

**Mobil Oil Exploration & Producing, U.S., Inc. and  
Bob L. Pemberton.** Case 15-CA-12801

November 8, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND  
HIGGINS

On April 13, 1996, Administrative Law Judge Albert A. Metz issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision, and to substitute a new Order.

The complaint alleges that the Respondent violated Section 8(a)(1) by terminating employee Bob L. Pemberton because he complained to other employees that the Respondent intended to terminate him due to his internal union activities. After issuance of the complaint, the parties executed a stipulation of facts. Thereafter, the judge dismissed the complaint, finding that deferral was appropriate to an arbitration award upholding Pemberton's discharge. We reverse.

*Facts*

The Respondent's employees are represented by the Associated Petroleum Employees Union (the Union). Charging Party Pemberton has had an ongoing dispute with Union President Glenn Thibodeaux concerning the operation and policies of the Union. Of recent concern to Pemberton was Thibodeaux's purported substitute teaching at a high school while excused to perform union business.<sup>1</sup> In mid-June 1994,<sup>2</sup> Pemberton complained to Senior Production Foreman Mary Ellen Waszczak concerning Thibodeaux's alleged misconduct in this respect.

On June 23, Pemberton visited the high school to gather information regarding whether Thibodeaux had worked as a substitute teacher while on union business. Pursuant to Pemberton's complaint to Waszczak, the Respondent referred the matter to its security department.

<sup>1</sup> Prior to July 19, 1994, the Respondent and the Union had a verbal agreement that the union president would be compensated for time lost, including overtime, when away from work on union business or when his presence as union president was requested by the Respondent. Under this agreement, when his work crew worked overtime, the union president would be paid for that overtime even though he was not working with his crew at that time. The Union would later reimburse the Respondent for all compensation received by the union president, including overtime, for those times when the union president was determined to have been working on union business.

<sup>2</sup> All dates are in 1994 unless stated otherwise.

On June 25, Thibodeaux informed the Respondent's labor relations adviser, Dan Whitfield, that he had heard of an inquiry at the high school by someone seeking his school payroll records. Whitfield told Thibodeaux that Pemberton had accused him of teaching while "on Respondent's time" and that the allegation had been turned over to the Respondent's security department.

On July 7, the Respondent's security advisor, John Burton, began an investigation. Burton took a written statement on that date from Thibodeaux, and Thibodeaux furnished documentation that he had worked as a substitute teacher on one day in January 1992. Thibodeaux informed Burton that he had been on union business that day, but that the Respondent had been reimbursed for Thibodeaux's salary.

On July 8, Burton contacted Pemberton. Pemberton questioned Burton as to whom he was investigating, Thibodeaux or himself. Burton indicated that it was customary to speak to the person who had come forward with the allegation that initiated the investigation. Burton stated that he did not know where the investigation would go. Burton told Pemberton that he understood that he had to tell the union representative, but that he should not discuss the investigation with anybody else. Burton then told Pemberton that this was a confidential investigation and that he was not to discuss anything that they had talked about that day. Pemberton agreed to do so. On about July 9, Burton again told Pemberton not to discuss the investigation.<sup>3</sup>

On July 17, Pemberton was present on an offshore platform, and Foreman Waszczak was sitting in a nearby office with the door open. Pemberton entered the galley-break area, while on breaktime, and spoke loudly to several fellow employees. Pemberton began talking about Thibodeaux receiving overtime pay and indicated that the Respondent was trying to fire him (Pemberton). According to the parties' stipulation of facts, Waszczak overheard Pemberton state as follows to the employees:

"The [Respondent] is trying to fire me, they have gotten a security guy, John Burton after me because I was trying to right a wrong"; "John Burton will dig something up on me"; "You know what I'll do, I'll sue the shit out of them."

At this point, Waszczak got up from her desk and had a brief conversation with one of the employees in the galley-break area. When she returned to her office, she heard Pemberton make the following statements:

<sup>3</sup> The Respondent does not have a formal written policy which prohibits interference with an official security investigation or which requires compliance with an official security investigation. The Respondent contends, however, that a past practice exists which requires that an employee cooperate with a security investigation in the manner instructed by the investigator.

“She’s the one who turned me in to John Burton”; “She knows about it”; “I wouldn’t be surprised if he had this phone [in the galley] tapped so he can hear what I’m saying out here”; “Do you know where [Respondent] gets its investigators . . . from the military,” “John Burton called me at my home on Friday and Saturday night”; “People say to me, ‘Bob you are just out to get Thibodeaux.’ I tell them they are wrong, I’m not out to get him. He is wrong, he is giving things to [the Respondent], we don’t have a union, we need to get in with the OCAW, we can’t do anything because of the [Union]. He’s not going to be president much longer.”

On July 19, Burton took a written statement from Pemberton regarding his accusation against Thibodeaux.

On July 29, the Respondent terminated Pemberton for improper interference with the security investigation and insubordination, based on the July 17 incident. Pemberton filed a grievance over his termination pursuant to the parties’ contractual grievance procedure. The Union processed the grievance to arbitration. On January 10, 1995, the arbitrator upheld the Respondent’s termination of Pemberton.

#### *The Arbitration Award*

The Respondent contended before the arbitrator that it terminated Pemberton for just cause. It asserted that Pemberton’s comments to fellow employees on July 17 were insubordinate because they were contrary to Security Advisor Burton’s instructions that he not discuss the investigation. The Respondent also relied on Pemberton’s previous receipt of disciplinary reprimands on four occasions in 1993 and 1994, including one incident in May 1994 when he received a reprimand for making insubordinate remarks to Waszczak about the Respondent’s officials. The Respondent also contended that Pemberton interfered with the investigation by virtue of his June 23 visit to the high school to investigate Thibodeaux’s substitute teaching.

The arbitrator found that Pemberton was insubordinate by not complying with Burton’s instructions. He found that Pemberton violated the spirit and letter of Burton’s instructions when he told others that an investigation was underway and then identified Burton as the investigator, accompanied by a negative characterization of Burton. The arbitrator also found that Pemberton had been insubordinate to Waszczak in May 1994 and that his past disciplinary record was characterized by repeated misconduct. The arbitrator

concluded that the cumulative weight of Pemberton’s actions constituted just cause for termination.<sup>4</sup>

#### *The Judge’s Decision*

The judge found that deferral to the arbitration award was appropriate under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984).<sup>5</sup> The judge found that Pemberton’s remarks on July 17 touched on the security investigation, Pemberton’s personal concerns, and the need for new direction for the Union, but that the thrust of his remarks was a personal complaint about the investigation and Pemberton’s intention to sue the Respondent if he were “adversely [a]ffected” himself. The judge concluded, contrary to the General Counsel, that the protected concerted nature of the remarks was “not overwhelming.”

With respect to the Respondent’s security concerns, the judge found that Pemberton had promised Security Adviser Burton that he would keep the investigation confidential and then violated that agreement when he openly discussed the investigation in front of others. The judge found that the Respondent had a legitimate business interest in keeping internal investigations confidential. The judge concluded that the arbitrator’s finding that, along with other factors, Pemberton’s breach of his confidentiality promise was sufficient cause for discharge was compatible with the purposes of the Act.<sup>6</sup>

#### *Discussion*

We agree with the General Counsel that the arbitration award is palpably wrong and repugnant to the Act because the precipitating event that caused Pemberton’s termination was his exercise of protected concerted activities.<sup>7</sup> Because the arbitration award upholds Pemberton’s discipline based on his protected concerted activities, we find that deferral to the award

<sup>4</sup>The arbitrator found, however, that Pemberton did not interfere with the investigation when he visited the high school to investigate Thibodeaux’s teaching.

<sup>5</sup>Under *Spielberg*, deferral to an arbitration award is appropriate when the proceeding is fair and regular, all parties have agreed to be bound, and the decision is not clearly repugnant to the purposes and policies of the Act. Under *Olin*, the arbitrator must have been presented generally with the facts relevant to the unfair labor practice, and deferral is appropriate unless the award is palpably wrong and not susceptible to an interpretation consistent with the Act.

<sup>6</sup>The judge relied on *Craig Hospital*, 308 NLRB 158, 164–165 (1992); *Altoona Hospital*, 270 NLRB 1179, 1180 (1984); and *Bell Federal Savings & Loan Assn.*, 214 NLRB 75, 77–78 (1974).

<sup>7</sup>The General Counsel concedes that the arbitration was fair and regular, that the parties agreed to be bound by the arbitration, and that the unfair labor practice issue was considered by the arbitrator in accordance with the *Olin* standards.

is inappropriate and that the Respondent violated Section 8(a)(1) as alleged.<sup>8</sup>

It is well settled that Section 7 encompasses the right of employees to oppose the policies and actions of their incumbent union leadership and to seek to persuade others to take steps to align the union with these opposing views. *Machinists Local 707 (United Technologies)*, 276 NLRB 985, 991 (1985), enfd. 817 F.2d 235 (2d Cir. 1987); *Laborers Local 652 (Southern California Contractors' Assn.)*, 319 NLRB 694 (1995). In the present case, it is stipulated that Pemberton has had an ongoing dispute concerning the operation, policies, and practices of the Union under incumbent Union President Thibodeaux's leadership. In furtherance of that dispute, Pemberton complained to the Respondent about Thibodeaux's alleged abuse of his privileges of union office while away from work on union business. On July 17, Pemberton continued his activities in opposition to Thibodeaux. He told a group of employees that Thibodeaux would not be president much longer and that the Respondent was "trying to fire me, they have gotten a security guy, John Burton, after me because I was trying to right a wrong." Pemberton also stated that "we don't have a Union, we need to get in with the OCAW, we can't do anything because of the [Union]."

It is evident from the foregoing that Pemberton's opposition to the union policies of Thibodeaux was of a longstanding character and that Pemberton's conduct of July 17 was a continued expression of those concerns, in a slightly different form because of Pemberton's concern that he himself might be disciplined. Thus, on July 17 Pemberton was attempting to enlist the support of other employees in opposition to the policies and alleged derelictions of the incumbent union leadership. Further, Pemberton additionally sought to enlist the support of other employees on his own behalf because of his expectation of discipline ("the Respondent is trying to fire me . . . because I was trying to right a wrong.") Pemberton's conduct on July 17 constituted protected concerted activity because it was engaged in with the object of initiating or inducing group action with respect to employees' mutual interests—group opposition to the incumbent union leadership and support of a fellow unit employee facing possible discipline because of his opposition. See *Whittaker Corp.*, 289 NLRB 933 (1988); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). Contrary to the judge, Pemberton's conduct was not merely a "personal complaint." Instead, it plainly was a manifestation of his ongoing op-

position to the union leadership, activity long recognized as protected under Section 7.

Further, Pemberton's concerted activity did not lose its protection under the Act by virtue of the insistence of the Respondent's security advisor Burton that Pemberton not discuss the investigation, and Pemberton's agreement to do so. Rightly or wrongly, Pemberton became concerned that he was the target of Burton's investigation.<sup>9</sup> The most practical recourse for Pemberton, in light of his concerns, was to seek the support of his fellow employees and to make those concerns known to others, as he did on July 17. Moreover, Pemberton did not state to employees that Burton was investigating Thibodeaux, nor did he reveal the nature of Burton's investigation of Thibodeaux. Instead, Pemberton repeated his opposition to Thibodeaux's leadership and alleged abuses, and he expressed concern about his own job tenure, matters not directly implicated by Burton's insistence that Pemberton not discuss the investigation.<sup>10</sup>

In addition, we find that the Respondent's confidentiality interests, in the circumstances here, were exceedingly minimal. Burton's asserted reason for insisting on confidentiality was to avoid alerting others about the investigation. Otherwise, according to Burton, "you get out and start discussing an investigation; you alert people. If there's a problem there, you alert them that they could maybe start trying to cover stuff up."<sup>11</sup> However, as Burton knew on July 8 when he contacted Pemberton and insisted on Pemberton's silence, Thibodeaux himself—who was the subject of the investigation—was already well aware of the investigation. Respondent's labor relations adviser, Whitfield, had told Thibodeaux on June 25 that Pemberton had accused him of teaching while on the Respondent's time, and that the allegation had been turned over to Respondent's security department for investigation. Thibodeaux had been questioned by Burton on July 7; he had furnished documentation to Burton regarding his substitute teaching; and he had informed Burton that he was on union business when

<sup>9</sup>The truth or falsity of an employee's communications to others generally is immaterial to the protected nature of the activity. See *Mediplex of Wethersfield*, 320 NLRB 510, 513 (1995); *Delta Health Center*, 310 NLRB 26, 36 (1993). We note, however, that when Burton's investigatory report issued on August 23, the subject of the report is identified as "Bob L. Pemberton." Indeed, only brief references in the report concern Pemberton's complaint about Thibodeaux. In contrast, the bulk of the report concerns Pemberton's alleged misconduct. We also note that when Pemberton complained about Thibodeaux's teaching to foreman Waszczak in mid-June, she told Pemberton that if there was an investigation in response to Pemberton's accusations, "he had better not leave himself open for anyone to come back and find something that he (Pemberton) is doing wrong."

<sup>10</sup>We therefore do not agree with our dissenting colleague that it could reasonably be found that the "Charging Party talked about the investigation" and was lawfully discharged for that.

<sup>11</sup>Burton so testified at the arbitration hearing.

<sup>8</sup>In light of this finding, we find it unnecessary to pass on whether the Respondent's discharge of Pemberton violated Sec. 8(a)(3) since this additional finding would not affect the Order or the remedy in this case.

substitute teaching on the date in question. Thus, by July 17, when Pemberton had the conversation for which he was fired, there was no possibility of prematurely alerting Thibodeaux and thereby compromising the investigation. Further, there is no evidence that Burton had any significant potential witnesses other than Thibodeaux and Pemberton, or that Pemberton's comments on July 17 were directed to, or overheard by, any potential witnesses. In these circumstances, the Respondent has not demonstrated a substantial interest that could justify the intrusion on Pemberton's exercise of Section 7 rights.<sup>12</sup>

Accordingly, we conclude that Pemberton was engaged in protected concerted activities on July 17.<sup>13</sup> As set forth in the stipulation of facts, Pemberton's purportedly "insubordinate" activities on July 17 were a motivating factor in his termination. Further, neither the stipulation nor the record as a whole establishes that the Respondent would have terminated Pemberton in the absence of those protected concerted activities and internal union activities. *Wright Line*, 251 NLRB 1083 (1980).

Finally, because the arbitration award sustains the Respondent's termination of Pemberton on the basis of his exercise of activities protected under Section 7, the award is repugnant to the Act and deferral is inappropriate. See *110 Greenwich Street Corp.*, 319 NLRB 331 (1995) (deferral inappropriate when discipline attributable to conduct that was protected under the Act); *Garland Coal & Mining Co.*, 276 NLRB 963 (1985) (deferral inappropriate when employee disciplined for "insubordinate" conduct that was protected activity under the Act). Accordingly, we find that the Respondent violated Section 8(a)(1).<sup>14</sup>

#### The Remedy

Having found that Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

<sup>12</sup>The cases relied on by the judge (see fn. 6, supra) to dismiss the complaint are distinguishable. In *Craig Hospital*, the employer had a substantial interest in maintaining the integrity and confidentiality of its in-house grievance procedure from conduct that undermined the process. In *Altoona Hospital*, the employer had a substantial interest in maintaining the integrity of its confidential hospital patient records from unauthorized disclosure. And in *Bell Federal Savings & Loan Assn.*, the employer had a substantial interest in maintaining the confidentiality of private telephone conversations with its legal counsel.

<sup>13</sup>We find it unnecessary to reach the issue of whether Pemberton's visit to the high school on June 23 to gather information about Thibodeaux was, by itself, protected concerted activity, as alleged by the General Counsel.

<sup>14</sup>Because deferral is inappropriate even under existing Board precedent, Member Fox does not reach the question whether the standard set by *Olin Corp.*, 268 NLRB 573 (1984), prescribes too broad a class of cases in which the Board must defer.

Having found that the Respondent unlawfully discharged Bob L. Pemberton we shall order Respondent to offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of wages and benefits he may have suffered as a result of the unlawful discharge. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### ORDER

The National Labor Relations Board orders that the Respondent, Mobil Oil Exploration & Producing, U.S., Inc., New Orleans, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees because of their exercise of protected concerted activities and internal union activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, offer Bob L. Pemberton immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(b) Within 14 days of this Order, remove from its files any references to its unlawful discharge of Bob L. Pemberton and notify him in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its New Orleans, Louisiana facility copies of the attached notice marked "Appendix."<sup>15</sup> Copies of the notice, on forms provided by the Regional Director for

<sup>15</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 15, 1994.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CHAIRMAN GOULD, concurring.

I agree with Member Fox that the Respondent violated Section 8(a)(1) by discharging Pemberton for engaging in protected Section 7 activity and that deferral to the underlying arbitration award sustaining his discharge is, therefore, inappropriate under the "repugnancy" standard set forth in *Spielberg Mfg. Co.*<sup>1</sup> and affirmed in *Olin Corp.*<sup>2</sup> As a separate basis for not deferring, however, is the arbitrator's failure to consider Pemberton's unfair labor practice charge in deciding that he was properly discharged under the just cause provision of the collective-bargaining contract.

The Board has established under *Spielberg* and its progeny a policy of deferring to a decision of an arbitrator when the arbitral proceeding was fair and regular, all parties had agreed to be bound, and the decision was not repugnant to the purposes and policies of the Act. In *Raytheon Co.*, 140 NLRB 883 (1963), the Board added the requirement that the arbitrator must have "considered" and ruled on the unfair labor practice issue that the Board is subsequently called upon to decide.

*Olin* essentially reaffirmed *Spielberg*'s general test for deferral, but substantially relaxed the *Raytheon* element that, until *Olin*, required specific evidence that the arbitrator had considered the unfair labor practice. Rather than requiring such evidence, *Olin* applies a presumption that the arbitrator has considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Id.* at 574.

<sup>1</sup> 112 NLRB 1080 (1955).

<sup>2</sup> 268 NLRB 573 (1984).

I am of the view that *Olin* was incorrectly decided in this regard and would adhere to the more stringent standard in *Raytheon*. I would also reverse *Olin* to the extent that it weakened *Spielberg*'s "clearly repugnant" standard by "not requiring an arbitrator's award to be totally consistent with Board precedent." *Olin*, 268 NLRB at 574. For an arbitral award not to be clearly repugnant to the purposes and policies of the Act under *Spielberg*, I would require that it be consistent with Board precedent.<sup>3</sup>

This approach is not only consistent with the policies of our own Act, but also the general sweep of Federal labor law which we, along with other agencies and tribunals, are obliged to take into account as we interpret and administer the statute. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457 (1957); *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942); *Mastro Plastics v. NLRB*, 350 U.S. 281-283 (1956); and *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 561 (1938). In order to obtain deference under this statute, arbitrators should consider—and be competent to consider the unfair labor practice controversy which would otherwise be adjudicated by this Agency. In this respect, some of the same policy considerations mandated by the Supreme Court in employment discrimination and individual employment contract litigation are applicable to the National Labor Relations Act. Cf. William B. Gould IV, *Labor Arbitration of Grievances Involving Racial Discrimination*, Vol. 118 University of Pennsylvania Law Review 40 (1969).

In *Alexander v. Gardner-Denver Co.*,<sup>4</sup> the Court charted the direction in which this Agency should be proceeding in the context of deference by stressing the circumstances under which "great weight" would be given to the award:

Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record.<sup>5</sup>

<sup>3</sup>I do agree, however, with *Olin*'s reversal of the allocation of burdens directed by *Suburban Motor Freight*, 247 NLRB 146 (1980) (party urging deferral bears burden of establishing that *Spielberg* test was met), and holding instead that the party opposing deferral bears the burden of showing that *Spielberg* test was not met.

<sup>4</sup> 415 U.S. 36 (1974).

<sup>5</sup> *Id.* at 60 fn. 21.

The fact that *Olin* was erroneously decided does not affect the deferral question here because even under *Olin*'s modifications, deferral to the arbitral award is clearly not warranted. As noted by the judge, Pemberton's unfair labor practice charge had just recently been filed and had not been investigated at the time the arbitration hearing began and, accordingly, the "Union and the Respondent told the arbitrator they were not placing the unfair labor practice charge issue before him for decision." The arbitral award itself confirms this. The sole issue formally presented to the arbitrator was whether the "company ha[d] just cause under the collective bargaining agreement to terminate [Pemberton]." No evidence bearing on the statutory issue of Pemberton's protected activity was presented and, perforce, none was considered by the arbitrator. It is thus evident that the arbitrator was not generally presented with the facts relevant to resolving the unfair labor practice issue as *Olin* mandates.

To consider the arbitration award here based on "just cause" as disposing of the statutory issue which the arbitrator plainly did not address virtually insures the destruction of statutory rights. Deferral under these circumstances is not appropriate and the Supreme Court has so held in *Gardner-Denver*. The statutory right at issue there was protection against racial discrimination under Title VII of the Civil Rights Act of 1964. The Court held that an employee does not forfeit his right to trial de novo under Title VII because of a prior submission to final arbitration of his grievance under the nondiscrimination clause of his collective-bargaining contract. A similar result applies here.<sup>6</sup>

Of course, the interplay between public law and contractual interpretation is inevitably complex. See *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994); *Renteria v. Prudential Ins. Co.*, 73 FEP Cases 1581 (9th Cir. 1997); *Austin v. Owen Brockway Glass Container, Inc.*, 78 F.3d 875, cert. denied 117 S.Ct. 432 (1996); *Brown v. Trans World Airlines*, 165 LRRM 2481 (4th Cir. 1997); *Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974); and *Electronic Reproduction Service Corp.*, 213 NLRB 758 (1974).

Here, however, the statutory violation was plain, the arbitrator did not address it, and we properly find it.

MEMBER HIGGINS, dissenting.

I agree with the judge that the Board should defer to the arbitral award.<sup>1</sup>

My colleagues argue that the arbitral award is clearly repugnant to the purposes and policies of the Act. However, as explained in *Olin*, an award is clearly repugnant only if it is "not susceptible to an interpreta-

tion consistent with the Act." Further, the burden is on the General Counsel to show such repugnance.

I agree with the judge that clear repugnance has not been shown. The arbitral award is susceptible to the interpretation that: Respondent had a legitimate interest in having employees refrain from talking about the internal investigation; to this end, Charging Party agreed not to talk about the investigation; Charging Party nonetheless talked about the investigation; Charging Party was discharged therefor.

Concededly, my colleagues have set forth a basis for reaching a different result on the merits of these issues. However, under *Spielberg-Olin* deferral principles, the fact that the Board could reasonably come to a different conclusion is not a basis for refusing to defer.

In sum, in deference to the arbitral process, and to the judge who evaluated the case in light of *Spielberg-Olin* principles, I would defer to the arbitrator's award.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our employees because of their exercise of protected concerted activities and internal union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Bob L. Pemberton immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Bob L. Pemberton that we have removed from our files any reference to his discharge

<sup>6</sup>The problems posed through grievances filed by employees opposed to incumbent union leadership dictate procedural fairness in the NLRA context in particular.

<sup>1</sup>See *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955); *Olin Corp.*, 268 NLRB 573 (1984).

and that the discharge will not be used against him in any way.

MOBIL OIL EXPLORATION & PRODUCING, U.S., INC.

*William T. Hearne, Esq.*, for the General Counsel.  
*Phillip R. Jones, Esq. (Littler, Mendelson, Fastiff, Tichy & Mathiason)*, of Dallas, Texas, for the Respondent.  
*Bob L. Pemberton*, Corpus Christi, Texas, for the Charging Party.

DECISION

INTRODUCTION

ALBERT A. METZ, Administrative Law Judge. This matter was submitted by a stipulation of the parties. The issue is whether Mobil Oil Exploration & Producing, U.S., Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act) when it terminated the Charging Party, Bob L. Pemberton.

The stipulation admits that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Associated Petroleum Employees Union (Union) is a labor organization within the meaning of Section 2(5) of the Act.

I. BACKGROUND

Pemberton was employed by the Respondent as a worker on offshore oil platforms. This work is covered by a collective-bargaining contract between the Respondent and the Union. The Union president is Glenn Thibodeaux. Pemberton has had an ongoing dispute with Thibodeaux concerning the way the Union was being administered. This dispute was well known to Respondent's personnel.

II. PEMBERTON'S DISCIPLINARY HISTORY

Pemberton was discharged on July 29, 1994,<sup>1</sup> for the asserted reasons of improper interference with an internal company security investigation and insubordination. The Respondent asserts, and an arbitrator found, that Pemberton's disciplinary record was part of the reason for the discharge. That disciplinary history consists of the following events.

A. *February 8, 1993*

In this incident, Pemberton was distraught about the installation of equipment on a platform. He angrily accosted fellow employees, cursed them, and threw his hard hat which glanced off an employee. He received a verbal reprimand for the incident.

B. *August 1993*

In August 1993, Pemberton was involved in a conversation with a technician assigned to take drug testing samples from workers. As a result of his aggressive rudeness to the technician he received a written reprimand.

<sup>1</sup> All subsequent dates refer to the year 1994 unless otherwise specified.

C. *March 10, 1994*

On this occasion Pemberton received a reprimand for statements he made about his opinion that women should not be allowed to work offshore, particularly in supervisory positions. Foreman Don Longorio, verbally chastised Pemberton for his comments and memorialized the incident in writing, noting he considered the statements to be in violation of the Respondent's EEO and antidiscrimination policies.

D. *May 1994*

A verbal reprimand was issued to Pemberton in May 1994 by Senior Production Foreman Mary Ellen Waszczak. Pemberton was censured for making derogatory remarks, including such terms as "assholes" and "stupid" to describe management officials of the Respondent.

III. PEMBERTON'S CONCERN ABOUT UNION MATTERS

A. *Payments to the Union President*

Historically the Respondent had a verbal agreement with the Union that the Union's president would be paid for time lost when he was absent from work on union business. By the terms of the agreement the president would be paid overtime if his crew was working overtime and he was absent. The Union would subsequently reimburse the Respondent for all compensation paid under the agreement.

In June 1994, the Respondent and the Union verbally agreed to cease the payments to the union president. This cessation was partially the result of complaints about the arrangement that were voiced by employees, including Pemberton.

B. *Pemberton States Concerns About Thibodeaux to the Respondent*

Sometime in June Pemberton asked questions of Respondent's supervisor, Kristina Mosca, concerning the amounts the Union paid the Respondent for Thibodeaux's time under the discontinued agreement. Mosca did not have that information and told Pemberton she was unable to answer his question then.

Between June 15 and 22, Pemberton had a conversation with Supervisor Mary Ellen Waszczak. He told her that he had spoken with the National Labor Relations Board and discussed filing a claim against the Union. He stated that he would not file the claim if the Respondent would get Thibodeaux to reimburse the Union. Waszczak said she would relay this information within the Company.

In this same time period, Pemberton received information from a fellow employee that Thibodeaux had done some work as a substitute teacher in the Lake Arthur, Louisiana school system. Pemberton was suspicious that Thibodeaux may have been teaching when he was being paid for doing union business.

A day or two after Pemberton's conversation with Waszczak, referred to above, they again talked. Pemberton mentioned learning of Thibodeaux's teaching school and his suspicion he was being paid at the same time for union business. He asked Waszczak what she would do with that information. She said she would treat it the same as information about any other employee of the Respondent and report it to the appropriate persons who could look into the matter.

Waszczak told Pemberton that she knew he did not care for Thibodeaux and that he should not use Respondent's time and phones for his "personal desires" relative to Thibodeaux. She stated that if they asked for an investigation to look into the matters he had brought forward, he had better not leave himself open for anyone to find something that he is doing wrong. Pemberton said he knew how to cover himself.

Pemberton followed up his concern about Thibodeaux by subsequently mentioning the matter to Waszczak. He asked if Waszczak had heard anything as a result of her reporting the matter internally. She told him she had not but the Respondent's labor relations department was looking into the situation.<sup>2</sup>

#### IV. PEMBERTON'S VISIT TO THIBODEAUX'S SCHOOL

The Government contends that Pemberton engaged in protected concerted activity on two occasions. The first instance occurred on or about June 23 when he went to the Lake Arthur High School in Lake Arthur, Louisiana. Pemberton's purpose in this visit was to collect information on whether Thibodeaux was teaching on days he was scheduled to work for Respondent but was excused for union business.

Pemberton met with a school official and stated his purpose in inquiring about Thibodeaux's work record. Pemberton also said that he and Thibodeaux worked for Respondent and that they were in the Union together. The school official refused to give Pemberton the information because it was confidential. Pemberton did not represent himself to the school official as an agent, supervisor, or investigator for the Respondent.

#### V. THE SECURITY INVESTIGATION

After learning of Pemberton's concern about Thibodeaux's teaching income, the Respondent commenced an internal investigation into the matter. On July 8 John Burton, Respondent's security advisor, had a telephone conversation with Pemberton. Burton said he wanted to talk to Pemberton because he was the source of information giving rise to the investigation. Pemberton asked if the investigation was of Thibodeaux or himself. Burton said he would follow the investigation wherever it led.

Pemberton stated he would meet with Burton as requested but he wanted a union representative with him. Burton agreed but cautioned Pemberton that he should not discuss the investigation with anyone other than the union representative. Burton told Pemberton that the matter was a confidential investigation and that he was not to discuss anything that they had talked about on the phone that day. Burton then told Pemberton that he should stress this point with the union representative. Pemberton indicated that was fine and he would do that.

On or about July 9 Burton had another telephone conversation with Pemberton. In this conversation, Pemberton and Burton changed the date and time of their meeting so Pemberton could give a statement for the investigation. Burton again told Pemberton that he should not discuss the in-

<sup>2</sup>Thibodeaux was investigated by the Respondent. The investigative report concluded that he did not violate any company rules by substitute teaching at Lake Arthur High School while serving as president of the Union.

vestigation with anybody, that the company's investigation was confidential.

Respondent has no written policy which mentions interference with a security investigation. The Respondent contends that there is a practice which prohibits such interference. No documentation exists that confirms this practice.

#### VI. PEMBERTON'S CONDUCT OF JULY 17

The Government asserts that the events of July 17 are the second occasion Pemberton engaged in protected concerted activity. On that date Pemberton was at an offshore platform called the High Island Complex. The parties' stipulation explains the occasion as follows:

Waszczak was sitting in the foreman's office on the High Island Complex with the door open. She heard Pemberton come in the area where the office was located speaking very loudly [to fellow employees in the galley-break area]. . . . Pemberton was not on working time. Pemberton then began talking about Glenn Thibodeaux receiving overtime pay and that Respondent was trying to fire him (Pemberton). At about 7:20 p.m., Waszczak heard Pemberton make the following statements . . . : "[Respondent] is trying to fire me, they have gotten a security guy, John Burton after me because I was trying to right a wrong"; "John Burton will dig something up on me"; "You know what I'll do, I'll sue the shit out of them." At this point, Waszczak got up from her desk in the office and [had a brief conversation with one of the employees in the galley-break area] Pemberton was silent while Waszczak was in the galley. When Waszczak got back to her office, she heard Pemberton make the following statements: "She's the one who turned me in to John Burton"; "She knows about it"; "I wouldn't be surprised if he had this phone [in the galley] tapped so he can hear what I'm saying out here"; "Do you know where [Respondent] gets its investigators . . . from the military"; "John Burton called me at my home on Friday and Saturday night"; "People say to me, 'Bob, you are just out to get Thibodeaux.' I tell them they are wrong, I'm not out to get him. He is wrong, he is giving things to [Respondent], we don't have a Union, we need to get in with the OCAW, we can't do anything because of the [Union]. He's not going to be president much longer."

#### VII. DISCHARGE OF PEMBERTON

On July 19 Pemberton and a union representative, David Bain, met with Burton who took a written statement. In the statement Pemberton denies telling anyone, other than Bain, that a security investigation was being conducted "about Glenn Thibodeaux." He did admit telling one fellow employee that an investigation was being conducted concerning himself (Pemberton). He stated he told the employee he could not say why he was being investigated.

Between July 19 and July 29 Mosca made a recommendation to Respondent's labor relations advisor, Dan Whitfield, that Pemberton be terminated: (1) Because he engaged in misconduct by interfering with a security investigation when he went to the school, (2) Because he engaged in insubordination by failing to abide by the confidentiality in-

structions given by Burton, (3) Because of Pemberton's prior discipline, and (4) For Pemberton's general course of conduct. Whitfield affirmed this recommendation.

On July 29 Pemberton was terminated "for improper interference with a Mobil security investigation and insubordination." The Respondent relies on the "just cause" clause in the collective-bargaining contract as the basis for the discharge. Pemberton filed a grievance contesting his termination. The grievance was ultimately processed to an arbitration hearing under the contractual procedures.

#### VIII. THE ARBITRATOR'S DECISION

The Union represented Pemberton in the arbitration. A transcript of that proceeding is part of the record in this case. At the time of the arbitration hearing the unfair labor practice charge in the present case had only recently been filed and was not fully investigated. The Union and the Respondent told the arbitrator they were not placing the unfair labor practice charge issue before him for decision.

The arbitration record shows that the Respondent relied on Pemberton's comments to fellow employees on July 17, his conduct in going to the school to independently investigate Thibodeaux's teaching, and his prior misconduct set forth above to sustain his termination.

On January 10, 1995, the arbitrator, Bill Detwiler, issued his written decision. After reviewing the facts, the arbitrator concluded that the grievance was sustained in part and denied in part resulting in the upholding of Pemberton's discharge:

There is insufficient evidence to prove that grievant interfered with the investigation. However, there is sufficient proof to demonstrate that grievant was insubordinate both to Waszczak and Burton. Moreover, grievant's past record is one of repeated misconduct. Grievant's temper, aggressive behavior, and poor judgment and use of verbal indiscretions are clearly shown by the evidence. Mosca stated that she took these parts in the whole of her decision to terminate Pemberton. It is not necessary for the Company to prove each and every charge against the grievant. The arbitrator finds the cumulative weight of the whole of Pemberton's actions to constitute just cause for termination.

#### IX. ANALYSIS

The Government alleges that Pemberton was engaged in protected concerted activity both on June 23 when he went to the school to investigate Thibodeaux's teaching, and on July 17 when he made his breakroom statements to fellow employees. It is argued that because part of the decision to fire Pemberton centered on these activities his discharge violates Section 8(a)(1) and (3) of the Act.

The Respondent defends on the basis that the discharge was not for protected activity but Pemberton's breach of confidentiality. In the alternative, the Respondent argues the Board should defer to the arbitrator's decision under the standards set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

#### A. The Board's Standards for Deferral

The threshold issue of whether deferral is appropriate must be decided in the negative before the merits of the unfair labor practice allegations can be considered. *E. I. DuPont & Co.*, 293 NLRB 896 fn. 2 (1988).

In *Spielberg* the Board stated its considerations in determining whether to defer to an arbitrator's award. The standards weighed are whether: (1) the proceeding was fair and regular, (2) all parties agreed to be bound, and (3) the decision was not clearly repugnant to the purposes and policies of the Act.

An additional criterion has subsequently been incorporated into the Board's consideration—that the issue involved in the unfair labor practice case must have been presented to the arbitrator and considered by him. *Olin Corp.*, 268 NLRB 573 (1984). In *Olin* the Board provided insight on the "clearly repugnant" standard. The Board noted that an arbitrator's award does not have to be totally consistent with Board precedent: "Unless the award is 'palpably wrong,' i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer." *Olin*, at 574. Additionally, *Olin* makes clear that the party seeking to prevent deferral has the burden of establishing that the standards for deferral have not been met.

#### B. Analysis of Pemberton's Arbitration

There is no dispute that the parties to the arbitration agreed to be bound by the arbitrator's decision and that the proceeding was fair and regular. It is also conceded that the arbitrator was generally presented with the facts that are relevant to resolving the unfair labor practice. The contractual issue, i.e., the just cause of the discharge, is factually parallel to the unfair labor practice charge wherein Pemberton alleges his termination was not justified because of his protected activity. However, the Government alleges the decision was deficient because it is "clearly repugnant" to the purposes and policies of the Act.

The stipulated facts show that Pemberton agreed with investigator Burton's demand that the investigation be kept confidential. The arbitrator found that by discussing the investigation with fellow employees on July 17, Pemberton violated the confidentiality promise and was thus insubordinate. Additionally, the arbitrator's appraisal of Pemberton's prior misconduct was enough to convince him that there was just cause for the discharge. The arbitrator rejected the Respondent's reasoning that by going to the school Pemberton interfered with the investigation. Nonetheless he found the discharge was justified regardless of that conduct.

The Government argues that Pemberton was engaged in protected concerted activity when he made his comments on July 17. The Respondent contends to the contrary that Pemberton was making personal complaints about his situation and disclosing to third parties that an investigation was ongoing. Both arguments have some merit. Pemberton's remarks touched on the investigation, his personal concerns and the need for new direction for the Union.

The thrust of Pemberton's remarks was a personal complaint about the investigation and how he was going to sue the Respondent if it adversely effected himself. The other remarks were not even aimed at the Respondent but concerned intraunion matters focusing on Pemberton's personal dispute

with Thibodeaux. Thus, the protected concerted nature of the remarks is not overwhelming and the arbitrator's attention to the breach of confidentiality issue as a valid motivation for discharge is reasonable.

The Board has been sensitive to honoring pledges of confidentiality made by employees in situations that also involve their concerted rights. The Board has concluded that reasonable requirements of confidentiality should be sustained. *Craig Hospital*, 308 NLRB 158, 164-165 (1992) (employee's discharge affirmed when she breached her pledge to keep company grievance panel's discussions confidential); *Bell Federal Savings & Loan Assn.*, 214 NLRB 75, 77-78 (1974) (receptionist's suspension upheld because she violated implied duty not to divulge telephone calls directed to her employer from its labor attorney). Likewise the Board has deferred to an arbitrator's decision which weighed confidentiality against the employee's interests in disclosing the information. *Altoona Hospital*, 270 NLRB 1179, 1180 (1984):

An employee's violation of an employer's rule against the disclosure of confidential information may also be the subject of lawful discipline even when the disclosure is made for reasons arguably protected by the Act. The test of such discipline is whether the employee's interests in disclosing the information outweighs the employer's legitimate interests in confidentiality. If they do not, then discipline is lawful.

. . . .

[T]he arbitrator here implicitly found that confidentiality concerns outweighed grievance needs. We will not decide whether we might strike a different balance. The arbitrator's award is susceptible to an interpretation consistent with the Act and is, therefore, not clearly repugnant.

Pemberton had voluntarily promised Burton to keep the investigation confidential. He clearly violated that agreement when he openly discussed the investigation in front of others. The Respondent had a reasonable expectation that the matter

would be kept confidential. Likewise the Respondent had a substantial and legitimate business interest in keeping such internal investigations confidential. The arbitrator's finding that Pemberton's breach of his confidentiality promise was part of the cause for his discharge is compatible with the purposes of the Act. *Craig Hospital*, *Altoona Hospital*, and *Bell Federal Savings & Loan Assn.*, supra.

Another factor in assessing if the arbitrator's decision is reasonable is the lack of animus. This is a common element in proving violations of Section 8(a)(3) of the Act. *Wright Line*, 251 NLRB 1083 (1980). A showing of animus is missing in this case. There is no evidence demonstrating a proclivity by the Respondent to oppose concerted or union activity.

In sum, Pemberton voluntarily agreed to keep the investigation confidential. He pursued his own inquiry, but was found not to have interfered with the investigation thereby. The discharge was upheld because he breached his freely given confidentiality promise and because of his poor prior conduct. On balance the arbitrator considered all the facts relevant to the unfair labor practice alleged. It is clear Pemberton had a full and fair hearing before the arbitrator. The arbitration decision reached a conclusion that was not "palpably wrong" in relation to the Act. I find that the Government has failed to sustain its burden of showing the arbitrator's decision was clearly repugnant to the Act. *Olin*, supra. I conclude the complaint shall be dismissed.

#### CONCLUSIONS OF LAW

1. Mobil Oil Exploration & Producing, U.S., Inc., New Orleans, Louisiana, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. Deferral to the arbitration award of arbitrator, Bill Ditwiler, dated January 10, 1995, is appropriate.

[Recommended Order for dismissal omitted from publication.]