

No. 20-1680

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

ROBERT ATKINSON JR.

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent,

UPS

Intervenor

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

**REPLY BRIEF FOR PETITIONER
ROBERT ATKINSON JR.**

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INTRODUCTION

The Board in this case adopted a *per se* rule that if facts relevant to a statutory issue are “presented generally” to an arbitrator or grievance panel, then the Board will deem the panel to have considered the issue sufficiently to warrant deferral. Section I(A), *infra*. If the panel provides no explanation for its decision, the Board will also assume it decided all statutory issues correctly – even though there are abundant reasons not to. Section I(B).

The Board and UPS argue that this rule satisfies the requirements for a reasonable deferral policy set out by the Third Circuit and others. Yet the cases they cite show the opposite – that a rational deferral policy requires understanding the basis of the ruling to which the Board defers. Section I(C).

The Board and UPS attempt to bolster the Board’s cursory ruling on the fairness of the grievance proceedings in this case with *post hoc* factual and legal arguments. Section II. The Board’s Opinion must stand or fall on its own reasoning. Section II(A). Moreover, the proposed factual findings are unsupported by the record, and the legal arguments misread the case law. Sections II(B) and (C).

Finally, Atkinson’s October 28 discharge does not render the legality of his June 28 discharge moot. Section III. The ALJ’s finding that the two were “closely related” is well supported by the record and unchallenged by the Board. *Id.*

ARGUMENT

I. The Board’s deferral rule abdicates its duties.

A. The Board did not make an inference; it adopted a *per se* rule.

The Board in this case adopted a standard that a grievance decision has “adequately considered” statutory issues unless the grievant can prove that they were not “factually parallel” to the contractual issues or that statutorily relevant facts were not “presented generally” to the grievance panel or arbitrator. App. 11-12; Opening Brief, 17-19, 25-29. The Board asks this Court to treat its standard as nothing more than a factual inference based on circumstantial evidence, to which it claims this Court must defer. Board Brief, 25-26, 29-30. Yet the Board in this case did far more than make an inference; it announced a *per se* legal rule.

An inference is part of a factual finding. Circuit Courts review the Board’s factual findings for substantial evidence in light of the record as a whole. *NLRB v. Imagefirst Uniform Rental Services*, 910 F.3d 725, 732-33, 736 (3rd Cir. 2018). A reviewing court does not consider one inference in isolation or give deference to it in isolation. It asks whether the record as a whole – including any contrary evidence – provides substantial evidence for the conclusion. *Id.*

The rule adopted in this case does not leave room for such an analysis. The question of whether statutory facts have been presented generally to an arbitrator is not one piece of evidence; it is the end of the discussion. Therefore, this Court

must decide not whether in some instances an inference might be warranted but whether a *per se* rule is reasonable for all cases.

B. The Board presumes silent decisions adequately protect employees' rights.

1. The Board's rule precludes meaningful analysis.

In some cases, the Board's *per se* rule precludes further consideration not only of whether the statutory issue was resolved but also of whether the resolution was consistent with the Act. As set out in Atkinson's Opening Brief, the Board placed the burden on the party opposing deferral to show that the grievance decision is not "susceptible of an interpretation that is consistent with the Act." Opening Brief, 26-29. Where, as here, an opinion provides no statutory analysis, it is susceptible to almost any interpretation, and therefore the "clearly repugnant" standard is impossible to meet. *Id.*

In other words, where a grievance decision provides little or no analysis, the Board proposes to conclude automatically that if facts relevant to a statutory issue were presented, the issue was resolved in a way that adequately protected statutory rights.

The Board's brief claims the failure of a grievance decision to articulate its basis might itself satisfy the repugnancy requirement. Board Brief, 35-36.

However, the Board’s Opinion explicitly precluded such reasoning, as Atkinson explained in his Opening Brief. App. 5 FN 6; Opening Brief, 26-27 FN 3.

2. *The Court should not ignore Atkinson’s or amici’s arguments.*

Both Atkinson and *amici* demonstrated a number of reasons why the Board cannot reasonably assume a perfunctory grievance decision adequately protects statutory rights. Opening Brief, 38-55; AUD Brief, 4-23. Rather than engage many of Atkinson’s and *amici*’s points on their merits, the Board primarily argues they are waived. Board Brief, 19-20, 26, 28 FN 7, 36 FN 9, 53 FN 12.

Yet Atkinson argued all of the points the Board asks this Court to ignore. With respect to the “clearly repugnant” standard, Atkinson argued for three pages why it is meaningless in cases such as his. *Compare* Opening Brief, 26-29, 47 *with* Board Brief, 19-20, 26. With respect to the burden of proof, Atkinson argued for 13 pages that the Board needs an affirmative showing that statutory issues were appropriately resolved – i.e. that the burden of proof on that issue must be on the party seeking deferral. *Compare* Opening Brief, 38-50 *with* Board Brief, 36 FN 9 *citing* AUD Brief, 16-20. Atkinson argued for five pages that any Board policy must consider protections for union democracy and the right to dissent within one’s union.¹ *Compare* Opening Brief, 45-50 *with* Board Brief, 28 FN 7 *citing*

¹ The right to dissent within one’s union without facing retaliation from one’s employer is protected by both the NLRA and the LMRDA. *See* AUD Brief, 5-6; Opening Brief, 48-50; App. 39 FN 51. For this reason, the *amici*’s analysis of

AUD Brief, 4-13; *see also* Opening Brief, 50-55. Finally, Atkinson argued for ten pages that the structure of most grievance processes creates substantial risks they will not protect the rights of dissidents. *Compare* Opening Brief, 45-55 *with* Board Brief p. 53 FN 12 *citing* AUD Brief, 23-28.

In other words, the *amici* brief is “helpful in elaborating issues properly presented by the parties.” *Nuveen Municipal Trust v. WithumSmith Brown, P.C.*, 692 F.3d 283, 300 FN 10 (3rd Cir. 2012) *quoting* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445 (2nd Cir. 2001).

Atkinson wishes to draw this Court’s attention to three ways the *amici* brief should inform its consideration of the Board’s. First, the Board asks why there would be any reason to think that a grievance process might not decide statutory issues adequately. Board Brief, 33-35. The *amici* review compelling scholarship showing why bipartite panels often do not. AUD Brief, 7-9, 23-28.

Second, one of *amici*’s core arguments is that the Board’s Opinion utterly ignored the NLRA’s and LMRDA’s protection for union democracy. AUD Brief, 4-14. The Board made no attempt in its brief to argue that it had in fact considered

LMRDA protections bears directly on Atkinson’s NLRA-focused arguments. This fact (along with AUD’s arguments) also defeats the Board’s implication that it can ignore the issue as outside its jurisdiction. Board Brief, 28 FN 9.

these protections in its Opinion. *Compare id. with* Board Brief, 28 FN 7, 35-36, 53.

Finally, the Board’s brief argues the “clearly repugnant” standard sufficiently protects dissidents. Board Brief, 35-36. Yet *amici* showed bipartite panels, which are the most subject to abuse, are also the least likely to state the basis for their reasoning – and therefore the most likely to be deemed *not* clearly repugnant. *Compare id. with* AUD Brief, 7-9, 23-28, Opening Brief, 25-29.

C. The cases cited by the Board require understanding a grievance award before deferring to it.

1. Hammill found “scrutiny” of an award “inevitable.”

The Board and UPS argue the standard adopted in this case comports with requirements announced in prior Circuit Court cases. Board Brief, 18 FN 10, 22-24, 26, 30-31, 39-42, 44-45; UPS Brief, 20-26. The Board relies most heavily on *Hammill*, so Atkinson will begin with it. Board Brief, 23, 24, 41, 42 *citing Hammill Paper Co. v. NLRB*, 658 F.2d 155 (3rd Cir. 1981).

The Board claims *Hammill* “presaged” *Olin* by endorsing the mere presentation of statutory issues as an adequate basis for deferral. Board Brief, 41; *Olin Corp.*, 268 NLRB 573 (1984). In fact, *Hammill* held precisely the opposite, that one cannot defer without understanding an arbitrator’s reasoning. *Hammill*, 658 F.2d at 160-61.

In *Hammermill*, an employer treated a steward more severely than other participants in an unauthorized work stoppage – it terminated the steward while only suspending similarly situated employees for two weeks. 658 F.2d 156-57. At arbitration, the employer argued the union contract gave the steward heightened responsibility and also that he had been a leader of the strike. *Id.* at 157-58, 158 FN 4. Either of these arguments would, if proven, justify disparate treatment. *Id.* at 157 FN 3, 163-64. The arbitrator reduced the steward’s termination to a five-month unpaid suspension, a punishment more severe than that of comparably situated non-stewards. *Id.* at 157.

Thus, if one were to ask only what facts and issues were presented to the arbitrator, deferral would be appropriate – the parties had presented factual arguments that could support disparate treatment. Fortunately, the arbitrator in *Hammermill* explained his reasoning. He had actually rejected both of the employer’s defenses. 658 F.2d at 157, 158 FN 4. He upheld a five month suspension simply because the walkout serious misconduct. *Id.* at 157. That is a reasonable contractual interpretation but inconsistent with the NLRA. *Id.* at 158, 165.

The Third Circuit acknowledged evidence and issues relevant to the ULP were presented to the arbitrator. *Id.* at 161. A footnote quoting authorities about the significance of that acknowledgment supplies two of the passages quoted in the

Board's brief. Board Brief p. 41, 42 *quoting Hammermill*, 658 F.2d at 161 FN 12. However, in the very paragraph containing that footnote, the court held that *even though* the arbitrator had been presented with the statutory issue, deferral was inappropriate. 658 F.2d at 161. In other words, the passages quoted by the NLRB are not the basis for the court's holding but authorities the court viewed as in some tension with it. *Compare* 658 F.2d at 161 *with* 658 F.2d at 161 FN 12.

Hammermill analyzed examples where statutory issues were presented to arbitrators, but arbitrators did not decide them.² *Id.* at 160-61 *discussing NLRB v. General Warehouse Corp.*, 643 F.2d 965 (3rd Cir. 1981); *Monsanto Chemical Co.*, 130 NLRB 1097, 1099 (1961); *and Kalamazoo Typographical Union Local 122*, 195 NLRB 1065, 1074 (1971). This analysis is the source of two of the NLRB's quotes; they are descriptions of prior cases rather than statements of a standard. Board Brief p. 41 *quoting* 658 F.2d at 160, 161.

Because presentation of statutory issues does not necessarily result in their resolution, *Hammermill* held, "failure to raise the statutory issue before the arbitrator is not a sine qua non for refusal to defer." 658 F.2d at 160-61.

It is thus inevitable that the ground upon which the arbitrator acts be subjected to some scrutiny before the Board or a court can conclude

² These examples and other cases discussed below provide one answer to the Board's question of why it should not assume that arbitrators reach all statutory issues presented them – experience shows they do not. *Id.*; *see* Section I(B)(2), *supra* and Board Brief, 33-35.

that the award disposes of the statutory issue raised before the Board. After all, the Board defers not because the arbitrator could have reached and decided unfair labor practice issues in a grievance arbitration, but because in the very process of deciding the contractual issue, the arbitrator may necessarily dispose of the question whether the employee's legitimate rights under § 7 of the NLRA were interfered with impermissibly . . .

658 F.2d at 161 (emphasis added).

The Board quotes the non-italicized portion of the passage above in support of the proposition that *Olin's* “factually parallel/presented generally prong provides adequate assurances that an arbitral decision addressed the unfair-labor-practice issue.” Board Brief p. 22-23 *citing Hammill*, 658 F.2d at 161. However, the sentence fragment quoted by the Board was not a holding that the possibility that an arbitrator “may” dispose of an NLRA issue is sufficient grounds for deferral. *Hammill*, 658 F.2d at 161. It was part of a holding that one must examine the basis of the award in order to determine whether statutory issues had in fact been disposed of in a particular case. *Id.*

2. *General Warehouse found actual consideration necessary to avoid abdication.*

Another example of how the Board misinterprets Third Circuit law can be seen in its attempt to minimize the impact of *General Warehouse*. Board Brief, 40-42 *citing General Warehouse*, 643 F.2d at 968 FN 10; *see also* UPS Brief, 20-21. The Board claims *General Warehouse* was “essentially approving the Board’s

then-current standard, not imposing a per se actual-consideration requirement.”

Board Brief, 40. In fact, *General Warehouse* rejected the standard applied by the Board and held that actual consideration is necessary to avoid abdication of the Board’s duties.

In *General Warehouse*, the Board refused to defer not because the arbitrator failed to consider the statutory issue but solely because the result was repugnant to the Act. 643 F.2d at 968-69; *General Warehouse Corp.*, 247 NLRB 1073, 1076 (1980). The Third Circuit rejected the Board’s analysis and added a requirement from an earlier Board standard:

The Board refused to defer because it found that the third requirement [repugnancy] had not been met. Although we agree with the Board’s conclusion that it was not required to defer in this case, we choose to base our decision on a fourth requirement a prerequisite to the *Spielberg* standards articulated by the Board in *Raytheon Co.*, 140 N.L.R.B. 883 (1963), enforcement denied on other grounds, 326 F.2d 471 (1st Cir. 1964).

643 F.2d at 968-69.

Thus, the Third Circuit adopted the “clearly decided” requirement despite, not because of, the Board standard before it.³ The footnote Respondent quotes in

³ The Board may be basing its argument that *General Warehouse* considered the Board’s “then current” standard on the fact that *General Warehouse* was issued in 1981, shortly after *Suburban Motor Freight*. Compare Board Brief, 40 with *Suburban Motor Freight*, 247 NLRB 146 (1980) and Opening Brief, 31-33. If so, the Board mistakes the case’s procedural posture. The ALJ in *General Warehouse* drafted the deferral analysis in 1979, before *Suburban Motor Freight*, and the Board did not modify it. 247 NLRB at 1073.

its brief explains only the court's willingness to accept the basic *Spielberg* premise. Compare Board Brief, 40 citing *General Warehouse*, 643 F.2d at 968 FN 10 with *General Warehouse*, 643 F.2d at 968 (FN 10 references *Spielberg*).

The court's language also shows actual consideration is an essential, not merely permissible, prerequisite to deferral. 643 F.2d at 968-69. For example, the court described the omitting such a requirement as "illogical" and "abdication." 643 F.2d at 969.

Another claim made by both the Board's and UPS's briefs is that the standards adopted by the Board here and in *Olin* satisfy *General Warehouse*. Board Brief, 41-42; UPS Brief, 20-21. They do not. *General Warehouse* requires

substantial and definite proof that the unfair labor practice issue and evidence were expressly presented to the *arbitrator and that the arbitrator's decision indisputably resolved the unfair labor practice*. If the arbitrator's decision is ambiguous as to the resolution of the statutory issue, we must hold that the clearly decided requirement has not been met.

643 F.2d at 969 FN 16 (internal citations and quotations omitted; emphasis in *General Warehouse*). Indeed, the arbitration in *General Warehouse* satisfied the factually parallel/presented generally requirement – the union presented evidence of the grievant's protected activities to the arbitrator. 247 NLRB at 1076. Yet the Third Circuit held deferral requires more. 643 F.2d at 969, 969 FN 16.

3. *Other Third Circuit cases rejected the Board's arguments.*

The remainder of the Board's and UPS's Third Circuit cases can be disposed of more quickly.

First, UPS cites *Ciba-Geigy* for the proposition that the standard announced in this case is consistent with pre-*Olin* Third Circuit precedent. UPS Brief p. 20-21 citing *Ciba-Geigy Pharmaceuticals Division*, 722 F.2d 1120, 1125 (3rd Cir. 1983). *Ciba-Geigy* cannot be read that way. The parties in *Ciba-Geigy* explicitly submitted a statutory issue to the arbitrator. 722 F.2d at 1123-25. He purported to resolve it, but without meaningful statutory analysis. *Id.* The Third Circuit held that the position of a dissenting Board member who “[did] not agree that the arbitrator’s failure clearly to decide the statutory issue is a reason for non-deferral” was “inconsistent with our holding in *NLRB v. General Warehouse.*” *Id.* (citations omitted).

The language quoted by UPS, that “either ... criterion suffices,” was from a sentence explaining either the “clearly decided” or “repugnant” criterion suffices to defeat deferral. Compare 722 F.2d at 1126 with UPS Brief, 21. The court did not hold it suffices for a deferral standard to include only one of the two criteria. *Id.*

Next, the Board cites *Pincus Brothers* for the idea that satisfaction of the factually parallel/presented generally standard provides an adequate basis to assess whether a grievance award is “clearly repugnant” to the Act. Board Brief, 26

citing NLRB v. Pincus Bros., Inc.-Maxwell, 620 F.2d 367, 374 (3rd Cir. 1980); *see also* Board Brief, 30 FN 8; UPS Brief, 22-23. *Pincus* does quote language that, taken in isolation, could lead to this result. 620 F.2d at 374.

However, *Pincus* noted the actual consideration requirement and found it clearly satisfied. *Pincus*, 620 F.2d at 372 FN 7. *Pincus* did not turn on any ambiguity in what the arbitrator held; the only doubt was whether his reasoning was sound under Board law. 620 F.2d at 371, 375-77. It was on this point that *Pincus* held it sufficient that the award was “arguably” correct. *Id.* *Pincus*, decided in 1980, also pre-dated *General Warehouse*, decided in 1981, and so cannot be read as rejecting it.

Finally, the Board argues both that *Yellow Freight* viewed *Olin* as consistent with Third Circuit precedent and that it offers only dicta on the deferral standard. Board Brief, 40 FN 10 *citing NLRB v. Yellow Freight Systems, Inc.*, 930 F.2d 316, 321-22 (3rd Cir. 1991); *see also* UPS Brief p. 20. On the contrary, *Yellow Freight* does not endorse *Olin* and did reaffirm the requirements discussed above. 930 F.2d at 322.

Atkinson agrees that *Yellow Freight* did not directly address the *Olin* framework – the ALJ and Board held without detailed analysis that *Olin* precluded deferral, and the employer did not directly challenge that holding on appeal. 930 F.2d at 322; 322; *Yellow Freight Systems Inc.*, 297 NLRB 322, 322, 327 (1989).

However, the employer did argue the Board should defer to the arbitrator's credibility determinations, even absent overall deferral. 930 F.2d at 317, 322. In that context, the Third Circuit reiterated its prior holdings that

the requirement that the statutory issues have been presented to *and decided* by the arbitrator is of particular significance to *insure the Board does not abdicate its responsibility to protect statutory rights*.

Yellow Freight, 920 F.2d at 322 (emphasis added, internal citations and quotations omitted).

4. *The DC Circuit requires meaningful analysis of an arbitration award.*

The Board's argument that the DC Circuit requires no more than general presentation of a statutory issue to an arbitrator also falls apart upon closer examination of the cases. Board Brief 44-45.

Atkinson agrees *Darr* did not directly propose a replacement for the factually parallel/presented generally prong. *Darr v. NLRB*, 801 F.2d 1404, 1408-09 (D.C. Cir. 1986). However, the reasoning in *Darr* necessarily requires more. Compare *id.* with Board Brief p. 44. For each possible theoretical justification for *Olin*, the court described information that would be needed in a particular case. If the Board is relying on waiver, it must determine "whether the agreement in this case has in fact" waived the rights at issue. *Id.* at 1408. If the Board reasons the CBA incorporated statutory rights, it must "at minimum, determine that the

arbitrator has in fact so held.” *Id.* at 1409. The court remanded in part so the Board could answer such questions. *Id.*

In *Plumbers*, the petitioner conceded both the validity of the Board’s overall framework for deferring to pre-arbitration settlements and that the settlement at issue had waived waivable rights. *Plumbers & Pipefitters Local Union No. 520 v. NLRB*, 955 F.2d 744, 751-52 (D.C. Cir. 1992), *cert. den.* 506 U.S. 817 (1992). It is from this discussion that one the Board’s quotes is taken. Board Brief p. 45 *quoting* 955 F.2d at 752. What the court found acceptable was deferral to the waiver of waivable rights. 955 F.2d at 752, 754. Nonetheless, the court went on to urge the Board to develop a framework that satisfies the concerns outlined in *Darr* and allows the Board to assess whether waivable or non-waivable rights had been waived in a given settlement. 955 F.2d at 755-57.

Finally, *Bakery Workers* is simply an example of a statutory issue being dependent on a contractual one, a posture discussed in the next section. Board Brief, 18 FN 10, 42, 45 *citing Bakery, Confectionary & Tobacco Workers Local 25 v. NLRB*, 730 F.2d 812, 814-15 (D.C. Cir. 1984); *see* Section I(C)(5), *infra*.

5. *The Board’s remaining cases are unhelpful to it.*

Finally, the Board claims without in-depth analysis that a number of other Circuits have rejected any requirement that statutory issues actually be considered.

Board Brief, 39. Most of the cases the Board cites stand for the principle that if a contractual issue is determinative of a statutory one, the Board can defer based solely on a contractual holding – the contractual result precludes the statutory claim as a matter of law.

The Board begins by quoting the first half of a sentence from an unpublished Ninth Circuit case. Board Brief, 39 citing *Goodwin v. NLRB*, 979 F.2d 854, 1992 U.S. App. Lexis 30934 (9th Cir. 1992)(unpublished). The portion of the sentence omitted by the Board is key – the Ninth Circuit held deferral is appropriate without explicit consideration of a statutory issue only if “its resolution is dependent on the resolution of the contractual issue the arbitrator decided.” *Goodwin* at *12 citing *Servair v. NLRB*, 726 F.2d 1435 1440-41 (9th Cir. 1984). Meaningful explanation of the contractual holding is necessary: “No one can reasonably argue that a nine-word ‘decision’ adequately protects employee rights under the Act or is consistent with the Act.” *Goodwin* at *17.

The next case cited by the Board is a good example of a statutory issue being dependent on a contractual one. Board Brief, 39 citing *NLRB v. Aces Mech. Corp.*, 837 F.2d 570, 574 (2nd Cir. 1988). The Board in *Aces* considered an allegation that on November 5, 1982, the employer refused to allow an employee to serve as a shop steward. 837 F.2d at 571-72. The employee had been terminated on September 17. *Id.* The employer and union president agreed the

employee could return to work, but not as a steward, pending arbitration of his discharge. *Id.*

An arbitration panel found the September 17 discharge to be for just cause without discussing the November 5 dispute. *Id.* at 572. The Second Circuit held that the Board should nonetheless have deferred on both issues, because the resolution of the termination necessarily resolved the steward issue:

In light of the arbitral decision on this question – which held that O’Toole was discharged for just cause – it is clear that, according to the terms of the bargaining agreement, O’Toole was ineligible to serve as shop steward on November 5th since he was not “in good standing” as of that date.

837 F.2d at 573. In other words, “the arbiters’ decision on a threshold issue [was] such that the statutory claim cannot stand.”⁴ *Id.*

The failure of the arbitration panel to discuss the statutory issue did not preclude deferral because the panel’s analysis on the contractual issue provided all the information needed to assess whether the employee’s statutory rights had been violated. 837 F.3d at 573. That is a far cry from deferring to a decision that provides no meaningful basis to assess statutory claims.

The Board’s third example mentions the same principle but also illustrates how narrow it is. Board Brief, 39 *citing Servair*, 726 F.2d at 1441. In *Servair*, an

⁴ The Court did not hold the steward issue was mooted by the termination, but rather that the employee’s rights had never been violated. *Id.*

arbitrator upheld some employees' discharge because they violated a no-strike clause. 726 F.2d at 1438. However, the arbitrator's determination left unresolved the question of whether serious unfair labor practices might have given employees a statutory right to breach the no-strike clause. 726 F.2d at 1441. Rather than endorsing deferral based solely on *Olin* factors, the Ninth Circuit rejected it:

The contention by Servair that because the statutory issue had been raised, the arbitration provided "ample opportunity" to develop testimony regarding the reasons for the strike, misinterprets the "clearly decided" requirement. While it is not necessary for the arbitrator to expressly review the statutory issue in his written memorandum, in the absence of *substantial and definite proof* that the unfair labor practice issue was presented *and the arbitral decision indisputably resolves that issue*, the "clearly decided" requirement has not been met.

Servair, 726 F.2d at 1440 (internal citations and quotations omitted, emphasis added).

Atkinson does not believe in-depth analysis of the remaining cases in the Board's string cite will be helpful. *Pioneer Finishing* is discussed in Atkinson's Opening Brief and held that, because union contracts can define terms differently from the Act, deferral requires looking beyond what words are used in the contract. *Pioneer Finishing Corp. v. NLRB*, 667 F.2d 199, 201-02 (1st Cir. 1981); Opening Brief, 41-42. The discussion in *Motor Convoy* is brief and does not indicate what level of analysis the arbitration panel provided or the Board should have required. *NLRB v. Motor Convoy, Inc.*, 673 F.2d 734, 736 (4th Cir. 1982). *American Freight*

is another example of a contractual holding foreclosing a statutory claim – the contract waived the statutory right. *American Freight Systems, Inc. v. NLRB*, 722 F.2d 828, 832 (D.C. Cir. 1983).

II. The Board’s arguments that the grievance process was fair are too little too late.

A. The Board cannot add *post hoc* arguments.

Because the Board’s Opinion provides no meaningful analysis of Atkinson’s second and third arguments against deferral, the Board’s and UPS’s briefs rely heavily on new legal arguments and even factual findings first proposed on appeal.

Atkinson showed in his Opening Brief that where an agency lacks reasoned argument or ignores contrary evidence, its decision is not entitled to deference. Opening Brief, 24-25. Neither UPS nor the Board disputes this basic principle. Board Brief, 10-11; UPS Brief, 14-15.

An agency cannot remedy such deficiencies by supplying the analysis on appeal. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962); *CBS Corp. v. FCC*, 663 F.3d 122, 137 (3rd Cir. 2011). “The courts may not accept appellate counsel’s *post hoc* rationalizations for agency action; *Chenery* requires that an agency’s discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself.” *Burlington Truck Lines*, 371 U.S. at 168-69 (citations omitted). Asking this Court to review legal or factual analyses

first made in the Board's briefs is "incompatible with the orderly functioning of the process of judicial review." 371 U.S. at 169.

B. The Board and UPS make unsupported, *post hoc* factual arguments.

Perhaps the Board's most striking *post hoc* rationale is related to the fact that Betty Fischer, the union officer who presented Atkinson's retaliation claims, had reported to management the protected activity for which Atkinson was fired.

Board Brief, 49-50; *citing* Opening Brief, 12-13, 53. The Board responds,

That statement is true only if his allegation that he was discharged for Vote No activity is meritorious. But that has not been proven, and UPS disputes it. . . The Board need not assume merit in deciding whether to defer.

Board Brief, 49-50 (internal citations and quotations omitted).

The ALJ in this case held precisely that UPS *did* fire Atkinson for his Vote No Activity. App. 13, 38-40; Opening Brief, 8-10. The Board's Opinion did not in any way criticize the ALJ's factual holdings, and it upheld the credibility determinations on which they were based. *Id.*; App. 3-4, 3 FN 2. The Board cannot now dispute the ALJ's holdings without having provided in its Opinion any explanation as to why they are not factually supported. Section II(A), *supra*.

Moreover, even if one were to ignore the ALJ's ultimate conclusion as somehow premature, the Board cannot argue that it may also ignore the underlying

facts. For example, the ALJ found four UPS supervisors either admitted UPS targeted Atkinson due to his Vote No activity or threatened Atkinson and others about it. App. 13, 17-18, 33-34, 38-40; Opening Brief p. 9-10. He found that Fischer “emailed copies of Atkinson’s Facebook posts” to UPS management. App. 20 *citing* Rec. 2553-59, 2562-64, 2600-06 (15-18, p. 16-22, 25-27, 63-69); *see also* Opening Brief, 12-14.

The Board’s Opinion made no attempt to dispute or engage this evidence. App. 3-4, 12. Nor did it adopt or attempt to justify a standard that would include ignoring evidence of a union’s involvement in alleged retaliation when deciding whether to defer those allegations to that union’s grievance process. *Id.*

As another, simpler example, consider the Board’s and UPS’s argument that any animus the panel felt towards Atkinson had dissipated by the time it rejected his grievance on January 15, 2015. Board Brief, 49, 51; UPS Brief, 29-30. The Board made no such holding. App. 4, 12. The ALJ made a contrary holding – that as of December 2014, UPS’s animus was sufficient for an incoming manager to comment on it to Atkinson. App. 40.

Consider also UPS’s claim that Gandee and the other members of the joint panel were “without knowledge of the dispute.” UPS Brief, 31. UPS provides no citation to support this claim. *Id.* Neither the ALJ nor the Board made any such holding. App. 3-4, 12, 16, 20, 33-34, 39. On the contrary, the ALJ held that not

only Atkinson's home garage but also UPS's central labor department monitored Atkinson's activity. App. 39; *see also* App. 16, 20. Atkinson summarized in his Opening Brief the extensive documentary evidence that Gandee monitored not only his protected activity but even retaliation grievances Gandee subsequently ruled on. Opening Brief, 15-16.

Equally inappropriate, but somewhat more involved, are the Board's and UPS's various claims to the effect that Fischer and the Joint Panel performed their functions rigorously. Board Brief, 8-9, 48-52; UPS Brief, 9, 29, 30-33. Atkinson will dissect one example, namely the argument that Fischer's submission of an information request was evidence of her zeal. Board Brief, 48; *c.f.* App. 4, 12 (Board making no findings on the issue).

Fischer hindered rather than helped the information request. App. 29-30; Rec. 411-14, 1038 (15-1, p. 411-14, 1038); Rec. 2785-98 (15-21, p. 8-21). Mark Kerr drafted the information request, twice submitted it to UPS, and grieved UPS's failure to provide the information requested. App. 29-30. The stated reason for UPS's refusal was that Fischer had not made the request. *Id.* Kerr copied Fischer on his request and asked her by telephone to submit it to UPS. App. 29-30; Rec 2791 (15-21, p. 14). She did not do so until months later, by which time UPS said it had routinely destroyed some of the records. App 30; Rec. 2796-98 (15-21, p. 19-21)(Items 17, 20 destroyed).

Atkinson believes that the examples above will suffice to illustrate that many of the factual assertions made in the Board's and UPS's briefs are neither supported by the findings made below nor a fair depiction of the record as a whole. Additional arguments Atkinson believes fall into this category can be found on pages 6-9, 22, 24-25, 29-33, and 35-36 of UPS's brief and pages 4, 7-9, 32, 46, 48-49, and 51-52 of the Board's.

Atkinson does not suggest this Court perform the intensive review of the record it would take to assess the accuracy of the factual claims made in UPS's and the Board's briefs. That is a task for the Administrative Law Judge who heard the testimony.

Rather, Atkinson asks that before relying on a factual argument made in the Board's or UPS's brief, this Court assess whether it is supported by specific findings below. *Burlington Truck Lines*, 371 U.S. at 168-69; *CBS Corp.*, 663 F.3d at 137. If the ALJ's or Board's Opinion supplies a reasoned factual analysis, then this Court can perform its appropriate appellate function.

If the Board's Opinion includes no such analysis, then neither counsel nor this Court should attempt to supply one now. *CBS Corp.* 663 F.3d at 137. The Board's decision must "be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck Lines*, 317 U.S. 169.

C. The Board’s and UPS’s *post hoc* legal arguments are inaccurate.

The Board and UPS also make a number of *post hoc* legal arguments concerning the “fair and regular” requirement. Board Brief, 47-54; UPS Brief, 27-28-44. Many are already addressed in Atkinson’s Opening Brief, but Atkinson will address a few additional points here. Opening Brief, 50-55.

First, the Board and UPS argue that the “apparent conflict” standard applies only to pre-arbitral deferral, while in post-arbitral deferral one must prove how the conflict influenced the hearing. *See, e.g.* Board Brief, 47-48, 52-53, 54 FN 13; UPS Brief, 28 FN 12, 31-44. Yet they cite no cases making this distinction. *Id.*

On the contrary, *Russ Togs* held that the Board refuses to defer “when the Union’s interests are adverse to those of the employee” in both pre- and post-arbitral cases. *Russ Togs*, 253 NLRB 767, 768 (1980). The Board declined to make any finding about how the arbitration hearing in *Russ Togs* was conducted, even though it was a post-arbitration case; it relied solely on pre-hearing indications of adverse interests. *Id.*

Similarly, *Roadway Express* was not only a post-arbitral case but one in which the Trial Examiner was “favorably impressed” with the proceedings. *Roadway Express, Inc.*, 145 NLRB 513, 514-15, 521-22 (1963). Again, the Board’s concern was not what happened at trial but whether the interests of the

panel “may be arrayed in common interest against the individual grievant.” 145 NLRB at 515; *see also id. at* 514-15, 521-22; Opening Brief, 50-52.

UPS implies *Herman Brothers* relied on a misrepresentation of fact made during an arbitration hearing. UPS Brief, 33 *citing Herman Brothers*, 252 NLRB 848, 848 FN 3 (1980), *enf’d. Herman Bros, Inc. v. NLRB*, 658 F.2d 201, 206-207 (3rd Cir. 1981). The misrepresentation was made by the employer’s advocate during a first hearing, 658 F.2d at 204, whereas the Third Circuit’s ruling concerned who sat on the panel for the second one, *id. at* 205, 207.

The Board implies that a 1978 UPS case refused to consider a political dispute as a conflict of interest by omitting from its quote the phrase “matters outside the scope of the record such as.” *Compare* Board Brief, 53 *quoting United Parcel Serv., Inc.*, 234 NLRB 483, 490 (1978)(“*UPS I*”), *enforcement denied mem.*, 1979 U.S. App. LEXIS 11241, (6th Cir. 1979) *with* 234 NLRB at 490.

The conflicted officer in *Botany 500* played no role in the grievance in that case – the union’s attorney silenced him when he tried to speak at the arbitration. *Compare* Board Brief, 50 *and* UPS Brief, 31, *citing Botany 500*, 251 NLRB 527 (1980) *with* 251 NLRB at 530. The union’s attorney invited the grievant to use her personal attorney, and she indicated she would prefer the union’s attorney handle the case. 251 NLRB at 534. The Board also emphasized the limited scope of the political conflict. 251 NLRB at 533-34.

UPS claims *American Medical Response* was vacated by *Noel Canning*, but the Board subsequently reconfirmed it. Compare UPS Brief, 29 FN 13 with *American Medical Response of Connecticut, Inc.*, 361 NLRB 605 (2014) *enf'd NLRB v. American Medical Response of Connecticut, Inc.*, 627 Fed. Appx. 40 (2nd Cir. 2016).

Finally, a number of cases cited by the Board and UPS do not rule on the “fair and regular” requirement at all. In *Radio Television Technical School*, the only open question was whether the arbitrator’s decision was consistent with the Act. Compare Board Brief, 47 with *Radio Television Technical School, Inc. v. NLRB*, 488 F.2d 457, 461 (3rd Cir. 1973). In *Asset Protection*, the ALJ analogized a *Weingarten* issue to deferral, but the Board rejected the analogy and held only that the charging party “did not effectively request a *Weingarten* representative.” 362 NLRB at 623 FN 1. Compare UPS Brief, 32 to *Asset Protection and Security Services*, 362 NLRB 623, 623 FN 1 (2015).

III. The Board cannot ignore the June 20 discharge.

Atkinson showed in his Opening Brief that where two claims are closely related, such as the June 20 and October 28 discharges in this case, the Board will not defer on either if it cannot defer on both. Opening Brief, 56-57. In the case at

hand, there was no grievance decision on the June 20 grievance, so deferral is impossible. Opening Brief, 10-11, 56-57.

The Board's brief argues that what it deferred to was not the grievance process for the June 20 discharge, but the grievance decision for the October 28 discharge. Board Brief, 55. That is precisely the problem – the decision to which the Board deferred did not reach all of the claims before the Board. App. 4 FN 5, 33, 37-38.

Nor was the June 20 discharge rendered moot by the October 28 discharge. *C.f.* Board Brief, 55; UPS Brief, 34-35. Even unfulfilled threats of retaliation violate the Act; it does not matter that they do not cost an employee money. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-20 (1969); *Murray American Energy, Inc.*, 366 NLRB No. 80, slip op. 1 FN 3 (2018). Where reinstatement and backpay are not available, the Board still has what the Supreme Court described as “other significant sanctions,” such as notice postings and contempt proceedings. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002).

UPS argues the June 20 and October 28 discharge were not “closely related.” UPS Brief, 35. The ALJ found that they were and that the June 20 and October 28 discharges were “tainted” by the same “unlawful plan to use [UPS’s] rules to single out and get rid of Atkinson because of his union and protected concerted activities.” App. 12, 37, 37 FN 48, 40; *see also* Opening Brief, 8-11.

The Board's Opinion did not question the holding. App. 4 FN 5, 5, 12; *see also* Opening Brief, 20-21, 56-57.

CONCLUSION

For the foregoing reasons and those set out in his Opening Brief, Atkinson respectfully requests that the Court grant his petition for review, vacate the Board's order, and remand for consideration of the parties' exceptions consistent with this Court's holdings.

Dated: September 28, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. I am a member in good standing of the bar of the Third Circuit.
2. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(b) because this brief contains 6,497 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2019 with 14-point Times New Roman.
4. The text of the electronic version of this brief is identical to the text in the paper copy.
5. The PDF file submitted to the Court has been scanned for viruses pursuant to Local Rule 31.1(c) using Norton 360 Deluxe (subscription version) and is virus-free according to that program.

Dated: September 28, 2020

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CERTIFICATE OF SERVICE

I certify that on September 28, 2020, I electronically filed the foregoing Reply Brief of Petitioner Robert Atkinson Jr. with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit by using the appellate 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.

Dated: September 28, 2020

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