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American Postal Workers Union, Local 735 (United States Postal Service) and Teri Adelson. Cases 17–CB–5444 and 17–CB–5517

July 21, 2004

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On March 23, 2004, Administrative Law Judge James L. Rose issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions, and to adopt the recommended Order as modified and set forth in full below.

The General Counsel’s initial complaint alleged that the Respondent Union excluded the Charging Party, Teri Adelson, from sharing in a backpay settlement of a lost-work grievance because she was not a union member. The parties settled Adelson’s initial charge through a non-Board settlement agreement.¹ Subsequently, however, the General Counsel revoked his dismissal of the complaint and issued a consolidated complaint on the basis of a newsletter column written by the Respondent’s president that discussed the settlement agreement and Adelson. The new complaint alleged that Adelson’s exclusion from the grievance settlement and the subsequent newsletter column each violated Section 8(b)(1)(A) of the Act.

In his initial decision, the judge found that the newsletter column neither was unlawful nor justified the revocation of the dismissal of the initial complaint. The Board majority (Member Liebman dissenting), however, found that the revocation was proper and remanded the case to the judge for a determination on the merits of both complaint allegations. *Postal Workers Local 735 (Postal Service)*, 340 NLRB No. 166 (2003).

In his supplemental decision, the judge found that both allegations had merit. The Respondent has not excepted

¹ Pursuant to the settlement agreement, the Respondent paid Adelson the amount of backpay she should have received and posted an informal notice.

to these findings.² However, the General Counsel filed two limited exceptions to the judge’s remedial provisions.

First, the General Counsel contends that the judge’s remedial notice was inadvertently addressed only to “Members,” rather than to “Employees and Members.” As the General Counsel points out, where a union violates the Act in a manner that affects both members and nonmembers, the Board normally requires that the notice be addressed both to “members” and “employees”—i.e., to all the employees in the bargaining unit.³

Second, the General Counsel contends that the judge erred by inadvertently failing to require the Respondent to “mail” copies of the notice to all bargaining unit members, rather than to “send” them as the recommended Order states. A Board order normally does specify that a notice be “mailed” when the respondent is required not only to post the notice, but also to distribute copies of it to individual unit members.⁴

We therefore find merit in both of the General Counsel’s exceptions, and we will modify the judge’s recommended Order and notice accordingly.⁵ Pursuant to the Board’s established practice in cases involving violations of Section 8(b), we will also modify the recommended Order to provide for the posting of the notice in the Employer’s workplace, if the Employer is willing. We will also delete the reference to the possibility of the Respondent’s going out of business. See, e.g., *L.D. Kichler Co.*, 335 NLRB 1427 fn. 2 (2001). Finally, we will also modify the notice in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

ORDER

The Respondent, American Postal Workers Union, Local 735, Wichita, Kansas, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to represent fairly all members of the bargaining unit, regardless of their membership in the Un-

² In the absence of exceptions to the judge’s unfair labor practice findings, we find it unnecessary to consider the judge’s basis for finding these violations.

³ E.g., *Joint Council of Teamsters 3, 28, 37, 42 (Lanier Brugh Corp.)*, 339 NLRB No. 24, slip op. at 5–6 (2003); *Teamsters Local 122 (August Busch & Co.)*, 334 NLRB 1190, 1195–1196, 1259 (2001), enfd. 2003 WL 880990 (D.C. Cir. 2003).

⁴ See, e.g., *Air 2, LLC*, 341 NLRB No. 23 fn. 2 (2004).

⁵ In its brief, the Respondent represents that it has already complied with the terms of the judge’s recommended Order, including mailing copies of the notice in the form attached to the judge’s decision to all employees in the unit. The legal effect of any efforts to remedy the violations found by the judge may be addressed in compliance.

ion, by excluding them from participation in a grievance settlement to which they would otherwise be entitled.

(b) Informing union members and nonmembers that the Union approves of actions its stewards take that discriminate against unit employees.

(c) In any like or related manner 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 after service by the Region, post at its business office and meeting places copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 17, 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 and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Mail a copy of the notice to every member of the bargaining unit.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by the U.S. Postal Service, if willing, at all places where notices to employees are customarily posted in its facility at 9450 East Corporate Hills Drive, Wichita, Kansas.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. July 21, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁶ 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."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS 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 any union
- Choose representatives to bargain on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to represent fairly all members of the bargaining unit, regardless of their membership in the Union, by excluding them from participation in a grievance settlement to which they would otherwise be entitled.

WE WILL NOT inform union members and nonmembers that the Union approves of actions its stewards take which discriminate against employees.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

AMERICAN POSTAL WORKERS UNION, LOCAL 735

David Nixon and Michael Werner, Esqs., for the General Counsel.

Terry D. Smith and Larry D. Ehrlich, Esqs., of Wichita, Kansas, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Wichita, Kansas, on October 11, 2001. The initial complaint alleged that the Respondent discriminated against the Charging Party because she is not a member of the Respondent by not including her in a payout that settled a grievance the Respondent brought against the United States Postal Service. This was an alleged violation of Section 8(b)(1)(A) of the National Labor Relations Act. The case was adjusted pursuant to a non-Board settlement agreement and the complaint dismissed by the Regional Director.

A second charge was filed by the Charging Party and the Regional Director concluded that postsettlement acts of the Respondent were also a violation of Section 8(b)(1)(A). He set aside the settlement agreement and issued a consolidated complaint.

Following a 1-day trial, I concluded that the Respondent's postsettlement act complained of was not a violation of Section 8(b)(1)(A) nor did it justify setting aside the settlement agreement. I therefore recommended that the matter be dismissed. Exceptions were taken to the Board, which held that the Respondent's postsettlement act minimized the effect of the settlement notice and therefore the agreement should be set aside. Accordingly, the Board remanded the matter to me for a decision on the merits of whether the Respondent's acts, which were settled, and statements in its newsletter were violations of Section 8(b)(1)(A).

Subsequent to the Board's remand, counsel for the Respondent moved to reopen the record so that he could present evidence. Counsel did cross-examine the General Counsel's witnesses (including Christine Pruitt, who allegedly committed the initial unlawful act); and, though given the opportunity to call witnesses and present other evidence, he declined to do so, resting at the close of the General Counsel's case. Counsel did not suggest any basis for reopening the record under the Board's Rules, and I find none.

Thus, on the record made at the trial, including my observation of the witnesses, briefs, and arguments of counsel, I make the following findings of fact, conclusions of law, and recommended Order:

I. JURISDICTION

The United States Postal Service (USPS) provides postal services for the United States and operates various facilities throughout the several States, including a facility at 9450 East Corporate Hills Drive, Wichita, Kansas. The Board has jurisdiction over the USPS pursuant to the Postal Reorganization Act, 39 U.S.C. § 1209(a).

II. THE LABOR ORGANIZATION INVOLVED

American Postal Workers Union, Local 735 (the Respondent or the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts.*

To reiterate the operative facts: For some years the Union has been the exclusive bargaining representative of a unit of the USPS employees at the East Corporate Hills Drive facility. On May 25, 2000,¹ Christine Pruitt, the Union's steward, filed a grievance alleging that Ricky Bryant, an employee in another craft, had been assigned work within the Union's bargaining unit jurisdiction. This matter was resolved at the second step with an agreement that unit employees who were on the "overtime desired" list would be compensated for the 105 hours that Bryant had done bargaining unit work. However, not all such unit employees received a payment.

Pruitt testified that she chose which unit employees would share in the payment, and that in order to give those chosen more money (specifically Alfred Norris and Debbie Holt, each of whom told Pruitt that they wanted \$300), she excluded Teri Adelson, the Charging Party. She denied that Adelson was

excluded because she was not a union member. She testified that she eliminated Adelson solely so that others could receive more money, however, she admitted that those who did so were union members.

Denise Brown, the USPS manager who settled the grievance with Pruitt, testified that during their meeting Pruitt called someone and then reported that since it was a "class action" grievance, the Union could choose whomever it wished to compensate. Alfred Norris, one of the unit employees who was compensated, credibly testified that Pruitt had told him she was only going to pay those who were union members, a statement he then relayed to Adelson's brother.

Adelson filed a charge alleging that she had been discriminated against because of her nonmembership in the Union, and, as noted above, the complaint was settled pursuant to a non-Board agreement, which required the Union to post a notice and make an appropriate payment to Adelson. This settlement was finalized in April 2001.

The notice posted by the Union was in the form of a letter to all bargaining unit employees from Dave Darrough, the Union's president. It reads:

The American Postal Workers Union Local 735 recognizes and observes the rights of all employees in the Unit.

In the May 2001 newsletter to members, Darrough reported concerning settlement of the of the grievance and the unfair labor practice:

In this particular case, a large sum of money was involved in the award. In order to make the award worthwhile, it was decided to divide it between a number of the Bargaining Unit. In this case we asked that the award be divided between approximately 50% of the Bargaining Unit employees at Corporate Hills. Normally the Union will rotate awards so that everyone will eventually receive compensation. However, in particular case [sic.], non-member Teri Adelson was not one of 50% chosen. Since her brother was one who was selected to receive compensation, Ms. Adelson was passed over. Evidently this didn't set well with Ms. Adelson. Although she doesn't pay dues and probably never will, she certainly demands everything that dues paying members struggle for. Ms. Adelson never called the Union or made an inquiry as to why she wasn't included. She simply filed a complaint with the National Labor Relations Board alleging she had been discriminated against by the Local Union. At some point, even when you are right, litigation costs more to defend than it is worth. On the advice of our attorneys, we decided to avoid further litigation that promised to run into the thousands. I settled her complaint by paying her the amount those who received the award settlement paid. I report this to the membership because it is true. I was cautioned that if I reported this I should look over my shoulder and not be surprised if another complaint isn't filed against me. I am never surprised at the steps a SCAB, FREE LOADER or what ever you choose to call a person who refuses to pay their fair share and take a free ride on the dues of the dues paying membership. I tell you right now, I am proud of Chris Pruitt and stand behind and

¹ All dates are in 2000, unless otherwise indicated.

support her 100%. She never intentionally did anything wrong, and I don't believe she ever will.

Based on this newsletter, Adelson filed the second charge in this matter and the Regional Director revoked his order dismissing the first complaint and issued the consolidated complaint alleging that the Union had violated Section 8(b)(1)(A) by the actions of Pruitt and Darrough.

B. Analysis and Concluding Findings

1. The newsletter

In my initial decision, I concluded that Darrough did not violate Section 8(b)(1)(A) in his newsletter to members. On this conclusion, the Board specifically expressed no opinion, ruling only that Darrough's statements in the newsletter justified setting aside the settlement agreement. However, the Board also said: "Darrough's comments exceeded Section 8(c)'s zone of protection by suggesting that it is permissible, indeed laudable, for a union to discriminate against nonmembers. For this reason, contrary to our dissenting colleague's view, Darrough's comments were not privileged."² Later in its decision, *Postal Workers Local 735 (Postal Service)*, 340 NLRB No. 166, slip op. at 3 (2003), the Board posed an analogy:

An employer's supervisor refused to grant monetary benefits to an employee because of the employee's membership in a union. The employee files a charge against the employer, and the General Counsel issues a complaint. The case settles on a non-Board basis. The settlement includes the posting of a notice. Shortly thereafter, the employer posts a notice which exorciates membership in the union and says that the employer "is proud of" the supervisor's conduct and "stands behind and supports the supervisor 100%." The General Counsel asserts that this conduct undermines the settlement *and is unlawful*. In our view, the General Counsel would be correct, and we reach the same result in the instant case. [Emphasis added.]

From this language I conclude that the rule of decision in this matter is that Darrough violated Section 8(b)(1)(A) by his newsletter comments because he implied that nonmembers would not be represented by the Union or treated fairly. As the Board notes, expressing contempt for "free loaders" would not be unlawful or justify setting aside the settlement agreement since the Union has an 8(c) right to state its opinion. See also *Letter Carriers Local 3825 (Postal Service)*, 333 NLRB 343 (2001).

2. Excluding Teri Adelson from the settlement

Though Pruitt testified that Adelson's nonmembership in the Union was not a factor in her decision to exclude Adelson, I credit the testimony of Denise Brown and Alfred Norris. Brown is the Employer's manager involved in negotiating the grievance settlement. She testified that during the settlement conference, employee Debbie Holt asked Pruitt "if we had to pay Teri because she was not a union member." Pruitt then made a tele-

phone call and subsequently "looked at Debbie and said, it is a class action. We can pay whoever [sic] we want."

Norris testified that in a discussion with Pruitt he said that Adelson should have been included in the grievance. Pruitt "kind of stated that they were going to pay only union members." He insisted that Adelson be on a subsequent grievance for overtime and she was. This fact, however, does not exonerate Pruitt's refusal to include Adelson in the first grievance settlement.

To exclude an employee from a grievance settlement simply because she is not a member of the union is clearly a violation of Section 8(b)(1)(A). *Letter Carriers, Local 3825 (Postal Service)*, supra.

Further, even if union membership was not a factor in excluding Adelson from the grievance payout, the mere fact that she was excluded though otherwise eligible is itself sufficient to conclude that Pruitt did not fairly represent members of the bargaining unit. Thus in *Mine Workers District 5 (Pennsylvania Mines Corp.)*, 317 NLRB 663 (1995), an arbitrator awarded backpay for supervisors having done bargaining unit work and retained jurisdiction over issues of who would receive money and how much. The union requested the employer to pay the whole amount (\$6121.09) to the union, which was done. The union did not distribute any of the award to employees on grounds that it would have been difficult to determine who was entitled to what. The Board found the union's act a breach of its duty of fair representation and a violation of Section 8(b)(1)(A).

This is an even stronger case. Accordingly, I conclude that excluding one member of the bargaining unit from a grievance award simply so that others might get more is a breach of the Union's duty of fair representation and a violation of Section 8(b)(1)(A).

REMEDY

Having concluded that the Respondent committed certain unfair labor practices, I shall recommend it cease and desist therefrom and post an appropriate notice. The Charging Party having been compensated in the amount received by others who participated in the grievance settlement, no backpay is due.

Since the Union's newsletter was the vehicle for Darrough's violation, I shall recommend that the Union be ordered to send a copy of the notice to each union member and each member of the bargaining unit.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommend³

ORDER

The Respondent, American Postal Workers Union, Local 735, its officers agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to represent fairly all members of the bargaining unit, regardless of their membership in the Union, by excluding

² While dissenting Member Liebman did "not reach the issue of whether Darrough's column violated Sec. 8(b)(1)(A)," implicitly, she must have concluded it did not, since she concluded that the settlement agreement should not have been set aside.

³ 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.

them from participation in a grievance settlement to which they would otherwise be entitled.

(b) Informing union members and nonmembers that the Union approves of actions its stewards take which discriminate against employees.

(c) In any like or related manner 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 after service by the Region, post at its business office and meeting places copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, 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

⁴ 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."

members and former members employed by the Respondent at any time since October 12, 2000.

(b) Send a copy of the notice to each member of the Union in addition to each nonunion member of the bargaining unit.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, San Francisco, California, March 23, 2004.

APPENDIX

NOTICE TO MEMBERS

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.

WE WILL NOT refuse to represent fairly all members of the bargaining unit, regardless of their membership in the Union, by excluding them from participation in a grievance settlement to which they would otherwise be entitled.

WE WILL NOT inform union members and nonmembers that the Union approves of actions its stewards take which discriminate against employees.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

AMERICAN POSTAL WORKERS UNION, LOCAL 735