United Parcel Service, Inc. *and* Robert C. Atkinson, Jr. Case 06–CA–143062

November 21, 2023

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND PROUTY

In this long-running case, we consider two questions arising out of a court remand: whether to defer to joint grievance panel proceedings upholding the Charging Party's discharge, and, if deferral is not appropriate, whether the Charging Party's discharge violated Section 8(a)(3) and (1) of the National Labor Relations Act.

On November 25, 2016, Administrative Law Judge Geoffrey Carter issued a decision finding that the Respondent, United Parcel Service (UPS or the Respondent), violated Section 8(a)(3) and (1) by twice discharging the Charging Party, employee Robert C. Atkinson, Jr., because he refrained from supporting and assisting the International Brotherhood of Teamsters (the Teamsters) and/or Teamsters Local 538 (Local 538) (collectively, the Union) and engaged in other protected concerted activities. The judge first declined to defer to the joint grievance panel's finding that Atkinson had been properly discharged, applying the Board's then-applicable *Babcock & Wilcox* test for post-arbitration deferral to a collectively bargained dispute resolution process.[1] Then, applying the Board's *Wright Line* standard, the judge found Atkinson's discharges unlawful.[2] The judge found further, however, that Atkinson's post-discharge misconduct disqualified him from reinstatement and limited his eligibility for backpay.

The Board, on review of exceptions filed by all parties, changed the deferral standard, overruling *Babcock & Wilcox* and reverting to the Board's prior *Spielberg*/*Olin* deferral standard.[3] Applying the reinstated *Spielberg*/*Olin* standard, the Board deferred to the joint grievance panel's finding and dismissed the complaint and therefore the case. *United Parcel Service*, 369 NLRB No. 1, slip op. at 1 (2019) (*UPS I*).

Subsequently, Atkinson filed a petition for review of the Board's Order with the United States Court of Appeals for the Third Circuit. On November 9, 2021, the court affirmed in part and vacated in part the Board's *UPS I* order and remanded to the Board for further proceedings. *Atkinson v. National Labor Relations Board*, No. 20-1680, 2021 WL 5204015 (3d Cir. Nov. 9, 2021) (unpublished).

In its opinion, the court found that the Board's readoption of the *Spielberg*/*Olin* deferral standard was "rational and consistent with the Act." Id., at *4 (quoting *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990)). But the court further concluded that the Board had not adequately explained its finding that the dispute-resolution panel's proceedings were fair and regular, as required by the deferral standard, particularly in light of Atkinson's citations to record evidence of several instances that Atkinson argued showed an absence of fairness and regularity. Id., at *7. Thus, the court remanded the case to the Board for further proceedings to address Atkinson's argument that the panel proceedings were not fair and regular. Id.

On January 13, 2022, the Board notified the parties that it had decided to accept the remand from the court and invited them to file statements of position with respect to the issues raised by the court's opinion. UPS, Atkinson, and the General Counsel each filed a statement of position; UPS filed a brief in response to the statements of position of the General Counsel and Atkinson; the Association for Union Democracy and Teamsters for a Democratic Union (two separate organizations) jointly filed an amicus brief.[4]

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

We accept the court's remand as the law of the case. We have carefully reviewed the record and the parties' and amici's statements of position in light of the court's remand. We find, for the reasons set forth below, that the joint grievance panel proceedings addressing Atkinson's discharges were not fair and regular. Accordingly, we find it inappropriate to defer to those proceedings.[5]

[1] See *Babcock & Wilcox Construction Co*., 361 NLRB 1127 (2014).

[2] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[3] *Olin Corp*., 268 NLRB 573 (1984); *Spielberg Manufacturing Co*., 112 NLRB 1080 (1955).

[4] On February 11, 2022, the Respondent filed a motion to strike the General Counsel's and Atkinson's statements of position as untimely. The Board denied that motion on February 14, 2022, but granted the Respondent's alternative request, allowing it to file one responsive brief addressing issues the General Counsel and Atkinson had raised that were arguably beyond the scope of the court's remand. The Respondent timely filed its responsive brief on February 21, 2022. Finally, on March 22, 2022, the Board granted the motion of Association for Union Democracy and Teamsters for a Democratic Union to file their joint amicus brief.

[5] "Fair and regular" is an element of the deferral standard under either *Babcock & Wilcox* or *Spielberg/Olin*. The conclusion that this element was not met precludes deferral under either standard. We therefore find it unnecessary to reach the arguments by the General Counsel, Charging Party, and amicus that the Board should revisit the deferral standard.

We respond to our dissenting colleague's contrary view that the proceedings were fair and regular and, therefore, that deferral was appropriate. Addressing the merits of the unfair labor practice allegations, we agree with the judge's findings, as modified below, that UPS violated the Act by discharging Atkinson on June 20 and October 28, 2014, because he engaged in protected concerted activity. We clarify the nature of Atkinson's protected conduct. Lastly, we reverse the judge's finding that Atkinson's post-discharge misconduct precludes reinstatement and limits backpay; thus, we modify the judge's recommended remedies, as explained below.[6]

I. BACKGROUND[7]

The International Brotherhood of Teamsters represents UPS' package car drivers nationwide, while various union locals represent smaller geographical regions for local supplemental issues and for purposes of administering the overall collective bargaining agreement (national master agreement plus local supplements). Robert C. Atkinson, Jr. had been a package car driver for UPS since 1988 and a shop steward at the New Kensington Center (New Kensington or the Center) in Apollo, Pennsylvania since 1996. New Kensington drivers are covered by both the national master agreement and the Western Pennsylvania (WPA) local contract supplement. In May 2013, UPS and the Teamsters negotiated a successor national master agreement and, together with the Teamsters' locals, negotiated successor local supplement agreements, both of which required member ratification under the Teamsters' constitution.

Atkinson opposed ratification of the national master agreement and the WPA local supplement, and he participated in a national "Vote No" campaign aimed at persuading the Teamsters to renegotiate a more favorable contract. He also created a "Vote No" Facebook page focused on the WPA local supplement and, together with other New Kensington employees, posted information on work bulletin boards and handed out literature opposing contract ratification.

In June 2013, the national master agreement was ratified by a narrow margin, but 18 (of 32) local supplements failed to pass, including the WPA supplement. The Teamsters' constitution specified that the successor national master agreement could not take effect unless all local supplements were ratified. Atkinson thus continued his active involvement in the local "Vote No" campaign. UPS was aware of Atkinson's involvement in this campaign and closely monitored it. In late 2013, supervisor Ray Alakson warned Atkinson to be careful about what he posted online because UPS' labor department was monitoring the WPA "Vote No" Facebook page.[8]

In January 2014,[9] there was a second vote on the local supplements, after which only three supplements, including WPA's, remained unratified. On February 25, UPS District Labor Manager Robert Eans sent an email to his superior, Dennis Gandee, a UPS Western Pennsylvania labor manager.[10] In the email, Eans referred to a "ring leader" with a "vote no website out there" and stated, "Betty can't stand him," in reference to the "ring leader."[11] In March, in anticipation of another vote and on Atkinson's initiative, New Kensington employees placed "Vote No" posters in the windshields of their personal vehicles when parked at the Center.[12] Atkinson saw supervisors photographing the signs. Supervisor Matt DeCecco told Atkinson that UPS' labor department was interested in what was going on and it was his right to send them the pictures.[13] In addition, Gandee sent an email to several members of UPS management, including

[6] We amend the judge's conclusions of law and remedy in accordance with our findings herein, and we modify the judge's recommended Order to conform to the amended remedy, to conform to the Board's findings and standard remedial language, and in accordance with our decisions in *Thryv, Inc.,* 372 NLRB No. 22 (2022), *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), and *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021). We shall substitute a new notice to conform to the Order as modified.

[7] The facts are fully set forth in the judge's decision.

[8] Alakson repeated that warning to employees in late March or early April of 2014.

[9] All subsequent dates are in 2014 unless otherwise noted.

[10] Gandee did not testify and his exact title as a UPS manager at most relevant times does not seem to be specified in the record. But Eans testified that, as District Labor Manager during the relevant time period, he reported to Gandee, who was "a region coordinator and then the region labor manager." Tr. 831–832. Early 2014 email threads show Gandee's title as "Region Labor Relations Coordinator, East Region." See CP Exhs. 1, 2. Regardless of Gandee's exact title at any particular point, it is clear that, at material times, he was a high-ranking UPS manager at the regional level, and that he oversaw the New Kensington facility as well as others.

[11] "Betty" referred to Local 538 longtime business agent Betty Rose Fischer. Although the judge did not make an express finding on whether the "ring leader" that "Betty can't stand" was Atkinson, he did describe Atkinson as "a ringleader among employees who used social media to voice (often sarcastically) their frustrations with UPS's extensive rules and procedures for package car drivers." Further, Atkinson testified that he was the only person at the Center with a "Vote No" website and the only one whom, in his view, Betty could not stand.

[12] As the judge described, Atkinson and assistant steward Mark Kerr made the "Vote No" signs, placed them in their vehicles, and distributed them to other employees to place in their own vehicles after supervisor Matt DeCecco had restricted them from using the facility's bulletin boards for "Vote No" postings. In a conversation with labor relations manager Tom McCready, Atkinson made clear that employees were putting "Vote No" signs in their vehicles because "[t]hat's what we're left with. We can't put stuff in the bulletin board anymore."

[13] John Lojas, the Center manager beginning in August 2014, later told Atkinson that the windshield signs had put Atkinson "on the radar" with management.

UPS' national head of labor relations,[14] complaining that employees were parking at UPS facilities with "Vote No" signs in their vehicles and posting them to Facebook. Gandee questioned whether they "have to allow this" or if they "have any recourse" for the activity. Consistent with the response Gandee received, which urged caution and referred to "a recent 'near miss' with the NLRB on this very topic," Gandee advised Eans, "[m]ake sure our people keep an eye on it but don't do anything improper."

As instructed, UPS management continued to monitor "Vote No" activity, with Local 538 Business Agent Fischer's active assistance. On April 3, Fischer sent to UPS managers screenshots from Atkinson's "Vote No" Facebook group showing a list of all the group's members and, in a series of April emails, Gandee and Eans shared Facebook posts from Atkinson containing his "Vote No" activity. The "Vote No" campaign ended in late April, when the Teamsters amended its constitution so that it could accept the three unratified supplements (despite remaining opposition), which allowed the national master agreement and all the local supplements to take effect.[15] Dissatisfied with the terms of the new agreement and how the Teamsters had pushed through the unratified local supplements, Atkinson decided to run against Fischer for the Local 538 business agent position in an effort to displace her.[16] Atkinson remained active on social media by, among other things, posting about his dissatisfaction with the incumbent leadership of the Union.

Fischer continued informing UPS management of Atkinson's activities, with a new focus on his campaign for Local 538 business agent. On May 19, Fischer emailed UPS management a Facebook discussion between Atkinson and other group members in which Atkinson expressed concern that UPS had retaliated against him after he announced that he was running to replace Fischer as business agent and that Fischer had retaliated against him by failing to stop UPS. On May 23, Fischer emailed to UPS' mid-Atlantic labor relations manager, Tom McCready, a post by Atkinson in which Atkinson thanked a group of members at Ashbury Graphite, another Local 538 employer, for meeting with him about his campaign to replace Fischer as business agent. Fischer asked McCready, "Hum, wonder if his 'time' at Ashbury [was] while he was delivering?"

In June, UPS selected several New Kensington package car drivers, including Atkinson, for On-the-Job Supervision (OJS) rides. Supervisors monitored the selected drivers' compliance with UPS-prescribed delivery methods, known as the "340 methods," recorded deviations from these methods ("methods violations"), and suggested ways in which each driver could be more efficient.[17] Those rides followed an April comment by supervisor DeCecco that he could have every driver on a working discharge for methods violations.[18]

Center Manager Jeremy Bartlett, who was aware of Atkinson's activity with the "Vote No" campaign, chose to personally conduct Atkinson's OJS rides because he considered Atkinson to be "the sphere of influence" among employees at the Center.[19] On June 5, Fischer emailed McCready a post by Atkinson in which Atkinson stated, in significant part:

> it's so weird that the center manager is doing a 3 day ride with me . . . I've NEVER had this happen in all my years with this company, . . . I wonder why it's happening now? . . . maybe because I've filed NLRB charges on our union? . . . or because I'm running for principle [sic] officer of our Local and they've been given the green light to come at me?

CP Exh. 5 part 2 at 31.

During the June 3–5 OJS rides, Bartlett identified ways Atkinson did not comply with the "340 methods" and recorded the methods violations.[20] Bartlett also calculated how many stops per on-road hour (SPORH) Atkinson made each day and averaged those numbers to create a base level of efficiency Atkinson was expected to maintain. Bartlett conducted a follow-up ride on June 18, after which he discharged Atkinson twice.[21] First, on

[14] That individual is identified by multiple names in the record, including Mike Rosewater and Mike Rosentrater.

[15] Atkinson testified that discussion on the "Vote No" Facebook page continued after the end of the "Vote No" campaign, addressing such topics as the next contract and voting in new Teamsters leadership at the local and International levels.

[16] Atkinson lost the union election held in early October.

[17] The "340 methods" are published in UPS' Standard Practice Manual, but UPS does not provide drivers with a copy of the manual.

[18] A "working discharge" is provided for by a policy in the union contract that generally allows an employee who grieves a discharge or suspension to continue working until the grievance is resolved. Discharges for "cardinal violations"—specified types of misconduct, including dishonesty—are ineligible for "working discharge" treatment.

[19] Bartlett testified that he used the term "sphere of influence" to "recognize an employee that would be an influential character within the [C]enter that people would come to" and that he had determined that Atkinson was such an influential person because of "his communication with the employees." Tr. at 1439–1440.

[20] The areas Bartlett noted for improvement were Plan Ahead, Smooth Car Routine, Minimum Handling, One Look Habit, Get Signature First, Move Out Without Delay, and Customer Contact Time.

[21] The June 18 ride was also a safety ride (or what UPS calls a "blended ride") because Atkinson had been involved in a minor accident on June 16 and was required to perform a safety ride on his next workday.

June 19, Bartlett discharged Atkinson, purportedly based on Bartlett's determination that Atkinson had not maintained his base efficiency (SPORH) level while working unsupervised. Second, on June 20, Bartlett discharged Atkinson after comparing Atkinson's methods violations from his June 3–5 OJS rides to the June 18 follow-up ride and purportedly determining that Atkinson had not adequately remedied the previously identified methods violations.

Atkinson grieved both discharges, alleging that they were retaliation for his role as a shop steward and for his protected concerted activity, and he continued to work under the working discharge policy. Meanwhile, on June 16, right before Atkinson's June 20 termination, a manager forwarded to Gandee and Eans a discussion about a meeting that Atkinson would attend that weekend. The following Monday morning, which was a few days after Atkinson's June 20 termination, Gandee emailed McCready, asking if there were any "rumors" about the meeting. McCready responded, "Yes, we knew about the meeting in advance and we know . . . Rob Atkinson was there." McCready added that Atkinson had come to work that morning with five grievances regarding his recent discharges and his OJS ride. CP Exh. 5 part 2 at 42–43.

On July 5, supervisor Matt Blystone phoned Mark Kerr, a New Kensington driver and assistant shop steward, while Kerr was on vacation with Atkinson, and Blystone told each of them that he had heard supervisors DeCecco and Alakson and Center Manager Bartlett talking about how they were "singling [Atkinson] out" and "coming after" him because he was a shop steward and because of his protected activity, including the "Vote No" windshield signs.[22] Blystone's phone call confirmed Atkinson's suspicions, as stated in his grievances and Facebook posts, that UPS had discharged him because of his union and dissident activity. Atkinson's grievances regarding the June discharges were not resolved at the Center level and were scheduled for a November 4 joint grievance panel.[23]

UPS discharged Atkinson for a third time in late October, soon after Atkinson lost his bid for union office. On October 27, drivers were upset to learn at a pre-shift meeting that they would no longer be allowed to wear UPS hoodies while working, and they approached Atkinson, their shop steward, to talk about the policy change. While Atkinson was en route to deliver Next Day Air packages (which had a 10:30 a.m. delivery deadline), he discussed the new policy by phone with two New Kensington drivers, Kerr and Robert Larimer. During that call, Atkinson realized that his handheld computer, the delivery information acquisition device (DIAD), did not have the specific delivery information he needed for the day, contained in the enhanced DIAD download (EDD).[24] Because both of Atkinson's phone lines were in use, Kerr called the Center and asked a manager to bring Atkinson a second DIAD with EDD. Supervisors Alakson and DeCecco together brought Atkinson a second DIAD, and he timely completed all his deliveries. On October 28, UPS discharged Atkinson for failing to download EDD on October 27. Atkinson grieved that discharge, too, and it was scheduled to be heard by a joint grievance panel on January 14, 2015.[25]

A November 4 joint grievance panel considered Atkinson's June discharges and reduced the June 19 discharge and other prior discipline to a 48-day suspension.[26] The panel deadlocked on whether to uphold the June 20 discharge. The Union filed for arbitration, but no arbitration was scheduled. Meanwhile, on November 6, Fischer forwarded to Eans and McCready a Facebook post in which Atkinson stated that UPS had retaliated against him by issuing various disciplines since he had announced that he was running against Fisher for business agent, and he referenced the November 4 grievance panel that considered those disciplines, in which Fisher represented him.

As Atkinson completed his suspension, a January 14, 2015 joint grievance panel considered his October 28

[22] The judge credited testimony that Blystone told Atkinson and Kerr:

"Hey, I just want you to know what's happening to you at that building isn't your fault. I hear these guys talking up in the office, Jeremy Bartlett, Matt DeCecco, Ray Alakson, and they're singling you out and they're coming after you. This is because of you being a shop steward and because of the things you have done with those window signs and everything like that."

During both that call and separate calls to Atkinson and Kerr a few days later, Blystone asked Atkinson and Kerr not to tell the manager and supervisors that Blystone had told them about the statements "because they'll fire me." Blystone also told Kerr on July 5 that DeCecco and Alakson "said that Atkinson was a troublemaker and they needed to get rid of him."

[23] The joint grievance panel hearing was step 3 in the contractual dispute-resolution process. If the panel did not agree on a resolution, a grievance could proceed to arbitration.

[24] EDD is available for download only when the DIAD is connected to the UPS intranet, at or in the immediate vicinity of the Center.

[25] Various witnesses testified to the procedures surrounding the joint grievance panels, including information requests made before each hearing (but not fully or promptly provided, at least in regard to the November 4 hearing, as discussed below); presentations by parties' representatives; questions asked of parties and their witnesses; and a decision after deliberations by the panel members. The judge did not discuss those proceedings in any detail.

[26] Neither the June 19 discharge nor the prior discipline is before the Board.

discharge. The panel consisted of four members: Gandee was UPS co-chair, with Steve Radigan as the other UPS member, and Jim Beros and Tom Heider were the Union members. Fischer represented Atkinson before the panel, while McCready represented UPS. All four panel members and Fischer had served on the bargaining committee for the WPA supplement agreement that Atkinson had opposed in the "Vote No" campaign.[27] The unanimous panel upheld Atkinson's October 28 discharge, stating in full: "Based on the facts presented and the grievant's own testimony, the committee finds no violation of any contract articles, therefore the grievances (#22310 and #22311) are denied." Because the panel had denied his grievances, Atkinson could not continue to work under the "working discharge" policy; he had no further recourse through the grievance procedure and was officially terminated.

Atkinson timely filed charges with the Board alleging that UPS violated the Act by discharging him on June 20 and October 28.[28] Although both discharges had been the subject of joint grievance panel decisions, the General Counsel determined that deferral to those decisions was inappropriate under Board law and issued a complaint alleging that both discharges violated Section 8(a)(3) and (1) of the Act.

II. PROCEDURAL HISTORY

1. The Judge's Decision

The judge agreed with the General Counsel that it was inappropriate to defer to the grievance and arbitration process for the June 20 discharge, because the November 4 panel did not resolve the grievance and it was part of a progression of allegedly unlawful discipline and discharges (including the October 28 discharge).[29] The judge also found it inappropriate to defer to the January 14, 2015 joint grievance panel's decision upholding the October 28 discharge because the one-sentence decision, finding "no violation of any contract articles," did not satisfy the deferral standard articulated in *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014).

Applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to both the June 20 and October 28 discharges, the judge found that the General Counsel made an initial showing that UPS discharged Atkinson because of his protected concerted activity. The judge found that it was undisputed that UPS was aware of Atkinson's support for the "Vote No" campaign. The judge also found that the General Counsel established the requisite animus through the statements of supervisors Blystone, Alakson, and DeCecco, and Center Manager Bartlett. In addition, the judge found that those statements established "that Bartlett (and others) had an unlawful goal of using UPS's rules to single out and get rid of Atkinson because of his union and protected concerted activities." The judge found that UPS failed to meet its rebuttal burden regarding the June 20 discharge because the credited statements "tainted" the June 18 follow-up ride and demonstrated that UPS "unlawfully had its thumb on the proverbial scale" in assessing methods violations that resulted in Atkinson's June 20 discharge. The judge also found that UPS failed to meet its rebuttal burden regarding the October 28 discharge, because UPS did not show that it disciplines drivers for failing to download EDD. Accordingly, the judge found that UPS violated the Act by discharging Atkinson on June 20 and October 28.

Although the judge found Atkinson's discharges unlawful, he declined to order the standard reinstatement remedy because, on May 9, 2015, about four months after the grievance panel had upheld Atkinson's October 28 discharge, Atkinson posted a Facebook comment mocking UPS managers McCready and Eans. Atkinson called McCready a "knuckle dragger" who "sounds like he's chewing on cotton balls and marbles" when he speaks, described Eans as sitting in a "dainty and effeminate way," and speculated that Eans had erectile dysfunction. The judge found that Atkinson's comment violated UPS' antiharassment policy, an infraction for which UPS routinely discharges employees. For this reason, the judge recommended that UPS not be ordered to re-instate

[27] We address below the dissent's attempt to downplay the panel members' and Fischer's involvement in contract negotiations and resulting conflicts of interests.

[28] Atkinson filed the unfair labor practice charge regarding his October 28 discharge, at issue here, on December 18, 2014. On the same day, he filed a charge in case 06–CB–143060 (which he supplemented in charge 06–CB–146170, filed on February 10, 2015), alleging that Local 538 had violated Sec. 8(b)(1)(A) and (2) by failing to investigate or meaningfully support his grievances, including the grievance regarding his final discharge; by delaying action on his request for exculpatory information until after UPS claimed it had been destroyed; and by encouraging, rather than opposing, UPS' disciplinary actions against him, "throughout the grievance process from June 23, 2014 through the present time." Atkinson's charges against Local 538 were dismissed, and the General Counsel upheld those dismissals on December 24, 2015, explaining simply, "The evidence failed to show that the Union did not properly process grievances on behalf of the alleged discriminatee." In the same letter, the General Counsel sustained Atkinson's appeal regarding the dismissal of his charge against UPS for the October 28 discharge.

The dissent finds the dismissal of Atkinson's Sec. 8(b) charges "noteworthy." We are aware of no precedents, however, and the dissent cites none, establishing that the "fair and regular" test for purposes of deferral applies the demanding "arbitrary and capricious" standard by which a denial of fair representation charge is assessed.

[29] The judge apparently viewed the earlier disciplines and June 19 discharge as motivated by UPS' animus toward Atkinson's protected conduct, contrary to the dissent's portrayal of those actions.

Atkinson or to provide backpay after June 21, 2016, when UPS first demonstrated that it knew of the Facebook comment.

2. The Board's UPS I Decision

On December 23, 2019, the Board issued its initial decision in this case. *United Parcel Service, Inc*., 369 NLRB No. 1 (2019) (*UPS I*). In that decision, the Board overruled the then-applicable deferral standard of *Babcock & Wilcox*, above, on which the judge had relied, and reverted to the Board's older postarbitration deferral framework set forth in *Olin Corp*., 268 NLRB 573 (1984), and *Spielberg Manufacturing Co*., 112 NLRB 1080 (1955). *UPS I*, above, slip op. at 1.[30] Applying its revised deferral standard retroactively, the Board found the joint grievance panel's decision complied with *Spielberg*/*Olin*, including, as relevant here, finding that it was "fair and regular." The Board's entire discussion of the "fair and regular" issue was as follows:

> [E]ven under *Babcock*, the judge did not find that the Respondent failed to show the joint panel proceedings were not fair and regular, and only the Charging Party relevantly excepted. Under the *Spielberg/Olin* standard, the General Counsel bears the burden of making that showing. Moreover, it is well established that the General Counsel, not the Charging Party, is in control of the complaint. In any event, we reject as unfounded speculation arguments suggesting that panel members were biased against Atkinson because of their involvement in negotiating the bargaining agreements that he actively opposed, or that Business Agent Fischer was biased against him because he ran against her in the local union election.

UPS I, above, slip op. at 10.[31] Finding all elements of the *Spielberg*/*Olin* standard met, the Board deferred to the joint grievance panel's decision that had upheld Atkinson's October 28 discharge, and it dismissed the complaint.

3. The Court's Opinion Remanding to the Board

After Atkinson sought judicial review of the Board's decision, the Third Circuit Court of Appeals affirmed the Board's change in the deferral standard, but it remanded for the Board to explain its finding that the grievance process was fair and regular. *Atkinson v. National Labor Relations Board*, No. 20–1680, 2021 WL 5204015, at 1 (3d Cir. Nov. 9, 2021). As to the first issue, the court found that the Board's readoption of the *Spielberg*/*Olin* deferral standard was rational and consistent with the Act as an effort to reconcile two policies expressed in the Act: (1) that the "desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement" should be by "a method agreed upon by the parties," 29 U.S.C. § 173(d), and (2) that the "Board is empowered . . . to prevent any person from engaging in any unfair labor practice," 29 U.S.C. § 160(a).

Atkinson v. NLRB, above at 1–2.[32] But, after recounting "several instances in the record" that Atkinson had "argue[d] demonstrate a lack of a 'fair and regular' dispute-resolution-panel proceeding," the court found that the Board erred in failing to explain why it found that the dispute-resolution panel's proceeding was fair and regular. Id., at 2–3. The court observed:

> [T]he Board bears the burden of stating reasons for its action and making sufficient factual findings to support them. Only when the Board does so can it clearly show that it has legitimately exercised its discretion." *Local 467, Upholsterers' Int'l Union of N. Am. v. NLRB*, 419 F.2d 179, 182 (3d Cir. 1969). If the Board fails to explain its findings or its application of those findings to the law, then we remand to the Board "to make whatever additional factual findings and to articulate whatever reasons it believes will be pertinent to its ultimate disposition of this case." Id.; *see also Dist. 1199P, Nat'l Union of Hosp. & Health Care Emps.*, 864 F.2d 1096, 1104 (3d Cir. 1989). The Board did not address Atkinson's allegations regarding a lack of a "fair and regular" proceeding.

Id., at 3.[33] Therefore, the court remanded the case in part "so that the Board can address Atkinson's argument that the dispute-resolution-panel proceeding was not fair and regular." Id. at 3. The Board accepted the court's remand and solicited the parties' positions.

III. THE PARTIES' POSITIONS

All parties submitted statements of position, as described above, and Association for Union Democracy

[30] The Board also overruled *Babcock & Wilcox*'s changes to the deferral standards applicable in other contexts, although none of those standards was, or is, at issue in this case. Id.

The "post-arbitration" deferral standard applies here because both of Atkinson's discharges proceeded through the steps of the grievance process and ended, even though no arbitration actually occurred in this case.

[31] As discussed below, the General Counsel now joins Atkinson in arguing that the proceedings were not fair and regular.

The dissent continues to argue, as the *UPS I* majority did, that the proceedings were fair and regular.

[32] The court did not find that the *Spielberg/Olin* deferral standard was the only appropriate one or in any way suggest that it would have found the *Babcock & Wilcox* deferral standard inappropriate if the Board had applied it.

[33] The court found that "[t]he General Counsel [did] not argue that the fair-and-regular issue was not properly before the Board and addresse[d] that issue head-on." Id., at *6.

and Teamsters for a Democratic Union submitted a joint amicus brief (TDU or amicus TDU).

The General Counsel raises two primary arguments. First, she argues, the Board should reverse the reinstatement in *UPS I* of the *Spielberg*/*Olin* deferral standard and reinstate instead the *Babcock & Wilcox* standard. In the alternative, the General Counsel contends that the proceedings were not fair and regular, and that, if the Board does not reinstate *Babcock & Wilcox*, the Board can and should so find on the present record and under the *Spielberg*/*Olin* deferral standard. GC brief at 6. The General Counsel points out that although, in *UPS I*, "[t]he Board rejected as 'unfounded speculation' the argument that the grievance panel members or Charging Party's Union representative were biased against him such that the proceedings were not fair and regular," the *UPS I* Board "did not make any positive findings as to whether the proceedings were fair and regular." GC brief at 2. The General Counsel highlights record evidence that all four members of the joint grievance panel and Atkinson's representative before the panel, Local 538 Business Agent Fischer, participated in the negotiations for the agreement that Atkinson actively opposed via the "Vote No" campaign; that Fischer communicated with panel member Gandee and various other members of UPS management about Atkinson's activities in the "Vote No" campaign and in his campaign to replace Fischer as business agent; and that members of management, including panel member Gandee, participated in UPS management communications about an unnamed "ring leader" who had a "Vote No" website and whom Fischer "can't stand." Thus, the General Counsel contends, the evidence reflects not only that Atkinson was a dissenter from the interests of both UPS and the Union but also that the joint panel participants and Atkinson's representative before the panel had animus against his protected conduct. In these circumstances, the General Counsel argues, the panel proceedings were not fair and regular, and deferral is not appropriate.[34]

Atkinson argues that deferral to a grievance procedure in which the targets of his concerted activity are authorized to protect it would inappropriately "assign the fox to guard the henhouse." CP brief at 20. He recounts the facts establishing an "extreme" conflict of interest between Atkinson and the Union officials and UPS officials who participated in the joint grievance panel, and he identifies longstanding Board precedents finding that such a conflict of interests – or even an apparent conflict of interests – precludes deferral. He contends that the *UPS I* Board's overruling of *Babcock & Wilcox* was procedurally improper and also failed to address the "fair and regular" question, and that all decisions based on that improper action must be vacated. Thus, he argues, the Board should reconsider the issue under the *Babcock & Wilcox* standard and should find deferral inappropriate. He also disputes the judge's remedial determinations limiting backpay and declining to recommend reinstatement. Noting the years (8 years then, and now more) that have elapsed since his discharges, Atkinson opposes remand and asks the Board to rule on the record already presented. In doing so, Atkinson argues, the Board should find the discharges unlawful under *Tschiggfrie Properties*' modifications to *Wright Line*;[35] should find that post-discharge conduct does not warrant limiting the remedies; should award consequential damages as the General Counsel has requested; and should modify the notice language to properly reflect the nature of Atkinson's protected conduct.

UPS, in its initial statement of position, argues that the proceedings were fair and regular. Its argument relies heavily on the prior General Counsel's brief to the Third Circuit in opposition to Atkinson's petition for review of *UPS I*, which UPS attached to its brief.[36] UPS adds that courts treat joint grievance panels, like the one here, no less deferentially than arbitration by a third-party arbitrator. It further contends that the passage of 10 months between the end of Atkinson's "Vote No" campaign and the joint grievance panel hearing negates any claim of improper motivation. It argues that joint grievance panels have "inherent fairness" built in by the requirement of full consensus to reach decisions. UPS initial brief at 5. UPS notes the absence of specific evidence of bias by the Union panel members, who concurred in the decision against Atkinson.[37] In its response to the General Counsel and Atkinson, UPS contends that the Board should retain the *Spielberg*/*Olin* deferral standard but that, even under *Babcock & Wilcox*, deferral to the joint grievance panel's decision is proper. UPS argues that there is "ab-

[34] The General Counsel also asks the Board to modify its remedial practices by ordering consequential damages, an issue that the Board has since addressed in *Thryv, Inc*., above.

[35] *Tschiggfrie Properties*, 368 NLRB No. 120 (2019); *Wright Line*, above. The Board, however, recently clarified the applicable standard in *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 6 (2023) (holding that *Tschiggfrie* "did not alter the Board's longstanding articulation of the General Counsel's evidentiary burden under *Wright Line*"); see generally id., slip op. at 6-13 (explaining Board's standard and rationale for providing clarification of *Tschiggfrie*).

[36] On remand, the current General Counsel no longer argues in support of the Board's findings in *UPS I*, as the prior General Counsel did when the *UPS I* decision came before the court on Atkinson's petition for review.

[37] UPS also states its opposition to any remand for additional evidence. In its response to the General Counsel and Atkinson, however, it asks the Board to obtain additional evidence if it does not find the proceedings fair and regular on the existing record.

solutely no evidence of bias" here, UPS response brief at 7, and characterizes Atkinson's position as improperly presuming that a conflict exists in the union-dissident context. Finally, UPS argues that Atkinson's challenges to the judge's limitation of the remedy exceed the scope of both the Third Circuit's remand and the General Counsel's arguments.

Amicus TDU argues that the Board's deferral decisions must account for the fact that, in cases involving union-dissident employees, the interests of the union and its grievance-handling officials may be more aligned with the employer than with the dissident employee. In light of that expected alignment of interests, TDU supports barring deferral in all cases where union dissidents are discharged and lose their grievances before a joint panel. In the alternative, TDU joins the General Counsel's and Atkinson's requests that the Board reinstate the *Babcock & Wilcox* deferral standard or at least restore it in cases involving joint grievance panels. But, if the Board chooses not to do so, TDU argues that it should find that the proceedings here fell far short of fair and regular for the reasons articulated by the General Counsel and Atkinson and because, here, "the conflicts of interest are so blatant they virtually scream 'unfair' and 'irregular.'" TDU brief at 17. Finally, responding to the contention that the passage of time would have eased any hostilities over the "Vote No" campaign and Atkinson's later campaign for Local 538 business agent, TDU highlights the national context and long-lasting effects of Atkinson's protected concerted activity.

IV. DISCUSSION

We first consider the question the Court expressly placed before us: whether the January 14, 2015 joint grievance panel proceedings regarding Atkinson's October 28 discharge were fair and regular.[38] Applying longstanding Board law, we conclude that the proceedings were not fair and regular. Deferral to those proceedings is therefore inappropriate. The dissent's contrary position is unpersuasive. Addressing the merits of the alleged unfair labor practices, we conclude, in agreement with the judge and for the reasons stated below, that UPS acted unlawfully when it discharged Atkinson on June 20 and October 28, 2014.[39] Thus, we consider the appropriate remedies for the unlawful discharges, and we modify the judge's recommended remedies in several respects.

A. The Joint Grievance Panel Proceedings Were Not Fair and Regular, and Deferral Was Therefore Inappropriate

In assessing whether the proceedings at issue here were fair and regular, we begin by reviewing the Board's precedents addressing conflicts of interest that have been alleged to cause dispute-resolution proceedings to fall short of fairness and regularity. As we will explain, we conclude that under our precedent, the conflicts demonstrated here suffice to prove that the proceeding was *not* fair and regular. We need not draw the bright line that UPS, and our dissenting colleague, demand between assertedly insufficient "apparent conflicts" that do not compromise a proceeding's fairness and regularity and assertedly required "actual conflicts."[40] Rather, as recounted below, we find extensive evidence in this case of conflicts of interest that raise "strong doubt . . . as to whether the procedures comport with the standards of impartiality that we expect to find in arbitration." *Roadway Express, Inc*., 145 NLRB 513, 515 (1963). Those conflicts would satisfy even a standard that required proof of an actual conflict, fairly understood. Relying on

[38] The November 4 joint grievance panel had considered Atkinson's June 19 discharge and prior disciplines, as well as his June 20 discharge. As noted above, it reduced to a lengthy suspension the June 19 discharge and earlier disciplines. The dissent recounts those disciplinary events in detail, apparently attempting to portray Atkinson as a problematic employee who was treated leniently by the November 4 joint grievance panel. As the judge observed, however, Atkinson had been subject to no discipline for several years (i.e., since 2011) before the sudden spate of disciplines and discharges that began in January 2014, after Atkinson "became more involved" in the "Vote No" campaign in the summer and fall of 2013. In this context, Atkinson's disciplines up through his June 19 discharge do not demonstrate the panel's leniency or the absence of an interest in getting rid of Atkinson; rather, they emphasize the significance and repercussions of his "Vote No" activity. *Hammontree v. NLRB*, 925 F.2d 1486, 1499 fn. 32 (D.C. Cir. 1991), cited by the dissent, is not to the contrary. There, unlike here, "the record contain[ed] no suggestion of . . . hostility between the union and [the grievant]." Id. at 1499. That "the judge did not find that th[o]se specific disciplines were motivated by [UPS'] animus toward Atkinson's protected conduct" and that evidence of such motivation was not presented, as the dissent notes, is not surprising; those disciplinary actions were simply not before the judge for assessment as unfair labor practices themselves.

The November 4 joint grievance panel deadlocked on Atkinson's June 20 discharge. Although the Union then requested arbitration of the June 20 discharge, no arbitration was held. The Third Circuit found that the October 28 discharge mooted consideration of the June 20 discharge in regard to Atkinson's argument that the failure to complete arbitration on the June 20 discharge made deferral inappropriate as to both discharges. In light of our conclusion that deferral was not appropriate, however, we analyze the lawfulness of both discharges, because a finding that either discharge was lawful would materially affect the remedies. But, as discussed, we find both discharges unlawful and we order remedies accordingly.

[39] Consistent with the positions of the General Counsel, Atkinson, and UPS' initial brief, and in light of the comprehensive factual record before us and the passage of time since Atkinson's discharges, we do not remand the case to the judge.

[40] The dissent is therefore mistaken when it claims that we take the "position that actual conflict is not required." As explained, we do not view the Board's cases as making a sharp distinction between apparent and actual conflicts of interests. More importantly, we do not view this case as turning on such a distinction.

well-established precedent, we conclude that the joint grievance panel proceeding at issue was not fair and regular and, therefore, does not warrant deferral.

1. The Origin and Importance of the "Fair and Regular" Prong of the Deferral Standard

Since the early days of the Board's deferral policy, the Board has deferred to the outcomes of arbitration and other grievance-resolution proceedings only where those proceedings were "fair and regular." *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082 (1955). By the early 1960s, the Board had established how it would assess the fairness and regularity of joint grievance panels, like the one at issue here. As the Board explained, such proceedings are not fair and regular if the grievant's interest conflicts with the panel members' interests:

> Where contract grievance procedures simply provide for the submission of a dispute to a bipartite committee, composed of representatives of the contracting parties, the absence of a public, or impartial, member will not necessarily foreclose the exercise of our discretion to give binding effect to decisions of the committee, for each representative is customarily prepared to argue for or against the merits of the employee's grievance. However, *where in addition to the absence of an impartial or public member it appears from the evidence that all members of the bipartite panel may be arrayed in common interest against the individual grievant, strong doubt exists as to whether the procedures comport with the standards of impartiality that we expect to find in arbitration*.

Roadway Express, Inc., 145 NLRB at 515 (emphasis added).

2. Application of the "Fair and Regular" Factor in Prior Cases

We now review our prior decisions assessing whether conflicts of interest caused dispute-resolution proceedings to fail the "fair and regular" test, focusing especially on those cases involving union dissidents, like Atkinson, and/or bipartite panels, like the joint grievance panel at issue here. As discussed above, *Roadway Express* established that we would not necessarily find a lack of fairness and regularity in decisions by a bipartite panel composed of representatives of the contracting parties with no neutral or public member, but we would view with disfavor cases with such panels where "it appears from the evidence that all members of the bipartite panel may be arrayed in common interest against the individual grievant." 145 NLRB at 515. There, we refused to defer to the bipartite panel's award where the grievant had been a vigorous and public opponent of the union and had repeatedly and publicly criticized the trucking industry, in which the grievant's employer was engaged. Those circumstances strongly supported the conclusion that the common interests of all the members of the panel were adverse to those of the grievant. Id. Similar circumstances exist here, where Atkinson has been a vigorous, public, and persistent critic of both the Union and UPS.

In several cases that followed *Roadway*, we declined to defer to the decisions of bipartite/multi-member arbitration or joint grievance panels where facts similar to those at issue here demonstrated a likely conflict of interests. Thus, in *Youngstown Cartage Co.*, 146 NLRB 305, 308 fn. 4 (1964), we refused to defer to an arbitration award where the employee was associated with a dissident movement seeking to establish a rival union and openly criticized trucking operators. The absence of an impartial public member and the fact that the entire arbitration panel "may have been arrayed in common interest against [the employee]," showed that the arbitration panel failed to comport "with the standards of impartiality we expect to find." In *Brown Co.*, 243 NLRB 769 (1979), enf. denied on other grounds and remanded, 663 F.2d 1078 (9th Cir. 1981), we found that a decision issued under the Teamsters' joint arbitration system was not fair and regular where all members of the panel represented competing local unions or employers that would have benefited from denying the grievance. We would not defer to a joint panel award "where it appears that members of the committee have interests which are directly in conflict with those of the grieving party." Id. at 770.[41] In *Herman Brothers*, 252 NLRB 848, 848, 852–853 (1980), enfd. 658 F.2d 201 (3d Cir. 1981), we found that arbitration panel proceedings were not fair and regular where the union disapproved of a grievant's anti-ratification activities and the employer made a material misrepresentation about the grievant's disciplinary history to the joint panel, which the union failed to correct. In enforcing the decision, the Third Circuit explained that the arbitration panel had consisted only of union and management representatives, "both of whose interests

[41] The dissent attempts to distinguish the instant case from *Youngstown Cartage* and *Roadway Express*, because the grievants in those cases sought to form competing unions rather than promoting vigorous dissident movements within the existing union as Atkinson did. Although our colleague believes that "Atkinson's dissident activities pale in comparison," we find that to be a distinction without a difference. Similarly unpersuasive is the dissent's attempt to distinguish *Brown Co.* as involving a grievance panel on which a union member represented a rival union; that fact highlights the similarity, not the difference, between that case and this one. Finally, as we discuss elsewhere, the dissent's effort to downplay the long-lasting and intense rivalry between the Teamsters and the dissenting faction that Atkinson actively supported is unavailing.

appeared to be aligned against" the grievant, who had opposed adoption of the proposed collective-bargaining agreement and had several disagreements with union leadership. 658 F.2d at 207.[42] See also *Mason and Dixon Lines, Inc*., 237 NLRB 6, 6 fn. 2, 12–13 (1978) (finding that employee's hearing before the joint local committee was not fair; employee "had become a problem for both" employer and union because of his grievances, his opposition to union steward's removal, and his activities on behalf of Teamsters for a Democratic Union).[43] Those cases provide strong support for concluding that the joint grievance panel's proceedings to resolve Atkinson's discharge grievances were similarly not fair and regular.

In other cases, we have found a lack of fairness and regularity based on party conduct similar to that which is at issue here, even if the structure of the proceedings differed from the joint grievance panel. Thus, in *Russ Togs*, 253 NLRB 767, 768 (1980), we found that the arbitration proceedings at issue were not fair and regular and refused to defer because the grievants' shop steward had reported their conduct to their employer, and that report contributed to their discipline. In *Tubari Ltd.*, 287 NLRB 1273 fn. 4, 1274, 1287 (1988), enfd. mem. 869 F.2d 590 (3d Cir. 1989), we found that deferral to an arbitration award was not appropriate because the discharged employees had been prominent supporters of a rival labor organization, creating a conflict of interest between them and the union involved in the arbitration.[44] See also *Kane v. NLRB*, 8 F.3d 27 (9th Cir. 1993) (finding grievant and his union representative in arbitration proceedings had significant conflict of interest because they were running opposing campaigns for union delegate) (vacating and remanding *United Parcel Service of Ohio*, 305 NLRB 433 (1991)).[45]

Of course, a finding that dispute-resolution proceedings were not fair and regular will not be the outcome in all cases in which a conflict of interest is alleged, and such allegations will not justify a refusal to defer where record evidence contradicts them or fails to support them. See, e.g., In re *Turner Const. Co*., 339 NLRB 451, 456 (2003) (affirming judge's finding that General Counsel had not established that joint panel proceedings regarding grievances of two employees were not fair and regular where General Counsel did not explicate or support his bare argument that two management panel members had "interests arguably at odds with" grievants' and did not argue that interests of union's panel members conflicted with employees' or that "the [u]nion or the panel was hostile to the employees"); *Motor Convoy, Inc*., 303 NLRB 135, 136 (1991) (rejecting dissent's argument that arbitral proceedings were not fair and regular where General Counsel had not raised fairness issue and employer supported grievants' position in arbitration).[46] The facts of each case are key and, although some kinds of conflicts have arisen repeatedly, no two cases are likely to be identical.[47] We now consider the facts established in this case.

3. The Facts of This Case Demonstrate That the Proceedings Were Not Fair and Regular

The record contains abundant evidence of adverse interests between Atkinson and the joint grievance panel members, and between Atkinson and Fischer, his representative at the panel, demonstrating clearly that the proceedings were not fair and regular.

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[42] We discuss below the dissent's argument that *Herman Bros*. is factually distinguishable from this case.

[43] The dissent seeks to distinguish *Mason and Dixon Lines* based on the lack of due process at the hearing there, which it contrasts with the joint grievance panel hearings here. But the judge in *Mason and Dixon Lines* relied on a great deal of other evidence demonstrating a conflict of interests. As discussed below, a facially inadequate hearing, like the one held there, is one way that a lack of fairness and regularity can be manifested, but it is not the only way.

[44] UPS and the dissent cite *Tubari* as support for the argument that the Board must find an "actual conflict of interest," not just an "inherent conflict," 287 NLRB at 1273 fn. 4. What matters here, however, is the Board's conclusion that deferral was inappropriate on the facts of that case, which supports our conclusion that deferral is similarly inappropriate here. We are not persuaded by the dissent's argument that *Tubari* is distinguishable on the basis that, there, the union was found to have violated Sec. 8(b)(1)(A) by failing to adequately represent the grievant. No such finding has been required by the Board to find that a conflict of interest existed, even in the "post-*Olin* cases" that the dissent finds persuasive.

[45] In its unpublished decision denying enforcement, the court explained, "[w]hen there is a conflict of interest between the employee and his union representative in an arbitration, the National Labor Relations Board does not defer to the results of the arbitration, because it cannot be presumed the union representative adequately protected the employee's statutory rights." *Kane v. NLRB*, 1993 WL 386703, at *1 (9th Cir. 1993) (citing cases). In a supplemental decision and order after the court's remand, the Board adopted the judge's unlawful discharge findings. See *United Parcel Service of Ohio*, 321 NLRB 300 (1996).

[46] The dissent argues that *In re Turner* and *Motor Convoy* are analogous to this case, and thus we should similarly find the proceedings here fair and regular. Unlike the dissent, we find a material difference between those cases and this one, in that the General Counsel (as well as Atkinson) did in fact raise, argue, and support the lack-of-fairness-and-regularity issue here.

[47] For this reason, the dissent's narrow focus on a particular factual similarity or two between the instant case and certain cited precedents, without regard to more salient factual differences, is mistaken.

This case must be decided on its own facts, regardless of whether the Board has found that proceedings under the UPS/Teamsters grievance process were fair and regular in other cases, involving other facts.

To begin, Atkinson's "Vote No" campaign targeted the collective-bargaining agreement that all four panel members and Fischer had participated in negotiating. Although UPS and the dissent argue that, of the panel members, only Gandee had even an arguable conflict of interests with Atkinson, we—and the Third Circuit—disagree. In *Herman Bros., Inc. v. NLRB*, the Third Circuit enforced the Board's decision not to defer to arbitration proceedings, explaining:

> The arbitration panel consisted only of union and management representatives, both of whose interests appeared to be aligned against [discriminatee] Stief. Normally, the Union representatives would adequately represent Stief's interest. Here, however, Stief actively opposed adoption of the proposed collective bargaining agreement which was supported by the Union as well as the Company. Stief had had several disagreements with the Union leadership which further aggravated the relationship between Stief and the Union. Given these facts, the Board did not abuse its discretion in determining that the arbitration proceedings did not appear to have been fair and regular as far as Stief was concerned.

658 F.2d at 207.[48] For similar reasons, Atkinson's "Vote No" activity created adverse interests that implicated all four panel members.[49]

We conclude, based on the facts of this case, that the conflict of interests arising out of Atkinson's vehement and persistent opposition to the national master agreement and WPA supplement that all joint grievance panel members and Fischer had participated in negotiating compromised the proceedings' fairness and regularity and makes deferral inappropriate. Atkinson's declarations that the agreements were too weak to deserve ratification would naturally generate antagonism toward him on the part of those who negotiated the agreements.[50] Moreover, Atkinson's active and visible leadership of the opposition to ratification was effective: the "Vote No" campaign succeeded at twice preventing ratification of the WPA local supplement and, as a result, significantly delayed implementation of the national master agreement. Nor was the "Vote No" campaign a short-term or innocuous dispute: Atkinson was active in the campaign throughout 2013 and 2014, and his advocacy led to the WPA region being among the last three regions holding out against the agreement by the second ratification vote. The holdout regions, including WPA, ultimately caused the Union to amend its national constitution to allow the agreement's adoption without regional ratification.[51]

This was not a fleeting dispute, quickly forgotten; it was a crisis for the Teamsters, for Local 538 leadership, and for UPS, and it had long-lasting effects. That the Teamsters—that is, the *International* Union—was forced to amend its own constitution to overcome the "Vote No" campaign and impose the contract that Atkinson and his fellow dissidents vehemently opposed is no minor,

[48] The dissent argues that *Herman Bros*. is distinguishable because, there, the contract-ratification dispute remained live, the grievant had demanded the resignation of a steward who had punched another union member in the mouth, and the union had failed to correct a material misrepresentation by the employer at the hearing. Although the facts here do not precisely track those of *Herman Bros*. in every detail, there is sufficient (albeit not complete) similarity to this case in the following respects: first, the continuing contentiousness over the contract's forced imposition – which continued on the "Vote No" Facebook page in the form of discussions about negotiations for the next contract and about replacing local and International Teamsters leadership, as well as transitioning into Atkinson's effort to oust Fischer as business agent; and, second, Fischer's provision of information about Atkinson's protected conduct to UPS management, which – as the record establishes – was "out to get" Atkinson.

[49] For this reason, we also reject the contention by UPS – which the dissent finds meritorious – that, even if Gandee had a conflict of interest, that did not affect the proceeding's fairness because Gandee could not uphold Atkinson's termination without the agreement of the other panel members. The other panel members, sharing the same conflict of interest that Gandee had regarding Atkinson, provided no countervailing fairness. Further, McCready testified that Gandee, as the UPS co-chair, chose Radigan to serve as the second UPS panel member. Radigan was apparently a district manager, and thus was below Gandee in UPS' organizational hierarchy. For this reason, too, we question the dissent's confidence that Gandee's conflict of interest would not affect any other panel members.

We decline TDU's proposal that we adopt a bright-line rule against deferring to bipartite proceedings like the joint panel here, or at least that we always refuse to defer when such proceedings involve the discharge of a union dissident. The dissent's assertion that our decision "calls into question the entire bipartite panel process" is similarly misplaced. Rather, we decide this case based on the facts presented, which are detailed above. But we recognize, as our precedent establishes, that cases involving a joint panel without a neutral member, and especially those involving the discharge of a union dissident like Atkinson, warrant a particularly searching look at the facts.

[50] The dissent contends that this inference is "unfounded on this record." We disagree, in light of the record evidence we have already discussed.

[51] The dissent, like UPS, argues that no conflict has been shown with regard to the panel members other than Gandee. But the dissent materially underestimates the contentiousness generated by the collective-bargaining agreement that UPS and the Teamsters negotiated and the resulting national "Vote No" campaign that Atkinson visibly led at the Center. It was of interest to UPS' national management, and thus was necessarily of concern to the regional managers who represented UPS on the grievance panel. The "Vote No" campaign was of concern to the Union, too, especially in the run-up to a second ratification vote after the public embarrassment of the contract's rejection in the first ratification vote, as shown by Fischer's own close monitoring of the "Vote No" activities and her communications with UPS about them. The hostility was widespread and intense. In those circumstances, the dissent's assumption that panel members who had participated in contract negotiations were disinterested and impartial (or that, at most, perhaps Gandee and Fischer "did not particularly like Atkinson") is simply implausible.

unremarkable incident. Contrary to UPS' and the dissent's arguments, the passage of mere months after the contract went into effect had not dimmed the memories or cooled the emotions of those disputes by the time of the joint grievance panel in January 2015.[52] Indeed, based on Atkinson's interaction with Center Manager Lojas in December 2014, the judge expressly—and, in our view, quite reasonably—found that UPS' animus towards Atkinson for his "Vote No" activity "persisted throughout the relevant time period."

Atkinson's interests were in conflict with those of Gandee and Fischer in even more weighty and personal ways. As the evidence recounted above shows, Gandee, the UPS co-chair on the joint grievance panel, expressed his disapproval of, and his wish to prevent, Atkinson's "Vote No" conduct by bringing it to the attention of national UPS officials, inquiring whether UPS had to tolerate it, and then advising managers at the Center to keep an eye on it – which they did, including taking photos of employee vehicles bearing "Vote No" signs and sharing those photos with UPS local, district, regional, and national leadership. Gandee thus closely monitored Atkinson's protected conduct himself, and he instructed other supervisors and managers to do so.

Gandee also communicated repeatedly with District Labor Manager Eans about Atkinson's protected conduct. Gandee and Eans discussed Facebook posts in which Atkinson had expressed "Vote No" sentiments. Further, they referred to a "ring leader," who Fischer despised, who had a "vote no website out there."[53] In addition, shortly after Atkinson's June 20 termination, Gandee asked about a union meeting that Atkinson had attended, and McCready informed Gandee that Atkinson had filed grievances regarding his discharges. Gandee heard those grievances, along with others, during Atkinson's first grievance panel in November 2014, just after Atkinson's final discharge.

Fischer, who represented Atkinson at the January 2015 grievance panel, had also participated in negotiations for the contract that Atkinson opposed. She had monitored Atkinson's "Vote No" Facebook group and, over the course of months, had repeatedly conveyed to UPS management information about their activities, including the identities of group participants.[54] When the "Vote No" campaign was brought to an end by the Union's adoption of the contract without WPA ratification, Atkinson continued his dissident activity, notably by running for Local 538 business agent against Fischer, the incumbent.[55] Fischer continued to report Atkinson's activities to management, including, in a May 23 message to McCready, questioning whether Atkinson's campaign event may have occurred on work time.[56] By implying that Atkinson may have been stealing time from UPS (i.e., engaging in the cardinal violation of dishonesty, which was not eligible for "working discharge" treatment), Fischer put Atkinson at risk of discharge and immediate dismissal from his job.[57] Fischer defeated Atkinson and retained

[52] That is particularly evident in the fact that the discussions on the "Vote No" Facebook page—to which Fischer had access—turned to contemplation of the next contract negotiations and potential replacement of local and International Teamsters leadership.

[53] Although, as noted above, the judge did not expressly find that Atkinson was the "ring leader" referred to in that email, he did expressly find that Atkinson's "Vote No" activity included "establishing a Vote No web page where area union members could learn about and discuss the Western Pennsylvania supplement." In any event, it is undisputed that Atkinson had created a "Vote No" Facebook page on which he posted regularly and that Gandee was aware of it. Further, the judge, in summarizing the evidence, identified Atkinson as "a ringleader" among employees at the Center who actively criticized their working conditions on social media, and Atkinson testified that the description of the "ring leader" fit no one at the Center but him.

In light of the foregoing evidence, the dissent's reliance on Eans' equivocal and implausible testimony that Kerr was the "ring leader" referred to in the email is misplaced. When asked about the email that he himself had sent to Gandee, Eans first denied that it referred to Atkinson and alluded vaguely to an attached flyer that Kerr had been handing out. Eans was then asked if he was saying that his email referred to Kerr, and he responded, "That was my understanding, yes." That is, Eans would not provide an unequivocal answer about who his own email referred to. Nor did Eans strengthen his credibility by responding to Union counsel's follow-up question that, yes, he meant that "Betty can't stand" *Kerr*. Although the record is replete with evidence of Fischer's hostility toward Atkinson, no comparable hostility by Fischer toward Kerr is documented. In light of all the evidence supporting Atkinson as the "ring leader" described in Eans' email, it is understandable that the judge did not find Eans' testimony – that it "was [Eans'] understanding" that he meant Kerr – worth discussing or crediting.

[54] Fischer regularly forwarded Facebook posts in which Atkinson engaged in protected concerted activity to McCready, who then forwarded the posts to other members of the UPS labor department. McCready represented UPS at the joint grievance panel, while Fischer represented Atkinson.

[55] See *Kane v. NLRB*, above (finding significant conflict of interest between grievant and his representative in arbitration proceedings because they were running opposing campaigns for union delegate).

[56] The dissent focuses on the May 23 email and argues that we put too much weight on it. It should be clear that we rely on a much more extensive record of Fischer's conduct (much of which the dissent ignores or minimizes) as demonstrating her conflict of interests as to Atkinson.

[57] As set forth below, UPS demonstrated significant animus towards Atkinson's union dissident activity and discharged him for it repeatedly. Two of Atkinson's three discharges (one of which was converted to a lengthy suspension) occurred within a month after Fischer's May 23 email to McCready. Thus, Fischer may have played a role in Atkinson's discharge. See *Russ Togs*, 253 NLRB at 768; see also *Warehouse Employees Local 20408 (Dubovsky & Sons)*, 296 NLRB 396, 409–410 (1989) (finding deferral to arbitration decision not appropriate where both union and employer had specifically expressed hostility toward discharged employees because of their opposition to respondent union and support for a rival labor organization, and union was found to have

her position as business agent in an election that occurred only 3 months before the final joint grievance panel at which she acted as his representative.[58]

In sum, UPS had an interest in ridding itself of a vocal dissident who had significantly delayed ratification of its national master contract and WPA local supplement; thus, UPS' interests were adverse to Atkinson's. See *Herman Brothers*, 658 F.2d at 207. The Union's interests were similarly adverse to Atkinson as it was in the Union's interest, too, to rid itself of a vocal dissident who substantially delayed ratification of its contract. Id. See also *Roadway Express*, 145 NLRB at 515 ("where in addition to the absence of an impartial or public member it appears from the evidence that all members of the bipartite panel may be arrayed in common interest against the individual grievant, strong doubt exists as to whether the procedures comport with the standards of impartiality that we expect to find in arbitration."). Further, Fischer had an interest in ridding herself of the same vocal dissident, who had not only significantly delayed the contract's ratification but who was also an opponent for the union office she held. See *Kane v. NLRB*, above.[59]

4. Response to the Dissent

The dissent essentially presents a two-step argument to support its conclusion that the proceedings here were fair and regular. First, the dissent argues that the Board's precedents require us to find an "actual conflict" of interests, not merely an "apparent conflict," in order to conclude that the proceedings at issue were not fair and regular. Then, the dissent concludes that the facts demonstrate that no actual conflict existed here. We are not persuaded by the dissent's reading of Board precedent, but, as stated, there is no need here to resolve the issue posed by the dissent, because the record here would satisfy an "actual conflict" requirement in any case.

First, the dissent points to no case in which the Board expressly considered and concluded that an actual conflict is required to find deferral inappropriate, and we are aware of none. Rather, the dissent cites the Board's casual description in *Motor Convoy* of the General Counsel's burden to show that a conflict existed. In *Motor Convoy*, however, the question was whether the General Counsel had even raised the fairness issue; the case indisputably did not turn on whether an actual conflict existed or merely an apparent conflict. Id., 303 NLRB 135, 136 (1991). *Motor Convoy*, in turn, cited a single footnote in a single case, in which the Board found deferral inappropriate, noted the existence of an actual conflict, and did not rely on the judge's discussion regarding an "inherent conflict."[60] See *Tubari, Inc.*, 287 NLRB 1273, 1273 fn. 4 (1988). It is common, of course, for the Board to state that the evidence presented in a particular case exceeds the requirements of the applicable standard. By doing so, the Board does not raise the legal bar to the level actually achieved.[61]

Second, and in any event, we find sufficient "actual" conflicts here to undercut the necessary fairness and regularity of the proceedings. Thus, as an initial matter, the dissent's portrayal of the evidence presented here is unpersuasive, as we have noted.[62] Moreover, the dissent

violated Sec. 8(b)(1)(A) and (2) by threatening employees with discharge and causing employees' transfer). Contrary to the dissent's argument seeking to distinguish the cases cited above, it is irrelevant that UPS did not discipline Atkinson for the exact misconduct that Fischer suggested he may have engaged in (particularly when it was already planning the early June OJS rides that ultimately provided the pretext for Atkinson's June discharges). Moreover, the judge never mentioned, and thus seemingly did not credit, McCready's testimony that he never investigated Fischer's suggestion, which the dissent cites. Although the dissent states that McCready's testimony was undisputed, it is not clear who the General Counsel might have called to testify to the contrary and, as noted, the judge's choice not to even reference McCready's testimony suggests that he, too, had doubts about its reliability. In contrast, the judge did cite a conversation between Atkinson and McCready in which the latter indicated his displeasure with Atkinson's "Vote No" activity.

[58] Even if one could reasonably conclude that the antagonism between Atkinson and Fischer would have cooled in the few months that had elapsed since the election (a suggestion that we find highly improbable), Atkinson's demonstrated persistence would not have reasonably led Fischer to expect Atkinson to cease his dissident activities.

[59] As detailed above, Atkinson had repeatedly expressed his suspicions that UPS and Fischer were retaliating against him for his protected activity, and supervisor Blystone had told Atkinson in early July that Center Manager Bartlett and other supervisors were coming after Atkinson because of his protected activities and activity as shop steward.

[60] The dissent appears to interpret "inherent conflict," as used by the *Tubari* judge, id. at 1287, as meaning the same thing as "apparent conflict." We need not resolve whether that interpretation is correct.

[61] The dissent views *Tubari* as effecting a change in the Board's prior standard, but the decision itself does not make such a statement. Had the *Tubari* Board intended to change the law, it surely would have said so—in conformity with the judicially enforceable requirement for reasoned decision making. See, e.g., *Circus Circus Casinos, Inc. v. NLRB*, 961 F.3d 469, 476 (D.C. Cir. 2020). The dissent also misses the mark in relying on the Board's characterization of *Tubari* in *Motor Convoy*, above. *Motor Convoy*'s statement of *Tubari*'s holding (which, as we have explained, cannot bear the weight the dissent places on it in any event) did not change the law any more than *Tubari* itself did.

The dissent is incorrect in asserting that we "have disregarded the more recent Board decisions that have found that 'apparent' conflicts are insufficient to establish that a proceeding is not fair and regular." Nor do we find those decisions "not controlling." We simply conclude that they do not support the dissent's argument. We do rely on *Roadway Express*, above, and other cases that the dissent characterizes as "significantly older" but that we regard as longstanding precedents that have not been overruled. In any event, we again emphasize that the "actual conflicts" the dissent deems necessary are present here.

[62] Contrary to the dissent's suggestion, this is not a case in which a grievant merely did not support the union representing him or her, and, as our detailed discussion of the facts demonstrates, that is not the basis on which we find a conflict of interests. Nor does the record support

relies disproportionately on the supposed absence of any blatant procedural missteps in the administration of the joint panel hearing[63] and fails to draw the most reasonable conclusions from the evidence of participants' underlying conflicts with Atkinson and their shared interest in his removal from employment with UPS. As to the procedural regularity of the hearing, given the existing and well-known conflicts, we are not surprised that the participants may have been scrupulous about the administration of the hearing.[64] Nevertheless, "fair and regular" requires more than administrative regularity; by definition, it also requires fairness.[65] Fairness, in turn, requires an impartial decisionmaker.[66] The conflicts of interest that existed here need not have resulted in obvious procedural missteps to undermine the impartiality, and thus the fairness, of the panel's decision making.

The dissent notes that Atkinson's ally, assistant shop steward Kerr, was permitted to assist Fischer in representing Atkinson and that Kerr (and eventually Fischer) submitted information requests of UPS to support Atkinson's grievance regarding the June discharges. The dissent fails to acknowledge, however, that Kerr's request for information was repeatedly rejected until Fischer belatedly submitted it shortly before the November 4 hearing. Kerr's assistance with Atkinson's representation was circumscribed by UPS' insistence on dealing only with Fischer as representative. In any event, Kerr's participation could have had, at most, a small impact on Fischer's representation and none at all on the underlying conflicts of both Fischer and the panel members.

Moreover, although the dissent suggests that Atkinson was satisfied with the presentation of his case at the hearing, Atkinson's December 18, 2014 and February 10,

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the dissent's suggestion that UPS did not perceive Atkinson as a leader in the "Vote No" campaign after he took the initial steps. Indeed, we note that the judge addressed a similar argument raised by UPS: "In litigating this case, UPS has posed the question of what makes Atkinson so special, and thus a target for an unlawful discharge, as opposed to countless other Vote No campaign supporters and union stewards? [citation to brief omitted.] The evidence of UPS's animus towards Atkinson that I have set forth here (among other evidence) answers that question." ALJD at 53 fn. 53.

[63] The dissent does not cite any sources in the record for its description of the hearing proceedings, which were not recounted in the judge's decision.

[64] Given the extensive record of bias against Atkinson on the part of Fischer, as well as others, it is no surprise that Fischer was careful to observe the administrative formalities during the hearing itself. As an experienced business agent (and an adversary of Atkinson quite familiar with his persistence in pursuing grievances and ULP charges), Fischer surely would have known that her representation of Atkinson would be scrutinized.

The dissent asserts that we engage in "wild speculation that Fischer actively conspired with the panel members . . . to hold a hearing simply for show." We do not find that there was such a conspiracy. Rather, we recognize that Fischer and the panel members had individual interests that aligned in opposition to Atkinson's continued employment.

[65] The dissent cites *Botany 500*, 251 NLRB 527 (1980), for the proposition that the Board will defer to a hearing where the apparent conflicts had not adversely affected the manner in which the hearing was conducted. There, as here, the charging party had run against an incumbent for union office, had participated in a "Vote No" campaign, and had then been discharged; however, that is the extent of the similarities between the cases. Neither the election campaign nor the "Vote No" campaign in *Botany 500* was remotely comparable to Atkinson's in the level of hostility engendered. Significantly, there, the discharged employee expressly stated that the union business agent against whom she had briefly campaigned was not responsible for her discharge, in sharp contrast to this case. Further, the dispute-resolution proceeding that the judge assessed for fairness and regularity in *Botany 500* was not a joint grievance panel with no neutral members, like the one here, but a traditional arbitration. The General Counsel contended that the arbitrator was not entirely neutral because, as permanent arbitrator under the contract, he had an interest in maintaining that role by seeing that the current union officials remained in power; however, the judge found that argument unsupported.

In any event, for the reasons stated above, procedural correctness alone does not necessarily demonstrate fairness where other evidence of a conflict of interests exists. For this reason, we also reject the dissent's reliance on only part of the discussion regarding procedural correctness in *Yellow Freight System, Inc.*, 337 NLRB 568, 570 (2002) (adopting judge's deferral recommendation based on judge's finding that fairness "entail[s] a review of what might be termed 'procedural due process,'" which, relevantly, requires that "the arbitral process *was impartial* and afforded the grievant an adequate opportunity to present evidence and be heard") (emphasis added). Finally, the dissent's reliance on *Bailey Distributors*, 278 NLRB 103 (1986), revd. on other grounds, 796 F.2d 14 (2d Cir. 1986), and on *International Harvester Co.,* 133 NLRB 923 (1962), enfd. 327 F.2d 784 (7th Cir. 1964), is misplaced. In *Bailey Distributors*, the hostility alleged to create a conflict of interests was between the attorneys, not the grievants and their own representatives or between the grievants and the decisionmakers and, in any event, the Board relied on evidence tending to disprove the alleged conflict. No such mitigating evidence exists here, where the conflict was far less theoretical. In *International Harvester*, the employee's union sought his discharge for failure to pay dues, consistent with the parties' collective bargaining agreement, and the union's grievance was against the employer, which resisted the discharge demand – hardly facts comparable to those at issue here. More importantly, the Board found that "[t]here is certainly not the slightest suggestion – *nor is such a contention even urged* – of fraud, collusion, or other irregularity on the part of any party to 'railroad' [the employee] out of his job."' Id. at 928 (emphasis added). Thus, in context, the Board's statement about procedural regularity, quoted by our colleague, conveyed that a relatively minor shortcoming in procedures (the employee's lack of notice of the arbitration proceeding) should not preclude deferral to arbitration where substantive fairness was not even in question. The Board did not suggest that procedural regularity demonstrates the presence of substantive fairness where the latter is actually disputed.

[66] The dissent takes issue with what it sees as a lack of evidence that the joint panel members' and Fischer's roles in negotiations for the contract influenced their consideration of Atkinson's grievance. The absence of direct evidence should not be surprising, given that there is no record of their deliberations and their decision contains virtually no articulation of its rationale. In light of the extensive evidence of various participants' continuing displeasure with Atkinson's protected conduct, and in the context of all the evidence, we have no difficulty inferring that the conflicts tainted the process here.

2015 unfair labor practice charges against UPS and Local 538 expressly tell a different story. Lastly, even if we were to agree with our dissenting colleague that the November 4 joint panel hearing treated Atkinson leniently, we would not assume, as he does, that the panel members were still inclined toward leniency in January 2015, after Atkinson's December filing of new unfair labor practice charges, containing allegations regarding the November 4 hearing, against both UPS and Local 538.

5. Conclusion Regarding Deferral

For the reasons stated above, we conclude that the joint grievance panel's proceedings to resolve Atkinson's grievances over his October 28, 2014 discharge were not fair and regular under the Board's standard for deferral to such proceedings. See *Mason and Dixon Lines, Inc.*, 237 NLRB at 6 fn. 2, 12–13 (finding that employee's hearing before the joint local committee was not fair; employee "had become a problem for both" employer and union because of his protected conduct, including his activities on behalf of Teamsters for a Democratic Union). Accordingly, we find it inappropriate to defer to the joint grievance panel's proceedings or its decision upholding Atkinson's discharge.

B. Applying Board Law, Atkinson's Discharges Were Unlawful

The *UPS I* Board did not, and today's dissent does not, reach the Section 8(a)(3) discharges or post-discharge misconduct issues because of their findings that deferral was appropriate. Because we find that deferral is not appropriate, we address those issues.

In order to determine whether an employer disciplined or discharged an employee for engaging in protected concerted activity in violation of Section 8(a)(3) and (1) of the Act, the Board considers whether protected concerted activity was a motivating factor in the employer's disciplinary decision. *Wright Line*, above; see also *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 2 (2023). Under this test, the General Counsel bears the initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action. The General Counsel meets this burden by proving that: (1) the employee engaged in Section 7 activity; (2) the employer knew of such activity; and (3) the employer had animus against the Section 7 activity. See id., slip op. at 6; see also *New York Paving*, 371 NLRB No. 139, slip op. at 3 (2022), enfd. 2023 WL 7544999, Case Nos. 22–1266 and 22–1289 (D.C. Cir. Nov. 14, 2023). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity. If the employer fails to meet its burden, the Board will conclude that a causal relationship exists between the protected activity and the adverse action, and a violation will be found. Id. The stronger the showing of discriminatory motivation, the more substantial the employer's defense burden. See *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010), enfd. 646 F.3d 929 (D.C. Cir. 2011). If the evidence as a whole "establishes that the reasons given for the [employer's] action are pretextual—that is, either false or not relied upon—the [employer] fails by definition to show that it would have taken the same action for those reasons, absent protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Cadillac of Naperville*, 371 NLRB No. 140, slip op. at 2 (2022) (citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003)); see also *Aliante Casino & Hotel*, 364 NLRB 1186, 1186, 1197 (2016); *Metropolitan Transportation Services, Inc.*, 351 NLRB 657, 659 (2007).

1. The June 20, 2014 Discharge

For the reasons discussed below, we affirm the judge's finding that UPS violated Section 8(a)(3) and (1) by discharging Atkinson on June 20, purportedly for methods violations in his OJS rides with Bartlett.

a. The General Counsel Met Her Initial Burden

We agree with the judge that the General Counsel made an initial showing that the discharge was unlawfully motivated. Atkinson engaged in highly visible protected concerted activity, specifically union dissident activity in his leadership role in the local "Vote No" campaign in 2013–2014, as discussed extensively above. UPS was unquestionably aware of this activity. Supervisor Alakson told Atkinson to be careful posting on Facebook because UPS' labor department was monitoring his "Vote No" page. When Atkinson saw supervisor DeCecco taking photos of "Vote No" windshield signs, DeCecco told Atkinson that he was taking the photos because UPS' labor department was interested in what was going on.[67] Multiple supervisors told Center Manager Bartlett that Atkinson and a coworker were involved in the "Vote No" campaign. Finally, Bartlett identified Atkinson as "the sphere of influence" who regularly communicated with other employees. UPS' animus towards Atkinson's protected activity was most directly

[67] The judge found it unnecessary to rely on additional testimony regarding alleged statements by Alakson and DeCecco suggesting that the Respondent's labor department saw the signs as a problem, because he found it "cumulative (i.e., the reaction of New Kensington and UPS labor department managers is clear enough from other testimony in the record. . . .)." The judge's view of the Respondent's reaction to Atkinson's "Vote No" activity thus contradicts the dissent's benign portrayal in its argument for deferral.

demonstrated by supervisor Blystone's statement in his July 5 phone call with Kerr and Atkinson that supervisors DeCecco and Alakson and Center Manager Bartlett were trying to get rid of Atkinson because of his protected activity.[68]

b. UPS' Rationale for the Discharge Was Pretextual

We find that UPS' purported justification for Atkinson's June 20 discharge was pretextual. Since "pretext" means that the stated reasons are either false or not in fact relied upon, *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003), our finding of pretext "defeats any attempt by the Respondent to show that it would have discharged" Atkinson absent his protected activity. *Rood Trucking Co.,* 342 NLRB 895, 898 (2004); see also *Intertape Polymer*, above, slip op. at 7 (inference of unlawful motivation is reinforced by employer's proffer of a pretextual reason for its action). Here, we find that the methods violations Bartlett recorded during the June 18 follow-up ride were not in fact relied upon as the basis for Atkinson's June 20 discharge, and that, instead, UPS was motivated by animus towards Atkinson's protected concerted activity. As stated above, supervisor Blystone told Atkinson he was being targeted for his protected activity during the "Vote No" campaign, and Bartlett, the most senior manager involved in the OJS rides, acknowledged at the hearing that he chose to conduct Atkinson's performance evaluation because he considered Atkinson to be "the sphere of influence" among employees. We agree with the judge's finding that because "Bartlett (and others) had an unlawful goal of using UPS's rules to single out and get rid of Atkinson because of his union and protected concerted activities, the June 18 blended ride is tainted, as is the June 20 discharge that resulted from methods infractions that Bartlett identified in that ride."[69] Under a pretext analysis, the judge's finding indicates that the negative performance evaluation was simply an excuse, rather than the real reason, for discharging Atkinson. Accordingly, we find that UPS discharged Atkinson because of his union and protected concerted activity in violation of Section 8(a)(3) and (1).

c. In the Alternative, UPS Failed to Meet Its Defense Burden

Even assuming arguendo that UPS' reasons for the June 20 discharge were not a pretext, we agree with the judge that UPS failed to meet its defense burden to show that it would have discharged Atkinson even absent his protected activity. As the judge found, Center Manager "Bartlett (and others) had an unlawful goal of using UPS's rules to single out and get rid of Atkinson because of his union and protected concerted activities," and that "tainted" the June 18 follow-up ride as the basis for the June 20 discharge. Bartlett's choice to conduct Atkinson's OJS rides himself (while lower-level supervisors handled other drivers' OJS rides) might raise an eyebrow in any context, but here, supervisor Blystone expressly identified Bartlett as one of the managers targeting Atkinson. Bartlett's explanation that he chose to personally conduct Atkinson's rides because Atkinson was "the sphere of influence" among his fellow drivers only underscores the conclusion that the process was aimed at finding infractions to use against Atkinson. Indeed, the strong showing of UPS' animus towards Atkinson, as illustrated by Blystone's July 5 phone call to Atkinson and Kerr, makes UPS' defense burden particularly high. *Bally's Atlantic City*, above. Thus, in view of Bartlett's animus towards Atkinson's protected conduct, UPS failed to show that it would have discharged Atkinson for the methods violations Bartlett identified on June 18, absent Atkinson's protected activity. Rather, as the judge found, "UPS (through Bartlett and other supervisors) unlawfully had its thumb on the proverbial scale when it decided to discharge Atkinson on June 20 based on methods infractions that Bartlett found . . . during the June 18 ride." Accordingly, we affirm the judge's conclusion that UPS violated Section 8(a)(3) and (1) of the Act by discharging Atkinson on June 20.

[68] We rely on Kerr's and Atkinson's unrebutted testimony regarding Blystone's phone call, which the judge also credited. On the date of the hearing, UPS still employed Blystone as a supervisor and could have called him as a witness. Since it chose not to do so, we agree with the judge that it is appropriate to draw an adverse inference against UPS about the testimony Blystone would have provided. *International Automated Machines, Inc.*, 285 NLRB 1122, 1123 (1987) (judge may make adverse inference against a party who refuses to call a witness reasonably expected to corroborate that party's version of events, especially when the absent witness is the party's agent), enfd. 861 F.2d 720 (6th Cir. 1988).

[69] We also note that many of the methods violations Bartlett recorded during the follow-up ride involved highly subjective judgments and placed Atkinson in the position of choosing between two (or more) contradictory method components. For example, the method "park close" includes a number of components, such as, "[u]se your knowledge of the area to drive directly to the closest park position," and "[e]valuate park location for driver safe exit and entry of vehicle." Whether Atkinson complied with these components was based on Bartlett's subjective judgment that Atkinson parked in a location that required an excessive walk to the delivery stop. But Atkinson's unrebutted testimony was that, if he had parked in Bartlett's chosen spot, he would have blocked traffic, thereby violating the component that required him to exit the vehicle safely. Atkinson's dilemma tends to confirm supervisor DeCecco's April statement that he could have every driver on a working discharge for methods violations and bolsters our conclusion that UPS' reliance on methods violations to discharge Atkinson was pretextual.

2. The October 28, 2014 Discharge

We also affirm the judge's finding that UPS further violated Section 8(a)(3) and (1) by discharging Atkinson on October 28. As with the June 20 discharge, we agree with the judge that the General Counsel satisfied her initial showing that the discharge, purportedly for Atkinson's failure to download EDD (that is, to update his handheld computer with work orders while at the Center), was unlawfully motivated. In addition to the evidence of animus relating to the June 20 discharge, including Blystone's July 5 statement that Bartlett was trying to get rid of Atkinson because of his protected activity, we also rely on Atkinson's credited, unrebutted testimony that in early December, approximately a month after the October 28 discharge, Center Manager John Lojas told Atkinson that the "Vote No" signs put him "on the radar" with UPS management. We agree with the judge that this demonstrates that UPS' animus towards Atkinson for protected activity "persisted throughout the relevant time period."[70] For the same reasons as the June 20 discharge, we also agree with the judge that the discharge "was tainted by UPS's unlawful plan to use its rules to single out and get rid of Atkinson because of his union and protected concerted activities." Accordingly, we find UPS' purported reason for discharging Atkinson—his failure to download EDD—to be pretextual; that is, it was not, in fact, relied upon as a reason for the discharge and was only an excuse to cover UPS' illegal motive.[71] For these reasons, we find that UPS again violated Section 8(a)(3) and (1) of the Act by discharging Atkinson on October 28.

C. Atkinson's Post-Discharge Misconduct Does Not Warrant Denying Him Reinstatement and Reducing His Backpay

Despite finding Atkinson's discharges unlawful, the judge declined to order reinstatement and full backpay. The judge found that Atkinson's post-discharge Facebook comment (posted on May 9, 2015), which disparaged McCready's intelligence and speech and Eans' masculinity, violated UPS' anti-harassment policy. The judge explained that if Atkinson had made this comment while still employed by UPS, it would have discharged him, and therefore, UPS was relieved of its continuing reinstatement and backpay obligations.

In declining to order reinstatement and full backpay, however, the judge erroneously applied the Board's standard for after-acquired knowledge of pre-discharge misconduct. That standard is appropriate only when the arguably disqualifying behavior occurs *before* the allegedly unlawful discharge, but the employer does not discover it until after the discharge. See, e.g., *Tel Data Corp.*, 315 NLRB 364, 366–367 (1994), revd. in part on other grounds, 90 F.3d 1195 (6th Cir. 1996). Because Atkinson posted the Facebook comment at issue approximately 4 months *after* his discharge was confirmed by the joint grievance panel, the judge should instead have applied the Board's standard for evaluating post-discharge misconduct.

Under the post-discharge misconduct standard, the test is not whether UPS would have discharged Atkinson had he still been employed, but whether UPS proved "misconduct so flagrant as to render [the discriminatee] unfit for further service, or a threat to efficiency in the plant." *Fund for the Public Interest*, 360 NLRB 877, 877 (2014) (quoting *Hawaii Tribune-Herald*, 356 NLRB 661, 663 (2011), enfd. sub nom. *Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012)). The Board has found that post-discharge misconduct precludes reinstatement only in "extraordinary situations," such as when a discriminatee made death threats, hit a supervisor with a car, or threatened to report a parole violation in order to influence testimony at a Board hearing. Id. at 877 (collecting cases). Thus, in *Fund for the Public Interest*, for example, the Board found that the discharged employee's comments, published in the local press, that his employer ran a "Ponzi scheme to get money out of progressive people" did not present the type of extraordinary situation warranting a denial of reinstatement. This is because "the Board affords discriminatees leeway in consideration of the experiences they have suffered when assessing their postdischarge comments . . . . [A]n 'evaluation of post-discharge employee misconduct requires sympathetic recognition of the fact that it is wholly natural for an employee to react with some vehemence to an unlawful discharge.'" Id. at 889 (quoting *Trustees of Boston University*, 224 NLRB 1385, 1409 (1976), enfd. 548 F.2d 391 (1st Cir. 1977)). The Board has imposed this heightened burden on employers for post-discharge misconduct because "[e]mployers who break the law should not be permitted to escape fully remedying the effects of their unlawful actions based on the victims'

[70] The dissent's effort to characterize UPS' reaction to Atkinson's "Vote No" conduct as having dissipated before the joint panel proceedings in November 2014 and January 2015 is thus not just unpersuasive but also contrary to the judge's express findings.

[71] Because we apply a pretext analysis, we need not separately analyze whether UPS satisfied its defense burden. *Cadillac of Naperville*, above. However, we find, in addition to pretext, that the judge correctly found that UPS failed to meet its defense burden. We are unpersuaded by UPS' argument on exceptions that a lack of comparator discipline for this particular offense is fatal to the General Counsel's initial showing. The General Counsel is not required to produce evidence of disparate treatment. *Avondale Industries, Inc.*, 329 NLRB 1064, 1066 fn. 9 (1999).

natural human reactions to the unlawful acts." *Hawaii Tribune Herald*, 356 NLRB at 662.

Under the post-discharge standard, Atkinson's Facebook comment does not disqualify him from reinstatement. Although Atkinson's comment was offensive, it did not rise to the level required by the Board for a denial of reinstatement for post-discharge conduct in response to an unlawful termination of employment. See e.g., *C-Town*, 281 NLRB 458, 458 (1986) (ethnic slur unaccompanied by threats or violence does not warrant denial of reinstatement).[72] Because Atkinson's comment does not present an "extraordinary situation" rendering him unfit for further service, he is entitled to reinstatement and full backpay and expenses plus interest until the date that UPS makes him a valid offer of reinstatement.

AMENDED CONCLUSIONS OF LAW[73]

Substitute the following for the judge's Conclusions of Law 1 and 2:

"1. By discharging Robert C. Atkinson, Jr. on June 20, 2014, because he refrained from supporting and assisting the International Brotherhood of Teamsters and/or Teamsters Local 538 and engaged in union dissident activity and/or other protected concerted activities, the Respondent violated Section 8(a)(3) and (1) of the Act."

"2. By discharging Robert C. Atkinson, Jr. on October 28, 2014, because he refrained from supporting and assisting the International Brotherhood of Teamsters and/or Teamsters Local 538 and engaged in union dissident activity and/or other protected concerted activities, the Respondent violated Section 8(a)(3) and (1) of the Act."

AMENDED REMEDY

In addition to the remedies provided in the judge's Order as amended, we shall require the Respondent to offer Robert C. Atkinson, Jr. full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position. Further, we find that backpay, expenses, and interest continue to accrue until the Respondent makes him a valid offer of reinstatement. In addition, in accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), the Respondent shall also compensate Atkinson for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharges, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

ORDER

The National Labor Relations Board orders that the Respondent, United Parcel Service, Inc., North Apollo, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they refrain from supporting and assisting the International Brotherhood of Teamsters and/or Teamsters Local 538 and engage in union dissident activity and/or other protected concerted activities.

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

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

(a) Within 14 days from the date of this Order, offer Robert C. Atkinson, Jr. full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Robert C. Atkinson, Jr. whole for any loss of earnings and other benefits and for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful June 20 and October 28, 2014 discharges against him in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Within 14 days from the date of this Order, remove from its files any references to the unlawful June 20 and October 28, 2014 discharges of Robert C. Atkinson, Jr. and, within 3 days thereafter, notify him in writing that this has been done and that the unlawful discharges will not be used against him in any way.

(d) Compensate Robert C. Atkinson, Jr. for the adverse tax consequences, if any, of receiving a lump-sum

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[72] Although Atkinson posted the Facebook comment 4 months after his discharge became final, we do not find that gap in time to be of significance. *Fund for the Public Interest*, 360 NLRB at 877 and 889 (Board reinstated a discriminatee who publicly disparaged his employer "almost 4 months after [his] termination"). The Board has recognized that an employee may continue to be upset, and even become more so, about an unlawful discharge over time as part of a "natural human reaction." *Hawaii Tribune-Herald*, above at 662. The Board has long held that a discriminatee's "emotional reaction" to being unlawfully discharged does not disqualify him or her from reinstatement unless the conduct "is violent or of such a character as to render the employee[] unfit for further service[]." *Alto-Shaam, Inc*., 307 NLRB 1466, 1467 (1992), enfd. 996 F.2d 1219 (7th Cir. 1993), cert. denied 510 U.S. 965 (1993). Here, Atkinson had been employed by UPS for approximately 27 years before he was unlawfully discharged and felt the managers about whom he commented had ruined his career.

[73] Having found that UPS violated the Act, we agree with Atkinson's exceptions that the notice, and therefore the Conclusions of Law and the Order, should specifically reference employees' right to engage in union dissident activity, not merely to refrain from engaging in union activity.

backpay award, and file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(e) File with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Atkinson's corresponding W-2 form(s) reflecting the backpay award.

(f) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its New Kensington Center in North Apollo, Pennsylvania, copies of the attached notice marked "Appendix."[74] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If 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 its New Kensington Center at any time since June 20, 2014.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 6 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.

Dated, Washington, D.C. November 21, 2023.

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Lauren McFerran, Chairman

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David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting.

This case is before the Board on remand from the United States Court of Appeals for the Third Circuit. The initial decision in this case overruled the then-applicable post-arbitration deferral standard articulated in *Babcock & Wilcox Construction Co*., 361 NLRB 1127 (2014), and restored its longstanding post-arbitral deferral framework announced in *Spielberg Manufacturing Co*., 112 NLRB 1080 (1955), and clarified in *Olin Corp*., 268 NLRB 573 (1984). *United Parcel Service, Inc*., 369 NLRB No. 1 (2019) (*UPS I*).[1] Applying the *Spielberg/Olin* standard retroactively, the Board deferred to the unanimous decision of a joint grievance panel upholding the October 28, 2014 discharge of Charging Party Robert C. Atkinson, Jr. Id., slip op. at 10. As relevant here, the Board rejected the argument that the joint panel proceedings were not fair and regular because the grievance panel members or Atkinson's union representative were biased against him, explaining that only the Charging Party excepted to the issue but that it is the General Counsel, not the Charging Party, who is in control of the

[74] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This is the same notice previously [sent or posted] electronically on [date]." 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."

[1] Under *Spielberg/Olin*, the Board will defer to the arbitrator's decision where (i) the arbitral proceedings appear to have been fair and regular, (ii) all parties have agreed to be bound, (iii) the arbitrator has adequately considered the unfair labor practice issue, and (iv) the arbitral decision is not clearly repugnant to the Act—i.e., the decision is susceptible to an interpretation that is consistent with the Act. See, e.g., *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1085 (2003).

complaint. Id. The Board further found that Atkinson's bias argument was based on "unfounded speculation" in any event. Id. Therefore, having found all criteria of the *Spielberg/Olin* standard satisfied, the Board reversed the judge and dismissed the complaint allegation that the Respondent, United Parcel Service (UPS or the Respondent) violated Section 8(a)(3) and (1) of the Act when it discharged Atkinson for violations of the Respondent's methods and procedures.

Atkinson thereafter sought court review of the Board's Order with the United States Court of Appeals for the Third Circuit. The court affirmed in part and vacated in part the Board's order and remanded to the Board for further proceedings. *Atkinson v. National Labor Relations Board*, No. 20-1680, 2021 U.S. App. LEXIS 33417, at *8 (3d Cir. Nov. 9, 2021) (unpublished). Notably, the court affirmed the Board's reinstatement of the deferral standard under *Spielberg/Olin,* noting that the "Board adopted an appropriate deferral standard." Id. at *7. However, the court found that the Board erred in failing to adequately explain its finding that the January 14, 2015 dispute-resolution panel proceedings were fair and regular under *Spielberg*/*Olin*. Id. at *7. Accordingly, the court remanded the case in part "so that the Board can address Atkinson's argument that the dispute-resolution-panel proceeding was not fair and regular." Id.

My colleagues reverse the Board's original decision, concluding that the joint grievance panel proceedings addressing Atkinson's October 28 discharge were not fair and regular. Because I do not believe that the record evidence supports that conclusion, I respectfully dissent. Instead, I would affirm the Board's prior decision dismissing the complaint.

I. BACKGROUND

A. Contract Ratification Issues

Atkinson worked as a package car driver at the Respondent's New Kensington facility in Apollo, Pennsylvania, since 1988. The International Brotherhood of Teamsters represents the Respondent's package car drivers nationwide, and Teamsters Local 538 represents employees at New Kensington, including Atkinson.

New Kensington drivers are covered by both the national master collective-bargaining agreement and a Western Pennsylvania (WPA) local supplement. In May 2013, the Respondent and the Union negotiated a successor national master agreement and successor local supplement agreements. The master agreement required member ratification on a national basis, and each supplement required member ratification on a local basis. In late June 2013, bargaining unit members voted to ratify the national master agreement. The national master agreement could not take effect, however, because bargaining unit members in 18 geographic areas (including Western Pennsylvania) did not ratify their applicable supplemental agreements. Numerous employees from around the country advocated against ratifying the national master agreement and their localities' supplement agreement. Collectively, employees who opposed ratifying the proposed collective-bargaining agreements referred to their efforts as the "Vote No" campaign. Atkinson joined this national Vote No campaign with the goal of persuading the Union to renegotiate a more favorable contract. The Respondent monitored the Vote No campaign to gain a sense of what issues or concerns union members had about the national master agreement and WPA supplement. The Respondent and the Union were both aware of Atkinson's involvement in the Vote No campaign. In late January 2014, there was a second vote on the local supplements, after which only three supplements, including WPA's, remained unratified.

The Vote No campaign ended in late April 2014,[2] when the Union amended its constitution so that it could adopt the remaining unratified local supplements without a vote of its members, which allowed the national master agreement and all the local supplements to take effect. Displeased with the new agreement and how the Union had passed the local supplements, Atkinson ran for local union office in an unsuccessful attempt to replace the longtime New Kensington Union Business Agent Betty Fischer.

B. Discipline of Atkinson

In the first half of 2014, the Respondent disciplined Atkinson on several occasions. In January, Atkinson received a written warning for mishandling a Next Day Air package; in April, he received a verbal warning for scanning the same delivery notice twice; in May, he received a three-day suspension for failing to complete a training and a verbal warning for failing to meet UPS appearance standards; and he received a 10-day suspension in June for an avoidable accident on June 16 after he pulled away from a gas pump while it was still connected to his truck. Atkinson filed grievances over the two suspensions.

In June, the Respondent selected several New Kensington package drivers, including Atkinson, for On-the-Job Supervision (OJS) rides in an effort to improve driver efficiency. Due to his June 16 accident, Atkinson was

[2] All subsequent dates are in 2014 unless otherwise noted.

required to complete a "safety ride"[3] when he returned to work. Upon Atkinson's return on June 18, the Respondent conducted a "blended" ride intended to satisfy the safety ride requirement as well as to operate as a follow-up on Atkinson's performance following his OJS ride. During the "blended" ride, Atkinson committed various infractions while running his route.

On June 19, the Respondent discharged Atkinson for not working as quickly unsupervised as he did while supervised. The following day, Atkinson received a second discharge for failing to follow proper methods, procedures, and instructions during his June 18 blended ride. Atkinson grieved both discharges and was able to continue working while the grievances were pending.

While the grievances were pending, Atkinson left the New Kensington facility on October 28 without downloading the necessary delivery information for his route onto his handheld computer. When Atkinson returned to the facility, the Respondent discharged him for this infraction, in part because he already had two separate discharges from June on his record, had an overall unacceptable work record, and, based on his failure to perform a routine task like downloading the necessary delivery information for his route, did not appear to be trying to change his behavior. Atkinson filed two additional grievances over this discharge.

Atkinson's grievances over his May and June disciplines and discharges went to a joint grievance panel consisting of two representatives from the Union and two from the Respondent on November 4. Dennis Gandee, a regional labor manager, and Steve Radigan, a district labor manager, represented the Respondent, and business agents Jim Beros and Tom Heider represented the Union. Atkinson was represented by Union Business Agent Fischer. The panel reduced Atkinson's 3-day suspension to a written warning, his 10-day suspension to a 3-day suspension, and his June 19 discharge to a 45-day suspension. The panel deadlocked on whether to affirm the June 20 discharge.[4]

The same joint grievance panel considered the October grievances at a January 14, 2015 hearing. The Respondent's case was presented by Tom McCready, the Respondent's labor manager for the geographic area that includes the New Kensington facility. Atkinson was represented again by Fischer and also assisted by Assistant Steward Mark Kerr. Kerr, who had been involved in the Vote No campaign, ran for union office on Atkinson's slate and was Atkinson's friend.

At the hearing, the Respondent and the Union submitted briefs along with exhibits, and both McCready and Fischer read their briefs to the panel.[5] The Union's brief argued that the panel should overturn the discharge, explaining that the Respondent did not have just cause to discharge Atkinson. The brief further argued that "Brother Atkinson [was] being discriminated against due to his Union activity" and "[t]he Company's action is nothing but retaliation for his Union activities." The Union's brief also presented evidence that other employees who had committed similar infractions were not disciplined.

The panel asked questions of each side's witnesses. The panel asked Atkinson about his disparate treatment allegations for union activity. McCready addressed Atkinson's retaliation allegations as well. Due to the amount of information that was presented, the hearing lasted "at least a couple hours," which was longer than a usual hearing for discharge cases. Consistent with its standard procedures, the panel concluded by asking Atkinson if he believed he had an opportunity to present all the facts relevant to his case and whether he felt the union representatives had properly represented him. There is no evidence that Atkinson objected either to the conduct of the hearing or to the adequacy of his representation. Following a private executive session where they debated Atkinson's grievances, the panel unanimously upheld the October 28 discharge, finding that "[b]ased on the facts presented and the grievant's own testimony the committee finds no violations of any contract articles therefore the grievances (# 22310 and # 22311) are denied." Because the joint panel denied Atkinson's grievance, he was officially discharged.

II. DISCUSSION

Consistent with the Board's policy favoring arbitration,[6] the Board has long held that, under *Spielberg/Olin*,

[3] A "safety ride," as the term suggests, involves having a supervisor accompany a driver to ensure that the driver is operating the vehicle safely.

[4] The Third Circuit found that Atkinson's October 28 discharge mooted consideration of his June 20 discharge with respect to Atkinson's argument that the failure to complete arbitration on the June 20 discharge made deferral inappropriate as to both discharges.

[5] Prior to the hearing, Fischer had sent the Respondent an information request concerning Atkinson's discharge.

[6] As the Board recognized in the initial decision in this case, the Supreme Court's decisions in the *Steelworkers Trilogy* were the "foundation stone" behind the federal policy favoring using grievance arbitration to resolve labor issues. See *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960) (noting "[t]he federal policy of settling labor disputes by arbitration"); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960) ("[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. . . . The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement."); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566, 80 S. Ct. 1343,

it will decline to defer to arbitration decisions on the basis that the underlying proceedings were not "fair and regular" when there is proof that an actual conflict of interest existed between the individual employee grievants and other participants in the grievance proceeding. See *Tubari LTD*, 287 NLRB 1273, 1274 n. 4, 1287 (1988), enfd. mem. 869 F.2d 590 (3d Cir. 1989) (finding that deferral to an arbitration award was not appropriate due to an actual conflict of interest between the respondent union and the discharged employees where the union breached its duty of fair representation in the arbitration proceeding by, inter alia, failing to present any evidence of key elements of the employees' grievance); see also *United Postal Service*, 336 NLRB 1182, 1191 (2001) (finding that the grievance panel was not fair and regular where the union president interfered with the proceedings by telling the panel to rule against the grievant); *Warehouse Employees Local 20408 (Dubovsky & Sons*), 296 NLRB 396, 409–410 (1989) (finding deferral to an arbitration decision was not appropriate where the union violated Section 8(b)(1)(A) and (2) by threatening and causing the discharge of the grievants).[7]

The Board has routinely found that arbitration panel proceedings satisfied the fair and regular criterion under *Spielberg* and *Spielberg/Olin,* including where the apparent conflicts between the individual employee grievants and other participants in the grievance proceeding had not adversely affected the manner in which the hearing was conducted. For example, in *Botany 500*, 251 NLRB 527 (1980), the Board found that postarbitral deferral was appropriate where the union had represented the grievant, even though the grievant had campaigned against contract ratification (including by wearing "Vote No" armband) and ran for union business agent against a longtime union business agent. Id. at 528. The Board determined that the grievant "was accorded a full and fair hearing" where the union secured witnesses on the grievant's behalf for the hearing, the grievant was present for the entire proceeding and had the opportunity to testify, and the grievant's protected concerted activity was fully addressed. Id. at 533–535. Moreover, the Board cautioned that the "connection drawn by the General Counsel, without more, is too remote to forfeit the arbitration when in all other respects it was fair and regular . . . ." Id. at 535.[8] Further, the Board has found that UPS

4 L. Ed. 2d 1403 (1960) (stating that the "policy" set forth in Section 203(d) "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play"); accord *UPS I*, 369 NLRB No. 1, slip op. at 2-3.

[7] In finding that the January 14, 2015 joint grievance panel proceedings regarding Atkinson's October 28 discharge were not fair and regular, my colleagues cite *Roadway Express, Inc.,* 145 NLRB 513 (1963), and other significantly older cases, for the principle that joint grievance panels are not fair and regular where "it appears from the evidence that all members of the bipartite panel may be arrayed in common interest against the individual grievant." Id. at 515 (emphases added). In relying heavily on these much older decisions to support their finding that the January 14, 2015 joint grievance panel proceedings regarding Atkinson's October 28 discharge were not fair and regular, my colleagues have disregarded the more recent Board decisions that have found that "apparent" conflicts are insufficient to establish that a proceeding is not fair and regular. My colleagues assert that these decisions did not hold that an "actual" conflict is required to find deferral inappropriate. But the Board in *Motor Convoy, Inc*., relying on *Tubari*, found that an actual conflict is required in this regard. 303 NLRB 135, 136 (1991) ("It is true that the Board has found deferral to arbitration inappropriate when there is proof that an actual conflict of interest existed between individual employee grievants and the union representing them. *Tubari Ltd*., 287 NLRB 1273, 1273 n. 4 (1988). Under *Olin*, however, the General Counsel bears the burden of raising and proving the argument that an actual conflict of interest impaired the fairness of arbitration proceedings.") And the Board again found that an actual conflict is required in *Roadway Express, Inc*., 355 NLRB 197, 203 & n. 28 (2010), enfd. 427 Fed. Appx. 838 (11th Cir. 2011) ("Where the interests of the charging party grievant conflict with the interests of his or her union representative, the arbitral proceedings are not fair and regular, and the Board does not defer to arbitration." (citing, inter alia, *Tubari*, 287 NLRB 1273)).

It is true that the Board did not expressly indicate in post-*Olin* cases that it was no longer applying the "apparent" conflict standard. But my colleagues have failed to cite any post-*Olin* precedent where the Board found that the grievance proceedings were not fair and regular because "it appears from the evidence that all members of the bipartite panel may be arrayed in common interest against the individual grievant." *Roadway Express*, 145 NLRB at 515. This is because all the post-*Olin* cases where the Board has found that deferral was inappropriate based on the "fair and regular" criterion have relied on an actual conflict of interest. I do not share my colleagues' apparent view that Board decisions applying a standard different from a previous standard are not controlling simply because the Board did not expressly indicate therein that it had chosen to apply a different standard. Nor have they cited any cases supporting that principle.

Finally, I note that the General Counsel appears to agree that an actual conflict is necessary. In her position statement, the General Counsel, citing *Dubovsky & Sons*, 296 NLRB at 409, stated that "the Board should not defer where the interests of the alleged discriminatee are in conflict with both the union and the employer." (Emphasis added.)

[8] See also *In re Turner Const. Co*., 339 NLRB 451, 456 (2003) (rejecting the General Counsel's contention that the grievance proceedings were not fair and regular because the management representatives had interests arguably at odds with the grievants, explaining, among other things, that the General Counsel did not show that the proceedings were "procedurally deficient"); *Yellow Freight System, Inc.*, 337 NLRB 568, 570 (2002) (observing that whether a proceeding is "fair and regular" "entail[s] a review of what might be termed 'procedural due process'" and concluding that the arbitration panel was not unfair where the panel based its decision on written evidence); *Motor Convoy, Inc.*, 303 NLRB at 136 (rejecting the dissent's argument that the arbitral proceeding was not fair and regular where there was no proof of an actual conflict of interest based on the arbitration proceeding itself where, among other things, the employer supported the grievants' position in arbitration); *Bailey Distributors*, 278 NLRB 103, 106 (1986), revd. on other grounds, 796 F.2d 14 (2d Cir. 1986) (rejecting the judge's finding that the arbitration was not fair and regular because of a conflict of interest between the union and the grievant where, among other things, the

and the Teamsters' grievance process was fair and regular for deferral purposes on many occasions. See, e.g., *United Parcel Service*, 270 NLRB 290, 291 (1984); *United Parcel Service, Inc*., 232 NLRB 1114, 1114–1115 (1977), enfd. 603 F.2d 1015 (D.C. Cir. 1979).

Applying this actual conflict of interest standard, I would affirm the Board's prior holding that the January 14, 2015 joint grievance panel proceedings that considered Atkinson's October 28 discharge were fair and regular. Even assuming that Atkinson's union representative, Fischer, and joint grievance panel member Gandee did not particularly like Atkinson,[9] there is no support for finding that any such personal feelings resulted in proceedings that were less than fair and regular.

To begin, my colleagues have failed to identify anything unfair or irregular that occurred during the joint grievance panel proceedings that would suggest an actual conflict. There is no evidence that Fischer's presentation of Atkinson's case to the grievance panel was affected by any personal animus. Instead, the record reflects that Fischer was a strong advocate for Atkinson during the panel proceedings. Specifically, in preparation for the hearing, the Union submitted an information request to the Respondent concerning Atkinson's discharge.[10] In addition, the Union submitted a brief and exhibits to the panel. Fischer read from the case file to the panel and responded to the panel's questions. Further, the Union's brief strongly advocated for Atkinson, arguing that Atkinson's discharge was unlawful and that "[t]he Company's action is nothing but retaliation for his Union activities." In support of its position, the Union's brief alleged that Atkinson was the victim of disparate treatment and presented evidence to support this argument. Indeed, the majority has failed to point to anything that Fischer should have done that she did not do or to anything that she did improperly during her representation of Atkinson at the joint grievance panel. Cf. *Roadway Express*, 355 NLRB at 202–204 (finding that arbitral proceedings were not fair and regular where union representative deliberately misled arbitral panel to ensure that union adversary's grievance was denied). In addition, Local 538 Assistant Steward Kerr, who ran for union office on Atkinson's slate, also supported Atkinson at the joint grievance panel, including answering questions from the panel. Like Fischer, it is clear Kerr was an advocate for Atkinson.[11]

Moreover, the joint grievance panel followed its standard procedures. The panel asked questions of both sides. Atkinson had the opportunity to testify about his disparate treatment allegations, providing examples to support his claims. There was no evidence of anything irregular or out of the ordinary about the January 14, 2015 grievance panel; for example, there is no evidence that the hearing was shorter than usual for such proceedings or that the panel failed to deliberate for an adequate period of time. Simply put, the record does not support my colleagues' conclusion that the grievance panel "rushed to judgment."[12]

My colleagues make much of Atkinson's involvement in the local Vote No campaign, arguing that the joint panel participants and Fischer were biased against Atkinson because they had served on the bargaining committee for the WPA supplement agreement that he actively opposed. But the majority provides no evidence that the panel participants' or Fischer's role in contract negotiations influenced their consideration of Atkinson's griev-

grievant's attorney attended the entire arbitration and did not object to the evidence offered or try to provide additional evidence).

[9] As set forth below, there is no evidence of specific bias by Union panel members Jim Beros and Tom Heider or by the other UPS panel member, Steve Radigan.

[10] My colleagues emphasize that the information request submitted by Kerr to support Atkinson's June discharges was denied twice. There is no evidence, however, these denials were due to any animus toward Atkinson's dissident activity. Instead, the record showed the information request was denied because the Respondent requires information requests to be submitted by the union business agent in order to safeguard any sensitive documents or internal reports contained in the Respondent's reply.

[11] My colleagues claim that Kerr's assistance of Atkinson was "circumscribed" by UPS's "insistence on dealing only with Fischer as representative." But the record shows that Kerr responded to "a lot of questions from both sides of the committee."

[12] My colleagues claim that I place too much weight on the absence of any procedural irregularities in the administration of the January 14, 2015 joint grievance panel proceedings. But, as discussed above, the Board explained in *Motor Convoy* that "under *Olin*, the General Counsel bears the burden of raising and proving the argument that an actual conflict of interest affected the fairness of arbitration proceedings." 303 NLRB at 136. (emphasis added); see also *International Harvester Company*, 138 NLRB 923, 928 (1962) (observing that "procedural regularity is not . . . an end in itself, but is . . . a means of defending substantive interests."), enfd. 327 F.2d 784 (7th Cir. 1964), cert. denied 377 U.S. 1003 (1964). And in numerous cases, as set forth above, the Board has looked to the grievance hearing itself in determining whether deferral was appropriate on fair and regular grounds. See, e.g., *Roadway Express*, 355 NLRB at 204; *United Postal Service*, 336 NLRB at 1191; *Tubari*, 287 NLRB at 1273 n. 4; *Herman Brothers*, 252 NLRB 848, 848, 852–853 (1980), enfd. 658 F.2d 201 (3d Cir. 1981); *Mason and Dixon Lines, Inc.*, 237 NLRB 6, 12 (1978). Moreover, contrary to my colleagues' assertion, the record does not just show the "absence of any blatant procedural missteps" during Atkinson's hearing. As discussed above, the record demonstrates that the Union effectively represented Atkinson and that he was "was accorded a full and fair hearing." *Botany 500*, 251 NLRB at 535.

My colleagues also assert that "given the existing and well-known conflicts, we are not surprised that the [hearing] participants may have been scrupulous about the administration of the hearing." Of course, my colleagues have cited no evidence to support their wild speculation that Fischer actively conspired with the panel members, three of whom showed no specific evidence of animus towards Atkinson, to hold a hearing simply for show.

ance. Indeed, the record fails to show the extent to which the panel participants or Fischer were even involved in the contract negotiations.[13] Therefore, my colleague's contention that the panel members' simply or Fischer's role in negotiations would "naturally generate antagonism" toward Atkinson is unfounded on this record.[14]

Additionally, any involvement that the panel members might have had with the contract negotiations ended with the conclusion of negotiations in April 2013—almost 2 years before the grievance hearing. And the Vote No campaign, which ultimately ended in failure, concluded approximately nine months before the grievance hearing. In any event, the Board has repeatedly rejected my colleagues' argument that an actual conflict exists for purposes of the fair and regular standard under *Spielberg/Olin* just because the grievant did not support the union representing him. *Tubari*, 287 NLRB at 1273 n. 4; see also *Botany 500*, 251 NLRB at 534 n. 23 (observing that "the fact that [grievant] and [the union shop chairman] disagreed on union politics [did] not by itself establish that … the arbitration was not fair and regular"); *United Parcel Serv., Inc*., 234 NLRB 483, 490 (1978), enfd. denied mem. 1979 WL 32446 (6th Cir. 1979) (noting that it cannot be "infer[red] that the [u]nion did not fairly represent [the grievant] in his final grievance proceeding simply because [of] . . . the widely publicized alleged dispute between [the dissident group] and the hierarchy of the Teamsters").[15]

My colleagues also point to an email from Fischer to McCready, in which Fischer questioned whether Atkinson had talked to other employees about his campaign to replace Fischer as business agent on work time to bolster their finding of an actual conflict. I do not believe that this email supports the weight that my colleagues place on it. Fischer's one-sentence email was sent in May 2014—almost 8 months before Atkinson's hearing. And this email did not even form the basis of Atkinson's dis-

[13] The evidence shows that the two union panel members, along with every other business agent in Western Pennsylvania, served on the bargaining committee simply by virtue of their union office. There is simply no record evidence as to what these members actually did with respect to negotiating the new contract. For instance, one of the Respondent's panel members, Steve Radigan, merely "sat in" on negotiations. If just being part of a union's bargaining committee precluded the union members and business agents in this case from serving on the grievance panel, it would follow that hereinafter every similarly situated union panel member or business agent would also be so barred.

[14] I also take issue with the majority's assertions that Atkinson's "visible leadership of the opposition to ratification was effective" and that "his advocacy led to the WPA region being among the last three regions holding out against the agreement by the second ratification vote." Although Atkinson started the Vote No campaign at New Kensington and created a Vote No Facebook page, a number of bargaining unit members covered by the WPA supplement supported the Vote No campaign and engaged in Vote No activities. Once the campaign was underway, however, there is no evidence that Atkinson played any more of a "leading" role in preventing the ratification of the WPA supplement than did any of the other participants in the Vote No campaign.

[15] In support of their position that actual conflict is not required, my colleagues rely on several significantly older cases, including *Roadway Express*, 145 NLRB at 515, *Youngstown Cartage Co*., 146 NLRB 305, 308 n.4 (1964); *Mason and Dixon Lines*, 237 NLRB at 6 n.2, 12-13; *Brown Co.*, 243 NLRB 769, 770 (1979), enf. denied on other grounds and remanded, 663 F.2d 1078 (9th Cir. 1981); and *Herman Brothers*, 252 NLRB at 848, 852–853.

I find those cases distinguishable. In *Herman Brothers*, the grievant's opposition to the contract was still an active dispute at the time of the hearing as the contract had not yet been ratified. 252 NLRB at 850-853. In addition, the grievant also had demanded the resignation of a steward (who had punched another union member in the mouth) a few weeks before the hearing. Id. at 851. Most significantly, during its presentation to the joint panel, the employer made a material misrepresentation about the grievant's disciplinary history, which the union failed to correct. Id. at 852. Here, contrary to my colleagues' assertions, there is no evidence of similar misconduct by the panel members or the Union. Further, in this case, the national master agreement and local supplements were ratified by April 2014, which was approximately 9 months before the grievance hearing.

During the hearing in *Mason and Dixon Lines*, the union business agent "offered 'very little' testimony or evidence on [the grievant's] behalf, and that at the beginning, [the union business agent] said to [the grievant] "... you are more familiar with your own case... why don't you put up your own defense?" 237 NLRB at 11–12. The Board observed that the arbitration hearing "lacked little (if any) resemblance of traditional fairness and due process." Id. at 12. Fischer did nothing of this sort during the joint grievance panel proceedings here.

In *Brown*, four members of the six-person grievance committee had interests opposed to the grievant, including a one of the union members, who represented a rival union.

In *Roadway Express*, the Board emphasized the fact that the grievant had formed a rival union and had repeatedly and publicly attacked the trucking industry. 145 NLRB at 515. Likewise, in *Youngstown*, the grievant had sought to form a competing union, and incumbent union officials had threatened the grievant. 146 NLRB at 308 n. 4. Atkinson's dissident activities pale in comparison.

In *Tubari LTD*, also cited by my colleagues, the union was found to have violated Sec. 8(b)(1)(A) by breaching its duty of fair representation to the discharged employees in the arbitration proceeding by, inter alia, failing to present any evidence of key elements of their grievance. 287 NLRB at 1273 n. 4, 1274, 1287. My colleagues observe that the Board has not required a finding that the union breached its duty of fair representation to find that a conflict of interest existed. But in most of the post-*Olin* cases in which the Board found that the grievance proceedings were not fair and regular, the Board has also found that the union breached its duty of fair representation. See *Roadway Express*, 355 NLRB at 204; *Dubovsky & Sons*, 296 NLRB at 409. In this vein, it is noteworthy that the General Counsel dismissed Atkinson's unfair labor practice charges alleging that the Union breached its statutory duty of fair representation by, among other things, failing to investigate or meaningfully support his grievances, including the grievance regarding his final discharge; and by encouraging, rather than opposing, UPS's disciplinary actions against him, "throughout the grievance process from June 23, 2014 through the present time." The General Counsel concluded that the "evidence failed to show that the Union did not properly process grievances on behalf of the alleged discriminatee."

cipline and discharge. Indeed, McCready testified, and it is undisputed, that the Respondent never even investigated the matter.[16] The majority also asserts that Fischer could not fairly represent Atkinson because he ran against her for the union office she held. Yet, Fischer prevailed in the election three months before the hearing even started.

I also disagree with the majority's assertion that UPS panel member Gandee's monitoring of the Vote No campaign provides evidence of the adverse interest between Atkinson and the Respondent. Gandee's conduct in this regard took place close to a year before the January 2015 panel convened. Moreover, there is no evidence that Gandee played any role in Atkinson's discharge. Indeed, the judge does not even mention Gandee in his decision.

In addition, in my view, the majority has overstated the evidence it cites in support of its assertions that Gandee closely monitored Atkinson's Vote No conduct and brought "it to the attention of national UPS officials." For example, the majority cites an email that Gandee sent to several members of UPS management, complaining about employees' Vote No activity and asking whether UPS had to allow this. But there is no mention of Atkinson's name in this email. My colleagues likewise observe that "Gandee also communicated repeatedly with District Labor Manager Eans about Atkinson's protected conduct." It is true that Gandee and Eans discussed a Facebook post from one of the drivers at the New Kensington (not Atkinson), noting that a driver was unlawfully discharged and several drivers, including Atkinson, responded to the post. But again, nowhere in these emails does Gandee link the Vote No campaign to Atkinson. My colleagues also rely on an email exchange between Eans and Gandee, in which Eans referred to a "ring leader" with a "vote no website out there" and stated, "Betty can't stand him." My colleagues suggest that Atkinson was the "ring leader" being referenced. However, Eans testified that this email referred to Kerr, and the judge did not find otherwise.

Moreover, the joint grievance panels have inherent fairness built into the panel process by the requirement that decisions must be reached by full consensus of the panel members. Therefore, even assuming, as my colleagues claim, that panel member Gandee was biased against Atkinson because of his dissident activities, Gandee had no ability to affirm Atkinson's termination without the other panel members. All four panel members (both UPS and union representatives) had to agree. My colleagues contend that I "downplay the panel members' and Fischer's involvement in contract negotiations" and, thereby, minimized the conflict caused by the Vote No campaign, which was a major concern for the Respondent as well as the Union. But, contrary to my colleagues' suggestion, there is no evidence of specific bias by the union panel members or other UPS panel member. Accordingly, I do not agree with my colleagues' finding that the joint panel had a "shared interest in [Atkinson's] removal from employment."[17]

Finally, I find it significant that this same joint panel that heard Atkinson's grievances on January 14, 2015, had shown leniency to Atkinson just two months beforehand. The November 4 joint grievance panel deadlocked on Atkinson's June 20 discharge and reduced to a suspension the June 18 discharge and earlier disciplines. And Fischer represented Atkinson as well during that panel. That the same panel had overturned Atkinson's prior discharge further undermines the majority's claim that the joint grievance panel proceedings were not fair and regular. If the panel wanted to get rid of Atkinson, they could have done so then. Cf. *Hammontree v. NLRB*, 925 F.2d 1486,1499 n. 32 (1990) (rejecting argument that grievance process was unfair where grievant's earlier grievance was resolved in his favor).[18]

[16] My colleagues cite to both *Russ Togs*, 253 NLRB 767, 768 (1980), and *Dubovsky & Sons*, 296 NLRB at 409–410, as support for their contention that Fischer played a role in Atkinson's discharge. However, in *Russ Togs*, it was undisputed that the employer had terminated the grievant based on information it obtained from the union, among other sources. 253 NLRB at 768. Similarly, in *Dubovsky & Sons*, 296 NLRB 396, 409–410, the Board found that deferral to an arbitration decision was not appropriate where the union violated Sec. 8(b)(1)(A) and (2) by threatening and causing the discharge of the grievants. In contrast, here, the record fails to show union complicity in Atkinson's discharge or that the Union breached its duty of fair representation to Atkinson. Further, in both *Russ Togs* and *Dubovsky & Sons*, the respective grievance disputes were submitted to arbitration shortly after the union played a role in the grievants' terminations. 253 NLRB at 767, 781–882; 296 NLRB at 407. By contrast, in this case, there is no evidence that any alleged hostility on the part of the Union occurred in close proximity to the January 2015 panel.

[17] It is important to note that the logic of my colleagues' argument calls into question the entire bipartite panel process. They observe that there was a conflict between the grievant, on the one hand, and his union and his employer, on the other, because the grievant opposed the parties' contract. Yet, in the typical grievance scenario, the grievant will be in conflict with their employer because the employer has acted against the grievant in some way. Accordingly, under the majority's reasoning, it would never be possible to have a "fair and regular" bipartite grievance panel proceeding so long as any conflict—whether it be large or small, whether it be actual or apparent—could exist between the grievant and the union, even if the union satisfied its duty of fair representation. I cannot help but wonder whether any but the most straightforward bipartite panel process will survive my colleagues' review.

[18] My colleagues contend that Atkinson's earlier disciplines that began in January 2014—including a written warning in January, a verbal warning in April, a three-day suspension in May, and a ten-day suspension in June—that were considered by the November 4 joint grievance panel were motivated by the Respondent's animus toward Atkinson's

In sum, in my view, Atkinson's dissident activities are insufficient to establish an actual conflict of interest between Atkinson with the panel members and Fischer. I believe that the majority has made "too remote of connections in an effort to forfeit arbitration when in all other respects was fair and regular." *Botany 500*, 251 NLRB at 535. I would therefore adhere to the Board's prior finding that the joint grievance panel proceedings to resolve Atkinson's grievances over his October 28, 2014 discharge were fair and regular and that deferral to the panel's decision upholding Atkinson's discharge was appropriate.

Dated, Washington, D.C. November 21, 2023

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge employees because they refrain from supporting and assisting the International Brotherhood of Teamsters and/or Teamsters Local 538 and engage in union dissident activity and/or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Robert C. Atkinson, Jr. full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert C. Atkinson, Jr. whole for any loss of earnings and other benefits resulting from the unlawful June 20 and October 28, 2014 discharges against him, less any net interim earnings, plus interest, and WE WILL also make Atkinson whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful discharges, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful June 20 and October 28, 2014 discharges against Robert C. Atkinson, Jr. and WE WILL, within three days thereafter, notify him in writing that this has been done and that the unlawful discharges will not be used against him in any way.

WE WILL compensate Robert C. Atkinson, Jr. for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Atkinson's corresponding W-2 form(s) reflecting the backpay award.

UNITED PARCEL SERVICE, INC.

The Board's decision can be found at www.nlrb.gov/case/06-CA-143062 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Vote No activity. My colleagues then conclude that these earlier disciplines do not show the panel's leniency but rather emphasize the consequences of Atkinson's Vote No activity. I disagree. Contrary to my colleagues' suggestion, the judge did not find that these specific disciplines were motivated by the Respondent's animus toward Atkinson's protected conduct and there is no evidence that they were. Again, the November 4 joint grievance panel had the opportunity to discharge Atkinson at this time but did not do so.