

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

# Advice Memorandum

DATE: November 20, 2003

TO : Earl L. Ledford, Acting Regional Director  
Region 9

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

SUBJECT: Carpenters, Local 104 536-2581-3384  
(Frank W. Schaefer Inc.)  
Case 9-CB-10963

Southwest Ohio Regional Council of  
Carpenters, United Brotherhood of  
Carpenters and Joiners of America,  
AFL-CIO  
(Frank W. Schaefer Inc.)  
Case 9-CB-10964

This case was submitted for advice on whether the Union breached its duty of fair representation by failing to pursue compliance with an arbitration award granting the Charging Party reinstatement and backpay.

We conclude that the Union breached its duty of fair representation in violation of Section 8(b)(1)(A) because the Union's lack of any reason for failing to pursue compliance with the arbitration award demonstrates perfunctory treatment of the Charging Party's claim.

The Charging Party, Sidney Tompkins, worked as a carpenter for Frank W. Schaefer Inc. for almost ten years. He was represented there by the Southwest Ohio District Counsel of Carpenters. On November 5, 1997, the Employer terminated Tompkins for allegedly committing an act of sabotage. The Union immediately grieved the termination and an arbitrator heard it in the summer of 1998. The arbitrator ruled in Tompkins' favor on February 27, 1999, directing the Employer to reinstate and make him whole for lost earnings. The Employer refused to reinstate Tompkins until backpay was resolved. The Union told Tompkins that they would not contest the Employer's refusal to delay reinstatement.

Following the arbitral award, the Union and the Employer had numerous contacts to establish the amount of backpay due Tompkins. On September 9, 1999, the Employer's counsel sent a letter to the Union summarizing Tompkins' earnings history, and requesting further information

concerning his earnings for that current year. The Union's first response to that letter was two years later, on October 2, 2001.

In the interim, Tompkins frequently questioned the Union about the status of his award. In particular, in February 2000, Tompkins became concerned that his claim would expire soon because it was one year since the arbitrator's decision. He voiced his concern to a number of Union officials, and made several phone calls to a succession of Union attorneys. He was repeatedly told that he should not worry. One attorney told him that there was no statute of limitations. A Union official told him to stop calling the attorney because the phone calls were costing the Union too much in legal fees. He was also told that the Union would not attempt to enforce the arbitration decision because it was too costly and the Union had to "look out for its own interest."

In March 2001, a new Union attorney, Fox, told Tompkins that he did not think a statute of limitations applied to the arbitral award. In response to Tompkins' persistence, in October 2001, Fox contacted the Employer requesting Tompkins' reinstatement while the parties worked out the backpay figures. On October 29, the Employer responded by claiming that the Union's right to enforce the arbitral award had lapsed.

On November 30, 2001, attorney Fox filed a Section 301 action on Tompkins' behalf to obtain compliance with the February 1999 award. The district court granted the Employer's motion for summary judgment, finding that the one year statute of limitations, based on Ohio state law, had lapsed one year after the parties had exhausted their efforts to quantify the backpay. The judge relied upon the fact that the Union failed to communicate with the Employer during the period from September 11, 1999 through October 2001. The Union did not appeal the district court's ruling, and informed Tompkins of the decision too late for him to obtain his own counsel.

We conclude that the Union's treatment of Tompkins' arbitral award was perfunctory because the Union never offered any reason for failing to pursue his right to reinstatement and backpay. Therefore, the Region should issue a Section 8(b)(1)(A) complaint, absent settlement, alleging that the Union breached its duty of fair representation.

Under the duty of fair representation, a union is afforded broad discretion in deciding which employee

grievances to pursue.<sup>1</sup> However, once a union undertakes to process a grievance, it may not thereafter drop the grievance for arbitrary or perfunctory reasons.<sup>2</sup> Thus, if there is no reason at all for dropping a grievance, a violation is established.<sup>3</sup> For instance, in Church Charity, the union violated its duty when it undertook to process a discharge grievance, and then it inexplicably failed to do so. This inaction constituted perfunctory treatment, for there was no explanation for the failure to process the grievance. Thus, the union's conduct was more than mere negligence and amounted to a willful failure to fulfill its obligation.<sup>4</sup>

In this case, the Union at no time offered any explanation for its failure to pursue compliance with Tompkins' arbitral award. Throughout the two years that Tompkins pursued the Union officials and their attorneys for some action, they brushed off his inquiries and made light of his concerns. There is no evidence that the Union dropped pursuit of the claim due to negligence<sup>5</sup> or an informed judgment that it had no merit.<sup>6</sup> Indeed, the

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<sup>1</sup> Ford Motor Company v. Huffman, 345 U.S. 330, 338 (1953).

<sup>2</sup> See Union of Security Personnel (The Church Charity Foundation of Long Island, Inc.), 267 NLRB 974 (1983). It is clear that these standards apply in the post-arbitral stage, as well. See Mine Workers District 5 (Pennsylvania Mines), 317 NLRB 663, 664 (1995) (union breached duty of fair representation by failing to distribute funds an arbitrator awarded).

<sup>3</sup> See, e.g., Local 3036, Service Employees International Union (Linden Maintenance Corporation), 280 NLRB 995 (1986); Local 417 Auto Workers (Falcon Industries), 245 NLRB 527 (1980); Teamsters Local 315 (Rhodes & Jamieson), 217 NLRB 16 (1975), *enfd.* 542 F.2d 1173 (9th Cir. 1976).

<sup>4</sup> 267 NLRB at 980.

<sup>5</sup> Compare Truck Drivers Local 692 (Great Western Unifreight System), 209 NLRB 446, 448 (1974) (union's negligence in failing to file timely grievance does not constitute by itself a breach of the duty of fair representation).

<sup>6</sup> Compare Steelworkers, District 38 (American Bridge Division of U.S. Steel Corp.), 261 NLRB 950 (1982) (union reasonably believed grievance lacked merit); Graphic

Union's March 2001 statement to Tompkins that it would not attempt to enforce the arbitration decision because it was too costly is belied by the fact that attorney Fox eventually did file a Section 301 action. In any event, the Union may have successfully pursued the claim short of costly legal action if it had merely answered the Employer's letter of September 11, 1999. In sum, the Union, with no explanation, failed to take any action to obtain the Employer's compliance with the arbitral award, and thus the Union's conduct constituted arbitrary, perfunctory treatment in breach of its fiduciary duty.<sup>7</sup>

Accordingly, the Region should issue a Section 8(b)(1)(A) complaint, absent settlement.

B. J. K.

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Communications Union No. 4 (San Francisco Newspaper Agency), 249 NLRB 88, 89 (1980) (same).

<sup>7</sup> [*FOIA Exemptions 5*