

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 10-94:

4	STEVE WINCHESTER,)	
)	
5	Complainant,)	
)	
6	vs.)	ORDER
)	
7	MOUNTAIN LINE - MARY PLUMLEY,)	
)	
8	Defendant.)	

* * * * *

On September 30, 1993, Complainant filed an Unfair Labor Practice Charge (Charge) with this Board alleging that Defendant had violated Sections 39-31-401(1), (2), and (4) and 39-31-201, MCA. Complainant contended that his employment suspension and eventual discharge were based upon his union activities and role as Union Shop Steward. This Board thereafter issued a Summons.

On October 8, 1993, Defendant filed its Response denying all charges. Defendant requested that the Charge be deferred, under the Collyer Doctrine¹, to the grievance and arbitration procedures set forth in the existing collective bargaining agreement.

On October 25, 1993, this Board issued a Recommended Order dismissing the Charge without prejudice finding the parties had submitted Complainant's suspension and discharge controversy to the arbitration process contained in the existing collective bargaining agreement. This Board noted that deferral to the already scheduled arbitration was proper under the Collyer Doctrine. The Recommended

¹ Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1971)

1 Order further provided that this Board retain jurisdiction for the
2 sole purpose of entertaining:

3 "...an appropriate and timely motion for further
4 consideration upon a proper showing that either:
5 the dispute has not, within a reasonable time, been
6 resolved pursuant to the parties' negotiated
7 grievance/arbitration procedure; or have reached a
8 result which is repugnant to the public policy
9 considerations of the Montana Collective Bargaining
10 for Public Employees Act."

11 On November 2, 1993, Complainant timely filed objections to
12 the Recommended Order. Thereafter, the matter was transferred to
13 the Hearings Bureau for adjudication.

14 Following two pre-hearing conferences, a date for a formal
15 hearing was scheduled and a Notice of Hearing was issued. Prior to
16 hearing, Defendant filed a Motion To Dismiss. The parties agreed
17 the Motion To Dismiss must be addressed prior to hearing,
18 therefore, the hearing date was vacated and a briefing schedule was
19 established.

20 Defendant argues in its Motion To Dismiss that Complainant's
21 Charge, his suspension and discharge, was fully and finally decided
22 in the binding arbitration which occurred December 1, 1993.
23 Defendant further argues that the matter was properly deferred to
24 arbitration under the Collyer Doctrine and the Spielberg Doctrine².

25 Complainant argues that, pursuant to the existing collective
26 bargaining agreement, any alleged violation of federal or state law
27 was not subject to the grievance and arbitration procedures and,
28 therefore, the Collyer Doctrine was inapplicable. Complainant's

² Spielberg Manufacturing Company, 112 NLRB 1080, 36 LRRM 1152
(1955)

1 Charge alleges violations of Sections 39-31-401(1), (2), and (4)
2 and 39-31-201, MCA.

3 In William M. Converse, Affiliated with the International
4 Association of Fire Fighters, Local 436 v. Anaconda-Deer Lodge
5 County, ULP No. 43-81 (April, 1982) and James Forsman, Affiliated
6 with the International Association of Fire Fighters, Local 436 vs.
7 Anaconda-Deer Lodge County, ULP No. 44-81 (April, 1982), this Board
8 formally adopted the National Labor Relations Board's precedent of
9 deferring certain unfair labor practice proceedings to an existing
10 negotiated grievance and arbitration procedure as set forth in
11 Collyer Insulated Wire, supra.

12 ULP No. 43-81 (William M. Converse, supra) set forth certain
13 standards for pre-arbitral deferral:

14 "The Collyer decision emphasized that the
15 prearbitral deferral process was appropriate where
16 the underlying dispute centered on the
17 interpretation of application of the collective
18 bargaining contract.... In practical application,
19 the factor requires that: (1) the contract
20 contains language expressly governing the subject
21 of the allegation, (2) the issue be deemed
22 appropriate for resolution by an arbitrator, (3)
23 the center of the dispute be interpretation of a
24 contract clause rather than interpretation of
25 provision of the Act."

21 And further, ULP No. 43-81 stated:

22 "Absent specific allegations of fact supporting a
23 violation of Sections 39-31-401(1) or (3), MCA, the
24 Board of Personnel Appeals can defer under the
25 Collyer policy."

25 In this instant matter, the Charge, as asserted by
26 Complainant, appears to be alleged violations of the Collective
27 Bargaining Act for Public Employees and not the existing collective
28 bargaining agreement he was subject under. The Charge, therefore,

1 does not meet the standards for deferral under the Collyer
2 Doctrine. Therefore, Defendant's Motion To Dismiss is hereby
3 DENIED.

4 DATED this 27th day of July, 1995.

5 BOARD OF PERSONNEL APPEALS

6
7 By: Stan Gerke
8 STAN GERKE
9 Hearing Officer

10 SPECIAL NOTE

11 In accordance with Board's Rule ARM 24.26.215(2), the above Order
12 shall become the Final Order of this Board unless written
13 exceptions are filed within twenty (20) days after service of this
14 Order upon the parties.

15 * * * * *

16 CERTIFICATE OF MAILING

17 The undersigned hereby certifies that true and correct copies
18 of the foregoing documents were, this day served upon the following
19 parties or such parties' attorneys of record by depositing the same
20 in the U.S. Mail, postage prepaid, and addressed as follows:

21 Richard R. Buley
22 Attorney at Law
23 P.O. Box 3778
24 Missoula, MT 59806-3778

25 Margaret L. Sanner
26 Attorney at Law
27 P.O. Box 4947
28 Missoula, MT 59806-4947

DATED this 27th day of July, 1995.

Christine A. Roland

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 10-94:

STEVE WINCHESTER
COMPLAINANT

- vs -

MOUNTAIN LINE - MARY PLUMLEY
DEFENDANT

)
)
)
) FINAL ORDER
)
)
)

* * * * *

The above-captioned matter came before the Board of Personnel Appeals (Board) on September 27, 1995. Appearing before the Board were Margaret L. Sanner, attorney for the defendant, and Richard R. Buley, attorney for the complainant. The matter before the Board concerned whether the hearing officer properly denied a motion to dismiss the unfair labor practice charge filed by the complainant.

At the Board proceeding, Mr. Buley argued that the unfair labor practice charge is a violation of state law which results in avoidance of arbitration pursuant to the terms of the collective bargaining agreement. In contrast, Ms. Sanner argued that the unfair labor practice charge alleges a violation of the collective bargaining agreement resulting in the requirement of submitting the dispute to arbitration.

After considering the record and the arguments made by the parties, the Board finds the decision of the hearing officer which denied the motion to dismiss to be in error. Article seven of the collective bargaining agreement prohibits discrimination against a person because of union activities. A basis for the unfair labor practice charge is discrimination because of union activities. Thus the unfair labor practice charge is covered by the collective bargaining agreement and pursuant to that agreement, is subject to arbitration. This Board is of the opinion that deferral to arbitration was the proper procedure in which to present this dispute pursuant to the Collyer doctrine. See *Collyer Insulated Wire, 192 NLRB 837 (1971)*.

Accordingly, the Board orders as follows:

1. IT IS HEREBY ORDERED that the hearing examiner's decision to deny defendant's motion to dismiss is reversed.

2. IT IS FURTHER ORDERED that unfair labor practice charge number 10-94 is hereby dismissed.

1 DATED this 2nd day of October, 1995.

2
3 BOARD OF PERSONNEL APPEALS

4
5
6 By Willis M. McKeon
7 WILLIS M. MCKEON
8 PRESIDING OFFICER
9

10 Board members Schneider, Talcott and Hagan concur.

11
12 Board members McKeon and Henry dissent.

13 * * * * *

14
15
16 NOTICE: You are entitled to Judicial Review of this Order.
17 Judicial Review may be obtained by filing a petition for Judicial
18 Review with the District Court no later than thirty (30) days from
19 the service of this Order. Judicial Review is pursuant to the
20 provisions of Section 2-4-701, et seq., MCA.

21 * * * * *

22
23 CERTIFICATE OF MAILING

24 I, Jennifer Jacobson, do hereby certify
25 that a true and correct copy of this document was mailed to the
26 following on the 27th day of October, 1995:
27
28
29

30 RICHARD R. BULEY
31 ATTORNEY FOR COMPLAINANT
32 TIPP & BULEY
33 PO BOX 3778
34 MISSOULA MT 59806-3778
35

36 MARGARET L. SANNER
37 ATTORNEY FOR DEFENDANT
38 MILODRAGOVICH DALE STEINBRENNER & BINNEY PC
39 PO BOX 4947
40 MISSOULA MT 59806-4947
41

42 * * * * *

1 prohibits discrimination against a person because of union
2 activities. Accordingly, the matter was fully and finally decided
3 against Winchester in an arbitration which occurred on December 1,
4 1993. See Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1971)
5 (NLRB may defer to final binding arbitration if four criteria are
6 met: (1) the unfair labor practice issue must have been presented to
7 and considered by the arbitration panel, (2) the arbitration
8 proceedings must appear to have been fair and regular, (3) all
9 parties to the proceeding must have agreed to be bound, and (4) the
10 decision of the arbitration tribunal must not be clearly repugnant
11 to the purposes and policies of the act).

12 Winchester maintains that the Collective Bargaining Agreement
13 specifically excludes arbitrations of alleged violations of law and
14 therefore the "Collyer Doctrine" does not apply. Further,
15 Winchester maintains that the recent case of Pryner v. Tractor
16 Supply Co., 109 F.3d 354 (7th Cir. 1997) decides the issue wherein
17 the 7th Circuit federal court determined that right to federal
18 statutory remedies were personal with the employee whereas the right
19 to bring a grievance or to arbitrate was only available to the
20 union. Thus, the only Collyer criteria challenged by Winchester is
21 the third criteria requiring agreement by all parties to be bound.
22 Essentially, Winchester argues that he should be allowed to opt out
23 of the arbitration process based on the Pryner decision.

24 The Montana Board of Labor Appeals formally adopted the
25 National Labor Relations Board's precedent of deferring certain
26 unfair labor practice proceedings to an existing negotiated

1 grievance and arbitration procedure as set forth in the Collyer
2 decision. William M. Converse, Affiliated with the International
3 Association of Fire Fighters, Local 436 v. Anaconda-Deer Lodge
4 County, ULP No. 43-81 (April, 1982). Nevertheless, that does not
5 make Pryner decisive in this matter as Winchester's claims are based
6 on Montana law, not federal law, and Montana law specifically allows
7 arbitration of labor disputes pursuant to MCA § 39-31-306.
8 Furthermore, Winchester is bound by his agent's actions, the
9 Collective Bargaining Unit, which specifically agreed that the
10 allegations made by Winchester are subject to arbitration. Thus,
11 the Final Order of the Montana Board of Personnel Appeals dismissing
12 Winchester's unfair labor practice charge is AFFIRMED, and
13 Winchester's Petition for Judicial Review is DENIED.

14 DATED this 13th day of February, 1998.

15 ED McLEAN

16 ED McLEAN
17 District Judge

18 cc: Richard Buley, Esq.
19 Margaret L. Sanner, Esq. ✓

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26
MIL

6/14/99

IN THE SUPREME COURT OF THE STATE OF MONTANA

1999 MT 134

294 Mont. 517

982 P.2d 1024

STEVE WINCHESTER,

Plaintiff and Appellant,

vs.

MOUNTAIN LINE, MARY PLUMLEY, and

THE BOARD OF PERSONNEL APPEALS,

DEPARTMENT OF LABOR,

Defendants and Respondents.

APPEAL FROM: District Court of the Fourth Judicial District,

In and for the County of Missoula,

The Honorable Ed McLean, Judge presiding.

RECEIVED

MAY 02 2002

HEARINGS BUREAU

COUNSEL OF RECORD:

For Appellant:

Richard R. Buley, Tipp & Buley, Missoula, Montana

For Respondents:

James A. Bowditch, Milodragovich, Dale, Steinbrenner & Binney, Missoula, Montana

Submitted on Briefs: December 3, 1998

Decided: June 14, 1999

Filed:

Clerk

Justice James C. Nelson delivered the Opinion of the Court.

¶1. Steve Winchester (Winchester) appeals from the Opinion and Order of the Fourth Judicial District Court, Missoula County, which affirmed the Final Order of Montana Board of Personnel Appeals which dismissed Winchester's unfair labor practice charge against Mountain Line and its general manager, Mary Plumley (collectively, "Mountain Line"). We reverse and remand for further proceedings consistent with this opinion.

¶2. Winchester raises one issue on appeal, which we restate as follows:

¶3. Did the District Court err in deciding that Winchester's unfair labor practice claims were subject to the final and binding arbitration clause in the collective bargaining agreement?

Background

¶4. Winchester was employed by Mountain Line, an urban transportation district in Missoula, as a bus driver. Winchester was a member of Teamsters Union Local No. 2 (Teamsters) and served as the Teamsters' shop steward at Mountain Line. The employment relationship between Winchester and Mountain Line was governed by a Collective Bargaining Agreement (CBA) between the Teamsters and Mountain Line which was effective from June 2, 1993, to June 30, 1996.

¶5. On July 16, 1993, Mountain Line suspended Winchester for allegedly violating Mountain Line's bus drivers' handbook by stopping a bus in the middle of an intersection and instructing a passenger to get off the bus and retrieve a hatchet which was laying on the street. On August 6, 1993, Mountain Line held a pre-termination hearing regarding the incident that gave rise to Winchester's suspension. Later that August, Mountain Line discharged Winchester, retroactive to July 16, 1993, for his alleged violation of the bus drivers' handbook.

¶6. On September 15, 1993, a grievance hearing was held regarding Winchester's discharge. Mountain Line upheld Winchester's discharge.

¶7. On September 29, 1993, the Teamsters asked Mountain Line to arbitrate the dispute over the reasons underlying Winchester's discharge pursuant to the arbitration clause in the CBA. On the following day, September 30, 1993, Winchester filed an unfair labor practice charge with the Montana Department of Labor and Industry,

Board of Personnel Appeals (Board). Winchester's charge alleged that Mountain Line first suspended him and then discharged him for soliciting other employees to attend a meeting at his house to discuss the decertification process required to change union representation and because he was the shop steward. Therefore, Winchester asserted that Mountain Line committed unfair labor practices in violation of §§ 39-3-201 and 39-31-401(1), (2), and (4), MCA.

¶8. On October 10, 1993, Mountain Line responded to Winchester's charge. Mountain Line asserted that it discharged Winchester for just cause pursuant to the CBA. Mountain Line also pointed out that the Teamsters had requested that the dispute be resolved through the arbitration procedure set out in the CBA. Hence, Mountain Line urged the Board to defer to the arbitration procedure.

¶9. On October 25, 1993, the Board's investigator issued a Recommended Order wherein she recommended that Winchester's charge be dismissed without prejudice to any party and without deciding the merits of the charge. The investigator recommended that the Board defer to the already scheduled arbitration pursuant to the "pre-arbitral deferral" policy which the National Labor Relations Board (NLRB) set out in *Collyer Insulated Wire* (1971), 192 N.L.R.B. 837, 77 L.R.R.M. 1931, and which the Board adopted in *William Converse v. Anaconda Deer Lodge County*, ULP 43-81 (April 1982) and *James Forseman v. Anaconda Deer Lodge County*, ULP 44-81 (April 1982). Notwithstanding, the investigator recommended that the Board retain jurisdiction over the matter so that the Board could hear the case if the dispute was not resolved within a reasonable time pursuant to the arbitration procedure set out in the CBA, if the arbitral procedure was not fair, or if the arbitrators reached a result which was repugnant to the public policy considerations contained in the Collective Bargaining for Public Employees Act, §§ 39-31-101 et seq., MCA.

¶10. Winchester filed objections to the investigator's Recommended Order on November 4, 1993. Winchester asserted that deferring to arbitration under *Collyer* was improper because the CBA stated that any alleged violation of federal or state law was not subject to the arbitration procedure. Since Winchester objected to the investigator's Recommended Order, the Board transferred the case to the Department of Labor's Hearings Bureau on December 22, 1993.

¶11. Despite Winchester's objection to the investigator's recommendation to defer the arbitration procedure, an arbitration hearing was held on December 1, 1993. Winchester did not attend the arbitration hearing. The arbitrators upheld Mountain Line's decision to discharge Winchester.

¶12. Thereafter, on November 25, 1994, Mountain Line filed a motion to dismiss Winchester's unfair labor practice charge on the grounds that the dispute was resolved at the arbitration hearing. On December 13, 1994, Winchester responded to Mountain Line's motion to dismiss by reiterating that the CBA specifically excluded claims made under state statutes from the arbitration. Hence, Winchester argued that deferral to

the arbitration procedure under *Collyer* was improper, that the arbitration hearing violated the CBA and, therefore, that the arbiters' decision was not binding.

¶13. On July 27, 1995, a hearings officer issued an Order on behalf of the Board which denied Mountain Line's motion to dismiss. The hearings officer ruled that Winchester's charge alleged that Mountain Line violated the Collective Bargaining for Public Employees Act, and not the CBA. Consequently, the hearings officer ruled that deferral to arbitration under *Collyer* was inappropriate.

¶14. On August 16, 1995, Mountain Line filed objections to the hearings officer's Order. Mountain Line maintained that deferring to the arbitration procedure was proper and, in effect, that the hearings officer erred in denying its motion to dismiss.

¶15. On September 27, 1995, the Board held a hearing on Mountain's Line's objections to the hearings officer's Order which denied its motion to dismiss. On October 2, 1995, the Board issued its Final Order wherein it determined that the hearings officer erred in denying Mountain Line's motion to dismiss. The Board stated that the basis for Winchester's unfair labor practice charge was discrimination because of union activities. Since the CBA prohibited discrimination because of union membership, the Board ruled that Winchester's unfair labor practice charge was covered by the CBA and, therefore, that it was subject to the grievance procedure set out in the CBA which culminated in final and binding arbitration. Thus, the Board ruled that deferral to the arbitration under *Collyer* was proper. Accordingly, the Board reversed the hearings examiner's decision and dismissed Winchester's unfair labor practice charge.

¶16. Winchester filed a Petition for Judicial Review on October 18, 1995. After both parties briefed the issues, the District Court issued an Opinion and Order wherein the court affirmed the Board's decision to dismiss Winchester's unfair labor practice charge. Winchester appeals from this Opinion and Order.

Standard of Review

¶17. The issue in the instant case concerns an interpretation of a contract, the CBA. The construction and interpretation of a contract is a question of law for the court to decide. *Stutzman v. Safeco Ins. Co. of America* (1997), 284 Mont. 372, 376, 945 P.2d 32, 34 (citing *Klawitter v. Dettmann* (1994), 268 Mont. 275, 281, 886 P.2d 416, 420.) We review a district court's conclusions of law to determine whether the court's interpretation of the law is correct. *Reichle v. Anderson* (1997), 284 Mont. 384, 387-88, 943 P.2d 1324, 1326 (citing *Carbon County v. Union Reserve Coal Ca* (1995), 271 Mont. 459, 469, 898 P.2d 680, 686).

Discussion

¶18. *Did the District Court err in deciding that Winchester's unfair labor practice claims were subject to the binding arbitration clause in the collective bargaining agreement?*

¶19. Winchester asserts that, since the CBA specifically exempted from arbitration alleged violations of federal and state law, *Collyer* is inapplicable and, hence, that the Board improperly deferred to the grievance procedure in the CBA which culminated in final and binding arbitration. Mountain Line maintains that *Collyer* is applicable and that the Board properly deferred to arbitration under *Collyer*.

¶20. In *Collyer*, the NLRB ruled that it would defer to an arbitration procedure established by a collective bargaining agreement before it would consider an unfair labor practice charge if certain conditions were met.⁽¹⁾ The NLRB ruled that deferment was appropriate in *Collyer* because: (1) there was a long-standing bargaining relationship between the parties; (2) there was no enmity by the employer toward the employee's exercise of protected rights; (3) the employer manifested a willingness to arbitrate; (4) the arbitration clause in the collective bargaining agreement was sufficiently broad to cover the dispute at issue; and (5) the collective bargaining agreement and its meaning lay at the center of the dispute and was thus "eminently well suited to resolution by arbitration." *Collyer*, 192 N.L.R.B. at 842, 77 L.R.R.M. at 1936. See also *Young v. City of Great Falls* (1982), 198 Mont. 349, 353, 646 P.2d 512, 514.

¶21. After a series of shifts in policy, the NLRB announced an extension to the policy set out in *Collyer* in *United Technologies Corp.* (1984), 268 N.L.R.B. 557, 115 L.R.R.M. 1049. In *United Technologies*, the NLRB held that it was proper to defer to an arbitration procedure established by a collective bargaining agreement even though the dispute arose under the National Labor Relations Act (NLRA) and did not necessarily require construction of the parties' collective bargaining agreement. In so holding, the NLRB explained that

It is fundamental to the concept of collective bargaining that the parties to a collective bargaining agreement are bound by the terms of their contract. Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the [National Labor Relations] Act for the [National Labor Relations B]oard to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery. For dispute resolution under the grievance-arbitration process is as much a part of collective bargaining as the act of negotiating the contract. In our view, the statutory purpose of encouraging the practice and procedure of collective bargaining is ill-served by permitting the parties to ignore their agreement and to petition this Board in the first instance for remedial relief.

United Technologies, 268 N.L.R.B. at 559, 115 L.R.R.M. at 1051 (footnote omitted). Thus, since the alleged violation of the NLRA was "clearly cognizable under the broad grievance-arbitration provision of the . . . collective-bargaining agreement," the NLRB decided to defer the case to arbitration. *United Technologies*, 268 N.L.R.B. at 560, 115 L.R.R.M. at 1052.

¶22. Likewise, in *Hammontree v. National Labor Relations Board* (D.C. Cir. 1991), 925

F.2d 1486, (en banc), the District of Columbia Circuit Court of Appeals considered a challenge to a NLRB order that required the complainant to exhaust grievance remedies established by a collective bargaining agreement before the NLRB considered his unfair labor practice complaint. The complainant in *Hammontree* argued that the NLRB's deferment authority was limited by § 203(d) of the Labor Management Relations Act (LMRA), which provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." *Hammontree*, 925 F.2d at 1493 (quoting 29 U.S.C. § 173(d)) (emphasis added by the court). The complainant maintained that § 203(d) of the LMRA authorized deferment only in cases "arising over" interpretation of a collective bargaining agreement and argued that his discrimination claim under §§ 8(a)(1) and 8(a)(3) of the NLRA⁽²⁾ did not "arise over" contract interpretation even though the collective bargaining agreement contained an anti-discrimination provision which paralleled §§ 8(a)(1) and 8(a)(3) of the NLRA. *Hammontree*, 925 F.2d at 1493. Thus, since his discrimination claim was actionable not only under §§ 8(a)(1) and 8(a)(3) of the NLRA but also under the collective bargaining agreement which prohibited "discrimination against any employee because of Union membership or activities" and "discriminatory acts prohibited by law," the complainant contended that his "claim [wa]s simply one that [arose] under a statutory provision that happens to be parallel to a claim that could be advanced under the contract," and, therefore, that his "claim does not rest upon a construction of the [collective bargaining agreement]." *Hammontree*, 925 F.2d at 1493-94.

¶23. Notwithstanding, the court rejected the complainant's argument and pointed out that his claim did not arise either under the NLRA or under the collective bargaining agreement; rather, his claim arose under both. *Hammontree*, 925 F.2d at 1494 (citing *Alexander v. Gardner Denver Co.* (1974), 415 U.S. 36, 52, 94 S.Ct. 1011, 1021, 36 L.Ed.2d 147). Thus, the court explained that

Hammontree cannot nullify his contractual claim simply by choosing to pursue his statutory claim. Such an interpretation of the law would severely undermine Congress' 'decided preference for private settlement of labor disputes without the intervention of government' as reflected in § 203(d). If a party could unilaterally release itself from a contractual pledge to submit complaints to arbitration simply because it had a parallel claim under the statute, then the pro-private dispute resolution policies of § 203(d) would be substantially abrogated.

Hammontree, 925 F.2d at 1494 (quoting *United Paperworkers International Union v. Misco, Inc.* (1987), 484 U.S. 29, 37, 108 S.Ct. 364, 370, 98 L.Ed.2d 286)(footnote omitted). Therefore, the court concluded that the complainant's claim arose under the collective bargaining agreement and held that § 203(d) did not preclude the NLRB from deferring to the grievance procedure set out in the parties' collective bargaining agreement. *Hammontree*, 925 F.2d at 1494.

¶24. In *Small v. McRae* (1982), 200 Mont. 497, 651 P.2d 982, the public employee made an argument similar to the argument made by the complainant in *Hammontree*. In *Small*, the employee argued that the grievance procedures in the collective bargaining agreement were only applicable to resolve contractual disputes. *Small*, 200 Mont. at

505, 651 P.2d at 987. The employee argued that his claim "did not center on a contractual dispute but, rather, on a violation of a constitutionally protected right." *Small*, 200 Mont. at 505, 651 P.2d at 987. In considering the employee's argument, this Court stated

Only in those cases where it is *certain* that the arbitration clause contained in a collective bargaining agreement is not susceptible to an interpretation that covers the dispute is an employee entitled to sidestep the provisions of the collective bargaining agreement.

Small, 200 Mont. at 504, 651 P.2d at 986 (emphasis added) (citing *Torrington Company v. Metal Products Workers Union Local 1645* (2nd Cir. 1966), 362 F.2d 677).

¶25. In the instant case, Article VII of the CBA provides:

Discrimination

Section 7.1: There shall be no coercion, intimidation, or discrimination on the part of either the District or the Union, or their respective agents, officers, or members against any employee covered by this Agreement for reasons of age, race, sex, color, religious or political beliefs, national origin, marital status, physical handicap, *Union membership* or non-membership, or any other group or classes protected by State or Federal law.

Section 7.2: Any *alleged* violation of Title VI of the Civil Rights Act of 1964 or other applicable Federal or State statutes shall be processed through the appropriate Federal and State agency(s) and will not be subject to the grievance and arbitration procedures as set forth in Articles 12 and 13.

(Emphasis added.)

¶26. Winchester's unfair labor practice charge alleged that Mountain Line discharged him for soliciting other employees to attend a meeting to discuss decertifying the union and because he was the shop steward. Hence, Winchester claimed that Mountain Line violated § 39-31-201, MCA, which provides:

Public employees shall have and shall be protected in the exercise of the right of self organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint, or coercion.

Winchester also claimed that Mountain Line committed unfair labor practices under § 39-31-401, MCA, which provides in pertinent part:

It is an unfair labor practice for a public employer to:

(1) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201;

(2) dominate, interfere, or assist in the formation or administration of any labor organization; however, subject to rules adopted by the board under 39-31-104, an employer is not prohibited from permitting employees to confer with him during working hours without loss of time or pay; . . . [or]

(4) discharge or otherwise discriminate against an employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter . . .

Thus, since his unfair labor practice charge alleged that Mountain Line violated §§ 39-31-201 and 39-31-401, MCA, Winchester argues that, pursuant to the plain language in Section 7.2 of the CBA, his charge is not subject to the CBA's grievance and arbitration procedures.

¶27. Mountain Line, however, contends that Winchester's allegations are "covered by" Section 7.1 of the CBA even though he generally alleged that Mountain Line violated §§ 39-31-201 and 39-31-401, MCA. In effect, Mountain Line asserts that, as in *United Technologies* and *Hammontree*, Section 7.1 of the CBA encompassed the allegations in Winchester's unfair labor practice charge and paralleled the claims that he advanced in his unfair labor practice charge. Therefore, Mountain Line maintains that the Board properly deferred to the arbitration procedure set out in the CBA.

¶28. Despite Mountain Line's argument, the plain, ordinary language in Section 7.2 of the CBA shows that the Board should not have deferred to the grievance and arbitration procedure set forth in the CBA. See *Hughes v. Blankenship* (1994), 266 Mont. 150, 154, 879 P.2d 685, 687 (citing *National Labor Relations Board v. Superior Forwarding, Inc.* (8th Cir. 1985), 762 F.2d 695, 697) (stating that "[c]ourts interpret contractual provisions according to the plain, ordinary language used by the parties."). The plain language of Section 7.2 of the CBA excludes "any *alleged* violation of . . . state statutes . . ." from the CBA's grievance and arbitration procedures. (Emphasis added.) Here, Winchester *alleged* that Mountain Line violated §§ 39-31-201 and 39-31-401, MCA. Thus, it is "certain," under Section 7.2 of the CBA, that Winchester's unfair labor practices charge, which alleged that Mountain Line violated §§ 39-31-201 and 39-31-401, MCA, was not subject to the grievance and arbitration provisions in the CBA. See *Small*, 200 Mont. at 504, 651 P.2d at 986.

¶29. In sum, even if Winchester's charge was covered by Section 7.1 of the CBA, the plain language in Section 7.2 of the CBA excludes his unfair labor practice charge from the grievance and arbitration procedure set out in the CBA. Accordingly, the District Court erred in ruling that the Board properly deferred to the arbitration procedure in the CBA.

¶30. Reversed and remanded for further proceedings consistent with this opinion.

/S/ JAMES C. NELSON

We Concur:

/S/ J. A. TURNAGE

/S/ KARLA M. GRAY

/S/ WILLIAM E. HUNT, SR.

/S/ W. WILLIAM LEAPHART

/S/ JIM REGNIER

/S/ TERRY N. TRIEWEILER

1. ¹ The NLRB has set forth a separate "post-arbitral deferral" policy, which is not at issue in the instant case, under which the NLRB gives limited deference to an arbitrator's resolution of an unfair labor practice charge. See *Spielberg Manufacturing Co.* (1955), 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 and *Raytheon Co.* (1963), 140 N.L.R.B. 883, 52 L.R.R.M. 1129, enforcement denied on other grounds, *Raytheon Co. v. National Labor Relations Board* (1st Cir. 1964), 326 F.2d 471.

2. ² Section 8(a) of the NLRA provides in pertinent part:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

29 U.S.C. § 158(a).

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. :

STEVE WINCHESTER,

Petitioner,

- vs -

MOUNTAIN LINE, MARY PLUMLEY and
BOARD OF PERSONNEL APPEALS,
DEPARTMENT OF LABOR,

Defendants.

ORDER OF REMAND

The above-captioned matter came before the Board of Personnel Appeals (Board) on February 28, 2002. The matter was before the Board for remand for investigation, pursuant to a remand from the district court.

1. IT IS HEREBY ORDERED that this matter is remanded to Board agents for investigation into the merits of the unfair labor practice originally filed herein.

DATED this 4th day of March, 2002.

BOARD OF PERSONNEL APPEALS

By:


Jack Holstrom
Presiding Officer

Board members Holstrom, Schneider, O'Neill and Reardon concur.
Alternate member Maronick concurs.

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CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify that a true and correct copy of this document was mailed to the following on the 8th day of March, 2002:

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2 Board of Personnel Appeals
3 PO Box 6518
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5 (406) 444-2718
6
7

8 STATE OF MONTANA
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 24-94

11 STEVE WINCHESTER,)
12)
13 Complainant,)
14)
15 -vs-)
16)
17 MOUNTAIN LINE, MARY PLUMLEY)
18 ANDTEAMSTERS UNION LOCAL NO. 2, UNION)
19 REPRESENTATIVE JACK CUTLER,)
20 Defendant.)
21)
22)

INVESTIGATIVE REPORT
AND
DETERMINATION

23
24 **I. Introduction**

25
26 On September 30, 1993, complainant, Steve Winchester, filed an unfair labor practice charge with this
27 Board alleging that his employer, Mountain Line an urban transportation district in Missoula, Montana,
28 first suspended him and then discharged him for soliciting other employees to attend a meeting at his
29 house to discuss the decertification process required to change union representation and because he
30 was the shop steward. The employment relationship was governed by a collective bargaining agreement
31 (CBA) between the Teamsters and Mountain Line which was effective from June 2, 1993, to June 30,
32 1996. Winchester contended the discharge was in violation of §§ 39-31-201 and 39-31-401 (1), (2), and
33 (4), MCA. On October 10, 1993, Mountain Line responded to the charge asserting it discharged
34 Winchester for just cause pursuant to the (CBA) because he allegedly violated Mountain Line's bus
35 drivers' handbook by stopping a bus in the middle of an intersection and instructing a passenger to get off
36 the bus and retrieve a hatchet which was laying on the street. Mountain Line also pointed out that the
37 Teamsters had requested that the dispute be resolved through the arbitration procedure set out in the
38 CBA.
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1 On October 25, 1993, the Board's investigator issued a Recommended Order wherein she
2 recommended that Winchester's charge be dismissed without prejudice to any party and without deciding
3 the merits of the charge. The investigator recommended that the Board defer to the already scheduled
4 arbitration pursuant to the "pre-arbitral deferral" policy of the National Labor Relations Board (NLRB) set
5 out in Collyer Insulated Wire, (1971), 192 N.L.R.B. 837, 77 L.R.R.M. 1931. The Board retained
6 jurisdiction if the dispute was not resolved within a reasonable time as set out in the CBA, if the procedure
7 was not fair, or if the arbitrators reached a result which was repugnant to public policy considerations
8 contained in the Collective Bargaining for Public Employees Act, §§ 39-31-101 et seq., MCA.
9 Winchester filed objections to the investigator's Recommended Order on November 4, 1993. The Board
10 then transferred the case to the Department Hearings Bureau on December 22, 1993.

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19 Despite Winchester's objection to the investigator's recommendation to defer to arbitration, an
20 arbitration hearing was held on December 1, 1993. Winchester did not attend the hearing. The
21 arbitrators upheld Mountain Line's decision to discharge Winchester. Mountain Line then filed a motion to
22 dismiss Winchester's ULP. Winchester responded to the motion again contending the CBA specifically
23 excluded claims made under state statutes from arbitration and deferral to arbitration under Collier was
24 improper, that the arbitration hearing violated the CBA and, therefore, that the arbitrator's decision was
25 not binding.

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32 On July 27, 1995, a hearing officer issued an Order on behalf of the Board which denied
33 Mountain Line's motion to dismiss. The hearing officer ruled that Winchester's charge alleged that
34 Mountain Line violated the Collective Bargaining for Public Employees Act, and not the CBA.
35 Consequently, the hearing officer ruled that deferral to arbitration under Collier was inappropriate. On
36 August 16, 1995, Mountain Line filed objections to the hearing officer's Order contending deferral to
37 arbitration was proper.

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42 On September 27, 1995, the Board held a hearing on Mountain Line's objections to the hearing
43 officer's Order which denied its motion to dismiss. On October 2, 1995, the Board issued its Final Order
44 wherein it determined that the hearing officer erred in denying Mountain Line's motion to dismiss. The
45 Board stated that the basis for Winchester's ULP was discrimination because of union activities. Since
46 the CBA prohibited discrimination because of union membership, the board ruled the ULP was covered
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1 by the CBA which culminated in final and binding arbitration. Thus, the Board ruled that deferral to
2 arbitration under Collier was proper and reversed the hearing officer's decision.
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4 Winchester filed a Petition for Judicial Review on October 18, 1995. The District Court affirmed
5 the Board's decision. Winchester appealed that decision to the Montana Supreme Court. The Court
6 found that even if Winchester's charge was covered by Section 7.1 of the CBA, the plain language in
7 Section 7.2 of the CBA excludes his ULP from the grievance and arbitration procedure set out in the CBA.
8 The Supreme Court on June 14, 1999, reversed and remanded the case for further proceedings.
9

10 Following this remand the parties engaged in resolution efforts. On January 16, 2002,
11 Winchester's counsel notified the Department the parties have been unable to settle the matter and
12 requested appointment of a hearing officer. On February 28, 2002, the matter came before the Board of
13 Personnel Appeals. By Order of March 4, 2001 the Board remanded the matter to Board agents for
14 investigation into the merits of the ULP. Pursuant to that order this investigation commenced.
15

16 **II. Background**

17 The Board of Personnel Appeals has jurisdiction over this matter under Sections 39-31-103 and
18 39-31-405, MCA
19

20 **III. Discussion**

21 Public employees under Section 39-31-201, MCA, are protected in and can exercise the right of
22 self-organization, to form, join, assist any labor organization, to bargain collectively through
23 representatives of their choosing on questions of wages, hours, fringe benefits, and other conditions of
24 employment, and to engage in other concerted activities for the purpose of collective bargaining or other
25 mutual aid or protection free from interference, restraint, or coercion. Under Section 39-31-401, MCA, it is
26 an unfair labor practice for a public employer to interfere with, restrain, or coerce employees in the
27 exercise of rights guaranteed in Section 39-31-201.
28

29 The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in
30 using Federal Court and National Labor Relations Board (NLRB) precedents as guidelines in interpreting
31 the Montana Collective Bargaining for Public Employees Act, State ex rel. Board of Personnel Appeals
32 vs. District Court, 183 Montana 223 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No. 45 vs. State
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1 ex rel. Board of Personnel Appeals, 185 Montana 272, 635 P.2d 185, 119 LRRM 2682; and AFSCME
2
3 Local No. 2390 vs. City of Billings, Montana 555 P.2d 507, 93 LRRM 2753.

4 Winchester's ULP alleged that Mountain Line discharged him in violation of §§ 39-31-201 and
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6 401, MCA, for soliciting other employees to attend a meeting to discuss decertifying the union and
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8 because he was the shop steward. Mountain Line, on the other hand, contends it discharged Winchester
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10 for allegedly violating Mountain Line's bus drivers' handbook by stopping a bus in the middle of an
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12 intersection and instructing a passenger to get off the bus and retrieve a hatchet which was laying on the
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14 street.

15 **IV. Determination**

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17 An investigation, which included contact with all parties involved, has shown:

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19 1. if the facts alleged by the Complainant are proven, an Unfair Labor Practice charge is
20 supported; and,
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22 2. the facts stated by one party do not agree with those offered by the other.
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25 Accordingly, pursuant to Section 39-31-405, MCA, we find that there is probable merit for the
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27 charges filed and will issue a notice of hearing.

28 DATED this 28th day of March 2002.
29

30 BOARD OF PERSONNEL APPEALS

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32 By: 
33 Joe Maronick
34 Investigator
35

36 NOTICE

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38 ARM 24.26.680B(6) provided for in 39-31-405(4), MCA, if a finding of probable merit is made, the
39 person or entity against whom the charge is filed shall file an answer to the complaint. The answer shall
40 be filed within ten (10) days with the Investigator at PO Box 6518, Helena MT 59604-6518
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I, Jennifer Jacobson, do hereby certify that a true and correct copy of this document was mailed to the following on the 28th day of March 2002:

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 24-94:

STEVE WINCHESTER,) Case No. 1895-2002

Complainant,)

vs.)

DISMISSAL ORDER

MOUNTAIN LINE, MARY PLUMLEY,)

AND TEAMSTERS UNION LOCAL)

No. 2, UNION REPRESENTATIVE)

JACK CUTLER,)

Defendants)

* * * * *

The Plaintiff has withdrawn his unfair labor practice complaint against the Respondent as the parties have entered into a settlement agreement. Accordingly, it is ordered that this matter is dismissed.

DATED this 24th day of July, 2002.

BOARD OF PERSONNEL APPEALS

By: Gregory L. Hanchett
GREGORY L. HANCHETT
Hearing Officer

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

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Tipp & Buley
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Missoula, MT 59806-3778

DATED this 24th day of July, 2002.

A handwritten signature in cursive script, appearing to read "Stanley A. Pappas", written over a horizontal line.