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Verizon New England, Inc. *and* International Brotherhood of Electrical Workers, Local 2324, AFL–CIO. Cases 01–CA–044539, 01–CA–044556, and 01–CA–044612

March 9, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On November 15, 2011, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief, and the Respondent filed an answering 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 only to the extent consistent with this Decision and Order.[1]

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by telling employees to remove informational picket signs from the windows of their personal vehicles parked on its property. An arbitration panel found that the display constituted picketing in contravention of the "no picketing" provision of the parties' collective-bargaining agreement. On a stipulated record, the judge deferred to the arbitration award and dismissed the complaint. The General Counsel and the Charging Party except, arguing that the arbitration award is "clearly repugnant" to the Act. Unlike the judge and our dissenting colleague, we agree that the award is clearly repugnant to the Act for the reasons discussed below.[2] We further find that the Respondent's directive violated Section 8(a)(1) of the Act.

Facts

The Respondent and the Charging Party were parties to a collective-bargaining agreement, effective through August 2, 2008, that covered the Respondent's facilities in Massachusetts and Rhode Island, including its Westfield, Springfield, and Hatfield, Massachusetts facilities where this case arose. Since 1977, the parties have included the same "No Strike" provision in their collective-bargaining agreement. That provision, Article G10, provides, in pertinent part:

> The Union agrees that during the term of this Agreement, or any extension thereof, it will not cause or permit its members to cause, nor will any member of the Union take part in any strike of or other interference with any of the Company's operations *or picketing of any of the Company's premises* . . . . [Emphasis added.]

Despite that contractual provision, the Charging Party had a long-established practice of engaging in ambulatory informational picketing at or near the Respondent's facilities, most commonly when the contract was nearing expiration. Consistent with this practice, in March 2008, the Charging Party distributed to bargaining unit employees 28" x 22" picket signs, bearing the slogans, "Verizon, Honor Our Existing Contract" and "Honor Our Contract." Also in March, ambulatory picketing began at some of the Respondent's Massachusetts facilities, but it was not slated to begin until April at the Westfield, Springfield, and Hatfield facilities.

A few weeks prior to the start of informational picketing at those three facilities, employees began displaying their picket signs in the windows of their personal vehicles parked on the Respondent's property while they were at work. The Respondent instructed the employees to remove the signs, and the employees complied. No employee was disciplined for displaying a sign, nor is there evidence that the displays interrupted or otherwise disrupted the Respondent's operations.

The Charging Party filed unfair labor practice charges alleging that the Respondent violated Section 8(a)(1) of the Act by prohibiting employees from displaying the signs in their vehicles. The Regional Director deferred the cases to the parties' contractual grievance and arbitration process under *Collyer Insulated Wire*, 192 NLRB 837 (1971).

The Charging Party's grievance alleged that the Respondent violated the contract by requiring the employees to remove the signs.[3] The grievance was heard by a

[1] We shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

[2] In *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), the Board modified its postarbitral deferral standard, but decided that it would not apply the modified standard in pending cases. Id., slip op. at 14. Accordingly, we decide this case under the standard adopted in *Olin Corp.*, 268 NLRB 573 (1984).

[3] In support of its grievance, the Charging Party cited article G9.03(b) of the contract and contended that the Respondent's decision to order the signs removed was arbitrary or in bad faith. Article G9.03(b) states:

> If such grievance concerns any other determination of the Company involving the exercise of discretion, such determination shall not be set aside by the Board of Arbitrators unless it shall find it to have been made arbitrarily or in bad faith.

three-member arbitration panel. In a two to one vote, the panel denied the grievance, finding that the display of signs in employees' vehicles amounted to picketing in violation of article G10. The award stated:

> By any other name, Union members who place protest signs in their cars to inform the public of its contract concerns with [the Respondent] are engaged in picketing. While the Union argues that placing signs in cars is not picketing because doing so only communicates a message, that is precisely what picketing is: to inform the public of the Union's concerns. Picketing does not have to be a sign on a stick.

In support of its conclusion, the award cited article G10, "several contract clauses,"[4] and two extrinsic sources—namely, a book on picketing from 1897[5] and a labor dictionary from 1949.[6] Expressly declining to rule on the statutory issue, the award stated: "Whether the [Respondent's] demand that the signs be removed from employees' vehicles infringed employees' Section 7 rights is a question that we do not have the authority to resolve."

The judge deferred to the arbitration award under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). The General Counsel and the Charging Party argued that the award was clearly repugnant to the Act because the placing of the signs in vehicles was protected by Section 7 of the Act and there was no "clear and unmistakable" waiver of the right to engage this activity. The General Counsel and the Charging Party further argued that the employees' conduct did not constitute "picketing" because the stationary display of signs in their vehicles lacked the necessary element of confrontation, citing *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.),* 355 NLRB 797, 802 (2010). The judge found that these arguments, even if correct, failed to show that the award was repugnant to the Act. He agreed with the Respondent that "[t]here is nothing in Board law that prevents an arbitrator from interpreting the word 'picket' in a collective bargaining agreement provision prohibiting picketing more broadly than the Board would in an unfair labor practice case not involving such a provision."

Discussion

Under *Spielberg*, supra, the Board defers to an arbitration award when the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. The Board also conditions deferral on the arbitrator having adequately considered the unfair labor practice issue, which is satisfied 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. *Olin Corp*., supra at 574. Deferral, however, will be found inappropriate under the clearly repugnant standard where the arbitration award is "'palpably wrong,' i.e., the decision is not susceptible to an interpretation consistent with the Act." Id.

Here, the only deferral factor in dispute is whether the arbitration award is "clearly repugnant" to the Act. For the reasons discussed below, we agree with the General Counsel and the Charging Party that the award is "clearly repugnant," and we reverse.

Section 7 of the Act gives employees the right to engage in concerted activities for the purpose of collective bargaining or for other mutual aid or protection. The Board and the courts have made clear that, absent special circumstances, employees' display of prounion signs in their car windows on an employer's property is protected concerted activity under the Act. See, e.g., *International*

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[4] The award did not clearly identify the contract clauses. But the award quoted articles G7 (Union Bulletin Boards) and G11 (Management Rights) as relevant provisions of the parties' agreement. Those two articles state as follows:

ARTICLE G7 (Union Bulletin Boards)

> G7.01 The Company agrees to furnish, without charge, space at bargaining unit locations to erect free access bulletin boards of a size approximately 30 by 30 inches. Bulletin boards will be furnished by the Union and erected by the Company. The number to be erected and the locations at which erected shall be mutually decided upon by authorized Union officials and Company representatives.
>
> G7.02 Bulletin boards are to be used by the Union for posting notices concerning official Union business, or other Union related matters, provided that if anything is posted on these bulletin boards that is considered by the Company to be controversial or derogatory to any individual or organization the Union agrees to remove such posted matter on demand and if it falls or refuses to do so, such matter may be removed by the Company.

ARTICLE G11 (Management Rights)

> G11.01 Subject only to the limitations contained in this Agreement the Company retains the exclusive right to manage its business, including (but not limited to) the right to determine the methods and means by which its operations are to be carried on, to assign and direct the work force and conduct its operations in a safe and effective manner.

[5] W.J. Shaxby, THE CASE AGAINST PICKETING 11 (1897). The award quotes the following passage from this source: "During a recent strike a small boy sat on a fence near the works and ate chocolates, whistling in the gladness of his heart between each toothsome morsel. In reality he was a 'picket,' and was marking and counting the men who entered the works."

[6] P.H. Casselman, THE LABOR DICTIONARY 362 (1949). Although the award cites this source to support its contention that displaying the signs constituted picketing, it fails to quote the dictionary's definition, which actually states: "[P]icketing: The stationing of men for observation or in order to coerce or to threaten, to intimidate or halt or to turn aside against their will those who would go to and from the picketed place to do business, or to work, or to seek work therein, or in some other way to hamper, hinder or interfere with the free dispatch of business by the employer."

Business Machines Corp., 333 NLRB 215, 219–221 (2001) (finding 8(a)(1) violation where supervisors told employees that displaying prounion signs on their vans parked in employee lots violated company policy), enfd. 31 Fed.Appx. 744 (2d Cir. 2002); *Firestone Tire & Rubber Co.*, 238 NLRB 1323, 1323 (1978) (finding 8(a)(3) and (1) violation where respondent disciplined employee who refused to remove prounion signs affixed to his car while parked in employee lot), enfd. mem. 651 F.2d 1172 (6th Cir. 1980); *Coors Container Co.,* 238 NLRB 1312, 1319 (1978) (finding 8(a)(1) violation where respondent promulgated and enforced rule prohibiting employees from displaying boycott sign inside a truck while on company premises), enfd. 628 F.2d 1283 (10th Cir. 1980); see also *District Lodge 91, Int'l Assn. of Machinists v. NLRB,* 814 F.2d 876, 879 (2d Cir. 1987) (approving Board's conclusion that employee engaged in protected activity when he displayed campaign sign on his van parked in employee lot).

It is also well settled that unions may waive certain Section 7 rights. See, e.g., *Lear Siegler, Inc.*, 293 NLRB 446, 447 (1989). Such waivers of statutory rights, however, "are not to be lightly inferred, but instead must be 'clear and unmistakable.'" *Georgia Power Co.*, 325 NLRB 420, 420 (1998) (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)), enfd. mem. 176 F.3d 494 (11th Cir. 1999); see also *110 Greenwich Street Corp*., 319 NLRB 331, 334 (1995). "[E]ither the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter." *Georgia Power Co*., supra at 420–421. The "clear and unmistakable" waiver standard has been applied by the Board for over 50 years and "has become deeply engrained in the administration of the Act and in the conduct of collective bargaining." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811–812 (2007). Although the Board has not required that arbitrators apply this standard as the Board would, in determining whether an award is repugnant to the Act, the Board will review "all the circumstances, including the contractual language, evidence of bargaining history and past practice presented in the case." *Southern California Edison Co*., 310 NLRB 1229, 1231 (1993), affd. sub nom. *Utility Workers Local 246 v. NLRB*, 39 F.3d 1210 (D.C. Cir. 1994); see also *Motor Convoy*, 303 NLRB 135, 136 (1991) (finding that the difference between the standard used by an arbitration panel and the Board's statutory standard, while not dispositive, is relevant to whether an award is repugnant). Applying these principles, we find that the award is clearly repugnant to the Act.

The award concluded that the Charging Party, by agreeing to the limitations on "picketing" in article 10, waived its right to post signs in the windows of unattended vehicles parked on the Respondent's property. The award, however, is devoid of any reasoning to support its conclusion that the conduct constitutes picketing other than stating that picketing "inform[s] the public of the Union's concerns" and "does not have to be a sign on a stick," citing a nineteenth century book about picketing and a mid-twentieth century labor dictionary.[7] The award cited nothing in article G10 or elsewhere in the contract, nothing in the parties' bargaining history, and no other extrinsic evidence to indicate that the parties either intended or anticipated that article G10 would cover the type of conduct at issue here.[8] See *Engelhard Corp.,* 342 NLRB 46, 48 (2004) (finding it "hard to see" how union clearly and unmistakably waived its right to engage in informational picketing at shareholders' meeting away from worksite where parties did not contemplate the waiver issue arising in the "unusual context" of that case), enfd. 437 F.3d 374 (3d Cir. 2006). Indeed, the Charging Party's long established practice of engaging in informational picketing shortly before contract expiration further demonstrates that the parties did not understand the conduct at issue to be encompassed by the provision barring picketing.[9]

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[7] Moreover, the arbitration award's citations to the 1891 book and 1949 labor dictionary—apparent references to industry custom or understanding—likewise fail to support its conclusion. In fact, quite the opposite—they militate against it. The signs here were merely posted in unattended vehicles. And unlike the circumstances described in the two cited sources, no one was stationed by the picket signs, and there is no evidence of any coercion or intimidation of those who went to and from the Respondent's premises.

[8] As noted above, the award states, without any discussion, that "several contract clauses" reflect the Charging Party's agreement that there would be no picketing on the Respondent's premises, presumably referring to article G7 (Union Bulletin Boards) and article G11 (Management Rights), which are cited elsewhere in the award as relevant provisions. However, neither of these provisions even remotely addresses the right of employees to display signs in their personal vehicles. With respect to article G10, the Respondent argues that the panel correctly interpreted the "no picketing" obligation separately from the obligation not to engage in "any strike of or other interference with any of the Company's operations." According to the Respondent, the use of "or" between the two obligations was intended to prohibit all picketing, not just picketing causing "interference" with its operations. But whether the "no picketing" language instituted such an absolute prohibition is irrelevant because the employees' conduct was not picketing.

[9] If anything, the evidence recounted by the award but never discussed in reaching its conclusion demonstrates that the parties narrowly interpreted the "no picketing" clause. That evidence shows, and the Respondent concedes, that the Charging Party engaged in *informational* picketing near the Respondent's facilities "for many years," and the Respondent "tolerated" such activity despite believing that it violated the "no picketing" provision. Although in this case the disputed display occurred *on* the Respondent's property, the Respondent's earlier toler-

Moreover, the award offered no support for its implicit suggestion that the parties understood "picketing" to encompass the displaying of signs in employees' vehicles. Its terse statement that "picketing is: to inform the public of the Union's concerns" is contrary to the well-established body of law defining picketing to include a confrontational element--which the parties were presumably aware of when they entered into their successive collective-bargaining agreements. See *Engelhard Corp*., supra at 48 (citing cases that found that a collective-bargaining agreement must be read in light of the prevailing law at the time the contract was made). For instance, the Supreme Court has observed that "picketing is qualitatively 'different from other modes of communication.'" *Babbitt v. United Farm Workers*, 442 U.S. 289, 311 fn. 17 (1979) (quoting *Hughes v. Superior Court*, 339 U.S. 460, 465 (1950)); see also *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council,* 485 U.S. 568, 580 (1988) ("[P]icketing is 'a mixture of conduct and communication' and the conduct element 'often provides the most persuasive deterrent . . . .'") (quoting *NLRB v. Retail Store Employees*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring)). More recently, the Board has explicitly distinguished "bannering" from "picketing" because bannering lacks the confrontation that is essential to picketing. *Carpenters Local 1506* (*Eliason* & *Knuth of Arizona)*, supra; see also *Chicago Typographical Union No. 16 (Alden Press*), 151 NLRB 1666, 1669 (1965) ("One of the necessary conditions of 'picketing' is a confrontation in some form . . . .") (quoting *NLRB v. United Furniture Workers of America*, 337 F.2d 936, 940 (2d Cir. 1964)).

To be sure, the Board has found that picketing is not confined to a "sign on a stick" and, in certain circumstances, has held that stationary signs can constitute picketing. See, e.g., *Construction & General Laborers Local 304 (Athejen Corp.)*, 260 NLRB 1311, 1316 (1982) (signs placed on cones, barricades, or a fence constituted picketing). But in finding that picketing occurred in such cases, the Board has relied on the presence of individuals in the area where the signs were stationed. "[T]he 'important' or essential feature of picketing is the posting of individuals at entrances to a place of work." *Service Employees Local 87 (Trinity Building Maintenance)*, 312 NLRB 715, 743 (1993), enfd. mem. 103 F.3d 139 (9th Cir. 1996); see also *Lumber & Sawmill Workers Local Union No. 2797 (Stoltze Land & Lumber Co.),* 156 NLRB 388, 394 (1965) ("The important feature of picketing appears to be the posting by a labor organization . . . of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union . . . ."). In other words, a necessary element of picketing is personal confrontation.[10] *Eliason & Knuth*, 355 NLRB at 802 ("The element of confrontation has long been central to our conception of picketing."). Notably, the award failed to reference any of the Board or court decisions that have defined what constitutes picketing.

In sum, the contractual provisions cited by the Respondent and considered by the arbitration panel neither address nor reasonably encompass employees' display of signs in their personal vehicles, and there is no evidence that the parties intended the contract to cover that conduct. Accordingly, considering all the circumstances, as the award is not susceptible of an interpretation that is consistent with the Act, we find that it is "clearly repugnant" to the Act, and that deferral to the award is inappropriate. Because it is undisputed that the Respondent's supervisors told employees at the three facilities that they could not display their signs in their vehicles, we conclude that the Respondent unlawfully prohibited the employees from exercising their Section 7 rights in violation of Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Verizon New England Inc., Springfield, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they cannot display signs in their personal vehicles parked on company property.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

ance of the employees' actual, physical picketing for informational purposes is at odds with its attempt now to construe the "no picketing" language as an absolute ban.

[10] Our dissenting colleague observes that, in some cases, the Board has found picketing even absent patrolling or other ambulation. As the Board observed in *Eliason & Knuth*, however, in many of those cases, the display of picket signs was preceded at the same location or accompanied at other locations by traditional, ambulatory picketing; union representatives were stationed near the stationary picket signs conspicuously to observe and, in some cases, record who entered the facility; and/or there was evidence that the stationary signs or posted union representatives had the effect of inducing employees to refuse to make deliveries to the target site. 355 NLRB at 804. Given the surrounding circumstances in those cases, the Board explicitly or implicitly found the conduct at issue constituted "signal" picketing. Id. at 805; see also *Southwest Regional Council of Carpenters (Held Properties)*, 356 NLRB No. 11, slip op. at 1–2 (2010). There is no evidence of "signal" picketing here. Further, unlike the dissent, we are focused here on whether the Charging Party waived its right to engage in the conduct at issue. It is the award's analysis and resolution of that question that we find clearly repugnant to the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Springfield, Westfield, and Hatfield, Massachusetts facilities copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 27, 2008.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 9, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, dissenting.

I respectfully disagree from my colleagues' finding that deferral to the arbitral award at issue was inappropriate because that award was repugnant to the Act. Even recent Board precedent holds that the display of placards in employees' cars parked on the employer's premises is susceptible to being interpreted as picketing because the same placards were simultaneously being used for the same informational protest in ambulatory picketing elsewhere and were also taken from those vehicles by the employees and carried when it was their turn to walk the picket line. See *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.),* 355 NLRB 797, 804 (2010) ("We also acknowledge that there are prior Board decisions finding picketing during periods when there was no patrolling or other ambulation. However, each of the prior cases is distinguishable from the banner displays at issue here. In many of the prior cases, the display of stationary signs or distribution of handbills was preceded at the same location or accompanied at other locations by traditional, ambulatory picketing.") Our deferral precedent holds that, if an arbitrator's interpretation is allowable under the Act, our inquiry must end. So it was here.

The picketing finding is also dispositive of the waiver issue. The Union here clearly and unmistakably waived the right of employees to engage in "picketing of any of the Employer's premises." If the display of placards in employees' cars on the Employer's premises in the circumstances of this case can be defined as picketing consistent with the Act--and the *Eliason & Knuth* majority acknowledged that it has been so defined--no Board or judicial precedent requires reference to some extrinsic evidence of the parties' negotiations and understanding before the Board will find waiver. There is no ambiguity here. The Union has the undisputed authority to waive the rights of represented employees on the Employer's premises, and it has plainly done so. [1]

Ultimately, deferral to an arbitral award merely requires that it be "consistent with the Act," which the Board has repeatedly held "does not mean that the Board would necessarily reach the same result. It means only that the arbitral result is within the broad parameters of the Act. Thus, the Board's mere disagreement with the arbitrator's conclusion would be an insufficient basis for

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] My colleagues disagree with the award because they do not find a "clear and unmistakable" waiver by the Charging Party. But the Board has deferred to an award even if "neither the award nor the [contract] clause read in terms of the statutory standard of clear and unmistakable waiver." *Motor Convoy*, 303 NLRB 135, 136 (1991); see also *Southern California Edison*, 310 NLRB 1229, 1231 (1993) (arbitral award "can be susceptible to the interpretation that the arbitrator found a waiver even if the arbitral award does not speak in [terms of clear and unmistakable waiver]"); *Postal Service*, 275 NLRB 430, 432 (1985) (deferring to arbitration award finding waiver of *Weingarten* rights despite failure to apply statutory standard); *Olin Corp.*, 268 NLRB 573, 576 (1984) (Even though Board Members might differ as to required specificity necessary for contractual waiver of statutory rights, "[t]he question of waiver . . . is also a question of contract interpretation. An arbitrator's interpretation of the contract is what the parties here have bargained for and, we might add, what national labor policy promotes.")

the Board to decline to defer to the arbitrator's award." *Smurfit-Stone Container Corp*., 344 NLRB 658, 659–660 (2005). See also *Andersen Sand & Gravel Co.*, 277 NLRB 1204, 1205 fn. 6 (1985) ("Deferral recognizes that the parties have accepted the possibility that an arbitrator might decide a particular set of facts differently than would the Board. This possibility, however, is one which the parties have voluntarily assumed through collective bargaining."). Although my colleagues might reasonably disagree with the conclusion reached by the arbitration panel here, a disagreement over an arguable contract or legal interpretation is not enough to set aside the result from the parties' chosen dispute resolution mechanism of arbitration.

I would affirm the judge's conclusion that deferral to the arbitration award is appropriate and that the complaint must be dismissed on this basis.

Dated, Washington, D.C. March 9, 2015

Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell you that you cannot display signs in your personal vehicles parked on company property.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

VERIZON NEW ENGLAND INC.

The Board's decision can be found at www.nlrb.gov/case/01-CA-044539 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Laura Sacks, Esq. and *Daniel Fein, Esq.,* for the General Counsel.

Arthur Telegen, Esq. and *John Duke, Esq.* (*Seyfarth Shaw LLP)*, for the Respondent.

Alfred Gordon, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. The consolidated complaint here, which issued on June 30, 2011, and was based upon unfair labor practice charges that were filed on March 27, April 9 and 29, 2008,[1] by International Brotherhood of Electrical Workers, Local 2324, AFL–CIO (the Union), alleges that Verizon New England, Inc. (Respondent), violated Section 8(a)(1) of the Act, by telling employees in about March and April that they could not display signs containing such statements as "Verizon Honor Or Existing Contract," "Verizon We Are Ready Contract 08" and "Every Verizon Worker Should Be A Union Worker" in personal vehicles parked on company property. Among other defenses, the Respondent defends that this complaint should be dismissed because the Board should defer to an arbitrator's decision which meets the standards set forth in *Olin Corp.,* 268 NLRB 573 (1984), and is dispositive of the charges here.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

The record here is based solely upon stipulations and exhibits agreed to by the parties; there was no record testimony. The Respondent is engaged in the business of providing telecommunications services nationwide; however, only three of its facilities in Massachusetts are involved here: the facilities in Westfield, Springfield, and Hatfield (the Westfield facility), the Springfield facility, and the Hatfield facility. Mark Brown was the manager of the Westfield facility, Tony Collier was the area operations manager of the Springfield facility, and David

[1] Unless indicated otherwise, all dates referred to here relate to the year 2008.

Walker was the area operations manager of the Hatfield facility, and each of them is admitted to be a supervisor and agent of the Respondent within the meaning of Section 2(11) and 2(13) of the Act.

Respondent was party to a collective-bargaining agreement effective from August 3, 2003, to August 2, covering so called "plant" employees in Massachusetts and Rhode Island. This bargaining unit is represented by a number of local unions of the International Brotherhood of Electrical Workers, including the Union. The contract contains a grievance and arbitration provision as well as a No Strike provision, which states:

> The Union agrees that during the term of this Agreement, or any extension thereof, it will not cause or permit its members to cause, nor will any member of the Union take part in, any strike of or other interference with any of the Company's operations or picketing of any of the Company's premises.

In addition the contract provides that the Respondent shall furnish the Union with bulletin boards at its facilities, with the caveat:

> Bulletin boards are to be used by the Union for posting notices concerning official Union business, or other Union related matters, provided that if anything is posted on these bulletin boards that is considered by the Company to be controversial or derogatory to any individual or organization the Union agrees to remove such posted matter on demand and if it fails or refuses to do so, such matter may be removed by the Company.

The Union has engaged in ambulatory informational picketing at or near Respondent's facilities over the years. This informational picketing was most common when contracts were nearing expiration. Employees engaged in informational picketing would arrive at work before the start of their shifts and carry picket signs either on the sidewalk in front of Respondent's facilities, or in a nearby public area. In March 2008, in preparation for contract negotiations that were to take place in August 2008, without notice to Respondent, the Union began engaging in informational picketing at some of Respondent's facilities in Massachusetts. While there was no picketing at or near the Westfield, Springfield, or Hatfield facilities in March 2008, the Union planned to engage in informational picketing at or near these facilities beginning in April 2008. Accordingly, in March 2008, the Union distributed informational picket signs to employees, which contained language to the effect of: "Verizon, Honor Our Existing Contract." These signs, measuring about 28 inches wide by 22 inches high, are in black with white lettering.

Bargaining unit employees at the Springfield facility displayed these signs in the windshields of their personal vehicles parked on the Respondent's property during the first week of April 2008, and the signs were displayed in the cars every day that week. A line of about 30 cars with these signs was visible upon entering the parking lot and, depending on which way the cars were facing, some of these signs displayed in the cars were visible from the street. On about Friday, April 11, Collier instructed bargaining unit employees to remove these signs from their car windows while the cars were parked on its premises, and the employees complied with these instructions and no employee was disciplined as a result of displaying the signs. At the time that these signs were displayed at the Springfield facility, and at the time that Collier instructed the employees to remove the signs, no ambulatory informational picketing had occurred at the Springfield facility. Rather, the ambulatory informational picketing began in the street in front of the facility between 7 and 7:30 a.m. on Thursday, April 24, and continued at this facility at these same times on Thursday mornings thereafter for a period of time, using the signs that were placed in the car windows as discussed above.

Bargaining unit employees at the Westfield facility displayed these signs in the windshields of their personal vehicles parked on the Respondent's property on Thursday, March 20 and Friday, March 21. The signs displayed in the car windows were not visible from the public street, but were visible to Respondent's bargaining unit employees and managers, and were visible to employees of the Penske Trucking and Agway facilities that share the property with Respondent, and were visible to delivery drivers and others entering the property. On about Monday, March 24 or Tuesday, March 25, Brown instructed bargaining unit employees to remove these signs from their car windows while the cars were parked on its premises, and the employees complied with these instructions and no employee was disciplined as a result of displaying the signs. At the time that these signs were displayed at the Westfield facility, and at the time that Brown instructed the employees to remove the signs, no ambulatory informational picketing had occurred at the Westfield facility. Rather, the ambulatory informational picketing began in the street in front of the facility between 7 and 7:30 a.m. on Friday, April 25, and continued occasionally thereafter at this location at these same times.

Bargaining unit employees at the Hatfield facility displayed these signs in the windshields of their personal vehicles parked on the Respondent's property on Wednesday, April 23. The signs displayed in the car windows were not visible from the public street, because they were facing the wrong direction, but were visible to Respondent's bargaining unit employees, managers, and contractors, and to others entering the property, such as personnel of waste removal and landscaping contractors and personnel of the Postal Service, Federal Express, and United Parcel Service. Later that day, Walker instructed bargaining unit employees to remove these signs from their car windows while the cars were parked on its premises, and the employees complied with these instructions at the time it was given, and no employee was disciplined as a result of displaying the signs. At the time that these signs were displayed at the Hatfield facility, and at the time that Walker instructed the employees to remove the signs, no ambulatory informational picketing had occurred at this facility. Rather, the ambulatory informational picketing began in a private parking lot approximately one half mile from the Hatfield facility between 7 and 7:30 a.m. on Thursday, April 24, and continued occasionally thereafter at this location at these same times.

The signs displayed in the bargaining unit employees' personal vehicles in March and April at the Springfield, Westfield, and Hatfield facilities as described above were not on sticks

and when the bargaining unit employees engaged in the informational picketing at or near these facilities, as described above, they used the same signs again, without sticks. Respondent is not aware of any interruption or other disruption of its operations caused by the ambulatory picketing at these facilities.

On May 21 and June 18, Region 1 of the Board deferred these unfair labor practice charges to the grievance and arbitration procedures of the parties' collective-bargaining agreement. Subsequently, the Union grieved the issue of whether the Respondent violated the contract by requiring the employees to remove the signs from their personal vehicles. An arbitration hearing was held on October 26, 2009, before Arbitrator Timothy Bornstein, one of a group of arbitrators regularly selected by the parties to resolve contractual disputes, and the Union presented six witnesses and Respondent presented one. Both sides were afforded the opportunity to examine and cross examine the witnesses and both submitted posthearing briefs.

The arbitrators' Award issued on January 20, 2010, with the Union's designated arbitrator dissenting. The award summarizes the testimony of the business managers of the Union, as well as another IBEW local union, three employees and Walker, and sets forth the contractual language of the following provisions: Bulletin Board, Arbitration, No Strike, and Management Rights, and the contentions of both sides. The Opinion concludes:

> The core question here is whether management violated the parties' contract when it required removal of Union protest signs from employee vehicles parked on Company premises. That was the issue which the NLRB *Collyerized*. We conclude that several contract clauses reflect the parties' agreement that the Union— and its members—would not engage in picketing on Company premises during the life of the collective bargaining agreement.
>
> Article G10, the No Strike article, provides that the "Union…will not cause or permit its members to cause, nor will any member of the Union take part in, any strike of or other interference with any of the Company's operations <u>or picketing of any of the Company's premises</u>." By any other name, Union members who place protest signs in their cars to inform the public of its contract concerns with Verizon are engaged in picketing. While the Union argues that placing signs in cars is not picketing because doing so only communicates a message, that is precisely what picketing is: to inform the public of the Union's concerns. Picketing does not have to be a sign on a stick.
>
> The Union also contends that the Company decision to order the signs removed from cars was arbitrary or in bad faith in violation of Article G9.03(b), but there is no such evidence.
>
> Whether the Company's demand that the signs be removed from employees' vehicles infringed employees' Section 7 rights is a question that we do not have the authority to resolve. Our authority is limited to interpreting the contract. We do no more.

By letter dated August 27, 2010, Region 1 of the Board notified the parties that it was refusing to issue a complaint in the matter and was dismissing the Union's unfair labor practice charges, stating:

> By letter dated May 21, 2008, pursuant to the Board's decision in *Collyer Insulated Wire*, 192 NLRB 837 (1971), and pursuant to "Arbitration Deferral Policy under *Collyer*- Revised Guidelines" publicly issued by the General Counsel on May 10, 1973, I deferred a decision on the charges in the above-captioned cases pending the outcome of an arbitration proceeding.
>
> On January 20, 2010, the arbitrator selected by the parties issued an award ruling that the Employer acted within its rights when it required that the picket signs be removed from personal vehicles in the Company parking lots.
>
> I have made a careful review of this matter and find that the arbitration proceedings were fair and regular, that the parties had agreed to be bound by the results of the proceedings, that the unfair labor practice issue alleged and involved in the charges were presented to and considered by the arbitrator, that the contractual issue was factually parallel to the unfair labor practice issue, that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and that the award is not in conflict with the purposes or policies of the National Labor Relations Act. Thus, the award meets the standards set forth by the Board in *Olin Corporation*, 268 NLRB 573 (1984), and the Board would defer to the award.
>
> Here, the unfair labor practice issue is whether the Employer violated employees' Section 7 rights by requiring employees to remove picket signs from their personal vehicles on the Employer's property. The issue presented to the Arbitrator was: Whether management violated the parties' contract when it required removal of Union protest signs from employees' vehicles parked on Company property. Both the unfair labor practice and the grievance contemplate the same actions by the employees, putting the picket signs in the cars and the same action by the Employer, requiring the removal of the signs. Therefore, the issues are factually parallel.
>
> In regard to your claim that the arbitrator's award was repugnant to the Act, the Board will not find an award is clearly repugnant unless it is shown to be palpably wrong, i.e., not susceptible to an interpretation consistent with the Act. The arbitrator's finding that the collective-bargaining agreement prohibited picketing on the Employer's premises and the union signs constituted picketing is susceptible to an interpretation with the Act and, therefore is not repugnant.
>
> I am, therefore, refusing to issue a Complaint in this matter, and the charges are hereby dismissed.

Subsequently, Region 1 conducted a further investigation, determined that deferral to the arbitrator's award was not appropriate, but dismissed the charges on the merits stating, by letter dated February 14, 2011:

> The Region has carefully investigated and considered the charges against Verizon, Inc., alleging violations under Section 8 of the National Labor Relations Act.

The charges allege that the Company interfered with employees' rights to engage in protected concerted activities under Section 7 of the Act, by ordering employees who displayed union signs in their cars, while the cars were parked on Company property, to remove them.

The case was originally *Collyer* deferred on May 21, 2008, and the Office of Appeals denied the Union's appeal of the deferral determination on June 28, 2008.

On January 20, 2010, an Arbitrator's Award issued in favor of the Employer, stating that the Employer acted within its rights when it required that the picket signs be removed from personal vehicles in the Company parking lots.

On May 14, 2010, the Union submitted a position statement requesting that the Region not defer to the Arbitrator's Award and, instead, process the case further. The Union argued that the Region should not defer to the Arbitrator's Award because: (1) The arbitrator did not consider the unfair labor practice issue; and (2) the award was repugnant o the Act.

On August 27, 2010, the Region deferred to the Arbitrator's award and dismissed the unfair labor practice charges, basing its decision upon its *Spielberg/Olin* review of the arbitration award. The Region determined that the proceedings were: fair and regular; the parties had agreed to be bound by the results of the proceeding; the unfair labor practice issue alleged in the charges were presented to, and considered by the arbitrator; the contractual issue was factually parallel to the unfair labor practice issue; the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice; and the award was not in conflict with the purposes or policies of the Act. *Olin Corporation,* 268 NLRB 573 (1984). Accordingly, the Region deferred to the award and dismissed the charge.

On September 5, 2010, the Union appealed the Region's dismissal. Prior to a finding by the Office of Appeals, the Region conducted further investigation. Based upon that investigation, I find that deferral to the Arbitrator's Award is not appropriate because his conclusion that the Union's conduct of seeking to communicate a message by displaying signs in parked vehicles constituted picketing was overly broad and, therefore, repugnant to the Act. I am, therefore, revoking my August 27, 2010 dismissal letter. I further find, however, that further proceedings on your charges are not warranted based on additional evidence obtained in the further investigation.

Decision to Dismiss: Based on additional investigation, I have concluded that further proceedings are not warranted, and I am dismissing your charge for the following reasons:

After further investigation, the Region found that the Union's informational picketing against the Employer was an area-wide effort that began two weeks prior to the Employer's prohibition against sign posting in employee vehicles on the Employer's property. Further, the directive to remove the signs at the locations at issue in your charges began one day prior to traditional picketing at two of the three locations at issue and within a couple of weeks at the third location. I note that the Union made and distributed the picket signs for the purpose of engaging in informational picketing, conduct the Union had a practice of engaging in prior to the expiration of prior contracts. Accordingly, it is reasonable to conclude that the conduct engaged in here was part and parcel of an area-wide picketing campaign in furtherance of a labor dispute rather than the mere placement of signs in employee vehicles on Company property. This finding is consistent with the Board's recent case on bannering. In *United Brother of Carpenters & Joiners of America (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (August 27, 2010), the Board acknowledged that there are prior Board decisions finding picketing during periods when there was no patrolling or other ambulation, and found those cases distinguishable because the display of stationary signs or distribution of handbills in those cases was preceded at the same location or accompanied at other locations by traditional ambulatory picketing and, in many instances, the same signs were displayed that had been utilized in traditional picketing. Accordingly, the Employer, relying on that portion of the collective-bargaining agreement in which the Union clearly and unequivocally waived the employees' right to picket on the Employer's premises, lawfully directed employees to remove signs from vehicles parked on the Employer's premises. I note that the Employer's directive was narrowly tailored to restrict picketing on the Employer's property in accordance with the parties' collective-bargaining agreement.

The Union appealed this dismissal on about March 6, 2011, and on June 2, 2011, the Office of Appeals sustained the Union's appeal, and remanded the case to the Region with instructions to issue a complaint, absent settlement, stating only: "The Employer's prohibition on employees from displaying union signs in their vehicles located in the employees' parking lot raised issues warranting Board determination based on record testimony developed at a hearing before an administrative law judge."

III. ANALYSIS

The initial question here is whether the arbitrators' decision satisfies the requirements of *Olin,* supra, which modified the Board's deferral standards somewhat. In *Olin,* the administrative law judge, finding that the arbitrator had not properly or seriously considered the unfair labor practice, declined to defer to the arbitrator's decision, but dismissed the complaint on the merits. The Board reversed, finding that the judge should have deferred to the arbitrator's decision under the standards set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), while also setting forth more specific standards for arbitration deferral, specifically rejecting the proposition that "arbitration awards are appropriate for deferral only when the Board determines on de novo consideration that the award disposes of the issue just as the Board would have." Rather, the Board adopted the following standard for deferral:

> We would find that an arbitrator has adequately considered the unfair labor practice 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. In this respect, differences, if any,

> between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act. And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

In addition, 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." Therefore, the issues here are whether the contractual issues as presented to the arbitrator were factually parallel to the unfair labor practice issues and whether the parties to the arbitration litigated the facts relevant to the unfair labor practice issue, as well as the contractual issue, and whether the arbitration decision was repugnant to the Act or was palpably wrong, remembering that it is the burden of counsel for the General Counsel and counsel for the Charging Party to establish that the Board should not defer to the arbitration award

In *Andersen Sand & Gravel Co.*, 277 NLRB 1204 (1985), the administrative law judge, in finding that deferral was inappropriate, relied on the absence of any rationale in the arbitration award indicating that the panel considered the unfair labor practice allegation. The Board reversed, finding that deferral was appropriate as the counsel for the General Counsel did not sustain her burden:

> First, it is clear that that the contractual and statutory issues are factually parallel. Indeed, as admitted by the General Counsel, the question of whether an employee may be discharged for violating a no strike clause is one which must be decided on a determination of the meaning and interpretation of the collective-bargaining agreement. Thus, the statutory question of whether the right to strike for less than 24 hours is protected under a 24 hour clause, or has been clearly and unequivocally waived under the no-strike provision of the contract, is a question of contract interpretation.

The Board found that the contractual and statutory issues were coextensive and that the arbitration panel was presented generally with the facts relevant to resolving the unfair labor practice. The Board stated further:

> Although the judge premised his decision in part on a finding that the arbitration panel did not receive or consider the law relating to the unfair labor practice, we believe the judge misinterprets the requirements of *Olin*. Under *Olin*, the arbitrator need only be "generally presented" with the facts relevant to resolving the statutory issue.

The Board concluded:

> In the absence of any evidence to the contrary, it is reasonable to conclude that resolution by the panel of the contractual issue required the same evidence relevant to resolving the unfair labor practice issue. Therefore, because the evidence before the arbitration panel was essentially the same evidence necessary for a determination of the merits of the unfair labor practice charge, we are satisfied that this requirement has been met.

Finally, in response to counsel for the General Counsel's argument that the award was repugnant to the purposes and policies of the Act, the Board, at footnote 6, states: "Deferral recognizes that the parties have accepted the possibility that an arbitrator might decide a particular set of facts differently than would the Board. This possibility, however, is one which the parties have voluntarily assumed through collective bargaining."

In *Specialized Distribution Management, Inc.*, 318 NLRB 158 (1995), four employees left their work stations without permission, in apparent violation of a number of contractual provisions. When they were called into the manager's office, were told that they were being suspended pending further investigation and were told to punch out and leave the facility, they refused to leave without a letter of explanation. Three eventually left after the security department was called, and the fourth did not leave until the sheriff's department was called. The arbitrator found that walking off the job was not a dischargeable offense, but that the insubordination charge warranted substantial disciplinary action. He converted the discharges of the three who left the facility into suspensions without backpay and found that the discharge of the fourth employee was for just cause. Counsel for the General Counsel argued against deferral, alleging that the unfair labor practice issue was not considered, and that the decision was repugnant to the Act. The judge, as affirmed by the Board deferred. Citing footnote 6 of the Board decision in *Andersen,* supra, the judge stated:

> Arbitrator Kagel has found facts that generally track those alleged to be unfair labor practices and the General Counsel has not established that the arbitrator was lacking any evidence relevant to the determination of that issue. Moreover, Kagel found that the insubordination overrode the other considerations, including what might be a protected circumstance.

In *Laborers International Union, Local 294,* 331 NLRB 259 (2000), the complaint alleged that the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by dispatching three individuals to jobsites, in violation of its contract and hiring hall rules, thereby bypassing other employee-registrants who were entitled to be dispatched. The relevant contractual provision relating to hiring hall dispatching generally provides that referrals are in the order of registration on the out-of-work list, with certain exceptions whereby an employer may request that a specific individual be referred. The judge refused to defer to an arbitrator's decision; the Board reversed, finding that the contractual issue before the arbitrator was factually parallel to the unfair labor practice issue:

> The critical point of both the contractual grievance and the unfair labor practice was that the Respondent Union violated the hiring hall rules in making specific dispatches to Valley Fence and Fresno Paving. Thus, the arbitrator considered substantially the same issue as that raised by the General Counsel's complaint. The arbitrator also had before him and reviewed the same facts that would be relevant to the unfair labor practice.

In *Smurfit-Stone Container Corp.*, 344 NLRB 658, 659–660

(2005), the Board, in deciding to defer to the arbitrator's decision, further defined "susceptible to an interpretation consistent with the Act" as stated in *Olin,* supra:

> "Susceptible to an interpretation consistent with the Act" means precisely what it says. Even if there is one interpretation that would be inconsistent with the Act, the arbitral opinion passes muster if there is another interpretation that would be consistent with the Act. Further, "consistent with the Act" does not mean that the Board would necessarily reach the same result. It means only that the arbitral result is within the broad parameters of the Act. Thus, the Board's mere disagreement with the arbitrator's conclusion would be an insufficient basis for the Board to decline to defer to the arbitrator's award.

In *Kvaerner Philadelphia Shipyard, Inc.*, 346 NLRB 390 (2006), the Board affirmed the judge's dismissal of a 8(a)(3) allegation and deferred to an arbitrator's decision upholding the discharge. The employee wrote a letter to fellow employees containing false allegations that the employer had withheld some of their pay and benefits and had earned interest for itself with the withheld money. The employee and the union contended that he was engaged in protected concerted activities, but the arbitrator distinguished his conduct from protected conduct: "However, by publishing unjustified allegations of intentional bad faith to other employees without attempting to ascertain the facts, the grievant rendered himself vulnerable to the imposition of substantial discipline. There is no merit to the Union's assertion that the grievant was engaged in protected speech or concerted action. His action recklessly publishing accusations of dishonesty for other employees to take or see is not protected speech under these circumstances" The Board, quoting from *Smurfit,* supra, found that the arbitrator adequately addressed the unfair labor practice allegation in finding that the grievant lost the protection of the Act and that his result was not repugnant to, or inconsistent with Board precedent: "The arbitrator's factual finding here, that Smith had acted with reckless disregard for the truth, is not palpably wrong, and is susceptible to an interpretation consistent with Board precedent. We therefore find that deferral is appropriate."

On the other hand, there are cases that go the other way, finding that the arbitrator's decision is repugnant to the purposes and policies of the Act. In *Garland Coal & Mining Co.*, 276 NLRB 963 (1985), the Board refused to defer to an arbitrator's decision upholding the discharge of a union president who was fired for refusing to obey a supervisor's order to sign a memo setting forth the employer's position on an issue relevant to the union. The arbitrator found his refusal to be insubordination. The Board agreed with the judge that the discriminatee "was espousing a view and engaging in activity in support of the union's interpretation of the collective-bargaining agreement. To find that Oldham was insubordinate under these circumstances is not susceptible to any interpretation consistent with the Act." Similarly, in *110 Greenwich Street Corp.*, 319 NLRB 331 (1995), the Board refused to defer to an arbitrator's award upholding the discharge of an employee for engaging in concerted activities. The employee was fired for posting signs in his car windows while the car was parked in front of the building where they were employed. The signs objected to the fact that the employer was regularly late in paying the employees and that the employer should sell his expensive car and pay the employees in a timely manner. The arbitrator ruled that the "display of controversial placards in front of the building" justified the discharge of the employee. The judge, as affirmed by the Board, found that "the arbitrator's finding that the display of controversial placards is a just basis for disciplinary action is similarly misguided; the award is not susceptible to an interpretation that is consistent with the employees' rights to engage in concerted activities under Section 7 of the Act" and was therefore repugnant to the Act.

In *Mobil Oil Exploration & Producing, U.S., Inc.*, 325 NLRB 176 (1997), the discriminatee/Charging Party had an ongoing dispute with the union president, alleging that he was working at another job while allegedly conducting union business, and he reported the situation to his (and their) employer. The employer told him that he would investigate the allegations, but that it was confidential, and that he was not to discuss it with anyone. Shortly thereafter, he was overheard discussing the investigation with fellow employees and he was fired for improper interference with the investigation and for insubordination. The arbitrator upheld the discharge finding that the Charging Party was insubordinate by not complying with the instructions that he received to keep the investigation confidential. The Board refused to defer to the arbitrator's award:

> We agree with the General Counsel that the arbitration award is palpably wrong and repugnant to the Act because the precipitating event that caused Pemberton's termination was his exercise of protected concerted activities. Because the arbitration award upholds Pemberton's discipline based on his protected concerted activities, we find that deferral to the award is inappropriate and that the Respondent violated Section 8(a)(1) as alleged.

The initial requirements of *Spielberg* and *Olin* have clearly been met as the proceedings appear to have been fair and regular and all parties agreed to be bound by the arbitrator's decision. I also find that the arbitrator was presented with the facts relevant to resolving the unfair labor practice issue and adequately considered the unfair labor practice issue, which was factually parallel to the contractual issue. The panel discussed all the relevant contractual terms, interpreted them and determined (right or wrong) that the signs in the car windows violated these contractual provisions and that the Respondent's directives to the employees to remove the signs did not violate the contract. The decision concluded by saying that the arbitration panel did not have the authority to resolve the issue of whether the management directive infringed on employees' Section 7 rights, and the panel was correct. That is a Board function to resolve and, if appropriate, to correct.

The final issue in determining whether to defer to the arbitration ruling is whether counsels for the General Counsel and the Charging Party have sustained their burden that the arbitrator's decision is repugnant to the Act, or palpably wrong. I find that they have not. Counsel for the General Counsel, in his brief, forcefully argues that the Respondent's direction to the employees to remove the signs from their vehicles was unlawful

because the no-picketing provision contained in the contract did not "clearly and unmistakably" waive the Union's statutory right to engage in lawful informational picketing. Citing a recent case, *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797 (2010), counsel for the General Counsel also argues that the signs in the employees' vehicles did not constitute picketing and, further, for a stationary sign to qualify as picketing there must be an element of confrontation. Although these arguments may be correct, that is not helpful in sustaining his burden here. More to the point is the argument made by counsel for the Respondent: "There is nothing in Board law that prevents an arbitrator from interpreting the word 'picket' in a collective bargaining agreement provision prohibiting picketing more broadly than the Board would in an unfair labor practice case not involving such a provision. This is especially so given the vacillations in Board precedent over the definition of 'picketing' under the Act." In *Bell-Atlantic-Pennsylvania, Inc.*, 339 NLRB 1084, 1087 (2003), the employer prohibited its employees with customer contact from wearing "Road Kill" shirts which it felt reflected negatively on its image and employees who failed to comply with this directive were suspended for one day without pay. The arbitrator sustained the punishment, finding that the employer reasonably could believe that observing the employees wearing the shirt would unsettle the public. In deferring to the arbitrator's decision, the Board stated that they could not say that the arbitrator was "palpably wrong" in striking the balance of interest as he did:

> In short, we find that although the Road Kill shirt was protected under Section 7, it was not repugnant or "palpably wrong" for the arbitrator to find that employees' Section 7 interests may give way to the Respondent's legitimate interests in protecting its public image under the circumstances of this case.

I therefore find that although the Board, upon hearing this case de novo might have reached a different conclusion than that reached by the arbitrator, finding that the signs in the vehicle windows was not picketing and were protected, the arbitrator's decision was neither repugnant to the Act nor was it palpably wrong. I would therefore defer to the arbitrator's decision, and recommend that the complaint be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The arbitrator's decision should be deferred to, and therefore the Respondent did not violate Section 8(a)(1) of the Act as alleged in the complaint.

On these findings of fact, conclusions of law and based on the entire record, I hereby issue the following recommended.[2]

ORDER

It is recommended that the consolidated complaint be dismissed in its entirety.

Dated, Washington, D.C. November 15, 2011

[2] 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.