, ALJ (Division of Judges)
melissa.olivero@nlrb.gov

s/Randall Vehar
Randall Vehar, Esq.



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

SUBREGION 17
8600 Farley St Ste 100
Overland Park, KS 66212-4677

Agency Website: www.nlr.gov
Telephone: (913)967-3000
Fax: (913)967-3010

November 8, 2013

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Randall Vehar
Assistant General Counsel
ICWU/UFCW Legal Department
1655 W. Market Street
Akron, OH 44313-7004

Alex V. Barbour
Meckler Bulger Tilson Marick & Pearson, LLP
14012 Francesca Cove
Huntley, IL 60142

Re: Cargill Salt Division
Case 17-CA-088608

Dear Mr. Vehar and Mr. Barbour:

This letter serves as written notification to the parties that the Region has revoked its October 9, 2012 administrative deferral of the allegations in the above-captioned case. Specifically, by letter dated October 9, 2012, the Region deferred to the parties' grievance and arbitration procedure the allegations that the Employer discriminated against its employee Chris Mayes by suspending him on May 10, 2012, and issuing him a written warning and discharging him on May 14, 2012. Thereafter, on October 24, 2012, an arbitration hearing was conducted concerning the deferred allegations. On December 21, 2012, the arbitrator issued a decision denying the grievance.

By letter dated February 7, 2013, the Region informed the parties that the Charging Party in this matter 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 hearing on December 10, 2013.

Daniel L. Hubbel
Regional Director
National Labor Relations Board
Region 14, By:



Naomi Stuart
Officer In Charge
National Labor Relations Board
Subregion 17
8600 Farley Street, Suite 100
Overland Park, Ks 66212-4676

NS:wc

cc: Mark Whitson, Plant Manager
Cargill Salt Division
609 E Avenue G
Hutchinson, KS 67501-7574

Kerry Phillips, International Representative
International Chemical Workers Union
Council/UFCW Local 188C
1102 Fm 1652
Grand Saline, TX 75140-4668