

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

Advice Memorandum

DATE: May 27, 2009

TO : Rosemary Pye, Regional Director
Region 1

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

SUBJECT: Electrical Workers IBEW Local 300, Unit 8
(Entergy Nuclear Vermont Yankee) 536-2531
536-2535
Case 1-CB-10944 536-2581-6701
536-2581-6733
536-2581-6767-0100

This case was submitted for advice as to whether the Union violated its duty of fair representation under Section 8(b)(1)(A) when it distributed the proceeds arising out of a grievance settlement to current unit members and retirees, and excluded former unit employees who were promoted to supervisory positions, quit, or were discharged prior to the time of distribution.

We conclude that the Union did not violate Section 8(b)(1)(A) by limiting distribution of the settlement funds to current unit members and retirees because its decision was based on permissible considerations.

FACTS

Entergy Nuclear Vermont Yankee (the "Employer") provides health coverage to its employees through a self-insured employer plan. Employee payments are made to a fund maintained at a level deemed actuarially sufficient to meet the plan's administrative and benefit costs. The amount of premium each employee pays varies depending on the type of coverage elected.

On August 9, 2007, the Union filed a grievance alleging that the Employer had overcharged bargaining unit employees for their health insurance coverage from January 1, 2005 through June 30, 2007 (the "settlement period"). According to an actuary hired by the Union, employees who elected health coverage were collectively overcharged a total of \$148,457 for the settlement period.

Prior to arbitration, the Union and the Employer engaged in negotiations to settle the grievance. The Employer initially proposed to reduce current employees' 2009 monthly premium payments by the amount each was

overcharged during the settlement period.¹ The Union rejected this proposal via email, stating: "This is not what we had in mind on how the settlement would be distributed. The [C]ompany is taking upon itself on how and to whom and when the settlement payment would be distributed." The Union submitted a counterproposal requesting the Employer to pay the settlement amount in a lump sum directly to the "IBEW Unit 8 Discretionary Fund." The Employer rejected the Union's counterproposal.

On June 11, 2008, the parties reached a final settlement agreement totaling \$148,457 for all the eligible employees. The agreement provided that the Union was responsible for identifying who would receive the disbursement and calculating the amount each individual would receive.² The Employer was then responsible for disbursing the money directly to those individuals as one-time payments. The agreement further provided that the Union's calculations were to be "designed, to the extent reasonably practical, to fairly and accurately reimburse eligible bargaining unit members for the amount of the surplus attributable to their individual premium payments during [the settlement period]." The Union was required to share its calculations with the Employer, who reserved the right to challenge that methodology before an arbitrator if the Employer believed the calculations did not fairly and accurately reimburse the eligible unit employees.

The Union developed the following methodology for allocating the settlement funds:

- (1) all eligible employees, i.e. current unit members and retirees, would be credited for each month they were covered by the Employer's medical plan during the settlement period;
- (2) based on documentation provided by the Employer, the Union would determine the number of months that each eligible employee worked during the settlement period;

¹ The Employer used its own actuary to determine the amount each employee was overcharged based on the type of health care plan the employee had elected during the settlement period. Based on these computations, the Employer created a schedule indicating the reduced 2009 monthly premium charge for each unit employee.

² The Union would do so using an Employer list identifying eligible employees; the number of months these employees participated in the plan; and their start and end dates.

(3) the total number of months worked by all of the eligible employees would be divided into the \$148,457 to obtain a dollar amount per month; and

(4) the dollar amount per month figure would be multiplied by the number of months each eligible employee worked during the settlement period to determine that individual's reimbursement amount.³

According to the Union, it included retirees in the settlement distribution to assist those employees "who dedicated a substantial portion, if not all of their working lives, to the Company;" it excluded employees who quit or were discharged because they no longer had a vested interest in the bargaining unit and because the Union believed they would be difficult to locate; and it excluded supervisors on the rationale that supervisors had higher paying jobs and excluding them would increase the amounts received by unit members with greater financial needs.

Later in June, the Employer began distributing settlement checks to the 147 individuals identified by the Union.⁴

The Charging Parties were former unit employees whom the Employer had promoted to supervisory positions by the time of the settlement distribution. All had been overcharged for their health care premiums at some point during the settlement period. The Charging Parties contacted the Union when they realized that they would not be receiving any reimbursement.⁵

³ The Union's list excluded approximately 49 overcharged employees: 29 who had left the unit to become supervisors and 20 who had quit or were discharged.

⁴ Applying the Union's list, the Employer also made disbursements to several current unit employees who did not participate in the health care plan but were in the bargaining unit during the settlement period. According to the Union, this was a simple mistake resulting from the Employer's failure to indicate on its list of current unit employees which employees did not participate in the health care plan. The Region has found no evidence that the Union intentionally included employees who had not participated in the health care plan on its list of eligible employees.

⁵ One Union official incorrectly told the Charging Parties that the Executive Board had decided that only people in good standing with the Union would be compensated. Although the Union considered limiting payment to members

The Region has determined that all of the overcharged employees were Union members at the time they were employed in the bargaining unit and that all of the employees who left the bargaining unit resigned their membership from the Union. Thus, no former unit employees, including retirees, remained Union members at the time of distribution.

ACTION

We conclude that the Union did not violate Section 8(b)(1)(A) by limiting distribution of the settlement proceeds to current unit members and retirees because its decision was based on permissible considerations.

As the exclusive bargaining representative, a union owes all unit employees the duty of fair representation.⁶ This duty extends to contract administration, including the disbursement of financial benefits to employees, and the distribution of proceeds from the settlement of a grievance or an arbitration award.⁷ In carrying out its duty of fair representation, a union is afforded a "wide range of reasonableness."⁸ Therefore, any subsequent examination of a union's performance must be highly deferential.⁹

A violation of Section 8(b)(1)(A) occurs only when a union has failed to represent an individual for discriminatory, arbitrary, or capricious considerations.¹⁰

in good standing, this requirement was eliminated prior to distribution.

⁶ Air Line Pilots Assoc. v. O'Neill, 499 U.S. 65, 75-78 (1991); Vaca v. Sipes, 386 U.S. 171, 177 (1967).

⁷ See Air Line Pilots Assoc. v. O'Neill, 499 U.S. at 67; See also Letter Carriers Branch 6070 (Postal Service), 316 NLRB 235, 236 (1995); Crown Zellerbach Corp., 266 NLRB 1231, 1232 (1983).

⁸ Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

⁹ General Truck Drivers Local 315 (Rhodes and Jamieson), 217 NLRB 616, 618 (1975), enfd. 545 F.2d 1173 (9th Cir. 1976).

¹⁰ Vaca v. Sipes, 386 U.S. at 190; Miranda Fuel Co., 140 NLRB 181, 185 (1962) (Section 8(b)(1)(A) "prohibits labor organization, when acting in a statutory capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair"), on remand from 366 U.S. 763 (1961).

Even without any hostile motive of discrimination, a union's course of action may be so unreasonable and arbitrary as to constitute a breach of its duty of fair representation.¹¹ An action is arbitrary where there is no reason or rule governing the decision, or where, in light of the factual and legal landscape at the time of the union's action, the behavior "is so far outside a wide range of reasonableness as to be irrational."¹²

The Board has also held that "not every act of disparate treatment is proscribed by Section 8(b)(1)(A) of the Act."¹³ Thus, a union may balance the rights of individual employees against the collective good, or subordinate the interests of one group of employees to those of another group, if its conduct is based upon permissible considerations, even though some employees may be adversely affected by the union's decision.¹⁴

Where a union distributes financial payments in a way that has a disparate impact on employees, the touchstone is whether the union exercised its discretion in a rational, nonarbitrary manner and applied reasonable, relevant criteria in distributing the payments to one group of recipients over another.¹⁵ In making that determination,

¹¹ Mine Workers Dist. 5 (Pennsylvania Mines Corp.), 317 NLRB 663, 663 (1995) ("A labor organization's arbitrary conduct alone may be sufficient to constitute a violation of Section 8(b)(1)(A)").

¹² Airline Pilots Assoc. v. O'Neill, 499 U.S. at 67. See also Letter Carriers Branch 1227 (Postal Service), 347 NLRB at 289; General Truck Drivers Local 315 (Rhodes and Jamieson, Ltd.), 217 NLRB 616, 618 (1975), enfd. 545 F.2d 1173 (9th Cir. 1976) (stating that union's duty to avoid arbitrary conduct means "at least there be a reason for the action").

¹³ Glass Bottle Blowers Assoc. Local 149 (Anchor Hocking Corp.), 255 NLRB 715, 719 (1981). See also Letter Carriers Branch 6070 (Postal Service), 316 NLRB at 236-37.

¹⁴ Vaca v. Sipes, 386 U.S. at 182; Humphrey v. Moore, 375 U.S. 335, 349-50 (1964); Ford Motor Co. v. Huffman, 345 U.S. at 338-39.

¹⁵ See, e.g., Letter Carriers Branch 6070 (Postal Service), 316 NLRB at 236-37 (union's decision to limit distribution of settlement proceeds to twelve current unit members and to exclude others who transferred out of the unit prior to settlement was not unlawful where the union chose the employees it believed were most adversely affected based on

the Board considers such factors as whether the union distributed the payments even-handedly to similarly situated employees;¹⁶ whether it distributed the payments based on valid administrative considerations;¹⁷ and whether

four adversity factors; the Board explained that even if some of the employees selected were less deserving than other employees, a lack of perfection in the selection process is within a union's latitude of reasonableness and margin for honest error); Steelworkers Local 2869 (Kaiser Steel Corp.), 239 NLRB 982, 982 (1978) (union's decision to limit distribution of settlement proceeds to current unit employees and to exclude those who left the unit was not arbitrary or unreasonable where computation of the losses sustained by individual employees would be difficult to determine; the Board explained that the guidelines adopted by the union to resolve the distribution problems "simply constituted one of a series of reasonable, practical administrative determinations regarding the employees entitled to share in the settlement proceeds").

¹⁶ See International Brotherhood of Pottery and Allied Workers, AFL-CIO (Colton Mfg. Inc.), 254 NLRB 696, 699 (1981) (union lawfully refused to pay earned strike benefits to employees who returned to work after resigning from the union where the union was following its policy of limiting payments to those who had a "need for the benefits" and where there was no evidence that the union permitted payments to similarly situated employees who had not resigned from the union but who were receiving earnings from some place other than the struck plant); Communications Workers of America, Local 13000 (AT&T Information Systems), Cases 4-CB-5420, 5428, 5444-1-2-3-4, 5464, 5470, Advice Memorandum dated November 16, 1987 at 4-5 (union did not breach its duty of fair representation by excluding from settlement employees who transferred to supervisory or management positions where the evidence demonstrated that supervisors made \$3,000-\$5,000 more than unit employees). Compare Montgomery Alabama Area Local, AFL-CIO & APWU, Cases 15-CB-5560, 5561, 5657, Advice Memorandum dated January 21, 2009 at 12-16, where we concluded that the union's conduct in distributing settlement proceeds was unlawfully arbitrary because the union had no fixed criteria or discernible rational reason for treating similarly situated unit employees differently.

¹⁷ See Kaiser Steel Corp., 239 NLRB at 982-83 (union's decision to limit distribution of settlement proceeds to employees in the unit at the time the grievance was settled was not arbitrary or unreasonable where expanding the distribution to employees no longer in the unit would have been a difficult administrative task).

it acted out of a good faith belief that its actions would benefit a significant majority of the unit employees.¹⁸

Here, it is undisputed that the union included all current eligible unit members and retirees in its list of employees who would receive a settlement distribution. Thus, the only question is whether the Union had a reasonable justification for deciding to exclude from that list employees who had left the unit to become supervisors, and employees who had been discharged or quit. Applying the above factors, we conclude that the Union's decision to limit distribution of the proceeds to current unit members and retirees was lawfully within its broad discretion as bargaining representative.¹⁹

First, the Union reasonably concluded that neither the employees who had quit or been discharged, nor the employees who became supervisors, were similarly situated to the current unit employees or the retirees. With respect to the employees who had quit or been discharged, the Union reasoned that they retained neither a continuing relationship with nor a long-term commitment to the Employer. With respect to the supervisors, the Union

¹⁸ See Crown Zellerbach Corp., 266 NLRB at 1232 (union's decision to distribute bonus payments solely to employees who were actively employed on a certain date, even though the chosen date would necessarily diminish payments to other employees who were on strike in support of a rival union, was not unlawfully discriminatory or arbitrary because the union acted consistently with past bargaining practice and "out of a good faith belief that the bonus proposal would benefit a significant majority of unit employees").

¹⁹ The Region's investigation disclosed insufficient evidence to demonstrate that the Union was unlawfully motivated on the basis of union membership because the retirees had resigned from the Union after leaving their employment. The Union also did not act unlawfully by including on its list of eligible employees current unit employees who did not participate in the plan. The evidence indicates that the Union's action was a mistake resulting from the Employer's failure to indicate on its list of current employees which employees did not participate in the plan. See SEIU Local 579 (Beverly Manor Convalescent Center), 229 NLRB 692, 695 (1977) (mere negligence is insufficient to establish a breach of the duty of fair representation).

reasoned that they presumably were receiving higher salaries and thus had less financial need for the money than current unit employees or retirees.²⁰ By contrast, retirees had devoted a substantial portion of their working lives to the Employer and maintained a continuing relationship with the Employer through their pension plans. They, unlike the supervisors, also would unlikely earn higher salaries than those of current unit employees.

Second, the Union reasonably concluded that it would have been administratively impractical for the Employer to distribute settlement funds to former unit employees who had quit or been discharged since the Employer was unlikely to have maintained current records on the whereabouts of those employees. By contrast, the Employer maintained the records of retirees through their continued participation in the Employer's pension plan.

Third, the Union acted out of a good faith belief that its distribution plan would benefit a significant majority of the aggrieved employees. In fact, under the Union's plan, 147 employees (including all the overcharged current unit members) were included in the settlement distribution, while only 49 overcharged individuals were excluded.

In sum, the Union exercised its discretion in a rational, nonarbitrary manner when it limited the proceeds of the grievance settlement to current unit members and retirees. Accordingly, we conclude that the Union did not violate its duty of representation under 8(b)(1)(A) and the Region should dismiss the charge, absent withdrawal.

B.J.K.

²⁰ See, e.g., International Brotherhood of Pottery and Allied Workers, AFL-CIO (Colton Mfg. Inc.), 254 NLRB at 699; Communications Workers of America, Local 13000 (AT&T Information Systems), Cases 4-CB-5420, 5428, 5444-1-2-3-4, 5464, 5470, Advice Memorandum at 4-5.