

American Postal Workers Union, AFL-CIO (United States Postal Service) and Abel P. Arteaga.
Case 23-CB-2750(P)

16 April 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 25 November 1983 Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a brief in support thereof and of the judge's decision.

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

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

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

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

² The judge relies on the pretrial affidavit of union officer Gilbert Uriegas to find that Union President Mary Mackay told him that employee Abel Arteaga had resigned from the Union. However, because it is undisputed that both Uriegas and Mackay knew that Arteaga had resigned when on 30 November 1982 Uriegas finally informed Arteaga that the Union would not file his grievance, the source of Uriegas' knowledge that Arteaga resigned is irrelevant. We therefore find it unnecessary to rely on Uriegas' pretrial affidavit.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This case was tried before me in San Antonio, Texas, on August 9, 1983, pursuant to the April 22, 1983 complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 23. The complaint is based on a charge filed March 9, 1983, by Abel P. Arteaga, an individual (Arteaga or Charging Party) against American Postal Workers Union, AFL-CIO (Respondent, Union, or APWU).¹

¹ All dates are for 1982 unless otherwise indicated.

In the complaint, as amended at the hearing, the General Counsel alleges that Respondent violated Section 8(b)(1)(A) of the Act by informing Arteaga on November 30 and December 1, 1982, that it would not file a grievance on his behalf, and by thereafter failing to file such grievance, because he was not a member of the Union.

By its answer Respondent admits certain factual matters but denies violating the Act.

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

FINDINGS OF FACT

I. JURISDICTION

The United States Postal Service (Postal Service or USPS), an independent establishment of the Executive Branch of the Government of the United States, operates various facilities throughout the United States in the performance of its basic function to provide postal service to the nation. In furtherance of its basic function, the Postal Service, at all material times, has operated a general mail facility, known as the GMF station, for the processing of mail and the furnishing of postal service in and around San Antonio, Texas. The GMF station is the only one directly involved in this proceeding. The USPS is now, and has been at all times material herein, subject to the jurisdiction of the Board in unfair labor practices under the Act pursuant to the provisions of Section 1209(a) of the Postal Reorganization Act (PRA).

II. THE LABOR ORGANIZATION INVOLVED

Respondent APWU admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Settlement of the McGlothing grievance

Around February 22-26, 1982, the USPS and the Union settled a rather complex grievance involving the upgrading of B.D. McGlothing from wage grade PS-6 to PS-7 in the Mail Classification Center (Center).² As part of the settlement, McGlothing withdrew his EEO charge. Also as part of the settlement, a PS-7 position in the Weighing Section, where Charging Party Arteaga worked, was declared vacant and replaced with a new classification at grade PS-6. The PS-7 position formerly had been held by Leland Mueller who had been serving for several months as an acting supervisor.

In short, it appears that in the settlement process of McGlothing's grievance, a PS-7 ranking (formerly held by Leland Mueller) was dropped from Arteaga's Weigh-

² The settlement was made effective as of March 6, 1982 (G.C. Exh. 3).

ing Section and used to settle the McGlothing grievance and EEO charge.

On February 26, 1982, Arteaga, classified as a grade or level 5, learned of the settlement and the fact that Mueller's old level 7 position (now no longer in existence, having been replaced with a level 6 job classification) would not be posted for bid. Arteaga complained to Donald E. Gignac, clerk craft president and also a shop steward, that the failure to post violated article 37, section 3, of the collective-bargaining agreement. Gignac explained the Union's reasons for the settlement, including the fact that the Postal Service had the option to revert Mueller's former position, that USPS apparently intended to revert it, and that arbitration offered no guaranteed result. Arteaga persisted and asked if the Union would file a grievance on his behalf. Gignac replied that he would not do so because the Union would not be acting in good faith (in light of the McGlothing settlement) and because there was no contract violation (Tr. 136).

Arteaga then telephoned Mary Jonell MacKay, general president of the Union's local, and inquired about the settlement and told her he wanted to file a grievance. MacKay told Arteaga that she had approved the settlement of McGlothing's grievance, and that the Union would not file a grievance over a failure to post Mueller's old position level 7 for to do so would be to abrogate the agreement the Union had made with the USPS regarding the McGlothing grievance. Even if the job had been posted, MacKay continued, McGlothing had more seniority and would have gotten the job if he, McGlothing, bid on it (Tr. 153, 177). At trial, MacKay confirmed these reasons (Tr. 161-163).

According to Arteaga he asked MacKay to notify him of the Union's answer in writing, and MacKay said she would send him something (Tr. 21). Apparently nothing was sent. It appears that Arteaga has confused this portion of the conversation with his early November 1982 conversation with MacKay.

On March 3 Arteaga spoke with Guadalupe Torres, director of labor relations for the USPS in San Antonio, who confirmed the fact of the settlement. That same day Arteaga again asked Gignac to file a grievance over the failure to post, but Gignac declined (Tr. 23).

2. Arteaga files EEO charges

On March 12, 1982, Arteaga filed a charge with the Equal Employment Opportunity Commission (EEOC) against the Union alleging discrimination based on national origin, Mexican-American, by denying him "the opportunity to file a grievance against the USPS (R. Exh. 1). The EEOC dismissed Arteaga's charge on May 11, 1982, for lack of reasonable cause to believe that the allegations were true. The dismissal letter advised Arteaga of his right to file suit in U.S. District Court.

In the meantime, on March 25, 1982, Arteaga initiated informal EEO steps under the internal procedures of the USPS (R. Exh. 2). By May these steps reached the formal stage when, on May 4, 1982, Arteaga, with the

assistance of Gilbert Uriegas,³ filed a formal EEO complaint alleging national origin discrimination as follows (G.C. Exh. 4):

I feel that I was discriminated against by the U.S. Postal Service. By Management agreeing with the Union to upgrade clerk Bill McGlothing job from level 6 to level 7, it deprived me of an opportunity to bid on clerk Leland Mueller's level 7 seven position. Clerk Mueller's job should have been posted for bid. Clerk Mueller had been on 204B detail [acting supervisor] for over 4 months. See Article 37 Sec. 7 of the National Agreement.

Management upgraded McGlothing's job and did not put for bid Mueller's job, who had since retired.

By letter dated October 18, 1982, the USPS notified Arteaga that his EEO claim was rejected because the Postal Service viewed the issue as a "contractual matter" (G.C. Exh. 6). Arteaga was advised of his right to appeal to the Equal Employment Opportunity Commission or to file a civil action in an appropriate United States District Court.

Arteaga apparently elected not to proceed further with either EEO claim. As earlier noted, he filed the charge in this case on March 9, 1983.

3. Arteaga resigns from the Union

On May 20, 1982, Arteaga went to the local personnel office of the USPS and signed a form revoking the checkoff authorization of his union dues (G.C. Exh. 5). There seems to be no dispute that the revocation form had to be held by the USPS until September 1982 before being processed. Arteaga testified that the personnel office (clerk) so told him (Tr. 67). Apparently September was the anniversary period of his checkoff authorization.

Eventually the Union's computer department in Minneapolis, Minnesota, was advised by the USPS of Arteaga's checkoff cancellation, and on October 20, 1982, that department issued a computer printout of the dues-checkoff roster (G.C. Exh. 7). Arteaga is shown as having canceled. Union President MacKay candidly concedes that such a revocation is commonly interpreted as the equivalent of a resignation from the Union (Tr. 159).

MacKay asserts, however, that the printout would not have been received in San Antonio until about early November because such printouts are sent in bulk to the treasurer's office in Washington, D.C., where a check is prepared for sending with the appropriate pages of the printout to the various locals (Tr. 160). Her secretary, MacKay testified, informed her around mid to late November 1982 of the fact that Arteaga had resigned from the Union (Tr. 1701-172, 183).

As we shall see in a moment, the timing of MacKay's knowledge is relevant to the issue of animus.

³ Although Uriegas is a union officer and shop steward, Arteaga does not contend that Uriegas was acting in his union capacity in so assisting (Tr. 26).

B. Events of October 1982

There is agreement that on October 28, after Arteaga had received the October 18 letter from the USPS advising him that his complaint was a "contractual matter," Arteaga contacted Gilbert Uriegas and requested that Uriegas, as a union representative, file a grievance for Arteaga regarding the subject they had discussed 8 months earlier (Tr. 32, 62, 98). Uriegas said he would have to check with MacKay. Later that same day he made a copy of the letter Arteaga had received to give to MacKay.

The next day, October 29, Uriegas submitted the copy to MacKay. She said she would contact Uriegas after she had checked with National Vice President Tom Neill. Around November 1, after conferring with Neill, MacKay called Uriegas at home and informed him that she and Neill were in agreement that Mueller's old level 7 was part of the McGlothing settlement and that no grievance would be filed (tr. 155, 167, MacKay).⁴

As a witness, MacKay testified that she takes full responsibility for the decision not to file a grievance in October–November 1982 (Tr. 182). No grievance was filed at that time, MacKay testified, because nothing had changed since February, except, she added, that now the contractual time limits for filing a grievance had long since expired. (Tr. 164–165).⁵

At this point there is a significant difference in the testimony regarding the dates. Arteaga places the concluding conversations (in which he learned the Union's answer) around November 30–December 1, 1982. This is so, Arteaga testified, because Uriegas was on annual leave and then jury duty for nearly the whole month of November. Without contradicting Arteaga regarding the lengthy absence of Uriegas, MacKay and Uriegas, in similar testimony, include all the conversations in one series beginning October 29 and concluding about November 1.⁶

I credit Arteaga's trial version of the date sequence. I note that his reference to Uriegas' absence from work was not directly contradicted. The date is significant because of the motivation issue.

When Uriegas returned to work on November 30, 1982, Arteaga asked him if he had given the October 18

letter to MacKay. Uriegas replied that he had done so on October 29. When Arteaga inquired whether the Union was going to do anything, Uriegas said he wanted to call MacKay.⁷ He left to do so. Moments later Uriegas returned. Arteaga testified that Uriegas began by saying that MacKay had told him that Arteaga was no longer a union member and that therefore the Union was not going to file a grievance or get involved at all. Arteaga responded by saying he would have to go to the Labor Board. Uriegas supposedly asked that Arteaga wait a day or two to give Uriegas a chance to talk to MacKay again. The following day Uriegas reported that MacKay's position was the same plus she was not going to give Arteaga anything in writing (Tr. 35–36, 65).

Uriegas denied saying to Arteaga anything like a statement that the Union would not represent Arteaga because he was not a member of the Union (Tr. 106). With persuasive demeanor, Uriegas testified that he told Arteaga that the Union would not file a grievance because the issue had already been resolved, that the time limits had expired, and that if the Union were to proceed it would be talking out of both sides of its mouth (Tr. 104). Arteaga became upset and said he wanted something in writing from MacKay or Neill. Uriegas said he would make a request for that. Later that day, Uriegas relayed the request for a written statement to MacKay. Declining to furnish a written statement, MacKay told Uriegas that if Arteaga called her she would explain the reasons to him. Uriegas reported this to Arteaga who said he would take care of the matter himself. (Tr. 105).

Before departing from Arteaga to ask MacKay for the written statement, Uriegas asked Arteaga why he had dropped out of the Union. Because, Arteaga answered, the Union had not done anything for him (Tr. 105). Uriegas testified that he asked his question because he was shocked to learn of Arteaga's withdrawal from the Union. He was curious as to Arteaga's reason, for Arteaga "had been my general president at one time," had done a lot for Mexican-Americans, had helped get Uriegas reinstated once, and "so I was surprised, you know, shocked that he would withdraw from the Union. Myself, I just wanted to know the reason" (Tr. 117).

This brings us to the question of how and when Uriegas learned of Arteaga's resignation from the Union. Such inquiry leads into the motivation evidence. Uriegas testified that when Union President MacKay called him the day after he had given her a copy of the October 18 letter Arteaga had received from the USPS, MacKay first informed him of the reasons the Union could not file a grievance on Arteaga's behalf (Tr. 103). In his pretrial affidavit of March 21, 1983, Uriegas records (G.C. Exh. 8): "MacKay then informed me that Arteaga had dropped out of the Union because of this issue." On cross-examination Uriegas testified that he was not sure it was MacKay who told him, that it could have been MacKay's secretary, and that he merely told the investigating Board Agent he thought it was MacKay (Tr. 109,

⁴ The testimony of Uriegas is similar to MacKay's. The dates and events to this point also are consistent with the testimony of Arteaga.

⁵ MacKay apparently did not interpret the "contractual matter" phrase in the October 18 rejection by the USPS of Arteaga's EEO complaint as a suggestion that a grievance could be filed. Nor would I. The more reasonable conclusion is that the USPS considered Arteaga's claim to be a matter which was controlled by the collective-bargaining agreement.

Arteaga could have filed a grievance himself at the first step of the grievance procedure (Tr. 69, 165; G.C. Exh. 2, art. 15, sec. 2, p. 52). His testimony that he did not do so because that is what he was paying union dues for is rather strange (Tr. 69–70). His dues cancellation, signed in May, became effective in September. His testimonial reason, therefore, could apply only to February–March, not to October–November. Finally, I should note that Arteaga is very familiar with contractual matters. During his 31 years with the USPS Arteaga served 1 year, 1972, as president of Respondent's local union (Tr. 37, 68, 69, 99, 117). He unsuccessfully opposed MacKay for president in 1980 (Tr. 40). That year was one of her three terms (Tr. 152).

⁶ In his pretrial affidavit of March 11, 1983, Arteaga's sequence is also confined to a single series of conversations beginning October 28 and ending November 1 (R. Exh. 2).

⁷ In crediting Arteaga's version on this point, I find that Uriegas had been informed a month earlier of the Union's position. Uriegas' call to MacKay at this point was, I find, simply to confirm that there had been no change while he was away from work.

111, 114). Although Uriegas generally exhibited a persuasive demeanor, on this point he was unconvincing, and I do not credit him as to this. I therefore find that the version quoted above, set forth in his March 1983 pretrial affidavit, is the more accurate account. Although it is unclear whether Respondent admits that Uriegas is its agent, the pretrial affidavit here is affirmative evidence. *Alvin J. Bart & Co.*, 236 NLRB 242 (1978).

C. Analysis and Conclusions

I find, as just discussed, that MacKay did tell Uriegas that Arteaga had dropped out of the Union over this issue. However, I further find that it was not October 29 that MacKay told him this, but the occasion when Uriegas telephoned her on November 30 after returning to work. Although MacKay was not asked about this testimonial assertion of Uriegas, and therefore neither confirmed nor denied it, I note that the date sequence, as found above, is consistent with her testimony that she learned around mid-November, from her secretary, that Arteaga had resigned from the Union.

Having found that MacKay did make the November 30 statement attributed to her by Uriegas, I further find that it was nothing more than a factual observation which followed her expression of the reasons the Union would not file a grievance. I also credit her denial that she ever said the Union would not represent Arteaga because he was not a member of the Union (Tr. 158).

At page 6 of his brief, counsel for the General Counsel argues that Respondent demonstrated its animus by admitting that it maintains a "scab" list. The force of that argument is greatly undercut by the fact it was counsel's question which contained the word "scab," and the witness, MacKay, answering in the affirmative, explained that such a list (of nonmembers) is maintained for the purpose of organizing (Tr. 179). I attach no significance to MacKay's confirmation of a "scab" list.

The crucial linchpin of the General Counsel's case is Arteaga's testimony that Uriegas quoted MacKay as saying the Union would not file a grievance because he had resigned from the Union. I do not credit Arteaga. I find that he embellished upon Uriegas' sincere question asking why Arteaga had dropped out of the Union.⁸

⁸ It is clear that Uriegas greatly respected Arteaga for all that the former president had done for Uriegas, for all Mexican-American employees, and for the Union. He was a sincere and believable witness. It is

Having substantially credited the testimony of Uriegas and MacKay, I find that the reasons MacKay elected not to file a grievance in October–November 1982 on behalf of Arteaga were those they described at trial and which Uriegas relayed to Arteaga on November 30, 1982. These reasons had nothing to do with the fact Arteaga had resigned from the Union. Accordingly, I shall dismiss the complaint.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the United States Postal Service pursuant to the provisions of the Postal Reorganization Act.

2. Respondent American Postal Workers Union, AFL–CIO is a labor organization as defined in Section 2(5) of the Act.

3. Respondent APWU did not violate Section 8(b)(1)(A) of the Act by refusing on November 30, 1982, to file a grievance pertaining to the failure of the Postal Service to post a certain job for bidding in February–March 1982 on behalf of Charging Party Abel P. Arteaga, allegedly because of Arteaga's nonmembership in Respondent Union.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended⁹

ORDER

The complaint is dismissed.

a mark of his sincerity, and not evidence of relevant animus, that he advised Arteaga the week before the instant hearing that he could not represent Arteaga in another EEO matter. Uriegas testified that he felt the pressure of a conflict of interest, defending himself from Arteaga's allegations in this case, while having to represent Arteaga in the pending EEO matter. That conflict prevented Uriegas from mustering the wholehearted enthusiasm which he felt was necessary for the role of representing Arteaga, and he therefore turned over certain documents to Arteaga in that case and asked him to obtain another representative (Tr. 113). This disclosure to Arteaga of a conflict of interest reflects candor and ethical conduct, not animus.

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.