

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

HOWARD INDUSTRIES, INC.

and

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL
UNION NO. 1317**

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Case 15-CA-131447

General Counsel's Cross-Exceptions to the Administrative Law Judge's Decision

November 4, 2015

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The General Counsel, through the undersigned Counsel for the General Counsel, and pursuant to Section 102.46 of the Board’s Rules and Regulations, files these Cross-Exceptions to the Administrative Law Judge’s Decision, which was issued on September 10, 2015, and transferred to the Board on September 24, 2015. The General Counsel makes the following cross-exceptions:

Cross-Exceptions

1. The Administrative Law Judge erred by deferring to an arbitrator’s award (findings located at pages 149 through 165 of the Transcript).
2. The Administrative Law Judge erred by not finding that the Arbitrator’s Award was palpably wrong (page 164 of the Transcript).
3. The Administrative Law Judge erred by not finding that the Arbitrator’s Award was repugnant to the Act (page 164 of the Transcript).

4. The Administrative Law Judge erred by raising the deferral issue *sua sponte* (located at page 8 of the Transcript).
5. The Administrative Law Judge erred by not finding that Howard Industries, Inc., violated the Act by terminating employee Gregory Jones.
6. The Administrative Law Judge erred by not making a finding whether employee Gregory Jones left work when he did for the purpose of enforcing the collective bargaining agreement.
7. The Administrative Law Judge erred by not making a finding whether employee Gregory Jones' leaving work was concerted and protected by the Act;
8. The Administrative Law Judge erred by not making a finding whether employee Gregory Jones' leaving work was union activity;
9. The Administrative Law Judge erred by not finding that Respondent terminated Gregory Jones because he engaged in protected concerted activity;
10. The Administrative Law Judge erred by not finding that Respondent suspended Gregory Jones because he engaged in protected concerted activity;
11. The Administrative Law Judge erred by not making any findings concerning backpay owed to Gregory Jones;
12. The Administrative Law Judge erred by not finding that Gregory Jones is entitled to \$40,220 in backpay.

Respectfully submitted this 4th day of November, 2015.

/s/ Joseph A. Hoffmann, Jr.
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Case 15-CA-131447

**Memorandum in Support of General Counsel’s Cross-Exceptions to the Administrative
Law Judge’s Decision**

The General Counsel, through the undersigned Counsel for the General Counsel, files this Memorandum in Support of General Counsel’s Cross-Exceptions to the Administrative Law Judge’s Decision.

I. Procedural History

The charge and amended charges in this matter were filed on June 24, August 18, and August 22, 2014, respectively, by the International Brotherhood of Electrical Workers, Local Union No. 1317 (“Union”). The charges allege that Howard Industries, Inc. (“Respondent”), unlawfully terminated its employee, Gregory Jones, the Union’s Chief Steward, in retaliation for his union and protected concerted activities.

On September 8, 2014, the Regional Director of Region 15 issued a letter announcing her intent to hold the investigation in abeyance and to defer to the results of the grievance and arbitration process of the parties.

On November 21, 2014, an arbitration hearing was conducted and, on February 6, 2015, the Arbitrator issued his Award, finding in favor of Respondent (the Arbitrator's Award was entered into the record as Respondent Exhibit 3).

On March 12, 2015, the Regional Director rescinded her deferral to the grievance and arbitration process of the parties.

On May 28, 2015, the Complaint and Notice of Hearing in this matter was issued and, on June 5, 2015, Respondent filed its Answer (General Counsel Exhibit 1(g) and 1(i), respectively).

On July 14, 2015, a Compliance Specification was issued along with an Order consolidating the unfair labor practice proceedings with the compliance proceedings (General Counsel Exhibit 1(m)). On July 17, 2015, Respondent filed its Answer to the Compliance Specification (General Counsel Exhibit 1(o)).

On September 9 and 10, 2015, a hearing was held before Administrative Law Judge Keltner Locke.

During the hearing, the General Counsel amended the Compliance Specification (Tr. 99-101, General Counsel Exhibit 4).

Also during the hearing, on September 10, 2015, Judge Locke issued a bench Decision (found on pages 149 through 165 of the Transcript).¹

On September 24, 2015, the proceedings were transferred to the Board.

On October 21, 2015, the Union filed Exceptions to the Administrative Law Judge's Decision.

On October 27, 2015, Respondent filed an Answering Brief to the Union's Exceptions to the Administrative Law Judge's Decision.

¹ Cites to the Transcript will be Tr. [page #].

Now, the General Counsel files these Cross Exceptions to the Administrative Law Judge's Decision and Memorandum in Support.

II. The Relevant Unfair Labor Practice Allegations

The unfair labor practice allegations at issue in these Cross-Exceptions, found at Paragraph Nos. 8 through 10 of the Complaint, are that Respondent unlawfully terminated Gregory Jones because of his union and protected concerted activity. However, Judge Locke did not consider whether Chief Steward Jones engaged in union or protected concerted activity or whether Respondent violated the National Labor Relations Act ("Act") by terminating Chief Steward Jones for that activity, instead, finding that the Regional Director should have deferred to the Arbitrator's Award.

III. The Facts as Demonstrated by Unrebutted Testimony

Respondent's employees work overtime practically every day. (Tr. 46). However, those same employees, through the Union, bargained for a limitation on the number of hours they may be required to work each day. (Tr. 85-86). According to Article VIII, Section 9, of the parties' collective bargaining agreement ("CBA"), employees may not be required to work more than 12 hours per day, unless it is the one day per week that employees may be required to work a "double shift."²

The Respondent and Union, however, dispute what makes a double shift. Respondent believes a double shift is any shift that is more than 12 hours. (Tr. 29, 81-82). According to the Union, and Chief Steward Jones, a double shift is 16 hours based on the simple mathematical truth that $2 \times 8 = 16$. (Tr. 28-29, 51).

² Tr. 48; Joint Exhibit 2, p. 6; though employees may voluntarily work more than 12 hours any day (Tr. 49, 82).

On Friday, June 6, 2014,³ Charles Smith, a supervisor, during the morning meeting of the employees on Smith's crew, informed employees they would be "working over" that day. (Tr. 45-48). By "working over," he meant they would be working overtime (longer than their base 8-hour shift). This was a daily occurrence. However, he then added they might be working more than 12 hours. This was not a daily occurrence; this was the first time Supervisor Smith ever required it. Chief Steward Jones, a member of Supervisor Smith's crew, spoke up and said that Smith could not do this. As noted above, Chief Steward Jones and the Union believe that employees cannot be made to work more than 12 hours in a day unless it is the designated double shift day and Supervisor Smith did not say they would be working a double shift.

Later that day, Chief Steward Jones' coworkers complained to him about Supervisor Smith's intent to require them to work more than 12 hours. (Tr. 51-53). Some of them even indicated they would leave after 12 hours regardless of how long Supervisor Smith wanted them to work. Chief Steward Jones advised them to stay and told them the Union would file a grievance. The employees worked between 13 and 15 hours that day.

On Tuesday, June 10, Chief Steward Jones filed the grievance. (Tr. 53; Joint Exhibit 4). The grievance protested Supervisor Smith's requirement that they work more than 12 hours. In addition, the previous day (June 9), Chief Steward Jones informed Supervisor Smith about the grievance. (Tr. 54-55). In response to Supervisor Smith's assertion that the employees volunteered to stay, Chief Steward Jones pointed out this was clearly not true because the employees asked that the grievance be filed.

Earlier on the day Chief Steward Jones filed the grievance (June 10), at the morning meeting of shift employees, Supervisor Smith again informed employees they would be working over. (Tr. 55). He did not say it would be a double and he did not say it would be more than 12

³ Unless otherwise noted, all dates are in 2014.

hours. At the end of the day, after working more than 12 hours, Chief Steward Jones left. (Tr. 56-58). Before leaving, however, Chief Steward Jones informed Supervisor Smith. Chief Steward Jones told Supervisor Smith he worked more than 12 hours and he was leaving. Chief Steward Jones did not ask any other employees to leave with him. (Tr. 57).

Two days later, on June 12, when Bailey James, a Human Resources Generalist, asked Chief Steward Jones why he left, Chief Steward Jones explained he left in observance with an arbitrator's decision (Tr. 59, "I said 'the arbitrator ruled on this here, we won this in arbitration.'"). According to HR Generalist James, Chief Steward Jones said that he left because he worked 12 hours and that he told her that Respondent's Vice President Human Resources, Loren Koski, had told him he could leave after 12 hours. (Tr. 20-21). Further, while she could not recall the details, HR Generalist James recalls Chief Steward Jones "mentioning that there was a contract that they awarded, and that's what he was saying – he was using that as – when he was talking to me." (Tr. 21).

The following day, June 13, HR Generalist James called Chief Steward Jones. (Tr. 60-61). When HR Generalist James asked Chief Steward Jones if Supervisor Smith had asked him whether he said "we aren't finished," Chief Steward Jones agreed that he did but then asserted that the CBA does not speak of working until finished but, rather, not being required to work more than 12 hours (Tr. 61, "I said 'but the contract don't say work until you're finished.' I said 'I done – I worked my 12 hours, I'm standing firm on 12.'"). While she could not recall precisely, HR Generalist James recalled that Chief Steward Jones said something about the CBA not requiring him to work more than 12 hours (Tr. 22, "I – he may have. I can't recall the whole statement. I'm sorry."). She also recalled that that he was "standing firm" on something, though she does not recall the details. (Tr. 22).

On June 19, Respondent sent a letter to Chief Steward Jones informing him that he had been terminated. (Tr. 62).

IV. Judge Locke's Findings as they Pertain to the Merits of the Complaint

Judge Locke made few findings as they pertain to the merits of the Complaint. Instead, Judge Locke deferred to the Arbitrator's Award (discussed *infra*). Judge Locke's findings in this regard were limited mostly to finding that most of the Complaint allegations were either admitted to or proven. (Tr. 151 – 153). He also found that, on June 10, Chief Steward Jones "complained that Respondent was requiring employees to work mandatory double overtime without proper notice, in contravention of the CBA. (Tr. 152). However, Judge Locke did not make a finding concerning the following paragraphs in the Complaint:

- Paragraph 8(b), alleging: Chief Steward Jones left work to protest Respondent's failure to abide by the CBA;
- Paragraph 8(c), alleging Chief Steward Jones' leaving work was related to the CBA;
- Paragraph 9(c), alleging Respondent suspended and terminated Chief Steward Jones because he engaged in protected concerted activity;
- Paragraph 9(d), alleging Respondent suspended and terminated Chief Steward Jones because he engaged in union activity; and
- Paragraph 10, alleging Respondent's conduct violated the Act.

Nevertheless, as noted and described above, all of the pertinent facts are established by Chief Steward Jones' unrebutted (and partially corroborated) testimony and they establish that Respondent violated the Act by terminating Chief Steward Jones.

V. Argument

Respondent violated the Act by terminating Chief Steward Jones. Often, the Board conducts a *Wright Line* analysis in determining whether an employer's action against an employee violates the Act. See *Wright Line*, 251 NLRB 1083 (1980). However, a *Wright Line* analysis is appropriate only in cases in which it is necessary to determine the employer's motive. *Phoenix Transit System*, 337 NLRB 510, 510 (2002). In cases in which it is undisputed that the employer's actions were motivated by the employee's allegedly protected activities, the only issue is whether the employee's activity is actually protected. *Id.*

An employee who attempts to enforce a provision of his CBA is engaged in concerted activity. See *Interboro Contractors*, 157 NLRB 1295 (1967). See also *Wheeling Pittsburgh Steel*, 277 NLRB 1388, 1394 (1985) ("It is well established that an employee's attempts to implement the terms of a collective-bargaining agreement are protected by Section 7 of the Act, whether or not the employee's interpretation of the contract is correct or whether the employee specifically refers to a contract clause while making his complaint.").

The conduct is protected even if the employee, in the process, violates a rule or disregards instructions. In *USPS*, 332 NLRB 340 (2000), a case remarkably similar to the instant one, the Board upheld the administrative law judge's finding that employees who refused direct orders to work overtime because management failed to follow the terms of the collective bargaining agreement were engaged in protected activity. The collective bargaining agreement required that if management wanted employees to work overtime, the employees must be given a one-hour notice. *Id.* at 341. When certain employees were told they had to stay overtime even though they had not been given the proper notice, they protested but were told by management to file a grievance. *Id.* at 342. Instead, the employees left at their scheduled time. *Id.* The

administrative law judge (later sanctioned by the Board) found that the USPS violated the Act because the employees, by refusing to work overtime, were engaged in protected concerted activity. *Id.* at 343.

In *Wheeling Pittsburgh Steel*, 277 NLRB 1388 (1985), an employee's refusal to operate a piece of machinery was found to be protected. In *Wheeling*, the employer and union had different interpretations over a provision in the collective bargaining agreement whether an employee who has a safety concern must continue working until the union's safety representative arrives or may stop working until the safety representative arrives. *Id.* at 1393. The discriminatee refused to operate a piece of equipment until it was inspected by a safety representative and disobeyed a direct order from a superior who looked at the piece of equipment and determined it was safe. *Id.* at 1390. The employer suspended and terminated the discriminatee. *Id.* However, the Board upheld the administrative law judge who found that the discriminatee's conduct was a protected concerted effort to enforce the collective bargaining agreement and the suspension and termination were thus unlawful. *Id.* at 1394.

In *Bob Henry Dodge*, 203 NLRB 78 (1973), the Board overturned an administrative law judge who found the discriminatee's conduct to be unprotected because the discriminatee disregarded an order of management. In the case, an employee, who was also the steward, stood up during a meeting and said he was not going to change his day off, which he had been instructed to do (as were all employees). *Id.* The administrative law judge found that the employee's statutory right to "grieve on his own behalf regarding the change to his day off," "did not entitle him to disobey a legitimate order of management." *Id.* The Board, however, disagreed, noting that the administrative law judge's characterization of the employer's order to the discriminatee as a "legitimate order of management" begs the very question on which the

legality of the employer's conduct in discharging the employee depends. *Id.* Finally, the Board noted that the protections accorded employees under the Act are not dependent upon the merit, or lack of merit, of the concerted activity in which they engage, even though such activity embraces the disobedience of an order of management. *Id.*

In *Mike Yurosek & Sons*, 306 NLRB 1037 (1992) ("*Yurosek 1*"), and *Mike Yurosek & Sons*, 310 NLRB 831 (1993) ("*Yurosek 2*"), the Board found that employees who refused instructions to stay late were engaged in protected concerted activity. In *Yurosek 1*, the administrative law judge granted the employer's motion for summary judgment finding that the General Counsel failed to make out a *prima facie* case. The Board remanded the case back to the administrative law judge finding that the General Counsel did make out a *prima facie* case.

In the case, a manager told five employees they had to leave at a particular time. *Yurosek 1*, 306 NLRB at 1037. Later, a supervisor separately instructed each of the employees to leave at a later time. *Id.* Each of the five employees told the supervisor he could not stay because he was told to leave at the earlier time. *Id.* At the time they were originally told to leave, they all left. *Id.* They had not spoken to each other about it. *Id.* Because of this, the administrative law judge found the conduct was not concerted. *Id.* at 1037-38. The administrative law judge also found the employees' conduct was not protected because they acted in defiance of their supervisor and were essentially trying to unilaterally determine their own working hours. *Id.*

In its remand, given the way the employer treated the employees as a group, and given their identical answers to the question why they left, the Board held the evidence was sufficient to make out a *prima facie* case that at least the employer believed they were engaged in concerted activity. *Id.* at 1038. The Board also found the employees' activity was protected, holding:

Employees have a right to engage in a concerted refusal to work, even when the assignment is to work overtime. Only when employees repeatedly refuse to perform mandatory overtime does their conduct become unprotected by the Act because that conduct constitutes a recurring or intermittent strike, which amounts to employees unilaterally determining conditions of work. In the instant case, the employees refused to work overtime on only one occasion. There was no indication that they were planning to intermittently refuse to work overtime thereafter. In these circumstances, the employees' concerted refusal to work overtime on [the date in question] was protected by the Act [*Id.* at 1039].

On remand, in *Yurosek 2*, 310 NLRB at 831, the administrative law judge found the employees engaged in protected concerted activity when they refused to stay and that terminating them because of it was a violation of the Act. Subsequently, the Board upheld the administrative law judge's findings and also held that the employees were engaged in protected concerted activity by protesting the conflicting instructions they were given. *Id.*

The conduct of the employees in the *Yurosek* cases is remarkably similar to that of Chief Steward Jones. In the *Yurosek* cases, the Board determined the employees left in protest of the conflicting instructions of the supervisor and a manager; in the current matter, Chief Steward Jones left in protest of a conflict between the protective constraints of the CBA and the dictates of a supervisor. At first, though, on June 6, when Respondent required employees to work more than 12 hours in violation of the CBA, Chief Steward Jones protested in the traditional way by filing a grievance. However, on the day he filed the grievance, June 10, Chief Steward Jones escalated his protest by leaving after 12 hours. While he may have acted alone, under *Interboro*, an employee acting alone to enforce the CBA is nevertheless engaged in concerted activity. Based on the *Yurosek* cases, even though he was disregarding expectations in doing it, his activity was also protected. Therefore, because Respondent fired Chief Steward Jones because he left work when he did, and Chief Steward Jones leaving work when he did was protected concerted activity, Respondent violated the Act.

While one might argue that the no-strike clause contained in the parties' CBA rendered Chief Steward Jones' actions unprotected, such an argument would fail. The no-strike clause states (in part, emphasis added): "There shall be no strikes, slowdowns or work stoppages of any kind or any other activity of employees or of the Union *designed to curtail or interfere with production* and there shall be no lockouts by the Company because of labor disputes between employees or the Union and the Company." (Joint Exhibit 2, p. 2). This language is not an effective waiver of Chief Steward Jones' right to leave work to enforce the terms of the CBA. The waiver of the statutory right to engage in a strike or work stoppage must be "clear and unmistakable." *St. Regis Paper Company*, 253 NLRB 1224 (1981). See also *Kellogg Company*, 189 NLRB 948 (1971).

In *Kellogg*, the Board found that two employees who refused to cross the picket line of another union did not act in violation of the no-strike clause in their own collective-bargaining agreement and were engaged in protected concerted activity. The employer disciplined the employees for unsatisfactory attendance. *Id.* Throughout the investigation and grievance, the employees maintained they missed work because they were refusing to cross the picket line. *Id.* The administrative law judge agreed with the employer that the employees acted in contravention of the no-strike clause; however, noting the actual language of the no-strike clause, the Board disagreed. *Id.*

There were two pertinent sections of the clause: one section prohibited strikes arising under the terms of the collective-bargaining agreement, the other prohibited sympathy strikes. *Id.* at 948-49. The section prohibiting strikes arising under the collective-bargaining agreement stated that no strike "shall be caused or sanctioned by the [u]nion, or by any members thereof," while the section prohibiting sympathy strikes stated "no sympathy strike shall be caused or

sanctioned by the [u]nion.” *Id.* Thus, reasoned the Board, the absence of the “or by any members thereof” language in the sympathy strike clause must mean the parties intended only to prohibit the union from calling such a strike, not to prohibit employees from engaging in one *sua sponte*. *Id.* Therefore, the Board found the employees did not act in violation of the no-strike clause and their refusal to cross the picket line was protected activity. *Id.* at 949.

Further, the Board noted that the employees, throughout their action, maintained their position that they were refusing to cross the picket line but the employer’s stated reason for disciplining them was not that they violated the no-strike clause but that they violated the work rule concerning unsatisfactory attendance. *Id.*

In the current matter, the no-strike clause does not prohibit *all* strikes, slowdowns or work stoppages but, rather, only those strikes, slowdowns or work stoppages “designed to curtail or interfere with production.” Because every strike or work stoppage will necessarily affect production in some way, the inclusion of the phrase *designed to curtail or interfere with production* must mean the parties intended to prohibit only those strikes that were actually *designed to curtail or interfere with production*. Any other finding would render the inclusion of the phrase “designed to” superfluous and mere surplusage. See, e.g., *Transitional Learning Cmty. v. United States Office of Personnel Mgmt.*, 220 F.3d 427, 431 (5th Cir.2000) (under federal common law, “a contract should be interpreted as to give meaning to all of its terms, presuming that every provision was intended to accomplish some purpose, and that none are deemed superfluous.”). Thus, unless it can be shown that Chief Steward Jones’s activity was *designed to curtail or interfere with production*, his actions were not in violation of the clause.

There is no evidence Chief Steward Jones’ conduct was “designed to curtail or interfere with production.” Further, Chief Steward Jones has always maintained that his intent was to

enforce the terms of the CBA. If he truly intended to curtail or interfere with production, he would have encouraged others to follow him for maximum affect on production; he did not. Further, as in *Kellogg*, Respondent did not terminate Chief Steward Jones for violating the no-strike clause but, rather, for violating plant rules. Consequently, because Chief Steward Jones' conduct was not "designed to curtail or interfere with production," his conduct was not a violation of the no-strike clause, and he did not lose protection of the Act. Therefore, Chief Steward Jones' termination was because of union and protected concerted activity and is a violation of the Act. Because of this, Judge Locke's deferral to the Arbitrator's Award, which found that Chief Steward Jones' termination was for "just cause," was in error.

VI. The Deferral

A. Judge Locke's Findings Pertaining to Deferral

Instead of determining whether Respondent violated the Act, Judge Locke determined it was appropriate to defer to the Arbitrator's Award. At the start of the hearing, Judge Locke *sua sponte* directed the parties to address the appropriateness of deferring to the Arbitrator's Award (Tr. 8). Subsequently, applying *Babcock & Wilcox Construction*, 361 NLRB No. 132 (2014), Judge Locke determined the proper standard to decide the issue was the standard articulated in *Olin Corporation*, 268 NLRB 573 (1984). Applying the *Olin* enumerated criteria, Judge Locke determined the Arbitrator considered the statutory issue, that the Award was not repugnant to the Act, and thus deferral to the Arbitrator's Award was appropriate. However, Judge Locke erred in doing so because the Arbitrator's Award is palpably wrong and repugnant to the Act.

B. Argument

Judge Locke erred by deferring to the Arbitrator's Award because the Arbitrator's Award is repugnant to the Act. An arbitrator's award is repugnant to the Act if it is "palpably wrong," which means the arbitrator's award is "not susceptible to an interpretation consistent with the Act." *Olin Corporation*, supra; See also *Mobil Oil Exploration & Producing*, 325 NLRB 176 (1997) (arbitrator's award repugnant to Act because it upheld termination for insubordination of employee who broke promise to not discuss an investigation when he tried to rally coworkers to his point of view); *Garland Coal & Mining Company*, 276 NLRB 963 (1985) (arbitrator's award repugnant to Act because it upheld termination for insubordination of union steward who refused to sign memorandum agreeing not to "interfere" in any area of the facility other than his own); and *USPS*, 332 NLRB 340 (2000) (arbitrator's award repugnant to Act because it upheld termination of employees who refused to work overtime because management failed to abide by terms of collective bargaining agreement in requiring them to stay). Similarly, in the current matter, the Arbitrator's Award is repugnant to the Act because Respondent terminated Chief Steward Jones for engaging in protected activity and yet the Arbitrator upheld the termination.

In his analysis, the Arbitrator acknowledged that Chief Steward Jones had a different interpretation of the relevant provisions of the CBA than that of Respondent, but found that Chief Steward Jones' belief in what the CBA required did not justify his actions. In doing so, the Arbitrator wrote the following:

- Regardless of whether [Chief Steward Jones'] interpretation of [the CBA] is correct or not, he committed misconduct by refusing to complete his overtime assignment and leaving the plant without the permission of his supervisor [Respondent Exhibit 3, p. 11].

- In the present case [Chief Steward Jones] failed to follow the well-established rule of “obey now grieve later” [Respondent Exhibit 3, p. 11].
- Employees must follow the orders of supervision and file a grievance even if they believe the agreement has been violated [Respondent Exhibit 3, p. 11].
- Unfortunately, [Chief Steward Jones’] genuine belief that his interpretation of the Agreement was correct is not a viable defense to refusing to complete his overtime assignment and leaving the plant without permission [Respondent Exhibit 3, p. 12].

All of these statements, especially the last, are directly contrary to the Board’s *Interboro* doctrine.

There is no dispute that Respondent terminated Chief Steward Jones because he left work when he did. Thus, the only statutory issue to be decided is whether Chief Steward Jones’ actions were protected by the Act. See, *Phoenix Transit System*, supra. If, as Judge Locke found, the Arbitrator considered the statutory issue and determined Chief Steward Jones’ termination was for “just cause,” then the Arbitrator’s Award is repugnant to the Act. The Arbitrator made several sweeping assertions, noted above, that an employee’s genuine belief in an interpretation of a collective bargaining agreement does not justify disobeying a supervisor’s instructions.⁴ Because these statements, underlying the Arbitrator’s analysis, are a “palpably wrong” description of long established Board law, the Arbitrator’s findings are not “susceptible to an interpretation consistent with the Act.” The Arbitrator’s finding is effectively: even though Chief Steward Jones engaged in protected concerted activity, his termination was for “just cause.” Such a finding is repugnant to the Act.

⁴ While the Arbitrator qualified his assertion that employees may not refuse a supervisor’s instructions based on their understanding of a collective bargaining agreement “in the absence of a safety concern” (Respondent Exhibit 3, p. 12), the Arbitrator did not cite, and the General Counsel is unaware of, any Board case establishing such a limitation to employees’ Section 7 rights. Further, cases such as *USPS* and *Bob Henry Dodge*, supra, show that there is, in fact, no such limitation.

In *USPS*, 332 NLRB 340 (2000), discussed *supra*, the administrative law judge declined to defer to an arbitrator's award because the award was repugnant to the Act. As noted above, the collective bargaining agreement required that, if management wanted employees to work overtime, the employees must be given a one-hour notice. When certain employees were told they had to stay overtime even though they had not been given the proper notice, they protested but were told by management to file a grievance. Instead, the employees left at their scheduled time. The following day they were fired.

Grievances were filed and the matter went to arbitration. The arbitrator found in management's favor, noting that the employees "decided to take matters in their own hands by refusing to work the required overtime." *Id.* at 342. He continued, "I find that the [USPS] in this matter took the termination actions because the grievants refused to work overtime, not because they engaged in protected concerted activity." *Id.* The General Counsel issued a complaint.

In response to the USPS' assertion that deferral was appropriate, the administrative law judge found that deferral was not appropriate because the arbitrator's award was repugnant to the Act. The administrative law judge found that the facts showed the employees refused to work overtime because the USPS was violating the collective bargaining agreement by not giving a one-hour notice. *Id.* at 343. Because employees who are attempting to enforce the provisions of a collective bargaining agreement are engaging in protected concerted activity, the administrative law judge found that the arbitrator's decision to uphold the terminations was repugnant to the Act (calling it the arbitrator's "own crude hand of industrial justice"). *Id.* at 344. The Board adopted the administrative law judge's findings. *Id.* at 340.

In the current case, the un rebutted testimony is that Chief Steward Jones left because he was attempting to enforce the terms of the CBA that prohibited Respondent from requiring

employees to work more than 12 hours that day. This activity is concerted and protected. The Arbitrator, however, found that Chief Steward Jones' belief regarding the CBA was not a "viable defense" to refusing to complete his overtime assignment. Therefore, the Arbitrator's Award is repugnant to the Act. Consequently, Judge's Locke failure to find the Award repugnant to the Act and his decision to defer to the Award were in error.

C. Other Issues Caused by the Erroneous Deferral

Because Judge Locke deferred to the Arbitrator's Award, Judge Locke did not make two necessary findings concerning whether Respondent violated the Act (one factual, one legal), and failed to make any findings concerning the amount of backpay owed to Chief Steward Jones. However, while such findings must be made, it is not necessary to remand the matter back to Judge Locke for his findings.

1. ULP Findings

Judge Locke did not determine whether Chief Steward Jones left work when he did because he was attempting to enforce the CBA, and Judge Locke did not determine whether that activity was protected and concerted. However, while the failure to make a factual finding usually requires remand, in the circumstances of the current case, remand is not necessary.

It is Chief Steward Jones' unrebutted testimony that he left work when he did because he was attempting to enforce the CBA. Further, his unrebutted testimony shows that, at each stage, he expressed this intent (some of which HR Generalist James corroborates, none of which she denies). Given this, any finding other than that Chief Steward Jones was attempting to enforce the terms of the CBA would be unsupported by the evidence. Thus, remanding the matter back to Judge Locke for a finding is unnecessary.

As for whether Chief Steward Jones' conduct was protected and concerted, these are legal conclusions which the Board may make *de novo*.

2. Backpay Findings

Judge Locke did not make any findings regarding whether Chief Steward Jones was owed backpay. Again, however, remand is not necessary.

There is no dispute over how much Chief Steward Jones would have earned if he had not been terminated. During the hearing, the General Counsel moved to amend the Compliance Specification and entered into evidence an Amended Compliance Specification (General Counsel Exhibit 4). Respondent admitted that the gross backpay calculation was accurate (Tr. 100 – 101).

Respondent offered no evidence suggesting that Chief Steward Jones earned more interim earnings than was alleged in the Specification. Consequently, any finding that Chief Steward Jones earned more than alleged in the Specification would be unsupported by the evidence.

Thus, the only issue is whether Chief Steward Jones exercised reasonable diligence in searching for work. Because this is a legal conclusion, however, it is unnecessary to remand the matter back to Judge Locke. In any event, Respondent did not present sufficient facts to support a finding that Chief Steward Jones did *not* exercise reasonable diligence in searching for work.

To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment; the discriminatee must put forth an honest, good-faith effort to find interim work; however, the law does not require that the search be successful. *Midwestern Personnel, Inc.*, 346 NLRB 624 (2006). While there is no particular standard for what constitutes a good-faith search for work:

It can be said that in broad terms a good-faith effort requires conduct consistent with an inclination to work and to be self-supporting and that such inclination is best evidenced not by a purely mechanical examination of the number or kind of applications for work which have been made, but rather by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment. Circumstances include the economic climate in which the individual operates, his skill and qualifications, his age, and his personal limitations.

Mastro Plastics Corporation, 136 NLRB 1342, 1359 (1962).

Respondent has the burden of establishing affirmative defenses to mitigate its liability, including willful loss of interim earnings. *Midwestern Personnel, Inc.*, 346 NLRB 624, 625 (2006). Respondent does not meet this burden by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings. *Id.* at 625. It is Respondent's burden to demonstrate affirmatively that the discriminatee failed to exercise reasonable diligence in searching for work. *Id.* Respondent must identify specific jobs that were available; however, the mere existence of "help wanted" ads does not satisfy this burden. *Id.* at 625-26. Doubts, uncertainties, or ambiguities are resolved against the wrongdoing Respondent. *Id.* at 625.

If Respondent shows that there were substantially equivalent jobs within the relevant geographic area during the backpay period, *only then* must the General Counsel show that the discriminatee took reasonable steps to seek those jobs. *St. George Warehouse*, 351 NLRB 961, 961 (2007).

While Chief Steward Jones admitted he did not submit any applications during the first quarter of 2015 (just before his disability payments began),⁵ this is insufficient to establish that Chief Steward Jones failed to exercise reasonable diligence in searching for work. If there are no job openings, Chief Steward Jones cannot apply for them. Exercising reasonable diligence does

⁵ Note: previously filed applications were still pending (Tr. 115).

not require a discriminatee to contact every business in his vicinity on the chance that they might be hiring, and the Board does not require the General Counsel to establish that there were no job openings for which to apply. On the contrary, it is Respondent's burden to establish that Chief Steward Jones failed to exercise reasonable diligence in searching for work by identifying specific jobs that were available. However, because Respondent presented no evidence of such jobs, any finding that Chief Steward Jones did *not* exercise reasonable diligence would not be supported by the evidence. Consequently, there is no need to remand the matter back to Judge Locke for his findings. Therefore, because the evidence supports only one finding concerning whether Chief Steward Jones is entitled to backpay, it is unnecessary to remand the matter back to Judge Locke for his findings.

D. A Final Concern Regarding the Deferral

As a final matter, the General Counsel takes great exception to Judge Locke raising the deferral issue *sua sponte*. ULP hearings are adversarial proceedings, with each party bearing certain responsibilities and burdens. A party's failure to meet one of its responsibilities will often, and rightly, render that party the loser. Whether the Board should defer to an arbitrator's award is an affirmative defense that must be raised by a respondent either in its answer or during the hearing or it is waived forever. See, e.g., *SEIU United Healthcare Workers*, 350 NLRB 284, 288 n.1 (2007). In the current matter, despite being aware of the favorable Arbitrator's Award, Respondent did not raise it in its Answer, an obvious course of action if Respondent intended to make the argument. While Respondent still could have raised the issue during the hearing, instead, Judge Locke took it upon himself to raise it for Respondent. Judge Locke's *sua sponte* assertion of Respondent's affirmative defense gave Respondent an advantage to which Respondent was not entitled. (Tr. 8). Moreover, raising affirmative defenses *sua sponte* is

contrary to federal jurisprudence. See, e.g., *US v. Mitchell*, 518 F3d 740, 745 (10th Cir. 2008) ([C]ourts generally may not raise affirmative defenses *sua sponte*). Therefore, regardless of the appropriateness of deferral, the General Counsel asks that the Board disregard Judge Locke's deferral and consider the merits of the allegations.

Conclusion

The General Counsel's exceptions should be granted. Judge Locke erred by deferring to the Arbitrator's Award because it was repugnant to the Act. Instead, Judge Locke should have considered the allegations and determined that Respondent violated the Act by terminating Chief Steward Jones for engaging in the protected concerted activity of attempting to enforce the terms of the CBA.

However, under the circumstances, it is not necessary for the Board to remand the matter back to Judge Locke for his findings. The evidence does not support any factual findings other than those that have been described above. As for whether Chief Steward Jones' activity was protected and concerted, those findings are legal findings which the Board may make *de novo*.

Therefore, the General Counsel asks the Board to grant its exceptions and to find that Chief Steward Jones's actions were an attempt to enforce the terms of the CBA, that Chief Steward Jones' actions were concerted and protected by the Act, and that Respondent violated the Act by terminating Chief Steward Jones for those actions. Further, the General Counsel asks that the Board find Chief Steward Jones is entitled to backpay in the amount set forth in Paragraph 13 of the Amended Compliance Specification - \$40,220.

Signed this 4th day of November, 2015.

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Certificate of Service

I hereby certify that a copy of the foregoing Exceptions and Memorandum in Support of
Exceptions have been served on the following, by email, on November 4, 2015:

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