Servair, Inc. ***and*** **District Lodge 143 and Local Lodge 601, International Association of Machinists and Aerospace Workers, AFL-CIO and Teamsters Local 959—State of Alaska affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Party in Interest, and Local 302, International Union of Operating Engineers, AFL-CIO, Party in Interest.** Cases 19-CA-9594, 19-CA-9663, and 19-RC-8328[1]

October 21, 1982

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND JENKINS

On June 30, 1978, the National Labor Relations Board issued its Decision, Order, and Direction of Second Election in the above-entitled proceeding,[2] finding that the Respondent violated Section 8(a)(1) of the Act by creating the impression of surveillance of employees' union activities, coercively interrogating employees concerning their union activities and sympathies, threatening employees with layoff or discharge because of their protected activities, and threatening to refuse to bargain with the Teamsters. The Board further found that the Respondent violated Section 8(a)(2) and (1) of the Act by devising a plan to prevent the Teamsters from representing the employees, causing an employee to distribute literature favoring the Engineers over the Teamsters, urging the employees to form their own labor organization, maintaining a list of Teamsters advocates scheduled for possible discharge and notifying the employees of the list, writing a warning letter to a Teamsters advocate and later discharging him, and discharging employees who were striking to protest the Respondent's unfair labor practices. Also, the Board determined that the Respondent violated Section 8(a)(3) and (1) of the Act by telling a clerical employee to screen out Teamsters supporters when reviewing job applications, writing a warning letter to a Teamsters advocate and subsequently discharging him, and discharging employees who were engaging in a strike to protest the Respondent's unfair labor practices.

The Board ordered the Respondent to cease and desist from these practices and from in any other manner interfering with employee rights guaranteed under Section 7 of the Act. Affirmatively, the Board ordered the Respondent to rescind and expunge from its files the letter of warning given to employee George MacLean dated June 13, 1977, and all references to it; to offer immediate and full reinstatement, with backpay plus interest, to MacLean and 19 named unfair labor practice strikers; and to post appropriate notices.

On October 23, 1979, the United States Court of Appeals for the Ninth Circuit issued its decision,[3] wherein the court affirmed the Board's finding that the Respondent, in response to the Teamsters drive to oust the incumbent Machinists, interrogated employees, created the impression of surveillance, threatened to discharge employees if the Teamsters won, and discriminated against Teamsters job applicants.

The court also affirmed the Board's finding that approximately 6 weeks after the initial election the Respondent unlawfully terminated a leading supporter of the Teamsters—MacLean. However, although the court upheld the Board's finding that MacLean was unlawfully discharged, it refused to enforce at this time that portion of the Board's Order requiring the Respondent to offer him reinstatement. In the court's view, because the Respondent had previously reinstated MacLean and MacLean had later quit or left his employ, to order his reinstatement now would be punitive and deprive the Respondent of a hearing on reinstatement. The court remanded the case to the Board "for appropriate findings [on] the question [of] whether MacLean terminated his employment voluntarily."

The court also refused to affirm the Board's finding that the Respondent unlawfully terminated the 19 employees who struck in protest of MacLean's unlawful discharge. The court found that the evidence did not support the Board's finding that the Respondent's motive in discharging the 19 employees was to prevent the Teamsters from becoming the employees' bargaining representative. The court additionally found that, in any event, the Board should have deferred to an arbitrator's decision upholding the discharge of the 19 employees. In the court's view, on the facts of this case "[t]here is little support for the Board's contention that 8(a)(2) issues were so 'intertwined' with the 8(a)(3) discharge issues that the question about the 19 strikers was not resolved at arbitration." Rather, the court found that the only issue, both before the arbitrator and before the Board, was the factual one of the Respondent's motive in discharging the 19 strikers, and in its view this factual issue "was the same whether it arose under 8(a)(2) or (3)." In these circumstances the court stated that choosing "to proceed on the basis of 8(a)(2) in addition to

[1] On April 21, 1981, the Executive Secretary, by direction of the Board, issued an Order severing Case 19-RC-8328 from this proceeding.

[2] 236 NLRB 1278.

[3] *Servair, Inc.* v. *N.L.R.B.*, 607 F.2d 258.

8(a)(3)" is not enough to "justify ignoring the arbitration award," and it expressed the further concern that, "if the Board's view of the law prevails, contractual issues resolved by arbitration can always be raised again before the NLRB by casting them as statutory violations." The court stated, "If an arbitrator, with the agreement of the parties, resolves an issue completely, that decision should not be disregarded simply because the issue is capable of being perceived as a statutory question."

On November 30, 1979, the General Counsel filed a "Petition for Rehearing, and Suggestion for Rehearing in Banc" on behalf of the National Labor Relations Board. In the petition for rehearing the General Counsel raised three separate issues: (1) proof of unlawful motivation was not essential in order to establish that the Respondent's discharge of the 19 strikers was unlawful; (2) the court's holding that the Board should have deferred to the arbitrator's decision reflected a misapprehension of the Board's rationale for refusing to defer on the facts of this case, and, even if the court adhered to its view that the Board's stated reason for refusing to defer to arbitration in this case was inadequate, the court was required to remand the case in order to permit the Board to make initial factual findings and to exercise its discretion in accordance with the criteria set forth in *Spielberg Manufacturing Company*, 112 NLRB 1080, 1081–82 (1955), and similar cases; and (3) the court's declining to enforce the reinstatement provisions of the Board's Order with respect to MacLean was based on a misunderstanding of the Board's procedures.

On May 22, 1980, the court issued the following order:

> Upon the petition for rehearing of the National Labor Relations Board filed herein on November 30, 1979, the opinion entered herein on October 23, 1979, is withdrawn and the cause is remanded to the National Labor Relations Board for further consideration under the standards set forth in *Spielberg Manufacturing Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955).
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> The above panel will retain jurisdiction if further appellate review is necessary. [624 F.2d 92.]

On July 17, 1980, the Board notified the parties of the remand and invited them to file statements of position. Thereafter, statements were filed by the Respondent and the General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record as a whole, the order of the United States Court of Appeals for the Ninth Circuit remanding the proceeding, and the statements of position, and, for the reasons set forth *infra*, has decided to adhere to its original decision of not deferring to the arbitrator's award concerning the discharge of the 19 strikers.

The only issue presently before the Board on the court's remand is whether the arbitral decision sustaining the discharge of the 19 employees who walked out to protest MacLean's discharge is entitled to deference under the Board's *Spielberg* criteria.[4] In *Spielberg*, the Board approved deferral to arbitration provided: (1) the arbitral proceedings were fair and regular, (2) all parties had consented to be bound by the arbitrator's decision, and (3) the award was not repugnant to the policies of the Act.

Here, the facts show that 19 employees met at the airport on June 19, 1977, to protest MacLean's discharge and agreed that they would not work until something was resolved with management about the discharge. Manager Nyeland discharged all 19 strikers. Seventeen of the nineteen strikers filed grievances, and the Machinists demanded reinstatement of all those discharged. The grievances, which were processed in accordance with the terms of the Respondent's expired contract with the Machinists, were presented to arbitration. The arbitrator ruled that all 19 discharges were for cause, but that some of the grievants should be reinstated because of mitigating factors. The arbitrator concluded that, under the facts and circumstances of this dispute, the grievants were engaged in work stoppage activity that was clearly in violation of the agreement. The agreement contained a no-strike clause.

The Board in its decision found that the Respondent's discharge of the 19 strikers was "an integral part" of its campaign of unlawful assistance in violation of Section 8(a)(2) of the Act, and declined to defer to the arbitrator's award that basically approved the discharge of the 19 employees. The Board stated, "[T]he issue before the arbitrator, the discharge of 19 employees, [was] so closely interwined with, and, indeed, a part of, the 8(a)(2) allegations, which types of allegations never have been and cannot be delegated to an arbitrator, that a hearing and decision by the Board is required."

That, however, is not the only reason deferral would be inappropriate in the circumstances of this case. The Board will not defer to an arbitrator's award unless the arbitral proceeding was fair and regular on its face. Where there is an apparent con-

[4] *Spielberg Manufacturing Company, supra.*

flict of interest between the employees and the union representing them in the arbitration proceeding, the Board properly refuses to defer. See *N.L.R.B.* v. *International Longshoremen's & Warehousemen's Union & Local 27 [Port Angeles Joint Port Labor Relations Committee]*, 514 F.2d 481, 483 (9th Cir. 1975); *Kansas Meat Packers, a Division of Aristo Foods, Inc.*, 198 NLRB 543, 544 (1972).

In the instant case, many of the employees who struck over the discharge of MacLean, a leading Teamsters supporter, also supported the Teamsters. At the time of the strike, the incumbent Machinists was seeking supporters for itself and was trying to defeat the efforts of the Teamsters. The Machinists had an interest in representing these striking employees in order to encourage them to be members of the Machinists, but the Machinists could also benefit if a substantial number of the employees who were supporting the rival Teamsters was not reinstated to their former jobs where they conceivably would continue their campaign against the Machinists. Because of this potential conflict of interest of the Machinists, the question of whether or not the strike was an unfair labor practice strike was not placed before the arbitrator for decision. Nor did the arbitrator consider whether the seriousness of MacLean's discriminatory discharge warrant a conclusion that the employees were not prohibited by the no-strike clause in the contract from striking to protest the discharge. The Machinists entire defense was that the employees did not strike, but merely attempted to talk with management when they were supposed to be working. The Machinists representative told the striking employees that what they were doing was contrary to the collective-bargaining agreement, and that under the circumstances it was going to be difficult to get their jobs back. Faced with apparent unanimity on the part of the Machinists and the Respondent that the employees' conduct was unjustified, and presented with no evidence or contention that would justify the employees' strike despite the no-strike clause, the arbitrator sustained the mass discharge. We conclude that the employees' interests were not adequately represented in the arbitral process.

The Supreme Court, in *Mastro Plastics*,[5] held that a waiver of the right to engage in "any strike" did not, without more, embrace strikes against unfair labor practices designed to interfere with the employees' free choice of a bargaining representative. The Court there indicated that the no-strike clause and the corresponding grievance-arbitration provisions were more naturally interpreted as providing a mechanism for avoiding interruptions of production due to disputes over the meaning and application of various contractual provisions. The Court stated that, without more, such clauses do not reach strikes which are in protest of unfair labor practices "destructive of the foundation on which collective bargaining must rest," that foundation being the employees' "full freedom of association." Where an employer has engaged in serious unfair labor practices that undermine employee free choice, and has thereby destroyed the foundations of stable collective bargaining, an ordinary no-strike clause does not constitute a legitimate and substantial business reason that justifies the discharge of employees who strike in response to serious unfair labor practices.

In the present case, the unfair labor practice findings sustained by the Ninth Circuit establish that the Respondent engaged in the kind of serious unfair labor practices that undermine the foundations of collective bargaining. Accordingly, we find that the Respondent was precluded from relying on the no-strike clause to discharge the 19 employees who refused to work in protest of MacLean's unlawful discharge.

For the foregoing reasons, we find that deferral to the arbitrator's award would not be appropriate. We believe that the evidence clearly shows that an inherent conflict of interest was present in the Machinists representation of the striking employees before the arbitrator. The evidence also establishes that the unfair labor practice strike issue was not raised before the arbitrator; nor was the question whether the employees were justified in striking even in the face of a no-strike clause in the contract. In such circumstances, we are constrained to conclude that the arbitration was not fair and regular and that it would be repugnant to the purposes of the Act to defer to the arbitrator's award.

The foregoing discussion has been responsive to the only issue before us on remand from the court. However, because of concerns earlier expressed by the court in its now-withdrawn opinion, we deem it appropriate to take the opportunity to address ourselves to those concerns.

With respect to the discharge of the 19 striking employees, we believe it unnecessary to determine whether the Respondent acted with a discriminatory motive. In our view, the issue is whether the striking employees were engaged in protected activity and, if so, whether they were discharged for that reason.

We have found on the basis of the record evidence that the strike was caused by the Respondent's unlawful discharge of MacLean and that the employees' action was to protest this discharge. We have also found, under the doctrine enunciated in *Mastro Plastics, supra*, that the unlawful dis-

[5] *Mastro Plastics Corp., et al.* v. *N.L.R.B.*, 350 U.S. 270 (1956).

charge of MacLean was a serious unfair labor practice which goes to the very heart of the Act. Accordingly, we concluded that the no-strike clause in the contract did not prohibit employees from striking to protest the unlawful discharge of MacLean. Consequently, the 19 striking employees were engaged in protected concerted activity and when the Respondent discharged them for this reason—which is undisputed—the discharges were unlawful, irrespective of the Respondent's motive.

With respect to our finding that employee MacLean was unlawfully discharged and that as a matter of remedy he is entitled to reinstatement and backpay, our rationale was as follows. We did not believe that anyone could seriously contest our finding that MacLean's discharge was unlawful under the Act. The only real issue raised is whether, after the discharge and reinstatement by the Respondent, MacLean voluntarily left his employment and thereby forfeited his right to reinstatement and partial backpay. The simple answer to this is that on the record before us we are unable to determine whether MacLean's departure was truly voluntary. In such circumstances, we are unwilling to resolve the doubt in favor of the wrongdoer and, in accordance with our customary practice, we leave the resolution of such matter to the compliance stage of the proceeding where both the General Counsel and the Respondent will have the opportunity to address this issue.

Accordingly, in light of the foregoing findings and conclusions, we shall affirm our prior Decision and Order in this proceeding.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby affirms its original Decision and Order in this proceeding reported at 236 NLRB 1278 (1978).

MEMBER FANNING, concurring:

I agree with the result reached by my colleagues in affirming the Board's prior Order in this proceeding. I conclude that declining to defer to the arbitrator's award properly obtains here, where the evidence shows the strike was occasioned by, and in response to, the Respondent's unlawful discharge of employee MacLean. Thus, under *Mastro Plastics, supra*, the strikers did not forfeit their protection under the Act. The Respondent by virtue of its commission of serious unfair labor practices was not entitled to rely on the no-strike clause here to discharge the 19 employees who protested those actions. The arbitrator did not address that issue—it apparently was not presented for consideration—and his award as rendered was in my view incompatible with Board and court precedent. Accordingly, I deem deferral to that award to be inappropriate.[6]

CHAIRMAN VAN DE WATER, concurring in part and dissenting in part:

I agree that the Board should not defer to the arbitration award upholding the discharge of the 19 unfair labor practice strikers. Although I favor a string deferral policy, I would not defer, as stated in my dissent in *Professional Porter & Window Cleaning Co., Division of Propoco, Inc.*, 263 NLRB 136 (1982), where the arbitration proceedings and award fail to meet the standards for deferral set by *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955). Here, because of the apparent serious conflict of interests between the strikers and their union representative at arbitration, the arbitration proceedings do not "appear to have been fair and regular," the first *Spielberg* deferral standard. Accordingly, deferral is inappropriate.

I also agree that *Mastro Plastics Corp. et al.* v. *N.L.R.B.*, 350 U.S. 270 (1956), is applicable here and that the strike in protest of the Respondent's discharge of employee MacLean was protected despite the contractual no-strike provision. Although not every strike over an unfair labor practice or over an unlawful discharge would warrant disregard of a no-strike provision, the Respondent's discharge of the leading Teamsters advocate, following other related serious unfair labor practices, constitutes misconduct sufficiently serious to justify the strike. The Respondent's discharge of MacLean was part of its unlawful plan to discriminate against employees who supported the Teamsters and its design to prevent the Teamsters from becoming the representative of its employees. As found by the Administrative Law Judge and adopted by the Board in the original Decision and Order herein, "Respondent's course of conduct . . . was pervasive, forceful, and in flagrant violation of the Act." 236 NLRB at 1285.

I do not agree that MacLean is entitled to a reinstatement order, even if it were contingent on compliance proceedings. Although MacLean was unlawfully discharged, he was reinstated pursuant to an agreement reached at the third step of the grievance procedure. Shortly after his reinstatement, however, MacLean left the Respondent's employment. In these circumstances, a reinstatement order

[6] In view of this conclusion, I find it unnecessary to conjecture as to possible reasons why this question—albeit in good faith—might not have been specifically litigated before the arbitrator, nor to derive conclusions therefrom. I note in passing, however, that the Board did not specifically posit that rationale in our earlier decision, believing it sufficient to note the plexus between the strike discharges and the 8(a)(2) issue, which is ont susceptible to deferral.

is proper only if the record shows that MacLean left involuntarily or was constructively discharged. Although the majority state that there is a real issue over whether MacLean left voluntarily, they also recognize that the record fails to show under what circumstances MacLean left. Thus, so far as the record shows, MacLean was reinstated and then quit; the record does not show that MacLean's departure was involuntary. Accordingly, on this record, reinstatement is not a proper remedy.[7]

[7] MacLean may, however, be entitled to backpay from when he was discharged until he was reinstated, but that is a matter properly left to the compliance stage of this proceeding.