

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**AMERICAN WATER WORKS COMPANY, INC.
A/K/A AMERICAN WATER WORKS SERVICE
COMPANY, INC., and its subsidiaries,**

Respondent,

and

**UTILITY WORKERS UNION OF AMERICA,
AFL-CIO.**

Charging Party.

**Exceptions to the Decision
of Judge Steven Davis**

Case No. 29-CA-30676

**RESPONDENT’S ANSWERING BRIEF TO THE CHARGING PARTY’S EXCEPTIONS
TO THE DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE**

Respondent, **AMERICAN WATER WORKS COMPANY, INC.** (“AWW,” the “Company,” or the “Respondent”) by its attorneys and pursuant to Section 102.46 of the Board’s Rules and Regulations, hereby submits its Answering Brief to the Exceptions and Supporting Brief filed by the Charging Party Utility Workers Union of America (“UWUA”). The Acting General Counsel (“AGC”) filed no exceptions to the Decision and Order of the ALJ.¹

OVERVIEW OF ANSWERING BRIEF

The UWUA’s Exceptions challenge the ALJ’s finding that Section 8(d)(3) of the Act requires only that the initiating party “notify” the FMCS of a bargaining dispute, but does not require “written notice” or notice in any particular form. Conspicuously, the UWUA avoids any citation or meaningful reference to the language of Section 8(d)(3) itself, which plainly does not require notification to the FMCS be in any form – and which stands in clear contrast with

¹ Citations to the ALJ’s Decision by page and line number appear as “JD at __, ll.__.” References to the hearing transcript appear as “(Tr. __); references to General Counsel’s and Respondent’s Exhibits appear as “(GC Ex.__)” and “(Resp. Ex.__),” respectively; and references to the Stipulations of the Parties (in the record as Joint Exhibit 1) appear as “(Stip. __).”

Section 8(d)(1) which does expressly provide for “written notice” to the other party of termination or modification of any existing collective bargaining agreement. The ALJ’s legal conclusion regarding the required notification to the FMCS is plainly supported by the statute, and is not contrary to any precedent of the Board or the courts. Further, it is undisputed that AWW did in fact notify the FMCS (both telephonically and in written communications) and, indeed, the FMCS actually participated in the parties’ negotiations.

Bottom line: Assuming that AWW is considering the “initiating party” for purposes of Section 8(d) of the Act, AWW met the requirement of “notifying” the FMCS under Section 8(d)(3) as held by the ALJ. The UWUA’s Exceptions should be rejected and denied.

ARGUMENT

I. The Facts Are Undisputed Regarding AWW’s Notification of the FMCS and the FMCS’s Participation in the Parties’ Negotiations.

The UWUA’s Exceptions relate solely to the ALJ’s legal conclusion that Section 8(d)(3) of the Act does not require that notification to the FMCS be made on FMCS Form F-7 or otherwise be made in writing (UWUA Exceptions). The UWUA does not except to any of the factual findings of the ALJ relating to FMCS notification, and such factual findings are not in dispute. Specifically, as found by the ALJ:

- On July 20, 2010, AWW’s Bob McKeage advised the UWUA’s George Manoogian that he would contact the FMCS to get the assistance of a federal mediator in the multi-unin national benefits negotiations (JD at 4, ll. 31-34).
- McKeage subsequently called the Chicago office of the FMCS to seek assistance, and was advised that mediator Javier Ramirez would be assigned to the matter (JD at 4, ll. 36-39).
- McKeage subsequently spoke by telephone to Ramirez, and followed up with e-mail communications on August 4 providing further information as to the issues that remained open in the bargaining (JD at 4, ll. 40-43).

- A week prior to the August 17 bargaining session, Ramirez called the UWUA's Manoogian to inform Manoogian of his planned participation in the negotiations, and Manoogian subsequently agreed to his participation (JD at 4, l. 52 to JD at 5, l. 4).
- It was stipulated that no party submitted an FMCS Form F-7 to the FMCS (JD at 5, ll. 23-24; see also Stip. 12). The UWUA did not object to continuing to bargain in the absence of a Form F-7 being filed (JD at 5, ll. 26-27).
- Ramirez (for the FMCS) attended bargaining sessions with the parties on August 16, 17, and 18 and September 16, 2010 (JD at 5, ll. 9-38).

Despite the absence of any exceptions to the ALJ's factual findings, the UWUA seeks in its brief to try to recast the facts with misrepresentations and speculation. Specifically, the UWUA states that "[i]t is undisputed that the Company never gave written § 8(d)(3) notice to the FMCS." (UWUA Brief at 2). This is not accurate. Rather, the stipulation by the parties was that neither AWW, the UWUA, nor any of the other participating unions filed a Form F-7 with the FMCS (Stip. 12). The evidence at hearing, however, was further undisputed that AWW had telephonic and written communications with the FMCS – and that the FMCS's appointed federal mediator in fact attended four bargaining sessions between the parties (as found by the ALJ). The UWUA's claim that there was no written notice is inaccurate.

Likewise, the UWUA resorts to immaterial and speculative musings regarding whether Ramirez (the federal mediator) had sufficient information regarding the dispute. (UWUA Brief at 3). First, the burden is on the AGC and the UWUA to present evidence to support the Complaint; it is not sufficient for the UWUA to merely speculate as to what Ramirez thought or did not think, then claim that this somehow proves a case against AWW. Second, what Ramirez thought (and how effective he was) is immaterial to the issue of Section 8(d)(3) notification – as found by the ALJ (JD at 10, ll. 5-9). Indeed, the Board's precedent makes clear there is no requirement that the FMCS even attend negotiations or provide mediation services – and, indeed,

either party may refuse to participate in mediation. See *Beacon Sales Acquisition, Inc.*, 357 NLRB No. 75 (2011), and numerous cases cited therein. Third, the UWUA’s speculation is simply contrary to the undisputed fact that Ramirez showed up at four bargaining sessions – that is, he had all the information he needed to contact the parties so as to offer to participate and provide services (the only information the Board has held is necessary). See *Lindy’s Food Center*, 232 NLRB 1001, 1005 (1977) (union’s letter to FMCS was sufficient to notify FMCS even though it did not even provide the name of the employer involved).

Simply put, the factual findings of the ALJ regarding AWW’s telephonic and written notification of the FMCS and the FMCS’s subsequent active participation in the negotiations are not subject to challenge.

II. Assuming That AWW Had An Obligation to Notify FMCS, The ALJ Was Correct In Concluding That AWW Notified FMCS Within the Meaning of Section 8(d)(3).

(A) The Statutory Language of Section 8(d) of the Act (Which the UWUA Disregards Altogether) Does Not Require “Written Notice” to the FMCS.

The UWUA argues that AWW was required to provide “written notice” to the FMCS under Section 8(d)(3) of the Act (UWUA Exceptions Brief at 2-4).² Quite tellingly, the UWUA ignores the actual language of Section 8(d) – indeed, not even quoting the statutory language in its briefing.

² The UWUA’s argument assumes that AWW was the “initiating party” in negotiations and that, accordingly, the obligations of Section 8(d)(3) fell to AWW. AWW contests the ALJ’s finding in this regard, as set forth in its own Exceptions to the Decision and Order of the ALJ. AWW will not unnecessarily repeat such arguments here, but rather refers the Board to such Exceptions and notes that Board precedent is clear that, if AWW was not the initiating party, then it had no obligation to notify the FMCS and was free to implement its last, best, final offer regardless of whether the FMCS was properly notified. *United Artists Communications, Inc.*, 274 NLRB 75, 76-77 (1985); *Petroleum Maintenance Co.*, 290 NLRB 462, 462 (1988).

Of course, the starting point with any analysis of the obligations under Section 8(d) of the Act starts with the language of Section 8(d). In that regard, by its terms, Section 8(d) of the Act provides in pertinent part as follows:

That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) _____ serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) _____ notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period sixty days after such notice is given or until the expiration date of such contract, whichever occurs later....

29 U.S.C. § 158(d) (emphasis added).

The clear differences in the language of Section 8(d)(1) and Section 8(d)(3) make glaringly obvious that the statute does not require “written notice” to the FMCS. Simply put, the UWUA’s claim that AWW was required to provide “written notice” to the FMCS is contrary to the language of Section 8(d) of the Act. Specifically:

- Section 8(d)(1) provides that the initiating party must “serve[] a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date.”

- By contrast, in the same listing of requirements, Section 8(d)(3) provides that the initiating party must “notif[y] the Federal Mediation and Conciliation Services within thirty days after such notice of the existence of a dispute.”

The distinction between the language used by Congress in listing the requirements under Section 8(d) of the Act could not be clearer – i.e., “written notice” is required under Section 8(d)(1), but only “notification” is required under Section 8(d)(3).

By arguing that “written notice” is required by Section 8(d)(3), the UWUA is trying to write in to the statute an additional requirement that Congress plainly did mandate.³ This violates the well-accepted doctrine of statutory construction of *expressio unius est exclusio alterius*. See *Russello v. United States*, 464 U.S. 16, 23 (1983); *United States v. Vidal-Reyes*, 562 F.3d 43, 53 (1st Cir. 2009). As the U.S. Supreme Court has explained:

“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (CA5 1972). In [*United States v. Naftalin*, 441 U.S. 768, 773 (1979)], the Court said: “The short answer is that Congress did not write the statute that way.” We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.

Russello, 464 U.S. 16, 23 (1983); see also *Vidal-Reyes*, 562 F.3d at 53 (statutory construction rests “on a presumption that Congress acts carefully and deliberately in including terms in one part of a statute and omitting them in another”). The application of this principle is particularly strong where, as here with the listing requirements under Section 8(d), “the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.” *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168-169 (2003); *United States v. Vonn*, 535 U.S. 55, 65 (2002).

³ The AGC made the same argument to the ALJ, but has filed no exceptions to the ALJ’s Decision and has abandoned that argument.

Furthermore, the UWUA tries to mandate a specific type of notification where the statute itself uses broad and general language. More specifically, in drafting Section 8(d)(3), Congress used the broad and general term “notifies” to indicate what communication was necessary with the FMCS. It did not restrict the form of notification to “serving a written notice” (as in Section 8(d)(1)), or indeed even indicate a need to “serve a notice” (which might imply some degree of formality). Rather, in using the term “notifies,” Congress used a broad and general term – one that plainly envisions any number of forms of communication. Cf. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325 (2011) (Supreme Court holding that “filed any complaint” means oral as well as written complaints).

The bottom line: Section 8(d)(3) cannot be reasonably construed to require “written notice” to the FMCS.

(B) The ALJ’s Conclusion That Written Notice To the FMCS (on FMCS Form F-7 or Otherwise) Is Not Required Is Fully Consistent With Section 8(d)(3).

The ALJ concluded that written notice to the FMCS is not required by Section 8(d)(3) of the Act, opining:

Section 8(d)(3) of the Act requires that the party desiring to modify a current contract must notify the FMCS The form of notification is not set forth in the statute. Accordingly such notification need not be in writing.

General Counsel argues, however, pursuant to 29 CFR Section 1402.1, the notification must be in writing. That FMCS regulation states that “the notice of dispute filed with the FMCS pursuant to the provisions of Section 8(d)(3) . . . shall be in writing. The following Form F-7, for use by the parties in filing a notice of dispute, has been prepared by the Service.” I do not agree with the General Counsel. The internal regulation of the FMCS cannot modify Section 8(d)(3) of the Act which does not require that the notification be in writing.

(JD at 9, ll. 42-51). This conclusion by the ALJ is fully supported by the language of Section 8(d)(3), as set forth above, and there is no Board precedent or other legal authority to support a contrary holding.

(C) Neither the FMCS Nor Any Precedent of the Board Requires Written Notification On Form F-7 or Otherwise, And the UWUA Misrepresents Board Precedent in Arguing Otherwise.

The UWUA attempts to rely on an FMCS regulation (notably, a regulation without penalty ascribed to it) to argue that the notice to the FMCS must be in writing – and generally made by way of filing FMCS Form F-7 – to comply with Section 8(d)(3) of the Act. (UWUA Brief at 2, citing 29 C.F.R. §1402.1). This argument is deficient on numerous grounds.

First, the FMCS has no statutory authority to construe Section 8(d)(3), or by extension Section 8(a)(5), of the Act. See *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 578 (6th Cir. 2003) (deference should be given only to an agency’s interpretation when the agency has been given responsibility to issue regulations under the statute in question). Second, even if the FMCS had authority to construe the NLRA (and bind the Board), the FMCS would have no authority to issue regulations requiring “written notice” inconsistent with the language of the statute which does not require such form of notice. *Bowen v. Yuckert*, 482 U.S. 137, 178 (1987) (“When a regulation is facially inconsistent with the statute, the administrative construction of the statute is necessarily wrong and there is no need to consider further the position of the agency. [An agency’s] interpretation of the statute as reflected in his regulation ‘cannot supersede the language chosen by Congress.’”).

Third, even if these fatal impediments could be overcome, it is clear that the FMCS itself does not require “written notice” (on its Form F-7 or otherwise) to initiate mediation services.

This is obvious from two overwhelming pieces of evidence:

- FMCS Form F-7 (both the old form and the form in effect in 2010) specifically states “use of this form is voluntary” (GC Ex. 11; AWW’s Post-Hearing Brief (Attachment A)).

- The FMCS did not, in fact, require AWW to submit the Form F-7 (or any other written notice or request) prior to assigning federal mediator Javier Ramirez and initiating its mediation services.

These facts are undoubtedly damning for the UWUA's theory that AWW was required to provide written notice on Form F-7 or otherwise to the FMCS. The facts are that neither Section 8(d)(3) requires such, nor does the FMCS. See also *How to Take A Case Before the NLRB*, p. 940 (8th ed., 2008) (F. Fischer, B. Garren, and J. Truesdale, eds.) (Form F-7 is an optional method provided for the convenience of the parties).

Likewise, while the UWUA admits that no Board precedent requires "written notice" under Section 8(d)(3) (UWUA Brief at 2), the UWUA proceeds to claim that there is some proscribed content of such notice. This assertion fails both factually and legally:

- First, it is significant that (although the UWUA urges that there must be "written notice") there is not a single Board or court decision that holds that the "notification" required by Section 8(d)(3) of the Act must be "written notice" or "notice on Form F-7."
- Second, while the UWUA questions the adequacy of the information provided to the FMCS, it presented no evidence of the information provided; indeed, while the AGC called representatives of the Pennsylvania and New Jersey mediation agencies as witnesses, neither the AGC nor UWUA called the FMCS mediator who was in attendance during the negotiations. The UWUA's speculation as to the information provided the FMCS is insufficient to support any factual finding that the information was "inadequate." The burden was on the UWUA to prove facts sufficient to support its theory, but there is no record evidence to support its theory (even assuming its validity).
- Third, the UWUA misrepresents Board precedent regarding the notification required under Section 8(d)(3). Thus, in *Lindy's Food Center*, 232 NLRB 1001 (1977), the Board found that the union's letter (notably, not a Form F-7) was sufficient notification even though it failed to even name the employer involved in the labor dispute. This supports AWW's position that the Form F-7 is not required – and that even the most basic notification to the FMCS that a dispute exists is sufficient. Likewise, in *United Mine Workers of America, Local 1854*, 238 NLRB 1583 (1978), the ALJ considered the claim that the union had provided verbal notification to the FMCS (implying that such could be sufficient), but found that there was no evidence of such notification. This decision (to which there were no exceptions filed, so no review by the Board

or courts) supports AWW's position that notification under Section 8(d)(3) may be verbal or written.

Finally, and maybe most importantly, the UWUA's assertion that the notification made by AWW to the FMCS was somehow inadequate or inaccurate is simply contrary to the facts. Indeed, the UWUA's assertion begs the question: Inadequate or inaccurate for what? The notification requirement is only intended to give the FMCS sufficient information to offer its services to willing parties; indeed, the FMCS Form F-7 merely provides basic information to allow the FMCS to contact the parties to offer its services with an understanding of the location and timing of the dispute (GC Ex. 11; AWW's Post-Hearing Brief (Attachment A)). It is not intended as a briefing of the bargaining history, outline of the issues in dispute, or statement of the parties' positions. In this case, it is clear that the FMCS was given all the information it needed to offer its services – indeed, it showed up at the next four bargaining sessions in Chicago and Maryland. Any claim that the information provided the FMCS was inadequate is ludicrous.

The UWUA's claim that "written notice" is required by Section 8(d)(3) is nothing more than a "made up" revision of the requirements of the Act. The Act does not set forth such a mandate to support the UWUA's theory, and the FMCS itself did not require such as a prerequisite in providing its services. Any decision finding to the contrary would effectively amount to an *ex post facto* legal mandate where none previously existed.

WHEREFORE, based on the foregoing facts, arguments, and authorities, **AMERICAN WATER WORKS COMPANY, INC.**, respectfully requests that the National Labor Relations Board reject and overrule the Exceptions of the Charging Party UWUA in their entirety and affirm that portion of the ALJ's Decision and Order finding that AWW complied with any obligation it may have had to notify the FMCS under Section 8(d)(3) of the Act at least 30 days prior to implementing its last, best, final offer.

Respectfully submitted:



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CERTIFICATE OF SERVICE

The undersigned certifies that on the 14th day of January, 2013, the above and foregoing document was served via electronic mail to the following:

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