

Nos. 15-73426

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

COLETTA KIM BENELI

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

BABCOCK & WILCOX CONSTRUCTION CO., INC

Intervenor

**ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER AND APPELLATE
JURISDICTION**

This case is before the Court on a petition for review of a Board Order dismissing an unfair labor practice complaint against Babcock & Wilcox

Construction Co., Inc. (“the Company”). The Board Order issued on December 15, 2014, and is reported at 361 NLRB No. 132. (ER 1-39.)¹ Coletta Kim Beneli (“Beneli”), the Charging Party before the Board, filed the petition for review. The Company has intervened on behalf of the Board. The Association for Union Democracy (“putative amicus”), which was an amici before the Board, has moved to file an amicus brief on behalf of Beneli. The petition for review is timely because the Act imposes no time limitation for such filings.

The Board had jurisdiction over this unfair labor practice case pursuant to Section 10(a) of the National Labor Relations Act, as amended (“the Act”) (29 U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), because the Order is a final order and the alleged unfair labor practices took place in Arizona.

STATEMENT OF THE ISSUES PRESENTED

In the Decision and Order under review, the Board modified its longstanding standard for deferring to arbitration decisions. The Board held that, in future cases, it would apply a new test to determine whether to defer to such decisions. The

¹ “ER” refers to the Excerpts of Record filed by Beneli with her opening brief. “SER” refers to the Board’s Supplemental Excerpts of Record filed with this Brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

Board did not apply the new standard to the instant case. Applying the old standard, the Board deferred to the arbitration decision at issue and dismissed the complaint against the Company. The Court's review of Beneli's petition turns on the following issues:

(1) Whether the Board acted within its discretion by deferring to the arbitration decision which determined that Beneli was discharged for cause, and therefore properly dismissed the unfair labor practice complaint alleging that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging Beneli for protected union activity.

(2) Whether the Board properly determined that it would apply its newly-announced deferral standard prospectively only, rather than retroactively to the instant case.

STATUTORY ADDENDUM

The addendum attached to this brief contains all applicable statutes.

CONCISE STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Acting on an amended unfair-labor-practice charge filed by Beneli, the Board's Acting General Counsel issued a complaint alleging that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by suspending and discharging Beneli for protected union activity. The case was

submitted to an administrative law judge, and the judge recommended deferring to an arbitration decision and dismissing the complaint. On review, although the Board announced a new deferral standard to be applied prospectively, it agreed with the judge's recommendation to defer to the arbitration decision in the instant case under its previous deferral standard. Accordingly, the Board dismissed the complaint. The underlying facts are outlined below, followed by a summary of the arbitration, the subsequent unfair labor practice proceedings, and the Board's Conclusions and Order.

II. THE BOARD'S FINDINGS OF FACT

A. Background

The Company is a construction contractor providing construction and maintenance service for Arizona Public Service ("APS") at the Cholla Power Generating Station in Joseph City, Arizona. (ER 37; SER 55-56.) The Company performs work at the jobsite under collective-bargaining agreements with various construction trade unions, including one with the International Union of Operating Engineers ("the Union"). (ER 37; SER 55-56, 81-101.) The collective-bargaining agreement includes various rules related to the Company's use of union hiring halls to hire employees. (SER 94.)

In January 2009, Beneli began working as a utility operator at the Company, operating a forklift and crane. Shortly thereafter, she became the Union's job steward for the worksite. (ER 37; SER 16-17.)

Beneli was sometimes late for job safety analysis ("JSA") meetings and used her cell phone while operating equipment. (ER 38; SER 36-38, 46, 62-63, 66-69, 70-71.) She also once moved a crane without the necessary spotter. (ER 38; SER 46-47, 57-58, 64-65.) On February 2, Beneli received a written warning for failing to comply with jobsite safety rules by driving her forklift through a prohibited area near a high-voltage transformer. (ER 37; SER 19-21, 35-36, 59-61, 102.)

B. Beneli's Union Steward Activity

Also on February 2, Beneli noticed that the Company had hired a new employee, Ian Christianson. Beneli called the Union and found out that Christianson had not been dispatched through the Union's hiring hall. Beneli told Christianson that he needed a dispatch from the Union's hiring hall. Later that day, Christianson told Beneli that he had spoken to the Company's timekeeper, Rhonda Roberson ("R. Roberson"), about it. (ER 37; SER 18-19.)

On February 16, Robert Alsop, a foreman and union member, told Beneli that he had not been paid properly for a full 40-hour week. Beneli then told Christopher Goff, the Company's project superintendent, that Alsop was short on his paycheck. Goff asked why, and Beneli responded that the collective-

bargaining agreement guaranteed foremen 40 hours a week. Goff then asked Beneli to tell R. Roberson to cut Alsop a check for the full 40 hours. (ER 37; SER 22-24.) Shortly thereafter, when Beneli was discussing Alsop's pay with R. Roberson, APS representative Bill Roberson ("B. Roberson") entered the office.² (SER 23.)

On March 10, Beneli saw another new employee, Heath Riley, on the job. Beneli asked him whether he was referred from the Union's hiring hall. Riley answered that Goff had called him directly because they had been neighbors in Kentucky. Beneli called the Union and had Riley speak with the union hiring hall dispatcher. Beneli then told Riley that the Union and Company would work it out. (ER 37; SER 24-27.)

C. The Events of March 11

Upon Beneli's arrival at work on March 11, Alsop told Beneli that B. Roberson wanted to talk to her. (ER 37; SER 27.) After a short discussion, Beneli told B. Roberson that she had spoken to the Union about Alsop's guaranteed pay. Beneli also told Roberson that it would be better if Goff did not bring in operators from outside the state without using the Union's hiring hall. (ER 37; SER 27-28.) Goff walked into the office at the end of the conversation. (ER 37; SER 28.)

² APS representative B. Roberson is married to company timekeeper R. Roberson. (SER 15.)

After her meeting with B. Roberson, Beneli arrived late for that morning's JSA meeting, which was being held in the break trailer. (ER 37; SER 28, 36-38.) As Beneli entered the trailer, Goff told Beneli that he wanted to speak with her after the meeting, stating that he would "take care of you later missy." (ER 37; SER 28.) The JSA meeting then went forward. Beneli ate a pastry during the meeting and failed to submit a required JSA form at the meeting's end. (ER 38; SER 41, 42-43, 72.)

Following the meeting, Goff asked Beneli what she had earlier been discussing with B. Roberson. Beneli said that she told Roberson that Riley had not been dispatched from the Union's hiring hall and that Alsop had not received his guaranteed pay. Goff told Beneli that she was not supposed to take care of union business on company time, and asked her why she had not discussed the matter with him. Beneli explained that B. Roberson had initiated the conversation. Goff said that the collective-bargaining agreement was with the Company and not with APS, and that Beneli had no business talking to APS. (ER 38; SER 29-31.) Goff told Beneli that she was "sticking her nose where it does not belong" and asking questions that were "none of her business." (ER 38; SER 30, 31.) Beneli stated that she had "made a mistake." (ER 38; SER 30.)

That same day, Goff called Shawn Williams, the Union's assistant business manager. Ralph McDesmond, a company safety representative, was also on the

call. Goff told Williams that he wanted to terminate Beneli because she had overstepped her boundaries as the Union's steward and was crossing the line into management. Goff said that Beneli was raising contractual issues and trying to tell the Company what it was supposed to pay employees. Williams responded that, in his view, Beneli was acting as a steward should. Goff stated that Beneli should not be getting the Company's customer, APS, involved by raising contractual issues with APS. Williams said that, in the future, Beneli would raise contractual issues solely with the Company. (ER 5, 37; SER 52-54.)

Later that day, Alsop told Beneli that Goff wanted them both to go to Goff's office. Beneli and Alsop went to Goff's office, where McDesmond and another safety representative, Matt Winklestine, were waiting. Winklestine told Beneli that she was being suspended for violating two safety policies earlier that day.

Specifically, Winklestine said that Beneli had been observed eating a pastry during the JSA meeting, and that she had failed to fill out the required JSA form. Beneli laughed, and asked Winklestine where it was stated that she could not eat a pastry during the JSA meeting. Winklestine said he did not have to show Beneli anything. Winklestine then stated that Beneli was being suspended for three days without pay for the two safety violations. (ER 37; SER 32-34.)

At this point, Beneli turned to McDesmond and said, "So this is the fucking game you guys are going to play?" (ER 37; SER 33.) Winklestine and

McDesmond pointed their fingers at Beneli and stated that she was terminated. McDesmond then said to Beneli that she had threatened them. Beneli said that she did not threaten anyone but had said, “is this the fucking game you are going to play?” (ER 37; SER 33.) McDesmond stated “there you go again,” and once more accused Beneli of threatening them. (ER 37; SER 33.) McDesmond then told R. Roberson to prepare termination papers and to cut Beneli’s final check. Beneli refused to sign the termination papers, which stated that she was being terminated for “inappropriate conduct.” (ER 37; SER 33-34.)

D. The Grievance/Arbitration Proceeding

On March 19, the Union filed a grievance over Beneli’s suspension and discharge pursuant to the applicable procedures in the collective-bargaining agreement. (ER 6, 38; SER 87-88, 129.) The grievance moved through the procedure to Step 4, which calls for a hearing before the Grievance Review Subcommittee (“Subcommittee”). (ER 38; SER 87-88.) The Subcommittee consists of two management representatives, two labor representatives, and one Subcommittee staff representative. (ER 38; SER 123-128.) All Subcommittee determinations are based upon the facts presented, both written and oral, and any decision rendered is final, binding, and not subject to appeal. (ER 38, SER 126.)

On September 17, the Union submitted a Step 4 grievance fact form, asserting that Beneli’s termination was in violation of the collective-bargaining

agreement, the Act, and Board decisions. (ER 38; SER 107-108.) Additionally, the Union stated that: “While engaged in a representational capacity as a Union steward, Beneli made the following statement ‘. . . so this is the fucking game you guys are going to play.’ She was immediately terminated without further discussion or due process.” (ER 38; SER 108.)

On October 8, the Subcommittee conducted the Step 4 hearing. (ER 38; SER 104.) Both the Union and the Company provided position statements and documentary evidence. (ER 38; SER 103-122.)

The Union’s submission included a report setting out a detailed timeline of Beneli’s extensive union and concerted activities in the month and a half before her suspension and discharge. (ER 38; SER 110-112.) The Company’s position statement stated, in part, that Beneli “was terminated due to the inappropriate conduct which she engaged in when the Company Supervisor informed her of their intent to administer a . . . three day disciplinary suspension for safety violations.” (ER 38; SER 113.) The Company also stated that a supervisor had complained that “the [s]teward was disruptive in terms of the amount of time being spent on Union duties, and had frequently evidenced a poor attitude toward safety on the job.” (ER 38; SER 113.) Additionally, the Company attached statements prepared by company officials who were present at the March 11 meeting. (ER 38; SER 115-119.)

By letter dated October 8, the Subcommittee denied the grievance and upheld Beneli's discharge, stating that, the "issue was the Union's contention the [Company] violated [the collective-bargaining agreement] by terminating the grievant, without just cause, for the grievant's use of profanity." (ER 38; SER 104.) The Subcommittee also stated that it "reviewed all the information submitted both written and oral" and determined that "no violation of the [collective-bargaining agreement] occurred and therefore, the grievance was denied." (ER 38; SER 104.)

E. The Unfair Labor Practice Proceedings

Meanwhile, in July and September, Beneli filed an unfair labor practice charge and an amended charge with the Board's Regional Office, alleging that the Company violated the Act by, among other ways, discharging her. (SER 73-74.) On September 30, 2009, the Region advised the parties that it would withhold making a determination on her amended charge while the grievance involving the same issue was pending pursuant to the contractual grievance/arbitration procedure.³ On August 29, 2011, following an investigation, the Region declined to defer to the Subcommittee's decision and issued the complaint in this matter. (ER 39; SER 75-80.)

³ See *Dubo Mfg. Corp.*, 142 NLRB 431 (1963).

On April 9, 2012, following a hearing, the administrative law judge recommended deferring to the Subcommittee's decision and dismissing the complaint under the arbitral deferral standard set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984) ("*Spielberg/Olin*"). Under that standard, the Board defers to arbitral decisions when: (1) all parties agree to be bound by the decision; (2) the proceedings appear to be fair and regular; (3) the arbitrator adequately considers the unfair labor practice issue, which requires the unfair labor practice issue and the contractual issue to be "factually parallel" and the arbitrator to have been "presented generally" with the relevant facts; and (4) the arbitration award is not clearly repugnant to the Act. *Spielberg*, 112 NLRB at 1082; *Olin*, 268 NLRB at 574. In explaining his finding that the Subcommittee's decision was not clearly repugnant to the Act, the judge stated, in part, that although he credited Beneli's and Williams' version of events at the hearing, the Subcommittee could have credited the Company's witnesses and reached a different conclusion. (ER 39).

III. THE BOARD'S CONCLUSIONS AND ORDER

On exceptions, the Board (Chairman Pearce and Members Miscimarra, Hirozawa, Johnson, and Schiffer), in agreement with the judge, deferred to the Subcommittee's decision and dismissed the complaint. In doing so, the Board

first noted that the General Counsel conceded that the first three factors of *Spielberg/Olin* were satisfied. (ER 14). The Board then agreed with the judge that the Subcommittee's decision was also not repugnant to the Act. In so finding, the Board found that the Subcommittee's decision was "arguably consistent" with a finding that the Subcommittee had considered and rejected the Union's contention that the Company had discharged Beneli for her steward activity. (ER 14.) Thus, the Board found that because the Subcommittee's decision was "susceptible to an interpretation consistent with the Act," it was not repugnant under *Spielberg/Olin*. (ER 14).

Notwithstanding its application of the *Spielberg/Olin* deferral standard to the instant case, the Board (Members Miscimarra and Johnson, dissenting) also modified that standard in favor of a new standard to be applied prospectively. (ER 1-36). Under the new standard, the Board will defer to an arbitral decision if the party urging deferral shows that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue—requiring the arbitrator to identify the issue and generally explain why he or she finds that the facts presented either do or do not support the unfair labor practice allegation—or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award. (ER 1-7). The Board emphasized that, in adopting the modified standard, it did not

suggest that the *Spielberg/Olin* standard constituted an impermissible construction of the Act, but simply concluded that the modified standard would more effectively protect employee's rights under the Act. (ER 2 n.5.)

The Board also explained its decision to apply the new standard prospectively only. (ER 13-14). In doing so, the Board acknowledged that although applying the new standard retroactively would “hasten the day when arbitral decisions more surely protect employees’ statutory rights,” that benefit was outweighed by the unfairness to parties in pending cases who had relied on the *Spielberg/Olin* standard “in negotiating contracts and in determining whether, and in what manner, to process cases . . . through the grievance-arbitration process.” (ER 14). Accordingly, the Board deferred to the Subcommittee’s decision under *Spielberg/Olin* and dismissed the complaint. (ER 14).

SUMMARY OF ARGUMENT

The Board acted within its broad discretion by deferring to the Subcommittee’s decision to uphold Beneli’s discharge because that decision was not clearly repugnant to the Act. Under the standards the Board established in *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955), and *Olin Corp.*, 268 NLRB 573, 574 (1984), the Board rationally determined that the Subcommittee’s decision—the end result of the parties’ negotiated grievance procedure— was consistent with a finding that her discharge was not motivated by her protected

union activities. Beneli's argument to the contrary turns a blind eye to the administrative law judge's finding, upheld by the Board, that the evidence is susceptible to two different interpretations because the Subcommittee could have credited the Company's witnesses over Beneli's witnesses. Because the Subcommittee's decision can be interpreted in a manner consistent with the Act, deference to the award was appropriate.

Contrary to Beneli and the putative amicus, the Board did not err in its decision to apply its newly-adopted deferral standard prospectively only, rather than retroactively to the instant case. The Board properly weighed the competing concerns under its longstanding balancing test and concluded that refraining from retroactive application would best effectuate the principal purpose of the Act, which is to promote collective bargaining by giving effect to the bargains the parties strike during such negotiations. Such bargains include the adoption of grievance-arbitration procedures and inform whether, and in what manner, to process unfair labor practice issues through the grievance-arbitration process. Given that *Spielberg/Olin* was in effect prior to the Subcommittee's proceedings and decision, the Board did not err in concluding that it would continue to apply *Spielberg/Olin* to the instant case, and apply its new deferral test prospectively only.

Neither Beneli nor the putative amicus has provided grounds to overturn the Board's finding in this regard. The Board fully considered the circumstances of Beneli's case and acknowledged that applying the new deferral test would hasten the day when arbitral decisions would better protect employee's rights. Nonetheless, the Board concluded that, on balance, applying the parties' relied-upon standard to the instant case better effectuated the purposes of the Act. Despite the putative amicus' claims to the contrary, the Board's analysis and conclusion fully comport with the standard applied by this Court in evaluating agency retroactivity determinations. Accordingly, this Court should uphold the Board's findings and affirm the dismissal of the complaint.

ARGUMENT

I. THE BOARD ACTED WELL WITHIN ITS DISCRETION BY DEFERRING TO THE ARBITRATION DECISION THAT BENELI HAD BEEN DISCHARGED FOR CAUSE AND THEREFORE PROPERLY DISMISSED THE UNFAIR LABOR COMPLAINT

A. Applicable Principles and Standard of Review

A principal aim of Congress when it established the Act was to “encourag[e] practices fundamental to the friendly adjustment of industrial disputes” Section 1 of the Act (29 U.S.C. §151). Section 203(d) of the Labor Management Relations Act (29 U.S.C. §173(d)) similarly declares that “[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing

collective bargaining agreement.” As the Supreme Court stated in *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 37 (1987), Section 203(d) reflects Congress’ “decided preference for private settlement of labor disputes without the intervention of government.” *See also Hammontree v. NLRB*, 925 F.2d 1486, 1502 (D.C. Cir. 1991) (Edwards, J. concurring).

Section 10(a) of the Act (29 U.S.C. § 160(a)) states that the Board’s power to prevent unfair labor practices “shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise” Nonetheless, “the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.” *Carey v. Westinghouse*, 375 U.S. 261, 271 (1964) (quoting *Int’l Harvester Co.*, 138 NLRB 923, 925-26 (1962)). *See also Hammontree*, 925 F.2d at 1491-93 (D.C. Cir. 1991) (en banc) (Section 10(a) does not diminish the Board’s authority to defer to arbitration).

As this Court has recognized, in exercising its discretion to defer to arbitration, the Board must reconcile competing statutory objectives. *Servair, Inc. v. NLRB*, 726 F.2d 1435, 1438 (9th Cir. 1984). On the one hand, Congress entrusted the Board with primary responsibility to ensure that the protections and prohibitions of the Act are uniformly applied. *See San Diego Bldg. Trades Council*

v. Garmon, 359 U.S. 236, 241-47 (1959). On the other hand, a goal of the Act is “to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife.” *Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959).

The Board’s decision in *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955), held that deferral to an arbitration award is appropriate if the proceedings were fair and regular, the parties agreed to be bound, and the arbitrator’s decision is “not clearly repugnant” to the policies of the Act. The Board emphasized that its decision to defer did not mean “that the Board would necessarily decide the issue . . . as the arbitration panel did.” 112 NLRB at 1082.

In *Olin Corp.*, 268 NLRB 573, 574 (1984), the Board reaffirmed the *Spielberg* standards, but modified other, later-formulated standards, in response to criticism that they had created unwarranted obstacles to deferral to arbitration. Thus, the Board overruled its policy of conditioning deferral on proof “that the arbitrator [had] ruled on the statutory issues.” 268 NLRB at 574-76. *See, for example, Suburban Motor Freight, Inc.*, 247 NLRB 146, 147 (1980). Further, the Board stated that henceforth it would require only that “an arbitrator has adequately considered the unfair labor practice” and that this standard is met 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.” *Olin*, 268 NLRB at 574.

The Board also clarified in *Olin* what was meant by the *Spielberg* “clearly repugnant” standard. The Board explained that it “would not require an arbitrator’s award to be totally consistent with Board precedent. Only if the award is “palpably wrong”; i.e., the arbitrator’s decision is not susceptible to an interpretation consistent with the Act, [the Board] will defer.” *Olin*, 268 NLRB at 574, 575 n.11 (citing *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352, 354 (9th Cir. 1979)). The party challenging the arbitration has the burden of showing that deferral is inappropriate. *Olin*, 268 NLRB 574-75.⁴

This Court has applied the *Spielberg/Olin* standard in reviewing Board decisions to defer to an arbitration award. *See Garcia v. NLRB*, 785 F.2d 807, 809-10 (9th Cir. 1986). Other courts have done the same. *See, e.g., Util. Workers Union of Am., Local 246 v. NLRB*, 39 F.3d 1210, 1213 (D.C. Cir. 1994); *Bakery, Confectionery and Tobacco Workers v. NLRB*, 730 F.2d 812, 815, 816 (D.C. Cir. 1984); *NLRB v. Ryder/P.I.E. Nationwide*, 810 F.2d 502, 506 (5th Cir. 1987).

⁴ The *Spielberg/Olin* “arbitration” deferral standards also apply to final dispositions of joint employer-union committees such as the one at issue in the instant case. *See K-Mech. Servs., Inc.*, 299 NLRB 114, 117 (1990).

This Court's review of a particular Board decision to defer to an arbitral award is limited to determining whether the Board has abused its discretion. *Garcia*, 785 F.2d 807, 809. More generally, the Board's factual findings are "conclusive" if supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. §160(e)). Moreover, a reviewing court "may [not] displace the Board's choice between two fairly conflicting views [of the evidence], even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); accord *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 (9th Cir. 1995).

B. The Board Acted Well Within Its Discretion in Finding that the Subcommittee's Decision Was Not Repugnant to the Act

As the Board found, there is no dispute that three of the four factors required for deferral under *Spielberg/Olin* have been met: (1) the arbitration proceedings appear to have been fair and regular; (2) all parties have agreed to be bound; and (3) the arbitrator adequately considered the unfair labor practice issue because the contractual issue was factually parallel to the unfair labor practice issue and the Subcommittee was presented generally with the facts relevant to deciding the

statutory issue. (ER 14).⁵ Therefore, should the Court agree with the Board’s decision to apply the *Spielberg/Olin* standard to the instant case (as addressed below at pp. 25-32), the only issue before the Court is whether the Board acted within its discretion in concluding that the Subcommittee’s decision was not clearly repugnant to the policies of the Act under that standard.

As discussed above, the Board only finds that an arbitrator’s decision is repugnant to the Act if the decision is “not susceptible to an interpretation consistent with the Act.” *Olin*, 268 NLRB at 574. *Accord Douglas Aircraft*, 609 F.2d at 354 (9th Cir. 1979) (“[i]f the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award is ‘clearly repugnant’”). The Board in *Olin* also stated that an award is repugnant to the Act if it is “palpably wrong.” 268 NLRB at 574, 575 n.11.

⁵ Beneli makes a vague assertion (B. Br. 5) in her “Summary of Argument” that the third factor—whether the arbitrator adequately considered the unfair labor practice issue—was not met “under the deferral standard in effect at the time the case was heard [*Spielberg/Olin*].” The Court is jurisdictionally barred from considering it. As the Board found (ER 14), the only exception taken by the General Counsel under *Spielberg/Olin* was to whether the decision was repugnant to the Act. *See* Section 10(e) of the Act (no objection that has not been urged before the Board shall be considered by reviewing court); *NLRB v. Sambo’s Restaurant, Inc.*, 641 F.2d 794, 795 (9th Cir. 1981). Moreover, Beneli does not make this argument anywhere in the “Argument” section of her brief, limiting her challenge under *Spielberg/Olin* to whether the decision was repugnant to the Act. Accordingly, Beneli has not properly raised it. *See* Fed. R. App. P. 28(a)(8)(A) (argument must contain appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies).

When finding that an award is repugnant to the Act because it is “palpably wrong,” the D.C. Circuit recently stated: “[w]hat does “palpably wrong” mean? The phrase means what it suggests. Wrong is not enough. The adverb matters. Egregiously wrong, clearly erroneous, badly flawed, totally wrong, jumping the rails.” *Verizon New England Inc. v. NLRB*, 826 F.3d 480, 487 (D.C. Cir. 2016).

The Board acted well within its discretion in concluding that “the Subcommittee’s finding that Beneli was discharged for using profanity” was “susceptible to an interpretation consistent with the Act.” (ER 14). Here, the statutory issue is whether the Company violated Sections 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3)).⁶ Section 8(a)(3) of the Act makes it unlawful to discipline employees for union activity, and such actions derivatively violate Section 8(a)(1) of the Act because anti-union-motivated discipline necessarily discourages union activities. *See HealthCare Employee Union, Local 399 v. NLRB*, 463 F.3d 909, 919 n.13 (9th Cir. 2006). Thus, the threshold issue was the

⁶ Section 8(a)(3) provides, in relevant part, that it is an unfair labor practice “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” Section 8(a)(1) provides that it is an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise of their [right to engage in union activity.]”

Company's motivation for Beneli's discipline, culminating in her discharge for her profane outburst upon receipt of her 3-day suspension.⁷

The Board rationally found that the Subcommittee's decision was not clearly repugnant to the Act. It is uncontested that the Subcommittee phrased the issue before it as whether Beneli was discharged for just cause for her use of profanity. And no one contests that the parties presented evidence to the Subcommittee that included the facts concerning Beneli's steward activities. (ER 14). In these circumstances, the Subcommittee's finding that Beneli was discharged for cause is, as the Board found, "arguably consistent with a finding that the Subcommittee considered and rejected the Union's contention that Beneli's discharge was motivated by her steward activities; at least the General Counsel has failed to prove otherwise." (ER 14, citing *Airborne Express Corp.*, 343 NLRB 580, 581 (under *Spielberg/Olin*, that burden is on General Counsel to prove statutory issue was not considered by arbitrator)).

Moreover, contrary to Beneli (B. Br. 7-15), the Board was well within its discretion in finding that the Subcommittee's decision was not otherwise "palpably wrong." Although the judge found, and the Board agreed, that there was evidence

⁷ See *NLRB v. Transp. Mgmt.*, 462 U.S. 393, 402-03 (1983) (approving the test for determining unlawful motivation first articulated by the Board in *Wright Line, a Div. of Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981)).

to suggest that Beneli's profane outburst was provoked by the Company's own wrongful actions and that the Company may have seized on Beneli's outburst as a pretext for getting rid of an assertive union steward, this does not end the inquiry. Beneli simply ignores the caselaw establishing that an award is not palpably wrong or repugnant when the reasoning behind it is susceptible to two interpretations. *See e.g., Douglas Aircraft*, 609 F.2d at 354.

Here, the Board affirmed the judge's finding that, although he credited Beneli and Williams, the Subcommittee could have instead believed the Company's witnesses, whose submitted statements attested that the main reasons for her discharge were her profane outburst and safety violations. (ER 39.) *See Teledyne Indus.*, 300 NLRB 780, 782 (1990), *enforced sub nom. Goodwin Indus.*, 979 F.2d 854 (9th Cir. 1992) (unpublished) (deferring to arbitration decision in which arbitrator, unlike judge, credited employer's version of events instead of discharged employee's version). Indeed, Beneli and Williams were the only witnesses to testify that Goff called Williams and stated he wanted to discharge Beneli for her steward activities. (ER 37.) If the Subcommittee discredited Beneli and Williams, it would eliminate a key piece of evidence credited by the judge, and would bolster the Company's position that it did not discharge Beneli for her steward activities. It therefore cannot be said that the Subcommittee's decision was "egregiously wrong, clearly erroneous, badly flawed, totally wrong, [or]

jump[ed]the rails.” *Verizon*, 826 F.3d at 487. Accordingly, Beneli has failed to meet her burden of proving that the Board abused its discretion in finding that the Subcommittee’s decision was not repugnant to the Act.

II. THE BOARD PROPERLY DETERMINED THAT IT WOULD APPLY ITS NEW DEFERRAL STANDARD PROSPECTIVELY, RATHER THAN RETROACTIVELY TO THE INSTANT CASE

Both Beneli and the putative amicus (B. Br. 15-23, A. Br. 12-21) challenge the Board’s decision not to apply its new deferral standard to the instant case. As shown below, the Board weighed the relevant competing concerns and properly determined that it would apply its new standard prospectively only.

As an initial matter, the Board agrees with the putative amicus that this Court has held that the Board’s retroactivity determination is a question of law subject to de novo review. *Oil, Chem. & Atomic Workers Int’l Union Local 1-547 v. NLRB*, 842 F.2d 1141, 1144 n.2 (9th Cir. 1998). In *Oil, Chemical & Atomic Workers*, this Court cited its earlier decision in *NLRB v. Guy F. Atkinson Co.* 195 F.2d 141, 148-51 (9th Cir. 1952), which it characterized as the holding that the “decision of retroactive application [is] not one within [an] agency’s special competence, therefore [it is] not subject to deference.” *Oil, Chem. & Atomic Workers*, 842 F.2d at 1144 n.2. But this Court has also held that, “while the court is not bound by the Board’s views on retroactive application, it should defer to those views absent manifest injustice.” *NLRB v. Best Prods. Co.*, 765 F.2d 903,

913 (9th Cir. 1985). Moreover, as discussed below, part of the Board's retroactivity analysis here included how to best effectuate the purpose of the Act. Thus, there is room for this Court to give deference to that portion of the Board's decision-making. *See, e.g., Hotel, Motel & Rest. Employees & Bartenders Union Local No. 19 v. NLRB*, 785 F.2d 796, 798 (9th Cir. 1986) (although a reviewing court reviews questions of law de novo, it should give considerable deference to the Board's expertise in construing and applying the labor laws.) In any event, as shown below, even under de novo review, the Board properly decided to apply its new test prospectively only.

The Board's usual practice is to apply new policies and standards in all pending cases at whatever stage, subject to balancing such retroactivity against "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." (ER 14, citing *Levitz Furniture of the Pac.*, 333 NLRB 717, 729 (2001)). *Accord SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Pursuant to this principle, the Board has stated it will apply an arguably new rule retroactively to the parties in the case in which the new rule is announced and to other cases pending at that time so long as this does not work a "manifest injustice." *SNE Enterprises*, 344 NLRB 673, 673 (2005). In determining whether retroactive application will cause manifest injustice, the Board balances three factors: (1) "the reliance of the parties on preexisting law"; (2) "the effect of

retroactivity on accomplishment of the purposes of the Act”; and (3) “any particular injustice arising from retroactive application.” *SNE Enterprises*, 344 NLRB at 673 (citing cases).

Applying its balancing test, the Board concluded that retroactive application of its new deferral standard would work a manifest injustice. The Board found that it would be “unfair to parties that have relied on the current deferral standard” to apply the new standard to them. (ER 14). The Board explained that the parties would have relied on the current standard in negotiating collective-bargaining agreements with grievance arbitration procedures, and in “determining whether, and in what manner, to process cases through the grievance-arbitration process.” (ER 14). Parties, including the Company and the Union here, might very well have struck different bargains during contract negotiations over any grievance-arbitration procedures if the new deferral standard was in effect at the time instead of *Spielberg/Olin*. The parties also might have presented their cases differently to the arbitrator or, as here, the Subcommittee. For example, they could have more explicitly argued and requested a decision on the unfair labor practice issue, given the Board’s new requirement that the arbitrator must “identify the issue and generally explain why he or she finds that the facts presented either do or do not support the unfair labor practice allegation—or was prevented from doing so by the party opposing deferral.” (ER 5-7).

The Board also assessed the remaining factors—the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice it would cause— and determined that it was not appropriate to apply the new standard to the instant case. In doing so, the Board acknowledged the salutary effect of retroactive application, stating that, in its view, it would “hasten the day when arbitral decisions more surely protect employees’ statutory rights.” Indeed, as the putative amicus correctly notes (A. Br. 17-18), the Board majority recognized that the new standard would better serve the purposes of the Act than *Spielberg/Olin*. See, e.g., ER 2 n.5 (“the modified standard will more effectively protect employees’ rights”). And the Board majority recognized the shortcomings of *Spielberg/Olin*, specifically as illustrated by Beneli’s case. (ER 5-6, 8). Nonetheless, given the parties’ above-discussed reliance interests, the Board found that refraining from retroactive application would effectuate “a more principal purpose of the Act,” that is, “to promote collective-bargaining, which necessarily involves giving effect to the bargains the parties have struck in concluding collective-bargaining agreements.” (ER 14). After thoroughly balancing these factors, the Board concluded that the “concerns supporting retroactive application are outweighed by the injustice that would result from applying the new standard in pending cases.” Accordingly, it decided that it would apply its new standard only prospectively. (ER 14).

Beneli and the putative amicus would have the Board strike the balance differently and come out in favor of retroactive application to the instant case, but none of their arguments warrants disturbing the Board's finding to the contrary.⁸ Beneli's assertion (B. Br. 22) that "the Board did not justify its decision to not apply the new standard in terms of the specific facts of Beneli's case" ignores the Board's extensive discussion (ER 5-6, 8) of Beneli's case prior to applying its balancing test. The Board simply concluded, as discussed above, that applying the standard relied on by the parties better effectuated a more principal purpose of the Act—giving effect to the bargains struck by the parties in collective bargaining. (ER 14.)

For its part, the putative amicus incorrectly contends (A. Br. 13-21) that a different result is warranted under this Court's decision in *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012).⁹ In *Garfias-Rodrieguez*, this Court applied

⁸ Beneli and the putative amicus do not challenge the Board's finding that, despite the Board's new standard going forward, *Spielberg/Olin* constituted a permissible construction of the Act. (ER 2 n.5). The Board's construction of the Act is entitled to considerable deference from this Court. *See Hotel, Motel & Rest. Employees*, 785 F.2d at 798 (court should give considerable deference to the Board's expertise in construing and applying the labor laws.)

⁹ The putative amicus also makes policy arguments that it made before the Board (A. Br. 3-11) as to what would be the best deferral standard to effectuate its union democracy interests. Specifically, it argues (A. Br. 11) that the Board's new deferral policy "could and should have gone further to preclude deferral" in certain

the following 5-part balancing test for determining whether an agency's new rule of law should be applied retroactively:

(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Garfias-Rodriguez, 702 F.3d at 518 (adopting 5-part test set forth in *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982)).

The Board's analysis and ultimate conclusion, however, comports with *Garfias-Rodriguez*. The putative amicus makes much (A. Br. 19-21) of the first factor, "whether the particular case is one of first impression." To be sure, the putative amicus is correct that the *Garfias-Rodriguez* decision discussed the D.C. Circuit's views regarding a case like this one, "in which one party had successfully urged the [Board] to change a rule." *Garfias-Rodriguez*, 702 F.3d at 520 (citing *Retail, Wholesale and Dept. Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972)). The D.C. Circuit's concern is "that denying retroactive effect" would "deny the benefits of a change in the law to the very parties whose efforts were largely responsible for bringing it about [and] might have adverse effects on the

cases. However, this argument is irrelevant given that there is no challenge in the present case before the Court to the Board's new deferral standard.

incentive of litigants to advance new decisions or to challenge outworn documents.” *Garfias-Rodriguez*, 702 F.3d at 520. But this factor is not to be considered to the exclusion of the others; indeed, as the *Garfias-Rodriguez* court observed, in *Montgomery Ward*, this Court considered the first three factors together as a single criterion. *Garfias-Rodriguez*, 702 F.3d at 521 (citing *Montgomery Ward*, 691 F.2d at 1333-34). Here, the remaining factors, as discussed above, outweigh the first factor alone. The Board implemented a new rule and did not just “fill a void” in settled law (Factor 2 of *Garfias-Rodrieguez*); noted that the parties had relied on the old rule (Factor 3 of *Garfias-Rodrieguez*); and found that applying the new rule to the parties would burden their principal collective-bargaining rights under the Act (Factors 4 and 5 of *Garfias-Rodriguez*).

The putative amicus’ remaining challenges to the Board’s analysis are equally without merit. For example, it baldly asserts (A. Br. 14) that the Company should not have relied on *Spielberg/Olin* because “it has been no secret in labor law circles” that a General Counsel or Board majority appointed by President Obama might be receptive to late-1998 suggested changes to that standard. Such speculation hardly proves that this change could have been anticipated by the Company prior to entering into its collective-bargaining agreement or presenting its case to the Subcommittee. Nor has it impugned the Board’s reasoning by questioning (A. Br. 15) how the Board would apply the standard to cases other

than the instant case. The relevant analysis to the instant case concerns the Board's clear position that it will not apply the new rule to any cases in which arbitration has yet to take place because the manner in which parties conduct arbitration depends on the arbitral standard in place. (ER 14). Finally, the putative amicus's assertion (A. Br. 16) that the reliance interest by the parties should be reduced because the change to the deferral standard did not concern "substantive standards of behavior that define the underlying alleged unlawful conduct," is a distinction without a difference. The change to the deferral standard concerned behavior regarding a "principal purpose" of the Act—collective-bargaining—which the Board correctly found would be unfairly altered by application of its new standard. Accordingly, this Court should not disturb the Board's decision to apply its new standard prospectively only.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that this Court should enter judgment denying the petition for review.

STATEMENT OF RELATED CASES

Board counsel is unaware of any related cases pending in the Ninth Circuit.

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National Labor Relations Board

October 2016

ADDENDUM

STATUTORY ADDENDUM

The following statutory provisions are excerpted below:

National Labor Relations Act

Section (1) (29 U.S.C. § 151)	1
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	2
Section 10(a) (29 U.S.C. § 160(a))	1-2
Section 10(e) (29 U.S.C. § 160(e))	2
Section 10(f) (29 U.S.C. § 160(f)).....	3

Labor Management Relations Act

Section 203(d) (29 U.S.C. § 173(d)).....	3
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Federal Rule of Appellate Procedure

28(a)(8)(A).....	3
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National Labor Relations Act

Sec. 1 [29 U.S.C. 151]

. . . Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees

Sec. 8. [29 U.S.C. § 158] Unfair Labor Practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

Sec. 10 [29 U.S.C. § 160] [Prevention of Unfair Labor Practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . .

Labor Management Relations Act
Section 203(d) (29 U.S.C. § 173(d))

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement

Fed. R. App. P. 28(a)(8)(a)

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

COLETTA KIM BENELI)	
)	
Petitioner)	
)	No. 15-73426
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	28-CA-022625
)	
Respondent)	
)	
and)	
)	
BABCOCK & WILCOX CONSTRUCTION CO., INC.)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 6,868 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 31st day of October, 2016

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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Respondent)	
)	
and)	
)	
BABCOCK & WILCOX CONSTRUCTION CO., INC.)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 31st day of October, 2016