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

Advice Memorandum

DATE: July 22, 2003

TO : Richard L. Ahearn, Regional Director
Catherine M. Roth, Regional Attorney
Raymond Willms, Assistant to the Regional Director
Region 19

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

SUBJECT: Painters Local 427 &
District Council 5 (Long Painting)
Case 19-CB-8928 536-2581-6733-5000

This case was submitted for advice as to whether the Union breached its duty of fair representation in its handling of a member's grievance by improperly failing to pursue the grievance or by falsely assuring him that his grievance was being pursued. The Region also requested advice as to the appropriate remedy.

We conclude that the Union's actual handling of the grievance was not arbitrary or perfunctory, but that a complaint should issue, absent settlement, alleging that the Union violated its duty of fair representation by willfully misinforming the member about the status of his grievance. We further conclude that the appropriate remedy is a cease and desist order.

FACTS

Charging Party Long ("Long") is a steward for IUPAT Local 427 ("the Union") and works as a master painter for Long Painting ("the Employer"). Long and other unit employees were working the 6:00 p.m. to 4:00 a.m. "swing shift" during August of 2000.[1] At about this time, Employer superintendent Duhon asked the crew to begin their shift earlier than 6:00 p.m. Long worked the earlier hours for only about one week, beginning August 23, 2000, whereas other employees worked that schedule for as long as six months.

Long was unsure of whether the employees should be getting premium pay for some of the hours worked,[2] and

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[1] Another shift apparently ran from 7:00 a.m. to 5:30 p.m.

[2] The employees were apparently working four 10-hour days. It appears that Long was questioning whether the employees

raised that issue with Mike Fitzsimmons, the local Union's business agent. Fitzsimmons told him that he didn't know the contract terms but would look into the matter. Long also asked Jim Taylor from the Union's District Council office in Spokane ("District Council") the same question.

Long stated that he did not hear back from Fitzsimmons or Taylor, and in the meantime spoke with other stewards in October 2000 and received a copy of the contract with the general contractor. According to Long, the contract stated that if employees worked before the 6:00 p.m. shift, they were to earn premium pay, and the two shifts should not overlap. In October or November of 2000, Long called Fitzsimmons and provided this information. Fitzsimmons said that he would "look into it."

In November or December of 2000, Long sent a "grievance" to Fitzsimmons and to Bob Matson of the District Council, supported by paperwork showing contract terms and wages to be paid under the contract.[3] Long then spoke with Fitzsimmons, who said that he would "get on" the grievance.

A. Charging Party's version of facts

After filing the grievance, Long called Fitzsimmons several times a month[4] to find out what was happening. On at least three of those occasions, Fitzsimmons told Long that he was going to Seattle on business and would speak with the Employer there. Upon returning from the first trip to Seattle, Fitzsimmons stated that he did not get a chance to speak with the Employer; on the second that they were still "working on it;" and on the last occasion, that the Union and Employer were "agreeing to disagree" but that he would still "work on it." In response to Long's calls, Fitzsimmons stated on more than a dozen occasions that he was "working on it."

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should be receiving premium pay for the hours worked in excess of eight hours a day. Under Article 8, Section 8-4 of the National Construction Stabilization Agreement, the first 2 hours performed in excess of the standard work day (Monday through Friday) "shall" be paid at time and a half.

[3] The grievance states that six members wanted to file a grievance, and lists several issues in addition to the premium/overtime pay issue.

[4] Long estimates that he called Fitzsimmons 20 to 30 times.

Long alleges that he and Mike Storrs, a working foreman, called Fitzsimmons at least once a month during the latter half of 2002. By the end of 2002, he and Storrs were so upset about not getting a response or hearing that Fitzsimmons was "working on it" that they planned to hire an attorney. On January 23, 2003, Long met with Fitzsimmons prior to filing the instant charge. Long was told that, unbeknownst to Fitzsimmons, the original grievance with the Union was never filed with the Employer.[5] Fitzsimmons told Long that Taylor and Matson (from the District Council) had gotten together and decided not to pursue the grievance, but that they had not informed Fitzsimmons of that decision. Hearing this, Long complained that Fitzsimmons had led him to believe that the grievance was being pursued, to which Fitzsimmons offered little response.

Storrs corroborates Long's version of the facts insofar as he states that he contacted Fitzsimmons numerous times about the grievance and was told, in reference to the Union and Employer, that "we're speaking" and "we're not throwing punches," and that Fitzsimmons was "working on it." Storrs also spoke with Fitzsimmons up to several times a month on various unrelated issues and would ask about the grievance. Fitzsimmons would always say that he was "working on it."

B. Union's version of facts

Sometime in the summer of 2000, the crew on which Long worked agreed to change their hours to a 2 p.m.-to-11:30 p.m. shift. The National Construction Stabilization Agreement provides that the Employer may regulate starting times of the shifts to permit the "maximum utilization of daylight hours." In 1999, the general contractor and the Building Trades Council agreed to a "4x10"[6] arrangement under which the day shift was to start at 7:00 p.m. and the second shift was to start a half hour after the close of the day shift. The Union contends that this 4x10 schedule does not follow, and appears to override, Section 8-4 of the Stabilization Agreement (one of the provisions relied upon by the Charging Party). Furthermore, the Union points out that the contract requires that grievances be called to the Employer's attention within 5 days of an alleged violation.

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[5] The Union admits that it did not tell Long that the grievance was not being pursued until this time.

[6] Consisting of four ten-hour days per week.

According to the District Council, Fitzsimmons summarized the complaint for Taylor. Taylor reviewed the contract and then spoke with Matson. In Taylor's and Matson's view, the crew (including Long) had accepted the shift without requesting additional premium pay, and a grievance would not be justified months later, particularly where the contract requires that a grievance be filed within five days. Taylor said that it would be frivolous to charge premium pay for a better shift that the crew preferred. Taylor, in mid or late November 2000, told Fitzsimmons that he saw no reason to go forward with the grievance.

According to Fitzsimmons, Long notified him in October or November that employees had been put on a different shift. Shortly thereafter, Fitzsimmons contacted Duhon, the Employer's superintendent, to discuss changing the employees' shifts. Duhon assured him that the employees would be going back to their regular hours shortly. Fitzsimmons stated that, after that contact, nothing further occurred for approximately two and a half months. Fitzsimmons states that in February 2001 he got a call from a painter who told him that the crew was still starting early. Fitzsimmons immediately called Duhon and asked him to transfer the shift back to the originally scheduled start time, which Duhon immediately did.[7]

Fitzsimmons denies being told in November 2000 that the District Council had decided not to pursue the grievance. He states that in February 2001 he gave Taylor a report supporting the grievance. Fitzsimmons claims that after this report went to Taylor, he assumed that the grievance was being processed until December 2002, when he was told it had been dropped.[8] Fitzsimmons also differs with Long in stating that Long only brought up the status of the grievance on a couple of occasions. Fitzsimmons could not recall the details of these conversations.

ACTION

We conclude that the Union's actual handling of the grievance was not arbitrary or perfunctory, but that a complaint should issue, absent settlement, alleging that the Union violated its duty of fair representation by

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[7] According to Fitzsimmons, some of the employees then complained because they liked getting off their shift earlier.

[8] Fitzsimmons stated that he did not find it unusual for the grievance to proceed slowly because in his experience grievance processing could take years.

willfully misinforming Long about the status of his grievance. We further conclude that the appropriate remedy is a cease and desist order.

It is well established that a union has broad discretion in deciding what grievances to process and how to process them.[9] If a union reasonably concludes that a grievance lacks merit, it does not breach its duty of fair representation if it later drops the grievance for objective reasons.[10] The Board looks broadly into the totality of circumstances in evaluating whether a union's grievance processing was arbitrary or perfunctory.[11] Where a union undertakes to process a grievance, it must explain any subsequent decision not to process it or to abandon it.[12] Also, a Union may not willfully keep employees uninformed or misinformed about grievances.[13]

In Iron Workers Local 377,[14] the Board revised and explained its standard for determining when backpay is an appropriate remedy for arbitrary or perfunctory grievance handling. It held backpay to be appropriate only where the General Counsel shows that the grievant would have prevailed, under a preponderance of the evidence standard, if the union had properly processed the grievance.[15]

In this case, the Union's actual processing of the grievance was not arbitrary or perfunctory. It appears to have made a good faith assessment of the facts before

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[9] Ford Motor Company v. Huffman, 345 U.S. 330, 338 (1953); Associated Transport, Inc., 209 NLRB 292, enfd. sub nom. Kesner v. NLRB, 532 F.2d 1169 (7th Cir. 1976).

[10] See, e.g., American Bridge Division of U.S. Steel Corp., 261 NLRB 950 (1982) (union reasonably believed grievance lacked merit).

[11] Office Employees Local 2, 268 NLRB 1353 (1984), affd. sub nom. Eichelberger v. NLRB, 765 F.2d 851 (9th Cir. 1985).

[12] See, e.g., Local 3036, New York City Taxi Drivers (Linden Maintenance Corp.), 280 NLRB 995 (1986); Union of Security Personnel (Church Charity Foundation), 267 NLRB 974, 980 (1983); Groves-Granite, 229 NLRB 56, 63 (1977).

[13] See, e.g., American Postal Workers Union, 328 NLRB 281, 282 (1999).

[14] 326 NLRB 375 (1998).

[15] Id. at 380.

deciding not to file a grievance with the Employer. Fitzsimmons considered the merits of the grievance and made a written report favoring the grievance that he sent to the District Council. Fitzsimmons also made attempts, which eventually succeeded, to have the Employer reinstate the crew's original schedule. At the District Council level, Taylor reviewed the complaints and the contract, and discussed the matter with Matson. Taylor and Matson concluded that the crew had accepted the shift without requesting additional premium pay, and that it would be improper to file a grievance months later, particularly where the contract requires that a grievance be filed within five days. Indeed, Taylor said that it would be frivolous to request premium pay for a better shift that the crew preferred. Thus the Union's conduct was arguably within the wide range of reasonableness accorded a union's handling of grievance decisions.

The only arbitrary and unlawful conduct was the Union's willfully misinforming the Charging Party about the status of his grievance. If the District Council's version of the facts is credited, Taylor told Fitzsimmons in mid or late November 2000 that the District Council saw no reason to go forward with the grievance. Knowing that the grievance was not being pursued, Fitzsimmons for more than two years nevertheless repeatedly told Long that he (apparently meaning both the Union and the District Council) was "working on" the grievance. Moreover, Fitzsimmons made numerous statements to both Long and Storrs describing the nature of the parties' negotiations and the positions the parties were taking, such as "we're talking," "we're not throwing punches," and "we've agreed to disagree."[16] Fitzsimmons' basic explanation that he was simply unaware of the fact that the grievance was never pursued and that he thought the District Council was handling it might justify his statements that "we're working on it," but it cannot explain or justify his furnishing of such clearly fabricated details.[17] Thus, rather than informing Long of the Union's decision not to

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[16] This is essentially the Charging Party's version of the facts, which was corroborated by Storrs. Fitzsimmons does not deny making the alleged remarks, but rather contends that Long only brought up the status of the grievance on a couple of occasions, and that he (Fitzsimmons) could not recall the details of those conversations.

[17] Thus, we would find that Fitzsimmons willfully misinformed Long about his grievance even if Fitzsimmons' version of the facts were to be credited.

go forward with the grievance, we conclude that Fitzsimmons actively misled him to believe that the Union was pursuing his grievance. Under these circumstances, the Union's conduct goes beyond mere negligence and violates its duty to "neither willfully misinform employees about their grievances nor willfully keep them uninformed."[18]

With regard to backpay as a remedy, it does not appear that the preponderance of the evidence would indicate that Long would have prevailed in arbitration. Indeed, the Union makes substantial contractual and equitable arguments suggesting that the grievance lacked merit. Thus, there is no basis for seeking backpay.

Accordingly, absent settlement, the Region should issue a Section 8(b)(1)(A) complaint seeking a cease and desist order.

B.J.K.

[18] American Postal Workers Union, 328 NLRB at 282.