UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES

and **Case 28-CA-022792**

WAYNE ABREU, an Individual

GENERAL COUNSEL'S REPLY BRIEF

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Counsel for the General Counsel (General Counsel), pursuant to Section 102.46(h) of the Board's Rules and Regulations, submits the following Reply Brief to the Answering Brief filed by Respondent BCI Coca-Cola Bottling Company of Los Angeles.[1] For the reasons described below, the matters asserted by Respondent in its Answering Brief are without merit, and the Board should grant the General Counsel's Exceptions.

I. INTRODUCTION

On September 26, 2013,[2] the General Counsel filed Exceptions and a Brief in Support, to the decision issued by Administrative Law Judge William Kocol (ALJ) on August 29, in the above captioned case (ALJD). On October 18, Respondent filed an Answering Brief to the General Counsel's Exceptions. Respondent argues that the ALJ was correct in his rulings both in his previous decision, overturned by the Board, and his recent decision. Respondent further asserts that the exceptions filed by General Counsel lack merit, and that the ALJ did not err by failing to take evidence as requested by General Counsel. Respondent's assertions are baseless, not supported by the law and should be rejected by the Board.

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[1] BCI Coca-Cola Bottling Company of Los Angeles is referred to as Respondent. References to the trial exhibits of the General Counsel, and Respondent will be designated as "GC" and "R" respectively, and references to the trial transcripts will be designated as "Tr."
[2] All dates refer to calendar year 2013, unless otherwise noted.

II. THE GENERAL COUNSEL EXCEPTIONS AND RESPONDENT'S ARGUMENTS

A. Exceptions Regarding the ALJ's Deferral Decisions

The General Counsel argued in its exceptions that the ALJ erred by continuing to object to the Regional Director's decision to defer this matter under *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), despite being overruled by the Board, showing a disdain for the Board's and the Regional Director's authority. Respondent mimics the ALJ, again arguing that the charge should have been deferred under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and then dismissed as opposed to the Region issuing a Complaint. The Board has already ruled upon this issue; regardless as to whether the charge was deferred under *Collyer* or *Dubo*, the ALJ needs to hold an evidentiary hearing on the Section 8(a)(1) rulings and determine whether the settlement agreement is repugnant to the Act. Respondent's continuous argument, just like the ALJ's finding, indicates that both refuse to accept the Board's previous decision. It colors all of its arguments. As such, Respondent's arguments have no merit.

As determined by the Board, it is immaterial whether the grievance was deferred by the Regional Director under *Collyer*. The ALJ had an obligation to allow the General Counsel to present evidence, to analyze the grievance settlement reached prior to arbitration pursuant to that evidence under either an *Olin/Spielberg*[3] standard or an *Independent Stave*[4] analysis, and reject the settlement if deferral to it was repugnant to the policies of the Act. Despite this ruling, the ALJ's actions by limiting evidence made the Board's order impossible to be followed.

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[3] 268 NLRB 573 919840; 112 NLRB 1080 (1955).
[4] 287 NLRB 740 (1987).

B. The ALJ's Factual Errors

In its Exceptions, the General Counsel pointed out several factual errors made by the ALJ in his decision which included: (1) that the Union agreed with Respondent that the grievance it filed had no merit; (2) that the Union did not take the grievance to arbitration because it did not think it had a valid argument; and (3) that the parties stipulated there was no evidence the Union breached its duty of fair representation. Respondent, in its Answering brief, disagrees with General Counsel, stating that the ALJ made no factual errors.

The General Counsel argued that the ALJ erred when he stated that "the Union ultimately agreed with Coca-Cola's interpretation of the contract and concluded it could not convince an arbitrator that Coca-Cola breached the contract." (ALJD at 1) The record evidence shows that there was a dispute regarding a provision in the contract regarding layoffs and the Union asserted from the very outset that the seniority provision applied to the distribution department, a department that the discriminatees worked in. (Tr. 2 at 71)

The ALJ stated in his decision that the Union agreed with Respondent's interpretation of the contract, that the contract allowed Respondent to lay off employees the way it did, that Wayne Abreu (Abreu) was among those selected for layoff, and the layoffs were expected because of the declining business. (ALJD at 1 and 3) As stated above, the ALJ is incorrect in this ruling. The Union repeatedly stated, through Perez, that it believed the contract required the layoff to be done by departmental seniority, not job classification. It was only after the Union had been decertified that the National Union decided the contract provision was open to interpretation and it might not win at arbitration. Therefore, again, the ALJ's statements that the Union agreed with Respondent's interpretation of the collective-bargaining agreement are not supported by the evidence and are incorrect.

The third factual determination of the ALJ that General Counsel took exception concerned a stipulation. The ALJ stated that the parties stipulated that a charge in Case 28-CB-074569, alleging a breach in the Union's duty of fair representation by its handling of the grievance at issue was withdrawn because there was no evidence that the Union had breached its duty of fair representation in settling the grievances as it did. To be clear, the only stipulation made by the General Counsel was that a charge was filed in Case 28-CB-074596, and that it was withdrawn by Abreu after an investigation. No other stipulation was reached. (Tr. 2 at 30) There was no record evidence as to the reasons for the withdrawal, other than Abreu's statement that he was told to withdraw the charge. The ALJ's leap to conclude that the parties stipulated that there was no breach of the duty of fair representation by the Union should not be allowed to stand.

C. Exceptions Regarding the Limiting of Evidence Regarding Section 8(a)(1) Allegations

On April 30, the Board issued its decision in *BCI Coca-Cola Bottling Company of Los Angeles*, 359 NLRB No. 110 (Remand Order), ordering the ALJ to hear evidence regarding whether the settlement agreement was repugnant to the Act, as well as evidence on the Section 8(a)(1) allegations in the Complaint. On July 23, the hearing opened on the Remand Order. The ALJ immediately stated that he would hear no evidence on the merits of the allegations in the Complaint and that he would hear evidence on the deferral only. (Tr. 6-8) General Counsel objected, arguing that the ALJ needed to hear some facts of the merits of the case to determine whether the grievance settlement agreement was repugnant to the Act, not to necessarily decide the case on the merits. (Tr. 6-8) Nevertheless, the ALJ limited the evidence to what occurred with the grievance and the settlement of the grievance. (Tr. 6-8)

Further, the ALJ refused to hear evidence on the Section 8(a)(1) allegations, finding that they were part of the grievance settlement agreement. The General Counsel filed exceptions to the ALJ limiting the record evidence regarding the settlement agreement and the Section 8(a)(1) allegations. Predictably, Respondent states that the ALJ was correct in doing so in its Answering Brief. Respondent's claims are without merit.

The Board, in its Remand Order, directed the ALJ to hear evidence on the merits of the Section 8(a)(1) allegations in the Complaint as they were not a part of the deferral action. (GCX 1(mm)) Respondent filed a Motion for Reconsideration, a Motion denied by the Board. (GCX 1(qq) and (uu)) The Board stated in its denial that "nothing in the April 30 Order forecloses the Respondent from arguing to the judge that the 8(a)(1) allegations in fact were resolved by the settlement and thus should be dismissed if the settlement warrants deferral under *Spielberg*, supra, and *Olin Corp*., supra." (GCX 1(uu))

This is exactly what Respondent argued in front of the ALJ. As the ALJ notes in his decision, he was directed to decide the merits of the Section 8(a)(1) allegations of the Complaint. (ALJD at 3) He stated, however, that the Board lacks the "intellectual integrity" to conclude that the remand order instructing him to decide the Section 8(a)(1) allegation on the merits without first determining whether they were subsumed by the grievance settlement was erroneous. (ALJD at 3) The ALJ's statements are evidence of the disregard he gives the Remand Order.

There is no evidence that the Section 8(a)(1) statements alleged in the Complaint were considered in the deferral action. As Perez testified, he was unaware of such statements, and "only heard gossip stuff that was heard through the grapevine". (Tr. 2 at 88). How could the Union have included the Section 8(a)(1) statements in the grievance settlement if the Union was not aware of their existence?[5] There is absolutely no evidence to support the ALJ's conclusion.

The General Counsel was barred from presenting any evidence on the Section 8(a)(1) statements and was only allowed to give an offer of proof as the evidence supporting this allegation. (Tr. 2 at 147) The General Counsel informed the ALJ that it had employee witnesses, as well as former supervisor witnesses, that would testify that union stewards, Abreu and Heath Gessner (Gessner), were put on a "list"—a list to get rid of the Union, that this topic was discussed at supervisor meetings, and the layoff was the only way to accomplish this objective. (Tr. 2. At 147) There is no record evidence that the Union was even aware of these statements, that the Union talked to the employees who heard these statements, or that these statements were considered during the settlement of the grievance. Therefore, the ALJ was in error in failing to hear evidence on the Section 8(a)(1) allegations as directed by the Board, and his decision should be overruled.

D. <u>The ALJ Erred by Limiting the Record Evidence Regarding Layoffs</u>

Although the Board stated in its Remand Order, that the ALJ was not required to decide the merits of the Section 8(a)(3) allegations, the Board ordered the ALJ to determine whether the grievance settlement agreement was repugnant to the Act. The ALJ determined that this meant that no evidence of what occurred prior to the layoff and the filing of the

[5] When Perez was asked to explain further what he meant, he stated that the statements were something to the effect about the Union not doing anything for you in the middle of a decertification campaign. (Tr. 2 at 89-90) Those are not related to the Section 8(a)(1) statements alleged in the Complaint.

grievance could be presented, and limited the evidence to only what happened after the filing of the grievance and why the Union and Respondent settled the grievance.

The General Counsel filed exceptions to the ALJ's limiting the evidence because by doing this, there is no way for the ALJ to make a determination that the grievance settlement agreement was repugnant to the Act. This was a layoff predicated by long-standing animus against the Union, as evidenced by the previous unfair labor practices cases involving Respondent, and in the midst of a decertification campaign that the Union ultimately lost. Two of the laid off employees, Abreu and Gessner, were active union stewards.[6] Furthermore, they were senior employees, having worked for Respondent for over ten years each. In order to get rid of them during a decertification campaign, Respondent instituted a permanent classification layoff that was arguably in violation of the collective-bargaining agreement. The ALJ refused to allow any evidence of the anti-union animus, the long-standing unfair labor practice history, and the evidence that would have shown that the only individual hired back as a driver after the layoff was a driver who was on a last-chance agreement at the time of his layoff. This evidence would have been presented to the ALJ, showing that a grievance settlement agreement entered into solely because the Union thought the collective-bargaining agreement was open to interpretation and did not consider the unfair labor practice aspect, would have resulted in a determination that the grievance settlement agreement was repugnant to the Act. By limiting the ability of General Counsel to present this evidence, the ALJ was able to reach the conclusion he wanted from the outset—to show

[6] Respondent argues that because there is no record evidence that Gessner was an active union steward, General Counsel cannot make this argument. Of course, as the Exception itself stated, the ALJ limited the evidence as to what occurred after the layoff, making it impossible for all evidence to be presented. Respondent wants to agree with the ALJ in limiting the evidence then argues that General Counsel cannot argue the facts because there is no record evidence. Moreover, an offer of proof was made in the form of the opening statement, acknowledging that Gessner was an active union steward. (Tr. 2 at 13) Respondent's argument has no merit.

the Board that its Remand Order was a waste of time and he was correct in dismissing the case from the outset. The ALJ achieved his desired by manipulating the evidence he would allow in the record and what evidence he would disallow. Therefore, the ALJ was incorrect and should be overruled. Respondent merely parrots the ALJ's decision in its Answering brief, agreeing that the ALJ properly limited the evidence.

E. The ALJ's Failure to find the Settlement Agreement Repugnant

The ALJ found that the grievance settlement agreement was not repugnant to the Act because the proceedings were fair and regular, the parties agreed to be bound by the agreement, including Abreu and the other alleged discriminatees, the Union adequately considered the unfair labor practices, and because the Union determined that the grievance lacked merit. The ALJ makes several incorrect conclusions—there is no evidence that Abreu and other alleged discriminatees agreed to be bound by the agreement. In fact, the opposite is true. Neither Abreu nor any of the alleged discriminatees agreed with the settlement agreement and the mere fact that they wanted the Union to file the grievance and take the grievance to arbitration, does not indicate, as a matter of law, that they have entered into an agreement to be bound by the grievance settlement agreement. Further, the Union did not adequately consider the unfair labor practices. In fact, as stated earlier, the Union only looked at the contract interpretation and did not consider the Section 8(a)(1) statements. The Union was only concerned with the decertification. Finally, because the merits of the unfair labor practices were not considered by anyone, there can be no finding that the resulting grievance settlement agreement is not repugnant to the Act.

F. The ALJ's Refusal to Apply an *Independent Stave* Analysis

The ALJ erred by failing to properly analyze the General Counsel's request for the ALJ and the Board to modify its approach to pre-arbitral deferral cases by applying current non-Board settlement practices, including review under *Independent Stave*, 287 NLRB 740 (1987). This case cries out for the approach set forth in *Independent Stave,* as here a decertified Union made a decision to drop a case for a settlement that does not come close to remedying the layoffs of eight long-term employees, and has left these discriminatees with no recourse.

Respondent argues that General Counsel has not presented any plausible reason for the Board to change its approach and apply the *Independent Stave* analysis to grievance settlement agreement. Respondent is incorrect. General Counsel laid out a cogent and judicious argument to apply *Independent Stave* to grievance settlements in its Exceptions. Respondent further argues that the Region is simply now trying to argue unsubstantiated allegations of unfair labor practices. There lies the problem - the Region has not been allowed to present the evidence it has regarding the unfair labor practice allegations because this ALJ has continually refused to allow said evidence. Respondent cannot argue on one hand that the ALJ was correct in not allowing evidence of the allegations, and then argue that General Counsel has unsubstantiated allegations of unfair labor practices as a reason to dismiss General Counsel's exceptions in requesting the Board to modify its approach to analyzing grievance settlement agreements.

III. CONCLUSION

It is respectfully requested that the Board accept the General Counsel's exceptions, overrule the ALJ's decision to dismiss this matter, apply an *Independent Stave* analysis to the settlement agreement in this matter, and further asks that this matter be remanded for a full evidentiary hearing.

Dated at Phoenix, Arizona, this 31st day of October 2013.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S REPLY BRIEF in BCI Coca-Cola Bottling Company of Los Angeles, Case 28-CA-022792 was served by E-Gov, E-Filing and by E-mail, on this 31st day of October 2013, on the following:

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