

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

# Advice Memorandum

DATE: December 12, 2008

TO : Frederick Calatrello, Regional Director  
Region 8

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

SUBJECT: Time Warner Cable, Northeast

Case 8-CA-37984

512-5072-5700

530-8083

Teamsters Local 377

530-6067-2080-6900

(Time Warner Cable)

536-2581-0180-5000

Case 8-CB-11000

These cases were submitted for advice as to whether, after decertification, the Employer unlawfully refused to arbitrate a grievance filed when the Union had been the collective bargaining representative. The Region also sought advice as to whether the Union violated its duty of fair representation by failing to challenge the arbitrator's decision to cancel the previously scheduled grievance. We conclude that (1) the Employer unlawfully refused to arbitrate a grievance that matured at a time when the Union was the collective bargaining representative, and that (2) the evidence is insufficient to establish that the Union acted in an arbitrary or irrational manner by declining to challenge the arbitrator's ruling.

## FACTS

Until recently, Respondent Teamsters Local 377 represented a unit of technical and warehouse employees employed by Respondent Time Warner Cable, Northeast at its facility in Warren, Ohio. In late 2007, the Union filed a contractual grievance over the discharge of Charging Party Michele Cummins. In April 2008, prior to a scheduled May 8 hearing, the arbitrator granted the Employer's request for postponement of the hearing, which the Union had opposed. A new hearing was set for July 21.

Prior to the hearing, the Region scheduled an election to resolve a decertification petition filed by certain employees. On July 11, the Employer requested a further

postponement, arguing that if the Union was decertified there would be no reason to hold the arbitration. According to a Union witness as well as the arbitrator, the Union again opposed any further delay. Nevertheless, the arbitrator granted the postponement and set the arbitration for August 12.

On July 24, a majority of unit employees voted to decertify the Union, prompting the Employer to request that the arbitrator cancel the scheduled hearing. The Employer's attorney argued that, "inasmuch as the decertification of the bargaining representative has the effect of terminating the collective-bargaining agreement between the parties, remedies under the collective bargaining agreement are no longer available to the grievants." Over the Union attorney's objection, the arbitrator cancelled the hearing, based on the Employer's request and the decertification vote.

Cummins subsequently contacted a Union business agent regarding her arbitration, who informed her that because of the Union's decertification the Employer would not participate without a binding labor contract. Cummins urged the Union to go forward with her case since the events occurred during the term of the former collective bargaining agreement, at a time when the Union was the employees' lawful representative. The business agent responded that, even if the Union could do that, the Union could not legally hold Time Warner to the arbitrator's decision. The Union subsequently has taken no measures to challenge the arbitrator's ruling or compel arbitration.

#### **ACTION**

We conclude that (1) the Employer unlawfully refused to arbitrate the grievance, which the Union filed at a time when it was the collective bargaining representative, and (2) the evidence is insufficient to establish that the Union acted in an arbitrary or irrational manner by declining to challenge the arbitrator's ruling.

Generally, employers are obligated to process and arbitrate grievances that arose under an expired bargaining agreement even after the union ceased to represent unit

employees. In Missouri Portland Cement Co.,<sup>1</sup> the Board modified its prior order subsequent to the lawful dissolution of the bargaining unit by, inter alia, deleting any requirement that the employer bargain on request with the employees' former union. The Board noted, however, that the changed circumstances did not affect grievances pending at the time the employer terminated all employees. Since these grievances dealt solely with the former bargaining unit's members, the union continued to represent them in the processing of those grievances. The Board accordingly held that "it effectuates the purposes of the Act to continue to require the Respondent to meet, on request, with the Union's designated representatives for the processing of these grievances."<sup>2</sup> In a subsequent case, the Board applied this rationale to compel an employer to arbitrate grievances filed by a union during the term of a collective bargaining agreement, even though it had subsequently been decertified.<sup>3</sup>

Applying this rationale, we conclude that the Employer unlawfully refused to arbitrate the Charging Party's grievance. The Union filed the grievance in 2007, at a time when it was the employees' designated representative. The Employer's insistence that the arbitrator cancel the hearing in light of the Union's subsequent decertification defies its obligation to "complete unfinished business"<sup>4</sup> by resolving disputes that arose at a time when the Union was the employees' lawful representative. Accordingly, the Region should issue complaint, absent settlement. As remedy, the Region should seek an order requiring the Employer (1) to notify both the Union and the arbitrator that it no longer contends that the grievance is not

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<sup>1</sup> 291 NLRB 1043 (1988).

<sup>2</sup> Id. at 1044.

<sup>3</sup> Antioch Building Materials, 316 NLRB 647 n.1 (1995).

<sup>4</sup> Arizona Portland Cement, 302 NLRB 36 (1991) (applying Missouri Portland Cement, but holding that employer had no duty to arbitrate grievance with new union that succeeded former collective bargaining representative in absence of contractual relationship).

arbitrable because the Union was decertified, and (2) to cease and desist from refusing to process the grievance, upon the Union's request.

We further conclude that the evidence is insufficient to establish that the Union violated its duty of fair representation by declining to seek to compel the employer to arbitrate. An exclusive bargaining representative satisfies its duty of fair representation when it serves the interests of all employees in the unit without hostility or discrimination toward any, exercises its discretion with complete good faith and honesty, and avoids arbitrary conduct.<sup>5</sup> In serving the bargaining unit a union is allowed a wide range of reasonableness, "subject always to complete good faith and honesty of purpose in the exercise of its discretion."<sup>6</sup> Consequently, a union's conduct may constitute evidence of a breach of its duty only if it can be fairly characterized as so far outside a "wide range of reasonableness ... that it is wholly irrational or arbitrary."<sup>7</sup>

The evidence here is insufficient to establish that the Union acted outside the bounds of rationality. Throughout these proceedings, the Union's attorney consistently opposed the Employer's efforts to delay and ultimately cancel the arbitration. The Charging Party did not allege and no evidence was uncovered to suggest that the Union harbored animus or hostility against employees because of their decision to reject the Union as representative. In light of the absence of any evidence of improper motive, we conclude that the Union's decision not to seek to compel the Employer to arbitrate, through judicial means or otherwise, was not wholly irrational or arbitrary.

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<sup>5</sup> See Vaca v. Sipes, 386 U.S. 171, 177 (1967).

<sup>6</sup> Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

<sup>7</sup> Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 67 (1991).

Cases 8-CA-37984, 8-CB-11000

- 5 -

B.J.K.