

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

IAP WORLD SERVICES, INC.

and

Case 31-CA-29505

TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN, INDUSTRIAL
AND ALLIED WORKERS OF

**IAP WORLD SERVICES, INC'S ANSWERING BRIEF TO EXCEPTIONS OF
THE COUNSEL FOR THE ACTING GENERAL COUNSEL TO THE DECISION
AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

IAP WORLD SERVICES, INC. (“IAP”), pursuant to Section 102.46(d)(1) of the Board’s Rules and Regulations, hereby files its Answering Brief to Exceptions of the Counsel for the Acting General Counsel (“AGC”) to the Decision and Recommended Order of the Administrative Law Judge.¹

II. THE AGC’S EXCEPTION 1 MUST BE REJECTED BECAUSE THE ALJ DID NOT ERR IN CANCELLING THE UNFAIR LABOR PRACTICE HEARING AND RULING SOLELY UPON THE QUESTION OF WHETHER TO DEFER TO THE ARBITRAL AWARD

The AGC argues in support of Exception 1 that the ALJ erred in deciding to bifurcate this unfair labor practice proceeding by cancelling the hearing and ruling solely upon the deferral issue. The AGC argues in support of Exception 1 that the “standard practice” is to hold a hearing on the merits of alleged unfair labor practice allegations before deciding the deferral question. However, the AGC cites no Board authority for his assertion that the “standard practice” is to hold a hearing on the merits before deciding the deferral question. The AGC’s lack of citation to Board authority is understandable because existing Board authority is contrary to the AGC’s position in Exception 1.

The Board has consistently held in cases where it has been presented with the issue of whether it should defer to the arbitrator’s factual findings in an *Olin/Spielberg* context that such deferral is appropriate where: 1) the findings are consistent with the record evidence; 2) there are no irregularities in the proceedings; and 3) there are no facial errors in the factual findings. *Atlantic Steel Company*, 245 NLRB 814, n.2 (1979); *The Kansas City Star Company*, 236 NLRB 866, 868 (1978); and *The Louis G. Freeman*

¹ References to the ALJ’s decision are designated as “ALJD” followed by the applicable page and line numbers. Joint Exhibits from the arbitration hearing are designated as “JX.”

Company, 270 NLRB 80, 81 (1984). In other words, there is no need to hold a hearing on the merits when a Respondent timely raises the issue of a deferral to the arbitrator's factual findings. The ALJ noted the above precedent in footnote 2 of his decision (ALJD fn. 2) and properly exercised his discretion to bifurcate this proceeding pending his ruling on the *Olin/Spielberg* repugnancy issue.

The AGC also argues in support of Exception 1 that bifurcation will result in an inordinate delay before a Charging Party could obtain relief. This argument overlooks the fact the delay is inherent in the Board's deferral procedure. The invocation of the Board's deferral procedure involves the postponement of the disposition of an unfair labor practice charge until an arbitrator rules. Delay is acceptable because the arbitrator's ruling (decision) could dispose of an unfair labor practice case without an expenditure of Board resources and time. It makes no sense to hold a complete de novo hearing on the merits before the Board ever rules on the deferral issue. The AGC's position ignores the possibility that the Board will defer to the arbitrator's decision. If deferral occurs, there will have been needless litigation over issues that did not have to be resolved. Accordingly, the Board should reject the AGC's Exception 1.

III. THE AGC'S EXCEPTION 2 MUST BE REJECTED BECAUSE THE ALJ DID NOT ERR IN CONCLUDING THAT THE ARBITRATION AWARD IS NOT PALPABLY WRONG AND IS NOT REPUGNANT TO THE ACT

The AGC's argument in support of Exception 2 is misplaced. The issue relative to the Charging Party's July 31, 2009 activity is not whether the Charging Party's activity was arguably protected concerted activity under the Act. Rather, the issue is whether the Charging Party's protected concerted activity lost the protection of the Act because of the manner in which the Charging Party raised IAP's failure to pay the contractual wage rate.

The AGC's citation of the three (3) Board cases in support of Exception 2 is not particularly helpful because the three (3) cases deal with fact patterns that are dissimilar to what happened in this case. In *110 Greenwich Street Corp.*, 319 NLRB 331, 335 (1995), two employees' posting of signs on their cars in front of the Employer's building because of the Employer's failure to pay wages was found not to go beyond the protection of the Act. Likewise, in *Mobil Oil Exploration & Producing*, 325 NLRB 176, 177-178 (1997), *enfd.*, 200 F.3d 230 (5th Cir. 1999), the Board found that an employee's complaints about union leadership were not merely "personal complaints" but were protected under the Act. The Board further found that, in publicizing the complaints and voicing a concern that he would be fired as a result of the Employer's investigation into the complaints, the employee did not violate the Employer's confidentiality interests in the investigation. Finally, in *Garland Coal & Mining*, 276 NLRB 963, 964-965 (1985), the employee (a union official) did not lose the protection of the Act and engage in insubordination by refusing to sign a memo which the employee believed undermined the Union's interpretation of the collective bargaining agreement. The fact that the three (3) cases found the arbitration awards to be repugnant to the Act proves nothing because the factual patterns in those cases are dissimilar to this case.

The ALJ correctly noted in his decision (ALJD 5:37-41) that the repugnancy/palpably wrong inquiry is fact intensive and requires a balancing of the *Atlantic Steel* factors. Accordingly, citations to Board cases where the Board found an arbitrator's award repugnant in a different factual situation is not dispositive of the repugnancy/palpably wrong issue in this case. Accordingly, the Board should reject the AGC's Exception 2.

IV. THE AGC'S EXCEPTION 4 MUST BE REJECTED BECAUSE THE ALJ DID NOT ERR IN CONCLUDING THAT THE ARBITRATOR'S DECISION TO UPHOLD THE CHARGING PARTY'S DISCHARGE ON THE GROUNDS THAT HIS JULY 31 CONDUCT WAS "DISRUPTIVE, ARGUMENTATIVE, AND DISRESPECTFUL" WAS NOT PALPABLY WRONG

The AGC cites three (3) Board cases in support of Exception 4 that the ALJ erred in concluding that the Arbitrator's Decision was not palpably wrong. The AGC's citation of three (3) Board cases that hold that employees' behaviors were loud or disrespectful, rude and defiant but still protected ignores the wide latitude accorded by the Board's repugnancy/palpably wrong standard. As the ALJ noted in his decision (ALJD 2:26-30),

....the Board does not require an arbitrator's award to be totally consistent with Board precedent. Rather, the inquiry is whether the award is "palpably wrong." Unless the arbitrator's award is not susceptible to an interpretation consistent with the Act, the Board will defer.

Thus, the relevant inquiry under the Board's repugnancy/palpably wrong standard is not whether there is Board precedent contrary to the arbitrator's award but whether there is Board precedent supporting the arbitrator's award. If there is such precedent, then the arbitrator's award is susceptible to an interpretation consistent with the Act. In this case, the Board decision in *Eagle-Picher Industries*, 331 NLRB 169 (2000) supports the arbitrator's award and renders the award susceptible to an interpretation consistent with the Act. In *Eagle-Picher*, 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 criticized 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 deferral to the arbitrator's award. Accordingly, the Board should reject the AGC's Exception 4.

V. THE AGC'S EXCEPTION 5 MUST BE REJECTED BECAUSE THE ALJ DID NOT ERR IN REJECTING THE ACTING GENERAL COUNSEL'S PROPOSED MODIFICATION OF THE OLIN/SPIELBERG DEFERRAL STANDARD

The ALJ did not err in rejecting the AGC's proposed modification of the *Olin/Spielberg* deferral standard because the ALJ cannot modify existing Board law (ALJD 6:33-34).

IAP disagrees with the AGC's arguments at pages 9 and 10 of his Brief in Support of Exceptions that, if the Board adopts the proposed framework, it should conclude that the arbitrator failed either to correctly enunciate or to apply the statutory principles applied by the Board. The AGC never explained how the arbitrator did not correctly articulate the nature of Section 7 protections nor does the AGC explain how the arbitrator failed to directly address or balance the *Atlantic Steel* factors.

The AGC arguments in support of Exception 5 appear to be that in order to pass muster under the second portion of the proposed modified *Olin/Spielberg* deferral 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 Charging Party's behavior lost its NLRA protection because it was disruptive, disrespectful and argumentative. (ALJD

5:11-13). The arbitrator's decision clearly considered the *Atlantic Steel* factors and that is enough.

Additionally, the AGC's arguments in support of Exception 5 suggest that, under the second portion of the proposed *Olin/Spielberg* modification the arbitrator must correctly apply the applicable statutory principles. As the ALJ observed in footnote 3 (ALJD 7), such a suggestion is incorrect. Such a suggestion eliminates the repugnancy standard which the AGC's proposed modification explicitly preserves. If the arbitrator must correctly apply the statutory principles, then there is no need for a separate repugnancy standard. In essence, the AGC is arguing under the second portion of the modified standard that the arbitrator must reach the same decision as the Board; if not, there can be no deferral. Such a modification to the existing *Olin/Spielberg* deferral standards allows the Board to review de novo an arbitration award and effectively eliminates the repugnancy palpably/wrong portion of the *Olin/Spielberg* standard. Accordingly, the Board should reject the AGC's Exception 5.

VI. THE AGC'S EXCEPTION 6 MUST BE REJECTED BECAUSE THE ALJ DID NOT ERR IN CONCLUDING THAT A WRIGHT LINE ANALYSIS WAS NOT APPROPRIATE

The AGC's arguments in support of Exception 6 are incorrect because a *Wright Line* analysis cannot be applied to the July 26, 2009 shower incident. The July 26, 2009 incident is a separate, prior incident which was never alleged as an unfair labor practice in the complaint and is completely unrelated to the Charging Party's July 31, 2009 meeting incident. The AGC argues in support of Exception 6 that, because IAP's August 6, 2009 termination letter labels the July 31, 2009 incident a primary reason for the Charging Party's discharge (JX. 5-1), the July 31, 2009 incident is therefore the

motivating factor for the Charging Party's discharge and can be used to supply motive for the unrelated July 26, 2009 shower incident. The AGC's position ignores the follow on language in the August 6, 2009 termination letter that "and adding to it was the instance of July 26, 2009" (JX. 5-1). IAP used the July 29, 2009 incident as a separate ground for the discharge. In such a circumstance, a subsequent incident implicating protected concerted activity cannot provide motive for the prior incident. The Charging Party's actions on July 26, 2009 did not implicate any protected concerted activity under the Act unless the AGC is arguing that time card falsification and leaving an assigned post are protected by Section 7 of the Act. More importantly, Charging Party's actions of July 26, 2009 were highly personal and individualized and in no way related to matters of common concern among IAP's employees. The AGC is wrong in attempting to "import" the July 31, 2009 incident into the July 26, 2009 incident.

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 *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.

A *Wright Line* analysis cannot be applied to the July 26, 2009 incident because the *Wright Line* analysis requires that the AGC establish that an employee's protected

activity was a motivating factor for the adverse employment action taken against the employee. *California Almond Growers Exch.*, 335 NLRB No. 6, fn. 4 (2008); *American Gardens Mgmt. Co.*, 338 NLRB 644, 645 (2002). Where there is no protected activity, there can be no *Wright Line* analysis. The July 26, 2009 incident stands alone and the AGC is not free to question or “second guess” IAP’s treatment of the July 26, 2009 incident in this case under a *Wright Line* analysis. Accordingly, the Board should reject Exception 6.

VII. CONCLUSION

Based on the foregoing, IAP World Services, Inc. respectfully requests that the Board reject the AGC’s exceptions 1, 2, 4, 5 and 6.

Dated this 20th day of September, 2011.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on September 20, 2011 the foregoing was filed electronically with the National Labor Relations Board at www.nlr.gov, and copies of the same were served via e-mail on the same date upon:

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