

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: April 26, 2017

TO: Leonard J. Perez, Regional Director  
Region 14

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Continental Carbon Company  
Case 14-CA-186718

240-3367-0193  
240-3367-0193-6700  
240-3367-3300  
240-3367-0430  
240-3367-0480-2500  
240-3367-6762-8400  
240-3367-0825  
240-3367-0825-3300  
240-3367-8350

This case was submitted for advice as to whether to defer resolution of a meritorious Section 8(a)(3) discharge of a (b)(6), (b)(7)(C) to the parties' grievance-arbitration process. We conclude that the Board should assert jurisdiction over this case because the Employer engaged in a pattern of hostility toward (b)(6), (b)(7)(C) for (b)(6), (b)(7) grievance activities and demonstrated a lack of respect for the grievance-arbitration machinery such that the parties' alternative process cannot be relied upon to fairly resolve this dispute.

**FACTS**

Continental Carbon Company ("Employer") manufactures carbon black, a binding agent used in the rubber industry. Local No. 13-857 of the United Steelworkers ("Union") has long represented a unit of production, maintenance, and shipping employees at the Employer's plant in Ponca City, Oklahoma. There are about 96 employees at the facility. The discriminatee worked in the shipping department for about (b)(6), (b)(7) years and (b)(6), (b)(7)(C) for that department since (b)(6), (b)(7)(C).

The parties' current collective-bargaining agreement is in effect from June 27, 2016 to June 26, 2019. The predecessor agreement was in effect from May 6, 2013 to May 5, 2016. In relevant part, the current contract provides for a grievance-arbitration process that culminates in final and binding arbitration. The arbitrator is not permitted to hear more than one grievance at a time, unless the disputes

involve identical facts or the parties agree to resolve the issues in a single proceeding. The parties' agreement grants the arbitrator the authority to specify the period for back wages, but provides that the parties thereafter shall compute those wages based on information gathered after the award. In addition, the collective-bargaining agreement permits the Employer to discipline and discharge employees for just cause, subject to a progressive discipline policy for violations of plant rules. Finally, the parties' contract contains a non-discrimination clause, which prohibits the Employer and Union from "discriminat[ing] against any [e]mployee per the [Employer's] Discrimination and Harassment (Including Sexual Harassment) Policy." Since 2012, the Employer has maintained a policy on "Discrimination and Harassment" which provides, in relevant part, that:

[it] is the policy of the [Employer] to ensure equal employment opportunity without discrimination or harassment based on race, color, religion, sex, sexual orientation, age, disability, marital status, national origin, gender identity, genetic information, veteran status, military status or any other characteristic protected by law. The [Employer] prohibits any such discrimination or harassment.

### Suspension and First Termination

On (b)(6), (b)(7)(C) 2015, the Employer suspended the discriminatee for five days for violating plant rules against insubordination, threatening and/or coercing employees, leaving one's place of work without permission, participating in malicious gossip, interfering with plant efficiency, and shouting and demonstrating on the premises. In brief, the discriminatee was disciplined for (b)(6), (b)(7)(C) complaints and actions to address odors in the bathroom and breakroom caused by a six-day power outage, as well as (b)(6), (b)(7)(C) allegedly loud, vulgar, and threatening behavior at a grievance meeting on (b)(6), (b)(7)(C) 2015 to discuss the Employer's failure to supply overtime meals during the power outage. During the grievance meeting, the (b)(6), (b)(7)(C) asserted that the contractual duty to provide overtime meals should be excused in light of the lack of power. The conversation became heated and, according to the discriminatee's notes, (b)(6), (b)(7)(C) expressed frustration that the Union did not understand that getting the plant back up and running was the Employer's main priority. (b)(6), (b)(7)(C) then suggested that perhaps it was just the discriminatee, rather than the Union, who did not appreciate the crisis. The discriminatee filed a grievance challenging (b)(6), (b)(7)(C) suspension.

On (b)(6), (b)(7)(C) 2015, the (b)(6), (b)(7)(C) complained to a Union (b)(6), (b)(7)(C) about the number of grievances that had been filed that year. (b)(6), (b)(7)(C) asserted that 22 grievances had been filed to date in 2015, which was more than the total grievances filed the prior year. When the Union (b)(6), (b)(7)(C) promised to look into it, (b)(6), (b)(7)(C) told (b)(6), (b)(7)(C) that the discriminatee was the one writing the grievances.

(b)(6), (b)(7)(C) complained that some of the grievances were ridiculous and a waste of time, and (b)(6), (b)(7)(C) told the Union (b)(6), (b)(7)(C) to do something about the discriminatee's grievance filing. When the Union (b)(6), (b)(7)(C) suggested bringing in a mediator to deal with all of the grievances at once, the (b)(6), (b)(7)(C) rejected that approach and threatened to take all of the grievances to arbitration instead.

On (b)(6), (b)(7)(C) 2015, the Employer terminated the discriminatee for violating its Discrimination and Harassment policy (hereinafter, the "first termination"). Prompted by an employee complaint, the Employer conducted an investigation into allegations that (b)(6), (b)(7)(C) employees were being harassed at the Ponca City plant and concluded that the discriminatee, as well as (b)(6), (b)(7)(C) other shipping department employees, had engaged in conduct prohibited by the nondiscrimination policy. The Employer issued three-day suspensions to the other employees, but terminated the discriminatee, purportedly based on its conclusion that (b)(6), (b)(7)(C) was the ringleader of the harassment. The discriminatee was informed of (b)(6), (b)(7)(C) termination during a meeting with (b)(6), (b)(7)(C) and a Union (b)(6), (b)(7)(C). The discriminatee refused to sign the termination paperwork, cursed at the Employer's (b)(6), (b)(7)(C), and accused the Employer of retaliating against (b)(6), (b)(7)(C) for filing grievances and Board charges. The Employer alleges that (b)(6), (b)(7)(C) threw a stack of papers at the (b)(6), (b)(7)(C). The discriminatee admits (b)(6), (b)(7)(C) threw (b)(6), (b)(7)(C) notebook on the table, where it slid and bumped into the (b)(6), (b)(7)(C) arm. The Union filed a grievance challenging the discriminatee's discharge.<sup>1</sup>

Shortly after the discriminatee's first termination, a Union (b)(6), (b)(7)(C) discussed the matter with the corporate (b)(6), (b)(7)(C). When (b)(6), (b)(7)(C) questioned the disparate punishment imposed on the discriminatee, the (b)(6), (b)(7)(C) responded that the discriminatee had just received a five-day suspension a month before, and that was why the Employer terminated (b)(6), (b)(7)(C). The Union (b)(6), (b)(7)(C) asserted that the suspension was illegitimate because it was based on the discriminatee's grievance activities and suggested that the Employer reduce the termination to a three-day suspension. The (b)(6), (b)(7)(C) responded that the discriminatee would not be permitted to come back to work.

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<sup>1</sup> The Union claims that no grievances have been filed since the discriminatee's (b)(6), (b)(7)(C) 2015 discharge. The Employer's (b)(6), (b)(7)(C) testified at the arbitral hearing in (b)(6), (b)(7)(C) 2016 that (b)(6), (b)(7)(C) had received grievances since that time, but (b)(6), (b)(7)(C) had not received any from the shipping department, where the discriminatee had been employed.

Grievance-Arbitration Proceedings Concerning Suspension and First Termination

On (b)(6), (b)(7)(C), 2015, the Union met with the Employer to discuss outstanding grievances, including the discriminatee's suspension and first termination grievances. After the parties discussed their opposing positions on the merits of the suspension, the Union (b)(6), (b)(7)(C) raised the termination grievance. The Employer (b)(6), (b)(7)(C) simultaneously stated that they would not discuss the matter and declared the meeting over. The Union (b)(6), (b)(7)(C) objected to cutting the meeting short and continued to press the Union's position that the discriminatee had not engaged in any harassment of (b)(6), (b)(7)(C) employees. Thereafter, the Employer (b)(6), (b)(7)(C) simply listened and did not respond to the Union's arguments.

In (b)(6), (b)(7)(C) 2016,<sup>2</sup> an arbitrator issued an award reducing the discriminatee's five-day suspension to a written warning. The arbitrator concluded that the discriminatee acted in (b)(6), (b)(7)(C) capacity as a (b)(6), (b)(7)(C) and within the bounds of protected conduct while handling the odor problem and attending the (b)(6), (b)(7)(C) 2015 grievance meeting, with one exception. The arbitrator sustained the accusation that the discriminatee had left (b)(6), (b)(7)(C) work station without permission. Since a first offense for violating that plant rule is a written warning under the then-applicable collective-bargaining agreement, the arbitrator downgraded the discipline accordingly. Finally, on the issue of whether the Employer violated the Act, the arbitrator concluded that the suspension did not violate Section 8(a)(1) and (3) because there was a lack of evidence demonstrating anti-union animus.

In August, another arbitrator ruled that the discriminatee's first termination was not for just cause and (b)(6), (b)(7)(C) converted the discharge to a three-day suspension. The arbitrator reduced the penalty because the Employer failed to prove that the discriminatee was, in fact, the ringleader of the harassment of (b)(6), (b)(7)(C) employees, and therefore the discriminatee was no more culpable than the other offenders. The arbitrator also concluded that certain harassment allegations against the discriminatee were unfounded or not probative of whether the nondiscrimination policy had been violated. The arbitrator directed the Employer to reinstate the discriminatee with full back pay, less three days for the suspension. At the request of the Union, the arbitrator retained jurisdiction over the case for the purpose of overseeing implementation of the award.<sup>3</sup>

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<sup>2</sup> All dates hereinafter are in 2016, unless otherwise noted.

<sup>3</sup> The Region deferred a charge challenging the discriminatee's (b)(6), (b)(7)(C) 2015 suspension and (b)(6), (b)(7)(C) 2015 termination to the parties' grievance-arbitration procedure, having determined that there was arguable merit based on the fact that

Following the arbitral award reversing the discriminatee's discharge, the parties' attorneys engaged in settlement discussions about the discriminatee's return to work and (b)(6), (b)(7)(C) backpay. During the course of several phone conversations, the Employer expressed its disappointment in the arbitrator's award and urged the Union to settle the matter monetarily, without reinstatement. To that end, the Employer indicated that it was weighing the option of terminating the discriminatee when (b)(6), (b)(7)(C) returned to the plant based on (b)(6), (b)(7)(C) misconduct during the discharge meeting on (b)(6), (b)(7)(C), 2015, and threatened to further delay (b)(6), (b)(7)(C) backpay by taking any dispute over this second termination all the way to arbitration. It also discouraged the discriminatee from returning to work by asserting—erroneously, according to the Union—that (b)(6), (b)(7)(C) job had changed and that (b)(6), (b)(7)(C) would not drive the forklift to the same degree as (b)(6), (b)(7)(C) had before. When the Union refused to waive reinstatement, the Employer insisted that the discriminatee take a drug test and physical before returning to work. Although the Union challenged this additional reinstatement prerequisite, the arbitrator ruled in favor of the Employer and the discriminatee ultimately passed both tests. Thereafter, the Employer indicated to the Union that it could still terminate the discriminatee, that it was still weighing its options, and that the well was poisoned.

Ultimately, the Employer issued a letter directing the discriminatee to return to work on October 7, 2016. Due to a family emergency, the discriminatee requested a 10-day extension to report to work. The Employer agreed, but took the position that backpay would toll as of October 7. On October 14, the Union sent the Employer its backpay calculations and supporting documentation.

### Second Termination

On (b)(6), (b)(7)(C), the discriminatee reported to HR and signed an offer of reinstatement. (b)(6), (b)(7)(C) was then immediately handed a termination letter, citing (b)(6), (b)(7)(C) insubordinate, abusive, and intimidating behavior during the (b)(6), (b)(7)(C) 2015 discharge meeting (hereinafter, the "second termination"). The letter states that, although the discharge is warranted based on the discriminatee's misconduct standing alone, it is also justified based on (b)(6), (b)(7)(C) prior disciplinary history, namely, (b)(6), (b)(7)(C) "final warning" (reduced from the five-day suspension) and (b)(6), (b)(7)(C) three-day suspension (reduced from the first termination). Furthermore, the letter states that the second termination became effective on (b)(6), (b)(7)(C) 2015. The Union immediately filed a grievance challenging the second termination.

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the discriminatee was suspended, in part, for protected grievance handling and that the Employer relied on that suspension in making the termination decision. Following the arbitral awards in favor of the discriminatee, the Union withdrew the Board charge.

The Region has already determined that the discriminatee's second termination was unlawful because it was in direct response to the discriminatee's successful processing of [REDACTED] first termination grievance and reflected the Employer's general animus toward the discriminatee's grievance activities. Alternatively, the Region concluded that the second termination violated the Act because the discriminatee was engaged in protected activity when [REDACTED] protested [REDACTED] first termination on [REDACTED] 2015, and [REDACTED] did not exceed the bounds of permissible conduct during that protest.

### Arbitral Ruling on Backpay Period for First Termination Grievance

By letter dated [REDACTED] the Employer took the position that the discriminatee was not entitled to any backpay because [REDACTED] second termination became effective on [REDACTED], 2015, that is, on the date [REDACTED] would have returned to work if [REDACTED] had served a three-day suspension for violating the nondiscrimination policy. The Employer also indicated that it disagreed with the Union's backpay calculations because, in its view, the discriminatee had failed to mitigate [REDACTED] damages. The Employer asserted that an arbitrator would need to resolve the parties' disputes over backpay and the discriminatee's second termination. Until these issues could be resolved, the Employer pledged to place the Union's estimated backpay sum into an escrow account.

The parties submitted supplemental briefs to the arbitrator concerning the implementation of the order for backpay and reinstatement. The Union took the position that the backpay period was still running because the [REDACTED] reinstatement was a sham. The Union also argued that the second termination could not toll backpay as of [REDACTED] 2015, since the discharge decision was not communicated to the discriminatee until [REDACTED] 2016, and the Employer failed to assert that the discriminatee's [REDACTED] 2015 conduct was a terminable offense either at the time it occurred or at the arbitral hearing. The Employer took the position that the validity of the second termination, and its retroactive effect, was beyond the arbitrator's jurisdiction because it represented a separate dispute and must be decided in another grievance proceeding under the terms of the collective-bargaining agreement. It also argued that the dispute concerned implementation of the initial award, which constitutes a new grievance under arbitral and judicial authority. Finally, the Employer reserved the right to challenge the Union's backpay calculations in the event the arbitrator ruled in favor of the Union with regard to the backpay period, and it indicated that it had escrowed the total amount due according to the Union's calculations until such issues could be resolved.

The arbitrator issued a supplemental ruling on [REDACTED] ordering backpay from [REDACTED] 2015 to [REDACTED] 2016, minus three days. The ruling did not address the merits of the second discharge, which the arbitrator viewed as a separate dispute. To date, the Employer has not paid the discriminatee any

backpay, nor is there evidence that the parties have engaged in further discussions regarding the amount of backpay owed.

### ACTION

We conclude that deferral to the parties' grievance-arbitration process is not appropriate because the Employer has engaged in a pattern of hostility toward the (b)(6), (b)(7)(C) for (b)(6), (b)(7) grievance activities and demonstrated a lack of respect for the grievance-arbitration machinery such that the parties' alternative process cannot be relied upon to fairly resolve this dispute.

Under *Collyer*<sup>4</sup> and *United Technologies*,<sup>5</sup> the resolution of an arguably meritorious unfair labor practice charge is to be administratively deferred to the parties' contractual grievance and arbitration procedure pending the outcome of that process when: (1) the dispute arises within the confines of a long and productive collective-bargaining relationship; (2) the parties' contract provides for arbitration in a broad range of disputes; (3) the dispute is cognizable under the parties' grievance and arbitration procedure; (4) there is no claim of employer animosity to employees' exercise of protected rights; (5) the charged party is willing to arbitrate the dispute; and (6) the dispute is well suited to resolution by arbitration.<sup>6</sup> In addition, if the collective-bargaining agreement under which the grievance arises was executed after December 15, 2014—the date the Board revised its standard for postarbitral deferral—administrative deferral is only appropriate in Section 8(a)(1) and (3) cases if the arbitrator is explicitly authorized to decide the statutory issue, either in the collective-bargaining agreement or by agreement of the parties in a particular case.<sup>7</sup>

The Board does not apply a “per se” rule against deferral in every case in which a claim of animosity is present or an employer has “sought, by prohibited

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<sup>4</sup> *Collyer Insulated Wire*, 192 NLRB 837, 840-42 (1971).

<sup>5</sup> *United Technologies Corp.*, 268 NLRB 557, 560 (1984).

<sup>6</sup> See *Collyer*, 192 NLRB at 842; Guideline Memorandum Concerning *United Technologies Corporation*, GC Memorandum 84-5, dated Mar. 6, 1984.

<sup>7</sup> *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132, slip op. at 12-14 (Dec. 15, 2014). See generally Guideline Memorandum Concerning Deferral to Arbitral Awards, the Arbitral Process, and Grievance Settlements in Section 8(a)(1) and (3) Cases, GC Memorandum 15-02, dated Feb. 10, 2015.

means, to inhibit or preclude access to the grievance procedures.”<sup>8</sup> Rather, deferral depends on the degree of hostility alleged in a given case, together with evidence of prior unlawful conduct.<sup>9</sup> In such cases, the Board assesses whether the grievance-arbitration machinery “can reasonably be relied on to function properly and to resolve the current disputes fairly.”<sup>10</sup> Where there is a “continuing pattern of efforts to defeat the purposes of our Act . . . , particularly if . . . the parties’ own machinery is either untested or not functioning fairly and smoothly,” the Board will assert jurisdiction over the matter.<sup>11</sup> On the other hand, “if the combination of past and

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<sup>8</sup> *Babcock & Wilcox Nuclear Operations Group, Inc.*, 363 NLRB No. 50, slip op. at 2 (Dec. 3, 2015) (deferring charge that steward was issued a disciplinary letter for asserting a missed overtime claim); *Joseph T. Ryerson & Sons, Inc.*, 199 NLRB 461, 462 (1972) (declining to defer where employer threatened reprisal against union officer if he pursued a grievance because, in part, such conduct “strikes at the foundation of [the] grievance and arbitration mechanism” and indicates that the alternative dispute resolution process was not “open, in fact, for use by the disputants”). See also *St. Francis Regional Medical Center*, 363 NLRB No. 69, slip op. at 3 (Dec. 16, 2015) (acknowledging that there is no “hard-and-fast rule” requiring deferral in cases involving claims of animus).

<sup>9</sup> *St. Francis*, 363 NLRB No. 69, slip op. at 3 (quoting *United Aircraft Corp.*, 204 NLRB 879, 879 (1972), *aff’d sub nom. Lodges 700, 743, 1746, Int’l Ass’n of Machinists v. NLRB*, 525 F.2d 237 (2d Cir. 1975)).

<sup>10</sup> *United Aircraft*, 204 NLRB at 879.

<sup>11</sup> *Id.* See *St. Francis*, 363 NLRB No. 69, slip op. at 3 (deferral inappropriate because discipline and discharge of union steward as well as another employee for investigating a possible grievance was “sufficiently severe” and exceeded the level of animosity present in cases where the Board deferred); *Paragon Paint Corp.*, 317 NLRB 747, 764-66, 769-70 (1995) (no deferral where employer issued written warnings to two union stewards for attempting to attend a grievance meeting, assigned onerous work to stewards in retaliation for their grievance handling, assigned a grievance representative without authority to settle grievances, withheld information, and barred all union representatives from the plant); *Dallas & Mavis Forwarding Co.*, 291 NLRB 980, 986 (1988) (no deferral, in part, because employer laid off 30 employees in retaliation for seeking their union’s assistance to obtain information to enforce contract rates), *enforced*, 909 F.2d 1484 (6th Cir. 1990); *Postal Service*, 290 NLRB 120, 120-21 (1988) (no deferral where employer threatened and refused to promote employee due to his grievance-filing because grievance process had been totally ineffective at curbing employer’s proclivity to retaliate), *enforced*, 906 F.2d 482 (10th Cir. 1990); *Ram Construction Co.*, 228 NLRB 769, 774 n.18

presently alleged misconduct does not appear to be of such character as to render the use of that machinery unpromising or futile,” the Board will defer the dispute to the parties’ grievance-arbitration process.<sup>12</sup>

Here, the Employer has engaged in a pattern of hostility toward the discriminatee in connection with (b)(6), (b)(7) grievance activities and has disrespected the grievance-arbitration process such that deference to that process is not appropriate. In 2015, the discriminatee was suspended, in part, for protected conduct in a grievance meeting where (b)(6), (b)(7) was acting in (b)(6), (b)(7) capacity as a (b)(6), (b)(7)(C).<sup>13</sup> Shortly

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(1977) (no deferral where employer discharged two employees for their efforts to assert their contractual rights), *enforced sub nom. Lastooka v. NLRB*, 566 F.2d 1169 (3d Cir. 1977); *Nissan Motor Corp.*, 226 NLRB 397, 397 n.1, 399-400 (1976) (no deferral due, in part, to fact that steward was suspended for grievance filing); *Morrison-Knudsen Co.*, 213 NLRB 280, 280 n.2, 287 & n.39 (1974) (no deferral where steward was discharged for pressing grievances and had also been retaliated against outside the 10(b) period), *enforced*, 521 F.2d 1404 (8th Cir. 1975); *North Shore Publishing Co.*, 206 NLRB 42, 42-43 (1973) (no deferral where employee discharged for refusing to abandon his grievance).

<sup>12</sup> *United Aircraft*, 204 NLRB at 879. *See Clarkson Industries*, 312 NLRB 349, 352 (1993) (deferral despite threat to hold union steward to a higher standard and issuance of formal warning letter to steward for briefly visiting the cafeteria during work time); *Consolidated Freightways Corp.*, 288 NLRB 1252, 1254-55 & n.12 (1988) (deferral where employer threatened a single employee, assigned him less desirable work, and changed its dispatch procedure because of his grievance filing), *enforced sub nom. Hammontree v. NLRB*, 925 F.2d 1486 (D.C. Cir. 1991) (en banc); *Postal Service*, 271 NLRB 1297, 1297-98 (1984) (deferral despite unilateral change to location, size, and arrangement of stewards’ work area, among other unilateral changes that frustrated the stewards’ performance of their union duties; no “genuine obstacle to utilization” of agreed-upon machinery); *Postal Service*, 270 NLRB 114, 114-15 (1984) (deferral of threats to several employees for grievance filing where both parties agreed to submit the dispute to arbitration); *United Technologies* 268 NLRB at 557, 560 & n.21 (deferring threat of discipline if employee processed her grievance to the next step where both parties continued to file and process other grievances thereafter); *United Aircraft*, 204 NLRB at 880-81, 884, 887 (deferral appropriate, notwithstanding claims that employer harassed shop stewards and suspended one steward, where misconduct was isolated and carried out primarily by first-line supervisors, and employer complied with prior arbitral awards).

<sup>13</sup> Although the arbitrator ruled that the suspension did not violate Section 8(a)(1) or (3), this conclusion is clearly erroneous as a matter of law given that the Employer

thereafter, the discriminatee was terminated based, in part, on that earlier suspension. Around this time, the Employer exhibited significant animus toward the discriminatee's grievance-filing, which it considered to be overzealous. Indeed, the Employer viewed the discriminatee's reinstatement as a non-starter and refused to engage in meaningful discussions to resolve [REDACTED] first termination grievance during the early phase of the grievance-arbitration process.

In addition, the Employer has denigrated the parties' grievance-arbitration procedure by refusing to comply with the outcome of that process.<sup>14</sup> The Employer has failed to pay the discriminatee any backpay despite an arbitral award setting forth a 17-month backpay period. Its position that backpay should toll as of [REDACTED] 2015 is untenable given that the Employer failed to present evidence at the arbitral hearing that it would have discharged the discriminatee based on post-discharge misconduct. The contractual limitation on resolving more than one dispute in a single arbitration does not legitimize the Employer's position because the remedy was one of the issues presented to the arbitrator, and post-discharge misconduct would be relevant to that question.<sup>15</sup> The Employer's escrowing of the disputed amount does not significantly moderate its denigration of the grievance-arbitration process. The Employer's position on tolling is in direct conflict with the arbitral award, which implicitly rejected the Employer's retroactivity argument. Likewise, the Employer's good faith in escrowing the money is undermined by the fact that it threatened to withhold backpay in order to apply financial pressure on the

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admitted the suspension was based, in part, on [REDACTED] conduct during the [REDACTED] 2015 grievance meeting, and the arbitrator concluded, as did the Region, that the discriminatee did not exceed the boundaries of permissible conduct during that meeting.

<sup>14</sup> Compare *Clarkson Industries*, 312 NLRB at 352 & n.17 (although deferral appropriate on other grounds, employer's alleged renegeing on a grievance settlement was a proper consideration in determining whether to defer to the grievance-arbitration machinery), with *United Aircraft*, 204 NLRB at 880 (employer's full compliance with arbitral awards reversing two unjust suspensions is evidence that the "machinery has worked—and worked fairly—when given a chance"). See also *Packerland Packing Co.*, 218 NLRB 676, 678 (1975) (noting that employer complied with prior arbitral award in finding that available machinery was not unpromising or futile).

<sup>15</sup> See ELKOURI & ELKOURI, *HOW ARBITRATION WORKS*, at 8-88 (Kenneth May et al. eds., 7th ed. 2012) (1952) ("With regard to back-pay awards, employees' post-discharge conduct may be relevant in determining the amount to be awarded.").

discriminatee to extract a settlement that waives reinstatement. Thus, it is evident that the Employer has failed to respect the finality of the arbitrator's award.

Finally, the Employer's animus toward the discriminatee's grievance activities culminated in a second termination, which the Region has concluded was in direct response to the discriminatee's successful processing of [REDACTED] first termination grievance.<sup>16</sup> Discharge—as opposed to a mere threat of reprisal or issuance of low-level discipline—in retaliation for invoking the grievance process or raising contract violations constitutes a high degree of hostility toward the parties' dispute resolution machinery, and the Board has accordingly refused to defer in such cases.<sup>17</sup> *United Beef Co.*<sup>18</sup>—where the Board deferred a complaint alleging that the employer harassed a shop steward in the course of grievance handling and ultimately discharged that steward—is not to the contrary. There, the Board found that the employer's alleged Section 8(a)(1) harassment of the steward in the course of his processing grievances was “not inimical to the . . . grievance-arbitration process itself.”<sup>19</sup> Although the employer later discharged the steward for engaging in union activities, it appears that the Board did not view that Section 8(a)(3) discharge allegation—which was prompted by the steward's spitting at a plant manager during a confrontation on the shop floor—to have been connected to the steward's grievance activities.<sup>20</sup> Furthermore, *United Beef* is inapposite because there the unfair labor practice charge had been administratively deferred under *Dubo Manufacturing Corp.*,<sup>21</sup> the parties had scheduled arbitration, and the union only

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<sup>16</sup> The pretextual nature of the Employer's grounds for the second termination is underscored by the disparity in punishment for similar conduct. In this regard, the discriminatee was only suspended for engaging in allegedly insubordinate, loud, vulgar, and threatening behavior on [REDACTED] 2015, yet [REDACTED] was terminated for engaging in supposedly insubordinate, abusive, and intimidating behavior on [REDACTED] 2015. The Employer's attempt to justify the heightened punishment based on [REDACTED] prior disciplinary record is unconvincing given this was the discriminatee's first offense for violating the plant rules cited in the second termination letter, after taking into account the arbitrator's determination that the discriminatee had merely violated the rule against leaving [REDACTED] work station on [REDACTED], 2015.

<sup>17</sup> See cases cited *supra* notes 11-12.

<sup>18</sup> 272 NLRB 66 (1984).

<sup>19</sup> *Id.* at 68 & n.5.

<sup>20</sup> See *id.* at 66-68 & n.5.

<sup>21</sup> 142 NLRB 431 (1963).

withdrew from the arbitral process upon receiving unfavorable rulings from the arbitrator on other matters.<sup>22</sup> Here, the Union maintains that the grievance-arbitration process cannot be expected to fairly resolve the discriminatee's discharge grievance, and there is no evidence that the Union seeks Board jurisdiction over the matter purely for strategic advantage, as in *United Beef*, or economic convenience.<sup>23</sup> Thus, the weight of authority supports asserting jurisdiction given the severity of the alleged retaliation against the discriminatee's grievance activities and the Employer's denigration of the grievance-arbitration process.<sup>24</sup>

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<sup>22</sup> *United Beef*, 272 NLRB at 67-68.

<sup>23</sup> See also *General Dynamics Corp.*, 271 NLRB 187, 188-90 (1984) (deferring steward's suspensions because the steward pursued a grievance through four of the five steps of the grievance-arbitration procedure, the parties had selected an arbitrator, and the steward withdrew the grievance simply because "it would be less expensive and more convenient to pursue his unfair labor practice charge before the Board").

<sup>24</sup> We note that this case would have met the criteria for prearbitral deferral but for the Employer's hostility toward the grievance-arbitration process. We agree with the Region that the authorization requirement for prearbitral deferral adopted in *Babcock & Wilcox Construction*, 361 NLRB No. 132, would apply here because the second termination grievance arose under the current collective-bargaining agreement, which was executed after December 15, 2014, rather than under the predecessor agreement. In this regard, the discharge decision was made and communicated to the discriminatee while the current contract was in effect. See *Litton Fin. Printing Div.*, 501 U.S. 190, 205-06 (1991) ("A postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement."). In addition, we would find that the Discrimination and Harassment policy's assurance of "equal employment opportunity without discrimination or harassment based on . . . any other characteristic protected by law," which the parties adopted as part of the collective-bargaining agreement, is broad and explicit enough to encompass the specific statutory right at issue in this case. Any ambiguity in the policy is dispelled by the fact that the arbitrator who ruled on the discriminatee's suspension listed the Section 8(a)(3) and (1) claims as issues to be decided in that case. Thus, it is reasonable to assume that other arbitrators would also interpret the parties' contract as granting them the authority to rule on claims alleging discrimination based on union activities.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(3) and (1) by discharging the discriminatee on October 17, 2016.

/s/  
B.J.K.

ADV.14-CA-186718.Response.ContinentalCarbon (b)(6), (b)(7)(C)