JD(ATL)–44–05
Wichita Falls, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL–CIO, BRANCH 1227

and **CASES** **16–CB–6815**

TERRY ERWIN, an Individual

and **16–CB–6874**

TERRY PENNINGTON, an Individual

Aaron J. Epstein, Esq. and Edward B. Valverde, Esq., for the General Counsel
Thomas N. Ciantra, Esq. (Cohen, Weiss and Simon, LLP), of New York, New York, for the Respondent

BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on September 6, 2005 in Wichita Falls, Texas. After the parties rested, I heard oral argument, and on September 7, 2005, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The Conclusions of Law and Order are set forth below.

CONCLUSIONS OF LAW

1. The Respondent, National Association of Letter Carriers, AFL-CIO, Branch 1227, is a labor organization within the meaning of Section 2(5) of the Act.

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1 The bench decision appears in uncorrected form at pages 202 through 214 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

2. The Respondent is subject to the Board's jurisdiction pursuant to Section 1209 of the Postal Reorganization Act.

3. The Respondent did not violate the National Labor Relations Act in any manner alleged in the Complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The case is dismissed.

Dated Washington, D.C.

Keltner W. Locke
Administrative Law Judge

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

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BENCH DECISION

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. Because the Union owed no duty of representation to individuals no longer in the bargaining unit, I conclude that it did not violate the Act.

Procedural History

On October 26, 2004, Charging Party Terry Erwin filed the initial charge in Case 10-CB-6815, and served it the next day on National Association of Letter Carriers, AFL-CIO, Branch 1227. For brevity, I will refer to this charged party as the "Union," "Branch 1227," or the "Respondent."

Charging Party Terry Pennington filed the initial charge in Case 16-CB-6874 on January 24, 2005, and served it on the Respondent the next day. Both Erwin and Pennington later amended their respective charges.

On May 31, 2005, the Regional Director for Region 16 of the Board issued an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing. Respondent filed an Answer on June 14, 2005 and a Motion to Dismiss on June 15, 2005. The General Counsel filed a Response in Opposition to Respondent's Motion to Dismiss on July 8, 2005. By Order dated July 26, 2005, the Board denied the Motion to Dismiss.

A hearing opened before me on September 6, 2005 in Wichita Falls, Texas. At that time, both the General Counsel and Respondent presented evidence and then argued the case orally. They also filed contemporaneous briefs. Today, September 7, 2005, I am issuing this bench decision.

Background

Although the Complaint alleges that Respondent is the exclusive representative of certain employees of the United States Postal Service, Respondent more accurately is described as the local affiliate of the Section 9(a) representative, the National Association of Letter Carriers, AFL-CIO, which I will refer to as the "NALC." The Postal Service has recognized the NALC as the exclusive bargaining representative of a unit consisting of city letter carriers. The Postal Service and the NALC have embodied such recognition in a series of collective-bargaining agreements, the most recent of which became effective on November 21, 2001 and remains in effect at this time. I conclude that the Board has jurisdiction of this matter pursuant to Section 1209 of the Postal Reorganization Act.

Additionally, I conclude that the following unit, represented by the NALC, is an appropriate unit for collective bargaining:

> All city letter carriers, EXCLUDING managerial and supervisory personnel; professional employees; employees engaged in personnel work in other than a purely non-confidential clerical capacity; security guards as defined in Public Law 91-375, 1201(2); all postal

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> inspection service employees; employees in the supplemental work force as defined in Article 7; rural letter carriers; mail handlers, maintenance employees, special delivery messengers, motor vehicle employees, and postal clerks.

The NALC has delegated responsibilities to Respondent to administer the collective-bargaining agreement at the local level in Wichita Falls. Based upon the testimony of Gene Goodwin, who is the NALC national business agent for its region 10, and the testimony of Branch 1227 president Renae Young, I find that both Young and Goodwin were agents of Respondent, within the meaning of Section 2(13) of the Act, at all material times.

At the beginning of September 1994, unit employees in Wichita Falls were receiving two 15-minute paid work breaks each day. They had done so for a number of years. However, on about September 17, 2004, over the Union's objection, local management reduced the breaks from 15 to 10 minutes.

The Union filed what it calls a "class action grievance." The grievance made its way slowly through the contractual dispute resolution procedure and, after 9 years, came before an arbitrator, who conducted a hearing on March 4, 2004. The arbitrator, Louise B. Wolitz, issued an award dated April 8, 2004.

Arbitrator Wolitz found that management had violated the collective-bargaining agreement by unilaterally reducing the breaks. She ordered the employer to restore the two 15-minute break periods within 20 days. She further ordered:

> The Union is entitled to a make-whole remedy for the carriers. That remedy should reflect the fact that the carriers have been forced to work an extra ten minutes per day, and would have worked the ten minutes per day at the overtime rate if their routes had been evaluated to reflect fifteen-minute breaks rather than ten-minute breaks. The arbitrator directs the parties to meet to fashion the precise nature of this remedy and how the total settlement will be distributed to the carriers. The remedy should cover the period from the date in 1994 when the breaks were improperly reduced to ten-minutes in violation of the National Agreement through the date on which the fifteen-minute breaks are restored.

The arbitrator retained jurisdiction "for purposes of assisting the parties with fashioning and implementing the remedy, if necessary."

Union officials negotiated with Postal Service management. The two sides ultimately agreed that the Postal Service would pay $800,000 "to the city letter carriers in Wichita Falls, TX. The local Union will furnish to the Postal Service the names and the amounts to be paid to each letter carrier; not to exceed the total of $800,000."

The present controversy arises out of how the Union apportioned and distributed the $800,000. The General Counsel alleges that the Union's action breached the duty of fair representation. Specifically, Complaint paragraph 10 alleges that "Respondent has failed to represent Charging

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Parties Erwin, Pennington, and other similarly situated employees for reasons that are arbitrary, unfair, and in bad faith, and has breached the duty of fair representation it owes to the employees it represents," in violation of Section 8(b)(1)(A) of the Act. Respondent denies these allegations.

How the Union Split the "Pie"

One possible method of apportioning the $800,000 would have entailed examining the time and payroll records of all letter carriers who worked in Wichita Falls at any time after September 17, 1994, and counting up how many breaks each employee took. For each employee, multiplying the total number of breaks times five would yield the number of extra minutes worked, which were to be compensated at the employee's overtime pay rate.

Theoretically, such calculations are possible, because the Postal Service keeps time records, called "clock rings," showing when and how long each employee worked. However, Union officials concluded that in practice, making such calculations for a sizable number of employees over a 10-year period would be exceedingly difficult. So instead, Union officials decided to divide the money using a formula which depended on years of service in the bargaining unit and on whether the employee was still working in the bargaining unit.

Respondent's Answer admits that it distributed the $800,000 as follows: "[A]ctive carriers as of the time of the settlement who had worked 10 years under the challenged practice each received $10,000; active carriers who had worked less than 10 years received a proportional share of $10,000 depending on their years of service; carriers who had retired as of the settlement date who had worked 10 years under the challenged practice received approximately $5,000 with retires with lesser service receiving proportionally lesser amounts, and carriers who otherwise separated from the craft or moved into management positions received proportionately less than retirees." I find that the Union distributed the $800,000 in the manner it admitted in its Answer.

Before deciding on this allocation scheme, Union officials had obtained legal advice. The Union's attorney had told them that the Union had no duty to give retirees any of the settlement proceeds. The Union's counsel based this opinion on a Supreme Court decision, *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971). The court held that an employer had no duty to negotiate with a union representing a unit of its workers concerning modification of benefits paid to retirees. Because the retirees had ceased work without expectation of further employment with the company, they were not members of the bargaining unit and the benefits they received were not mandatory subjects of bargaining.

The Union's counsel argues that since the retirees are not part of the bargaining unit, the Union has no duty to represent them. There can be no breach of the duty of fair representation when there is no duty of representation at all.

Notwithstanding the attorney's advice, Union president Young wanted the retirees to have some share of the arbitral award. She and the other Union officials decided that retirees should

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receive approximately half as much as employees still working in the bargaining unit. Thus, a retiree with 10 years service in the bargaining unit would receive about $5,000.

At about the same time Arbitrator Wolitz heard the decade-old grievance, Terry Pennington retired. He began his retirement in March 2004 after about 26 years in the bargaining unit. Thus, for about the last nine-and-one-half years of his employment, Pennington had been affected by the employer's reduction in breaktime. However, because he had already retired before the Union distributed the arbitral award, Pennington only received $4,957.54, about half what he would have received if he had still been working.

The other charging party, Terry Erwin, had retired in October 2003 after about 35 years employment. He received $4,790.90 from the arbitral award. The Union admits that this is about half the amount distributed to an employee of similar experience who was still in the bargaining unit.

The General Counsel does not allege that the Union treated the retired employees less favorably because they had engaged in any kind of protected activity. Indeed, the record would not support such a theory. For example, one of the charging parties, Pennington, remains an associate member of the Union but the other, Erwin, had resigned. Yet they both received essentially the same treatment.

Rather, the Complaint alleges that the Union's action breached the duty of fair representation "for reasons that are arbitrary, unfair, and in bad faith. . ." Under well established precedent, union action which is sufficiently arbitrary and unfair can violate Section 8(b)(1)(A) even absent any discriminatory intent. However, the law gives a union considerable leeway in deciding how to fulfill its responsibilities as exclusive bargaining representative. To violate Section 8(b)(1)(A), a union action must be so far outside a "wide range of reasonableness" that it is wholly irrational or arbitrary. See *Air Line Pilots v. O'Neill*, 499 U.S. 65 (1991).

Analysis

The General Counsel argues that because the Union undertook to represent all of the affected employees, including those who later retired before the distribution of the award, the Union had a duty to treat them in a similar fashion "absent some legitimate basis to treat them differently." Such a legitimate basis, the government contends, is lacking here.

Citing *United Steelworkers Local 2869*, 239 NLRB 982 (1978), Respondent asserts that once an individual leaves the bargaining unit, it no longer has a duty to represent him. There can be no breach of a duty which does not exist. Respondent also cited *Branch 6070, National Association of Letter Carriers, AFL-CIO*, 316 NLRB 325 (1995).

That latter case concerns a union's decision not to distribute part of a grievance award to individuals who had left the bargaining unit. However, the judge's decision, adopted by the Board,

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was not based on a finding that the Union had no duty to represent the former unit employees. Rather, the judge concluded that the Union's actions fell within the range of reasonableness. The decision may be read, therefore, as suggesting that the Union did have such a representation duty, but discharged it in a lawful manner.

Although this is nearly an issue of first impression, I am not writing on an entirely blank slate. Were that the case, I would have little difficulty in concluding that the Union's duty to represent these employees did not simply disappear when they decided to retire. That strikes me as an unjust and unnecessary extension of the *Pittsburgh Plate Glass* principle.

In the present case, Union officials made a point of characterizing the grievance in question as a "class action grievance." However, this term does not appear in the contractual grievance provisions, so I conclude that it does not refer to a particular category of grievance to which special rules apply. The term does appear in other decisions involving the NALC but I believe it is more a descriptive phrase than a term of art. It obviously signifies a single grievance that affects many employees.

If the Union had filed a separate grievance for each employee who suffered harm because of the unilateral reduction in break time, the facts would appear quite different. Suppose, for example, that in 1994, the Union had filed a separate grievance for Pennington and had pursued it on his behalf for a decade. Further suppose that the Union then dropped the grievance when Pennington retired.

That result would not inspire particularly positive feelings in an observer, but it would not appear to offend the Act. When a union becomes an exclusive bargaining representative, under Section 9(a) of the Act, it not only acquires authority but also responsibilities that require time and attention. Expending those resources on behalf of someone no longer in the unit could well diminish them for the employees still under the union's aegis.

The General Counsel argues that the Union, having undertaken to represent the now-retired employees, has a continuing duty. In effect, the government would treat the retirees as still being in the unit for the limited purpose of the grievance. Such an argument greatly appeals to my sense of fairness, but I do not believe that it accords with existing Board law.

In *Branch 529, National Association of Letter Carriers, AFL-CIO*, 319 NLRB 879 (1995), Member Cohen, concurring in a footnote, expresses the view that since a grievance was filed and settled while a certain individual remained in the bargaining unit, the union "must represent her fairly, even if this extends the representation into postemployment periods." 319 NLRB at 881, footnote 11. However, the other two members of the Board panel did not adopt this theory. In my view, it would not be appropriate for a judge to decide a case based upon an opinion not yet adopted by the Board, no matter how appealing that rationale might appear.

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In *Local 888, American Federation of Government Employees (Bayley-Seton Hospital)*, 308 NLRB 646 (1992), the Board dealt with a highly unusual fact situation involving a rival union becoming the exclusive bargaining representative. Based on the rather unique facts of that case, the Board held that the first union continued to have a duty to arbitrate a grievance even though it no longer was the exclusive representative of the unit. That precedent might have relevance to the present case. However, absent other authority more directly on point, I would hesitate to dilate this narrow exception to encompass the present situation.

In sum, the extant case law leads me to conclude that the Union did not breach a duty of fair representation because it owed no representation duty to the retirees. This conclusion leads in turn to dismissal of the Complaint.

Accordingly, I do not reach the question of whether the Union acted within its wide range of reasonableness. Clearly, this range has limits. A union, for example, may not simply deposit a grievance settlement in its own treasury rather than distributing to the affected employees.

The Union's actions in the present case appear to be pretty close to the edge of the range of reasonableness. Rather than doing the difficult math, the Union adopted a formula which was to some extent arbitrary. However, I do not reach the issue of whether the action was so arbitrary as to violate the Act.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, and Order. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout this proceeding, all counsel have displayed the highest standards of civility and professionalism, which I truly appreciate. The hearing is closed.