

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

Advice Memorandum

DATE: March 16, 2009

TO : Michael W. Josserand, Regional Director
Region 27

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

SUBJECT: American Postal Workers Union, Pueblo 536-1225
Area Local No. 436 536-2581
Case 27-CB-5049 536-2581-6700

The Region submitted this case for advice on whether the Local Union President's actions in awarding himself the largest portion of a monetary arbitration award violated the Union's duty of fair representation under Section 8(b)(1)(A) of the Act.

We conclude that the Region should issue a Section 8(b)(1)(A) complaint, absent settlement, alleging that agent Trujillo violated the Union's duty of fair representation in allocating the award because the allocation was based on personal self-interest, rather than on the interests of the represented employees, and was bad faith.

FACTS

From 1996 until September 2006, employees of the U.S. Postal Service (the Employer) delivered Express Mail to the area referred to as Pueblo West. On or about September 18, 2006, the Employer began contracting to a third party the delivery of Express Mail to Pueblo West. The President of American Postal Workers Union, Pueblo Area Local No. 436 (the Clerk's Union), Gil Trujillo, filed a grievance in response to the subcontracting, alleging that it was a unilateral change and that it adversely affected members of the Clerk's Union who had previously been doing that work. The grievance proceeded to arbitration and the National Association of Letter Carriers (the Carrier's Union) intervened, alleging that the change had adversely affected its members. The unions prevailed, and the arbitrator ordered the Employer to return the work to the affected employees and to make whole employees who had lost overtime wages. The arbitration award decreed that, "[a]ny

bargaining unit employees who would have delivered the Express Mail to Pueblo West shall be compensated for the time they would have spent on the deliveries, but for the contract violation."

Thereafter, Trujillo and the Carrier's Union president negotiated the dollar amount of the award with the Post Master. The parties agreed on an award of about \$60,000. The union presidents agreed that half of the \$60,000 would be allocated to the Carrier's Union and half would be allocated to the Clerk's Union. Although the Clerk's Union is locally autonomous, Trujillo informally discussed his proposed distribution with both National Arbitration Advocate Prusak and Marilyn Merrill, an APWU Business Agent. Neither Prusak nor Merrill alerted Trujillo to any possible conflict of interest problem. Of the \$30,000 allotted to the Clerk's Union, Trujillo allocated himself about \$17,000 (60% of the clerks' portion). Trujillo allocated 20% of the clerks' portion to Nathan Valdez, and 4% each to employees Diaz, McDonald, Goss, Sanchez, and Anthony Valdez.

In the weeks before the final allocation was made, the Charging Party and other clerks approached Trujillo at various times to discuss what they considered a more equitable division of the arbitration award. These attempts at discussion were largely rebuffed. Four days before the final award was determined, the Charging Party attempted to deliver to Trujillo a letter signed by most of the Clerk's Union members requesting that the award be divided equally among them. Trujillo refused to accept a hand delivered copy of the letter and did not read a certified copy of the letter until after the final award determination. Trujillo asserts that the complaining parties could have, but did not, attend union meetings where the allocation was discussed. After the award was distributed, the Charging Party filed the instant charge.

Trujillo held the job of Clerk-Messenger, and as such had primary responsibility for the delivery of the Express Mail and could choose to either personally deliver Express Mail or assign delivery to the other clerks. These assignments were considered perks, as they offered clerks a chance to leave the post office and recoup mileage reimbursements. There is conflicting testimony regarding how often Trujillo assigned the deliveries and how often he

personally delivered them. Trujillo claims that he was the primary deliverer among the clerks, and that he assigned only a small amount of the Express Mail to the other clerks. The Charging Party and other employees all claim that Trujillo rarely delivered Express Mail and that, of the clerks, Trujillo delivered the least Express Mail to Pueblo West. The Post Office does not have records that shed light on which employees delivered Express Mail to Pueblo West during the relevant period.¹

Trujillo has testified that he allocated himself the largest portion because he delivered the largest share of the Pueblo West Express Mail. One unit member, Goss, testified that when he asked Trujillo why Trujillo was getting such a large portion, Trujillo told him it was because he (Trujillo) had been the one to file the grievance.

ACTION

We agree with the Region that a Section 8(b)(1)(A) complaint should issue, absent settlement, alleging that the Union, by its agent Trujillo, violated the duty of fair representation when it allocated the arbitration award. The Region should allege that the allocation was made in bad faith, because it was based on personal self-interest, not the interests of the represented employees. The Region should not allege that it was a per se violation of the duty of fair representation for Trujillo to allocate the award when he would also be one of the recipients.

As exclusive bargaining representative for clerk employees of the Pueblo Post Office, the Union owes the unit employees the duty of fair representation². This duty has been applied to many union functions, including the

¹ The Region has Express Mail mileage Expense Reports, for dates *after* the subcontracting, that show Trujillo doing little Express Mail delivery in general. Those reports however are consistent with Trujillo's testimony that, after the subcontracting, management changed his hours, bid job and job duties.

² Air Line Pilots Assn. v O'Neill, 499 U.S. 65, 75-78 (1991); Vaca v. Sipes, 386 U.S. 171, 177 (1967).

distribution of grievance settlements.³ The duty of fair representation is breached when a union's conduct is arbitrary, discriminatory, or in bad faith.⁴

Under the bad faith prong of the duty of fair representation, the union owes the employees it represents "complete good faith and honesty of purpose."⁵ Because the duty of fair representation is a fiduciary duty and "akin to other fiduciary duties," the duty of good faith can be understood as a derivative of the common law duty of loyalty that fiduciaries owe their principals.⁶ The common law principle of loyalty "requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship."⁷

Trujillo's allocation of the award to himself, the member who was the least affected by the subcontracting, demonstrates substantially less than complete good faith or loyalty. His stated rationale for the allocation he made - that he did the majority of the affected work - is contradicted by the other clerks, all of whom testified

³ Letter Carriers, Branch 6070 (Postal Service), 316 NLRB 235, 235 (1995).

⁴ Vaca v. Sipes, 386 U.S. at 190.

⁵ Letter Carriers Branch 6070, 316 NLRB at 236 ("A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."); Schmidt v. International Broth. of Elec. Workers, 980 F.2d 1167, 1170 (8th Cir. 1992) ("a union is protected by the 'wide range of reasonableness' shield only if it has acted in good faith").

⁶ O'Neill, 499 U.S. at 75 ("Just as [other] fiduciaries owe their beneficiaries a duty of care as well as a duty of loyalty, a union owes employees a duty to represent them adequately as well as honestly and in good faith.").

⁷ Restatement (Third) of Agency § 8.01 *comment b*.

that Trujillo was *least* responsible for doing Express Mail delivery to Pueblo West. Indeed, an employee testified that Trujillo had admitted that he allocated himself the majority of the award because he had done the work of filing the grievance.⁸

While, as noted below, the Board and courts have not gone so far as to rule that union representatives may never act in situations in which they have a conflict of interest, they have found violations where the union representatives' conflicts of interest manifest in sacrifices of the rights or interests of the employees they represent.⁹ For example, in Local 600 (UAW), union committeemen filed a grievance against a Unit Chairman asserting that the Unit Chairman had allocated to himself overtime work that committeemen were due, in violation of the contract.¹⁰ The committeemen pursued their only avenue for relief, which was to file a grievance with the Unit Chairman himself. The Unit Chairman denied the grievance. The Board found it "manifestly unfair" that the union allowed "its agent to reject the [grievance] for the individual benefit of that agent."¹¹ Consistent with these

⁸ While the Federal Rules of Evidence only apply in NLRB proceedings "so far as practicable", this statement would survive hearsay objections even under a strict interpretation of the Federal Rules, as the statement is an admission by a party opponent. Fed.R.Evid. Rule 801.

⁹ Thus, "a union may violate the Act when a conflict of interest between a union and a grievant *rises to a level* which denies the grievant an impartial hearing." Local 91, Case 33-CB-2697, Advice Memorandum dated August 28, 1990. See also, Achilli v John J. Nissen Baking Co., 989 F.2d 561 (1st Cir. 1993) (union may not resolve conflict at employee's expense).

¹⁰ Local 600 (UAW), 225 NLRB 1299 (1976).

¹¹ Id. at 1299. Although the Board in Local 600 also ruled that the overtime allocation itself was not unlawful, but only the denial of the grievance, that allocation is not analogous to the award distribution here because it was not a final decision and therefore the employees' contractual

principles, the Region should allege here that, when Trujillo allocated himself a larger portion of the award than reflected his loss of work relative to other workers, he sacrificed the interests of the represented employees in favor of his own interests, which constituted unlawful bad faith.

Although we conclude that Trujillo's actions were in bad faith, the Region should not allege that there was a "per se" violation when Trujillo acted as both allocator and a recipient of the award. While a union representative's dual role as allocator and recipient certainly places the union representative in a position of conflicting interest, allowing Trujillo to perform that task was not outside the "wide range of reasonableness" afforded a union's good faith conduct.¹² Thus, although there are no cases directly addressing whether a union representative may permissibly distribute arbitration awards to himself, it would appear that this kind of conduct is not a clearly prohibited conflict of interest.¹³ Moreover, it is common for union representatives to act in the dual role of distributor-recipient of arbitration awards, and Trujillo has testified that he has routinely performed in this role without incident or complaint. Indeed, when Trujillo discussed the allocation with International officials, they did not express any concern that Trujillo's role in allocating the award could present an inappropriate conflict of interest.

right to overtime was not lost until the grievance was unfairly denied. In this case, Trujillo's action was final, and because the Local is autonomous there is no way for the decision to be reviewed.

¹² Air Line Pilots Assn. v O'Neill, 499 U.S. 65, 67 (1991) (internal citation omitted); Letter Carriers Branch 1227 (Postal Service), 347 NLRB 289, 289 (2006).

¹³ See Local 600 (UAW), above, where the Board found that the denial of a grievance against a union agent by the same agent was "manifestly unfair", but *did not* find that the self-allocation of overtime by the union agent violated the Act.

Accordingly, the Region should issue a complaint, absent settlement, alleging that the Union breached its duty of fair representation by acting in bad faith in allocating the arbitration award. The Region should not allege that Trujillo unlawfully served as the allocator of the award.

/s/
BJK