UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

BABCOCK AND WILCOX NUCLEAR OPERATIONS GROUP, INC.	
and	**CASE: 08-CA-138022**
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL #900	

REPLY OF THE GENERAL COUNSEL IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE COMPLAINT AND NOTICE TO SHOW CAUSE

Pursuant to Sections 102.24 and 102.50 of the Rules and Regulations of the National Labor Relations Board, as well as the Order Transferring Proceeding to the Board and Notice to Show Cause, dated March 12, 2105, the undersigned Counsel for the General Counsel files this Reply in Opposition to Respondent's Motion to Dismiss the Complaint. The Respondent has moved to dismiss the Complaint based solely on its contention that this matter should be deferred to the grievance-arbitration procedure of the parties' collective bargaining agreement. General Counsel urges that this case is not appropriate for deferral to an arbitrator to decide because it presents a genuine material, statutory issue for hearing rather than a matter of contract interpretation.

I. Introduction

The Complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by issuing union steward Larry Stauffer a letter of discipline to his personnel file because he

engaged in union and/or protected concerted activities. Notably, the Union did not file a grievance over the disciplinary action because it determined that there was no contract violation. Moreover, the Union asserts that Stauffer received this letter to his personnel file in violation of the National Labor Relations Act.

Respondent denies that Larry Stauffer was communicating with the supervisor in his capacity as union steward. (*See* Resp. Ans. Paragraph 13.) Further, Respondent denies that the letter effectuated discipline or was issued for disciplinary reasons. (*See* Resp. Ans. Paragraph 14). Notwithstanding that Respondent denies it disciplined Stauffer, it relies upon the grievance provisions of the contract at Article 6 arguing that because of the broad arbitration provision, the parties also process claims of unjust discipline through the grievance procedure. (*See* Resp. Motion at pg. 2). For the reasons outlined below, the General Counsel respectfully submits that the Respondent's Motion should be denied.

II. Factual Background

The Employer and the Union have a bargaining relationship, most recently embodied in a collective bargaining agreement effective from May 1, 2013 through April 30, 2017. The Union represents the following employees:

> All shop hourly production and maintenance employees at its Barberton Works, excluding shop office employees, salaried laboratory employees, technical employees, professional employees, safety engineers, watch services employees, exempt employees, and all supervisory employees above the classification of leader.

Stauffer has worked for Respondent since 2009 as a mill operator and has served as union secretary, vice president and union steward. Stauffer held the position of union steward until August 31, 2014. On August 18, 2014, Stauffer, in his capacity as union steward, asserted the

contractual right to overtime by filing a "missed overtime" form.[1] Due to cancelled overtime, Stauffer submitted the form to his direct supervisor, Rick Humphreys. When an employee or union steward believes that the overtime guidelines have been violated, the employee can request that a union steward submit a "missed overtime" form to the employee's immediate supervisor.[2] Here, Stauffer was serving as union steward and submitted this form on his own behalf.[3] When Stauffer returned to his work station on the shop floor, supervisor McLaughlin approached Stauffer to discuss the missed overtime. The Respondent issued Stauffer a letter to his personnel file for this conversation while Stauffer was performing his function as union steward. On September 11, 2014, Stauffer received a letter from superintendant Jim Ingersoll.[4] In the letter, Ingersoll informed Stauffer that his:

> [r]eaction to the supervisor's explanation was not appropriate or respectful...this type of approach is not acceptable and will not be permitted at our facility. *Please be advised that if there is a recurrence of this behavior in the future, you may be subject to greater discipline, up to and including discharge* (emphasis added).

On September 12, 2014, union president Don Brown sent a letter to labor relations manager Richard Yoke informing Yoke that Stauffer was acting in his capacity as union steward and Respondent's discipline of Stauffer was harassment and intimidation of a union official in violation of the National Labor Relations Act.[5] In that regard, the Union declined to file a grievance over the discipline and instead filed the instant charge. The discipline of Stauffer is a matter to be considered under *Atlantic Steel Co.*, 245 NLRB 814 (1979) and is therefore not appropriate for deferral.

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[1] A copy of this form is attached as Exhibit A.

[2] These Overtime Guidelines are referred to in a Memorandum of Understanding adopting the NPA Overtime Guidelines.

[3] Approximately a week earlier, Stauffer submitted a separate missed overtime form to supervisor Rick Humphreys. Stauffer submitted this form on his behalf and the parties resolved the claim with Stauffer making up the missed overtime. A copy of that form is attached as Exhibit B. Stauffer signed his name on the "employee" line as well as the "union rep." line.

[4] A copy of this letter is attached as Exhibit C.

[5] A copy of this letter is attached as Exhibit D.

III. Legal Standards, Analysis and Argument

Counsel for the General Counsel submits that because the parties' have not either contractually or explicitly authorized an arbitrator to decide unfair labor practice claims, the law in Babcock & Wilcox Const. Co., 361 NLRB No. 132 at 19 (Dec. 15, 2014) does not apply. In that regard, the appropriate legal standard for pre-arbitral deferral is set forth in Collyer Insulated Wire, 192 NLRB 837 (1971), and United Technologies Corp., 268 NLRB 557 (1984).

It is well-settled that the Board has "considerable discretion to defer to the arbitration process when doing so will serve the fundamental aims of the Act." Regency Heritage Nursing and Rehabilitation Center, 353 NLRB 1027, 1035 (2009). The Board has found deferral appropriate in instances where: (1) the dispute arose within the confines of a long and productive bargaining relationship; (2) there is no claim of employer animosity to the employees' exercise of protected statutory rights; (3) the collective bargaining agreement's arbitration provision envisions a broad range of disputes; (4) the arbitration clause clearly encompasses the dispute at issue; (5) the employer indicates a willingness to utilize arbitration to resolve the dispute; and (6) the dispute is eminently well suited to such resolution. *Collyer Insulated Wire Co.*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557, 558 (1984).

Contrary to Respondent's contention, the parties' collective bargaining agreement does not expressly provide for grievance resolution of claims of unjust discipline. Looking at the plain language of the contract, the terms discipline and/or unjust discipline do not appear at all in Article 6, Grievance Procedure. That Article references only "complaints" and "discharges." Moreover, nothing in Article 7, Arbitration, refers to the arbitration of discipline or claims of unjust discipline. While Respondent submitted a "Declaration of William F. Gribbon," which declared that the parties have processed claims of unjust discipline under the grievance

arbitration provision of the contract, this declaration does not reconcile the fact that Respondent vehemently denies that it disciplined Stauffer. (*See* Resp. Exhibit 2 to Motion at Paragraph 5; Resp. Ans. Paragraph 14). In that regard, Respondent has not met its burden under Collyer to show that the arbitration clause clearly encompasses the dispute at issue **or** that the dispute is eminently well suited to such resolution. That is, it is undisputed that the Union never filed a grievance over the letter. Id. Next, Respondent denies that it disciplined Stauffer and thus it cannot be said that the arbitration clause encompasses the dispute at issue. Id. And finally, even if it were to admit that it disciplined Stauffer, the parties' agreement does not encompass the dispute since the grievance and arbitration provisions of the contract do not provide for resolution of claims of unjust discipline.

Additionally, this case clearly involves a claim of employer animosity to employees' exercise of protected rights. The Board has noted that deferral to an arbitrator's decision is especially inappropriate in a case where the arbitration involves discipline of stewards in reprisal for their grievance activities. *Union Fork and Hoe Co.,* 241 NLRB 907, 908 (1979). The Board reaffirmed the principle that in presenting and processing grievances, shop stewards retain the protection of the Act except for extreme misconduct in the performance of their union duties. Id.[6] This is true even when the grievance in question is not formally stated or does not take place under the auspices of a contractual grievance procedure. *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1033 (1976). The term "grievance," as used in Section 9(a) of the Act, refers "to both disputes over interpretation and application of a collective-bargaining agreement and those matters delimited in Section 9(a) of the Act: rates of pay, wages, hours of employment, or other conditions of employment." *Dow Chemical Co.*, 227 NLRB 1005 (1977). The General Counsel contends that Stauffer was issued this letter to his personnel file for his alleged actions

[6] *See also* Bowman Transportation, Inc., 134 NLRB 1419 (1961).

which arose in the context of his conduct as a union steward. Stauffer asserted a contractual overtime right in his capacity as union steward, and reported the overtime directly to his immediate supervisor Rick Humphreys and subsequently discussed the matter with supervisor McLaughlin. Union grievance filing activity and the discussion of grievances are both protected and concerted activity.[7] Stauffer was subsequently issued a Letter of Discipline because McLaughlin claimed that Stauffer "was not appropriate or respectful." The disciplinary action taken against Stauffer demonstrates Respondent's animosity toward employee's exercised of Section 7 rights. Whether Stauffer conducted his duties in a manner that fell outside the protection of the Act is a matter to be considered by applying the standards set forth in *Atlantic Steel*, 245 NLRB 814 (1979). Moreover, General Counsel intends to present witnesses at trial that can attest to Respondent's union animus through statements made by its agents concerning the disciplinary action taken against Stauffer. In that regard, Respondent has not met its burden under Collyer as there is a claim of employer animosity to the employees' exercise of protected statutory rights.

IV. Conclusion

Based upon the above, the General Counsel respectfully requests that the Board deny Respondent's Motion to Dismiss and that an Administrative Law Judge should determine the merits of this genuine material issue at hearing.

Respectfully submitted,

/s/ Sharlee Cendrosky

Sharlee Cendrosky
Counsel for the General Counsel
National Labor Relations Board
1240 E. 9th St., Room 1695

[7] *See* Shrock Cabinet Co., 339 NLRB 182 (2003); United States Postal Service, 345 NLRB 426 (2005).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically and served by regular mail on March 25, 2015 to the following:

Julie A. Trout
KASTNER WESTMAN & WILKINS, LLC
3480 W Market St Ste 300
Akron, OH 44333-3369
Phone: (330)867-9998
Email: jtrout@kwwlaborlaw.com
Fax: (330)867-3786

Ryan T. Smith, Esq.
KASTNER WESTMAN & WILKINS,
3480 West Market Street, Suite 300
Akron, OH 44333
Phone: (330)867-9998
Mobile Phone: (812)343-7001
Email: rsmith@kwwlaborlaw.com
Fax: (330)867-3786

Thomas Evan Green, Esq.
KASTNER WESTMAN & WILKINS, LLC
3480 West Market Street, Suite 300
Akron, OH 44333
Phone: (330)867-9998
Email: tgreen@kwwlaborlaw.com
Fax: (330)867-3786

Donald Brown
International Brotherhood of
Boilermakers, Iron Ship Builders,
Blacksmiths, Forgers and Helpers, Local
#900
469 W Tuscarawa
Barberton, OH 44203
Phone: (330)745-3129
Email: dmbrown900@gmail.com
Fax: (330)745-7706

OFFICE OF THE EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
1099 14TH ST NW
WASHINGTON, DC 20570-0001

Respectfully submitted,

/s/ Sharlee Cendrosky

Sharlee Cendrosky
Counsel for the General Counsel
National Labor Relations Board
1240 E. 9th St., Room 1695
Cleveland, OH 44199
(216) 522-8191
sharlee.cendrosky@nlrb.gov

Missed Overtime

EMPLOYEE NAME: _____ EMPLOYEE # _____

On the following date/s, I was missed for an overtime opportunity that I should have been offered.

DATE/S MISSED: _____ SHIFT: _____ JOB CLASS: _____

Employee _____

Union Rep _____

Supervisor _____ Date _____

OVERTIME GUIDELINES

1. Where an honest mistake in overtime scheduling occurs, the missed employee will be offered like overtime upon the first occasion, time permitting, after the error comes to supervision's attention when:

   A. Some overtime is to be scheduled in his department in any event.
   B. The missed employee would not otherwise be scheduled, and
   C. The missed employee is available for the overtime.

2. Should the missed employee refuse the offered overtime, the requirement to make up overtime shall be considered satisfied. It is understood that the execution of this procedure may require that a missed employee be scheduled out of his normal rotation and that no further liability to the Company shall result.

___ The above employee made up the overtime on the following date: _____

___ The above employee was offered the overtime, but did not make it up on the following date: _____

Employee _____

Union Rep _____

Supervisor _____ Date _____

Distribution: Original - Supervisor
1 copy - Union Representative
1 copy - Employee
1 copy - Employee

GC EXH. A

Missed Overtime

EMPLOYEE NAME: Larry H. Stauffer Jr EMPLOYEE # 40301

On the following date/s, I was missed for an overtime opportunity that I should have been offered.

DATE/S MISSED: 8/13, 8/14, 8/15 SHIFT: 2nd shift JOB CLASS: 1425

Employee Larry H. Stauffer Jr.

Union Rep Larry H. Stauffer Jr.

Supervisor R Humphrey

Jim Holderbaum was on Vic those days, Tom Bender was called on one day, never should I was never called, on any of the days when Bender refused!

Date 8-15-14

OVERTIME GUIDELINES

1. Where an honest mistake in overtime scheduling occurs, the missed employee will be offered like overtime upon the first occasion, time permitting, after the error comes to supervision's attention when:

   A. Some overtime is to be scheduled in his department in any event.
   B. The missed employee would not otherwise be scheduled, and
   C. The missed employee is available for the overtime.

2. Should the missed employee refuse the offered overtime, the requirement to make up overtime shall be considered satisfied. It is understood that the execution of this procedure may require that a missed employee be scheduled out of his normal rotation and that no further liability to the Company shall result.

4 hours 1.5 8-21-14

___ The above employee made up the overtime on the following date: 3 hours 2.0 8-24-14

___ The above employee was offered the overtime, but did not make it up on the following date: _____

Employee Larry H. Stauffer Jr 8/24/14

Union Rep Larry H. Stauffer Jr 8/24/14

Supervisor _____ Date _____

Distribution: Original - Supervisor
1 copy - Union Representative
1 copy - Employee
1 copy - Employee

GC EXH. B

babcock & wilcox
1 91 stirling avenue • barberton, oh 44203-0271 usa
• phone 330.753 4511 • www.babcock.com

September 11, 2014

Larry H. Stauffer
3901 Ennis Circle NE
Canton, Ohio 44705

Dear Larry:

On August 18, 2014, supervisor Dave McLaughlin met with you on the production floor to explain why your weekend overtime was cancelled. Your reaction to the supervisor's explanation was not appropriate or respectful. This is the most recent situation where your actions have been viewed as disrespectful toward peers and people with positions of authority. This type of approach is not acceptable and will not be permitted at our facility. Please be advised that if there is a recurrence of this behavior in the future, you may be subject to greater discipline, up to and including discharge. We appreciate your passion and strong work performance, but simply can't have these outbursts occurring at our facilities and disrupting our operations.

Sincerely,

Jim Ingersoll

cc: Employee file
Rick Humphrey
Tim Ringer

GC EXH. C

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
IRON SHIPBUILDERS, BLACKSMITHS, FORGERS & HELPERS
Local Lodge No. 900
469 W. Tuscarawas Avenue
Barberton, OH 44203
Phone: 330.745.3129
Fax: 330.745.7706
Email: ibblocal900@sbcglobal.net

September 12, 2014

RICH YOKE
LABOR RELATIONS MANAGER
91 STIRLING AVE.
BARBERTON, OHIO 44203

RE: Larry Stauffer - Letter of Discipline

Dear Mr. Yoke:

On September 11, 2014, superintendent, Jim Ingersoll, issued Larry Stauffer a letter of discipline stating that his reaction to a supervisor's explanation was not appropriate or respectful. When this conversation took place on August 18, 2014, Larry was a Union Steward and was acting in that capacity when he responded to the supervisor, Dave McLaughlin. Larry was well within his legal rights as an Officer of Local 900. These rights are spelled out in the National labor Relations Act.

The Union views this discipline as harassing and intimidating a Union Official and believes it to be a violation of the National Labor Relations Act, Section 8, Item 1. We demand this discipline get expunged from Larry's Employee File immediately. If the Company refuses to respond to this letter by Wednesday, September 17, 2014, the Union will consider that as a denial and will move forward with the appropriate action to bring resolution to this matter.

Sincerely,

Donald M. Brown,
President, Local 900.

RECEIVED
SEP 15 2014
LABOR RELATIONS

DMB:nln
cc:
File

GC EXH. d