

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15**

HOWARD INDUSTRIES, INC.,)	
Respondent,)	
)	
and)	Case: 15-CA-131447
)	
INTERNATIONAL BROTHERHOOD OF)	
ELECTRICAL WORKERS, LOCAL 1317,)	
Union.)	

**RESPONDENT’S ANSWERING BRIEF TO THE EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE’S DECISION**

COMES NOW Respondent, Howard Industries, Inc. (the “Respondent”), through undersigned counsel and pursuant to Section 102.46(d)(1) of the Board’s Rules and Regulations, files this its Answering Brief to the Exceptions to the Administrative Law Judge’s Decision filed by IBEW Local 1317 (the “Union”) on October 21, 2015.

INTRODUCTION

The Union has raised one (1) exception to the findings of the Administrative Law Judge (“ALJ”), specifically, that his decision to defer to the arbitration award was wrong because “all the arbitrator really did was consider whether the Employer violated the contract.” (Union’s Memorandum in Support of the Administrative Law Judge’s Decision, p. 4.) An analysis of the arbitration award clearly establishes that the ALJ correctly found that the arbitrator also considered and ruled on the unfair labor practice allegations. Accordingly, the Union’s exceptions should be denied.

LEGAL ANALYSIS AND ARGUMENT

The Administrative Law Judge Was Correct to Apply the *Olin* Deferral Standard.

In *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB 132 (2014), the Board adopted new standards for deciding the circumstances under which it would defer to an arbitrator's decision. There, it held that the new standard would apply to deferrals under existing collective bargaining agreements if the parties either contractually or explicitly authorized arbitrators to decide unfair labor practice claims. By contrast, when current contracts did not authorize arbitrators to decide unfair labor practice issues, the new standards would not apply until those contracts expired or until the parties agreed to present particular statutory issues to the arbitrator. (*Id.* at 14.)

The parties' collective bargaining agreement was in effect from January 21, 2012 until January 20, 2015.¹ Article V, Section 5, of that contract describes the arbitrator's authority as follows:

Section 5. The arbitrator shall be bound by the facts and the evidence submitted to him in the hearing and the issues involved in the grievance. The decision of the arbitrator shall be final and binding upon both parties, provided the arbitrator shall have no authority to add to, subtract from, nullify, or modify any of the terms or provisions of this Agreement, or to impair any of the rights reserved to the Company or the Union by the terms thereof, either directly or indirectly; nor shall he have the power to substitute his discretion for that of the Company in any matter where the Company has not contracted away its right to exercise such discretion.

(Joint Ex. 2, p. 4.) The contract does not authorize arbitrators to decide unfair labor practice claims, nor was there an agreement to do so.

The arbitration hearing that included the unfair labor practice charge deferral took place on November 21, 2014, while the contract was still in effect. (R's Ex. 3, p. 1.) Thus, the new standard would not apply until that future date when the contract expired. Furthermore, because

¹ The contract was subsequently extended to April 6, 2015.

the hearing took place before *Babcock* was decided on December 15, 2014, the *Olin* standard was applicable. (See General Counsel Memorandum 15-02.)

The Olin Standard.

In *Olin Corp.*, 268 NLRB 573 (1984), the Board held that an arbitrator has adequately considered an alleged unfair labor practice if (1) the contractual issue was factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented with the facts generally relevant to resolving the unfair labor practice. The Board announced the following standard for deferral to arbitration awards:

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.

(*Id.*) The Board placed the burden of proof on the parties objecting to deferral, in this case the Union. “[W]e would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award.” (*Id.*) The Board concluded that it would fulfill its statutory obligation of assuring protection of employee rights by reviewing arbitral awards to ensure that they are not inconsistent with, nor clearly repugnant, to the National Labor Relations Act (the “Act”).²

² Under the applicable standard, the arbitration hearing had to be conducted in a fair and regular manner, and the parties had to agree to be bound by the arbitrator’s award. The ALJ correctly concluded that there was no evidence

The Arbitrator Correctly Applied the *Olin* Standard to the Arbitrator's Award.

1. The Contractual Issue Was Factually Parallel to the Unfair Labor Practice Issue, and the Arbitrator Was Presented with the Facts Generally Relevant to Resolving the Unfair Labor Practice.

The arbitration award reads like a synopsis of the evidence presented at the unfair labor practice trial. The facts are identical, there were no new witnesses at trial other than the Region 15 Compliance Officer who testified about potential damages, and the arbitrator squarely addressed the issue of whether Jones' decision to walk off the job in defiance of his supervisor's directive and at least two (2) plant rules was grounds for suspension and ultimately termination.

The so-called "factual parallelism" standard examines only the question of whether the arbitrator considered the factual issues that also would be considered in an unfair labor practice case. *Specialized Distribution Mgmt.*, 318 NLRB 158 (1995). Absent evidence that important facts have been omitted, the Board will find that the cases are factually parallel. *Anderson Sand & Gravel Co.*, 277 NLRB 1204 (1985).

Here, the facts presented at the unfair labor practice trial mirror those that were presented to and relied upon by the arbitrator. Likewise, the arbitrator directly addressed the issue of whether Jones' discharge violated the Act. (See R's Ex. 3, pp. 13-14.)

2. The Award Is Not Repugnant to the Policies of the Act.

The test for repugnancy is not whether the Board would have reached the same result as an arbitrator, but whether the arbitrator's award is palpably wrong as a matter of law. *Inland Steel Company*, 263 NLRB 1091 (1982). That standard of scrutiny was reaffirmed by the Board in *Olin Corp.*, where the Board defined "palpably wrong" as "not susceptible to an interpretation consistent with the Act." *Olin*, 268 NLRB 573 at 574.

or even a claim that the proceeding was unfair or irregular. He also correctly concluded that Article V, Section 5, of the contract clearly bound both parties to the decision of the arbitrator.

There is nothing in the arbitration award that even suggests that it is repugnant to the Act. The arbitrator squarely addressed Jones' violation of at least two (2) plant rules while on a final warning for having recently violated those same rules. Further, while the award did not contain an analysis of the parties' No Strike/No Lockout clause, the arbitrator clearly examined it in reaching his decision. Otherwise, that contract provision would not have been listed under the heading "PERTINENT CONTRACT PROVISIONS." (R's Ex. 3, p. 2.)

The ALJ correctly concluded that the arbitrator's decision was susceptible to a construction which is consistent with the Act, was not "palpably wrong" as defined by Board law, and that it was not clearly repugnant to the Act.

3. The Union's Argument Is Facially Inaccurate.

The Union bases its exception on the argument that the ALJ improperly found that the arbitrator "considered the unfair labor practice."³ According to the Union, the arbitrator only considered whether the Employer violated the contract by concluding that a contract violation was the same thing as deciding whether Jones was terminated because of his protected activity.

The arbitrator's "OPINION" begins mid-way down on page 9 of the Award and ends on page 14. Essentially, the Opinion section of the Award is five (5) pages long. Approximately one and one half (1 ½) of those pages are devoted to the unfair labor practice allegations. The arbitrator distinguished that issue from the "just cause" contractual standard, which actually carries a higher burden of proof on the part of the Respondent. The arbitrator clearly examined and rejected the unfair labor practice allegations. The Union's claim that the arbitrator equated a contract violation with a violation of the Act is simply wrong.

³ Actually, the Union's brief states that the "arbitrator" found that the "arbitrator considered the unfair labor practice." Presumably, it intended to state that the ALJ made this finding.

CONCLUSION

For the reasons cited by the ALJ and those above, the Union's Exception should be denied.

Respectfully Submitted,

/s/ Elmer E. White III
Elmer E. White III
The Kullman Firm
A Professional Law Corporation
600 University Park Place, Suite 340
Birmingham, AL 35209-6786
205-871-5858 Phone
205-871-5874 Fax
ew@kullmanlaw.com

COUNSEL FOR RESPONDENT,
Howard Industries, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 27th day of October, 2015, caused a copy of the above and foregoing pleading to be E-filed via www.nlr.gov and served upon the following:

VIA EMAIL

Clarence Larkin
President/Business Manager
IBEW, Local 1317
ibewlocal1317@bellsouth.net

VIA EMAIL

Joseph A. Hoffmann, Jr., Esq.
NLRB, Region 15
joseph.hoffmann@nlrb.gov

/s/ Elmer E. White III
Counsel for Respondent