

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9**

**In the Matter of**

**OVATIONS FOOD SERVICES, L.P. INC**

**and**

**NADINE WEAVER, AN INDIVIDUAL**

**Case 9-CA-046264**

**RESPONDENT'S MOTION TO DISMISS COMPLAINT, OR IN THE  
ALTERNATIVE GRANT SUMMARY JUDGMENT IN FAVOR OF  
OVATIONS FOOD SERVICES, L.P.**

Ovations files this motion pursuant to the Board's Order of July 10, 2012.

Board precedent mandates that this case be deferred to the Arbitrator's award dated February 5, 2012, in which a neutral arbitrator found that Nadine Weaver was terminated with just cause and that Respondent Ovations Food Services, L.P. ("Ovations" or "Respondent") did not violate the National Labor Relations Act (the "Act") when it terminated her employment. As explained herein, the Arbitrator's decision easily satisfies all of the requirements for post arbitral deferral. The Acting General Counsel's ("AGC") only arguments against deferral are based on mischaracterizations of the Arbitrator's decision. Indeed, on June 7, 2012, the AGC summarily dismissed Charging Party Nadine Weaver's unfair labor practice charge against her Union based on the same decision which he now contends is "repugnant to the Act." In that proceeding, the AGC determined that the Arbitrator's decision is "final and binding on the parties."

The AGC is taking inconsistent positions that cannot be reconciled and is ignoring clear precedent which mandates deferral in this case. Accordingly, Respondent respectfully

moves the Administrative Law Judge (“ALJ”) to dismiss the Complaint, or in the alternative grant summary judgment in favor of Ovation’s.

**I. FACTUAL BACKGROUND**

As found in the Arbitrator’s decision, Ovation’s provides food and beverage services to public assembly facilities throughout the country, including the Duke Energy Convention Center in Cincinnati, Ohio. (See Exhibit 1, Affidavit of David K. Montgomery, at Exhibit B (“Arbitration Award”), p. 2.) Ovation’s and Chicago 7 Midwest Regional Joint Board and its affiliated Local 12, Cincinnati, Ohio (the “Union”) are parties to a Collective Bargaining Agreement that was in effect at all times relevant to this dispute. (See *id.* at pp. 7-8.)

Weaver was hired as an A-Cook by Ovation’s on March 28, 2009, and retained that position until her termination on February 17, 2011. (*Id.* at p. 2.) As an A-Cook, she was responsible for working with Executive Chef Purvill Chaney and the entire kitchen staff in order to prepare meals for guests of the Duke Energy Convention Center. (*Id.*) During part of her tenure with Ovation’s, Weaver also served as a Union Steward. (*Id.* at p. 14.)

As an hourly employee, she was required to clock-in at the beginning and clock-out at the end of each scheduled shift. (*Id.* at p. 2.) According to Ovation’s written Payroll Policy, employees are not permitted to clock-in more than five minutes prior to the start of their scheduled shifts. (*Id.*) This policy was in effect during Weaver’s entire employment with Ovation’s. (*Id.*) Not only was the policy located in the Employee Guidebook (which Weaver acknowledged having received), but also was posted near the time clock where she and the other kitchen employees clocked-in and clocked-out. (*Id.*) In practice, Ovation’s was even more lenient than the written policy and permitted its kitchen employees to clock-in up to ten minutes before the start of their shifts. (*Id.* at pp. 2-3.) Additionally, the Employee Guidebook expressly

identifies “having time card violations” and “falsifying . . . timecards, in any way” as infractions for which immediate termination may be warranted. (*Id.* at p. 2.)

On December 2, 2010, Chef Chaney held a meeting with the kitchen staff, including Weaver, to remind them about Ovation’s clock-in/clock-out procedures and policies. (*Id.*) At the meeting, Chef Chaney advised Weaver and the rest of the kitchen staff that (1) they were required to comply with Ovation’s Payroll Policy, which prohibits employees from clocking-in more than ten minutes prior to the start of their scheduled shifts without management permission; and (2) an employee’s failure to comply with Ovation’s clock-in policies would be cause for termination. (*Id.* at pp. 2-3.)

Approximately one month later, and despite Chef Chaney’s unambiguous warning, Weaver repeatedly clocked-in early on a number of occasions (many of these instances occurred when Chef Chaney was working out of town). (*Id.* at p. 3.) Ovation discovered that between January 9 and January 23, 2011, Weaver clocked-in up to 77 minutes early for her scheduled shifts, without management approval, on seven separate occasions. (*Id.*) Shortly after making this alarming discovery, Ovation began attempting to schedule a meeting with Weaver and the Union. (*Id.* at pp. 3-4.) As a result of scheduling difficulties with the Union, the meeting was not scheduled until February 17, 2011. (*Id.* at p. 4.)

At the February 17, 2011 meeting, Ovation gave Weaver the opportunity to explain her pattern of unauthorized early clock-ins. (*Id.*) Weaver, however, was not able to provide any legitimate explanation for her conduct, and Ovation terminated her employment as a result of the repeated time-card violations at the end of the February 17 meeting. (*Id.*)

## II. PROCEDURAL HISTORY

Days after her termination, on February 22, 2011, Weaver filed this unfair labor practice charge against Ovations, alleging that she was unlawfully terminated in retaliation for her Union activities.<sup>1</sup> (*Id.* at p. 6.) On February 24, 2011, she also filed a grievance in relation to her termination. (*Id.*) The parties agreed, pursuant to the Collective Bargaining Agreement, to submit the grievance to binding arbitration. (*Id.* at pp. 6-7.) On April 26, 2011, the Acting Regional Director notified the parties that it would defer its final determination regarding Weaver's charge until after the arbitration was complete. (*See* Exhibit A to Montgomery Aff.)

The arbitration hearing was held in Cincinnati, Ohio on October 13 and December 6, 2011 before Arbitrator Stephen L. Hayford. (Arbitration Award, at p. 1.) Arbitrator Hayford was selected in accordance with the arbitrator-selection procedures described in the Collective Bargaining Agreement. (*See generally id.* at p. 7.) Prior to the arbitration, the parties stipulated that the issues before Arbitrator Hayford would be:

1. Whether Ovations discharged Weaver for just cause, and whether the discharge was in violation of the National Labor Relations Act; and
2. If the discharge was not for just cause or was in violation of the National Labor Relations Act, what was the proper remedy?

(*Id.* at p. 6.)

At the hearing, both parties were given the opportunity to present evidence supporting their positions; multiple witnesses – including Weaver and Chef Chaney – testified, and numerous documents were submitted as exhibits. (*Id.* at p. 1.) Additionally, Ovations allowed Weaver's personal attorney to attend the hearing, in addition to her Union

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<sup>1</sup> Weaver also filed at least two separate unfair labor practice charges against the Union for failing to adequately represent her. Weaver independently dismissed the first charge (NLRB Charge No. 9-CB-12490) on or about April 27, 2011. The Regional Director dismissed the second charge (Charge No. 09-CB-073966) on or about March 28, 2012.

representation. Following the hearing, both Ovations and the Union submitted post-arbitration briefs summarizing the evidence presented at the hearing and urging Arbitrator Hayford to accept their respective arguments. (*Id.*)

On February 5, 2012, Arbitrator Hayford issued his award. (*Id.*) In the award, Arbitrator Hayford specifically held that “[t]he Company discharged Nadine Weaver for just cause **and her discharge did not violate the National Labor Relations Act.**” (*Id.* at p. 19 (emphasis added).) Arbitrator Hayford held that Weaver’s repeated, unauthorized early clock-ins violated Ovations’ policy and constituted just cause for her termination, as her conduct was “both insubordinate (in that she refused to work the hours she was scheduled to work) and dishonest (in that she enabled herself to earn wages to which she was not entitled).” (*Id.* at pp. 16-18.)

Importantly, Arbitrator Hayford specifically analyzed whether Weaver’s termination was in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. (*Id.* at p. 18.) In doing so, he applied the four-factor test articulated by the Board in *Wright Line*: (1) whether Weaver was engaged in Union or other protected concerted activities; (2) whether Ovations knew about that activity; (3) whether Ovations took an adverse employment action against her; and (4) whether there was a nexus between the protected activity and the adverse employment action. *See Wright Line*, 251 NLRB 1083 (1980). Finding that the first three factors were met in this case, Arbitrator Hayford’s analysis focused on the fourth and final factor – whether there was any causal connection between Weaver’s Union activities and her termination. (Arbitration Award, at p. 18.) After reviewing the evidence, Arbitrator Hayford held that Ovations did not violate either Section 8(a)(1) or Section 8(a)(3) when it terminated Weaver:

**What the record does not reveal is any concrete nexus between Ms. Weaver's union activities and the Company's decision to terminate her employment.** That the Grievant at times behaved in an aggressive or abrasive manner in the course of fulfilling her union duties, and occasionally filed grievances does not demonstrate that the Company's decision to terminate her for what has been determined to have been repeated intentional time card violations was somehow a result of her actions as a Union Steward.

Section 8(a)(3) of the NLRA is a shield, it is not a sword that can be used to excuse or mitigate otherwise improper and unacceptable workplace misconduct by a union representative. Because the Company has proven just cause for the Grievant's termination and because **Ms. Weaver and the Union have not adduced concrete probative evidence demonstrating that her otherwise justified discharge resulted from or was linked to her union activities**, the Arbitrator can only conclude that the Company did not violate Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act when it discharged Nadine Weaver.

*(Id. (emphasis added).)*

Following the issuance of the arbitration award, Ovations notified the Board of the award and requested that Weaver's charge be dismissed in accordance with the award and relevant legal authority mandating deferral in this instance. On May 18, 2012, however, the AGC issued its Complaint and Notice of Hearing, in which he alleged that Ovations discharged Weaver because she "formed, joined or assisted the Union, and engaged in concerted activities, and to discourage employees from engaging in these concerted activities." (*See* Complaint, ¶5.) According to Board Agent and Counsel for the AGC Julius Emetu, the AGC elected not to defer to the arbitration award because he determined that the award was repugnant to the Act. (*See* Exhibit C to Montgomery Aff.) This conclusion was based on a significant mischaracterization of the award, in which the AGC erroneously alleged that "[t]he arbitrator found that one of the primary reasons the Employer stated for Nadine Weaver's discharge was her activities as a union steward and the Employer failed to prove that the alleged inappropriate steward conduct was just cause for her discharge. The arbitrator nevertheless concluded that her discharge did not violate

the Act.” (*Id.*) Board Agent Emetu also relayed the AGC’s misguided opinion that the arbitrator’s application of the *Wright Line* analysis was improper. (*Id.*)

As noted above, on June 7, 2012, the AGC issued an Order in Weaver’s still pending action against the Union in which it said the following with regards to the Arbitrator’s award: “The Arbitrator, after a hearing held on two dates, denied your grievance. This decision is final and binding on the parties.” (Exhibit 2, Letter from AGC to Nadine Weaver in Case No. 09-CB-073966, Jun. 7, 2012) The AGC’s decision to dismiss Charging Party’s unfair labor practice charge against her former Union is based on the same Arbitrator’s decision in this case, which the AGC now claims is repugnant to the Act.

### **III. ARGUMENT**

#### **A. Under Current Board Precedent, The AGC Must Defer To The Arbitration Award And The Complaint Must Be Dismissed.**

##### **a. Legal Standard.**

According to the Board’s seminal *Spielberg Manufacturing Co.* decision, the Board should defer to an arbitration award where (1) the arbitration proceedings appear to have been fair and regular; (2) all parties had agreed to be bound by the arbitration award; and (3) the decision of the arbitration panel is not “clearly repugnant to the purposes and policies of the Act.” *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082 (1955) (dismissing complaint in its entirety). To satisfy the “clearly repugnant” standard, an arbitrator’s award need not be totally consistent with Board precedent; rather, the Board should defer unless the award is “palpably wrong” and “not susceptible to an interpretation consistent with the Act.” *See Olin Corp.*, 268 NLRB 573, 574 (1984). In *Spielberg*, the Board promulgated this standard with the acknowledgment that “the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators’ award.” *Id.*

The Board later added an additional element to the deferral analysis – deferring to arbitration awards only where the arbitrator had considered the unfair labor practice issue. *See Olin Corp.*, 268 NLRB at 574. An arbitrator has adequately “considered” the unfair labor practice issue if (1) the contractual issue is factually parallel to the unfair labor practice issue; and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Id.* *See also Lewis v. NLRB*, 779 F.2d 12 (6th Cir. 1985) (affirming decision to defer even though the arbitration panel failed to explicitly set forth the fact that the statutory issue was presented and considered). Notably, the burden of showing that these criteria have not been met is on the party requesting that the Board reject deferral and consider the merits of the dispute. *See Olin Corp.*, 268 NLRB at 574 (“[T]he party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award.”). *See also IAP World Servs.*, 2012 NLRB LEXIS 92 (NLRB, Feb. 24, 2012) (ruling in favor of deferral to arbitration and holding that “the General Counsel shoulders the burden of establishing that arbitration decision was clearly repugnant to the Act and was palpably wrong”); *Verizon New Eng., Inc.*, 2011 NLRB LEXIS 630 (NLRB, Nov. 15, 2011) (ruling in favor of deferral to arbitration and stating that “the Board placed upon the party seeking to have the Board ignore the arbitrator's decision, ‘the burden of affirmatively demonstrating the defects in the arbitral process or award’”).

Finally, the Acting General Counsel is not entitled to disregard an arbitration award merely because he does not agree with the result. *See Verizon New Eng., Inc.*, 2011 NLRB LEXIS 630 (“although the Board, upon hearing this case *de novo* might have reached a different conclusion than that reached by the arbitrator, . . . the arbitrator's decision was neither repugnant to the Act nor was it palpably wrong.”).

b. Arbitrator Hayford's Award Easily Satisfies The Requirements For Deferral.

The arbitration award issued by Arbitrator Hayford in this dispute clearly satisfies the conditions for deferral that have been promulgated by the Board in *Spielberg* and its progeny. It is without dispute that the arbitration proceedings were fair and regular; Arbitrator Hayford was selected using the procedures outlined in the Collective Bargaining Agreement, and both parties had the opportunity to – and actually did – present witness testimony and documentary evidence supporting their claims and positions. (*See generally* Arbitration Award.) Further, it is beyond contest that both Ovations and the Union (of which Weaver was a member) agreed to be bound by arbitration. The AGC himself found that the Arbitration award was binding on all parties when he summarily dismissed Weaver's unfair labor practice charge against the Union. (Exhibit 2)

It is clear from Arbitrator Hayford's award that he adequately considered the unfair labor practice issue. The contractual issue (whether Weaver was terminated for just cause) and the statutory issue (whether Weaver was terminated in violation of the Act) are factually parallel. Because both questions relate to the reason for Weaver's termination, the arbitrator necessarily had to – and actually did – consider both Weaver's time-card violations and her alleged protected activity when determining whether she was terminated with just cause. (*See* Arbitration Award at p. 18 (noting the lack of “concrete probative evidence demonstrating that [Weaver's] otherwise justified discharge resulted from or was linked to her Union activities.”).)

The record demonstrates that Arbitrator Hayford was presented with the facts relevant to resolving Weaver's unfair labor practice charge. His award outlines the Union's position that Weaver allegedly was terminated because of her Union activities. (*See id.* at pp.

11-12.) The record further demonstrates that the arbitrator considered purported and potential comparators who allegedly engaged in similar conduct to Weaver in an effort to determine if she was treated unfairly. (*Id.* at fn. 5, pp. 17-18) Based on the evidence, Arbitrator Hayford determined that Ovations treated Weaver fairly. (*Id.*) The evidence before Arbitrator Hayford relating to the question of whether Weaver was discharged with just cause is the same evidence necessary to determine whether she termination was related to her Union activities, and the AGC cannot satisfy his burden of showing that Arbitrator Hayford was lacking any evidence relevant to the determination of the unfair labor practice issue.

Finally, the arbitration award is not clearly repugnant to the Act. Arbitrator Hayford applied the *Wright Line* analysis to the particular facts of this dispute, and ultimately held that the evidence did not support a nexus between Weaver's Union activities and her termination. (*See id.* at p. 18.) Without any causal nexus, Ovations' discharge of Weaver did not violate the Act. (*Id.*) This holding is entirely consistent with the Act.

Clearly, the AGC cannot satisfy the heavy burden of proving that the award is "palpably wrong." *See Verizon New Eng., Inc.*, 2011 NLRB LEXIS 630 ("although the Board, upon hearing this case *de novo* might have reached a different conclusion than that reached by the arbitrator, . . . the arbitrator's decision was neither repugnant to the Act nor was it palpably wrong."). Under these circumstances, the AGC must defer to the arbitration award, and the Complaint should be dismissed.

c. The AGC's Justification For Refusing To Defer Is Neither Factually Nor Legally Supportable.

The AGC has identified two reasons why it believes that the arbitration award issued in this matter is clearly repugnant to the Act: (1) that the arbitrator misapplied the *Wright Line* analysis; and (2) that "[t]he arbitrator found that one of the primary reasons the Employer

stated for Nadine Weaver's discharge was her activities as a union steward and that the Employer failed to prove that the alleged inappropriate steward conduct was just cause for her discharge. The Arbitrator nevertheless concluded that her discharge did not violate the Act." (See Exhibit C to Montgomery Aff.) Both of these conclusions, however, mischaracterize the award and are contrary to the actual language and reasoning of the arbitration award.

Even a cursory review of the award confirms that Arbitrator Hayford correctly applied the *Wright Line* analysis. Arbitrator Hayford correctly identified all four elements of the analysis. (See, e.g., Arbitration Award at pp. 9, 18.) After determining that the first three factors had been met in this dispute, his analysis focused on the fourth and final factor: whether there existed a causal nexus between Weaver's Union activities and her termination. (*Id.* at p. 18.) Because the evidence in the record did not reveal "any concrete nexus between Ms. Weaver's union activities and the Company's decision to terminate her employment," Arbitrator Hayford correctly determined, pursuant to *Wright Line*, that Ovations' termination of Weaver did not violate the Act. (*Id.* at pp. 18-19.)

The burden to prove a link between an employee's union activities and an adverse employment action always lies with the General Counsel or the Union (in the case of grievance and arbitration proceedings). See *Sunrise Health Care Corporation*, 334 NLRB 903 (NLRB 2001). See also *Wright Line*, 1251 NLRB 1080 (1980). Accordingly, Arbitrator Hayford's finding that there was no "concrete nexus between Ms. Weaver's union activities and the Company's decision to terminate her employment" is determinative. (See Arbitration Award at pp. 18-19) There is simply no causal relationship between Weaver's termination and Ovations' decision to terminate Weaver. (*Id.*)

The AGC's second assertion also is directly contrary to the arbitration award. In the award, Arbitrator Hayford expressly found that Weaver's "pattern of repeated time card violations that were both insubordinate (in that she refused to work the hours she was scheduled to work) and dishonest (in that she enabled herself to earn wages to which she was not entitled)" gave Ovation just cause to terminate her and was the motivating factor behind Ovation's termination decision. (*See id.* at pp. 17-18.) Arbitrator Hayford further explained that the evidence did not support the Union's contention that Weaver's termination was linked in any way to her Union activities. (*Id.* at p. 18.) Under these circumstances, it simply is incorrect for the AGC to allege that the Arbitrator found that one of the primary reasons for Weaver's discharge was her Union activities.

Therefore, none of the reasons provided by the AGC are sufficient to justify his decision to refuse to defer to the arbitration award, and the Complaint must be dismissed.

**B. Even If The ALJ Decides To Adopt a New Standard Regarding Post-Arbitration Deferral Recently Proposed By The AGC, Deferral Still Is Appropriate.**

In a January 20, 2011 memorandum, the AGC proposed a new framework for arbitral deference that re-allocates the burden of proof and largely ignores the well-established public policy in favor of arbitration as the preferred means of resolving labor disputes. *See* Memorandum GC 11-05 (January 20, 2011). In its proposal, the AGC urged the Board to adopt a new standard where the party seeking deferral has the burden of demonstrating that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. *Id.* at pp. 6-7. If the party urging deferral makes this

showing, the Board should defer unless the arbitration award is clearly repugnant to the Act. *Id.* at p. 7. The AGC's proposal, however, never has been adopted by the Board.

Even if the Board had adopted this framework, deferral still would be appropriate. As described more thoroughly above, the statutory issue – whether Weaver's termination violated either Section 8(a)(1) or Section 8(a)(3) – was presented at the hearing and considered by Arbitrator Hayford. Moreover, the Arbitrator correctly enunciated and applied the *Wright Line* standard for determining whether a violation of those statutory sections occurred. Finally, for the reasons previously articulated, the arbitration award is not clearly repugnant to the Act.

Therefore, regardless of which standard the Board applies, deferral was appropriate in this case, and the AGC's Complaint must be dismissed.

#### **IV. CONCLUSION**

For all of the foregoing reasons, Respondent Ovarions Food Services, L.P. respectfully requests that the ALJ dismiss in its entirety the Complaint and Notice of Hearing issued by the Acting General Counsel on May 18, 2012. Alternatively, Respondent requests that the Board grant summary judgment in its favor. Copies of legal authority for Respondent's position are attached hereto as Exhibit 3.

Dated: July 19, 2012.

Respondent,

OVATIONS FOOD SERVICES, L.P.

By: *David A. Nenni*

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**CERTIFICATE OF SERVICE**

This is to certify that on July 19, 2012, a copy of the foregoing Motion to Dismiss, or in the Alternative for Summary Judgment, was served, via electronic mail where possible and first class mail, postage prepaid upon the following:

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