

Specialized Distribution Management, Inc. and Bob Mattingly. Case 32-CA-13415

July 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND TRUESDALE

On April 25, 1995, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed a request for review of the judge's order dismissing the complaint and the Respondent filed an opposition to the General Counsel's request.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

DECISION AND ORDER OF
DEFERRAL/DISMISSAL

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This matter is before me upon Respondent's motion to defer the General Counsel's complaint to the decision of Arbitrator Sam Kagel, who issued a decision in this matter on May 12, 1994, is in actuality a motion to dismiss the complaint. The unfair labor practice charge in this case was filed on August 30, 1993, by Bob Mattingly, an individual. Thereafter, the Regional Director for Region 32 of the National Labor Relations Board deferred processing the unfair labor practice case under the *Collyer*¹ doctrine to allow the arbitrator to rule. Subsequently, on August 12, 1994, after the arbitrator's ruling, an official of the Board's Regional Office, speaking on behalf of the Regional Director, advised the parties that the Regional Director had concluded that the arbitrator's decision was repugnant to the policies of the Act under the *Spielberg/Olin* test.² Thereafter, on August 26, 1994, the Acting Regional Director issued the instant complaint.

In that complaint the acting Regional Director asserted that Respondent had violated Section 8(a)(1) and (3) of the Act in May 1993 when it first suspended and then discharged three employees, Jerry Freihammer, Ed Speckman, and Sam Rosas, because they had assisted Teamsters Local 853, International Brotherhood of Teamsters, AFL-CIO. That labor organization is the 9(a) representative of certain of Respondent's employees and has a collective-bargaining contract with

it. It is the Union that pursued the grievance to arbitration. In the complaint the acting Regional Director acknowledged that Arbitrator Kagel had issued an opinion and decision concerning the suspensions and discharges of these employees, yet asserted, consistent with the earlier letter, that Arbitrator Kagel's decision "is repugnant to the Act and may not be deferred to." Respondent filed an answer denying the commission of unfair labor practices. A hearing was set for March 8, 1995, but on February 28 Respondent filed its motion to defer the matter and to stay the proceedings. By Order dated March 7 (following a conference call), I ordered the hearing postponed indefinitely pending resolution of the motion to defer. I simultaneously issued a Show Cause Order directing counsel for the General Counsel to file a response to the motion. On March 21, he filed an opposition.

In the meantime, Respondent chose to ask Arbitrator Kagel for a clarification of his decision, and on March 22, Arbitrator Kagel reopened the record in that matter. On the record, and with the Union participating, he reaffirmed his decision and, to the extent he deemed it necessary, clarified his earlier analysis. On March 27, 1995, Respondent filed a reply to the General Counsel's opposition, which included a copy of the transcript of Arbitrator Kagel's March 22 proceeding. After receiving a copy of the reply, counsel for the General Counsel asked for and received permission to file an additional response. It was filed on April 6, 1995. I have carefully considered all the filings.

I. ISSUE

The issue before me is whether Respondent's motion to defer the General Counsel's complaint under the *Spielberg/Olin* doctrine should be granted. The standards for deferral under that doctrine are: (1) the arbitral proceedings must have been fair and regular; (2) all parties must have agreed to be bound; (3) the arbitral decision must not be repugnant to the policies of the Act; (4) the contractual issue before the arbitrator must be factually parallel to the unfair labor practice issue; and (5) the arbitrator must have been presented generally with facts relevant to resolve any unfair labor practice. Furthermore, the Board stated in *Olin* that the "clearly repugnant" standard does not require the arbitrator's decision to be totally consistent with Board precedent, but that it would nonetheless refuse to defer to an arbitral decision if that decision was "palpably wrong," i.e., if the arbitrator's decision was "not susceptible to an interpretation consistent with the Act."

Until the General Counsel's last filing, no party to this action had contended that any test other than the "repugnancy" test is of concern here. In that document the General Counsel challenges the "clarification" proceeding, contending the arbitrator exceeded his authority in entertaining the request to clarify and that as a consequence the proceeding should be deemed not to be fair and regular. Both issues require discussion.

II. CONTENTIONS OF THE PARTIES

Arbitrator Kagel determined, in his opinion and decision, that the three employees had engaged in misconduct sufficient to warrant discipline. Specifically, he found that the three employees (together with a fourth who is not involved here) left their work station and building without permission.

¹ *Collyer Insulated Wire*, 192 NLRB 837 (1971).

² *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955); *Olin Corp.*, 260 NLRB 573 (1984).

He also found that they subsequently engaged in certain insubordination when they were faced with discipline for that misconduct. Respondent discharged all four. In his decision he found that discharge was too severe a penalty under the collective-bargaining contract and ordered the discharges converted to suspensions without backpay.

Based on language in the complaint, as well as that set forth in the Region's August 12 letter, it is apparent that the General Counsel asserts that Arbitrator Kagel ignored the fact that the employees in question had left work to attend a "union meeting" apparently being held elsewhere on Respondent's premises and engaged in protected conduct afterwards when during the same meeting at which the arbitrator found them to have been insubordinate they demanded letters of explanation. The General Counsel contends that both activities were protected and that the subsequent discipline was an unlawful retaliation. He also claims that the discipline level for leaving work was increased when Respondent learned that the four had left work to attend a union meeting. Accordingly, he argues that Arbitrator Kagel failed to recognize that unfair labor practices had occurred and that his remedy is inadequate at law for it does not provide an appropriate remedy under the Act, citing the Board's decision in *Cone Mills Corp.*, 298 NLRB 661 (1990). Respondent asserts that *Cone Mills* does not apply and that the appropriate analysis is that used by the Board in *Teledyne Industries*, 300 NLRB 780 (1990).³

III. ARBITRATOR KAGEL'S DECISION

The facts found by Arbitrator Kagel are not in significant dispute. Respondent operates a wholesale warehouse and distribution center for food and related products in Tracy, California. As noted, it has a collective-bargaining agreement with Teamsters Union Local No. 853. That collective-bargaining contract contains a "just cause" standard for discipline and discharge. In addition, Respondent has certain rules to which the arbitrator looked in resolving the case. These included: A rule requiring employees "to be ready for work when the horn or buzzer blows and continue working until the horn or buzzer blows" indicating a break; a rule that employees "must notify their immediate supervisor prior to leaving their work area during work time"; and a rule prohibiting employees from "transact[ing] personal business during working time." In addition he relied on the "severe misconduct" rules that include insubordination, dishonesty, and theft. The last includes "stealing time."

Kagel found that on May 6, 1993, the three employees in question (plus the fourth) left their work area at a time when they were supposed to be performing work and went to a lunchroom in another building. He also found their department manager, Beeson, observed that they had done so, and initially intended to give them a warning letter for having been out of their work areas. The arbitrator further found that Beeson called them into his office and told them it was his intention to give them such a letter. Later, Beeson informed his superior, Director of Operations Flanigan, what he had done. Flanigan overruled Beeson saying that these individuals should be suspended pending further investigation be-

cause he believed they were stealing time and he wanted to investigate the matter further. As a result Beeson called all four employees back to his office and informed them of the change, advising that they had been "suspended pending further investigation." He directed them to punch out and leave the facility. All four refused despite at least three more requests that they do so. They insisted Beeson give them a letter of explanation before they would leave. The three involved here left only when Beeson announced that he had called the security office. The fourth still would not leave and another company official called the sheriff's department. Arbitrator Kagel found their refusal to leave to be an act of insubordination.

Also, according to the arbitrator, it was during this period that the facility manager learned, as he admitted in an unemployment proceeding, that the reason the individuals were absent from their work was: "[T]he scuttlebutt I got was that they were over there conducting union business, and, based on the contract, they are not able to conduct union business on company time and that was the reason I went back to do more investigating to try to find what was going on."

The arbitrator further found and included in his decision as follows:

It must be concluded based upon this entire record that the violation of the rule of walking off the job standing by itself was not considered by the company's own actions in this case a dischargeable offense. However, the admitted violation of that rule together with the insubordination charge does require a substantial disciplinary response. Both the "Standard Conduct" and "Severe Misconduct" rules do not provide for automatic discharge for violation of any of the rules. They provide for disciplinary action up to and including discharge.

DECISION

There was not just cause for the discharge of Edward Speckman, Jerry L. Freihammer and Sam Rosas. There was just cause for substantial discipline. Accordingly, their discharge of May 17, 1993, is converted to a suspension. They shall be returned to work forthwith with no loss of seniority during the period of suspension but without back pay or any other economic benefits during the period of the suspension.

Kagel also concluded that the discharge of the fourth employee was for just cause. (The Regional Director agrees.) He retained jurisdiction over any matter that might arise regarding the implementation of his decision.

IV. ANALYSIS

It should be noted here that Arbitrator Kagel was clearly aware that the employees had left their building to go to the lunchroom in another building for the purpose of conducting some sort of union meeting. He also perceived that these individuals had left their work stations at a time when they were supposed to be performing work and had done so without permission. Likewise he knew that during the second meeting, after they had been informed of the suspension pending investigation, that they had repeatedly demanded an explanatory letter before they would leave the premises.

³The Board's decision to defer in *Teledyne* was affirmed by the U.S. Court of Appeals for the Ninth Circuit in an unpublished opinion filed November 16, 1992. Docket No. 91-70216.

With respect to their leaving their building without permission to attend the meeting, that activity is not protected under the National Labor Relations Act even though it is union activity. Unless these individuals were engaged in a strike, and there is no contention that they were, they were performing personal or outside business while still on the clock. Working time is for work and employees do not have the authority to set their own terms and conditions of when they will work and when they will not, particularly when a valid rule is in effect. The Board has long approved of such rules. *Peyton Packing Co.*, 49 NLRB 828, 843 (1943); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962); and *Our Way, Inc.*, 268 NLRB 394 (1983). The fact that they left for union business did not mean, *ab initio*, that their purpose would be material to the arbitrator's decision. Indeed, there is no suggestion that the Act protects such conduct. *Bird Engineering*, 270 NLRB 1415 (1984); *Interlink Cable Systems*, 285 NLRB 304, 306-307 (1987). Thus, the arbitrator was aware of the "union activity," considered it, and, it may fairly be inferred (even without reference to his later clarification), determined that it was not material to his concern in determining whether these individuals had (1) violated the rules of conduct and (2) been appropriately disciplined.

From that perspective, it is quite clear that the arbitrator recognized these individuals had not at that point engaged in any conduct protected by the Act and he therefore focused only on the issue of whether they had breached the behavior rules, both when they left work without permission while still on the clock to attend the meeting and when they repeatedly refused to leave the warehouse manager's office later on when he informed them that their operations director had changed the level of accusation.

It is probably also true that the director's current contention that the employees' demand for a letter of explanation did not receive much scrutiny from the arbitrator as being possibly protected conduct. Yet, the arbitrator was clearly aware of those facts for he specifically alluded to them in his decision.

The threshold question therefore is whether the General Counsel has demonstrated that these three individuals engaged in any activity protected by the Act in the first place. His representative cites no case demonstrating that attending a meeting without permission while on the clock, even if it is an union meeting, constitutes a protected act. The law is to the contrary. If that were the case, then it seems to me that the General Counsel's early position as expressed in the August 12 letter might be more persuasive. As noted, however, I fail to understand the theory behind the existence of an unfair labor practice during that portion of the incident for it is basic labor law that one was not committed. Apparently, neither did Arbitrator Kagel who gave that issue the short shrift it deserved; the subject matter warranted hardly any discussion at all.

The General Counsel then attempts to bootstrap that unremarkable circumstance to something closer to the Act. He contends that the arbitrator's decision demonstrates that Respondent enhanced the penalty from letters of reprimand to suspension when it learned that the reason for the employees departure was to attend a union meeting. Frankly, that is a misstatement of the arbitrator's findings. First, all that really happened was, according to the arbitrator, the employees' immediate supervisor's discipline was determined by his su-

perior to be a misanalysis of the company rules. It fell within the severe misconduct category according to Operations Director Flanigan, not the standard conduct category. Even so, Flanigan's direction to Beeson was not to suspend the four entirely, but to suspend them only for the purpose for further investigation. There was not really a change in discipline at all, for the first had not yet been levied. Instead it can easily be seen as an effort to buy some time to determine what discipline was appropriate. No enhancement occurred, for it was the first discipline imposed. Beeson's original decision was simply a false start. It was undoubtedly for that reason the arbitrator did not find any such enhancement. The General Counsel's analysis is simply a stretch.

The General Counsel's last thrust to demonstrate the existence of an underlying unfair labor practice is the best, but still falls short on the facts. He asserts that the four engaged in protected concerted activity within the meaning of the "mutual aid and protection" clause of Section 7 of the Act, i.e., the italicized portion of the statute set forth in the footnote.⁴ An employer's interference with that right would constitute a violation of Section 8(a)(1) of the Act and if the arbitrator failed to address that issue would arguably have written a decision that failed to meet the *Spielberg/Olin* test. The problem the General Counsel faces is basic. He contends that the employees were disciplined because they concertedly demanded letters of explanation, not because of any insubordination they displayed. Indeed, he asserts that insubordination did not occur, or if it did, it was not serious.

A look at the sequence of facts demonstrates that not to be the case. Respondent had determined, prior to the commencement of the meeting, to suspend the four "pending further investigation." Thus, the disciplinary machinery was already in motion when Beeson first instructed the employees to punch out and leave the premises. That instruction was the trigger for the four to begin demanding the letters. They had already been suspended at that stage; the letters of explanation would not have changed that. In fact, since they had been "suspended pending further investigation," it is apparent that no letter of explanation could have been drafted at that point for no final decision had yet been reached. Respondent did not yet have all the facts; it could not have created what the employees wanted. No other discipline was even thought of until they refused to leave despite being repeatedly instructed to do so. Thus, the employees combined their demand with misbehavior and would not leave until Beeson announced he had called security to effect their removal. The decision to discharge them was not made until later, when, as Arbitrator Kagel found, their behavior was sufficiently egregious to warrant discipline, but not discharge. Thus, the arbitrator was aware of both the facts and the issues, and those issues did not involve unfair labor prac-

⁴Sec. 7 of the Act states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities for the purpose of collective bargaining or other mutual aid or protection*, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3). [Emphasis added.]

tice theories until the decision was made to discharge the four.

Nonetheless, the arbitrator found that the contract did not authorize discharge for that level of insubordination; discharge was too severe. The General Counsel contends that their refusal to leave did not rise to the level of insubordination, but clearly it did. The general rule in such circumstances, as this distinguished arbitrator well knows, is: "Obey now; grieve later." These employees did not follow that well-ingrained procedure and their misconduct as they refused to follow it can be reasonably seen as amounting to insubordination.

The Board has certainly agreed with that assessment in the past. See the judge's comments in *Finlay Bros. Co.*, 282 NLRB 737, 739 (1987):

Bonnett disobeyed an explicit and clearly understood company rule after being urged to comply and after being given several opportunities and a period of time in which to make his decision. His conduct passed the bounds of protest and became insubordination. He utilized a means of protest which was improper and prolonged an argument after the Employer reconsidered and reaffirmed its original decision. The evidence of the Employer's attitude shows, not animus, but a desire to terminate a disruptive situation and to get on with implementation of its policy. See *Mead Corp.*, 275 NLRB 323 (1985); *Beacon Upholstery Co.*, 226 NLRB 1360, 1366-1367 (1976).⁵

Although it may be true that Arbitrator Kagel did not explicitly discuss the unfair labor practice issue, the same can be said for the arbitrator whose decision was upheld by the Board in *Teledyne Industries*, supra. There a union steward engaged in an overly lengthy discussion with another union steward while away from his work station. He was given a warning, engaged in some subsequent insubordination, and was subsequently discharged for the insubordination. The *Teledyne* arbitrator, like Kagel, reviewed that steward's conduct and found that he had engaged in insubordination. He did not really discuss in any meaningful way the unfair labor practice theory. Nonetheless, the Board said, *id.* at 781-782:

In addressing these matters, the arbitrator also necessarily rejected the Union's assertions to him that Goodwin's status as a union steward or his performance of his steward duties motivated his discharge. Moreover, the factual questions considered by the arbitrator are virtually coextensive with those that would be considered by the Board in a decision on the statutory question regardless of whether the General Counsel's theory of the violation was that Goodwin's discipline was motivated by his assertedly protected union conduct at the tool shed with [chief steward] Jones or dur-

ing the conference room meeting, or by his status as a union steward. See *Garland Coal & Mining Co.*, 276 NLRB 963, 964 (1985). . . .

We also find that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, the General Counsel did not argue nor establish that the arbitrator was lacking any evidence relevant to the determination of the unfair labor practice issue. . . .

We find, contrary to the judge, that the General Counsel has failed to show that the arbitrator's decision is not susceptible to an interpretation consistent with the Act [footnote citing to *Cone Mills*, supra]. The arbitrator, unlike the judge, credited the Respondent's version of the events. In light of his factual findings, the arbitrator determined that Goodwin was not disciplined for protected union activity. [Footnote omitted.] As the Board observed in *Andersen Sand & Gravel Co.*, 277 NLRB 1204 fn. 6 (1985),

Deferral recognizes that the parties have accepted the possibility that an arbitrator might decide a particular set of facts differently than would the Board. This possibility, however, is one which the parties have voluntarily assumed through collective bargaining.

Accordingly, we find that the arbitrator's decision satisfies the requirement of *Olin* and that the General Counsel failed to satisfy his burden of proof that deferral is unwarranted. [Footnote omitted.]

Thus, Arbitrator Kagel's treatment of the three employees here is exactly the same treatment given the grievant by the *Teledyne* arbitrator. Arbitrator Kagel has found facts that generally track those alleged to be unfair labor practices and the General Counsel has not established that the arbitrator was lacking any evidence relevant to the determination of that issue. Moreover, Kagel found that the insubordination overrode the other considerations, including what might be a protected circumstance. The Board has, when the facts warranted, done the same thing. See *Grand Rapids Die Casting*, 279 NLRB 662, 667 (1987), a case in which a union steward was ordered back to work even though he was assisting an employee in writing a grievance. There the Board adopted the judge's reasoning: "[Steward] Hogan's insubordinate refusal to obey an order to return to work, I find, was not privileged by protected activity in which he was engaged at that moment."

The General Counsel argues, nonetheless, that Arbitrator Kagel's failure to grant backpay as a remedy renders the decision repugnant. The problem with this analysis is twofold: In the first place, the General Counsel has not established that the employees were disciplined in circumstances that involve a prima facie case of an unfair labor practice. Second, even if he had, his citation to *Cone Mills*, supra, is misplaced. A careful review of *Cone Mills* demonstrates that the employer there was in fact interfering with a specifically protected act, the union steward's placement of a petition to protest the discharge of fellow employees on the lunchroom table. That occurred in a nonwork area and was to be read and signed by employees who were not engaged in work. The steward's action and the solicitation of fellow employees

⁵ Compare *Peck, Inc.*, 226 NLRB 1174 (1976). See also *Jos. Schlitz Brewing Co.*, 240 NLRB 710 (1978). There an employee who was also a union steward did not wish to work the day shift, preferring nights. He defied a direct order to do so, appearing for night-shift work. The employer regarded his actions as insubordination and discharged him. The administrative law judge held that if he wished to test the validity of that order, he should have followed the "Obey now, grieve later" procedure. The Board agreed.

to join her were, therefore, entirely protected. Respondent's interference with that activity by removing the petition and inducing the steward to engage in certain insubordinate activity to try to get the petition back, constituted a provocation that Respondent could not hide behind. In essence, the arbitrator found that the employer had engaged in a specific unfair labor practice but had not granted an appropriate remedy. The Board therefore found the arbitrator's decision to be repugnant under the *Spielberg/Olin* test.

Unlike *Cone Mills*, here, as noted before, the employees have not clearly been shown to have been engaged in any protected activity. Nor has the arbitrator been presented with any facts that would warrant the conclusion that Respondent took a reprisal for it, thereby committing an unfair labor practice. He was well aware that the employees had left their work station without permission while still on the clock to attend what was later characterized as a union meeting. He also observed their repeated refusal to obey directions to leave the premises. He was, therefore, unable to see how that was protected. He saw, because the facts required him to, that the employees had breached a valid company rule against leaving their work stations without permission and an equally valid rule against stealing company time, followed by subsequent acts of insubordination. Because there was no evidence of an unfair labor practice, he saw no reason to issue a remedy respecting one. *Cone Mills* simply doesn't apply.

Ultimately, Arbitrator Kagel's decision was that discharge for the acts of insubordination that occurred during the second meeting was excessive. And there is no question that the insubordinate acts did occur. These employees refused to leave when notified that they had been suspended pending further investigation until the foreman announced that security had been called. Even so, under the contract, Arbitrator Kagel found that discharge was excessive in the circumstances.

V. THE CLARIFICATION

Later, on March 22, 1995, Arbitrator Kagel was asked to clarify his earlier decision and he essentially did so, reiterating the point that was implicit in his earlier decision. He said (at p. 11 ff.):

Now, with reference to the matters that the company representatives bring up, it is a fact, as evidenced in my opinion quite in detail, that I did consider the grievance "union activities." We had testimony on that, it was briefed, and it was argued.

It is clear from—or at least I think it's clear from what I said in my award and opinion, that that was not the turning point so far as I was concerned in this case.

The grievants decided on their own, and admitted that they walked off the job in violation of a clearly stated rule. The business of the union activities was simply their explanation of what they wanted to do and why they did it.

...
What I got down to in this case was that the company had not made out a case that when somebody walked off the job, in the first instance, that they automatically can them. And the second thing, however, in this case was the insubordination of the grievants.

Now, if, frankly, there had been no insubordination, they would have gone back to work, and with reference to the back pay, my decision could have been completely different.

Now, I am not making this up now, and not revisiting the case. I want to at this point read what I said, and why it can't be understood by others, or other agencies, I don't understand, but I said at page 11:

It must be concluded based upon this entire record that the violation of the rule of walking off the job standing by itself was not considered by the Company's own actions in this case a dischargeable offense.

Now that has nothing to do with union activities or why they walked off. Then I went on to say:

However, the admitted violation of that rule together with the insubordination charge does require a substantial disciplinary response. Both the 'Standard Conduct' and 'Severe Misconduct' rules do not provide for automatic discharge for violation of any of the rules. They provide for disciplinary action up to and including discharge.

And, therefore, with reference to the insubordination which is described in great detail in [my] opinion and I am not going to read it now at this point, they didn't get back pay.

And I think any sensible reading of my opinion and decision would indicate what I was dealing with was two, three, or four persons originally, who just walked off a job because they decided they wanted to walk off. And they admitted it. I didn't care if they did it for union activity or whether they did it to go to the men's room when they shouldn't have gone.

And that, by itself, was not a dischargeable offense because of the company's own practice. That's what I found. But it was the insubordination that resulted in the discipline, basically.

Thus, in his clarification, the arbitrator made explicit what he had said implicitly: That he had specifically considered the union activities of these individuals. He determined that leaving one's work station while still on the clock is not protected, either by company rule or by law. That is consistent with Board law and the levy of discipline for having done so is not an unfair labor practice. Similarly, the follow-on conduct does not lead to a different conclusion for the insubordination, which he found overrode the other considerations.

That, of course is discernible even from the original decision. Arbitrator Kagel's clarification really added nothing that he had not said before. Thus, all he did was reiterate. Whether he had "jurisdiction" to clarify his decision or not is of little moment. He did not substantively modify it or his logic one whit. Clearly, proceeding in that fashion does not justify claiming that his decision is not fair and regular as required by *Spielberg*, supra. In any event, the Union was present and he also had authority, which he had specifically retained, to reconsider the remedy. Arguably, at least, that gave him the authority to reconsider at least some portion of his decision. He did so, but changed nothing; the original decision stood. Thus, the General Counsel's most recent claim,

that the proceedings were not fair and regular, is without merit.

CONCLUSIONS

I think it might have been better had the arbitrator more specifically dealt with the claim that the employees' demands for letters of clarification lacked merit as protected conduct under the Act, yet given the sequence and the fact that Respondent was not in a position to issue such letters, something which the employees probably saw, their demand must be viewed as not quite legitimate. Instead, that demand is now being used as an after-the-fact attempt to avoid the consequences of conduct far more serious.

Accordingly, I conclude that proceedings before the Board are unjustified as the arbitrator's ruling warrants a deferral. His decision is consistent with the Act and far from repug-

nant to it. Applying the *Olin* doctrine, it is clear that arbitrator Kagel's decision is "susceptible to an interpretation consistent with the Act." There is simply no reason to conduct a separate hearing to revisit what the arbitrator has already done fairly, even if his approach and style are at variance from the standards the General Counsel would like to see. Therefore, the complaint will be dismissed.

ORDER

Respondent's motion to defer to the arbitrator's decision is granted and the complaint is dismissed.⁶

⁶A request for review of this order dismissing complaint may be filed with the Board pursuant to Sec. 102.27 of the Board's Rules and Regulations.