United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 10, 2007

TO : Stephen Glasser, Regional Director
Region 7

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: SBC Communications, Inc. 240-3367-0150
Case 7-CA-47757 240-3367-8367-2000
512-7550-7500

This Section 8(a)(3) and (1) case was submitted for advice as to whether an arbitration award is clearly repugnant to the Act under Spielberg/Olin[1] because it sustained the discipline of an employee for allegedly engaging in picket line misconduct.

We conclude that the arbitration award is not clearly repugnant to the Act and deferral to the award is therefore appropriate. The Region should dismiss the charge, absent withdrawal.

FACTS

On May 21, 2004, CWA Local 4107 ("the Union") engaged in a four-day economic strike of the Employer. During the strike, a picketing employee confronted an assets protection manager[2] as he was exiting his car by placing her finger near his face while shouting obscenities at him. The employee, who was standing within about one foot of the manager, also waved her sign and arms around his face. No other employees on the picket line engaged in similar conduct. Another picketer attempted to remove the employee from the scene and calm her down. The manager had done nothing to provoke the employee's actions.

The manager complained about the incident and the Employer subsequently conducted an investigation including interviewing other managers and employees who witnessed the altercation. On July 1, 2004, as a result of its investigation, the Employer notified the employee that she was suspended for three days for having violated the

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[1] Spielberg Mfg. Co., 112 NLRB 1080 (1955); Olin Corp., 268 NLRB 573 (1984).

[2] The manager is a former police officer.

Employer's Code of Business Conduct[3] by using vulgar language, intimidating behavior, and violating another's personal space. That same day, the Union filed a grievance alleging that the Employer unjustly suspended the employee. The Employer denied the grievance. On August 9, 2004, the Union filed this charge alleging that the employee was suspended without just cause and for engaging in protected concerted activity. The Region deferred the charge to the parties' grievance arbitration procedure under Collyer.[4]

Eventually, on November 8, 2006, an Arbitrator conducted a hearing pursuant to the following contract provision:

> Article 12, Problem Resolution Procedures, Section 12.03: The Company agrees that it will act with just cause in taking any disciplinary action including dismissal, suspension or demotion of any employee.

The parties also stipulated the following issue for determination by the Arbitrator: "Whether or not the Company had just cause to discipline [the employee] with a three day suspension for her conduct on May 22, 2004."

On March 19, 2007, the Arbitrator denied the Union's grievance and found the Employer had just cause to discipline the employee for her conduct on the picket line. The Arbitrator considered whether the employee's conduct was intimidating to others and how it differed from that of other employees on the picket line. The Arbitrator noted that no other employees on the picket line had to be removed or pacified and concluded that the employee's abusive actions directed personally at a manager differentiated her conduct from that of the other employees on the picket line.

The Union asserts that the Arbitrator's decision is clearly repugnant to the Act because the Arbitrator construed the Employer's rules governing conduct in the

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[3] The Employer's Code of Business Conduct states:

> SBC is committed to the safety of its employees. Physical violence, intimidation, or any threat of violence by any employee against any co-worker, supervisor, or customer will not be tolerated. Any incidents will be investigated and employees engaging in this conduct will be disciplined, up to and including termination.

[4] Collyer Insulated Wire, 192 NLRB 837 (1971).

workplace in light of his own personal sense of appropriate behavior to activity outside the workplace. As a result, he penalized the employee for engaging in non-threatening protected picket line speech and expression.

ACTION

We conclude that since the arbitration award is not clearly repugnant to the Act under Spielberg/Olin, deferral is appropriate and the Region should dismiss the charge, absent withdrawal.

It is well-settled that the Board will defer to an arbitral award when (1) all parties agreed to be bound by the decision of the arbitrator; (2) the proceedings appear to have been fair and regular; (3) the arbitrator adequately considered the unfair labor practice issue; and (4) the award is not clearly repugnant to the purposes and policies of the Act.[5] The "clearly repugnant" standard requires that the award not be "palpably wrong," i.e., not susceptible to an interpretation consistent with the Act; it does not require that an arbitrator's award be totally consistent with Board precedent.[6] For instance, the Board has deferred to arbitration awards upholding employee discipline even for arguably protected conduct.[7] The

[5] Spielberg Mfg. Co., 112 NLRB at 1082; Olin Corp., 268 NLRB at 574.

[6] See Aramark Services, Inc., 344 NLRB No. 68, slip op. at 2-3 (2005) (Board deferred to award finding just cause for employee's discipline for workplace misconduct; arbitrator need not decide case as Board would have, nor reach decision totally consistent with Board precedent to satisfy Board's requirements for deferral); Texaco, Inc., 279 NLRB 1259, 1259-60 (1986) (Board deferred to award finding just cause for discipline for alleged strike misconduct; although unfair labor practice issue required different analytical framework, award was consistent with the Act). See also Smurfit-Stone Container Corp., 344 NLRB No. 82, slip op. at 3, 4 (2005) (Board deferred to award interpreting management rights clause, where award was "susceptible to an interpretation consistent with the Act", even though Board might have reached different result) (emphasis in original).

[7] Aramark Services, Inc., 344 NLRB No. 68, slip op. at 3 (award not clearly repugnant just because employee's conduct was arguably not so abusive or disruptive to cost her protection of the Act; award was reasonable and rational, even if different from how Board would decide); Shimazaki Corp., 274 NLRB 15, 18-19 (1985) (Board affirmed

opponent to deferral has the heavy burden of demonstrating that the standards for deferral have not been met.[8]

In this case, there is no contention or evidence that the first three Spielberg/Olin factors were not satisfied. Rather, the Union argues that the decision is palpably wrong and clearly repugnant because the Arbitrator improperly applied the Employer's workplace rules and/or his own sense of acceptable picket line behavior to protected picket-line conduct. However, a review of the Arbitrator's decision establishes that the Arbitrator clearly considered the relevant facts and statutory issue in finding just cause for the employee's discipline under the parties' agreement.[9]

Thus, in evaluating whether the employee's discipline was justified under the contract, the Arbitrator considered whether, under all the circumstances, her conduct toward the asset protection manager would reasonably tend to intimidate others.[10] The Arbitrator acknowledged that

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ALJ's decision to defer to award finding just cause for employee's discharge where he had engaged in work slowdown and made obscene remarks to shop steward; even assuming employee had engaged in protected concerted activity, arbitrator's decision not clearly repugnant).

[8] Olin Corp., 268 NLRB at 574. See also Kvaerner Philadelphia Shipyard, Inc., 347 NLRB No. 36, slip op. at 2 (2006) (heavy burden on party opposing deferral to show award is palpably wrong and clearly repugnant); Smurfit-Stone Container Corp., 344 NLRB No. 82, slip op. at 2 (party opposing deferral bears burden of proof that no reasonable interpretation of award would be consistent with the Act); Aramark Services, Inc., 344 NLRB No. 68, slip op. at 2 (same).

[9] Cf. Smurfit-Stone Container Corp., 344 NLRB No. 82, slip op. at 2, 3 (although award was unclear, arbitrator adequately addressed statutory issue by determining contractual issue, i.e., whether implementation of new work rule was unlawful unilateral change).

[10] Clear Pine Mouldings, 268 NLRB 1044, 1046 & n.14 (1984), enfd. mem. 765 F.2d 148 (9th Cir.1985), cert. denied 474 U.S. 1105 (1986) (propriety of discipline, and specifically reinstatement, based on whether misconduct under all the circumstances would reasonably tend to coerce or intimidate employees in exercising their rights; analogous standard governs misconduct directed against nonemployees). See also Detroit Newspapers, 342 NLRB 223, 224 (2004) (striker's playful water-squirting with water pistol not

although the manager might not actually have been intimidated by the employee, her conduct of thrusting her finger inches from his face while yelling profanities at him was nonetheless "generally considered to be intimidating behavior." The Arbitrator also considered the surrounding circumstances and found that the employee's behavior differed from that of other picketers.

Contrary to the Union's contention, the Arbitrator did not apply the Employer's Code of Business Conduct to the employee's picket line conduct. Notably, the parties stipulated that the issue before the Arbitrator was whether the Employer had just cause to discipline the employee with a three-day suspension for her conduct. In this regard, after considering the circumstances relevant to the statutory question of whether the employee had lost the protection of the Act, the Arbitrator decided that there was just cause for the employee's discipline under the parties' contract, not that her conduct violated the Employer's Code of Business Conduct. In this situation, where the arbitrator is presented with the same evidence that would have been presented to a judge in a ULP proceeding, the Board will defer to the arbitrator's decision if it is susceptible to any interpretation consistent with the Act.[11] Therefore, even if the employee's conduct at issue here arguably did not lose the Act's protection, the General Counsel cannot satisfy his heavy burden of establishing that the Arbitrator's award is clearly repugnant where it was based on the relevant facts and the appropriate statutory framework.[12]

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coercive or intimidating); Airo Die Casting, 347 NLRB No. 75, slip op. at 1, 3 (2006) (Board affirmed ALJ that in circumstances of case, picketer's racial slur and obscene gesture unaccompanied by threatening or coercive behavior did not lose Act's protection).

[11] See Aramark Services, Inc., 344 NLRB No. 68, slip op. at 2, 3 (arbitrator's decision not palpably wrong even though Board might have found that employee's conduct did not lose Act's protection; arbitrator's decision was reasonable and rational).

[12] See id.; Shimazaki Corp., 274 NLRB at 18-19 (even assuming employee was engaged in protected concerted activity, award upholding employee's discharge for just cause not clearly repugnant). See also Smurfit-Stone Container Corp., 344 NLRB No. 82, slip op. at 2-3 (arbitrator considered statutory issue).

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K