

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington D.C.

VERIZON CALIFORNIA, INC.

and

Case 21-CA-039382

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 9588, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S
REPLY TO RESPONDENT'S
ANSWERING BRIEF

Submitted by:

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Virtually all of the arguments in Respondent's Answering Brief to the General Counsel's Exceptions to the Decision of the Administrative Law Judge have been previously addressed in the General Counsel's Brief in Support of Exceptions.

Therefore, this Reply Brief will be limited to the following points:

1. The Arbitrator's Award is not supported by the record evidence from the Arbitration

Respondent avers that the General Counsel is seeking to substitute its own viewpoint for the Arbitrator's factual conclusions, witness credibility determinations, and holding that employee Brian Rodriguez (Rodriguez) did not have a reasonable belief that discipline may result from the telephone inquiries of his supervisor. (RAB at 3)¹

However, as noted in General Counsel's exceptions, this is not merely a "disagreement" over the Arbitrator's findings. Rather, General Counsel has shown that the Arbitrator completely disregarded the established fact that Performance Improvement Plans (PIP) of the type imposed on Rodriguez were a form of discipline, or at the very least a program for which an employee could be disciplined or even terminated for failure to follow.

Furthermore, the Arbitrator, while ostensibly crediting Manager Cooper, ignored her own testimony, based on her contemporaneous notes of the conversation, that she called Rodriguez to have him explain his long-duration ticket. Thus, Cooper admitted in the Arbitration transcript that one of the reasons she had called Rodriguez on the day in question was because he had failed to call in during his long-duration job as, as he was required to do by his PIP. Despite this testimony, which the Arbitrator actually cites in his decision, he nevertheless characterizes Manager Cooper's questioning as "routine"

¹ References to Respondent's Answering Brief will be cited as "RAB," followed by the page number.

and not investigatory in nature. Only by failing to give any import to this record evidence was the Arbitrator able to conclude that Rodriguez did not have a reasonable expectation of discipline that would give rise to rights under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

Respondent suggests that the mere fact that evidence was “before” the Arbitrator and that he incorporated the entire Arbitration transcript into his subsequent Award is enough to show that he considered the totality of the facts in reaching his conclusion. (RAB at 15) As noted above, the Arbitrator purported to credit Cooper over Rodriguez, generally; but he did not specifically discredit Cooper’s testimony about the reason for her call. Based on that testimony showing that she was in fact calling about a long-duration job that was covered by his PIP, there can be no other objective conclusion other than that this was an investigatory interview, Rodriguez’s subjective opinion notwithstanding.

Moreover, this is not a case, as Respondent then suggests, where the Board is being asked to engage in conjecture as to which way the decision would have gone had certain additional facts come to light. (Id) Rather, the foregoing facts, although in the record, were simply ignored. Had the Arbitrator included the foregoing into his analysis, he could not have reached the conclusion he that did, particularly given Cooper’s credited admissions about the reason for her call.

Therefore, General Counsel is simply urging a conclusion based not on personal preference, as asserted by Respondent, but one based on the actual facts adduced at the Arbitration, and asserting that the Arbitrator’s Award that ignores these facts and their import cannot be susceptible to a reasonable interpretation of the law. As such,

General Counsel reiterates that the Arbitrator's Award is repugnant to the Act and should not be deferred to under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984).

2. The Board should modify its approach to post-arbitral deferral cases

Although deferral in this case would be inappropriate under the Board's current deferral standards, General Counsel also urges the Board to consider modification of its approach to post-arbitral deferral cases so as to provide greater weight to safeguarding employees' statutory rights under Section 8(a)(1) and (3) of the Act. Based on the rationale in General Counsel's Brief on Exceptions, General Counsel urges that the post-arbitral deferral standard be modified so that the party urging deferral must demonstrate that (1) the contract had the statutory right incorporated therein, 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 case. Then, if the party urging deferral makes that showing, the Board should, as under the current standard, defer unless the award is clearly repugnant to the Act.

Under this alternate standard, as well as under the current standard, deferral to the Arbitral Award in this case would still be inappropriate because, as previously noted, the Arbitrator did not correctly apply *Weingarten* to the facts in the record before him, and failed to consider all of the relevant facts surrounding Rodriguez's request for Union representation. As such, the Award would be repugnant to the Act under either standard.

3. Inasmuch as the Arbitration Award is repugnant to the Act and cannot be deferred to, a de novo hearing is required to resolve the alleged unfair labor practice

Inasmuch as the Arbitration Award is repugnant to the Act for the reasons set forth above and in General Counsel's Brief in Support of Exceptions, General Counsel respectfully submits that the Award should not be deferred to. Accordingly, General Counsel requests that a hearing be ordered for the purpose of having an Administrative Law Judge determine whether Respondent violated Section 8(a)(1) and (3) of the Act by refusing Rodriguez's request for Union representation during a conversation which, based on a totality of the facts, may have resulting in discipline, and by thereafter disciplining him for refusing to participate in that conversation without Union representation.

DATED this 2nd day of June, 2014,
at Los Angeles, California.

Respectfully submitted,

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Ami Silverman,
Counsel for the General Counsel
National Labor Relations Board

STATEMENT OF SERVICE

I hereby certify that a copy of **COUNSEL FOR THE GENERAL COUNSEL'S REPLY TO RESPONDENT'S ANSWERING BRIEF** was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on June 2, 2014.

The following parties were served with a copy of said documents by electronic mail on June 2, 2014:

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Respectfully submitted,

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