

**BCI Coca-Cola Bottling Company of Los Angeles and  
Wayne Abrue.** Case 28–CA–022792

October 28, 2014

**DECISION AND ORDER**

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On August 29, 2013, Administrative Law Judge William G. Kocol issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order.

**I. PROCEDURAL HISTORY**

This case arises from the Respondent's layoff of eight employees, including Charging Party Wayne Abrue, in November 2009. At the time of the layoff, employees were represented by the United Industrial, Service, Transportation, Professional and Government Workers of North America, Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters (the Union), and a collective-bargaining agreement (the CBA) was in effect.<sup>1</sup> The Respondent selected employees for layoff based on their seniority in their job classification, which it claimed was agreed to in the CBA. The Union, relying on a different CBA provision, argued that employees should have been laid off according to their departmental seniority.

The Union and the individual employees filed grievances pursuant to the contractual grievance-arbitration provision, alleging that the layoffs violated the CBA. Abrue also filed a charge with the Board on November 23, 2009, alleging that the Respondent had discharged the eight employees because of their union membership and other concerted activity and without giving the Union notice and the opportunity to bargain.<sup>2</sup> On December 28, 2009, the Regional Director deferred Abrue's charge under *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), because the Union was processing a grievance concerning the allegations in the charge and because the allegations might be resolved through the grievance-arbitration procedure, which provided for final and binding arbitration.

<sup>1</sup> The Union was subsequently decertified in March of 2010.

<sup>2</sup> Abrue also filed an 8(b)(1)(A) charge alleging that the Union failed to take his grievance to arbitration after promising to do so. After investigating the merits of that charge, the Region solicited Abrue to withdraw it, and Abrue did so.

On January 31, 2012, the Union and the Respondent finalized a settlement of the grievances. The settlement agreement required that the Respondent pay \$3000 to each laid-off employee. In return, the Union agreed to withdraw the grievances. The settlement agreement also indicated that Abrue had filed an unfair labor practice charge with the Board and stated that:

The Union acknowledges that its investigation of the Grievance revealed no evidence to support any allegation that the Company . . . interfered with, restrained, coerced, and discriminated against employees in the exercise of their rights under Section 7 of the Act by discharging any one or more of the Grievance Payees because of their Union membership and other concerted activity . . . as alleged in Charge 28–RC–22792.[<sup>3</sup>] The Union further acknowledges that its agents with personal knowledge of the Union's investigation of the grievance will so testify in any hearing or other proceeding to collect evidence in Case No. 28–RC–22792.

On March 29, 2012, the Regional Director notified the parties that he was revoking deferral and resuming the investigation of the charge. A complaint issued on May 31, 2012, alleging Section 8(a)(1) threats of futility, layoffs, and other unspecified reprisals<sup>4</sup> as well as the layoff of eight employees in violation of Section 8(a)(3) and (1). The Respondent filed a timely answer, denying that it had committed any unfair labor practices. The answer also pleaded, as an affirmative defense, that a grievance concerning the layoffs was processed and resulted in a settlement between the Respondent and the Union.

As the original hearing in this case began on September 12, 2012, the judge questioned why the charge was deferred under *Dubo Mfg. Co.*, 142 NLRB 431 (1963), instead of under *Collyer Insulated Wire*, 192 NLRB 837 (1971). The judge concluded that the dispute was suitable for *Collyer* deferral and ordered that the case be deferred under *Collyer*.

The General Counsel filed exceptions to the judge's decision, arguing that the judge erred by refusing to allow a full evidentiary hearing and by failing to analyze the existing settlement agreement pursuant to the postarbitral deferral standards laid out in *Spielberg Mfg.*

<sup>3</sup> The charge was actually numbered 28–CA–22792.

<sup>4</sup> Specifically, the complaint alleged that on November 12, 2009, Night Distribution Supervisor Lou Santos threatened employees with layoffs and other unspecified reprisals because of their union and other concerted activities, and that Santos again threatened employees on November 13 with layoffs and other unspecified reprisals, while also informing employees that it would be futile to select the Union as their collective-bargaining representative.

*Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984).

The Board concluded that the basis for the initial deferral of a charge does not affect the standard governing the Board's review of an ensuing settlement agreement and explained that the *Spielberg/Olin* factors are used to decide whether deferral to a grievance settlement is appropriate. 359 NLRB 988 (2013), citing *Alpha Beta Co.*, 273 NLRB 1546, 1547 (1985), *enfd.* 808 F.2d 1342 (9th Cir. 1987). The Board remanded the case to the judge to hold an evidentiary hearing as requested by the General Counsel and to determine whether it was appropriate for the Board to defer to the settlement pursuant to *Spielberg/Olin*. The Board also instructed the judge to decide the 8(a)(1) complaint allegations, which the parties had not addressed at the hearing or in briefs and which the judge had not mentioned in his decision or otherwise dismissed.

The Respondent filed a motion for reconsideration, contending in part that the Board erred in remanding the 8(a)(1) allegations. In its June 28, 2013 Order denying the motion, the Board pointed out that no party argued on exceptions to the judge's decision that the settlement agreement encompassed the 8(a)(1) allegations. The Board further explained, however, that the Respondent was not foreclosed from arguing to the judge that those allegations were resolved by the settlement and thus should be dismissed if the settlement warranted deferral under *Spielberg/Olin*.

At the time of the Decision and Order reported at 359 NLRB 988 and of the June 28, 2013 Order denying the Respondent's motion for reconsideration, the composition of the Board included two persons whose appointments had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid.

In view of the Supreme Court's decision, we have considered de novo the entire record in this case, the parties' briefs, and the Respondent's motion for reconsideration. Having done so, we agree with the General Counsel that the judge, in his first decision, should not have ordered the case deferred under *Collyer*, but rather should have determined whether the settlement agreement warranted deferral under the *Spielberg/Olin* postarbitral deferral standards, pursuant to *Alpha Beta Co.*, *supra* at 1547, and should have held an evidentiary hearing for the purpose of making that determination. We further find that it was appropriate for the judge, in his second decision, to address the 8(a)(1) allegations because they were not specifically mentioned in the settlement agreement and not

addressed at the initial hearing or in the exceptions briefs.

Turning to the Respondent's motion for reconsideration, the Respondent advances two contentions. First, the Respondent contends that the Board did not have a quorum when it issued the decision reported at 359 NLRB 988, in which the Board ordered the case remanded to the judge. The Respondent is correct. However, after de novo review, we have found, above, that the judge, in his first decision, erroneously failed to determine whether the settlement agreement warranted deferral, and that he had erroneously failed to conduct a hearing for the purpose of making that determination. Thus, we reject the Respondent's first argument as moot. The Respondent also contends that the Board erred in remanding the 8(a)(1) allegations for consideration by the judge. We have rejected that argument for the reasons stated above. Accordingly, we deny the Respondent's motion for reconsideration.

A second hearing was held on July 23, 2013, where the judge limited the scope of the evidence to whether or not the grievance settlement met the Board's deferral standards and refused to hear evidence on the merits of either the 8(a)(3) and (1) allegation or the 8(a)(1) allegations.<sup>5</sup>

## II. FACTS

The evidence introduced at the second hearing shows that the Union and the Respondent processed the grievances without reaching a resolution. In deciding whether to submit the grievances to arbitration, Union Vice President Heriberto Perez and his subordinates spoke with Abrue and several other grievants. With respect to employees' claims that they were laid off because of their union activity, Perez testified that the Union was never provided with specific facts concerning this allegation, only "hearsay or gossip stuff."

Perez then consulted with his superiors about whether the Union should take the grievances to arbitration. Perez argued in favor of arbitration, but his superiors concluded, based on their interpretation of the CBA, that the Union was unlikely to prevail. Perez testified that the evidence of antiunion animus in the layoff decision was insufficient to convince his superiors to proceed to arbitration on that claim.

## III. JUDGE'S DECISION

The judge found that the Board should defer to the grievance settlement pursuant to the factors laid out in

<sup>5</sup> The General Counsel made an offer of proof at the hearing with respect to the 8(a)(1) allegations, saying that the evidence would show that the Respondent put Abrue on a list of employees to get rid of because of their union activity and that supervisors discussed the layoff as being the only way to do so.

*Spielberg/Olin*. In addition to finding that the proceedings were fair and regular and that the parties had agreed to be bound by the settlement, the judge further found that the Union fully considered the contractual aspect of the layoffs and concluded that the contract required the Respondent to act as it did. Given that the Union concluded that the grievances lacked merit, the judge found that the settlement was not repugnant to the Act, even though it failed to grant all the relief the Board would order were the General Counsel to fully prevail on the merits.

The judge dismissed the 8(a)(1) allegations, finding it “obvious” that the allegations were subsumed in the settlement.

The General Counsel excepts to both of the judge’s conclusions.

### III. ANALYSIS

#### A. Deferral to the Settlement

The Board applies the *Spielberg/Olin* factors to decide whether deferral to a settlement agreement arising from contractual grievance-arbitration procedures is appropriate. *Alpha Beta*, supra, 273 NLRB at 1547.<sup>6</sup> Under *Spielberg/Olin*, the Board will defer to an arbitration award/settlement agreement when the proceedings are fair and regular, all parties agree to be bound, and the decision is not repugnant to the Act. *Spielberg*, supra, 112 NLRB at 1082. An additional condition for deferral is that the arbitral/settlement forum must have considered the unfair labor practice issue. *Raytheon Co.*, 140 NLRB 883 (1963), set aside 326 F.2d 471 (1st Cir. 1964). Under current law, the Board deems the unfair labor practice issue to have been adequately considered if the contractual issue is factually parallel to the unfair labor practice and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Olin Corp.*, supra, 268 NLRB at 574.

There is no contention that the proceedings here were not fair and regular. The General Counsel argues that, although the Union and the Respondent agreed to be bound, Charging Party Abrue and the other alleged discriminatees did not. As noted by the judge, however, the approval of the Charging Party and other alleged dis-

criminatees is not necessary for the Board to defer to the settlement under *Spielberg/Olin*, and a Union can approve a settlement agreement despite a grievant’s express objection. See *Postal Service*, 300 NLRB 196, 197 (1990).<sup>7</sup>

The General Counsel also argues that the Union did not adequately consider the unfair labor practice issue and that the settlement is repugnant to the Act. On the contrary, the evidence clearly establishes that the Union considered the employees’ allegations that they were selected for layoff because of their union activity, but simply concluded that it lacked sufficient evidence to substantiate those allegations.

Our review of this issue is informed by the fact that, under the duty of fair representation (“DFR”), unions are afforded a “wide range of reasonableness” in serving the units they represent. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). In particular, absent discrimination or bad faith (and there is no allegation of either here), unions have broad discretion in deciding which grievances to pursue and how to handle them. See *Service Employees Local 3036 (Linden Maintenance)*, 280 NLRB 995, 996 (1986); see also *Auto Workers Local 651 (General Motors Corp.)*, 331 NLRB 479, 480 (2000) (citing *Teamsters Local 814 (Beth Israel Medical)*, 281 NLRB 1130, 1146 (1986)). Further, a union is not required to carry out an investigation of the same scope and rigor as one that the Region might carry out or to follow any particular procedures in processing an employee’s grievance. See *Pacific Maritime Assn.*, 321 NLRB 822, 823 (1996); *Asbestos Workers Local 17*, 264 NLRB 735, 735–736 (1982); *Plumbers Local 195*, 240 NLRB 504, 504 fn. 3 (1979), enf. 606 F.2d 320 (5th Cir. 1979).

Here, there is no complaint allegation that the Union violated its DFR either through its investigation into the grievances or by agreeing to the settlement.<sup>8</sup> That is not surprising given the evidence that, as described by Union Vice President Heriberto Perez, the Union apparently conducted a good-faith investigation, which involved speaking with Abrue and other alleged discriminatees, but simply did not uncover any specific facts supporting the allegation that employees were selected for layoff because of their union activity; there was only “hearsay or gossip stuff.” As a result, the Union concluded that it was unlikely to prevail in arbitration proceedings and

<sup>6</sup> We find that the judge properly declined to consider the General Counsel’s request that the Board modify its approach to determining whether deferral to a settlement agreement reached by the parties during contractual grievance-arbitration procedures is appropriate. The General Counsel argued from the beginning of this proceeding that the judge should analyze the settlement under *Spielberg/Olin* and first raised his request to change Board law in his posthearing brief after the second hearing. The Respondent had no notice that the General Counsel would be requesting a change to the Board’s longstanding practice and was not given a sufficient opportunity to address the issue.

<sup>7</sup> The General Counsel recognized that employees’ individual consent was not necessary to make deferral appropriate and conceded at the initial hearing and in his subsequent exceptions that all parties had agreed to be bound.

<sup>8</sup> The Region, in fact, asked Abrue to withdraw his charge making such an allegation.

that there were insufficient facts to support an unfair labor practice charge. That evidence shows, contrary to the General Counsel's argument, that the Union did adequately consider the grievants' statutory claims, and the settlement agreement reflects the Union's assessment of the strength of those claims.

Furthermore, we disagree with the General Counsel's contention that the settlement is repugnant to the Act. Because the Union did not believe it could prevail on its contractual claim in arbitration, and determined that it had insufficient evidence of an unfair labor practice, settling the grievances and obtaining at least some monetary settlement for the grievants, rather than pursuing a doubtful arbitration proceeding, was a reasonable resolution.

There remains one issue to be resolved before we may conclude whether the judge appropriately deferred to the settlement agreement. As explained, on remand the judge prohibited the General Counsel from introducing evidence concerning the 8(a)(1) allegations. The judge did, however, allow the General Counsel to make an offer of proof, in which the General Counsel stated that certain of the Respondent's supervisors had informed employees, apparently including Abrue and another of the alleged discriminatees, that Abrue was put on a list of employees to get rid of because of their union activity and that supervisors discussed the layoff as being the only way to do so. The General Counsel argues that the judge should have admitted the proffered testimony, which, if credited, not only would have proved the alleged 8(a)(1) violations, but also would have established that the layoffs were unlawfully motivated as alleged. The General Counsel also argues that the settlement agreement was repugnant to the Act because it does not remedy the unlawful layoffs. He therefore urges us not to defer to the settlement agreement but instead to remand the case for a full evidentiary hearing on the merits of both the 8(a)(3) and the (1) allegations.

We are not persuaded. First, as found above, the Union considered the employees' allegations that they were selected for layoff because of their union activity based on the evidence that it had at the time, obtained through interviewing Abrue and other discriminatees.<sup>9</sup> The Union reasonably concluded that the evidence did not support this allegation, and the fact that the General Counsel now assesses the merits of the allegation differently is not alone a sufficient reason to reject the settlement under the *Spielberg/Olin* standard.

<sup>9</sup> To the extent that the General Counsel claims that evidence of the Respondent's animus comes from Abrue himself, we note that Abrue had the opportunity to present that evidence to the Union during its investigation into the grievances. He apparently either failed to do so or failed to convince the Union of its persuasiveness.

The General Counsel argues that some evidence of the Respondent's animus was acquired only after the settlement agreement was signed and was therefore not considered by the Union. However, under the *Spielberg/Olin* standard, whether the contractual issue is factually parallel to the settlement agreement, and whether that agreement is repugnant to the Act, must be determined in light of the facts and theories known to the parties at the time the settlement agreement was reached. See *Electrical Workers Local 1522*, 180 NLRB 131, 132 (1969) (finding that Board will not disregard an arbitral award simply because certain facts and contentions were presented to the Board but not to the arbitrator).

In light of the foregoing, we agree with the judge that it is appropriate to defer to the settlement agreement. There is no dispute that the proceedings were fair and regular, and all necessary parties agreed to be bound by the settlement. It is clear that the parties specifically considered the statutory issue and found no evidence to support the allegation that the layoffs were unlawfully motivated. In those circumstances, moreover, we cannot say that the settlement agreement was repugnant to the Act. Accordingly, we defer to the settlement agreement.<sup>10</sup>

#### B. *The Independent 8(a)(1) Allegations*

The remaining issue is whether the independent 8(a)(1) allegations were subsumed in the settlement agreement or are still before us. The General Counsel argues that there is no evidence that the 8(a)(1) statements were included in the settlement agreement or were even known

<sup>10</sup> In reaching that conclusion, we do not rely on certain erroneous factual findings in the judge's decision. Specifically, in addition to finding that some union officials agreed with the Respondent's interpretation of the contract, the judge found that the Union concluded that the contract "required" the Respondent to act as it did, that employees told the Union "much of the same things" that those employees told the General Counsel and that form the basis of the 8(a)(1) allegations, and that the Union concluded that the grievances "lacked merit." We agree with the General Counsel that these findings do not follow inexorably from the evidence. Although the Union concluded that it was unlikely to prevail in arbitration, this does not mean that the Union concluded that the grievances lacked merit or that the Respondent was "required" to act as it did. Rather, as described, the Union simply concluded that the available evidence would be insufficient to persuade an arbitrator. Further, there is no evidence that grievants told union investigators any of the facts underlying the 8(a)(1) allegations.

As for the judge's statement that the Union "simply refused to process the grievances through arbitration or settle them in a manner satisfactory to all parties," we emphasize that settlement is a legitimate resolution of a grievance and is not disfavored. See *Catalytic, Inc.*, 301 NLRB 380, 382 (1991), petition for review denied sub nom. *Plumbers Local 520 v. NLRB*, 955 F.2d 744 (D.C. Cir. 1992), cert. denied 506 U.S. 817 (1992); *Alpha Beta*, 273 NLRB at 1547. Further, as the judge recognized elsewhere in his decision, the Union did not need to obtain the consent of the grievants in reaching a settlement, and the grievants' objections to a settlement do not alone make it unsatisfactory.

to the parties at that time. When the Board remanded this case, there was no indication in the record as to what allegedly unlawful statements were made, and there was no way to tell if the statements were related to the layoff or if they constituted completely separate violations. From the General Counsel's offer of proof at the second hearing and his argument on exceptions, however, we now know that the 8(a)(1) allegations are indeed related to the layoffs and are offered as proof of the Respondent's discriminatory motive. Because we are deferring to the settlement agreement, which states that its "express intent" is to resolve all unfair labor practice issues raised by Abrue's charge, and because the 8(a)(1) allegations complement and support the 8(a)(3) allegation, we find that all of the allegations are inextricably bound together and that the parties intended to resolve all such allegations through the settlement agreement. As a result, we dismiss the 8(a)(1) allegations.<sup>11</sup>

#### ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

*Sandra Lyons, Esq.*, for the General Counsel.

*Douglas M. Topolski, Esq. (McGuire, Woods, LLP)*, of Baltimore, Maryland, for the Respondent.

#### SUPPLEMENTAL DECISION

##### STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. The Board has recently confirmed its support for the longstanding deferral policies under *Collyer Insulated Wire*, 192 NLRB 837 (1971). *Sheet Metal Workers Local 18 (Everbrite LLC)*, 359 NLRB 1095 (2013). For decades now the Board's deferral policies has been well settled, in large part thanks to the seminal General Counsel Memorandum 73-31. This case serves as a reminder

<sup>11</sup> In his supplemental decision, the judge again explained his view of the differences between *Dubo* deferral and *Collyer* deferral. Be that as it may, the basis for the initial deferral of a charge does not affect the standard governing the Board's review of an ensuing settlement agreement. The *Spielberg/Olin* factors are applied to decide whether deferral to a grievance settlement is appropriate regardless of whether the charge was deferred under *Dubo* or *Collyer*. We do not pass on or adopt any portion of the judge's discussion of this issue.

However, as to the judge's assertion that the Regional Director initially deferred the charge under the wrong deferral standard, we point out that Sec. 3(d) of the Act gives the General Counsel final authority to investigate charges and issue complaints. The General Counsel has unreviewable discretion over "prosecutorial" decisions, and his authority in this realm is "exclusive and final" and "independent of the Board's supervision and review." *Beverly California Corp.*, 326 NLRB 232, 236 (1998) (citing *NLRB v. Food Workers Local 23*, 484 U.S. 112, 126 (1987)), enf. denied on other grounds 227 F.3d 817 (7th Cir. 2000). Deciding what steps to take before issuing a complaint, including how to investigate the charge and whether to defer to pending or possible arbitration of the charge, is one of those prosecutorial decisions.

that those policies have successfully defined the rules of the game and should not be flippantly ignored.

The complaint in this case alleges that Coca-Cola violated Section 8(a)(3) and (1) by laying off eight employees because of their union activities and also independently violated Section 8(a)(1) by making unlawful statements. The employees at the time were represented by a labor organization and were covered by a collective-bargaining agreement. The General Counsel asserts that Coca-Cola wanted to lay off Wayne Abrue, the Charging Party, because he was an activist shop steward and it laid off the other seven employees in order to get to Abrue. Coca-Cola asserts that it selected the employees for lay off in accordance with the contract with the Union; the General Counsel counters that Coca-Cola's past practice was not entirely consistent with its interpretation of the contract. Coca-Cola asserts that complaint allegations were settled with the Union after grievances were filed. As described below, 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. In other words, this is an ideal case for the deferral to the grievance-arbitration procedure under *Collyer Insulated Wire*, 192 NLRB 837 (1971). But, alas, first the General Counsel and then the Board itself have refused to do so.

I issued my original decision in this case on September 28, 2012. In that decision I concluded that the General Counsel incorrectly deferred this case under *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), instead of under *Collyer*. I pointed out the differences between the two types of deferral. Under *Dubo*, if the grievance is not arbitrated, then the Region proceeds to complete the investigation of the case; under *Collyer*, if the grievance is not arbitrated or properly settled the case is dismissed. A union is not *requested* to arbitrate a *Collyer* deferred case, it is instructed to do so or else the case will be dismissed. Equally important is the fact that when a case is deferred under *Collyer*, the parties realize that the General Counsel has investigated the case and has determined that the case has at least "arguable merit." No such determination is made when a case is deferred under *Dubo*; such a case may be entirely without merit. This difference is not simply a matter of words. It may impact the way in which the parties process or resolve the underlying grievance. In an attempt to correct this significant error I ordered that the case be correctly deferred under *Collyer* to allow the Union, Coca-Cola, and the Charging Party to properly assess their actions knowing the correct consequences. The Board reversed. The Board held that I should have assessed whether the grievance settlement reached in this case meets the standards laid out in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). Implicitly the Board concluded that it made no difference whether the parties are correctly advised of the consequences of failing to take a grievance to arbitration or even of the General Counsel's assessment as to the possible merits of the case; the parties would act the same in any event. The Board cited *Alpha Beta Co.*, 273 NLRB 1546, 1547, enf. 808 F.2d 1342 (9th Cir. 1987), and *Postal Service*, 300 NLRB 196, 197 (1990), as authority for its holding. But neither case involved the situation here, namely a case that should have been deferred under *Col-*

lyer; those cases simply did not address this issue. The Board stated:

This is true whether the unfair labor practice charge was deferred under *Collyer*, deferred under *Dubo*, or never deferred. *Alpha Beta*, 273 NLRB at 1547.

But the Board in *Alpha Beta* most did *not* say what this Board said it said, not even in dicta as that case did not involve a *Collyer* deferral case. Nonetheless, I recognize that I am bound to apply Board law. The problem, however, is that the Board does not typically issue ipse dixit rulings. Rather, it generally recognizes that cited cases are not directly on point and then explains why, in light of the differences, it decides to apply those cases to a different situation.

And to make matter worse the Board then went on to order, sua sponte, that I:

[S]hall decide the complaint allegations that Respondent violated Section 8(a)(1) by making threats of futility, layoffs, and other unspecified reprisals. These allegations were not addressed by any party at the hearing or in the briefs, but they have not been dismissed.”

Of course these allegations were not addressed for the obvious reason that those allegations were subsumed as part of the deferral. For decades now it has been the Board policy to defer these type 8(a)(1) allegations as part and parcel of deferring the 8(a)(3) allegations. The Board simply ignored decades of precedent. When Coca-Cola pointed this out to the Board in a motion for reconsideration, the Board refused to acknowledge its error and stated “We . . . reject Respondent’s argument that the Board erroneously remanded the 8(a)(1) allegations for *consideration* by the judge.” (Emphasis added.)<sup>1</sup> But the Board continued:

Nevertheless, 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.

So as I read the Board’s instructions to me, I am to resolve the 8(a)(1) allegations on their merits; the Board confirmed this instruction was not erroneous. Understandably, this is the position the General Counsel takes at the remand hearing and reiterates in his post-hearing brief. But Coca-Cola argues to me that I should not do so. What am I to make of this? I conclude what the Board lacked the intellectual integrity to conclude: That its remand order instructing me to decide the 8(a)(1) allegations on the merits without first determining whether they were subsumed by the grievance settlement was erroneous. At the remand hearing I decided to proceed in the only manner that was consistent with existing law, notwithstanding the Board having twice instructed me to determine the merits of the independent 8(a)(1) allegations without regard to the grievance settlement.

<sup>1</sup> Of course, this is not an accurate statement; the Board did not simply remand these allegations to me for my consideration. Rather, it ordered me to resolve them on their merits.

#### I. FACTS REGARDING DEFERRAL

The remanded portion of this case was tried in Phoenix, Arizona, on July 23, 2013. At that hearing I limited the scope of the evidence to whether or not the grievance settlement met the Board’s deferral standards. The grievances stem from a layoff that occurred in November 2009. Heriberto Perez was the Union’s vice president for the West Coast Region at that time; his duties included overseeing the contract the Union had with Coca-Cola. Perez admitted that the Union knew that it was apparent that layoffs were coming; remember the country was then in the midst of the Great Recession. The dispute between the Union and Coca-Cola concerned which employees should be laid off. Coca-Cola laid off the employees according to seniority in their job classification, the Union argued that the employees should have laid off according to departmental seniority; each cited different provisions in the collective-bargaining agreement for support. After the parties were initially unable to resolve the matter through the grievance procedure the Union was faced with the decision of whether to take the grievances to arbitration. Perez consulted with his superiors concerning that matter; he argued in favor of arbitrating the grievances. His superiors, however, concluded that the Union would not prevail in arbitration and therefore decided not to go to arbitration. They ultimately agree with Coca-Cola’s interpretation of the contract.

Perez and his subordinates also examined the facts to determine whether Coca-Cola included the Charging Party in the layoffs because of his actions as union steward. Remember that the Union ultimately concluded that the contract allowed Coca-Cola to lay off employees according to their classification seniority and that therefore the Charging Party was properly among those selected for lay off and that the layoffs were expected because of declining business.<sup>2</sup> In conducting its investigation the Union spoke with the Charging Party and several other employees. Perez concluded that the Union:

[W]as never provided with . . . specifics other than a lot of hearsay or gossip stuff that was heard through the grapevine or whatever, but nothing substantial that I could produce to argue with counsel for . . . evidence to proceed on that.

I conclude that the Union refused to take the grievances to arbitration, and that it did so because it reasonably concluded, from its point, that the grievances did not have merit. Of course, it did not know the General Counsel felt otherwise, but as described above the Board has concluded that this is irrelevant.

Under these circumstances, the Union agreed to settle the grievances by payment of \$3000 to each laid off employee and include the language in the settlement agreement, described in my earlier decision, concerning its investigation into the 8(a)(3) allegations. None of the alleged discriminatees agreed to accept the settlement, and it appears that several objected to it. The General Counsel calculates net backpay for the alleged discriminatees as follows:

<sup>2</sup> The General Counsel’s theory is that the other seven employees were selected for lay off in order to disguise Abrue’s unlawful lawful.

1. Wayne Abreu—\$74,941
2. James Conway—\$104,044
3. Othon Garcia—\$120,198
4. Heath Gessner—\$19,659
5. Chris Langley—\$71,886
6. Craig Stevenson—\$27,594
7. Tony Peden—\$70,490
8. Donnell Winston—\$94,373

The parties stipulated that the charge in Case 28–CB–074569 alleged that the Union breached its duty of fair representation by its handling of the grievances at issue. After conducting an investigation of the merits of the charge the General Counsel solicited withdrawal of the charge and the charge was withdrawn. In other words, there is no evidence that the Union breached its duty of fair representation in settling the grievances as it did.

## II. ANALYSIS

I now apply the *Spielberg/Olin* standards in a manner consistent with *Alpha Beta*, supra, to assess whether the Board should defer to the grievance settlement. First, the grievance proceedings were fair and regular. Coca-Cola claimed the contract required it to select employees for lay off based on classification seniority while the Union claimed the contract required that the employees be laid off based on departmental seniority. The Union advocated as best it could through all the pre-arbitration steps of the grievance procedure. Next, I conclude that all parties, including the Charging Party and the other alleged discriminates, agreed to be bound by the result of the grievance procedure. This is so both because the alleged discriminatees themselves invoked the grievance procedure by filing grievances and because the Union is the representative of those employees in the grievance process. In other words, as a matter of law the employees have agreed to be bound by the actions of their collective-bargaining representative, at least in the absence of any evidence that the Union acted outside of the broad boundaries of its duty of fair representation. The next *Spielberg/Olin* standard is whether the “arbitrator” considered the unfair labor practices in the sense that the arbitrator was generally presented with the evidence concerning the unfair labor practice. In this case the question must be whether the Union adequately considered the evidence of any unfair labor practice, because the grievances never made it to arbitration. I conclude the Union has done so. It fully considered the contractual aspect of the layoffs and it ultimately concluded that the contract required Coca-Cola to act as it did. And the Union interviewed the Charging Party and other alleged discriminatees. In the absence of evidence to the contrary I conclude those employees told the Union much of the same things that those employees told the General Counsel during the investiga-

tion of the charge and form the basis of the independent 8(a)(1) allegations. Finally, I assess whether the grievance settlement is repugnant to the Act. In this regard, the General Counsel argues that the issue must be assessed as if the complaint allegations are meritorious. If this is the test, then the settlement is clearly repugnant because it provided only for a tiny fraction of backpay and no reinstatement. But I conclude that the General Counsel misapplies the standard. Rather, the test must be as if an arbitrator (or here the Union) has considered the complaint allegations and concluded they were without merit. Having concluded that the grievances (and implicitly the complaint allegations) lacked merit there is nothing repugnant about a failure to grant relief. I conclude that the grievance settlement meets the standards for deferral and I dismiss the complaint.

I further conclude that the analysis in the preceding paragraph was entirely unnecessary. This is so because the charge should have been deferred under *Collyer* and the Union simply refused to process the grievances through arbitration or settle them in a manner satisfactory to all parties. When a union refuses to arbitrate a case under these circumstances, the result is dismissal of the charge.<sup>3</sup> As I stated in my previous decision, to conclude otherwise would fundamentally alter the well-settled principle that deferral under *Collyer* is not a request to arbitrate but rather an order to do so.

Finally, in his brief the:

General Counsel would also urge the ALJ and the Board to modify its approach to pre-arbitral deferral cases by applying current non-Board settlements practices, including review under *Independent Stave*, 287 NLRB 740 (1987).

However, the General Counsel does not present any arguments as to why existing law should be changed or how the application of *Independent Stave* would impact the Board’s deferral policy. In the absence of such arguments I am unable to make any recommendation to the Board as to whether it should consider changing existing law.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

### ORDER

The complaint is dismissed.

<sup>3</sup> I have repeatedly asked the General Counsel whether he agrees with this statement of the law and if not to explain why. The General Counsel has just as consistently refused to do so. For some reason it seems intellectual integrity appears in short supply in this case.

<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.