

Turner Construction Co. and Nicholas Fabrizio and Robert Faria. Cases 19–CA–27478–1 and 19–CA–27478–2

June 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On September 13, 2002, Administrative Law Judge Thomas M. Patton issued the attached decision. Charging Party Fabrizio filed exceptions and a supporting brief. The Respondent filed an answering brief.

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 exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

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

Michelle Frank, Esq. and *Daniel Sanders, Esq.* for the General Counsel.

¹ Charging Party Nicholas Fabrizio has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We agree with the judge's conclusion that deferral to the arbitration award is warranted under the criteria and the burden of proof set forth in *Olin Corp.*, 268 NLRB 573, 574 (1984). In adopting the judge's decision, we emphasize that the General Counsel has failed to show that the contract issue is not factually parallel to the unfair labor practice issue, or that the arbitration panel was not presented generally with the facts relevant to resolving the unfair labor practice issue. The contract issue was whether the Respondent's treatment of the Charging Parties on March 14, 2001, violated provisions of the collective-bargaining agreement, including Appendix 6 (Substance Abuse Policy), relating to drug testing based upon suspicion, and requiring notification to the Union of drug testing under certain circumstances. The unfair labor practice issue was whether the Respondent's treatment of the Charging Parties on March 14, 2001, violated their statutory rights, including their alleged right to the presence of a union representative during an investigatory interview in which the Respondent allegedly demanded that the Charging Parties submit to drug testing. These issues can both be resolved by the same set of facts, i.e., the actions of the Respondent's supervisors and the Charging Parties on the morning of March 14, 2001, when the Respondent began investigating a report that the Charging Parties had been smoking marijuana in a car near one of the Respondent's projects. Accordingly, we agree with the judge that the General Counsel has not shown by a preponderance of the evidence that the contract and unfair labor practice issues were not factually parallel.

William G. Jeffery, Esq., of Seattle, Washington, for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS M. PATTON, Administrative Law Judge. This case was tried in Seattle, Washington, on December 20 and 21, 2001.³ Individuals Nicholas Fabrizio and Robert Faria each filed charges on April 10, 2001. On September 28, 2001, the Regional Director issued an Order consolidating cases, consolidated complaint, and notice of hearing consolidating the cases for hearing. The complaint alleges violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by Turner Construction Co. (the Employer, Respondent, or Turner).

The Employer denies any violation of the Act and pleads affirmative defenses, including deferral to a final and binding award under the terms of a collective-bargaining agreement.

On the entire record, including my observation of the demeanor of the witnesses⁴ and after considering the briefs filed by the General Counsel and Respondent I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is a corporation with a place of business in Seattle, Washington, where it is engaged in the business of construction and construction management. The Employer admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Employer admits and I find that Laborers International Union, AFL–CIO, CLC (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

A unit of Turner's business is the Northwest District, which has a Special Projects Division (SPD) that handles smaller projects including improvement work within buildings. Most of the SPD work is subcontracted. One SPD project was tenant improvement work at a building in Seattle, Washington (the Project). On March 14, Turner's manager at the Project was Jim Rucker. Laborers Fabrizio and Faria were the only two craft employees of Turner on the Project at that time. Rucker's immediate supervisor was Tim Charoni, the general superintendent of SPD. Shannon Sellers was safety director for the Northwest District.

The Project was completed the first week of April, leaving only "punchless work", which Rucker described as sub-trades

³ Unless otherwise indicated, all dates are in 2001.

⁴ In assessing credibility, testimony contrary to my findings has not been credited, based on a review of the entire record and consideration of the probabilities and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

doing touchup painting⁵ and miscellaneous repairs, which was completed by the end of April. The work being performed by laborers was completed by April 6, and they were laid off at that time.

The complaint alleges that Turner violated Section 8(a)(1) and (3) by discharging Fabrizio and Faria on March 14, because they refused to submit to a drug test. Fabrizio and Faria were represented by the Union at the project and covered by a collective-bargaining agreement (the contract). The contract has detailed substance abuse and drug testing provisions, as well as a grievance procedure providing for final and binding resolution by a board of conciliation.

The contract is a master agreement between the Associated General Contractors of Washington and the Washington and Northern Idaho District Council of Laborers. The contract was in effect at all relevant times. Under the terms of the contract Laborers Local 242 represented Fabrizio and Faria at the project. The master agreement provided for an exclusive hiring hall, which required the employers to obtain employees through the constituent union offices. The validity and applicability of the contract are not at issue.

Tom Gerlach is a Turner vice president. On March 13, Gerlach had a telephone conference call with Charoni and Sellers and advised them that he had received an anonymous report that Fabrizio and Faria had been smoking “pot” (marijuana) in a car near the Project. Gerlach expressed concern regarding potential liability by Turner if the report was not investigated and something occurred on the jobsite involving either of the employees. It was decided that Charoni and Sellers would visit the project the following day. Charoni and Sellers testified that Fabrizio and Faria would have been subject to discipline for smoking marijuana on the job.

B. March 14

On the morning of March 14, Charoni and Sellers met with Rucker at the project. Rucker was advised of the situation and Rucker then found Fabrizio and Faria and had them come to the Turner office at the project.

When Fabrizio and Faria arrived at the office there was a brief exchange between the five men. Rucker recalled that a brief discussion of the drug issue began in the office and that a decision was made to continue the discussion outside the office. The other witness did not recall the issue being broached with the employees in the office. In any case, Sellers and Fabrizio then walked to a location in the building where they had a conversation regarding Fabrizio taking a drug test. At the same time Charoni and Faria went to a different location in the building where they had a separate conversation regarding Faria taking a drug test.

1. Faria’s account

Faria testified that after going with Charoni to a location away from the others, Charoni told him that the Employer had received an anonymous telephone report that Fabrizio and Faria were smoking marijuana in Fabrizio’s car in front of the jobsite. Faria related that Charoni said that if he wanted to prove him-

self innocent, he needed to go with Charoni at that time and take a urine test for drugs. According to Faria he told Charoni that it was a lie and that he did not want to take any test until he knew who had made the report and that he wanted a union business agent present. Faria testified that Charoni told him that he was not obligated to bring Faria his business agent and that Faria’s only choice was to take the test and prove himself innocent. Faria stated that Rucker then came up and a few moments later Sellers joined them and asked Faria whether he was going to take the drug test. Faria testified that he told Sellers that he was not going to take the drug test until his accusers were identified and he had a chance to talk to his business agent. Faria said that he then walked away with Rucker, who encouraged him to take the test. Faria testified that he then left the site without further discussions with management. He testified that it was his belief that he was discharged since he had refused to take the drug test. Faria testified that he would have passed the drug test.

2. Fabrizio’s account

Fabrizio testified that after going with Sellers to a location outside the office Sellers stated that the Employer had received phone calls reporting that Fabrizio and Faria had been smoking pot on the job. According to Fabrizio, he denied the accusation, but Sellers replied that he wanted Fabrizio to go with him to take a drug test. Fabrizio testified that at one point after Sellers kept insisting that Fabrizio take a drug test, the following exchange took place

You know, Shannon, this is bullshit. I never did that. I never did anything like that.” And he said, . . . “Just come with me and take the test and prove yourself.” And I said, “I’m not going to take any test. I want to face my accuser.” Then he said something, he said something about Tom Gerlach said that I needed to do this. I needed to come down here and get you to do that. And I go, “You tell Tom Gerlach that I didn’t think it was any of his business of what I do. If I dance show tunes in my living room, it’s none of his business.” And he said that Tom Gerlach thinks that’s his business. And then we started arguing. I started getting silly because I just didn’t trust Shannon’s credibility at that point. He said—He did say at one point, “Okay, I’m your accuser.” And then I thought, well, this is pretty ridiculous. And I told him I’m not, you know—I said when—I know what I told him about Tom Gerlach. It was that, “You tell Tom Gerlach that what I do when I go home is none of his business. The next time you come down here to harass me, bring my Business Agent.

Fabrizio testified that Sellers said that he was not required to do either one and that he told Sellers that under those conditions he was not going to take a drug test. Fabrizio related that believing that he had been terminated, since he had refused to take the drug test, he picked up his tools and personal belongings and left the site. Just before leaving he said he had a final conversation with Rucker who asked if he was going to take the drug test. Fabrizio testified that he had no reason to believe that he would not have passed the drug test.

⁵ The transcript is corrected to delete the comma between the words “touchup” and “paint” in L. 6, p. 259.

3. Charoni's account

Charoni testified that he began his discussion with Faria by describing the anonymous phone call and why he was there. Charoni said that he then asked Faria if he smoked pot and Faria said that he did not. When Faria said that he did not smoke pot, Charoni testified, "And I said well great, then would you have a problem taking a drug test so we can just put this all behind us and get on with the work of doing the job and he said no I wouldn't have a problem doing that." Charoni said that they discussed the issue some more and Faria began to get upset, and that his upset increased when Rucker walked up. Charoni did not recall Rucker having anything to say. Charoni recalled Sellers then walking up, at which time Charoni asked Faria to step outside while he talked to Sellers. According to Charoni, he learned that Fabrizio had left and they discussed what they should do. Charoni testified that he and Sellers walked toward the place where Sellers had talked with Fabrizio and found that Faria had also left.

Charoni specifically denied that he told either Fabrizio or Faria that they had to take a drug test to stay employed and denied that Faria ever indicated that he wanted a union representative.

4. Sellers' account

Sellers described his conversation with Fabrizio as follows

I explained why I was there, I explained about the phone call from Mr. Gerlach and an anonymous caller, I stated that I was on Nick's side, I understood that it was an anonymous call.

Nick was upset immediately, he wanted to know who it was that had called. I told him again that I didn't know who it was that the person did not want to identify himself to Mr. Gerlach. That my concern was not really who had called but to find out what the issue was about, to get his comments.

Nick said it was BS, he was very upset. He stood up, he was sitting, resting on a packing crate if I recall there, he stood up, he had a cell phone and some keys attached to his belt or something and he took those off and put them down on the crate and said something like I don't have to put up with this bull and what I do at home on my own time is my own business.

And I remember trying to get him to calm down and he said something like I am out of here and was walking away. I asked him to come back and said lets talk this through, lets resolve the issue. I believe I had something like you know, the easiest way to put this to rest, the quickest way, would you go down and take a test and he said I don't have to, I don't want to.

And then it was either when he was walking out the door he made the statement to me well I couldn't pass a piss test anyway and that was basically the end of our conversation. The whole thing took maybe three or four, five minutes at the maximum.

Sellers specifically denied that he told either Fabrizio or Faria that they had to take a drug test to stay employed and denied that Fabrizio ever indicated that he wanted a union rep-

resentative. He testified that after Fabrizio walked away, he went to where Charoni and Faria had gone to talk. Sellers related that when he arrived at that location, Rucker and Faria left the area while Charoni and Sellers talked. Rucker thereafter returned and told them that Faria had left.

5. Rucker's account

Rucker testified that he initially stayed in the office and then left the office and walked to where Fabrizio and Sellers were talking and after a few minutes walked to where Faria and Charoni were talking. Rucker related that Sellers was urging Fabrizio to take the drug test to put the matter to rest and Fabrizio was contending that he and Faria were being unjustly accused and that they had a right to know who their accusers were. Rucker related that in the portion of the Faria-Charoni discussion he recalled Faria was upset about the accusations and believed that he was being set up and that Charoni was asking him to take the test.

Rucker testified that while he was present during the separate discussions Sellers and Charoni had with Fabrizio and Faria, he never heard either Sellers or Charoni indicate to either of the employees that they had to take the drug tests to retain their employment, he further testified that neither Fabrizio nor Faria ever asked to have a union representative present or ask if they could call their union representative.

C. The Grievances

Keith Kilbourn was the elected business manager for Laborers Local 242. As business manager Kilbourn oversaw the business of the local. He handled grievances that were filed by Fabrizio and Faria relating to the March 14 events. Kilbourn learned of their situation in a telephone conversation with business agent Terry Seals, who had been called by Fabrizio. Kilbourn met with Fabrizio and Faria. His credible testimony regarding what they told him was as follows

Q. All right. What do you recall him telling you?

A. Basically, that they were—The Employer came to them, and I believe it was one other superintendent or whatever. They had split them off to separate rooms. They were asked —They said that they had received an anonymous tip from a sub or somebody that they were doing drugs on the job, doing marijuana, I believe, is what they said they were using or whatever, and that these guys had smelled it on other jobs, and it wasn't quite clear if they had smelled it on this job or whatever, but anyway, Shannon or Turner Construction took the position that they felt that they needed to go drug test these guys.

Q. Did you counsel or indicate to these guys, these gentleman, sorry, about walking off the job?

A. Oh, the first day I met with them, they kind of explained their situation and I asked them what was, you know, did Turner say that you were fired, and the answer was no, that apparently there was a disagreement, and when I say disagreement, apparently words were being exchanged that were heated to a certain extent, and I believe it was Nick that said that he handed Shannon his keys and said, "I'm out of here." And what I told him was, "Hey, look, don't ever walk off the job. You make sure that the

employer terminates you. You make sure he says you're fired or you can't work here or something of that nature." I also told them that, you know, if there is a problem like that, make sure you get a hold of us, and we will come on down and try to take care of it.

....

Q. Now during this meeting you have been telling us about, did Mr. Fabrizio or did Mr. Faria ever tell you that they asked Turner to have a representative from their Union present on the 14th and that request was denied?

A. Not to me.

The meeting lasted at least an hour. Kilbourn gave Fabrizio and Faria grievance forms. The employees took the forms with them. On March 20, each of the employees returned completed grievance forms to Kilbourn, together with a narrative account of what happened on March 14.

The grievance form is on a single piece of 8-1/2 x 11 paper and approximately one-third of the form consists of 15 lines provided for a description of the nature of the grievance. On each of the completed grievance forms a "fired" box is selected and in the space provided to describe the nature of the grievance each merely references article and section numbers of the contract. The employees' provided detailed accounts of their versions of the March 14 events in separate narratives submitted to Kilbourn with the grievances. Fabrizio's narrative concluded with a description of his asserted request for a union representative. That portion read as follows

After vehemently denying the allegations, I asked for my union business representative and told him I wanted to confront my accuser. Mr. Sellers would not oblige, saying he was not obligated to do anything. Shannon Sellers gave the choices of taking an illegal drug test or having to leave the job. I found it necessary to end the hostility of the workplace and left the job immediately.

The portion of Faria's narrative concluded with a description of his asserted request for a union representative. That portion read as follows

After vehemently denying the allegations, I asked for my union business representative and told him I wanted to confront my accuser. Mr. Charoni would not oblige, saying he was not obligated to do anything. Tim Charoni gave the choices of taking an illegal drug test or having to leave the job. I found it necessary to end the hostility of the workplace and left the job immediately.

Following unsuccessful efforts by the Union and Employer to resolve the grievances at step one, they were heard by a board of conciliation on April 17. Determination by a board of conciliation is the final step in the contractual dispute resolution process and is final and binding on the parties. The board of conciliation consisted of four persons, two designated by the Union and two designated by the Employer. (The contract provides for appointment of a fifth member if necessary to reach a majority decision.) Kevin Cimmery and Chuck O'Halloran were designated by the Union to serve on the panel. At the time the grievances were heard Cimmery was business manager of Laborers Local 242 and O'Halloran was field representative

and dispatcher for Laborers Local 440. Two management representatives employed by other employers were designated by Turner. There is no evidence that Faria or Fabrizio at any time objected to the persons designated to sit on the panel.

Those present for the board of adjustment hearing on April 17, included Sellers, Fabrizio, Faria, Kilbourn, and Noel McMurtray, the Union's attorney. The hearing lasted about an hour and a half. Kilbourn and McMurtray presented the case for the employees.

Kilbourn credibly testified that the grievances and the narratives of both Fabrizio and Faria were submitted to the board of conciliation as a part of the Union's presentation at the April 17 hearing.⁶

Faria and Fabrizio could not recall one way or the other whether the question of union representation was discussed at the hearing. The two board of adjustment members designated by the Employer were not called to testify. McMurtray and Kilbourn testified that McMurtray briefly addressed the issue. Kilbourn thought McMurtray might have raised the issue early in the hearing. McMurtray testified that during the hearing the participants were arguing over the drug policy, liability, jobsite safety, procedural issues, probable cause, and the proceedings were not moving along. He testified that at that point he observed that an additional procedural problem that had to be considered was that the employees had a right to have a union representative and they were denied that right, but he did not otherwise address union representation at the hearing. The contract has a number of detailed requirements relating to drug testing procedures, including a requirement that when an employee is transported to an exam site for drug testing based upon suspicion, the Employer is required to notify the Union. I found McMurtray's testimony on this question of when and how he raised the union representation issue during the hearing to have been the most reliable and credibly offered version.

McMurtray testified that he did not address the narrative statements of Faria and Fabrizio in his presentation at the hearing because he did not believe the statements to be true. McMurtray credibly testified that he had interviewed Faria and Fabrizio on March 17, and they never claimed that they had requested a union representative, even after he explained their *Weingarten* rights.⁷ As previously noted, Faria and Fabrizio had

⁶ Faria initially testified that to the best of his memory his grievance and narrative were both presented to the board of adjustment. Later he claimed that he had no "specific memory" of whether the narrative was given to the Panel. Fabrizio testified that he "did not remember" any facts being presented with respect to his request for a union representative. The board of adjustment hearing was held one week after Faria and Fabrizio each had filed unfair labor practice charges that alleged a denial of union representation. The testimony of Faria and Fabrizio on this question of fact was less convincingly offered and is less probable than the credited testimony of Kilbourn. I credit Kilbourn on this issue despite McMurtray's uncertainty whether Faria's narrative was submitted to the panel. I was not favorably impressed with the demeanor of either Faria or Fabrizio and to the extent their testimony conflicts with the testimony of Kilbourn or McMurtray regarding the proceedings of the Board of Adjustment, I am convinced that Kilbourn and McMurtray were more accurate and truthful.

⁷ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

also not described a demand for a union representative when they met earlier with Kilbourn.

The Board of Conciliation issued a written award based upon a unanimous decision on March 23. The award reads as follows:

Nicholas Fabrizio & Robert Faria Grievance
17 April 2001

- Lump Sum Payment to Nick Fabrizio & Robert Faria of \$1700 each (No HRs – no benefits)
- Turner does not have to reinstate these laborers but they are eligible for rehire/dispatch to future Turner projects.
- Turner Construction is advised to review their drug testing procedures.
- This agreement will be kept confidential by all involved parties.
- There is no guilt or wrongdoing assigned to any of the parties.

All four members of the panel signed the decision on April 23. Faria and Fabrizio do not deny having been informed of the decision. There has been no contention that the Employer has not complied with the board of adjustment award. Laborer work on the Project had been completed on April 6, prior to the Board of Adjustment hearing, and the laborers hired to replace Fabrizio and Faria had been laid off. The record does not show that the Employer had a practice of moving employees in the positions held by Faria and Fabrizio from job to job.

The Employer issued checks for the payments specified in the decision. Fabrizio's check was received as an exhibit. It is dated May 3, and is accompanied by a pay statement indicating that it was for "special pay" with a gross pay figure of \$1700, with deductions limited to customary tax items.⁸ The net amount of the check was \$1244.67. Fabrizio testified that he received and cashed the check.

Faria testified that he received and cashed a \$1700 check from the Employer. He testified that he was given the check by a business agent at the union hall after receiving a call, but he claimed to not remember who gave it to him and that he did not know what the check was for. Faria's check is not in evidence. It appears likely that his check had tax deductions like those made from Fabrizio's check.

D. The Deferral Issue

The gravamen of the complaint is that the Faria and Fabrizio were discharged for refusing to cooperate with the employer in an investigatory interview without union representation. An employee's insistence upon union representation at an employer's investigatory interview that the employee reasonably believes might result in disciplinary action is protected concerted activity. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). The General Counsel contends that the drug tests proposed by the Employer fall within the purview of *Weingarten*. While there is no reported case where the Board has applied *Weingarten* to drug testing, the contention is fairly arguable.

⁸ Other categories listed on the pay stub for which deductions were not made appear to be for fringe benefits and voluntary allotments.

See *Systems 99*, 289 NLRB 723, 724–727 (1988); cf. *Mashkin Freight Lines*, 272 NLRB 427 fn. 4 (1984).

Whether deferral is appropriate is a threshold question, which must be decided in the negative before the merits of the unfair labor practice allegations are considered. *L. E. Myers Co.*, 270 NLRB 1010 (1984). I have not resolved the credibility issues necessary to decide the case on the merits, before addressing the deferral issue. See *Blue Cross Blue Shield*, 286 NLRB 564, 582 (1987). Moreover, I have not determined whether the evidence, viewed in a light most favorable to the General Counsel, would establish a violation on the merits.

The Board will defer to the decision of arbitration proceedings when four criteria are satisfied. They are: (1) the arbitration proceedings were fair and regular; (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice; (3) the decision is not repugnant to the Act; and (4) all parties agreed to be bound. *Spielberg Mfg. Co.*, 112 NLRB 1980 (1955); *Raytheon Co.*, 140 NLRB 883 (1963).

The Board further refined the criteria for deferral and the burden of proof in *Olin Corp.*, 268 NLRB 573, 574 (1984), stating

Accordingly, we adopt the following standard for deferral to arbitration awards. We would find that an arbitrator has adequately 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. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the Spielberg standards of whether an award is "clearly repugnant" to the Act. And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award 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.

Finally, we would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award. [footnotes omitted]

The General Counsel contends that the record evidence establishes that deferral is not appropriate on several grounds. The General Counsel contends the proceedings were not fair and regular, arguing on brief at 18:

In at least one case, the Board has also held that it would not defer to awards of joint committees where the members of such committees have interests which were directly in conflict with those of the grieving party. *Brown Co.*, 243 NLRB 769, 770 (1979). Here, two of the committee members were management representatives with interests arguably at odds with the Charging Parties, and the contractual decision may be set aside on that basis as well.

The General Counsel does not further explicate the claim that the management representatives had “interests arguably at odds” with Faria and Fabrizio. The General Counsel’s position is inconsistent with the generally accepted proposition the Board defers to such labor-management panels, absent evidence that the members of the panel may be arrayed in common interest against the individual grievant. See *Herman Bros., Inc.*, 252 NLRB 848 (1980). Moreover, the General Counsel does not contend that the panel members designated by the Union, who joined in the unanimous decision, had interests in conflict with those of the employees or that the Union or the panel was hostile to the employees. The award itself, which was in significant measure favorable to the employees and critical of the Employer, is inconsistent with a conclusion that the panel decision was based upon unfair considerations. The General Counsel does not contend and the evidence does not show that the proceedings were procedurally deficient. I conclude that the General Counsel has not proven by a preponderance of the evidence that the proceedings regarding the grievances of Faria and Fabrizio were not fair and regular.

The General Counsel also asserts on brief at 18. “[T]he statutory issue concerning *Weingarten* rights is not directly parallel to the panel’s consideration on the question of whether the parties followed the letter of their contract in requesting employees to drug test.” Assuming that this is a contention that the contract issue is not factually parallel to the unfair labor practice issue, the record does not support it. To the contrary, the evidence is that the contract issue was whether the Employer violated the contract by the actions of Charoni, Rucker, and Sellers on the morning of March 14, while the unfair labor practice issues are whether their actions that morning violated the employees’ *Weingarten* rights. It is noted that the contract gives union agents a right of access to the jobsite. I conclude that the General Counsel has not proven by a preponderance of the evidence that the contract issues and unfair labor practice issues were not parallel. To the contrary, the record shows that the statutory and contract issues were factually parallel. See *Anderson Sand & Gravel*, 277 NLRB 1204 (1985)

The General Counsel argues that the Panel was not presented generally with the facts relevant to resolving the unfair labor practice. As discussed earlier, the credible evidence shows that the detailed narrative accounts of the May 14 events prepared by Faria and Fabrizio were submitted to the board of adjustment. Moreover, attorney McMurtray called the panel’s attention to the fact there was an issue of the employee’s right to

union representation. The lack of recollection by the two panel members called as witnesses is insufficient to warrant a different conclusion. I conclude that the General Counsel has not proven by a preponderance of the evidence that the Panel was not presented generally with the facts relevant to resolving the unfair labor practice. Rather, the evidence shows that the facts were presented to the Panel.

The General Counsel contends that the parties had not agreed to be bound. On brief at 18 the General Counsel argues “[T]he ‘parties’ who agreed to be bound to the contract which sets forth the Panel process were the Employer and the Union—not the Charging Parties to this matter.” No authority is cited in support of this argument. The requirement that there be agreement of the parties refers not to individual discriminatees, but to the union and employer. See *Great Scott Supermarkets*, 206 NLRB 447, 452–453 (1973).⁹ The evidence establishes that the parties agreed to be bound.

Neither at the hearing nor on brief has the General Counsel contended that the award of the board of adjustment is clearly repugnant. While the award of the panel is not totally consistent with the award that the Board would order if the complaint allegations were found to have merit, the evidence does not show that the Panel’s award is not susceptible to an interpretation consistent with the Act. Indeed, deferral to the award appears to be consistent with protecting the rights of employees, while advancing collective bargaining. See *International Great Lakes Shipping*, 215 NLRB 701 (1974).

On these findings of fact and conclusions of law and on the entire record I issue the following recommended¹⁰

ORDER

The complaint is dismissed.

⁹ Moreover, the employees filed the grievances and they did not object to the panel hearing the grievances, even though they had filed unfair labor practice charges prior to the panel hearing. The question of whether the panel or the Union was hostile to Faria or Fabrizio was addressed as a part of the issue of whether the proceedings were fair and regular.

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.