Aramark Services, Inc. *and* Leslie Lauria. Case 7–CA–43748

April 29, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On November 26, 2002, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent indicated below and to dismiss the complaint.

We find, contrary to the judge, that the conclusion of the arbitrator that the Respondent properly disciplined Charging Party, Leslie Lauria, for harassing other employees in connection with a union-related issue, was not "clearly repugnant to the Act" within the meaning of *Spielberg Mfg. Corp.,* 112 NLRB 1080 (1955), and *Olin Corp.,* 268 NLRB 573 (1984). As discussed below, it is well established that an arbitrator, to satisfy the *Olin/Spielberg* requirements for deferral, need not decide a case the way the Board would have decided it or in a manner "totally consistent with Board precedent." *Olin*, 268 NLRB at 574. In order for an arbitrator's decision to be considered repugnant to the Act, the party opposing deferral must show that the decision was "palpably wrong"—i.e., not susceptible of any interpretation consistent with the Act. Because we find that the General Counsel made no such showing here, and that the arbitrator's decision at issue—to reinstate Lauria without backpay—was not inconsistent with the Act, we conclude that the Board should defer to that decision and dismiss the complaint.

BACKGROUND[1]

Lauria, a 13-year employee of the Respondent, was employed as a cashier when she was discharged on January 22, 2001. She was an employee in a bargaining unit represented by the United Catering, Restaurant, Bar and Hotel Workers Union, Local 1064, RWDSU, AFL–CIO (the Union). In December 2000 and January 2001, the Union and the Respondent were negotiating a new collective-bargaining agreement.

On December 7, 2000, Sandra Fanning, another employee in Lauria's section, circulated a petition calling for an election to replace the section's current union steward, Rita Palmieri, and alleging that Palmieri was "biased" and had caused "animosity between fellow workers." Lauria, who was opposed to holding an election during bargaining, circulated a counter-petition on January 19, 2001, stating that "I am against a Stewards Election during the contract negotiations."

Among the employees Lauria approached with her counter-petition were Fanning and Jeremy Sill. Both Fanning and Sill complained to the Respondent's service director, Fred Rieman, later the same day (a Friday), that Lauria had harassed and intimidated them in an effort to get them to sign her counter-petition. Two other employees corroborated these complaints against Lauria.

The following Monday, Rieman sent Lauria a termination notice, informing her that two employees had complained that she had "harassed and intimidated them and tried to coerce them into signing a petition concerning union steward representation," and that she was "accused of physically poking, swearing at one of the employees, and being verbally abusive to both." Rieman also wrote that two additional witnesses verified that they heard or saw Lauria engage in this misconduct. Rieman stated that as "[i]t is the policy of Aramark that workplace harassment, in any form, is strictly prohibited and will not be tolerated," Lauria would therefore be terminated as of January 29, 2001.

The Union filed a grievance on Lauria's behalf, and Lauria filed an unfair labor practice charge with the Board. The Regional Director deferred action on the charge, pending the arbitration of Lauria's grievance, and a grievance hearing was held before Arbitrator Mark Glazer on September 5, 2001. On November 21, 2001, the arbitrator issued his decision.

II. THE ARBITRATOR'S DECISION

The arbitrator found that Lauria did not violate the Respondent's formal harassment policy, because her misconduct did not fall within the scope of "harassment" as defined therein.[2] However, the arbitrator concluded that Lauria did engage in clearly wrongful conduct by poking an employee and otherwise intimidating employees into signing a petition. Specifically, the arbitrator found that Lauria "exhibited a hostile and angry attitude towards Sandra Fanning" and that "[t]he evidence further supports that [Lauria] poked Sill and that she was yelling

[1] The following recitation of facts is based on the arbitrator's findings of fact. The judge incorrectly rejected the arbitrator's credibility findings and substituted his own.

[2] The Respondent's written harassment policy provided that "sexual and other workplace harassment, in any form, is strictly prohibited and will not be tolerated in the workplace." The policy defined "other workplace harassment" as including but not limited to "any unwelcome verbal or physical conduct, which denigrates or shows hostility or aversion toward an individual's gender, race, nationality, religion, age, disability, sexual orientation, or other personal characteristic protected by federal, state or local law. . . ."

and was loud towards him." The arbitrator found that, by this conduct, Lauria "certainly harassed coworkers who were on the other side of a Union issue." He also found that:

> It was not shown that the Grievant was engaged in protected Union activity. Either she and the complainants, or the complainants alone, were on the clock when the harassment occurred. The complainants were prevented by the Grievant from performing their jobs, and therefore the Grievant's activity was not protected. Also, the nature of the Grievant's conduct would not constitute protected Union activity. As a result, a violation permitting discipline has been established.

Taking into account Lauria's job tenure, and other factors, the arbitrator determined that discharge was too severe a penalty for her misconduct. Instead, he ordered the Respondent to reinstate Lauria, but without pay or benefits for the period following her discharge.

III. THE JUDGE'S DECISION

After a hearing on July 30, 2002, the judge found that Lauria's discharge for allegedly harassing her fellow employees violated Section 8(a)(3) and (1) of the Act; that the arbitrator's decision was "repugnant to the Act" within the meaning of *Spielberg* and *Olin*; and that deferral to that decision by the Board would therefore be inappropriate. The judge found that Lauria's conduct—which the arbitrator concluded was harassment—related solely to her circulation of a union petition, which was protected activity under the Act. The judge further found that "[t]he record here, as well as the opinion of the arbitrator, is devoid of any suggestion that Lauria made threats, used intimidating motions or gestures or repeatedly pestered Fanning or any one else." Citing *Consolidated Diesel Co.*, 332 NLRB 1019 (2000), enfd. 263 F.3d 345 (4th Cir. 2001), the judge further noted that the standard for assessing whether aggressive solicitation is protected under the Act is an objective one, and that solicitation does not become unprotected harassment merely because employees who are solicited feel "annoyed or upset" by the efforts to persuade them.

The judge also found that "[t]he notion that Lauria prevented the employees from their work during their worktime was an afterthought by the Respondent and, in any case, without basis," and that "[t]he record also shows that the employees routinely discussed nonwork related issues among themselves without incurring any discipline."

The judge accordingly found the violation alleged in the complaint and ordered the complete remedy for an unlawful discharge: reinstatement of Lauria with backpay and benefits.

IV. ANALYSIS

A. The Board's Law of Deferral

It is well established that labor policy "strongly favors the voluntary resolution of disputes." *Olin*, 268 NLRB at 574. See also 29 U.S.C. § 173(a).[3] The Board will accordingly defer to an arbitrator's decision where the proceedings "appear to have been fair and regular," the parties have agreed to be bound by the result of the arbitration, the decision is not "clearly repugnant" to the Act, and the arbitrator has considered the unfair labor practice issue. *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1085 (2003), affd. 99 Fed. Appx. 223 (D.C. Cir. 2004); *Laborers Local 294 (AGC of California)*, 331 NLRB 259, 260 (2000); *Olin*, 268 NLRB at 573–574. Moreover, a "heavy burden" is on the party opposing deferral to show that an arbitration decision does not merit deferral by the Board under these standards. *Martin Redi-Mix*, 274 NLRB 559 (1985); *Olin*, 268 NLRB at 573–574.

In deciding a question of deferral, the Board will presume that the arbitrator adequately "considered the unfair labor practice issue" if the contractual issue was "factually parallel" and the arbitrator was "presented generally" with the facts relevant to the former. *Olin*, 268 NLRB at 574; *Martin Redi-Mix*, 274 NLRB at 559. In addition, the Board will not find an arbitrator's award "clearly repugnant" unless it is shown to be "palpably wrong," i.e., not susceptible to an interpretation consistent with the Act. *Bell-Atlantic-Pennsylvania*, 339 NLRB at 1085–1087; *Olin*, 268 NLRB at 574.

Under these standards, as we noted at the outset, an arbitrator need not decide a case the way the Board would have decided it, nor reach a decision "totally consistent with Board precedent" in order to satisfy the Board's requirements for deferral. *Bell-Atlantic-Pennsylvania*, supra at 1085; *Olin*, 268 NLRB at 574. In practical terms, where an arbitrator is presented with the substance of the same evidence that would have been presented to a judge in a Board proceeding, the Board will defer to the arbitrator's findings unless they are not susceptible to an interpretation consistent with the Act. Similarly, with respect to remedy, an arbitration award that otherwise meets *Olin/Spielberg* standards can be appropriate for Board deferral even if the award provides a lesser remedy than the Board would have ordered. *Laborers Local* 294 (AGC of California), 331 NLRB at 260.

[3] "The importance of arbitration in the overall scheme of Federal labor law has been stressed in innumerable contexts and forums." *Olin*, 268 NLRB at 574. See also id. at fn. 5 for additional authorities.

B. The Arbitrator's Finding that Lauria Engaged in Harassment

Under these established standards, we shall defer to the findings of the arbitrator. The issue in the arbitration—whether there was just cause for Lauria's discharge—was factually parallel to Lauria's unfair labor practice charge. The facts material to her discharge—i.e., the collective-bargaining agreement, the Respondent's written policy on harassment, the background of the dispute over holding a steward's election and the related rival petitions, the circumstances and substance of Lauria's interactions with Fanning and Sill, the subsequent discharge itself, and the Respondent's discharge letter to Lauria—were all presented to the arbitrator through both documentary and testimonial evidence. The arbitration was the established contractual forum for contesting disciplinary actions, and there is no contention that the proceeding was not "fair and regular."

The arbitrator gave two separate reasons for finding Lauria's conduct was unprotected. First, he credited the Respondent's witnesses and, as stated above, found that Lauria intimidated and "certainly harassed coworkers who were on the other side of a Union issue," by exhibiting a "hostile and angry attitude towards Sandra Fanning," and by "poking" and "yelling and [acting] loud towards [Sill]."[4] Second, the arbitrator also found that because Lauria and/or the complainants "were on the clock when her harassment occurred," "the complainants were prevented by [Lauria] from performing their jobs" and, therefore, Lauria's conduct was unprotected. We find it unnecessary to pass on the arbitrator's second reason because, as more fully discussed below, we believe that his first reason (harassment) furnishes a sufficient basis to remove Lauria's conduct from the protection of the Act.[5]

With respect to the issue of repugnancy, we note that, under Board law, an employee engaged in otherwise protected activity, such as union solicitation, may, in a variety of circumstances, lose the Act's protection. See, e.g., *BJ's Wholesale Club*, 318 NLRB 684 (1995) (solicitations during work hours). Engaging in conduct that is abusive or opprobrious can exempt solicitation from statutory protection. See, e.g., *PPG Industries*, 337 NLRB 1247 (2002) (sexual harassment). Just how abusive the conduct must be to lose the Act's protection is a difficult issue, with the difficulties of line-drawing apparent in the Board's cases.[6] Distinctions are drawn based on the degree of offensiveness of the conduct and other factors.

In the present case, the arbitrator concluded, based on his findings of fact, that there was just cause for Lauria's discharge because her conduct toward her fellow employees was "abusive." The arbitrator considered whether Lauria engaged in prohibited harassment under both the Respondent's formal harassment policy and as that term may generally be understood. He found that the latter form of harassment had occurred. Significantly, the arbitrator also found that the harassment was so aggravated as to render Lauria's conduct unprotected. The arbitrator also specifically noted that Lauria should have known that she could not engage in the conduct for which she was disciplined.

Arguably, a case can be made that Lauria's conduct was not so "abusive" or disruptive as to cost her the protection of the Act. However, that does not mean that the arbitrator's decision was repugnant to the Act. As noted supra, the line between protected and unprotected in this context is not a clear one. Even if the Board were to conclude that the instant conduct was protected, the arbitrator was acting reasonably and rationally to come out the other way. Thus, the General Counsel has not met his burden of establishing that the arbitrator was "palpably wrong" in deciding the case as he did.[7]

In finding that the manner in which Lauria engaged in her union activity took her outside of Section 7's zone of protection, the arbitrator analyzed the case consistent with the Board's approach to determining when union solicitation loses the protection of the Act. We therefore cannot say that the arbitrator's findings and award are not susceptible to an interpretation consistent with the Act.[8] We accordingly find that the judge erred by declin-

[4] The arbitrator did not rely solely on Fanning's and Sill's subjective reactions to determine that Lauria harassed them. In stating that "[i]t is clearly wrongful conduct to poke a co-employee and to yell at and to otherwise intimidate employees into signing a petition" (emphasis added), the arbitrator was clearly also relying on the objective aspects of Lauria's physical and verbal actions.

Contrary to the assertion of our colleague, this is not a case where the solicited employees simply "did not want to be solicited." This is a case where they were confronted with objective acts of harassment. To the extent that the arbitrator considered their subjective reactions to the solicitations, these reactions were in response to objective acts.

[5] We do not express any view as to the merits of our colleague's criticism of the arbitrator's decision as set out in fn. 6 of her dissent.

[6] Gorman & Finkin, *Basic Text on Labor Law Unionization and Collective Bargaining,* 423 (2d Ed. 2004).

[7] Our colleague argues that the arbitrator "strayed too far from Board precedent" for us to defer. This standard, in the context of the legal issue presented, is a slippery slope on which to avoid deferral. The proper standard is that of "palpably wrong," i.e., "not susceptible to an interpretation consistent with the Act."

[8] *Cone Mills*, 298 NLRB 661 (1990), on which the judge relied, is distinguishable. In that case, the arbitrator found that the misconduct by the grievant that allegedly deprived her of protection was "contributed to and provoked" by the employer's unlawful actions, and was later "condoned" by the employer. 298 NLRB at 666. Lauria's con-

ing to defer to the arbitrator's decision under *Spielberg* and *Olin* and by making independent findings of fact, credibility, and law.

For these reasons, we will dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER LIEBMAN, dissenting.

The arbitrator's decision in this case—which upheld the discipline of Leslie Lauria, who gathered signatures on a petition involving a union steward's election—disregarded well-established principles of Board law. Lauria was engaged in activity protected by Section 7 of the Act, and she did nothing to lose the Act's protection. In concluding that Lauria harassed her coworkers, the arbitrator improperly relied on the subjective reactions of other employees. Because, under the standard of *Olin Corp.,* 268 NLRB 573 (1984), the arbitrator's decision was "clearly repugnant to the Act"—i.e., "palpably wrong" and not "susceptible to an interpretation consistent with the Act"—the majority errs in deferring to that decision and in reversing the judge, who correctly found that Lauria's discharge violated Section 8(a)(3) and (1) of the Act.

I.

The arbitrator's decision establishes that Lauria, in the course of gathering signatures, separately approached Sandra Fanning and Jeremy Sill, two other unit employees. Later the same day, Fanning and Sill reported to the Respondent's service director, Fred Rieman, that Lauria had "harassed" them. The following Monday, Rieman sent the following discharge letter to Lauria:

> On January 22, 2001 Aramark management received two separate complaints involving you. Two employees came to me to complain that you harassed and intimidated them and tried to coerce them into signing a petition concerning union steward representation. You also were accused of physically poking, swearing at one of the employees, and being verbally abusive to both. . . .
>
> It is the policy of Aramark that workplace harassment, in any form, is strictly prohibited and will not be tolerated. Therefore, your employment with Aramark is terminated. . . .

Lauria filed a grievance contesting her discharge, which went to arbitration.

The arbitrator found that the Respondent's harassment policy, cited in Lauria's discharge letter, did not support her discharge. Rieman, the official who discharged Lauria, also confirmed to the arbitrator that "[t]he Company does not have specific work rules" that would have banned workplace conversation. However, based on Fanning's and Sill's testimony that, in essence, they did not want to be solicited by Lauria, the arbitrator found that Lauria "exhibited a hostile and angry attitude towards Fanning [that] caused Fanning to become upset and [feel] intimidated," and that Lauria "poked Sill [in the hand] and . . . she was yelling and was loud towards him, which again caused him to be intimidated. . . ." The arbitrator thus concluded that Lauria "certainly harassed coworkers who were on the other side of a Union issue." Noting that Lauria's solicitation occurred "on the clock," he also found that "[t]he complainants were prevented by [Lauria] from performing their jobs, and therefore [her] activity was not protected." Accordingly, the arbitrator found that Lauria committed punishable misconduct and denied her backpay, despite ordering her reinstatement.

II.

Properly viewed in light of the Board's case law, the arbitrator's fact findings gave him no basis to conclude that Lauria's activity was unprotected. Our precedent establishes that the protected nature of union solicitation is not dependent on the "idiosyncratic" reaction of the employee "who happens to be on the receiving end of that activity." *Patrick Industries*, 318 NLRB 245, 248 (1995).[1] Union solicitations "do not lose their protection simply because a solicited employee rejects them and feels 'bothered' or 'harassed' or 'abused'" by them. *Frazier Industrial Co.,* 328 NLRB 717, 718–719 (1999),

duct, by contrast, was neither provoked nor condoned by the Respondent.

Further, in *Cone Mills*, it was clear under Board law that the employer's discipline was unlawful, and the arbitration's decision in favor of the employer was thus repugnant to that clear Board law. By contrast, the legal lines in the instant case are not clear and bright, our colleague's statement to the contrary notwithstanding. Her contention in this regard stems, in part, from her mistaken view that the arbitrator's assessment of Lauria's conduct simply relied on the subjective reactions of her coworkers and that Lauria's conduct was neither offensive nor threatening. As we explained above, that is simply not the case. Lauria's conduct was objectively both offensive and threatening such that the arbitrator's decision was not repugnant to the Act. In this regard, we disagree with our colleague's implication that conduct, in order to be deemed threatening in this context, must involve violence or threats of violence.

Our colleague states that in both *Cone Mills* and the instant case, the arbitrator's decision clearly established that an employee was disciplined for engaging in protected activity. While this may have been the case in *Cone Mills*, we find, for the reasons we have stated, that the instant arbitral decision does not establish that Lauria was disciplined for engaging in *protected* activity.

[1] See *Greenfield Die & Mfg. Corp.,* 327 NLRB 237, 238 (1998).

enfd. 213 F.3d 750 (D.C. Cir. 2000).[2] Even "persistent" and "repeated" union solicitations do not constitute harassment if the soliciting employee does not act in an offensive or threatening manner.[3] Contrary to the majority's suggestion, this authority is "clear and bright." In relying on Fanning's and Sill's subjective reactions to Lauria's solicitation, the arbitrator ignored this established law. Fanning's or Sill's feeling "upset" or "intimidated" by Lauria's "persistent" and "repeated" solicitations, even if they were "loud," did not deprive her of the protection of the Act.[4]

The majority describes Lauria's solicitation as "aggravated" and as consisting of both verbal and "physical" actions that "intimidated" the complaining employees. But we are not dealing with threats of violence or actual violence here. Fanning's and Sill's own testimony to the arbitrator, as quoted in his decision, establish that the only reason they felt "harassed" was that they did not care to be solicited concerning the steward's election. The "physical" conduct established in the arbitrator's decision is that Lauria, in the course of trying to persuade Sill, "eventually poked him in the hand" by way of emphasis.[5] This and the mere fact that Lauria was "loud" came nowhere close to the line of extreme misconduct that would deprive an employee of protection under the controlling authority.

My colleagues also attempt to distinguish *Cone Mills*, 298 NLRB 661 (1990), on which the judge correctly relied, by pointing out that none of Lauria's actions were provoked or condoned by the Respondent. That distinction, however, is irrelevant. What matters is that in *Cone Mills*, as here, the arbitrator's own decision clearly established that the employee was disciplined for engaging in protected activity. Accordingly, in this case as in *Cone Mills,* the arbitrator's refusal to award backpay was repugnant to the Act, and *Olin* deferral is unjustified.

III.

The majority's effort to show that the arbitrator's decision was not palpably wrong is unpersuasive. The majority emphasizes that the Board's deferral standard does not require an arbitrator to decide a case the way the Board would have decided it, or to reach a decision "totally consistent with Board precedent." But the arbitrator strayed much too far from Board precedent for us to defer to his decision.[6]

The arbitrator's own fact findings rather confirm that Lauria's discharge violated the Act. When there is no dispute that an employer's disciplinary action was directed at Section 7 activity, a *Wright Line* analysis to determine the employer's motive is unnecessary.[7] Because the discharge was directed at Lauria's protected activity and she never lost the Act's protection, her discharge violated Section 8(a)(3) and (1). It was the judge, then, who acted properly in refusing to defer and ordering a complete remedy, including back pay and full benefits, for Lauria. Accordingly, I dissent.

Donna Nixon, Esq., for the General Counsel.
Richard A. Buntele and *Oliver Zeidler*, of Livonia, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was heard on Tuesday, July 30, 2002, in Detroit, Michigan, upon a complaint, dated March 26, 2002. The charge was filed by Leslie Lauria, an individual. The complaint alleges that the Respondent, Aramark Corporation, engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by discharging Leslie Lauria on January 22, 2001, because of her union activity.

On consideration of the entire record, including my observation of the witnesses and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

[2] E.g., *Handicabs, Inc. v. NLRB,* 95 F.3d 681, 684–685 (8th Cir. 1996), cert. denied 521 U.S. 1118 (1997); *Consolidated Diesel*, supra, 332 NLRB at 1020.

[3] *Frazier Industrial Co., v. NLRB*, 213 F.3d at 756–757; *Bank of St. Louis v. NLRB,* 456 F.2d 1234, 1235 (8th Cir. 1972); *RCN Corp.,* 333 NLRB 295, 300 (2001); *Arcata Graphics*, 304 NLRB 541, 542 (1991).

[4] For this reason, the fact that other witnesses confirmed before the arbitrator that Lauria engaged in her solicitation, which the majority apparently finds significant, adds nothing to the analysis.

[5] As the arbitrator noted, "Mr. Sill is 5'10" tall, and [Lauria] is considerably smaller."

[6] My colleagues find it unnecessary to rely on the arbitrator's additional rationale for finding Lauria's activity punishable—i.e., that her solicitation occurred on worktime—to justify deferral. The principle defect in this alternate ground is obvious: a possibly lawful basis for discipline alleged as discriminatory is irrelevant if it was not in fact relied upon. E.g., *Stemilt Growers*, 336 NLRB 987, 990 (2001). Neither the Respondent's discharge letter nor its internal documentation referred to worktime solicitation. The arbitrator's discussion rather confirms that the only reason for the discharge was Lauria's alleged "harassment." In addition, worktime interruptions do not compromise Sec. 7 protection where they are "brief and [do] not involve any obvious disruption in production." *Frazier Industrial*, 328 NLRB at 718. The arbitrator cited no evidence for his assertion—never made by the Respondent—that Lauria "prevented" employees "from performing their jobs." Finally, the Respondent had no rule prohibiting worktime solicitation. Absent such a rule, "it is not a sufficient defense that . . . [protected solicitation] 'impinged on working time.'" *Selwyn Shoe Mfg. Co.*, 172 NLRB 674, 676 (1968), enf. denied on other grounds 428 F.2d 217 (8th Cir. 1970). For these reasons, *Olin* deferral is no more justified to the arbitrator's finding of worktime solicitation than to his finding of "harassment."

[7] *Burnup & Sims*, 379 U.S. 21, 22–23 (1964); *Shamrock Foods*, 337 NLRB 915 (2002), enfd. 346 F.3d 1130 (D.C. Cir. 2003); *Honda of America Mfg.*, 334 NLRB 751, 753 (2001), affd. 73 Fed. Appx. 810 (6th Cir. 2003); *Neff-Perkins Co.,* 315 NLRB 1229 fn. 2 (1994).

FINDINGS OF FACT

I. JURISDICTION

Aramark Corporation, the Employer and Respondent, has been engaged in the business of providing cafeteria services for various enterprises. Respondent annually purchases and receives goods valued in excess of $50,000, from locations outside the State of Michigan and has them shipped to their Michigan facility. Respondent has been engaged in commerce and is an employer within the meaning of Section 2(2), (6), and (7) of the Act. The Union, United Catering, Restaurant, Bar and Hotel Workers, Local 1064, RWDSU, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

This case involves issues which had been arbitrated and which resulted in an arbitration award, dated November 21, 2001 (R. Exh. 4). The facts underlying the controversy are as follows.

Aramark has maintained a bargaining relationship with the United Catering, Restaurant, Bar and Hotel Workers Union and was in negotiations for a new collective-bargaining agreement. The union steward was out on medical leave. In her absence, Rita Palmieri assumed the duties as union steward.

On December 7, 2000, Sandra Fanning, an employee, drafted and circulated among the employees a petition advocating an election to elect a new union steward to replace Palmieri. Nine employees signed the petition, acknowledging the following, ". . . we feel she is biased and has caused such animosity between fellow workers which means there is no communication or fair representation for the majority of our staff" (GC Exh. 8).

Leslie Lauria, a cashier for Aramark and a union member, was against having an election while contract negotiations were taking place between Aramark and the Union. On January 19, 2001, Lauria circulated a counter petition, stating the following, "I am against a Stewards Election during the contract negotiations" (GC Exh. 9). Eleven employees signed the petition.

On January 22, 2001, the Respondent's food service director, Fred Rieman, sent a termination notice to Lauria, based on the complaints of two employees, Jeremy Sill and Sandra Fanning. The note states as follows (GC Exh.5):

> On January 22, 2001 Aramark management received two separate complaints involving you. Two employees came to me to complain that you harassed and intimidated them and tried to coerce them into signing a petition concerning union steward representation. You also were accused of physically poking, swearing at one of the employees, and being verbally abusive to both. Two witnesses came forward to verify these things were true and that they either saw or heard you do these things you are accused of doing.
>
> It is the policy of Aramark that workplace harassment, in any form, is strictly prohibited and will not be tolerated. Therefore, your employment with Aramark is terminated effective Monday, January 29, 2001, when your current one layoff will expire.

Although neither employee was identified in the letter by name, the record shows that both employees separately complained to their supervisor, Rieman, about Lauria's behavior on January 19, 2001. They reported that she harassed and intimidated them in an effort to get them to sign the petition that disfavored elections during contract negotiations. Two other employees corroborated the complaints against Lauria.

According to the letter Lauria had been terminated for violating Aramark's harassment policy, which provides (GC Exh. 2):

> "It is the policy of Aramark that sexual and other workplace harassment, in any form, is strictly prohibited and will not be tolerated in the workplace." According to the policy, "other workplace harassment includes, but is not limited to the following,"
>
> any unwelcome verbal, visual or physical conduct, which denigrates or shows hostility or aversion toward an individual because of an individual's gender, race, nationality, religion, age, disability, sexual orientation, or other personal characteristic protected by federal, state or local law, and that has the purpose or effect of creating an intimidating, hostile or offensive work environment, has the purpose or effect of unreasonably interfering with an individual's work performance, or otherwise adversely affects an individual's employment opportunities [GC Exh. 2].

Lauria testified about the episode with Sandra Fanning who was one of the two employees that accused Lauria of harassment. On January 19, 2001, Lauria approached Sandra Fanning at her work area and asked her to sign the petition. They briefly discussed whether they needed another union steward. Fanning became snippy, indicating that she would not sign the petition. Lauria said that she "did not want the contract to get fucked up," in reference to the contract negotiations between the Union and Aramark (Tr. 59). Lauria did not characterize the conversation as an argument or as verbal combat. She described it as "not a big conversation" (Tr. 97), and said it "did not strike me as a problem conversation" because "there was no yelling involved" (Tr. 96). Lauria testified that the conversation lasted only a "couple of minutes" (Tr. 61).

Fanning testified that she, along with several employees, "had taken up a petition to have [their] Union Steward alternate removed from position." Lauria who, "may have been going on break," approached her and "got in her face." She conceded that Lauria did not threaten her, touch her, or swear at her. Fanning testified that Lauria had approached the girls who had signed the petition in favor of holding an election, and "was trying to convince us that what we were doing, we could not do, that she was right and we were wrong." According to Fanning, Lauria's behavior constituted harassment, "because she went up to all the girls who signed the petition to try and change their minds" (Tr. 132). "I was harassed because she was approaching me trying to convince me that my opinion should change to be hers" (Tr. 136). Fanning also testified that she was annoyed by Lauria repeatedly taking the petitions down. She therefore complained to management.

Jeremy Sill was the other employee who complained to Rieman about Lauria's behavior. Lauria testified that she approached Jeremy Sill on the morning of January 19, 2001, and asked him to sign the petition. He told her that he wouldn't sign it, but he then stated, "I would let her know later on,

maybe think about it" (Tr.182). Later that day, Lauria approached Sill again and jokingly told him that she would give him $20 if he would sign the petition. They both laughed. Sill told her, "no," and went back to work.

At about 1 p.m., Lauria saw Sill seated in a cart with Rochelle Lynn and engaged in a conversation with Amy Cirenese about the Union. Lauria joined in and expressed her views that employees should stick together and support the Union. Sill said that he did not care about unions and raised his voice. She also raised her voice and argued that he should care, because without the Union he would not have a pension or medical benefits. Lauria had already clocked out when she approached Sill, but he was still working at the time of the conversation. Lauria denied yelling at Sill or touching him.

Cirenese, employed as a cashier, similarly testified that Lauria joined the conversation which was already in progress and which concerned the union petition. Cirenese, who was only a couple of feet away, observed that Sill and Lauria began to argue in a louder than usual voice, but never to the point of yelling at each other. According to her testimony, Lauria did not touch Sill.

Lynn who was seated next to Sill in the cart during this episode testified that Lauria spoke to Sill in a voice slightly louder than normal. Lauria was not yelling at him, but, trying to make her point, she poked Sill on his hand, which was draped across the steering wheel.

Sill testified that Lauria yelled at him for 2–3 minutes, during which time he listened without making any comments to her. He stated that Lauria told him that he would "be fucking up the contract by not going with her." According to Sill, Lauria poked him on his hand like a hand gesture, which did not hurt but which he found embarrassing. Sill admitted that his prior testimony in the unemployment hearing was false, where he stated that she poked him in the chest.

Following the complaints to management, Rieman issued the termination notice without ever speaking to Lauria or to Cirenese, even though she had informed Rieman that she had witnessed the incident.

Following the filing of a grievance on behalf of Lauria on January 29, 2001, the matter was deferred by the Board's Regional Director on April 19, 2001, to the arbitration procedure. On September 5, 2001, both parties appeared before Arbitrator Mark Glazer. On November 21, 2001, the arbitrator issued his opinion concerning the matter (R. Exh. 4). He concluded, "She certainly harassed coworkers who were on the other side of a Union issue," but that "the Grievant did not violate the Employer's formal harassment policy which carries dismissal as a potential penalty." Significantly, he stated as follows (R. Exh. 4, p. 4):

> It was not shown that the Grievant was engaged in protected Union activity. Either she and the complainants, or the complainants alone, were on the clock when the harassment occurred. The complainants were prevented by the Grievant from performing their jobs, and therefore the Grievant`s conduct would not constitute protected Union activity. Also the nature of the the Grievant`s conduct would not constitute protected Union activity.

Lauria was therefore reinstated, with seniority, but was not awarded backpay or benefits.

The General Council contends that the arbitrator's decision is repugnant to the Act, and that Aramark violated Section 8(a)(1) and (3) by terminating Lauria for protected union activity. More specifically, it is submitted that the arbitrator's finding of harassment in a mere request to sign a union petition is inexplicable with respect to Lauria`s conduct towards Fanning. With respect to Lauria's conversation with Sill, the arbitrator failed to show why that her conduct was not protected by the Act.

The Respondent argues that the matter was properly deferred to and properly decided by arbitration. Even if the Board had reached a different conclusion, it has failed to show that the process was flawed or that the result was repugnant to the Act.

III. ANALYSIS

A. The Discharge

The record shows that Lauria's conduct which the Respondent characterized as harassment and which initially resulted in her discharge was solely related to her circulation of a union petition.

The first episode brought to management's attention was her 2-or-3 minute conversation with Fanning. She [Fanning] had initially circulated her union petition, and was thereby the instigator and precursor of any union activities among the employees. Lauria's activity was a mere response to Fanning's attempt to rally her coworkers into replacing a union steward. The only difference was that Fanning, frustrated by Lauria's attempts to interfere with her efforts for a steward election, complained to Rieman. For example, when asked what she meant by being harassed, Fanning testified, "She was trying to convince us that what we were doing, we could not do, that she was right and we were wrong." This, according to her testimony, made her feel upset and intimidated. Lauria used the "f" word and may have been more emphatic, but her conduct was no more harassing than Fanning's. And by most accounts, the use of strong language, including profanity, among the employees was not unusual. Indeed, Rieman testified that he probably used it himself. See *Felix Industries,* 331 NLRB 144 (2000). The record here, as well as the opinion of the arbitrator, is devoid of any suggestion that Lauria made threats, used intimidating motions or gestures or repeatedly pestered Fanning or any one else. The Respondent arbitrarily accepted Fanning's subjective characterization of what she considered intimidation or harassment, and unfairly singled out Lauria's conduct without hearing her side of the story and without considering the surrounding circumstances. Lauria's role was only an integral part of a broader picture of union activities among the employees.

With regard to Lauria's alleged harassment of Sill, the record shows that her two earlier conversations with Sill about the Union were brief and of little consequence. In his own words, it was not "that big a deal." Other accounts about the conversations between these employees confirm that conclusion. But the episode that prompted his complaint to Rieman happened in the afternoon in front of other employees, while he sat in a cart with another employee. According to Sill's testimony, "it was a quick little argument" which he resented and about which he

"felt embarrassed because people were walking by and I am sitting here getting yelled out for nothing, over some contract" (Tr. 191). By all other accounts, more credible than his, she spoke loudly, but she never yelled and he certainly retorted in kind.

Furthermore, considering Sill's inconsistent testimony and his general lack of candor, I credit Cirenese's testimony and that of Lauria that she did not touch Sill. But even assuming that Lauria touched his hand on this occasion, Sill described it as poking or as "a hand gesture," while "she was yelling and she was moving her hands around at the same time," it now appears that the "physical poking, swearing," and "verbally abusive" incident, was far more benign than described by the Respondent in the January 22, 2001 memo. Admittedly, she did not poke Sill's chest, as he had represented in prior testimony, and she only touched his hands as a hand gesture, hardly an intimidating event. As far as the "swearing at one of the employees" reference is concerned, the record reveals her use of the "f" word, used in connection with a union contract and not directed at any one, hardly an unusual occurrence at the facility.

Significantly, she did not initiate but merely joined in an ongoing conversation between Sill and one or two other employees about the Union. He resented her approach and strongly disagreed with her opinion favoring the Union and decided to complain to management. Relying on partial employee witnesses, excluding, for instance, Lauria and Cirenese who were most directly involved, the Employer conveniently and summarily discharged her, without complying with the Company's progressive discipline procedure. The notion that Lauria prevented the employees from their work during their worktime was an afterthought by the Respondent and, in any case, without basis. Not only had Sill and the others started their discussion in her absence, but they also could have left at any time. The record also shows that the employees routinely discussed nonwork related issues among themselves without incurring any discipline.

Lauria was perhaps more emphatic and persistent in her efforts to have the employees sign the petition, but her conduct did not exceed the bounds of protected activities. The standard for assessing whether such conduct is protected under the Act is an objective standard, as held in *Consolidated Diesel Co.,* 332 NLRB 1019 (2000). The Act has designed a system allowing employees to engage in concerted or union activities during which attempts to persuade one another may be robust and vigorous. The consequence may be that some employees may feel annoyed or upset by the efforts to persuade them, but they may have to accept a certain level of annoyance if the purpose of the Act is to be achieved. It is also clear that an employer is prohibited from enforcing its harassment policy to interfere with the rights of the employees under the Act. Consolidated Diesel, supra. I accordingly find that Lauria's activities were protected under the Act, and that her discharge based on her exercise of those rights violated Section 8(a) (1) and (3) of the Act.

The General Counsel has shown, as required under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that the protected activity was a motivating factor in the employer's decision and that the employer had knowledge of the union activity of the employee. The Respondent knew that the employees had circulated union petitions, and that Lauria had approached Fanning and Sill to obtain their signatures on her petition. Indeed, Rieman testified that he had investigated the incidents and "found out that they did want to have an election, one group did and one group did not" (Tr. 46). Although Rieman knew that the entire episode revolved around a union petition and included other employees, he nevertheless concluded that Lauria's participation violated Earmark's workplace harassment policy.

The Respondent has failed to demonstrate that it would have taken the same action, even in the absence of the employee's union activity. There simply were no other activities, which the Respondent could have described as harassment or intimidation. See, *Wright Line*, supra. The Respondent failed to show that other employees who engaged in similar conduct were disciplined. Lauria was the only employee who was disciplined. Rieman's investigation was cursory and arbitrary, without giving the employee an opportunity to explain her version. The Respondent advanced shifting reasons as a basis for the adverse personnel action and belatedly contended that Lauria had approached the employees who were "on the clock."

B. Deferral

The next issue to be decided in this case is whether the Board should defer to the arbitration opinion and award (R. Exh. 4). The guidelines, set forth in *Spielberg Mfg. Co.,* 112 NLRB 1080 (1055), and *Olin Corp.,* 268 NLRB 573 (1984), provide that the Board should defer if the arbitration proceeding was fair and regular, the parties agreed to be bound, and the award is not clearly repugnant to the Act. There is no issue with respect to the first two standards. But the parties in this case have submitted sharply differing views as to whether the arbitrator's decision is repugnant to the Act, and whether he failed to consider the unfair labor issue.

The General Counsel has cited *Cone Mills,* 298 NLRB 661 (1990), where the arbitrator found sufficient culpability in the employee's conduct that he ordered reinstatement without backpay. There, as here, the employee was discharged for having engaged in protected activities. The Board framed the issue, whether the arbitrator's award of reinstatement but without backpay is susceptible to an interpretation consistent with the Act. After reviewing the arbitrator's findings, the Board concluded that "nothing in the opinion and award . . . provides a rational basis" for the discharge, "apart from her union activities, or that recounts misconduct that would justify withholding her backpay." The arbitrator's refusal to award backpay, according to the Board, "has the effect of penalizing [the employee] for engaging in those protected activities that the arbitrator found precipitated her discharge, a result that is plainly contrary to the Act." The Board found the award to be clearly repugnant to the Act and refused to defer to it.

In agreement with the General Counsel, I find that the award here is similarly repugnant to the Act, and that the Board should not defer to it for several reasons. First, contrary to the finding herein, the arbitrator concluded that Lauria was not "engaged in protected Union activities." Yet her exercise of

these rights did not exceed the bounds of proper conduct even assuming the facts of the arbitration award. Second, only a cursory observation supported his finding that Lauria "certainly harassed coworkers who were on the other side of a Union issue," and his conclusion that the activity was not protected union activity. According to his opinion, she or "the complainants alone, were on the clock when the harassment occurred" and they "were prevented from performing their jobs." As already observed, Lauria was not on the clock when she joined the conversation, and the complainants who were already conversing could have discontinued their talk any time. Moreover, employees spoke routinely about nonwork matters during worktime. His references to "poking" or "intimidation" were not explained or defined. The arbitrator merely assumed that these acts occurred. Third, the arbitrator's justifications for finding fault were inconsistent with the reasons given by the Respondent as reflected in the discharge notice. Finally, the arbitrator failed to consider the scope of protection afforded under the Act and whether that protection could have encompassed her conduct. For these reasons, as well as those discussed by the General Counsel, the arbitration opinion and award should be rejected in so far as it assigns any culpability to Lauria's activities.

CONCLUSIONS OF LAW

1. Respondent, Aramark Services, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Leslie Lauria for engaging in union or protected activities.

4. This unfair labor practice has an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Board should not defer to the arbitration award.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom. Further, the Respondent shall be required to offer employee Leslie Lauria immediate and full reinstatement to her former position of employment and make her whole for any loss of wages and other benefits she may have suffered by reason of Respondent's discrimination against him in the manner prescribed in *F.W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons* for the *Retarded,* 283 NLRB 1173 (1987). In addition, the Respondent shall be required to post an appropriate notice, attached as "Appendix."

[Recommended Order omitted from publication.]