

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

**AMERICAN FEDERATION OF TEACHERS,
AFL-CIO d/b/a WASHINGTON STATE
NURSES ORGANIZING PROJECT,
and/or AMERICAN FEDERATION OF
TEACHERS, AFL-CIO and WASHINGTON
STATE NURSES ORGANIZING PROJECT**

and

Case 19-CA-190619

**COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 7901**

**GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

Washington State Nurses Organizing Project (“Respondent”) excepts (“Exceptions”) to the December 23, 2019 decision (“ALJD”) of Administrative Law Judge Eleanor Laws (the “ALJ”). That ALJD found Respondent violated §§ 8(a)(3) and (1) of the Act by interrogating and threatening employees about their concerted activities, and unlawfully suspending and discharging employees Joseph Crane (“Crane”), Matthew Burdine (“Burdine”), Cecile Reuge (“Reuge”), Gabrielle Hanley (“Hanley”), Steven McAllister (“McAllister”), and Darnley Weekes (“Weekes”). (ALJD 11:5-15, 14:31-39). Pursuant to § 102.46 of the Rules and Regulations of the National Labor Relations Board (“Board”), Counsel for the General Counsel (the “General Counsel”) submits this Answering Brief to Respondent’s Exception and its Brief in support.¹

Respondent does not except to the ALJ’s legal findings or her deferral to many of the arbitrator’s fact findings and substantive credibility determinations. REX 1-2, REB 1. Nor does Respondent otherwise directly challenge the facts or legal conclusions in the case. REB 1 n.3. Instead, Respondent excepts only to the fact that the ALJ refused to defer to the arbitrator’s remedy award. REX 1-2.

In sum, the arbitrator found that all six employees were discharged unlawfully under the Act, but limited the employees’ backpay to two weeks without any factual or legal analysis. See ALJD 16:23-30. In addition, the arbitrator merely converted the

¹ References to the ALJD will be referred to as “ALJD” followed by the page number(s), a colon and the particular line number(s). References to the July 30, 2019 Board hearing transcript appear as (Tr. --:--). The Joint Stipulation approved by the ALJ is referenced as (ALJX 1:--). References to Joint Exhibits 5 and 6 appear as (JX --:--). However, some documents part of Joint Exhibits 1 through 4 are not referenced as JX in this brief. JX 1 is the three-day arbitration transcript and references appear as (AT --:--). JX 2 exhibits appear as (Arb UX --:--). JX 3 exhibits appear as (Arb EX --:--). JX 4 exhibits appear as (Arb JX --:--). References to Respondent’s Exceptions Brief are designated “REB”, followed by the page number(s). References to Respondent’s Exceptions are designated “REX” followed by the page number(s).

employees' unlawful discharges into layoffs, rather than vacating their terminations altogether. ALJD 15:24-40. As a result, the ALJ found the arbitrator's remedy was not a "reasonable application of the statutory principles that would govern the Board's decision, if the case were presented to it [...]." ALJD 16:27-29 (citing to *Babcock & Wilcox*, 361 NLRB 1127 (2014)). The ALJ then ordered Respondent, as guaranteed by American Federation of Teachers, AFL-CIO, to rescind the discharges of all six employees and make each of them whole, including "for any loss of earnings or other benefits." ALJD 20:30-21:34, n. 37.

Respondent excepts to that conclusion on the basis that the Board overturned *Babcock & Wilcox* in *UPS, Inc.*, 369 NLRB No. 1 (December 23, 2019), on the same date the ALJD issued, returning to the older *Olin* and *Spielberg* standards. REX 1; REB 4; *Olin Corp.*, 268 NLRB 573 (1984); *Spielberg Mfg. Co.* 112 NLRB 1080 (1955). Respondent claims that under *Olin*, the arbitrator's entire decision should stand, even with the heavily curtailed backpay remedy. REB 5-6. However, Respondent substantively misrepresents the ALJD in this regard; the ALJ evaluated the case based on Board law that arose under *Olin* as well. This analysis provided strong proof the award did not meet, much less surpass, the lower *Olin* bar either, and so deferral would still be inappropriate.

For the reasons set forth below, the General Counsel respectfully requests the ALJ's findings be affirmed in their entirety, that the Board reject Respondent's exceptions in their entirety and refuse to defer to the arbitrator's repugnant remedy, and that the discharged employees be awarded full backpay remedies as set forth in the ALJD.

II. THE ARBITRATOR'S REMEDY IS REPUGNANT TO THE ACT

In *UPS*, the Board reinstated the *Olin* and *Spielberg* standard for deferral to arbitration in §§ 8(a)(3) and (1) cases.

Specifically, the Board will defer to an arbitration award in such cases 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. As in *Olin*, the burden will be on the party arguing against deferral to demonstrate defects in the arbitral process or award.

UPS, Inc., 369 NLRB No. 1 (Dec. 23, 2019) (citations omitted). Here, neither Respondent nor the General Counsel challenge the legitimacy of the arbitration in this case as to items 1-4. The issue is solely whether the backpay award was repugnant to the purposes and policies of the Act under item 5.

Respondent accurately notes that an arbitrator's award must be "susceptible to an interpretation consistent with the Act" even if the General Counsel or Board would actually find differently. REB 6-7 (citing to *Olin*, 268 NLRB at 574, and *Smurfit-Stone Container*, 344 NLRB 658 (2005)). Nevertheless, Respondent errs when it asserts that the arbitrator's award in the instant case passes such muster.

Preliminarily, it should be noted that the parties specifically stipulated to the fact that Respondent only ceased to exist on August 31, 2018, and that the CBA between Respondent and the Union ran through June 30, 2018. (ALJX 1; Tr. 10:5-11:10; JX 5:19). Respondent's attempts throughout its REB to argue that there is insufficient evidence to find that a two-week backpay award was inadequate for the discharge of all

but one (less senior) employee is thus not only misleading, but facially absurd as well. (REB 8-9).

The arbitrator's award converting the employees' discharge to layoffs is plainly wrong, as Respondent hired and/or transferred seven or eight employees to replace the six discriminatees. (AT 154). More importantly, the one surviving employee from Respondent's mass discharge – Roxanna McCloud-Lewis ("McCloud-Lewis") – remained employed by Respondent until February 16, 2018. (AT 553, 583-584).

McCloud-Lewis quit Respondent voluntarily to take a National Representative Position with AFT, rather than being laid off as part of a "winding down." (AT 584). When she left, there were two remaining organizers. (AT 585). Lastly, as of the date of the arbitration hearing – June 4, 2018 - Respondent had at least three organizers and was "still an ongoing operation." (AT 20). This means Respondent hired someone to replace McCloud-Lewis.

Discriminatees Crane and Weekes were both more senior than McCloud-Lewis, and Article 10 of the CBA provides for reverse-seniority layoff procedures.² (Arb. JX 1:5). This means that both Crane and Weekes would have still been employed at Respondent through at least June 4, 2018. Crane, being the most senior employee, would have had a gross backpay award accruing until the cessation of Respondent's existence.

Respondent's long citation to *Crown-Zellerbach*, 215 NLRB 385, 387 (1974), is misplaced. See REB 6-7. In that case, the Board recognized that the arbitrator had

² McCloud-Lewis was hired on about December 15, 2015. (AT 583). Crane was hired as a temp in January 2015 and full-time in March 2015. (AT 334; ALJD 3:35-37). Weekes was hired in about April 2015. (Tr. 35:19).

justified limiting an employee's backpay to 40% gross backpay because the employee's actions were insubordinate and therefore "deserving of some censure." 215 NLRB at 387. In addition, the discriminatee in that case was actually reinstated. However, the Board still recognized that deferral would not be appropriate "if the award on its face contained grievous error." *Id.* In this case, such a grievous error is apparent.

Gross backpay for at least some of the discriminatees was approximately 2% rather than 40%.³ It is also axiomatic that an unlawfully motivated layoff is just as much a violation as an unlawfully motivated termination. Finally, as the ALJD emphasized, the arbitrator did not find actual insubordination that would justify such an egregious limitation on backpay, further distinguishing it from *Crown-Zellerbach*. ALJD 16 n. 30.

Other cases where the Board upheld a no-backpay award for a discharge are equally at odds. See *e.g. Specialized Distribution Mgmt., Inc.*, 318 NLRB 158, 161 (1995) (finding that arbitrator's conversion of discharge to suspension without pay was acceptable only because there was no prima facie proof that the discharge itself was motivated by protected, concerted activities).

The Board has specifically disavowed the idea that a no backpay remedy is too weak to be repugnant to the Act. *Sea-Land Serv., Inc.*, 240 NLRB 1146, 1149 n.4 (1979); *Cessna Aircraft Co.*, 220 NLRB 873, 875 (1975). Instead, the Board has found the opposite:

We further find that the arbitrator's award of reinstatement with no backpay [...] in light of the unlawfulness of the discharge,

³ At minimum, Crane, the most senior organizer, would have been entitled to backpay through the end of the project. The project ended 98 weeks after the unlawful discharge. Two weeks backpay out of 98 is just over 2%. In addition, Weekes was more senior than McCloud-Lewis and Respondent employed at least three organizers as of June 4, 2018. June 4, 2018 is about 85 weeks after the unlawful discharge. Two weeks backpay out of 85 is still only 2.35%.

repugnant to the Act, and we shall therefore not defer to it but provide the customary remedy.

Dunham-Bush, Inc., 264 NLRB 1347, 1349 (1982). Also see *USPS*, 366 NLRB No. 168 (2018) (Board rejected deferral to a pre-arbitration grievance settlement because “deferring to a settlement that fails to provide back pay to make employees whole for the losses they suffered as a result of the Respondent’s unlawful action is repugnant to the Act”).

Moreover, the arbitrator’s issuance of a “compromise award” in order to “split the baby” without making sufficient legal or factual analyses is repugnant to the Act in §§ 8(a)(3) and (1) cases. *Triple A Mach. Shop, Inc.*, 245 NLRB 136, 137 (1979). In the instant case, the arbitrator’s only explanation for his two-week backpay award was by listing the CBA’s requirements for paying employees who were laid off. ALJD 15:20-40 (citing to JX 5:22). This is a total non-sequitur, as the discriminatees were discharged for unlawful reasons, and there was no planned layoff of employees since Respondent admittedly “scrambled” to hire an equal or greater number of replacements. (AT 108:8-15, 154:5-19).

While Respondent will argue that this case is different than some of the above-cited cases where no backpay was paid at all, it is being disingenuous and misleading. Two weeks backpay has far more in common with no backpay than with 98 weeks of backpay. Ultimately, if a backpay award so facially inadequate, factually unsupported, and logically incoherent can stand, then no award could realistically be found “repugnant to the Act.” This is the type of award the Board’s *Spielberg* standard was designed to guard against, one that undermines faith in the legitimacy of arbitration proceedings. Worse still, it is an award that serves only to dissuade employees from

exercising their protected rights, knowing that *even if they are vindicated*, they may lose tens or hundreds of thousands of dollars for their trouble.

III. RESPONDENT MISREPRESENTS THE ALJD'S CONSIDERATION OF THE ARBITRATOR'S AWARD

In its Brief in Support of Exceptions, Respondent claimed that “the ALJ specifically noted that she would have found differently under the standards prior to *Babcock and Wilcox*, supra [...]” REB 4. Respondent then cites to the ALJ's comment in footnote 30 of the ALJD. However, as will be explained below, Respondent's claim substantially misrepresents the ALJD, both in claiming that the ALJ stated “she would have found differently”, and in stripping the ALJ's footnote of its actual context. That context supports the opposite conclusion.

The ALJ did accurately admit that the Board need not “automatically refuse to defer in all situations involving arbitration awards that provide incomplete make-whole remedies, or remedies not otherwise totally consistent with Board precedent.” ALJD 16:11-13 (citing *Cone Mills Corp.*, 298 NLRB 661 n. 19 (1990)). However, the ALJ also explained that in various cases where the Board (under *Olin*) refused to overturn an arbitrator's decision based on backpay curtailment, those decisions were clearly distinguishable from the instant case.

The ALJ clarified: “In these cases, decided under the Board's previous standard [*i.e. Olin*] upholding deferral unless the arbitrator's award is repugnant to the Act, ***the arbitrator offered some justification for curtailing backpay, such as misconduct, warranting the reduction.***” ALJD 16:19-21 (emphasis added). Yet, the ALJ immediately followed by stating: “Here, arbitrator Bail[e]y ***made no factual findings to justify such a severe curtailment*** of make-whole relief required by the Act.” ALJD

16:23-24 (emphasis added). The ALJ also rejected Respondent's argument that the arbitrator implied a reason for curtailing backpay:

The closest [the arbitrator] comes is his statement, "Even if one were to find insubordination at the meeting it would not rise to an egregious level to support discharge." ([JX] 5, p. 18.) This hypothetical consideration cannot under any reasonable reading serve as a factual justification for denying almost 2 years of backpay.

ALJD 16 n.29. Logically, the arbitrator saying "even if one were to find" is not in any way an *actual* finding of insubordination, it is merely dismissing the claim.

The ALJ did, in fact, go on to state in a footnote that under *Olin*, "the very limited backpay itself likely would not have rendered the award 'repugnant to the Act.'" ALJD 16 n.30. The ALJ's conspicuous use of "itself" is key. That is because, as the ALJ noted above, the issue was not merely that the backpay award itself was minimal, but that the arbitrator made no plausible or fact-based justification warranting such a radically reduced backpay award. The backpay award was not merely problematic, it was inexplicable and thus "repugnant to the Act" even under *Olin*. Therefore, Respondent's attempt to weaponize footnote 30 must fail.

In addition, the ALJ expressly rejected Respondent's contention that even a complete lack of backpay would not render the award inconsistent with the Act. As the ALJ summed up in whole:

The Respondent cites to *Aramark, Inc.*, 344 NLRB 549 (2005), for the proposition that a lack of backpay does not necessarily render an arbitration award inconsistent with the Act. Reliance on *Aramark* is misplaced, however, because in that case the arbitrator had determined there was just cause for the employee's termination based on her abusive behavior. There was no such determination here.

ALJD 16 n.28.

In reality, there is little difference between no backpay at all and 2 weeks backpay where, as here, some employees would have been owed up to 98 weeks of backpay via a “make whole” remedy.

VI. CONCLUSION

Based upon the foregoing and the record evidence considered as a whole, the General Counsel respectfully requests that the Board reject Respondent’s exceptions and affirm the ALJ’s findings in their entirety. Specifically, the Board should reject deferral to the arbitrator’s fatally flawed backpay award, affirm that Respondent violated §§ 8(a)(3) and (1) of the Act when it suspended and discharged Crane, Burdine, Weekes, Reuge, McAllister, and Hanley for their protected, concerted and Union activities, and award those six employees the complete make-whole financial remedy required by Board law.

Dated at Portland, Oregon, this 28th day of February, 2020.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge was served on the 28th day of February, 2020, on the following parties:

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