*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: June 27, 2005

TO : Gary T. Kendellen, Regional Director
Region 22

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: United Parcel Service 240-3367-0100
Cases 22-CA-25027, 25042 240-3367-1200

The Region submitted these Section 8(a)(3) cases for Advice on the issue whether the Board should reassert jurisdiction over this dispute, where the Union's decision to not proceed to arbitration on the Charging Party's grievances was based upon the Charging Party's failure or refusal to comply with existing procedures under the Employer-Union arbitration system. We conclude that, as the instant dispute was otherwise appropriate for deferral to the Employer-Union grievance/arbitration system under United Technologies, Inc., 268 NLRB 557 (1984), the noncooperation of the Charging Party with the grievance/arbitration procedures should not require the Board to reassert jurisdiction over the instant charges. The Charging Party's conduct was equivalent to his noncooperation with the Board's investigation of an unfair labor practice charge. Thus, the result should be the same, i.e., the dismissal of the charge based upon noncooperation.

## FACTS

The Charging Party is employed by United Parcel Service as a loading worker at the Secaucus, New Jersey facility. He is part of a collective-bargaining unit which is covered by an existing contractual grievance/arbitration system between the Employer and the Union. Among the existing procedures under this arbitration system is that grievants must provide the Union with requested notarized statements supporting the grievance. The Union has a past practice of helping grievants prepare their notarized statements. The Union even offers to provide a notary to the grievant. The Union's use of notarized statements is apparently to avoid the expense of oral testimony in arbitral hearings.

Beginning in around November 2002, the Charging Party led a group of employees filing grievances protesting alleged Employer harassment and undue supervision. The Charging Party filed a charge with the Board in Case 22-CA-25027 in which he similarly alleged that in January 2002, the Employer retaliated against him by issuing discipline

and harassing him and other co-workers. The Charging Party filed a second charge in Case 22-CA-25042 alleging that since February 5, 2001, the Employer continued to over-supervise, harass and discriminate against him and another employee because of their grievance activities.

The Charging Party filed contractual grievances over the matters alleged in Cases 22-CA-25027 and 22-CA-25042. The Regional Office deferred these charges to the Employer-Union grievance/arbitration procedures on February 7 and April 3, 2002. Deferral letters were sent to the Charging Party on these dates, stating, in pertinent part, that the Regional Director intended to dismiss the charges in the event the Charging Party does not promptly submit the dispute to the contractual arbitration procedures.

Following unsuccessful efforts to resolve the grievances at the local level, the Union twice requested that the Charging Party provide notarized statements of his grievances and scheduled the grievances for the January 2003 National Master Panel. In November 2002, the Charging Party asked that the Union obtain certain relevant information to assist him in preparing his statements. The Union provided the information in December 2002 and January 2003, and again requested the Charging Party provide notarized statements and information in support of his grievances. Without notarized statements, the Union rescheduled the hearing on the Charging Party's grievances from January to April, and then to the July 2003 Panel.

By letter to the Charging Party of May 21, 2003, the Union described the history of the grievances and the rescheduled hearing dates, and informed the Charging Party that unless the requested information was provided by June 16, 2003, that the Union would withdraw the grievances. By letter of June 20, 2003, the Union notified the Charging Party and two other employees that it was dropping the grievances based upon the Charging Party's failure to provide the requested information. None of the employees responded.

The Charging Party contended that there was no past practice or contractual requirement that he present notarized statements, that he had no obligation to comply with such an onerous request, and that the Union treated him disparately because of hostility against him. The Region's investigation revealed, however, that the Union's practice was consistent with National Master Panel rules. Grievances like the Charging Party's, which allege violations of the National Master Agreement, are referred to the National Master Panel if they cannot be resolved at the local level. The Union does not bring employee witnesses to these

hearings which are held quarterly in various parts of the country, but rather submits packets to each member of the Panel containing notarized statements from the grievant, grievant documents and relevant contract provisions, and then argues the merits before the Panel. The statements can be handwritten and, as noted, the Union will provide a notary if necessary. While the national rules permit in-person testimony, the local Union representative states that this rarely occurs; he had never done so.

The Charging Party offered no factual basis to support his claim that the notarized statement requirement was onerous. The Charging Party also conceded that he had been prepared to submit the required notarized statement by the Union's June 16, 2003 deadline, but decided not to comply when he was discharged by the Employer on June 3, 2003. The Region's investigation further revealed no evidence that the Union bore animus to him based upon his grievance filing activities, as alleged. Indeed, the Union pressed the Charging Party's subsequent discharge grievance to arbitration under the local agreement and secured his reinstatement after a lengthy hearing including oral testimony. The Charging Party filed no Board charges against the Union.

ACTION

It was concluded that the Region should dismiss the instant charges, absent withdrawal. The Board's deferral of these charges under United Technologies for resolution under the parties' grievance/arbitration procedures has been frustrated by the Charging Party's failure or refusal to comply with existing rules of the parties' grievance/arbitration system. In these circumstances it would not be appropriate for the Board to reassert jurisdiction over the Charging Party's unfair labor practice charges and to pass on the merits of those charges.

In United Technologies, the Board extended its arbitration deferral policy set forth in Collyer Insulated Wire, 192 NLRB 837 (1971) to cases alleging violations of Section 8(a)(1) and (3) and 8(b)(1)(A) and (2). The Board in United Technologies noted that it was fundamental to the concept of collective bargaining that the parties to a collective-bargaining agreement are bound by the terms of their agreement. Where the parties have agreed to a voluntary dispute resolution machinery culminating in final and binding arbitration, "it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their

disputes through that machinery."[1] The Board concluded that the statutory purpose of encouraging the practice and procedure of collective bargaining would be ill served by permitting the parties to ignore their agreement and to seek from the Board relief in the first instance.

In this case the Regional Office properly deferred this matter for resolution under the parties' grievance/arbitration procedures.[2] The Union was fully prepared to process and defend the Charging Party's grievances before the National Master Panel. The Union's requirement that the Charging Party had to submit notarized statements to support his grievances was consistent with past practice and was objectively within the wide range of reasonableness which an exclusive collective-bargaining representative has in discharging its grievance processing functions.[3] There was no evidence presented in this case that this requirement was either onerous or that the requirement was disparately imposed upon him. There was also no evidence that the Union harbored animus toward the Charging Party, as confirmed by the Union's successful pursuit of arbitration over the Charging Party's subsequent discharge grievance.

Moreover, the Charging Party's unexcused failure to comply with existing rules under the parties' arbitral procedures undermined the proper use of the parties' grievance/arbitration machinery. The Union therefore acted reasonably in dropping the grievances and refusing to present them to the National Master Panel.[4] It would equally frustrate national labor policy as set forth in United Technologies to permit the Charging Party by his

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[1] United Technologies Corp., 268 NLRB at 559.

[2] It appears that the parties' arbitral procedures culminates in a bipartite employer-union panel. The Board has long held that such joint employer-union committees can function as the equivalent of arbitral panels. See, e.g., Terminal Transport, Inc., 185 NLRB 672, 673 (1970); Automobile Transport, Inc., 223 NLRB 217, 221 (1976).

[3] See generally Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

[4] A grievant's failure to cooperate can form the reasoned basis of a union's lawful decision to withdraw a grievance. See, e.g., Teamsters Local 901 (Interstate Air Service Corp.), 167 NLRB 135, 140 (1967); Hamm Brewing Co., 151 NLRB 397, 410 (1963).

conduct to force the Board to reassert jurisdiction over the unfair labor practice charges, where the Union has reasonably decided not to pursue the arbitral procedures. In the same manner that the Board will not pursue unfair labor practice charges where there has been noncooperation by a charging party,[5] the Board should not permit its Collyer-United Technologies deferral policies to be frustrated by an individual charging party's noncooperation with the rules of the applicable arbitral machinery.[6] A contrary result would reward the Charging Party for his recalcitrance or poor judgment.

In these circumstances, the Region's reassertion of jurisdiction over the instant charges is not warranted. The Region should therefore dismiss these charges, absent withdrawal.

B.J.K.

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[5] See NLRB Casehandling Manual Part One - Unfair Labor Practices at Sections 10054.1(b) and 10058.5(a) (Government Printing Office September 2003).

[6] This is not a case where the individual charging party's refusal to participate in the contract's arbitral procedures is based upon evidence that his interests are adverse to the union. Compare, e.g., Servair, Inc., 265 NLRB 181, 182-83 (1982), enfd. 726 F.2d 1435 (9th Cir. 1984).