

No. 20-1680

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ROBERT C. ATKINSON, JR.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

UNITED PARCEL SERVICE, INC.

Intervenor.

On Petition for Review from the National Labor Relations Board,
Case No. 06-CA-143062

BRIEF OF INTERVENOR UNITED PARCEL SERVICE, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Intervenor United Parcel Service, Inc. hereby certifies that it is a publicly traded corporation and does not have a parent corporation. No other publicly held corporation owns 10 percent or more of the stock in UPS.

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STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION

This case is before the Court on a petition filed by Robert C. Atkinson, Jr. (“Petitioner”) for review of the Decision and Order by the National Labor Relations Board (“the Board”) issued on December 23, 2019, reported as *United Parcel Service, Inc.*, 369 NLRB No. 1. (PA 3-43),¹ in which the Board dismissed in its entirety the underlying Complaint issued against United Parcel Service, Inc. (“Intervenor” or “UPS”). Petitioner was the charging party before the Board and seeks review of the Complaint’s dismissal.

The Board had subject-matter jurisdiction over the proceedings below under Section 10(a) of the National Labor Relations Act (“the Act” or “NLRA”), as amended, 29 U.S.C. §§ 151, 160(a), which authorizes the Board to adjudicate unfair labor practices affecting commerce. The Board’s Orders are final with respect to all parties.

This Court has jurisdiction pursuant to Section 10(f) of the Act. Venue is proper, as an unfair labor practice was alleged to have taken place in Pennsylvania. The petition is timely as the Act provides no time limit for such filings. UPS has intervened in support of the Board in this proceeding.

1 “PA” references Petitioner’s Short Appendix filed with the Court on July 16, 2020; Doc. 21-2.

STATEMENT OF ISSUES

1. Whether the Board's re-adoption of its traditional deferral standard, in unfair labor practice cases alleging discrimination under Section 8(a)(1) and (3) of the Act, is rational and consistent with the NLRA?
2. Whether as a result of that re-adopted deferral standard, the Board is entitled to summary enforcement of its unanimous decision to dismiss the Complaint against UPS and defer to the parties' grievance panel decision?

RELATED CASES AND PROCEEDINGS

There are no current related cases and/or proceedings.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. COLLECTIVE BARGAINING HISTORY

UPS employs approximately 230,000 hourly employees in its package delivery operations, all of whom are represented by the International Brotherhood of Teamsters (“Teamsters” or “the Union”). PA 13. The Teamsters and UPS bargain for a collective bargaining agreement, referred to as the Master Agreement, on a national level. *Id.* While bargaining for the Master Agreement, UPS also bargains on a local level with local Teamsters unions across the country for thirty-six local supplements and riders. *Id.* The local supplements concern local working conditions in specific areas, including western Pennsylvania.² Rec. 88. The Western Pennsylvania (“WPA”) Supplement contains the local working conditions for nine local unions, including Local 538. Rec. 2989. The Teamsters’ membership votes separately on the Master Agreement and any supplements. Rec. 672-673. Despite the separate votes, the Master Agreement and the corresponding local supplements are considered one combined collective bargaining agreement and become effective at the same time. *Id.*

2 The certified record filed by Respondent National Labor Relations Board on May 21, 2020 (Doc. 15), will be referred to as “Rec.” with the corresponding page number(s) of the full record.

The Master Agreement was ratified by bargaining unit employees, but approximately fifteen local supplements and riders were rejected in the initial vote. Rec. 2415-2426. UPS met with the local Teamsters unions and renegotiated the rejected supplements and riders, which were largely ratified on a second or third vote. Rec. 676-684. However, three local supplements failed to be ratified at the local level: the Louisville Supplement, the Philadelphia Local 623 Supplement, and the WPA Supplement. Rec. 682-683.

B. VOTE NO CAMPAIGN

In May 2013, while the Teamsters presented the Master Agreement and local supplements to union members for ratification votes, several employees opposed ratifying the Master Agreement due to the changes in healthcare plans. PA 13. The Teamsters and UPS negotiated changes to employees' healthcare plans, which were reflected in the negotiated 2013 Master Agreement. PA 13. In an attempt to force change in the Master Agreement, employees coordinated a strategy to oppose their local supplements. PA 13. Employees implemented this strategy knowing the Master Agreement and local supplements are considered one collective bargaining agreement and are contingent upon each other; therefore, none would take effect until all of the contracts were ratified. Rec. 672-673.

However, the position of both UPS and the Teamsters was that the Master Agreement resolved the healthcare issue, and healthcare was not subject to

renegotiation in the local supplements. Rec. 2435-2436. In late April 2014, the Teamsters amended their internal constitution to address this issue, and pursuant to that amendment, the Teamsters Executive Board implemented the Master Agreement and all local supplements nationwide. PA 20; Rec. 2439-2446.

C. PETITIONER'S EMPLOYMENT WITH UPS

Petitioner was employed by UPS as a package car driver at the New Kensington Center in North Apollo, Pennsylvania since 1995, and he had been a union steward since 1996. PA 3. In 2013-2014, Petitioner, along with thousands of employees nationwide, participated in the national "Vote No" campaign until it concluded as a result of the Teamsters' amendment to its constitution.³ PA 4; Rec. 690-691. In 2014, Petitioner unsuccessfully ran for union office against Local 538's long-time Business Agent, Betty Rose Fischer ("Fischer"). PA 4. However, there is no evidence UPS had any interest in who served as the business agent for the local union. Rec. 798-800.

On October 28, 2014, UPS discharged Petitioner for failing to follow package delivery procedures.⁴ Petitioner filed two grievances over his discharge, both of

3 The New Kensington Center is covered by the WPA Supplement. Rec. 88.

4 Petitioner had an extensive history of undisputedly nondiscriminatory discipline, including, but not limited to, his May 19th suspension, June 18th suspension, and June 19th discharge, which the Panel merely reduced and consolidated into a 48-day suspension and "final warning," a decision to which the Board deferred. PA 33; Rec. 943; Rec. 1784; Rec. 2493. Petitioner was also discharged on June

which referenced Petitioner's belief that his discharge violated Section 8(a)(3) of the Act.⁵ PA 4; Rec. 2044; Rec. 2227. The first grievance, No. 22310, stated: "The Employer is retaliating against the grievant. The employer is intimidating, harassing, and coercing the overly supervising the grievant. This is also a violation of the NLRA Section 8(a)(3)." Rec. 2044. Petitioner's requested relief from UPS was to "stop violating the contract in all respects mentioned above. No discharge or discipline." *Id.* The second grievance, No. 22311, stated: "Grievant is being overly disciplined as a result of his union and steward activities. Steward is being retaliated against and discriminated against for union activity. This is also a violation of the NLRA Section 8(a)(3)." Rec. 2227. Petitioner's requested relief from UPS in this grievance was to "stop all retaliation and discrimination. Stop overly disciplining grievant. No discharge or discipline." *Id.*

On January 14, 2015, Petitioner's grievances over his October 28, 2014, discharge proceeded to the grievance panel ("Panel"). PA 34. The Panel is comprised equally of Union and UPS representatives from another geographic area. Rec. 151.⁶

20, 2014, but he continued to work due to a provision in the Master Agreement. PA 4; Rec. 2832. In any event, as the Board noted Petitioner's subsequent October 28, 2014 discharge was determinative of his employment. PA 4.

5 The Master Agreement and the WPA Supplement contain a negotiated grievance procedure. Rec. 2964; Rec. 2995-3003.

6 The Panel members on behalf of UPS were Dennis Gandee, who served as Chairman, and Steve Radigan (a District Labor Manager from Virginia). The Panel members on behalf of the Union were Jim Beros, who served as the Chair,

Petitioner was represented by the Union, and the Union specifically referenced the allegations that Petitioner's discharge violated Section 8(a)(3) of the Act.⁷ Rec. 291. Business Agent Fischer submitted a written panel brief and read a statement into the record, which included the allegations listed in above grievances. Rec. 2221. Fischer's written statement also specifically referenced Petitioner's union activity, stating, in part:

On October 28, 2014, Brother Atkinson was called into the office and issued yet another discharge letter for his 'continued failure to follow the proper methods, procedures, and instructions along with your overall unacceptable work record.' [...] This is a continuation of the Company's blatant attempt to discharge Brother Atkinson due to his Union activities. Brother Atkinson does, in fact, perform his duties and does abide by the labor agreement[.] [...] The Company's action is nothing but retaliation for his Union activities. We respectfully request

and Tom Heider. Rec. 975-976. All Panel members were on the negotiating committee for the WPA Supplement; however, every Teamsters local business agent in the corresponding geographic area serves on the WPA Supplement negotiating committee. *Id.*

- 7 Petitioner's alleged statutory claims were also before the Panel as a contractual matter. In Article 21 of the parties' Master Agreement, the parties specifically prohibit discrimination based on union activity stating:

Any employee member of the Union acting in any official capacity whatsoever shall not be discriminated against for acts as such officer of the Union so long as such acts do not interfere with the conduct of the Employer's business, nor shall there be any discrimination against any employee because of union membership or activities. [...]

Rec. 2878.

Moreover, Article 4 of the Master Agreement specifically confirms that "[s]tewards and/or alternate stewards shall not be subject to discipline for performing any of the duties within the scope of their authority[.]" Rec. 2825.

that this committee uphold the claim of the grievant and the discharge against Brother Atkinson be removed and all references to the discharge be removed from Brother Atkinson[’s] file.

Rec. 2221-2224. In addition to the written panel brief submitted by the Union, UPS Labor Manager Tom McCready also submitted a written panel brief that outlined UPS’s decision to terminate Petitioner. Rec. 982; Rec. 2197-2220. Petitioner testified on his own behalf, and the Panel specifically asked Petitioner questions about the nature of his alleged activity protected by the Act. Rec. 288-289. The Panel also heard testimony from Fischer, McCready, UPS Driver Mark Kerr, Dispatcher Supervisor Ray Alakson, and On-Road Supervisor Matt DeCecco. Rec. 978; Rec. 981-982; Rec. 1002-1004. After a thorough deliberation, the Panel reached a decision and determined: “Based on the facts presented and the grievant[’s] own testimony, the Committee finds no violations of any contract articles. [T]herefore, the grievances [...] are denied.”⁸ Rec. 2244. Because the Panel denied Petitioner’s grievance, his discharge became final and he was officially terminated. PA 4.

II. PROCEDURAL HISTORY

Petitioner filed unfair labor practice charges with the Board alleging that his discharge violated the Act. PA 4. After a hearing before an administrative law judge (“ALJ”) of the Board, the ALJ applied the Board’s new standard in *Babcock &*

⁸ Article 21 was specifically listed as one of the contract articles at issue on Petitioner’s grievance. Rec. 2221.

Wilcox Construction Co., 361 NLRB 1127 (2014), rev. denied sub nom. *Beneli v. NLRB*, 873 F.3d 1094 (9th Cir. 2017), and determined that the Board should not defer to the Panel's resolution of Petitioner's grievances, finding instead that his June 20, 2014 and October 28, 2014 discharges violated Section 8(a)(3) of the Act. PA 4. UPS filed exceptions to the ALJ's decision with the Board. PA 3. The Board reversed *Babcock & Wilcox*, and reinstated its prior standard for deferral under *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955) and *Olin Corporation*, 268 NLRB 573 (1984). PA 3. Under the *Spielberg/Olin* standard, deferral is appropriate in the following circumstances:

(1) 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.

PA 11.

The Board applied the *Spielberg/Olin* standard retroactively to the instant case and deferred to the unanimous decision of the Panel upholding Petitioner's discharge. PA 3. In making that determination, the Board recognized that all parties agreed to be bound by the decision of the Panel, and there was no evidence that the proceedings were not fair and regular. PA 12. Further, the contractual issues in Petitioner's discharge were factually parallel to the unfair labor practice issue, and the Panel was presented with all relevant facts to decide both issues. *Id.* Petitioner

had the opportunity to testify, and did so testify, regarding his union activity before the Panel. *Id.* Finally, the Board determined that the Panel's decision was not repugnant to the Act, noting that the decision is consistent with a finding that it specifically considered and rejected the contention that Petitioner's discharge was motivated by his union activities. *Id.* Accordingly, the Board concluded that the Panel's decision was consistent with the Act. *Id.*

SUMMARY OF ARGUMENT

The Board was well within its discretion to reinstate its longstanding deferral standard under *Spielberg Manufacturing Co.*, 268 NLRB 557 (1995), and *Olin Corp.*, 268 NLRB 573 (1984). Prior to the misguided advent of *Babcock & Wilcox*, the *Spielberg/Olin* deferral standard governed parties' private resolution of labor disputes for sixty years. Its elements further important policy goals for the Board; in particular, the twin goals of promoting industrial stability and encouraging arbitration.

Contrary to Petitioner's argument, the *Spielberg/Olin* deferral standard does not abdicate the Board's responsibility to enforce statutory rights. Instead, the standard adequately safeguards statutory rights while also promoting private resolution. The Board built protections for employees' statutory rights into the standard itself, limiting deferral to situations where the following criteria are met: (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 issue; and (5) the decision was not clearly repugnant to the purposes and policies of the Act. These standards ensure that statutory rights under the Act are considered and remain consistent with its purposes and policies.

The Board's application of the *Spielberg/Olin* standard is supported by substantial evidence. All of the parties agreed to be bound by the decision of the Panel. PA 12. The proceedings were fair and regular; the Board properly dismissed Petitioner's unfounded speculation that the Panel or the local business agent exhibited bias, as there was no evidence to support his claims. *Id.* The contractual question was factually parallel to the statutory issue because the alleged legal claims were included in the written grievances and the statutory protections were expressly encompassed in the Master Agreement. *Id.* The Panel was presented with the facts relevant to resolve the unfair labor practice allegation. *Id.* Finally, the Panel's decision was not repugnant to the Act, given that it was susceptible to an interpretation consistent with the Act. *Id.*

Accordingly, the Board did not abuse its discretion in deferring to the Panel, as its decision was supported by substantial evidence. The Court should deny the petition for review.

ARGUMENT

I. STANDARD OF REVIEW

This Court regards the Board’s findings of fact as conclusive if they are “supported by substantial evidence on the record as a whole.” *NLRB v. New Vista Nursing & Rehab.*, 870 F.3d 113 (3d Cir. 2017) (quoting *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 606 (3d Cir. 2016)). The Board’s “factual findings regarding the intent of the parties to the collective bargaining agreement” receive the same deference as other factual findings. *Quick v. NLRB*, 245 F.3d 231, 240 (3d Cir. 2001). A reviewing court “may not displace [the Board’s] choice of two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Id.* (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

This Court reviews the Board’s deferral decisions for abuse of discretion. *NLRB v. Yellow Freight Sys., Inc.*, 930 F.2d 316, 322 (3d Cir. 1991) (citing *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 550 (3d Cir. 1983)); *see also NLRB v. Gen. Warehouse Corp.*, 643 F.2d 965, 970 (3d Cir. 1981).

The Court exercises plenary review of the Board’s legal conclusions outside of the Act. *New Vista Nursing*, 870 F.3d at 122 (citing *MCPc Inc. v. NLRB*, 813 F.3d 475, 482 (3d Cir. 2016)). Where the legal issues involve the NLRA, however, the Court follows “[f]amiliar principles of judicial deference to an administrative

agency,” upholding the Board’s conclusions of law if they are based on a “reasonably defensible” construction of the Act. *Quick*, 245 F.3d at 240-41 (citing *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996)) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)); see also *NLRB v. Imagefirst Uniform Rental Serv.*, 910 F.3d 725, 732 (3d Cir. 2018). This Court will uphold the Board’s interpretations of the Act if they are reasonable. *Citizens Publ’g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001). Due to the Board’s “special competence” in the field of labor relations, its interpretation of the Act is afforded substantial deference.” *Id.* at 232 (citing *Pattern Makers’ League of N. Am. v. NLRB*, 473 U.S. 95 (1985)). Therefore, the Court must “defer to the requirements imposed by the Board if they are rational and consistent with the [NLRA][.]” *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 364 (1998).

II. THE BOARD’S RE-ADOPTION OF ITS SPIELBERG/OLIN DEFERRAL STANDARD WAS RATIONAL AND CONSISTENT WITH THE ACT.

The Board was well within its discretion to re-adopt its longstanding deferral policy. As discussed above, the Board’s decision to defer to the grievance procedure is analyzed under an abuse-of-discretion standard. *NLRB v. Pincus Bros., Inc.-Maxwell*, 620 F.2d 367, 371 (3d Cir. 1980). The abuse of discretion standard requires the Court to ensure the Board adheres to its established criteria “unless [the Board] decides to modify or alter those standards.” *Id.* (emphasis added). The Board “can

change its mind or alter its standards for deference in some respects without necessarily engaging in conduct so blameworthy as to justify [...] calling it abuse of discretion.” *NLRB v. Horn & Hardart Co.*, 439 F.2d 674, 679 (2d 1971). Consequently, “since the Board has original discretion to select among various deference standards, it unquestionably has discretion to change its mind and thus change its own standard.” *Pincus Bros., Inc.-Maxwell*, 620 F.2d at 367 (Garth, J. concurring). Petitioner does not contest the Board’s authority to announce its own deferral standard; he merely does not like the standard. However, since the Board acted within its authority, Petitioner’s arguments lack merit and should be rejected.

A. THE REINSTATED *SPIELBERG/OLIN* DEFERRAL STANDARD IS CONSISTENT WITH BOARD POLICY OBJECTIVES.

The Board’s readopted *Spielberg/Olin* deferral standard serves important policy objectives. The Act itself has an expressed policy objective promoting deferral to parties’ grievance and arbitration procedure, as it promotes a “national policy in favor of the private resolution of labor disputes through consensual arbitration.” *NLRB v. Wolff & Munier, Inc.*, 747 F.2d 156, 160 (3d Cir. 1980); *see* 29 U.S.C. § 173(d). The purpose of the Act is primarily “to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining.” *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964) (internal citation omitted); *see also Colgate Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362 (1949)

(“To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act”). The primary method to achieve industrial stability is through collectively bargained grievance resolution. *See United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (“[A]rbitration is the substitute for industrial strife.”)

In addition to furthering the Board’s policy objectives, the *Spielberg/Olin* deferral standard furthers the federal policy in favor of arbitration. As the Supreme Court recognized, “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration... The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in the favor of arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *see also Warrior & Gulf Navigation Co.*, 363 U.S. at 581 (Arbitration “should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”) Federal policy also enthusiastically endorses arbitration of statutory claims. *See Shearson/Am. Express, Inc. v. McMahan*, 482 U.S. 220, 226 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

By embracing these policy initiatives, the Board recognized and accepted that—through the grievance and arbitration procedure—unfair labor practice

charges may be resolved differently than if exclusively processed by the Board. However, “the federal policy of settling labor disputes by arbitration would be undermined if the courts [or the Board] had the final say on the merits of the awards... [P]lenary review by a court [or the Board] would make meaningless the provisions that the arbitrator’s decision is final, for in reality, it would almost never be final.” *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596-599 (1960). As this Court recognized:

Deference by the Board to the arbitration process, especially when the award has already been rendered and it is arguably consistent with Board policy, will effectuate the intent of the parties in the collective bargaining agreement and avoid the time, expense and inconvenience of duplicative proceedings. The parties accepted the risk that arbitration results could differ from Board decisions when they elected to proceed by arbitration and the Board recognized such possibilities when it adopted the policy to defer to an arbitrator’s award.

Pincus-Bros, Inc-Maxwell, 620 F.2d at 374-375.

Finally, the Board’s application of the *Spielberg/Olin* standard promotes stability in labor relations. As the Ninth Circuit Court of Appeals surmised:

The *Spielberg/Olin* deferral standard was based on NLRB decisions that served as controlling law for decades. [...] [The] *Spielberg/Olin* standard controlled for almost 60 years, and employers and unions relied upon it during that time period. Courts of appeals throughout the country, including this one, repeatedly upheld that standard.

Beneli, 873 F.3d at 1099-1100. This established policy guides parties in negotiating of multi-year labor agreements and promotes the efficient resolution of disputes.

Consistency with this practice aids in further stabilizing industrial relations by ensuring all parties—employers, employees, and unions—know what to expect. Accordingly, the Board was well within its discretion to facilitate these important policy goals.

B. THE SPIELBERG/OLIN DEFERRAL STANDARD ADEQUATELY CONSIDERS STATUTORY RIGHTS.

The Board’s reinstated deferral standard adequately considers employees’ statutory rights. Petitioner’s chief complaint about the Board’s deferral standard is, in his view, it does not adequately defend employees’ statutory rights under the Act. (Petitioner’s Brief, hereafter referred to as “Br.” at 29-48). However, the Board carefully considered this issue when re-adopting the deferral standard under *Spielberg/Olin*. PA 7. The Board noted the previous standard under *Babcock & Wilcox*, which Petitioner urges this Court to apply, rested on flawed assumptions about the sanctity of statutory rights in an arbitration proceeding. PA 7. Instead, as the Board asserted in its decision, arbitrators routinely and capably adjudicate statutory claims. *See, e.g., 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 268 (2009) (“arbitral tribunals are readily capable of handling factual and legal complexities,” and “there is no reason to assume at the outset that arbitrators will not follow the law”); *Servair, Inc. v. NLRB*, 726 F.2d 1435, 1441 (9th Cir. 1984) (“where the statutory issue is primarily factual or contractual, an arbitrator is in as good, if not

better, position than the Board to resolve the issue”). As the Board recognized, contrary to Petitioner’s suggestion:

[I]n the [National Labor Relations Act], Congress clearly did not seek to segregate private dispute resolution as a remedy separate from and independent of statutory remedies. Indeed, Section 203(d)’s express preference for private remedies reflects Congress’ considered view that, with regard to NLRA rights, private and public dispute resolution were *not* independent, but interdependent.

PA 8 (*citing Hammontree v. NLRB*, 925 F.2d 1486, 1497-1498 (D.C. Cir. 1991)); 29 U.S.C. § 173.

The Board’s re-adoption of the *Spielberg/Olin* standard expressly reflects its concern for statutory rights with two prongs written directly into the test: (1) a requirement that the contractual question is factually parallel to the unfair labor practice issue; and (2) a requirement that the arbitrator is presented generally with the facts relevant to resolving the unfair labor practice allegations. PA 11. The Board’s standard is consistent with the pre-*Olin* requirements for deferral in this Court.⁹ *Ciba-Geigy Pharm. Div. v. NLRB*, 722 F.2d 1120, 125 (3d 1983). As this Court noted, “we have explicitly recognized the importance of the Board’s condition that deferral depends on the arbitrator’s consideration of the statutory issue.” *Yellow Freight Sys., Inc.*, 930 F.2d at 322. This element is met if “there is substantial and

9 Intervenor also directs the Court’s attention to the National Labor Relations Board’s discussion of the relevant Circuit case law affirming the *Spielberg/Olin* deferral standard. (National Labor Relations Board’s Brief, Doc. 38, at 38-45).

definite proof that the unfair labor practice issue and evidence were expressly presented to the arbitrator and the arbitrator's decision indisputably resolve[d] the issue." *Gen. Warehouse Corp.*, 643 F.2d at 965 fn. 16 (citing *Stephenson v. NLRB*, 550 F.2d 535, 538 (3d Cir. 1977)). The Board's implementation of these elements ensure employees' statutory rights are considered, and the Board's consideration of such satisfies its exercise of discretion. *See, e.g., Ciba-Geigy Pharm. Div.*, 722 F.2d at 125 ("[I]t is clear that under the case law in this court either [...] criterion suffices to sustain the Board's exercise of discretion.")

Petitioner speculates that arbitrators might resolve only the contractual issue and ignore the statutory issues. (Br. at 42-45). But there is no basis for this assumption, and the Board properly reviews concerns about whether statutory rights are addressed on a case-by-case basis. As discussed above, under the *Spielberg/Olin* standard, the Board reviews concerns about statutory concerns by ensuring: (1) the contractual question is factually parallel to the unfair labor practice issue; and (2) the arbitrator is presented generally with the facts relevant to resolving the unfair labor practice allegations. PA 5. The Board's application of each of those prongs in this case is supported by substantial evidence. First, the contractual issue is factually parallel to the statutory issue. PA 12. As the Board noted, both grievances filed by Petitioner explicitly referenced Section 8(a)(3) of the Act. *Id.* The grievance also alleged violations of the Master Agreement, which contains a separate section

prohibiting discrimination based on stewardship or union activity, retaliation for the enforcement of contract rights, and discharge without just cause. *Id.* Accordingly, since the statutory rights are both embodied in the labor contract and cited in Petitioner's grievances, the contractual and statutory violations alleged under Section 8(a)(3) of the Act are one and the same. The Panel must decide both issues to fully resolve Petitioner's grievance. Moreover, the allegations were presented to and considered by the Panel, along with each party's panel brief referencing Petitioner's statutory allegations. *Id.* In addition, Petitioner testified about his union activity, and responded to questions from the Panel with respect to the same. As such, the Board had substantial evidence to conclude that both of these elements were established.

C. THE SPIELBERG/OLIN DEFERRAL STANDARD IS CONSISTENT WITH THE ACT.

As the final prong of its deferral analysis, the Board ensures any decision made by an arbitrator or grievance panel is not repugnant to the Act. Stated differently, the arbitral award must be susceptible to an interpretation that is consistent with the Act. PA 12. As this Court recognized, "it is an abuse of discretion for the Board to refuse to defer to an arbitration award where the findings of the arbitrator may arguably be characterized as not inconsistent with Board policy." *Pincus Bros., Inc.-Maxwell*, 620 F.2d at 374. For instance, "if the reasoning behind

an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was clearly repugnant to the Act.” *Id.* (citing *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352, 354 (9th Cir. 1979)).

Petitioner seems to imply that the only arbitral awards that could possibly warrant deferral are those reflecting a thorough written analysis, such as one might expect from a judicial opinion. (Br. at 32-36). Yet the Board has long held that an arbitrator need not clearly explain all of the reasons for his decision, nor ensure it is perfectly worded. *Smurfit-Stone Container Corp.*, 344 NLRB 658 (2005) (“The Board ... will not find an imperfectly drafted arbitral decision clearly repugnant, provided that a reasonable interpretation of the award is consistent with the Act.”); *see also Yellow Freight Sys., Inc.*, 337 NLRB 568, 572 (2002) (deferral to arbitral award where wording was somewhat ambiguous, but could be reasonably interpreted as consistent with the Act); *Specialized Distrib. Mgmt.*, 318 NLRB 158, 163 (1995) (deferral not repugnant to the Act even where arbitrator’s “approach and style are at variance from the standards the General Counsel would like to see”). For example, “when the arbitrator finds that the employer had ‘just cause’ to discipline the employee, his award is typically at least ‘susceptible’ to the interpretation that ‘there is no causal connection of any anti-union bias and the loss of the job.’” *Hammermill Paper Co. v. NLRB*, 658 F.2d 155, 160 (3d Cir. 1981) (citing *Edgewood Nursing Ctr., Inc. v. NLRB*, 581 F.2d 363, 368 (3d Cir. 1978)).

Notably, in *Babcock & Wilcox*, the Board applied the *Spielberg/Olin* standard to uphold deferral to an award rendered by a joint labor-management panel, where the award's explanation was strikingly similar in its simplicity to the Panel decision issued in this case. *Babcock & Wilcox Const. Co., Inc.*, 361 NLRB 1127 (2014), rev. denied sub nom. *Beneli v. NLRB*, 873 F.2d 1094 (9th Cir. 2017). In that case, like this one, the union filed a grievance expressly alleging the grievant's discharge violated the Act. *Id.* at 1164. The union presented a position statement detailing the grievant's "extensive union and concerted activities." *Id.* The panel denied the grievance and upheld the grievant's discharge. In its decision, the panel noted that it "reviewed all the information submitted both written and oral" and determined "no violation of [the contract] occurred, and therefore the grievance was denied." *Id.* The Board determined that since the panel's decision stated that it reviewed the facts presented (including those concerning the grievant's union activities), and found no violation of the contract, its decision is arguably consistent with the finding that the panel considered and rejected the union's contention the grievant's discharge was connected to her union activities. *Id.* at 1140. Accordingly, the Board found the decision was not repugnant to the Act, and deferral was appropriate.

Here, the Panel's decision nearly mirrors the language of the panel award in *Babcock v. Wilcox*, and as such, the Panel's unanimous decision is susceptible to an interpretation consistent with the Act. The Panel based its decision on "the facts

presented and the [grievant's] own testimony.” PA 12. Petitioner argues the Panel’s decision is silent as to its basis, but it is clearly not silent, as the award specifically outlines that it relied upon “the facts presented” and Petitioner’s testimony to reach its decision. (Br. at 27-28). The facts presented and Petitioner’s own testimony were centered on his union activities, and Petitioner specifically alleged his union activity was the reason for his discharge. However, the Panel rejected his contention and found “no violation of any contract articles,” which critically includes the statutory protection. Accordingly, the Panel’s decision that Petitioner was discharged for failing to follow company procedures is susceptible to an interpretation consistent with the Act.

III. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS DECISION TO DISMISS THE COMPLAINT AND DEFER TO THE PARTIES’ PANEL DECISION

The Board was within its discretion to defer to the Panel’s determination of Petitioner’s grievance. *Al Bryant, Inc.*, 711 F.2d at 550. As the Supreme Court noted, “as a policy matter, the Board will not overturn arbitration awards based on behavior that is also an alleged unfair labor practice if the arbitration proceedings comply with certain procedures.” *Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971). Here, the Board clearly outlined the procedures that the proceeding must meet in order for it to defer to its determination. As the Board announced:

[T]he Board defers when (1) all parties have agreed to be bound by the arbitrator's decision; (2) the proceedings appear to be fair and regular; (3) the contractual issue is factually parallel to the unfair labor practice issue; (4) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue; and (5) the arbitral decision is not clearly repugnant to the Act—i.e. the decision is susceptible to an interpretation that is consistent with the Act.

PA 12. Further, the party opposing deferral has the burden to show the standards were not met. Petitioner has not meet this burden, and the Board was well within its discretion to defer to the Panel decision.

A. THE BOARD'S DECISION TO DEFER IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The Board's application of its standard is supported by substantial evidence. Petitioner does not dispute that all parties agreed to be bound by the Panel's decision. PA 12. As discussed above, the Board had substantial evidence to support its decision that (1) the contractual issue was factually parallel to the unfair labor practice issue; (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue; and (3) the arbitral decision is not clearly repugnant to the Act—i.e. the decision is susceptible to an interpretation consistent with the Act. The only remaining question is whether the grievance proceedings were fair and regular. The Board, supported by substantial evidence, properly concluded the Panel hearing were fair and regular and thus properly dismissed Petitioner's conjecture to the contrary as unfounded speculation. PA 12.

Petitioner contends the grievance proceedings were not fair and regular. (Br. at 55).¹⁰ In making this argument, Petitioner apparently disagrees with the Board's evaluation of the evidence presented during the hearing. However, the Board's factual findings and reasonable findings must be accepted if they are "supported by substantial evidence on the record considered as a whole." *MCPc, Inc.*, 813 F.3d at 481-482 (3d Cir. 2016); *see also Stardyne, Inc. v. NLRB*, 41 F.3d 141, 151 (3d Cir. 1994). Here, the Board's findings are supported by substantial evidence on the record as a whole.

The requirement that arbitral proceedings be "fair and regular" has been defined to "entail a review of what might be termed 'procedural due process,' rather than a review of the logic of the arbitrator's result." *Yellow Freight Sys.*, 337 NLRB at 570. The Board has routinely deferred to the determinations of joint labor-management grievance panels.¹¹ PA 11. *Airborne Freight Corp.*, 343 NLRB 580

10 As the Board noted, the General Counsel is in charge of the Complaint and failed to raise this exception to the Board. PA 12. Petitioner excerpts a statement from the General Counsel's Brief in Opposition to UPS' Exceptions. (Br. at 55) (emphasis added). However, pursuant to Section 102.46 of the Board's Rules and Regulations, the General Counsel is required to raise all relevant exceptions in its exceptions (not in its Brief in Opposition to UPS' Exceptions), and the General Counsel's exceptions contain no reference of any argument pertaining to whether the proceedings were fair and regular. Rec. 3326-3328. Nonetheless, the Board considered and rejected Petitioner's argument that the Panel proceedings were not fair and regular. PA 12.

11 Moreover, specifically, the Board has routinely found UPS and the Teamsters' grievance process to be fair and regular. *See, e.g., United Parcel Serv., Inc.*, 270

(2004); *Denver-Chi. Trucking, Inc.*, 132 NLRB 1416 (1961); *Gen. Drivers, Warehousemen, and Helpers, Local Union No. 89 v. Riss & Co., Inc.*, 372 U.S. 517 (1963) (holding an award of the Teamsters' joint grievance committee is judicially enforceable under Section 301 if the parties intended in their collective-bargaining agreement for the award to be final and binding). The Board will not deny deferral to a joint labor management panel based on mere suspicion of an apparent conflict between the grievant and members of the panel; instead, there must be "evidence that the members of the panel may be arrayed in common interest against the individual grievant." *Turner Const. Co.*, 339 NLRB 451 (2003).

Contrary to Petitioner's claims, there is no evidence the Panel members were biased against Petitioner because of their involvement in negotiating the Master Agreement or the WPA Supplement. (Br. at 15-16; 50-55). Petitioner argues an apparent conflict of interest is sufficient to negate otherwise fair and regular proceedings, but his argument would allow unsubstantiated conjecture to rule. The Board instead requires an actual conflict of interest to preclude fairness and regularity.¹² The cases cited by Petitioner are demonstrative. None of them reflect

NLRB 290, 291 (1984); *United Parcel Serv., Inc.*, 232 NLRB 1114, 1114-1115 (1977), rev. denied, 603 F.2d 1015 (D.C. Cir. 1979).

¹² The apparent conflict standard that Petitioner argues may be sufficient to negate deferral in a pre-arbitral deferral setting, but once the parties have actually concluded their process, the Board is in a position to actually determine whether a conflict impacted the arbitration procedure.

an apparent conflict between the members of the panel and the grievant; instead there was evidence of an actual conflict of interest.¹³ In *Kansas Meat Packing*, there was evidence of an actual conflict of interest between the union and the grievant, as the union business agent encouraged the company to discharge the grievant, and never investigated the circumstances of the grievant's discharge. *Kan. Meat Packing*, 198 NLRB 543 (1972). Here, there is no evidence that Local 538 had a role in Petitioner's discharge or failed to zealously represent him during the hearing. Indeed, the Panel, per its normal procedures, specifically asked Petitioner whether he felt Business Agent Fischer had properly represented him and his interests. Rec. 3708; 295-296; 978-982; 1001-1004.

In *Roadway Express*, there was evidence that all members of the panel had a common interest against the grievant rendering the proceedings unfair. *Roadway Express*, 145 NLRB 513, 515 (1963). But here, there is no such evidence that members of the Panel had any conflicting interest than that of Petitioner. Although one of the Panel members, Dennis Gandee ("Gandee"), monitored the activities of the "Vote No" campaign approximately a year before the Panel convened. (Br. at

¹³ *American Medical Response of Connecticut, Inc.*, 359 NLRB 1301 (2013) is inapplicable as it was decided by a two-member Board, and subsequently set aside pursuant to *Noel Canning. Am. Med. Response of Conn., Inc.*, 2014 NLRB LEXIS 512, 2014 WL 2929807 (citing *NLRB v. Noel Canning*, 573 U.S. 513 (2014)).

15-16). The Board correctly dismissed this argument as not having any inference of discriminatory motive. PA 12. Consistent with the Board, this Court has uniformly failed to find proximity between protected activity and an adverse action of more than a year to suggest any discriminatory motive. *See Thomas-Taylor v. City of Pittsburgh*, 605 Fed. Appx. 95, 98-99 (3d Cir. 2015); *see also Kerrigan v. Otsuka Am. Pharm., Inc.*, 706 Fed Appx. 769, 772 (3d Cir. 2017) (“Under [Third Circuit] precedent, this timeline—with a gap of six-months to a year between employment action and the protected activity—is not unusually suggestive to infer retaliation.”); *see also LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 233 (3d Cir. 2007) (“Although there is no bright line rule as to what constitutes unduly suggestive temporal proximity, a gap of three months between the protected activity and the adverse action, without more, cannot create an inference of causation[.]”) (emphasis added).

Furthermore, there is no evidence or allegation that Gandee’s monitoring of the “Vote No” activities, in which thousands of employees participated in, was unlawful. (Br. at 15-16). Further, there is no evidence that Gandee could not be a fair and impartial Panel member. Additionally, Petitioner does not present any evidence that the other members of the Panel were not fair and impartial members, other than his speculation based on their involvement in negotiating the labor agreement he had fought to keep from being ratified. Petitioner’s unfounded

suspicions are insufficient to negate the “fair and regular” nature of the Panel. *See Asset Prot. & Sec. Servs.*, 362 NLRB 623 (2015) (discriminatee’s union representative had been on the opposite ticket during campaign insufficient to warrant a finding of hostility, conflict of interest or adverse interest).

Instead, the Board routinely defers grievances under similar circumstances. In *Botany 500*, the General Counsel alleged that the arbitration proceedings were not fair and regular because the grievant was a union dissident. *Botany 500*, 251 NLRB 527 (1980). In that case, the grievant campaigned against the union business agent and believed that she was discharged as a result of that activity. *Id.* at 534. The grievant testified on her own behalf, and presented two employee witnesses during the arbitration hearing. The union assisted in preparing for the hearing and obtaining the additional witnesses. The Board denied the contention that these proceedings were unfair as there was no evidence of fraud or collusion. Instead, the Board cautioned the General Counsel from making too remote of connections in an effort to forfeit arbitration when in all other respects it was fair and regular. *Id.* at 535. Similarly, here, Petitioner was awarded a full and fair hearing. The Panel was comprised equally of Union and UPS representatives from another geographic area without knowledge of the dispute. Petitioner testified extensively about the Company’s alleged violations of the Act and his union activity, and he presented multiple witnesses, including Fischer, who testified on his behalf. Accordingly, the

Board had substantial evidence to conclude that the Panel proceedings were fair and regular.

Petitioner's claims that the Panel proceedings were not fair and regular because he was represented by Fischer fare no better. (Br. at 11-14; 53-54). The Board considered Petitioner's argument and rejected it as unfounded speculation, finding no evidence of bias on Fischer's behalf simply because Petitioner ran against her in the local union election. *PA 12. Asset Prot. & Sec. Servs.*, 362 NLRB 623 (2015) (discriminatee's union representative had been on the opposite ticket during campaign insufficient to warrant finding of hostility, conflict of interest or adverse interest). When a union fully represents a grievant during an arbitration hearing – despite any prior animus or rivalry that may have existed due to the grievant campaigning against the representative – the Board has found the “fair-and-regular” element satisfied. *See, e.g., Botany 500*, 251 NLRB 527 (1980). Here, that element is satisfied as Petitioner voluntarily initiated the grievance procedure. Petitioner had a full and fair opportunity to present his grievances, including testifying on his own behalf. Rec. 980-982. Further, Petitioner received proper representation from Fischer, who testified on his behalf during the Panel. Rec. 995. Accordingly, the Board relied upon substantial evidence to conclude that the proceedings were fair and regular.

In support of his argument, Petitioner cites to *Herman Brothers*, where there was actual evidence of bias on the part of the union. *Herman Bros.*, 252 NLRB 848, 848 fn. 3 (1980), enfd. *Herman Bros, Inc. v. NLRB*, 658 F.2d 201, 206-207 (3d Cir. 1981). In that case, the company representative made a material misrepresentation of fact that was un rebutted by the union. *Id.* Here, there is no evidence of similar misconduct. By all accounts, Fischer fully represented Petitioner during the Panel hearing, including testifying on his behalf. Rec. 3708; 295-296; 978-982; 1001-1004.

The lack of evidence of misconduct or bias in Local's 538's representation of Petitioner distinguishes this case from those cited in Petitioner's brief.¹⁴ *See, e.g., Valley Material Co.*, 316 NLRB 704, 708-709 (1995) (arbitration proceedings not fair and regular because union threatened grievant, reached a grievance settlement on grievant's behalf without his input, and told him that his grievance was not winnable); *Russ Togs*, 253 NLRB 767 (1980) (arbitration proceedings not fair and regular because union failed to file a grievance over grievants' underpayment, and union's attorney informed the grievants during arbitration that he represented union and not them); *Sirangelo*, 298 NLRB 924, 928 (1990) (arbitration proceedings not fair and regular because grievants ousted the union as the bargaining representative,

¹⁴ *Consolidated Edison Company* is inapposite because in that case the employer did not express a willingness to resolve the dispute via the arbitration. *Consol. Edison Co.*, 280 NLRB 338 (1986).

and union no longer served in that role); *Hendrickson Bros. Inc.*, 272 NLRB 483 (1994) (arbitration proceedings not fair and regular as union had demonstrated history of unfair labor practices against grievants, and grievants doubted union's ability to be impartial). Here, there is no evidence of actual bias. The Board correctly dismissed Petitioner's theories to the contrary as unfounded speculation. Hence, there is substantial evidence to conclude the proceedings were fair and regular, and the Board's determination should be affirmed.

B. THE PANEL'S DECISION WAS FINAL AND COMPLETE.

The Board properly concluded the Panel's decision was final and complete. Petitioner argues since the parties never arbitrated his grievance protesting his June 20, 2014, the Board is not permitted to rely upon the later Panel decision that affirmatively resolved his separation from employment. (Br. 56-58). This argument ignores the disciplinary process contained in the parties' collective bargaining agreement. Petitioner continued to be employed after his June 20, 2014 discharge and suffered no adverse employment action as a result of that discharge. PA 4. UPS continued to pay him his normal hourly rate, and he continued on his normal route. PA 4. However, when Petitioner was again discharged on October 28, 2014, the Union pursued his discharge through the grievance procedure. At this stage, Petitioner's earlier discharge was moot and his subsequent discharge was conclusive

as to his actual separation from employment. It is irrelevant whether or not Petitioner's June 20, 2014 discharge was arbitrated because (1) the outcome of the arbitration could not have resulted in Petitioner being re-employed as the later October 28, 2014 discharge precluded such a result, and (2) the merits of the June 20, 2014 discharge were irrelevant to the Panel's decision to uphold Petitioner's subsequent discharge on October 28, 2014. In sum, the Panel's decision concerning Petitioner's October 28 discharge was not dependent on his earlier discharge, and the Panel's denial of Petitioner's grievance protesting the October 28 discharge ended his employment making the outcome of the prior discharge grievances irrelevant.

Further, contrary to Petitioner's arguments, the grievances over his June 20 and October 28 discharge were not closely related. The Board finds complaint allegations to be closely related when they arise from the same factual situation as the allegations in the charge. See *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988) (explaining that, to decide whether complaint allegations are closely related to those in a timely filed charge, the Board evaluates whether the complaint allegations are factually and legally related to the charge). Petitioner's June 20 and October 28, 2014 discharges occurred over four months apart and do not involve similar facts. The collective bargaining agreement provides the ability to award a full remedy in

connection with each discharge, and as such, the Board was not compelled to hear either claim to ensure the availability of complete relief.

CONCLUSION

For the reasons stated above, the Board did not abuse its discretion in determining to defer to the Panel's decision as its decision was supported by substantial evidence. The Court should deny Petitioner's application for review.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

In accordance with the Third Circuit L.A.R. 28.3(d) and 46.1(e), counsel for the Intervenor United Parcel Service, Inc., Tony C. Coleman, hereby certifies that he is a member in good standing of the bar of the Third Circuit.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Intervenor United Parcel Service, Inc., hereby certifies that its brief contains 7,918 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016. Counsel for the Intervenor, United Parcel Service, Inc., further certifies that the electronic version of the Intervenor's brief filed with the Court and served on opposing counsel; and the PDF file submitted to the Court has been scanned for viruses using Sophos Central version 10.8.6 and is virus free according to that program.

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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