

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

WEAVEXX, LLC

Case No. 15-CA-119783

Respondent,

and

TEAMSTERS LOCAL UNION 984,

Charging Party.

REPLY TO GENERAL COUNSEL'S ANSWERING BRIEF
IN RESPONSE TO RESPONDENT'S EXCEPTIONS

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I. Introduction

The General Counsel, like the Administrative Law Judge's decision ("ALJD"), evades the critical deferral issue – whether the award is susceptible to any interpretation consistent with the Act. See *Smurfit-Stone Container Corp.*, 344 NLRB 658, 659-660 (2005). Indeed, the General Counsel's brief ("GC Brief") completely ignores the most rational reading and thereby forfeits any claim to have proven that it is unreasonable. See *Olin Corp.*, 268 NLRB 573, 574 (1984)(party opposing deferral must prove deficiency in award).

The Board has only once before, in *Smurfit-Stone*, assessed whether an arbitrator in a Section 8(a)(5) unilateral change case relied on contractual "reserved rights" or extra-contractual "inherent rights". The Administrative Law Judge ("ALJ") cursorily dismissed *Smurfit-Stone's* relevance and the General Counsel doubles down by eschewing any consideration of this most pertinent precedent, never explaining why the Board's analysis in that case does not warrant application here.

II. "Managerial Discretion" Does Not Mean "Inherent Rights"

Rather than analyze the entire award in accordance with Board law, the General Counsel's case rests on the arbitrator's use of a single phrase: "Instead, as Judge Cates accurately concluded, the arbitrator rested his decision on what he described as Respondent's 'managerial discretion' to change employee pay periods." [See GC Brief, at p. 14]. The propriety of deferral under this approach necessarily turns on interpretation of that phrase, which appears one other time in the arbitration record – as a reference to the collective bargaining agreement's ("CBA") "reserved rights" language. [See Co. Exh. 1, at p. 4].

The General Counsel's brief, like the ALJD, conveniently ignores this connection because it conflicts with the ALJ's interpretation of the award, which rests on the shaky premise that the arbitrator ascribed a meaning to "managerial discretion" contrary to that phrase's usage in the record. By pretending that the arbitrator concocted the phrase without consideration of the parties' arguments, the ALJD implicitly concluded that the arbitrator's adoption of Weavexx's terminology *cannot* be interpreted to refer to Section 4 of the CBA. Yet neither the ALJD nor the General Counsel's brief offer a single word of explanation for this determination, curiously choosing instead to assign a meaning with no basis in the arbitration record and ignoring the arbitrator's repeated citation of the "reserved rights" provision.

The General Counsel and ALJ's misinterpretation of this critical phrase is further exposed by their failure to offer any rationale for the arbitrator's identification of the CBA's "reserved rights" language as relevant to the dispute and then supposed omission of any consideration of it in his decision. In their reading, the arbitrator noted the relevance of numerous provisions of the contract in Part II of his opinion but then considered all but one of them, the "reserved rights" proviso, and decided the case based on "inherent rights" never referenced by anyone. Indeed, by failing to grasp the arbitrator's use of the "excessive or unnecessary" test to ascertain whether Weavexx's actions were "unreasonable" under the CBA's Section 4, the General Counsel, like the ALJD, stunningly interprets the opinion as never having addressed Section 4 in any way. Only by recognizing that the arbitrator intended "managerial discretion" to carry the same meaning as it appeared in the record can an interpretation account for all provisions of the CBA deemed relevant by the arbitrator.

The misreading of this phrase also reflects a misguided conflation of the terms "managerial discretion" and "inherent rights." A union in collective bargaining may lawfully

grant an employer the right to act unilaterally. For example, the CBA's Section 3 allows Weavexx freedom to exercise its discretion with regard to the products to be manufactured, the location of plants, and the production schedule, among other things. [Co. Exh. 2, at p. 5]. An arbitrator could properly state that Weavexx employed its "managerial discretion" to change the products it makes without suggesting the existence of any inherent rights. The Board has itself routinely referred to "reserved rights" as "managerial discretion". See, e.g., *Register-Guard*, 339 NLRB 353, 355 (2003); *Blue Circle Cement Co.*, 319 NLRB 954 (1995). The arbitrator's usage of that phrase is hardly the "smoking gun" perceived by the ALJ and General Counsel. Having established that "managerial discretion" can reasonably be interpreted to refer to the CBA's "reserved rights" provision, Board law clearly requires deferral as the General Counsel tacitly acknowledges by his silence. *Dennison National Co.*, 296 NLRB 169, 170 (1989).

III. The General Counsel Relies on Misstatements of Fact and Law

The General Counsel's brief manifests numerous errors of law and fact in seeking to relitigate the arbitration, challenging the arbitrator's past practice analysis and presenting arguments regarding the parties' bargaining history not even referenced in the ALJD.

First, the Board is not charged with adjudicating the arbitration. [See GC Brief, at p. 14]; see *Dennison National*, 296 NLRB at 170 (Board's role at post-arbitration deferral stage is not as a trial de novo); *Andersen Sand & Gravel Co.*, 277 NLRB 1204, 1205 (1985)(Board will not substitute its judgment for that of arbitrator regarding contractual issues).

Second, neither the ALJD nor Weavexx's exceptions referenced the parties' 2011 collective bargaining negotiations and the General Counsel may not properly raise them now. 29 C.F.R. §102.46(g). Additionally, the General Counsel's flagrant embellishment of them

underscores their immateriality, The General Counsel's brief falsely asserts that Union President Lovan suggested including pay cycles and pay days in the contract during the 2011 negotiations. [GC Brief, at p. 6]. Lovan offered no such testimony. The alleged conversations that he described concerned past practices more generally, not pay days or pay periods. [Tr. 53:25, 54:1-9]. The Union never sought the inclusion of any language regarding past practices in the contract and Lovan did not recall seeking Weavexx's agreement not to change them. [Tr. 58:16-19, 60:3-5]. The General Counsel also misidentifies Ross Johnstone as the other party to the alleged discussion. [See GC Exh. 2, at p. 26; Tr. 34:14-15].

The ALJ apparently and rightly deemed Lovan's testimony irrelevant to resolution of the issues before him. Lovan's inability to recall where or when the alleged conversation occurred or even who was present undermines whatever tangential relevance, let alone probity, his testimony might offer. [See Tr. 60:17-62:20]. The Union did not achieve, or even attempt to achieve, any limitation on Weavexx's contractual right to change pay periods or pay days at the bargaining table in 2011, as demonstrated by the record evidence, including the CBA. [See GC Exh. 2]. In any case, the first sentence of the CBA's Section 58 rendered invalid any alleged oral understanding regarding past practices that Lovan avowed to have reached with the former plant manager. [See GC Exh. 2, at p. 21].

Finally, the General Counsel disregards *Olin* and more than 30 years of Board case law by positing that the arbitrator erred in not applying statutory tests. [See GC Brief, at p. 15]. The Board's deferral standard expressly disavows such a requirement. See *Olin*, 268 NLRB at 574; *Dennison National*, 296 NLRB at 170 (arbitrator's award need not be totally consistent with Board precedent). Indeed, the General Counsel simply ignores the Board's deferral precedent, expressly cited in Weavexx's brief, by attacking the opinion for not applying the clear and

unmistakable waiver test. See *Motor Convoy, Inc.*, 303 NLRB 135, 136 (1991)(deferral warranted even if it does not read in terms of statutory clear and unmistakable waiver standard).

IV. The Union Had the Duty to Arbitrate the Pay Day Change

The General Counsel deems “preposterous” the reality that the Union bore responsibility for the arbitrator’s failure to consider the propriety of the payday change, while admitting, as he must, that Board policy requires dismissal of a charge allegation not pursued through arbitration. [See GC Brief, at p. 13; NLRB Casehandling Manual, Part 1, Unfair Labor Practice Proceedings, §§10118.1, 10118.2] This seeming contradiction rests on another paradox in the General Counsel’s brief. On the one hand, the General Counsel acknowledges that “the arbitrator was not presented with the change to the employees’ pay day from Thursday to Friday.” [GC Brief, at p. 13]. In the very next paragraph, he contends that “the Union processed the charge allegations through the arbitration procedure.” [Id.]. Since the charge alleged two unilateral changes, the pay day change being one, both of these statements cannot be true. [See GC Exh. 1(c)].

The General Counsel tap dances around this obvious inconsistency by placing the burden on Weavexx to have raised the pay day issue at the arbitration – accusing Weavexx of relying on a pre-complaint standard. [GC Brief, at p. 13]. But the arbitration occurred pre-complaint. The Union, not Weavexx, bore the obligation to pursue the charge allegations through the arbitration when it occurred. Under Board policy, the pay day allegation should have been dismissed based on the Union’s failure to do so. [See NLRB Casehandling Manual, Part 1, Unfair Labor Practice Proceedings, §§10118.1, 10118.2]. The Union’s dereliction of its duty prevented the arbitrator from considering the pay day issue.

The General Counsel disregarded Board policy by issuing complaint on the pay day change issue, still without explanation. The ALJD glanced only at the arbitrator's failure to consider this issue, not analyzing the grievance itself, and compounded the error. The General Counsel now audaciously suggests that Weavexx bears responsibility for the Union's blunder in not arbitrating the issue, even insisting that Weavexx's argument is not supported by legal precedent, but tellingly citing none. [GC Brief, at p. 10]. Weavexx cannot fairly be denied the proper application of the Board's own rules and the pay day change claim must be dismissed.

V. Conclusion

The award is reasonably read as dismissing the grievance based on the CBA's "reserved rights" clause whether viewed in its entirety or solely with reference to the arbitrator's employment of the "managerial discretion" terminology, The General Counsel and the ALJD, by (a) foregoing the consideration of alternative interpretations required by *Smurfit-Stone*, (b) ignoring the most reasonable interpretation considering the entire opinion, the parties' own understanding of "managerial discretion", and the arbitrator's designation of the relevant contractual provisions, (c) disdaining any analysis of the factors deemed relevant by the Board in *Smurfit-Stone* in interpreting the arbitrator's opinion, and (d) imposing statutory standards on the arbitrator's opinion in contravention of *Olin*, have not met the high bar established by the Board for denying deferral.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of November, 2015 served a copy of this Reply Brief in Support of Exceptions of Weavexx, LLC by electronic mail service upon the following:

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