JD(SF)–10–14
Pomona, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO BRANCH OFFICE

VERIZON CALIFORNIA, INC.

and **Case 21-CA-039382**

COMMUNICATION WORKERS OF AMERICA, LOCAL 9588, AFL-CIO

Ami Silverman, Esq., for the General Counsel
William J. Dritsas, Esq., **and** ***Kamran Mirrafati, Esq.,***
for the Respondent
Judith G. Belsito, Esq., **and** ***David A. Rosenfeld, Esq.***
for the Charging Party

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge: The stipulated record in this case presents the issue of whether deferral to an underlying arbitration award is appropriate pursuant to *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955), and *Olin Corp.,* 268 NLRB 573 (1984), the cases which set forth the Board's current standards for post-arbitral deferral.[1] I find that deferral is appropriate under those standards because the arbitrator's decision is susceptible of an interpretation consistent with the Act.

PROCEDURAL HISTORY

On June 11, 2010, Communication Workers of America, Local 9588, AFL-CIO (the Union), filed an unfair labor practice charge asserting that Verizon California, Inc. (the Respondent) unlawfully denied employee Brian Rodriguez his *Weingarten*[2] right to Union representation at an investigatory interview which he reasonably believed might result in discipline. Rodriguez was suspended for one day for insubordination when he refused to continue the interview without Union representation.

---

[1] On February 7, 2014, the Board invited filing of briefs by parties and amici in *Babcock & Wilcox Construction Co.,* 28-CA-022625, pending before the Board on exceptions to Administrative Law Judge Jay R. Pollack's decision, JD(SF)-15-12, to consider, inter alia, whether the Board should adhere to, modify, or abandon the current standards for post-arbitral deferral in Sec. 8(a)(1) and (3) cases.

[2] *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 256-257 (1975).

Initially the Region administratively deferred the charge to arbitration.[3] On January 17 and February 16, 2012, Respondent and the Union arbitrated the grievance before a neutral arbitrator. The arbitral award, issued on April 7, 2012, concluded there was good cause for the suspension. Categorizing the arbitral award as "repugnant to the Act,"[4] on December 31, 2012, the region issued a complaint and on February 19, 2013, an amended complaint, alleging a *Weingarten* violation of Section 8(a)(1) and (3). Respondent timely filed answers to the complaint and amended complaint admitting and denying various allegations.

In lieu of a hearing, on November 21, 2013, Respondent moved to adopt the record in the arbitration proceeding and allow the parties to brief the deferral issue. By order of December 12, 2013, I granted the motion. On January 21, 2014, the parties entered into and submitted a stipulation of facts on the deferral issue and on February 14, 2014, the parties submitted their briefs on the deferral issue.

On the entire record and after considering the briefs filed by counsel for the General Counsel, counsels for the Charging Party, and counsels for the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

Jurisdiction and Labor Organization Status

Respondent is a corporation with offices and places of business located at 1400 E. Phillips Blvd., Pomona, California and other locations. It is engaged in providing telephone communications and related services. Annually, Respondent derives gross revenues in excess of $100,000 and purchases and receives goods at its Pomona facility valued in excess of $5000 directly from points outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act. Thus I find that this dispute affects commerce and that the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

The Arbitration Hearing

Testimony at the hearing established that Rodriguez, a field technician II working from the Respondent's Pomona California yard, installs and repairs customer communications equipment and systems. His immediate supervisor is Pomona yard local manager Brenda Cooper.

June 2 PIP: On June 2, 2010,[5] Rodriguez was placed on a performance improvement plan (PIP) which included various targeted objectives. One objective was a requirement that he improve productivity (JPD or jobs per day) and another was that he contact his manager on all long-

[3] See *Collyer Insulated Wire, A Gulf & Western Systems Co.*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984).

[4] See *Spielberg,* supra, 112 NLRB at 1082; *Olin,* supra, 268 NLRB at 574-574.

[5] All further dates are in 2010 unless otherwise referenced.

duration jobs, that is, jobs which require over 1.8 hours to complete. The purpose of a PIP, according to Cooper, is to bring an employee up to objectives such as number of jobs per day. In her team of 17 technicians, 6 of them were on PIPs.[6] In 2009, Rodriguez was placed on a PIP to improve his productivity. Cooper took him off the PIP when she saw some improvement although Rodriguez did not achieve the PDA set for him in the 2009 PIP.

June 3 failure to call in on long-duration job: In any event, with the June 2010 PIP in place, on June 3, Cooper counseled[7] Rodriguez regarding failure to call her when he was working on a long-duration job the prior day. Rodriguez recalled the counseling:

> I got called in with a union rep and I didn't call [Cooper] on the June 2nd to let her know that I had a long-duration ticket, so this basically tells me – she notified me anything that takes me two hours or longer, it's an expectation and a directive. . . . If I don't follow any of those guidelines, it could lead to discipline up to termination.

Forty-five minute discussion with Cooper on morning of June 8: Rodriguez testified that Cooper questioned him at length during the morning of June 8 about "my stops and everything from the day before [June 7]. . . . I was upset that she was constantly harassing me every day. I mean, I came in that morning to order shirts just like everybody else and I stayed over 45 minutes just to answer questions. So honestly, I didn't want to talk to her."

Rodriguez' long-duration job of June 8: After spending 45 minutes with Cooper in the morning of June 8, Rodriguez worked a long-duration job that afternoon. Cooper knew that Rodriguez would be on this long job and an extra ticket was written to cover the long-duration job. Rodriguez did not call in during the June 8 long-duration job.

Before work on June 9, Rodriguez is instructed by thte Union regarding *Weingarten* right: Rodriguez, concerned about how long the job on June 8 took and his failure to call Cooper, met with a Union representative before work the following morning and received information about his *Weingarten* right which he understood to mean: "[I]f I felt that a conversation with management or a local manager could lead to discipline, that I had a right to ask for union representation."

Rodriguez asserts his *Weingarten* right during a phone call with Cooper on June 9: On June 9, Cooper noted that her supervisor summary report (SABIT report) for June 8 contained GPS information that Rodriguez made two stops before arriving at the previously arranged long-duration call. Cooper needed an explanation for the two stops that Rodriguez made. Cooper left a message for Rodriguez around 1:45 p.m. requesting that he call her. Rodriguez returned the call five minutes later. Cooper asked Rodriguez to explain the stops he made prior to arrival at the long-duration job the previous day and Rodriguez responded that he did not feel comfortable discussing the matter without a Union representative.

---

[6] Rodriguez was on a prior PIP in 2009 which had a production notation, "Move to steps of discipline if required improvement is not met." The 2010 PIP did not have such a notation.

[7] According to Cooper, counseling, discussing, and coaching all mean basically talking to the employee and are non-disciplinary actions.

From Cooper's perspective, she just wanted an explanation for the two stops before the long-duration stop of June 8. She testified that she frequently called technicians on her team, including Rodriguez, for explanations which she needed to complete her daily reports. Rodriguez agreed that he had these calls on many occasions and was not disciplined but this time he did not want to answer because he had already been warned on June 3 about failure to call in. Rodriguez admitted, though, that Cooper did not ask him about failure to call in. Her questions were about the two stops and about the total length of the job. In any event, Cooper told Rodriguez that she just needed to know what those stops were so she could complete her report. Rodriguez responded that he had been told by the Union not to talk to Cooper.[8]

Cooper agreed that she did not tell Rodriguez that the conversation would not lead to discipline. Cooper took both contemporaneous notes and later completed a more formal notebook entry regarding the conversation with Rodriguez. The contemporaneous notes state, "don't feel comfortable talking to supervisor," "won't talk to me," "refused w/o union," and "denied to involve union." Cooper's later notes regarding the conversation are more detailed and state in part,

> Called [Rodriguez] to review 6/8 JPD (1) ticket . . . [Rodriguez] stated he didn't feel comfortable talking to supervisor without union rep. Explained to [Rodriguez] this is the detail I need for my SABIT call + he needs to explain long duration tickets as stated on PIP/works. [Rodriguez] stated he was instructed by Union D. Goodwin not to talk to me without a union rep. I denied to involve union when getting details of a long duration ticket – just normal conversation.

<u>Cooper suspends Rodriguez for insubordination</u>: Cooper testified that she had conducted investigatory interviews which might lead to discipline and her practice was to call the Union herself before conducting the meeting. She recalled such an incident in 2010 involving Rodriguez. However, on June 9, Cooper told Rodriguez that his refusal to answer her question constituted insubordination. She requested that Rodriguez return to the yard where she would have a Union representative present. When Rodriguez returned to the yard later on June 9, Cooper suspended him for one day for insubordination for refusal to explain information on a job ticket. Cooper's notes of the suspension meeting reflect she reiterated he was being suspended for refusal to answer questions about a job without a Union representative. The suspension letter states in part,

> In the afternoon of June 9, 2010 you were contacted by management for information on a job ticket from June 8, 2010. You responded to your manager that you would not speak to management without a union representative present. You were informed that this was not an investigation or disciplinary meeting; management was questioning only what you did on the job ticket from the day

---

[8] Rodriguez was asked whether subjectively he was concerned about the PIP when he contacted the Union on June 9. His testimony is somewhat confusing on this point in that he initially said he was not and then said he was. However, in his view the PIP was a disciplinary action. Chief steward Bonilla, who met with Rodriguez early on June 9 and told him about his *Weingarten* rights, described Rodriguez as distraught.

> before. You were advised that your failure to provide management information would be considered insubordination; you continued to refuse to speak to management without a union representative present.

Contractual and Handbook Provisions

Memorandum of Agreement Global Positioning System (GPS) provides that if management identifies a possible work rule infraction through GPS, the possible infraction will be discussed with the employee and, if the infraction did occur, coaching will be offered to correct the behavior. If there are further infractions identified through GPS, the company and the Union meet to discuss the infraction. If there is a third infraction identified through GPS, disciplinary action may be taken. According to Cooper, coaching is not a disciplinary action.

Pursuant to Respondent's applicable work rules, field technicians are required to call their local manager if a job takes over 1.8 hours to complete. The handbook containing this and other work rules further provides that failure to adhere to the work rules could subject the technician to disciplinary action up to and including termination. Cooper testified at that failure to adhere to the call-in requirement for jobs which take over 1.8 hours to complete (long duration jobs) is a work rule which could subject the technician to such disciplinary action. However, she added that she has never disciplined any employee for violation of this rule and she is not aware of any employee being disciplined for failure to call on a long-duration job.

Respondent introduced another arbitration award (the Walker award) involving their Newbury Park employee Wanda Walker, who was suspended for insubordination for refusal to participate in an investigatory meeting without a *Weingarten* representative. The Walker award was offered as directly on point and as justifying the discipline imposed on Rodriguez.

The Arbitrator's Award

The parties' agreed-upon statement of the arbitration issue was, "Did [Respondent] have just cause to suspend [Rodriguez] on June 9, 2010? If not, what is the appropriate remedy?" The arbitrator, Philip Tamoush (the Arbitrator), found just cause and upheld the suspension. His conclusion was as follows:

> This case is fairly straightforward and really must be determined based on the "rule of reasonableness." Here, the Union's argument is that whenever an employee subjectively believes that a discussion with Management could result in discipline, then he has a right to Union representation. In its extreme, this could mean every employee, at all times, when receiving a communication, whether orally or in writing, from a supervisor or manager could refuse to respond. Some employees, perhaps have such a "guilt complex" that they unreasonably believe that discussion could result in discipline. Here, Cooper's testimony was too credible and believable regarding her attempt to obtain objective information with regard to her report-writing responsibilities. While in fact, discipline can result in discussions with employees, that does not give rise to an obligation by Management or a right by employees to have Union representation. The Weingarten criteria and standards are laid out in the detailed exposition of Arbitrator William Petrie in [the Walker award] that the Undersigned adopts his

> rationale and discussion specifically regarding Weingarten and attaches it to this award so that the reader, whether the parties or NLRB representatives, can incorporate his reasoning in their analysis as well.
>
> In summary of his conclusions on this matter, the Undersigned believes the Company exercised its rights reasonably in denying Rodriguez Union representation when Cooper was soliciting information from him regarding his long-duration job. The expectation that he might be disciplined as a result of Cooper's inquiry was unreasonable, considering all of the facts as presented. The grievance will be denied.

In the Walker award, arbitrator Petrie quoted extensively directly from the Court's decision in *Weingarten:* "The 'reasonableness' of an employee's belief that discipline might result will be determined 'by objective standards under all of the circumstances of the case.'" Thereafter, arbitrator Petrie stated,

> On these bases, therefore, the outcome of this proceeding depends upon the presence or absence of "objective standards" establishing the Grievant's reasonable belief that her participation in the requested meeting with management . . . could have led to discipline."

Arbitrator Petrie concluded that no objectively-based, reasonable belief existed. He found after assessing demeanor credibility that the grievant's testimony was varying, contradictory, confusing, and implausible and did not establish a reasonable belief that discipline would result from the interview.

Refusal to Defer

Current deferral standards as articulated in *Spielberg,* supra 112 NLRB at 1082, and *Olin,* supra, 268 NLRB at 573-574, require that in order to defer to an arbitration award:

1. The arbitration proceeding itself must be fair and regular.
2. All parties agree to be bound by the arbitral award.
3. The arbitrator must have considered the unfair labor practice at issue.
4. The arbitral award is not clearly repugnant to the Act's purposes and policies.

The region relied on the fourth criteria, repugnance to the Act, in refusing to defer. Thus the complaint and the amended complaint state, "About April 17, 2012, an arbitral award issued, which is repugnant to the Act because the arbitrator misapplied or incorrectly enunciated statutory principles as well as failed to consider fully the import of discriminate-Rodriguez's PIP on the issues before him."

Analysis

The parties agree and I find that the first three deferral criteria have been met.

All parties agree that the arbitration proceeding was fair and regular and I find that it was as well. Respondent and the Union were represented by counsel at the proceeding. They were given full opportunity to present, question, and cross-examine witness and to submit documents in support of their positions.

There is no dispute that all parties agreed to be bound by the arbitral award rendered pursuant to the parties' collective-bargaining agreement, Articles 12 and 13. As to the third criteria, consideration of the unfair labor practice at issue, the arbitrator acknowledged the factually parallel *Weingarten* issue and was aware that the NLRB had deferred further proceedings to the parties' arbitration because the Union advised him of this fact and asked that he send a copy of his award to the NLRB. The arbitrator was presented with the facts generally relevant to the unfair labor practice. Finally, in acknowledgement of the unfair labor practice issue before him, the arbitrator ruled on the *Weingarten* issue. Thus, I find the arbitrator considered the unfair labor practice at issue.

The arbitral award is not clearly repugnant to the Act's purposes and policies

Although the Board has been urged to revise its standards for post-arbitral deferral in order to provide greater protection to employee statutory rights,[9] the standards set forth in *Olin,* supra, 268 NLRB at 574, guide me in determining whether the arbitral award is clearly repugnant to the Act's purposes and policies:

> And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

The "clearly repugnant" standard has been harshly criticized as lacking in theoretical underpinning and allowing the Board to arbitrarily defer when it approves of the award but to withhold deferral when it does not approve.[10] However, under the clearly repugnant/palpably wrong standard, the Board sometimes states that it is of little or no import that the Board or another arbitrator might have reached a different result.[11] Given the evidence presented at the arbitration hearing, it is possible to reach a different result than the Arbitrator. However, this fact alone does not render the award clearly repugnant or palpably wrong. In analyzing the "clearly repugnant" aspect, I am mindful that the party opposing the arbitration award has the

---

[9] See GC Memorandum 11-05 (January 20, 2011), Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) cases.

[10] *Plumbers and Pipe Fitters Local 520 v. NLRB,* 955 F.2d 744, 756-757 (D.C. Cir), cert. denied, 506 U.S. 817 (1992).

[11] See, e.g., *Kvaerner Philadelphia Shipyard, Inc.*, 346 NLRB 390, 394 (2006)(the Board or another arbitrator could have made another finding).

burden to show that the award is inappropriate.[12] However, after consideration of the grounds urged for finding the award "clearly repugnant," I find the award is susceptible of an interpretation consistent with the Act.

- Incorporation of another arbitration award by reference did not render the award clearly repugnant to the Act.

As the General Counsel and the Union point out, the Arbitrator incorporated the Walker decision by reference. The General Counsel and the Union argue that incorporation of the Walker decision was not just as to the *Weingarten* discussion but was additionally adopted as the substantive rationale for finding that Rodriguez did not have an objectively reasonable belief that the interview might lead to discipline. Although I agree that the facts of the two cases are markedly different, I disagree that the Arbitrator relied on anything other than the Walker discussion of legal precedent under *Weingarten.*

In my view the Arbitrator's decision is capable of being understood as adopting only the *Weingarten* discussion at pages 19-21 of arbitrator Petrie's decision. The Arbitrator stated, "The Weingarten criteria and standards are laid out in the detailed exposition of [arbitrator Petrie] . . . that the Undersigned adopts his rationale and discussion **specifically regarding Weingarten** and attaches it to this award so the reader . . . can incorporate his reasoning in their analysis as well." (emphasis added). It is possible to read this rather complex sentence to state that the Arbitrator did not adopt the conclusion that grievant Walker's discipline was justified and apply that to grievant Rodriguez. Rather, a reasonable reading of the sentence is that the Arbitrator incorporated the summary of *Weingarten* law only and then applied his own *Weingarten* analysis to the Rodriguez facts. Thus, I reject this basis for finding the award is palpably wrong.

- Given the Arbitrator's credibility findings, his award may be understood as finding that Rodriguez did not have a reasonable belief that explaining the two stops shown on GPS prior to the stop at the long-duration location would lead to discipline.

The General Counsel and the Union further argue that the Arbitrator's decision was palpably wrong because Rodriguez had a reasonable belief that speaking to Cooper might result in discipline. According to the General Counsel and the Union, this reasonable belief was based on the PIP, which targeted calling in on long-duration jobs, and failure of Cooper to state that no discipline would result. The General Counsel and the Union assert that the Arbitrator ignored these facts.

Although the General Counsel and the Union, using their own credibility preference, make a solid argument for finding an objectively based reasonable belief that discipline could result, this is not the appropriate inquiry regarding deferral. Rather, the argument attempts to second guess the Arbitrator's credibility resolutions. The appropriate question is whether the award is susceptible of an interpretation consistent with the Act. The Arbitrator found Rodriguez' expectation "that he might be disciplined as a result of Cooper's inquiry regarding two stops shown by GPS was unreasonable, considering all of the facts as presented." In fact, the

[12] *Turner Construction Co.,* 339 NLRB 451 (2003).

Arbitrator specifically credited Cooper's testimony: "Here, Cooper's testimony was too credible and believable regarding her attempt to obtain objective information with regard to her report-writing responsibilities."

- The Arbitrator's standard for determining the *Weingarten* issue is consistent with the Act.

Reducing the Arbitrator's award to its simplest, it may be understood to discredit Rodriguez and to credit Cooper:

> Some employees, perhaps have such a "guilt complex" that they unreasonably believe that the discussion could result in discipline. Here, Cooper's testimony was too credible and believable regarding her attempt to obtain objective information with regard to her report-writing responsibilities."

The General Counsel and the Union contend that the award misapplied the facts and law and reached a conclusion that cannot be supported by any reasonable interpretation of the Act.[13] However, based on the Arbitrator's credibility finding, the award may be understood to find that Rodriguez' belief that discipline might result was unreasonable because the entire tenor of Cooper's credited testimony is that she only wanted the information about two stops shown by GPS in order to complete an internal report. The GPS information she sought had nothing to do with Rodriguez' PIP or his prior warning, both of which are in any event non-disciplinary according to Cooper's credited testimony.

I reject the General Counsel's contention that the Arbitrator had a "basic misunderstanding" of *Weingarten*. The Arbitrator stated,

> Here, the Union's argument is that whenever an employee subjectively believes that a discussion with Management could result in discipline, then he has a right to Union representation. In its extreme, this could mean every employee, at all times, when receiving a communication, whether orally or in writing from a supervisor or manager could refuse to respond.

Although the General Counsel and Charging Party argue that these two sentences are susceptible of being understood to incorporate a subjective, industry-disabling standard into the reasonable belief component of *Weingarten*, I find these sentences merely reject the Union's argument regarding introducing subjectivity into the *Weingarten* standard. Clearly, the Arbitrator did not adopt a subjective standard.[14]

---

[13] The General Counsel specifically cites to two statements in the arbitration award asserting that these statements represent the Arbitrator's misunderstanding of *Weingarten.* I find that both of these statements (operations of Company would suffer immeasurably if employees could demand Union representation in every conversation with management; proper *Weingarten*-oriented investigation occurred when Rodriguez given suspension when accompanied by Union representative) were summaries of Respondent's contentions rather than attributable to the Arbitrator.

[14] Were the Arbitrator's statement ambiguous, I would nevertheless find it susceptible of an

Continued

CONCLUSION OF LAW

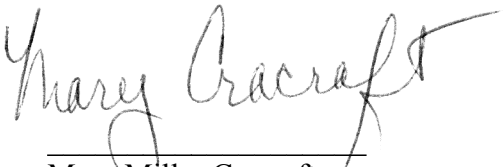
Having accepted the stipulated record including the transcript of proceedings before the Arbitrator as well as the Arbitrator's award, I find that the award is not clearly repugnant to the Act pursuant to the standards enunciated in *Spielberg,* supra, and *Olin,* supra. Accordingly, I defer to the Arbitrator's award and dismiss the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. March 20, 2014



Mary Miller Cracraft
Administrative Law Judge

---

interpretation consistent with the Act. See, e.g., *Bell-Atlantic-Penn,* 339 NLRB 1084, 1085 (2003)(arbitrator's award need not be totally consisitent with Board precedent to warrant deferral); *Postal Service,* 275 NLRB 430, 432 (1985)(in order to foster collective and cooperative resolution of workplace disputes, Board will defer if award is susceptible of interpretation consistent with Act).

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.