FORM NLRB-5026
(4-80)

UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

TO : Glenn A. Zipp, Director
Regin 33

DATE: OCT 2 9 1982

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

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SUBJECT: Spector Red Ball, Inc.
Case 33-CA-5846

Teamsters Local 279
(Spector Red Ball, Inc.)
Case 33-CB-1787

This case was submitted for advice as to whether a union violates its duty of fair representation by refusing to request certain information from an employer and whether, upon the union's refusal to make such a request, individual employees may invoke a derivative Section 8(a)(5) right to such information. 1/

FACTS

The facts, as disclosed by the Region's initial investigation of the Section 8(a)(5) charge, are set out in the attached Advice Memorandum.

Spector Red Ball (the Employer), as a result of a grievance resolution in the grievant employees' favor, was found to have violated its labor contract by ceasing to pay double time for time worked on a Sunday following a holiday. The grievance settlement award, however, was ambiguous as to who would bear the burden of furnishing individual proof of entitlement to back pay. The Charging Party, Jack Sparrow, an affected employee who had not kept copies of his payroll records and was thus unable to prove his entitlement to back pay, asked Local 729 (the Union) to file an information request with the Employer for the relevant payroll records. After discussing the matter with the Employer, the Union's Business Agent refused to file such a request. In addition, the Business Agent refused to support a subsequent request to the Employer, made at Sparrow's urging and filed by the Union steward. The Employer continues to refuse to provide the information.

1/ The Region originally submitted to Advice only the 8(a)(5) issue. The instant matter involves a resubmission of that issue as well as the submission of the duty of fair representation question, to be reconsidered in light of the completed investigation of the DFR charge. A copy of the initial Advice Memorandum, issued on March 31, 1982, is attached.

The Union has justified its refusal to file such a request by stating its belief that the Employer "was abiding by the terms of the grievance settlement" in refusing access to payroll records and by asserting its desire to preserve its "ongoing collective bargaining relationship" with the Employer. In addition, the Union's Business Agent emphasized that it is common for the joint grievance committee to issue decisions that require the prevailing party to prove the accuracy of individual claims based upon the settlement award.

After the Union failed to support the local Union steward's information request, the Charging Party filed the instant charges against the Employer and the Union based upon Section 8(a)(5) and 8(b)(1)(A), respectively.

ACTION

It was concluded that the charges should be dismissed, absent withdrawal, on the view that the Union's action was reasonably based upon its belief that the Employer had met its obligations under the grievance resolution and its concern for the preservation of its bargaining relationship with the Employer. In addition, it was concluded that the Employer did not violate its 8(a)(5) duty to bargain because the Union's conscious decision not to request the information sought by Sparrow constitutes a waiver of any obligation the Employer may otherwise have had to supply the information.

It is well settled that a union "has a wide range of discretion in serving the unit it represents." Truck Drivers Local No. 355, I.B.T., 229 NLRB 1319, 1321 (1977); San Francisco Web Pressmen Union No. 4 (San Francisco Newspaper Printing Co.), 249 NLRB 88, 89 (1980). The Board has held on many occasions "mere negligence, poor judgment, or ineptitude in grievance handling are insufficient to establish a breach of the duty of fair representation." San Francisco Web Pressmen Union, supra; SEIU Local No. 579 (Convacore of Decatur), 229 NLRB 692, 695 (1977) and cases cited therein. Moreover, the duty of fair representation "does not require that every possible option be exercised or that a grievant's case be advocated in a perfect manner." Truck Drivers Local Union No. 355 (Monarch Institutional Foods), 229 NLRB 1319, 1321 (1977). The issue is "whether, in undertaking its efforts, [the Union has] dealt fairly." Id., 1321. Thus, the Board has found no violation of the union's duty where a union, although conceding the grievant employees' "legal" rights under the labor contract to certain recall preference, refused to process their grievances because the union "was forced to temper a strict reading of the contract with an appreciation of expectations [of the other unit employees] raised by the 1975 layoff," when recall was based upon a different system of preferences. USWA Local 7748 (Eaton Corp.), 246 NLRB 12, 13 (1979). The Board has been reluctant to "second guess" a union on issues involving grievance handling where there is some indication that the union has exercised its judgment after surveying the merits of the situation. See, e.g.,

San Francisco Web Pressmen Union, supra; Plumbers Local Union No. 195 (Stone & Webster Engineering Corp.), 240 NLRB 504 (1979) and Plumbers Local 60 (Buck Kreihs Co.), 242 NLRB 1203 (1979). This principle has been applied even where a union decided not to seek a full remedy for a grievant. Buck Kreihs, supra. In Buck Kreihs Co., the Board recognized the union's concern for maintaining a harmonious bargaining relationship with the employer. Id. at note 4.

In the instant case, the Union 2/ has refused to request certain payroll information from the Employer based upon the Union's belief that the Employer has fulfilled its obligations under the grievance resolution and upon its concern for maintaining a good bargaining relationship with the Employer. It would be argued, therefore, that the Union has not exceeded its "wide range of discretion" by its refusal to align itself with the Charging Party's request for this information. The duty of fair representation does not require that the Union exercise "every possible option" in handling grievances, and, in this case, in light of the Union's reasonable interpretation of the ambiguous settlement language, it was not incumbent upon the Union to pursue the request for payroll information. Having consulted with the Employer in advance and considering what it asserts has been the past practice in grievance settlements, the Union decided that it would not pursue the matter further. San Francisco Web Pressmen Union, supra.

Having found that the Union did not violate its duty of fair representation, it was concluded that the Charging Party's 8(a)(5) charge should be dismissed, absent withdrawal. Further proceedings in this case would not effectuate the policies of the Act in that the issuance of a complaint on the individual's 8(a)(5) charge would undermine the exclusivity of the Union's 9(a) status. ITT Continental Baking Co., Case 25-CA-1118, Advice Memorandum dated January 24, 1980 and Carnation Company, Pet Food Division, Case 17-CA-8910, Advice Memorandum dated July 31, 1979. Thus, while the Board may, where appropriate, consider the merits of an 8(a)(5) charge filed by an individual, 3/ the gravamen of such a charge is the employer's alleged failure to fulfill its bargaining obligation to the union. Given the Union's waiver here of any right it might have had to secure the requested information, there can be no basis for alleging that the Employer is in breach of any statutory obligation to the Union. 4/ Accordingly, the issuance of a complaint herein

2/ This memorandum assumes that the Business Agent, rather than the steward, speaks for the Union. Hence, the fact that the steward once sought the information does not gainsay the proposition that the Union is not now seeking the information.

3/ Vee Cee Provisions, Inc., 256 NLRB 758 n. 1 (1981).

4/ Unlike the situation presented herein, the General Counsel has authorized complaints in cases involving a violation of the union's duty of fair representataion as well as a concommitant refusal to bargain by the employer. See, e.g., Foster & Kleiser, 13-CA-12,262, G.C. Minute dat-

(Continued)

would undermine the Union's clearly established authority, as the exclusive bargaining agent for the unit, to waive its right to request information from the Employer in the circumstances of this case. 5/

For the foregoing reasons, the Region should dismiss the charges, absent withdrawal.

[redacted]

H. J. D.

4/ June 20, 1973 (individual has right to file 8(a)(5) charge to compel employer to supply information when the union, previously found to have violated its duty of fair representation to the charging party, does not completely pursue its obligation to compel production by filing a charge); IATSE (The Vidtronics Co., Inc.), Case 31-CB-3018, Advice Memorandum dated February 15, 1979 (Section 8(b)(3) charge that union insisted on a proposal which violated 8(b)(1)(A) filed by individual was processed because it was intertwined with the union's alleged breach of its duty of fair representation).

5/ See, e.g., Colgate Palmolive Co., 261 NLRB No. 7, ALJD at 10 (1982); Borden Chemicals, Division of Borden, Inc., 261 NLRB No. 6, ALJD at 27-29 (1982), and Minnesota Mining and Mfg. Co., 261 NLRB No. 2, ALJD at 17 (1982).