

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

AMALGAMATED SUGAR CO. LLC

and

**Cases 27-CA-243789
27-CA-248764**

**BAKERY CONFECTIONERY, TOBACCO
WORKERS & GRAIN MILLERS UNION, LOCAL
284g, AFL-CIO**

**COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Section 102.24 of the Rules and Regulations of the National Labor Relations Board (Board), counsel for the General Counsel files this Opposition to Respondent's Motion for Summary Judgment (Motion). Counsel for the General Counsel requests that the Board deny Respondent's Motion because Respondent's argument in support of deferral is not supported by current Board law. Furthermore, this matter raises factual issues that are appropriate for resolution by an Administrative Law Judge.

INTRODUCTION

Based upon charges filed by the Bakery Confectionery, Tobacco Workers and Grain Millers, Local 284g, AFL-CIO (Charging Party), the Regional Director for Region 27

issued a Consolidated Complaint and Notice of Hearing (Complaint) on January 17, 2020, and an Amended Complaint and Notice of Hearing (Amended Complaint) on January 31, 2020.¹ The Amended Complaint alleges that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. On February 18, 2020, Respondent filed its Motion with the Board seeking deferral of the allegations in Cases 27-CA-243789 and 27-CA-248764, and dismissal of the Amended Complaint. The hearing in this matter is scheduled for March 18, 2020.

ALLEGATIONS

The relevant allegations are set forth in the Amended Complaint and are based on evidence obtained during the Region 27's investigation of Cases 27-CA-243789 and 27-CA-248764. Specifically, paragraph 5 alleges violations of Section 8(a)(1) of the Act including implied threats, threats, interrogations, and coercive statements because employees sought to invoke their rights under the collective bargaining agreement between the Charging Party and Respondent, and/or engaged in union activities, including filing and/or pursuing grievances. Paragraph 6 alleges violations of Section 8(a)(3) of the Act including the assignment of more onerous working conditions to employee Mark Gamble (Gamble) under paragraph 6(a), the denial of wage increases to employees Justin Stevens (Stevens) and Brady Pierce (Pierce) under paragraphs 6(b) and 6(c) respectively, and Gamble's assignment to a different work area under paragraph 6(d). The Amended Complaint further alleges that Respondent engaged in the conduct

¹ The amended Complaint dated January 31, 2020, was issued to clarify the allegations. Pursuant to the Board's Rules and Regulations Sec. 102.17, a complaint may be amended by the Regional Director prior to the hearing.

in paragraphs 6(a) and 6(d) because, among other things, Gamble filed a grievance, and in paragraph 6(b) because Stevens invoked his rights under the collective-bargaining agreement. Finally, the Amended Complaint alleges that Respondent engaged in the conduct described in paragraph 6(c) because Pierce, in his capacity as Charging Party's Vice-President, filed grievances on behalf of employees, including Gamble. Respondent's Answer to the Amended Complaint denies the Section 8(a)(1) and (3) allegations set forth in paragraphs 5 and 6. The Administrative Law Judge will be tasked with addressing the factual issues in this matter and determining whether Respondent did, in fact, engage in the alleged unfair labor practices.

In support of its Motion, Respondent provided the non-Board statements of two supervisors, including Craig Ashcraft (Ashcraft), who are alleged in the Amended Complaint as Respondent's agents and supervisors. Ashcraft claims in his statement that he is not involved in the handling or processing of grievances. However, the issue is not about who is involved in the *grievance procedure*, but rather, who is involved in the *disciplinary procedure*. The evidence will establish that employees who were engaged in the filing and processing of grievances were threatened with discipline and more onerous working conditions, matters that are ostensibly within Ashcraft's authority. Further, the evidence will also establish with respect to the Section 8(a)(3) allegations that employees were retaliated against as a result of their grievance filing activities, something that is distinct from who is actually involved in the administration of the grievance-arbitration process.

ARGUMENT

For nearly 50 years, the Board has abstained from intervening in cases that are cognizable under the parties' collective-bargaining agreement. In *Collyer Insulated Wire*, 192 NLRB 837 (1971), the Board indicated its willingness to withhold litigation in cases where the contractual grievance procedure was well-suited to resolve disputes that may also be violations of the Act. The allegation of a statutory violation and a contractual dispute would have to be encompassed within the parties' contract. The Board noted: "[w]hen the parties have contractually committed themselves to mutually agreeable procedures for resolving their disputes during the period of the contract, we are of the view that those procedures should be afforded full opportunity to function." *Id.* at 843. The Board would retain jurisdiction, however, to ensure that any arbitration award would comport with the requirements of its earlier decision, requiring fair procedures and results not repugnant to the Act. *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955). The Board will also defer to settlements short of arbitration, so long as they are not repugnant to the Act. *Alpha Beta Co.*, 273 NLRB 1546 (1985).

The Board's policy is limited though in that it will not defer to matters that strike at the very heart of the grievance-arbitration procedure as in this matter. In *Joseph T. Ryerson & Sons, Inc.*, 199 NLRB 461 (1972) (*Ryerson*), the Board refused to defer to claims that a respondent "sought, by prohibited means, to inhibit or preclude access to the grievance procedures," noting that the grievance procedure must not only be "fair and regular," but also that they were, in fact, open for use by the disputants. *Id.* At 462. In *Ryerson*, a union official pursuing a grievance was told that he would "have a hard time with the company and also the men in the warehouse" if he pursued a grievance. *Id.* The

Board refused to defer to the parties' contractual grievance procedure and proceeded to address the merits of the alleged threat. *Id.* at 464. *Ryerson* has been applied by the Board and never modified nor abrogated. See, e.g. *Babcock & Wilcox*, 363 NLRB No. 50 (2015); *United States Postal Service*, 271 NLRB 1297 (1984); *Nissan Motor Corporation*, 226 NLRB 397 (1976); *North Shore Publishing*, 206 NLRB 42 (1973).

The cases cited by Respondent seeking deferral are inapplicable. The Board in *United Parcel Service, Inc.*, 369 NLRB No. 1 (December 23, 2019), a case relied on by Respondent in arguing that deferral in this matter is appropriate, decided to return to the deferral standards that had been in place prior to its earlier decision in *Babcock & Wilcox Construction, Co., Inc.*, 361 NLRB 1127 (2014). The Board reviewed an arbitration award involving the discharge of an employee who was a package car driver and a union steward, who alleged that his discharge violated the contract as well as Section 8(a)(3) of the Act. In deferring to the award, the Board returned to the prior requirements that deferral is appropriate if: (1) the arbitration proceedings were fair and regular; (2) the parties agreed to be bound; (3) the contractual issue was factually parallel to the unfair labor practice issue; (4) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice; and (5) the decision was not clearly repugnant to the purposes and policies of the Act. The Board concluded in *United Parcel Service* that the arbitration panel's decision met these five criteria and deferral was warranted. It did not reverse *Ryerson*.

The predicate to an arbitral process that is "fair and regular" is, of course, access to the process itself. *Ryerson*, at 462. *United Parcel Service* did not alter these requirements. Nor did the decision change the requirement that the statutory allegations

and contractual dispute must be encompassed within the parties' collective-bargaining agreement. *Collyer*, 192 NLRB at 839. Thus, Respondent's argument that the unfair labor practice allegations in paragraphs 5 and 6 of the Amended Complaint are deferrable should be rejected.

CONCLUSION

Deferral of Cases 27-CA-243789 and 27-CA-248764 is inappropriate under current Board law for several reasons. The unfair labor practice allegations in the Amended Complaint are of the type that are not deferrable because they involve employer action in response to employee conduct related to grievance filing. Furthermore, there are genuine issues of material fact appropriate for consideration by an Administrative Law Judge. Therefore, counsel for the General Counsel requests that the Board deny Respondent's Motion for Summary Judgment.

Submitted this 21st day of February 2020, at Denver, Colorado.



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**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S
OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

I, Todd Saveland, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on February 21, 2020, I served the above-entitled document(s) by email, upon the following persons, addressed to them at the following email addresses:

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