

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

IAP WORLD SERVICES, INC.,

and

CASE NO.: 31-CA-29505

TEAMSTERS, CHAUFFERS,
WARHOUSEMEN, INDUSTRIAL, AND
ALLIED WORKERS OF AMERICA, LOCAL 166

**IAP WORLD SERVICES, INC.'S BRIEF IN SUPPORT OF THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION

In accordance with Section 102.46 of the Board's Rules and Regulations, IAP World Services, Inc. ("IAP") respectfully files this brief in support of Administrative Law Judge William Kocol's ("ALJ") decision dismissing General Counsel's complaint against IAP. (ALJD 8:10)¹ The ALJ properly deferred to Arbitrator Joseph E. Grabuskie's ("Arbitrator") decision under *Atlantic Steel Co.*, 245 NLRB 814 (1979) because the Arbitrator's decision was not clearly repugnant to the National Labor Relations Act ("NLRA"). (ALJD 6:6-9.) The ALJ correctly concluded that the Arbitrator's decision finding Larry Treen's ("Treen") insubordinate and disruptive conduct on July 31, 2009² unprotected under the NLRA was neither palpably wrong nor inconsistent with the NLRA, and that deferral was appropriate. (ALJD 6:6-9.) Accordingly, the ALJ's decision should be affirmed.

II. STATEMENT OF FACTS

A. TREEN'S TERMINATION FROM IAP

Three incidents led to Treen's termination from IAP World Services, Inc. ("IAP") – one on March 19, 2009, a second on July 26, 2009 and the final incident on July 31, 2009.

1. March 19, 2010 Incident

On March 17, 2009, Hobie Hicks, IAP's Division Manager of Human Resources and Labor Relations, sent an e-mail to all employees providing them with a copy of the new CBA and informing them that the CBA would be effective March 23, 2009. (EX. 4.)

¹ References to the ALJ's decision are designated as by "ALJD" followed by the applicable page and line numbers. References to the reporter's transcript of the arbitration are designated as "Tr." followed by the page number. Joint exhibits from the arbitration are designated as "JX." Employer exhibits from the arbitration are designated as "EX." Union exhibits from the arbitration are designated as "UX." References to the Arbitrator's decision are designated as "Arb. Op." followed by the page number.

² All dates hereinafter take place in 2009, unless otherwise specified.

The e-mail also stated that *the CBA was pending approval by the Contracting Officer and all economic issues, including wages, would remain in effect as stated in the old CBA until such approval time* (emphasis added). (*Id.*) Mr. Hicks' e-mail was consistent with IAP's communications to the Union during negotiations that if the Contracting Officer disapproved the wage increases, it was possible that the first year's wage rates would remain in effect until the second year of the CBA. (Tr. 177-78.)

Despite this notice, Treen asked his supervisor Dave Dearman during a safety meeting on March 19, 2009 when IAP was going to sign the contract and pay back pay. (EX. 1-2.) Mr. Dearman responded that he believed the new contract would be effective on March 23, 2009. (*Id.*) Treen responded "fuck the company." (*Id.*) Mr. Dearman told Treen that he needed to change his attitude and Treen again responded, "fuck the company and this job." (*Id.*)

Mr. Dearman informed his supervisor, Public Works Division Manager Kevin Maune of Treen's conduct during the safety meeting. (Tr. 24.) On the same day, a fact finding meeting was held, attended by Treen, Mr. Maune, Mr. Dearman, Operations Manager Pamela Church and Union Steward Jose Olvera. (EX. 1.) During the meeting, Mr. Maune explained the purpose of the meeting and relayed Mr. Dearman's account of Treen's conduct. (*Id.*) Treen confirmed that he used profanity in disagreement with Mr. Dearman's response to his question. (*Id.*) When asked further about the reason for his conduct, Treen answered, "I don't remember" and "leave me alone." (*Id.*)

As a result of Treen's insubordinate conduct, confirmed by the admissions he made during the fact finding meeting, Mr. Maune recommended that Treen be suspended for two days. (Tr. 29.) The recommendation was approved and Treen was suspended

without pay on March 20 and 21, 2009. (EX. 2 and 3.) The Union grieved the suspension and on May 1, 2009, IAP agreed to remit back pay to Treen for his two-day suspension in exchange for Treen's and the Union's agreement that the discipline would be reduced to a final written warning and that Treen would attend anger management training. (*Id.*) Under the terms of the agreement, Treen would be subject to termination for any future incidents of insubordinate conduct. (*Id.*)

2. July 26, 2009 Incident

On Sunday, July 26, 2009, Treen was assigned to work from 7 a.m. – 3:30 p.m. (Tr. 139.) His shift supervisor was Andy Uraine, a weekend facilitating engineer. (Tr. 67.)

At approximately 2:30 p.m., Treen left the Building 300 boiler room where he was assigned to work because he was “too hot.” (Tr. 139, 141.) He then went back to the shop, drank a glass of iced tea and prepared paperwork. (Tr. 141.) R.J. Steele, a second shift boiler operator whose shift began at 3 p.m., reported to work at approximately 2:30 p.m. (JX. 5-4.) At approximately 2:40 p.m., Treen told Mr. Steele that he felt like he was going to “melt” and that he was going to shower. (Tr. 142; JX. 5-4.) Treen also asked Mr. Steele to finish his work in Building 300. (JX. 5-4.) At no time did Treen communicate his departure from the Building 300 boiler room or the shop to Mr. Uraine. (*Id.*)

When Treen finished his shower, he saw that there was a missed call on his cell phone from Mr. Dearman. (Tr. 144.) Mr. Dearman instructed Treen to call Mr. Uraine, which Treen did as he was driving towards the base gate around 3:30 p.m. (Tr. 145.) Mr. Uraine told Treen that he was concerned about his safety and wanted to see him to make sure he didn't need any assistance. (Tr. 71.) Treen chuckled, said, “no” and exited the

facility. (Tr. 70-71, 146.) Despite leaving his work station before the end of his shift, Treen indicated on his time sheet that he worked a full eight hours. (EX. 5.)

On Monday, July 27, 2009, Mr. Uraire reported to Mr. Maune that Treen left work before the end of his shift without notifying Mr. Uraire and that despite leaving early, Treen reported that he worked a full eight hour shift on his time card. (JX. 5-4 and EX. 5.) Mr. Uraire recommended that Treen be terminated for insubordinate conduct for leaving his work station early, refusing to return as he directed and submitting a time card with fraudulent entries. (Tr. 77-78.)

3. July 31, 2009 Incident

IAP's General Manager Jeff Williamson conducted a division-wide meeting on July 31, 2009. (Tr. 38-39.) Approximately 130-140 of IAP's 157 Public Works employees attended the meeting. (Tr. 95.)

Treen was seated approximately 10 to 15 feet away from Mr. Williamson during the meeting. (Tr. 40.) During the safety portion of the meeting, Treen asked Mr. Williamson about back pay he believed was owed to the union employees. (Tr. 96.) Mr. Williamson replied that it was a very good question, but now was not the appropriate time to ask non-safety related questions. (Tr. 89, 96.) He further indicated that Treen could ask the question in the Q & A session. (*Id.*) Treen asked his question again during the Q & A session. (JX. 5-10.) As Mr. Williamson explained the process by which back pay could be provided, Treen stated "I don't work for the government, I work for IAP. Where's my back pay?" (*Id.*) Mr. Williamson responded to Treen's question, but Treen continued to interrupt Mr. Williamson, insisting that IAP "needed to pay its bills." (Tr. 40.) According to Mr. Maune, who was standing approximately five to 10 feet from Treen, Treen's tone of voice was "loud" and "disrespectful." (JX. 5-9.) Mr. Williamson

told Treen that he could be asked to leave the room, and Treen stated, “Well, that wouldn’t be the first time.” (JX. 5-11.) At that point, Mr. Maune directed Treen to leave the room. (*Id.*) At no time before or after July 31, 2009 did Treen attempt to ask Mr. Williamson one-on-one about his wages or ever file a grievance regarding his wages. (Tr. 175.)

Treen’s behavior was witnessed by several IAP employees who testified at the hearing. David Jensen, a Public Works facility inspector and quality insurance representative, described Treen as “boisterous” and “almost threatening” toward Mr. Williamson. (Tr. 86; JX. 5-10.)

Douglas Latimer, a safety specialist for IAP, was also present at the July 31, 2009 meeting. (Tr. 104.) Mr. Latimer stated that Treen became “very agitated” when Mr. Williamson answered his question regarding back pay and that Treen yelled at Mr. Williamson. (Tr. 106-07; JX. 5-8.)

Although Ms. Church did not testify at the hearing, she provided a statement to Mr. Hicks detailing Treen’s behavior during the meeting. (JX. 5-6 and 5-7.) According to Ms. Church, Treen asked about the back pay in a “loud angry voice” and “continued to interrupt [Mr. Williamson] in a loud voice.” (*Id.*)

Jose Olvera, a general maintenance mechanic and Union witness, also confirmed the nature of Treen’s behavior. (Tr. 128.) Mr. Olvera testified that Treen interrupted Mr. Williamson during the safety portion of the meeting and had to be told by Mr. Williamson to “calm down” or be asked to leave the meeting. (Tr. 131, 133.) Mr. Olvera testified that Treen responded, “It wouldn’t be the first time.” (*Id.*)

Due to the nature of Treen's conduct, Mr. Maune convened a fact finding hearing later that day after gathering statements from several employees present at the meeting. (Tr. 41-42.) Present at the fact finding hearing were Treen, Chief Steward John Clark, Union Business Representative Robert Rios, Steward Steve Craig, Mr. Dearman, Mr. Maune, Ms. Church and Mr. Jensen. (JX. 5-6.) According to Ms. Church, Treen was "highly agitated" and angry during the meeting, even denying that he received prior discipline for insubordinate behavior. (JX. 5-6 and 5-8.) Mr. Maune questioned Treen about his behavior, but Treen said "leave me alone," "this is not the military" and "ignor[ed] everyone." (Tr. 43; JX. 5-6.)

Based on his July 26 and July 31 conduct and the fact finding hearing, and in light of having received a final written warning on May 1, 2009, Mr. Maune recommended that Treen be terminated. (Tr. 44, 45.) This recommendation was approved and Treen was notified of his termination via a letter from Mr. Hicks mailed on August 6, 2009. (JX. 5-1.)

B. PROCEDURAL HISTORY

The unfair labor practice charge in this case was filed by the Union on November 18, 2009. The charge alleged that:

Within six months prior to the filing of this charge the Employer discharged Larry Treen because he lodged a complaint with the Employer over their failure to pay him his contractual retroactive wages. (*Id.*)

By letter dated December 29, 2009, Region 31 deferred the charge in this case to arbitration.

The arbitration case was heard by Arbitrator Joseph E. Grabuskie on May 18, 2010. The Arbitrator issued his award on September 21, 2010. The award concluded that:

The Company did not violate Article 02.01.06 and terminated Larry Treen on August 6, 2009 for Just Cause. Due to the facts outlined above, it is concluded that in terminating the Treen the Company did not violate the National Labor Relations Act as charged by the Union.

The arbitration hearing was recorded by a court reporter and there was a written transcript of the arbitration hearing. The parties submitted numerous exhibits to the Arbitrator which were made a part of the arbitration hearing record. Both the Union and IAP submitted post hearing briefs to the Arbitrator.

C. REGION 31 ISSUES COMPLAINT

By letter dated November 3, 2010, Region 31 notified IAP's attorneys that the Union was alleging that the Arbitrator's award did not meet the Board's deferral standards. Subsequently, Region 31 issued the Complaint and Notice of Hearing in this case on March 29, 2011. The Region's Complaint and Notice of Hearing made no mention of the initial deferral to arbitration or the Arbitrator's Award. A hearing in this case was scheduled for June 27, 2011 at 1:00 p.m. in Los Angeles, California, but was cancelled on June 23, 2011 pursuant to Administrative Law Judge William Kocol's order granting IAP's motion to accept the record developed in the arbitration case and defer to the findings of fact made by the Arbitrator for the purpose of determining whether the matter was resolved in accordance with *Olin Corp.*, 268 NLRB 573 (1984) and *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). The parties submitted briefs on the subject.

D. ADMINISTRATIVE LAW JUDGE KOCOL'S DECISION

The ALJ found that deferral was appropriate under *Olin* and *Spielberg* because the Arbitrator's decision was not palpably wrong. As the ALJ set forth:

The arbitrator assessed all the evidence and concluded that Treen's conduct was disruptive, argumentative and disrespectful. Remember, this was in the context where in March Treen had raised the same matter and had said, according to the Arbitrator, 'Fuck the Company and this job.' A conclusion that Treen's conduct at the July 31 meeting, in this context, could be sufficient to strip an employee of the protection the Act otherwise would provide is not palpably wrong. *Aramark Services*, 344 NLRB 549 (2005) (ALJD 5:48-6:8.)

III. THE ALJ'S CORRECTLY DISMISSED GENERAL COUNSEL'S COMPLAINT

A. THE ALJ PROPERLY DEFERRED TO THE ARBITRATOR'S AWARD AND DISMISSED THE COMPLAINT

The ALJ properly dismissed the complaint and deferred to the Arbitrator's award because the Arbitrator's award was not clearly repugnant to the NLRA. The ALJ correctly enunciated that in determining whether an Arbitrator's decision is clearly repugnant to the NLRA:

The Board does not require an arbitrator's award to be totally consistent with the Board's precedent. Rather, the inquiry is whether the award is "palpably wrong. Unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, the Board will defer. Also, the party seeking to have the Board reject deferral and consider the merits of the unfair labor practice matter has the burden of showing that the standards for deferral have not been met. (ALJD 2:26-32.)

The ALJ found that although in one sense Treen may have attempted to enforce the collective bargaining agreement, he nevertheless attempted to disrupt the understanding between IAP and the Union that an appropriate government official or

agency first had to approve the increased monetary items in a contract before they could be implemented. (ALJD 5:29-33.) Since Treen was informed of this process in the March 17 memo but persisted in pressing for immediate money, his conduct was not an attempt to enforce the contract. (ALJD 5:34-36.) Rather, it was an attempt to undermine it. (ALJD 5:36.)

The ALJ then correctly stated even assuming Treen's conduct was for the purpose of enforcing the contract, none of the cases cited by General Counsel dealt directly with this factual setting. (ALJD 5:28-29, 5:38-39.) As he further states, evaluating this type of case is fact intensive and requires balancing the *Atlantic Steel* factors. (ALJD 5:40-41.)³ As the ALJ states, although the Board *could* find Treen's conduct protected, it depends on the nature of his conduct. (ALJD 5:47-48.) Since the Arbitrator assessed all the evidence and determined that Treen's conduct at the July 31 meeting was disruptive, argumentative and disrespectful, a conclusion that his conduct was sufficient to strip an employee of the protection the NLRA otherwise would provide is not palpably wrong. (ALJD 5:48-6:8.) The ALJ cited *Aramark Services*, 344 NLRB 549 (2005) (ALJD 6: 8) in support of his conclusion that the arbitration decision in this case was not clearly repugnant to the Act and was not palpably wrong. In *Aramark Services*, the Board majority deferred to the findings of fact of the arbitrator and noted that the line between protected and unprotected conduct in cases of this type is not a clear one. *Aramark* 344, NLRB at 551. *Aramark* provides the proper framework for the clearly repugnant/palpably wrong analysis particularly, when in this case, there is existing Board

³ The ALJ correctly concluded that Treen's conduct was not prompted by any unfair labor practice. (ALJD 5:42.) In addition, he correctly found that the setting in which his disruptive behavior occurred was at the lower end of protection because it did not occur at the bargaining table or during the grievance process where an employer and union are in an equal position. (ALJD 5:43-45.)

precedent that deals with conduct very similar to that engaged in by Treen in the July 31, 2009 meeting. In *Eagle-Picher Industries*, 331 NLRB 169 (2000), the Board held that an employee's comments during an election campaign meeting were insubordinate and unprotected when the employee, despite being told that questions could be asked after the speech, muttered "garbage" when the company president made remarks critical of unions. Significantly, the Board majority in *Eagle Picher* held that it was the nature and context of the employee's comment and not the relative inseverity of the discipline (a warning) which warranted dismissal of the charge. *Id.* In light of the *Eagle Picher* decision, the ALJ correctly determined that the arbitrator's decision in this case was not palpably wrong because it is susceptible to and was in fact an interpretation consistent with the Act. Accordingly, the ALJ properly held that the Acting General Counsel failed to establish that the Arbitrator's decision was clearly repugnant to the Act (ALJD 6: 8-9).

B. THE ALJ PROPERLY REJECTED GENERAL COUNSEL'S INCONSISTENT ARGUMENT THAT *WRIGHT LINE* SHOULD HAVE BEEN APPLIED

The ALJ correctly rejected General Counsel's inconsistent argument that the Arbitrator should have applied *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). (ALJD 6:14-31.) As the ALJ stated, applying *Wright Line* is directly contrary to *Olin* and would allow a union to get two bites at the apple by allowing it to litigate one theory in arbitration but withhold another theory to litigate in an unfair labor practice hearing. (6:16-19.)

The ALJ is absolutely correct in labeling as inconsistent the Acting General Counsel's *Wright Line* argument, i.e. that the arbitrator should have applied *Wright Line* analysis to the July 26, 2009 Treen incident. Not only is the Acting General Counsel's

Wright Line argument inconsistent for the reasons stated by the ALJ but it is contrary to Board precedent.

The Board has consistently held that the analysis to be applied in cases where protected concerted activity and discipline for such alleged protected concerted activity is involved is the *Atlantic Steel* analysis and not the *Wright Line* analysis. *Plaza Auto Center, Inc.*, 355 NLRB No. 85 (2010), citing to *Felix Industries*, 331 NLRB 144, 145-146 (2000), enf'd in relevant part 251 F.3d 1051 (D.C. Cir. 2001), supplemented 339 NLRB 195 (2003), enf. mem. 2004 U.S. App. LEXIS 13793, 2004 WL 1498151 (D.C. Cir. 2004). In *Felix*, 331 NLRB at 146, the Board observed that the *Wright Line* analysis is used in dual motive situations where there is union or other protected activity but the Employer also advances a legitimate, non-discriminatory reason for the discipline.

The July 26, 2009 Treen incident is a “stand alone” incident totally unrelated to Treen’s subsequent July 31, 2009 meeting incident. Yet, the Acting General Counsel in his brief attempts to “bundle” the two incidents together and then argue that the alleged protected, conduct of July 31, 2009 somehow provides the requisite protected concerted activity to allow a *Wright Line* analysis of the July 26, 2009 incident.⁴ The Acting General Counsel’s argument is fatally flawed. Treen’s actions on July 26, 2009 did not implicate any protected concerted activity under the Act unless the Acting General Counsel is arguing that time card falsification and leaving an assigned post are protected by Section 7 of the Act. More importantly, Treen’s actions of July 26, 2009 were highly personal and individualized and in no way related to matters of common concern among

⁴ The *Wright Line* analysis requires that the General Counsel establish that an employee’s protected activity was a motivating factor for the adverse employment action taken against that employee. *California Almond Growers Exchange*, 353 NLRB No. 6 fn. 4 (2008); *American Gardens Management Company*, 338 NLRB 644, 645 (2002).

IAP's employees. In this regard, is there any doubt that if Treen's actions of July 26, 2009 had been presented as a separate unfair labor practice charge, the charge would have been summarily dismissed? The Acting General Counsel's *Wright Line* argument also ignores the fact that the July 26, 2009 incident, as a stand alone incident justifying discharge, triggers Section 10(c) of the Act so as to preclude backpay and reinstatement because Treen was discharged for cause.

Finally, as the ALJ further states, the July 26 discipline allegedly subject to the *Wright Line* analysis was not alleged as an unfair labor practice charge in the General Counsel's complaint and could not be litigated without such an allegation. (ALJD 6:23-31.)

C. THE ALJ PROPERLY REFUSED TO MODIFY EXISTING BOARD LAW

The ALJ rejected General Counsel's argument that the Board should modify the *Olin* deferral approach. (ALJD 6:33-7:41.) He properly stated that he could not modify existing Board law. (ALJD 6:34.)

The ALJ did, however comment on the Acting General Counsel's proposed modification of *Olin* and post-arbitration deferral (ALJD 6: 34-35). His comments about the application of the second point in the proposed standard as posing practical difficulties is well taken. (ALJD 7: 24-28, fn. 3). The Acting General Counsel's brief appears to argue that, under the second point of the proposed standard, the arbitrator must enunciate the applicable statutory principles in haec verba in his decision. That is not necessary. What is necessary is that the record, including the parties' briefs and the award, demonstrate that the arbitrator considered the correct NLRB standard in arriving at his decision. In this case, the arbitrator described the circumstances of the meeting and

concluded that Treen's behavior lost its NLRA protection because it was disruptive, disrespectful and argumentative. (ALJD 5: 11-13). The arbitrator's discussion clearly considered the *Atlantic Steel* factors and that is enough.

Additionally, the Acting General Counsel's brief suggests that under the second point of the proposed modification the arbitrator must correctly apply the applicable statutory standard. As the ALJ observed in footnote 3 (ALJD: 7), such a suggestion is incorrect. Such a suggestion eviscerates the repugnancy standard which the Acting General Counsel's proposed modification explicitly preserves. If that is indeed the case, there is no need for a separate repugnancy standard. In essence, the Acting General Counsel is arguing under the second point of the modified standard that the arbitrator must reach the same decision as the Board; if not, there can be no deferral. Such a position allows the Board to review de novo an arbitration award under the guise of deferral. The Acting General Counsel is not seeking the modification of *Olin* and the post arbitration deferral. He is seeking its demise.

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IV. CONCLUSION

The ALJ correctly concluded that the Arbitrator's decision was neither palpably wrong nor inconsistent with the NLRA and that deferral was appropriate. (ALJD 6:8-9.) Accordingly, the ALJ's decision must be affirmed and the complaint dismissed.

Dated this 6th day of September, 2011

Respectfully submitted,

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