

**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
GENERAL COUNSEL’S CROSS-EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE’S DECISION**

COMES NOW Respondent, Howard Industries, Inc. (the “Respondent” or the “Company”), through undersigned counsel and pursuant to Section 102.46(f)(1) of the Board’s Rules and Regulations, files this its Answering Brief to the General Counsel’s Cross-Exceptions to the Administrative Law Judge’s Decision.

INTRODUCTION

General Counsel’s multiple cross-exceptions fall into three (3) general categories. First, General Counsel alleges that the Administrative Law Judge (“ALJ”) erred by raising the deferral issue *sua sponte*. (Cross-Exception No. 4.) Next, the General Counsel alleges that the ALJ should have found that Gregory Jones (“Jones”) is entitled to forty thousand two hundred twenty dollars (\$40,220.00) in back pay. (Cross-Exception Nos. 11-12.) All of the remaining cross-exceptions are based on the General Counsel’s allegation that the ALJ erred by deferring to the arbitrator’s award and instead should have found that Respondent violated the Act by terminating Jones. For the reasons set forth below, each and all of these cross-exceptions should be denied.

I. FACTUAL SUMMARY

A. Stipulated Facts.

Howard Industries, Inc. is North America's largest manufacturer of distribution transformers, most of which are manufactured at its two (2) plants located in Laurel, Mississippi. The International Brotherhood of Electrical Workers, Local 1317 (the "Union") has represented the production and maintenance employees in those plants for many years. In 2014, the bargaining unit represented by the Union included approximately two thousand (2,000) employees.

In 1999, the Company and the Union agreed to language in their collective bargaining agreement which included the following provision: "No employee will be required to work more than one (1) double-shift during a work week or more than twelve (12) hours on any other day." The language has been continuously in the parties' collective bargaining agreement to the present.¹

Jones was the Union's Chief Steward from 2006 until 2014. During the morning meeting on June 6, 2014, Supervisor Charles Smith ("Smith") notified Jones and other employees on his production line that they would be required to work more than twelve (12) hours that day. Several employees on Jones' production line informed Jones that they intended to refuse to work more than twelve (12) hours. Jones instructed those employees to perform the required work and instead allow him to file a grievance challenging Smith's right to require the employees to work more than twelve (12) hours, but less than sixteen (16) hours.

On the morning of June 10, 2014, Jones informed Smith about a grievance that he and Delena Jordan ("Jordan") had filed claiming that Smith had improperly required employees to

¹ That language was modified in the collective bargaining agreement that was negotiated after this matter was heard.

work more than twelve (12) hours, but less than sixteen (16) hours the preceding Friday. (Joint Ex. 1.)

B. Undisputed Facts.

Respondent has published and strictly enforced plant rules that prevent employees from leaving the plant between working hours without authorization from their supervisor, and that instruct employees to carry out their work assignments and to discuss any complaints that they may have with their supervisors. The penalty for violating either of these rules is discharge. (Tr. p. 84, l. 16-p. 85, l. 14; Joint Ex. 9; R's Ex. 1.) However, through the course of past negotiations between the Union and the Company, an exception was created for employees who refuse a daily overtime assignment. In that case, an employee receives a Final Warning for the first refusal. If a second refusal occurs within twelve (12) months of the issuance of the Final Warning, the employee is discharged. (Tr. p. 85, l. 15-p. 86, l. 10; Joint Ex. 9.)

On May 15, 2014, Jones left work without the permission of his supervisor while on a daily overtime assignment. As a result, Jones was given a Final Warning on May 28, 2014. (Tr. p. 40, ll. 14-17; Joint Ex. 5.) While on another daily overtime assignment on June 10, 2014, Jones left work in defiance of his supervisor's directive to complete his work assignment. (Tr. p. 70, ll. 20-23; p. 72, l. 22-p. 73, l. 23.) On June 12, 2014, the Company suspended Jones pending an investigation by the Human Resources Department, and Jones' employment was terminated on June 19, 2014. (Stipulations Nos. 11 and 12.)

Business records indicate that between January 1, 2014 and August 1, 2015, more than fifty (50) employees received Final Warnings because they left work without permission while on a daily overtime assignment. (Tr. p. 88, l. 20-p. 89, l. 16; R's Ex. 1.) The use of these warnings has proven to be effective because other than Jones, only two (2) of these employees

repeated the offense within the aforementioned time period. Like Jones, both employees were discharged. (Tr. p. 89, l. 24-p. 90, l. 9.)

At the time that Jones engaged in the aforementioned conduct, the Company and the Union had an active collective bargaining agreement that contained the following No Strike/No Lockout provision:

Section 1. 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 Ex. 2, p. 2.) By walking off the job on June 10, 2014, Jones left behind unfinished work. (Tr. p. 70, ll. 20-23.)

II. THE DEFERRAL

A. The *Olin* Standard.

In *Olin Corp.*, 268 NLRB 573 (1984), 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 the 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 General Counsel and 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 of 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 or clearly repugnant to the National Labor Relations Act (the “Act”).

B. The Administrative Law Judge Correctly Applied the *Olin* Standard to the Arbitrator’s Award.

Under the applicable standard, the arbitration hearing had to be conducted in a fair and regular manner, the parties had to agree to be bound by the arbitrator’s award, the contractual issue had to be factually parallel to the unfair labor practice issue, and the arbitrator must have been presented with the facts generally relevant to resolving the unfair labor practice. General Counsel does not allege that any of these requirements were not satisfied. Instead, General Counsel argues that the award is repugnant to the policies of the Act.

The test for repugnancy is not whether the Board would have reached the same result as the arbitrator but whether the arbitrator’s award is palpably wrong as a matter of law. *Inland Steel Company*, 268 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. In evaluating whether an arbitrator’s award is clearly repugnant to the Act the Board does not require the award to be “totally consistent with Board precedent.” *Olin*, 268 NLRB at 573; *see also Smurfit-Stone Container Corp.*, 344 NLRB 658 (2005); *Aramark Services*, 344 NLRB 549 (2005); *Motor Convoy*, 303 NLRB 135 (1991); *Postal Service*, 275 NLRB 430 (1985).

The Board’s standard for determining whether an arbitrator’s decision is clearly repugnant to the Act has been described as follows:

Finally, contrary to the judge and our dissenting colleague, we find that the arbitrator's decision is not clearly repugnant to the purposes and policies of the Act. The standard for determining whether an arbitral decision is clearly repugnant is whether it is "susceptible" to an interpretation consistent with the Act. *Olin*, 268 NLRB at 574; *see Motor Convoy*, 303 NLRB 135 (1991). "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. *See Anderson Sand & Gravel*, 277 NLRB 1204, 1205 (1985). The Board, moreover, will not find an imperfectly drafted arbitral decision clearly repugnant, provided that a reasonable interpretation of the award is consistent with the Act. *See Yellow Freight System*, 337 NLRB 568, 572 (2002) (Board deferred to arbitral award where wording of award was somewhat ambiguous, but could be reasonably interpreted to support a finding consistent with the Act); *see also Specialized Distribution Management*, 318 NLRB 158, 163 (1995) (deferral not repugnant to the Act even where arbitrator's "approach and style are at variance from the standards the General Counsel would like to see").

Smurfit-Stone Container Corp., 344 NLRB at 659-60 (emphasis and citations in original).

General Counsel has extracted four (4) sentences from the arbitrator's decision which he claims to be directly contrary to Board law. Apparently the General Counsel believes that the arbitrator relied on those findings in reaching his conclusion that Jones' discharge did not violate the Act. However, these quotations were not extracted from the portion of the award where the unfair labor practice allegations were evaluated. Rather, the arbitrator made those findings in support of his conclusion that Respondent had just cause under its union contract to discharge Jones.

The extracted quotations begin on page 10 and end on page 12 of the award. That entire discussion involves the "just cause" issue, not the unfair labor practice claim. In fact, the first two sentences cited by the General Counsel are followed by a quotation from Elkouri & Elkouri, How Arbitration Works, 6th Ed. which is generally accepted as being the bible of labor

arbitration law. The third sentence that the General Counsel has extracted from the award comes immediately after the Elkouri quotation. The final sentence relied upon by the General Counsel is contained in the first full paragraph on page 12 of the award. The last sentence of that paragraph reads as follows: “Accordingly, the Company had just cause to discipline Grievant for his misconduct on June 10, 2014.” (Emphasis added.) Clearly, all four of the extracted sentences related to and supported that conclusion.

The arbitrator separated the “just cause” determination from the unfair labor practice determination. The latter analysis did not begin until page 13, and then only after the “just cause” issue had been addressed. Nothing contained in the analysis of the unfair labor practice allegation could even arguably be characterized as “palpably wrong” or “repugnant to the Act.”

The General Counsel will undoubtedly argue that the aforementioned findings must have influenced the arbitrator’s conclusion that Jones’ discharge did not violate the Act. Were that the case, the arbitrator would have included those findings when addressing the unfair labor practice issue. Regardless, at most the reasoning behind the award is susceptible of two interpretations, one permissible and one impermissible. In such cases it is simply not true that the award is “clearly repugnant” to the Act. *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352 (9th Cir. 1979).

C. Respondent Did Not Violate the Act by Terminating Jones’ Employment.

In *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 837 (1984), the Supreme Court stated the following:

The fact that an activity is concerted, however, does not necessarily mean that an employee can engage in the activity with impunity. An employee may engage in concerted activity in such an abusive manner that he loses the protection of Section 7. Furthermore, if an employer does not wish to tolerate certain methods by which employees invoke their collectively bargained rights, he is free to negotiate a provision in his collective bargaining agreement that limits the availability of such methods. No strike provisions, for instance, are a common mechanism by which employers and employees agree that the latter will not

invoke their rights by refusing to work. In general, if an employee violates such a provision, his activity is unprotected, even though it may be concerted. Whether Brown's action in this case was unprotected, however, is not before us.

Although the court acknowledged that it was not determining whether the individual's conduct in *City Disposal* was protected, the court clearly articulated the standard that employees who violate a no strike provision are not engaged in protected activity.

At the time that Jones engaged in the conduct that is the subject matter of this case, the Company and the union had an active collective bargaining agreement that contained the following no strike/no lock-out clause:

Section 1. There should 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.

Section 2. In the event the employees, the Union, or the Company should engage in any activity in violation of the provisions of Section 1 hereof, the aggrieved party shall have the right to avail itself of any appropriate legal remedy without prior resort to any step of the grievance procedure.

(Joint Ex. 2, p. 2.)

The General Counsel argues that Jones' decision to walk off the job leaving assigned work undone was not "designed to curtail or interfere with production." Even were that the case, the General Counsel has ignored the portion of the sentence that prohibits strikes, slow-downs, or work stoppages of any kind. The portion of the sentence relied upon by the General Counsel only addresses "other activity" designed to curtail or interfere with production. In other words, it is addressing activities other than strikes, slow-downs, or work stoppages. By walking off the job without permission leaving work undone, Jones engaged in a work stoppage, the very activity addressed by the Supreme Court in *City Disposal*.

The General Counsel cites two cases involving a refusal to perform overtime and/or similar work. One case is *USPS*, 332 NLRB 340 (2000) which the General Counsel describes as “a case remarkably similar to the instant one.” It is Respondent’s understanding that employees of USPS are legally prohibited from striking so it is highly unlikely that the contract in question contained a no-strike clause. If it did, no mention was made of it in the decision. The other case is *Mike Yurosek & Son, Inc.*, 310 NLRB 831 (1993). In that case the Board determined that the employees’ conduct was not part of an intermittent work stoppage. However, the Board emphasized that the employees had refused to work an extra hour on only one occasion and that there was no indication that the employees’ refusal was one of a series of intermittent strikes. It is undisputed that within less than a one (1) month period, Jones twice walked off the job while on an overtime assignment.

In *House of Raeford Farms, Inc.*, 325 NLRB 463 (1998) the administrative law judge determined and the Board affirmed that the refusal by several employees to continue to work until their tasks were completed was not protected concerted activity. Likewise, *Bird Engineering*, 270 NLRB 415 (1984) involved six (6) employees who clocked out in violation of a new policy prohibiting employees from leaving the premises during their work shifts. The administrative law judge determined that these employees were engaged in protected concerted activity. However, the Board disagreed. Although the Board concluded that the employees had engaged in concerted activity it further determined that because the employees chose to ignore the employer’s rule in direct defiance of the direction and warnings of management, the conduct was not protected. Significantly, Jones was not only warned by his supervisor to finish his work, he was on a Final Warning because he had previously engaged in the same misconduct.

III. THE GENERAL COUNSEL'S FINAL CONCERN REGARDING THE DEFERRAL

It is unclear as to why the General Counsel is so upset over what he characterizes as the ALJ's *sua sponte* raising of the deferral issue. During a preliminary conference call, Judge Locke questioned the parties about the arbitrator's award. (Tr. p. 8.) It could not have come as a surprise to the General Counsel that the issue would be litigated. Further, during the hearing Judge Locke did not ask the parties to address the issue of deferral. Instead, he asked the parties to address the issue of which deferral standard would apply, *Olin* or *Babcock & Wilcox*. (Id.) For reasons unknown, the General Counsel failed to address this issue. However, he did argue against the deferral. (Tr. p. 127, l. 6-p. 128, l. 21.)

The General Counsel's suggestion that Respondent waived its right to pursue the deferral issue by not raising it in its Answer is misguided. First of all, in the very next sentence the General Counsel concedes that Respondent was not required to include this defense in its Answer. In fact, doing so would be serious miscalculation. Unlike civil litigation, the Board does not require respondents to assert affirmative defenses until they reach trial and, of course, there is no pretrial discovery. A respondent would be foolish to unnecessarily tip its hand about any defense that it planned to pursue.

General Counsel's position is further undermined by both the pretrial and trial proceedings. The arbitrator's award was offered as a Joint Exhibit, but did not become one because the General Counsel opposed including it as a Joint Exhibit. Respondent then entered the award into evidence at trial, again over the objections of the General Counsel. Respondent had every intention of pursuing the deferral defense; otherwise, it would not have fought for the inclusion of the arbitrator's award. The General Counsel's opinion to the contrary has no factual or legal basis and should be rejected.

IV. JONES WAS WILLFULLY UNEMPLOYED

In the event that Jones is awarded back pay, it should be substantially reduced either because Jones was not available for work, or willfully chose not to seek employment.

In keeping with Board procedures, Jones completed NLRB Form 5224. (R's Ex. 4.) In the section of that form that addresses periods during which an individual was unable to work, Jones wrote that as of September 14, 2014, he was no longer able to work. (Id., p. 3.) That form further shows that Jones stopped applying for work on December 14, 2014. Perhaps not coincidentally, this is when Jones' eligibility for unemployment compensation expired.² (Tr. p. 111, ll. 18-24.)

It is well settled that a discriminatee must make reasonable efforts to secure interim work in order to be entitled to back pay. *Grosvenor Orlando Associates, Ltd.*, 350 NLRB 1197, 1198 (2007), citing *Glenn's Trucking Co.*, 344 NLRB 377 (2005). And, the sufficiency of a discriminatee's efforts to mitigate back pay is determined with respect to the back pay period as a whole, and not based on isolated portions of the back pay period. *Id.*

By his own admission, Jones made no effort to seek interim employment after December 13, 2014. Any back pay to which Jones might be entitled should be cut off no later than the end of 2014, and perhaps as early as September 14, 2014, when Jones became unable to work.

CONCLUSION

The arbitrator's award fully satisfies the *Olin* requirements. It is neither palpably wrong nor repugnant to the Act. Under then longstanding Board precedent, deferral must be granted.

² Like most states, Mississippi requires recipients of unemployment compensation to actively seek employment.

Jones' repeated misconduct violated the No Strike Clause contained in the parties' collective bargaining agreement. Accordingly, while walking off the job during a daily overtime assignment might have been concerted activity, it was not protected, concerted activity.

The General Counsel's attempt to have Judge Locke's decision reversed based on his belief that Judge Locke improperly raised the deferral issue has no basis in fact or law. Finally, if Jones should receive a back pay award, it should be substantially reduced because Jones was unable to work and unwilling to seek employment.

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
P: 205-871-5858 | F: 205-871-5874
ew@kullmanlaw.com

COUNSEL FOR RESPONDENT,
Howard Industries, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 13th day of November, 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

Elmer White - RE: 15-CA-131447-Unknown

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Case Number: 15-CA-131447
Filing Party: Charged Party / Respondent
Name: White, Elmer
Email: eew@kullmanlaw.com
Address: 600 University Park Pl., Ste. 340
Birmingham, AL 35209
Telephone: (205) 871-5858
Fax:
Additional Email: rjt@kullmanlaw.com
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