JD–24–13
Minneapolis, Minnesota

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMALGAMATED TRANSIT UNION
LOCAL NO. 1498 (JEFFERSON
PARTNERS L.P.)

and Case 18-CB-086687

RAYMOND JONES, An Individual

Chinyere C. Ohaeri and *Nichole L. Burgess-Peel, Esqs.,* for the Acting General Counsel.

Weston R. Moore, Esq. (Moore Law Center), for the Respondent.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This case arises out of a September 28, 2012 complaint and notice of hearing that stems from an unfair labor practice (ULP) charge that Raymond Jones, an individual, filed on August 6, 2012, against Amalgamated Transit Union Local No. 1498 (ATU, the Union, or the Respondent).

I held a trial in Minneapolis, Minnesota, on February 13 and 14, 2013, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Jefferson Partners L.P. (JP or the Company) chose not to participate in the proceedings.

Issues

(1) Did the Union breach its duty of fair representation, and thereby violate Section 8(b)(1)(A) of the Act, by

(a) Failing to timely request an arbitration panel from the Federal Mediation and Conciliation Service (FMCS), as per the terms of its collective-bargaining agreement with JP, for the grievance that maintenance department employee Jones filed on July 23, 2010[1] regarding JP's failure to accept his bid to become a C Mechanic[2] and;

(b) Misleading Jones, from about August through the summer of 2012, into believing that his grievance was still scheduled for arbitration?

(2) If the Union breached its duty of fair representation, has the Acting General Counsel (the General Counsel) sustained its evidentiary burden of showing the probability that the grievance would have been successful on the merits, and established that that the Union should be held liable for a provisional make-whole remedial formula? The parties agreed that I should make this determination. See *Iron Workers Local377 (Alamillo Steel Corp.),* 326 NLRB 375 (1998).

Witnesses and Credibility

Testifying for the General Counsel were Jones, B Mechanic John Moore (Moore), and Sam Howell, who has served in various management or supervisory positions with JP since October 2007. Howell has never exercised supervisory authority over the maintenance department, where Jones was employed from March 2003 until his termination on May 12, 2012.[3] Howell's testimony related primarily to the contractual grievance-arbitration procedure and his communications thereon with Union President Richard Davis, not with the underlying circumstances of the grievance itself. Davis and ATU's attorney, Weston Moore (Attorney Moore), testified on ATU's behalf. The General Counsel contends (GC Br. at 30–31) that I should treat Attorney Moore as an agent of Respondent even though he is not named in the complaint. His and Davis' testimony leave no doubt that he was an agent, and I so find.

Howell appeared candid, he answered questions directly and with specificity, his testimony on direct and cross-examination was consistent, and I did not detect any suggestions that he was trying to skew his testimony for either the General Counsel or the Respondent. Inasmuch as he was the most credible witness, I credit him where his testimony diverged from that of Davis, Jones, and Moore. Other than the caveats described below, Moore and Davis appeared generally credible and to offer candid testimony.

[1] All dates are in 2010 unless otherwise indicated.

[2] The General Counsel avers that the Union acted arbitrarily, not necessarily discriminatorily or in bad faith. Tr. 314.

[3] The termination had nothing to do with the instant grievance, and the parties agreed that it is not germane to this proceeding.

Preliminarily, I note that nothing in the collective-bargaining agreement or elsewhere in the record reflects that the bidding process was any different for A and B mechanics than it was for C mechanics, and it is therefore appropriate to consider evidence relating to the selection of A and B mechanics. Indeed, the General Counsel offered General Counsel's Exhibit 22, which pertained to the selection of a B mechanic.

General Counsel's Exhibit 22 is a December 23 memorandum that then Vice President Robert Doherty sent to Shop Maintenance Manager Ted Fritsch and Howell regarding a conversation that he had with Davis about the shop tire position that had become open, and for which two employees, Moore and Quinton Moore, had bid. Based on Moore's testimony, this had to be the B Mechanic position for which he successfully bid and currently encumbers, even though he gave a later date. The memorandum reflects that Quinton Moore was more senior but that Moore had more experience.

The memorandum also indicates that seniority was not necessarily the paramount consideration, at least from management's viewpoint. Thus, Doherty had asked Davis, "[D]o we go off experience first or seniority?," to which Davis replied that if both had experience, no matter how much, seniority always takes precedence. In his memorandum, Doherty expressed reservations about Davis' stance. Moreover, Moore was ultimately selected for the position—even though he had less seniority than Quinton Moore. These actions of management undermine the testimony of Davis, Jones, and Moore that seniority has always necessarily been the governing criterion in determining which competing bidder gets a mechanic position.

In crediting the statements made in the memorandum, I take into account that it was admitted without objection; that both Doherty and Davis were agents of their respective principals; and that Davis did not testify about the conversation referenced in the memorandum and, ergo, did not dispute any of the statements therein attributed to him and Doherty. Cf. *Daikichi Corp.,* 335 NLRB 622, 622 (2001); *Colorflo Decorator Products,* 228 NLRB 408, 410 (1977), enfd. mem. 583 F.2d 1289 (9th Cir. 1978).

Further, Davis, Jones, and Moore testified that, other than the situation in this case, positions were always filled through the internal bidding system (semiannual or when vacancies occurred), and never by hiring outside applicants. That testimony was implicitly contradicted by Howell's testimony, in connection with General Counsel's Exhibit 20 (the advertisement for the C mechanic position on which Jones bid), that it has "been our practice to post" advertisements for positions on line or in the newspaper.[4] Moreover, Moore testified that, at some later point, an individual with the first name of Chris was hired from outside the Company to be an A mechanic.[5]

The above considerations aside, Jones was not a generally reliable witness. First and foremost, he was contradictory on a number of significant matters. Second, his testimony about his meeting with Howell on November 11, 2011, was inconsistent with Howell's account. Third, Jones often couched his answers with "might have" or other qualifiers indicative of lack of

[4] Tr. 213.
[5] Tr. 76.

certainty. Fourth, and related thereto, Jones frequently appeared to be trying to answer questions in the best light in his favor rather than in a direct, straightforward manner.

Jones first testified that the date of July 28 in management's response to his grievance was written by Fritsch but, later, that he was the one who wrote it in.[6] He testified that at the time that he filed the grievance (July 23), he did not know that a new employee had been selected to fill the position for which he had bid,[7] but the final schedule showing that he did not get the position was posted on July 18.

Jones' testimony was also confusing and contradictory, both on direct examination and cross-examination, as to when he first complained to Davis about the bidding process in July vis-à-vis when Fritsch asked him to fill out an application and when he filed the grievance.[8] For example, Jones testified that after he notified Davis on about July 23 that he had filed the grievance, Davis replied that the Union would take it to arbitration if Davis did not get the position[9]—even though this had been announced on July 18.

Jones' testimony about what occurred when he went to see Howell on November 11, 2011, about the status of his grievance, did not jibe with Howell's account. Thus, Jones testified that he "figured" the matter was going to arbitration after the computer screen that Howell accessed showed "arbitration," and Howell told him that "[i]t's going to arbitration."[10] Howell, on the other hand, testified that the screen showed that the Company had received no panel pick, that he told this to Jones, and that Jones was "a little incredulous" and indicated that he had filed or would file a complaint about the way ATU handled his grievance.[11] Howell was a more credible witness, and I credit his account over Jones'.

When Jones was asked how many conversations he had with Davis on the status of his grievance between January 2011 and May 2012, Jones first said "several," then "at least two or three times a month," and, finally, "four or five times a month."[12]

I do note that Davis did not testify about his postgrievance conversations with Jones and, hence, did not deny what Jones testified Davis told him therein. Cf. *Daikichi Corp.,* above; *Colorflo Decorator Products,* above. Jones' testimony on this matter was also consistent with what Davis testified was his misunderstanding of the arbitration posture of the grievance. Accordingly, I credit this aspect of Jones' testimony. I cite the well-established trial precept that witnesses may be found partially credible. *Jerry Ryce Builders,* 352 NLRB 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). In this regard, the trier of fact must consider the plausibility

[6] Tr. 168–169, 275. The General counsel represented that after Fritsch denied the grievance, Howell later had him add the date. This does not cure the inconsistencies in Jones' testimony.

[7] Tr. 128. See GC Exh. 5.

[8] See Tr. 122, et. Seq.; Tr. 170, et. Seq.

[9] Tr.132.

[10] Tr. 156–157. See also Tr. 195 (viewing the screen "satisfied" him that the arbitration process was still going on).

[11] Tr. 258–260. See also Tr. 242–243.

[12] Tr. 144–145.

of a witness' testimony and appropriately weigh it with the evidence as a whole. *Golden Hours Convalescent Hospitals,* 182 NLRB 796, 797–799 (1970).

Facts

I find the following facts in this case, based on the entire record, including testimony, observations of witness demeanor, and my credibility findings; documents; stipulations; and the thoughtful posttrial brief that the General Counsel filed. Although the Respondent's counsel was granted an extension of time to file a brief, he failed to do so.

At the outset, I emphasize that the absence of the Company as a formal participant in the trial, and the lack of testimony by any maintenance department management/supervisors, has resulted in an evidentiary void in terms of deciding whether the grievance probably would have been found meritorious had the Union taken it to arbitration. All I have before me are fairly summary written statements from Doherty and Fritsch when they responded to the grievance and/or to the Union's related information requests.

Thus, we do not know the precise reasons why management determined that applications were necessary for the C Mechanic position in July, why they deemed Jones and the two other coach servicers who bid on the C Mechanic position unqualified to perform the work, how often positions were posted to nonemployees, whether other positions in the maintenance department have been filled by outside candidates, and perhaps other relevant facts and circumstances.

I further note that the record is devoid of any evidence of arbitrators' decisions construing or weighing the contractual provisions that ATU and JP cited in support of their respective positions on the grievance.

JP, a limited partnership with a headquarters office and place of business in Minneapolis, Minnesota (the facility), and with various branch locations in several states in the Midwest and Southwest, is engaged in the interstate and intrastate bus transportation of passengers. In the calendar year ending December 31, 2011, JP derived gross revenues in excess of $250,000 for the transportation of passengers from within Minnesota directly to points outside of the state, thus establishing the Board's statutory jurisdiction.

At all times material, ATU has been the exclusive collective-bargaining representative of a unit of employees as described in article 3, recognition, of the most recent collective-bargaining agreement between JP and ATU, effective by its terms from March 1, 2009, to February 29, 2012,[13] and extended by mutual agreement into 2013 and until negotiation of a successive contract.

The unit consists of up to about 95 employees at the various locations where the Company conducts business, including drivers and maintenance department employees. The latter includes, A mechanic (the highest classification), B mechanic, C mechanic aka tire

[13] GC Exh. 2.

maintenance, coach servicer, and detailer.[14] On average, there are about seven A mechanics, two B mechanics, one C mechanic at a time, and about 10-15 coach servicers at the facility.

Relevant Provisions in the Collective-Bargaining Agreement

Central to this proceeding are the contract's bidding and grievance-arbitration provisions. There are two kinds of bidding for maintenance department positions: for particular vacancies or new positions, and for all positions on a semiannual basis.

Article 48, provides, inter alia, that when new vacancies occur or are created, employees be notified by bulletin board, system wide, no longer than 5 days after the position is vacant and shall remain posted for 5 continuous days. Particularly pivotal to this case, the article goes on to state, "Employees bidding for such positions, upon being deemed qualified by the shop foreman, will be selected on the basis of seniority." Further, if the shop foreman, after a probationary period not exceeding 20 days, finds the employee incapable of holding the position, the employee shall revert to his former position.

Article 48.1 sets out the semiannual bid procedure for all jobs in the maintenance department, to be effective the first Saturday on or after January 15 and July 15 of each year. Bids shall be posted for at least 5 calendar days and closed at 12:01 p.m. on the fifth day preceding the effective date of the bid. This provision does not expressly refer to seniority or a probationary period, but the practice has been similar to that for vacancy bids.

For the semiannual bids, two sheets are posted, listing positions and shifts: one for mechanics, and the other for coach servicer positions. Employees can bid on more than one position or shift, on one or both sheets, designating their choices in order of preference. It appears, contrary to Jones' testimony (at Tr. 113), that employees wishing to stay in their current positions still enter their names.

Turning to the grievance procedure, article 42.4 sets out the steps for cases not dealing with discipline, which includes the instant matter. There is no contention that the Union's was remiss in its handling of Jones' grievance prior to the final step, arbitration.

The arbitration provision is article 43, which provides, in relevant part, that:

(1) The aggrieved party files for arbitration by notifying FMCS and the Company within 30 days following receipt of the Company's decision on a grievance appeal.
(2) The party requesting arbitration shall request that FMCS submit a list of seven arbitrators to the Company and to the Union, from which one shall be selected as the arbitrator.
(3) Within 10 work days following receipt of the list of arbitrators, the Union and Company representatives shall alternately strike one name until one name remains and will the arbitrator.
(4) The arbitration shall be conducted as soon as possible . . . .

[14] Ibid. at 37.

The article is silent on who bears the burden of proof at an arbitration proceeding. It concludes with paragraph 43.7, time limits, stating:

> It is agreed that either party hereto failing to comply with the time limits outlined in [the grievance and arbitration procedures] shall forfeit its case, unless the parties agree in writing to extend or waive the time limits . . . .

In addition to citing article 48 in support of the grievance, the Union cited article 45.7 (an employee who bids and qualifies for a higher-pay classification position shall receive the higher pay upon completion of a 20-day probationary period) and 56 (incorporating working practices that are not specified in the agreement). In opposition to the grievance, management also cited article 48, as well as article 7.1, the management rights clause (providing, inter alia, that the right to promote is the sole responsibility of the Company).

Article 56 states that working practices exist that are not specified in the contract and that, if proven, they are binding upon the parties. The party asserting a past practice needs to prove beyond a reasonable doubt: (1) that the practice be unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

Jones' Bid for C Mechanic

Jones was a coach servicer at the facility at all times, from about March 2003 until May 19, 2012, when he was terminated,. A coach servicer maintains the interior and exterior cleanliness of the buses, maintains fuel levels, and parks the buses in the lot outside of the wash bay. The position requires a certain amount of physical exertion. Jones became a union member when he became full time after his first year of employment.

On July 7, management posted the semiannual bid sheet for mechanics[15] on a bulletin board in the break room. It included all positions, including a C mechanic. The C mechanic mounts and dismounts tires, determines which ones cannot be repaired, polishes and cleans tires, and makes certain that there is sufficient stack for the next shift.[16] The position, which requires a great deal of lifting and bending, and take considerable energy, is more physically demanding that the coach servicer position. Jones and other coach servicers had occasion to assist Moore move or lift bus tires.

Jones was the most senior of the three coach servicers who bid for the C mechanic position. Moore, the incumbent, did not, since he was voluntarily returning to a coach servicer position. The bid sheet stated that bids closed on July 14 at 12 o'clock and that selections would be effective on July 18.

[15] GC Exh. 4.

[16] See GC Exh. 3, an accurate job description. Tr. 84 (Moore).

Fritsch, the new shop maintenance manager, asked Jones on about July 15 to fill out an application for the position.[17] He also had the other two applicants fill out applications. On its face, the application form appears to be for new hires.

I credit Jones and Moore that they were unaware of any other occasions when management asked employees who bid on a higher-level position to complete such an application. I further find, taking into account their testimony and Davis', but noting Moore's selection in 2010, that seniority was usually, but not always, the deciding criterion in determining which bidder was selected. I also credit Jones' and Moore's uncontroverted testimony that coach servicers bidding into the C mechanic position have usually received a week of training from someone already encumbering that position, and that no one has "failed" and lost the new position, although on at least one occasion, an employee voluntarily relinquished it while still in the training period. As previously noted, Moore received a week of training when he went into the B mechanic position.

Fritsch told Jones that he wanted to get someone who had the most experience and that he was pressed for time in filling the position. He confirmed that he was looking for outside applicants. Immediately after their conversation, Jones went to see Vice President Dougherty, who was also a new manager. Jones told him that having an employee fill out an application for a bid position was unusual and that normally an employee was chosen solely by seniority and then trained once in the position. Doherty said that he stood by what Fritsch was doing.

On about July 16, the Company advertised for a "qualified mechanic" to work in the tire shop.[18] Howell testified that it was generated by the Company's human resources department and that he saw it posted at bulletin boards at the facility. Although he could not say whether it was also posted on line or in the newspaper, he testified, "I know that's been our practice to do so."[19] Moore did see it posted on line on an employment website. On at least one other occasion, the Company has hired an individual outside of the Company to fill a mechanic position (mechanic A) rather than "promoting" from within.

On July 18, the Company posted the new list of employees' positions.[20] For the C mechanic position, Moore's name was given, with the explanation that "John would have to wait till we would get someone trained in the tire shop."[21]

An outside candidate, Mike Masanz, was hired for the C mechanic position. He started on August 9 and received a week of training from Moore, who then went into the coach servicer position for which he had bid.

As noted earlier, Jones' testimony was confusing and contradictory as when he first called Davis vis-à-vis when he filed his grievance on July 23, and whether he knew at the time that he filed the grievance that he had not been given the position. In any event, Davis

[17] GC Exh. 17.
[18] GC Exh. 20.
[19] Tr. 213.
[20] GC Exh. 5.
[21] See also GC Exh. 6, showing that Moore put in for a coach servicer position and received it, with the notation, "John won the bid but he will need to stay in the tire shop until we get a replacement."

encouraged him to file a grievance and suggested what language he use, and on July 23, he did so.[22] It stated:

> I want to be placed in which position I picked for as my number one choice for tire maintenance because I shouldn't have to do the application process. I should be trained into the position.

Thus, the focus of the grievance was on his having to fill out an application, but by that time, management had already announced (on July 18) that he had not received the position.

On July 28, Fritsch, on the bottom portion of the grievance, wrote "denied based on article 48 in the contract."

The Union's Handling of Jones' Grievance

1. The Union's communications with Jones

Jones likely exaggerated the number of subsequent conversations he had with Davis about the status of the grievance, and his testimony about the specific words Davis used was not always clear. Nevertheless, the latter did not testify thereon or dispute Jones' account, which comported with what Davis testified was his understanding. Accordingly, I find that Davis told Jones (incorrectly) that the grievance was going to arbitration, even after Jones' termination in May 2012, or close to 2 years after Jones did not get the position. I also credit Jones' testimony that Davis never told him at any time that there was a problem with the grievance proceeding to arbitration. Jones never had any conversations with Attorney Moore.

I find, based on Howell's credited version, that on November 11, 2011, when Jones came to see him about the status of the grievance, Jones became upset when Howell told him in so many words that the grievance was not scheduled for arbitration because the Union had failed to provide the Company with a panel. However, inasmuch as Davis thereafter told Jones the contrary, I conclude that Jones' charge of August 12, 2012, was not barred by Section 10(b) of the Act.

2. The Union's communications with management

In late July or early August, after the grievance was filed, Davis called Doherty. Doherty said that he did not have the time to train Jones and was going to hire outside help. Davis unsuccessfully tried to get him to change his mind.

By letter of August 8 to Doherty, Davis filed an appeal of Fritsch's denial of the grievance, citing articles 48, 45.7, and 56 of the collective-bargaining agreement (described earlier) and requesting that Jones be awarded the C mechanic position retroactively to July 17.[23]

[22] GC Exh. 7.
[23] GC Exh. 8.

Doherty responded by letter of August 17, stating that the Company stood by Fritsch's decision, based on Jones' "previous work history and experience" and "on the amount of time needed to train a new person in the position vacated by another union employee."[24] Doherty pointed out that both articles 45.7 and 48 referred to "qualified" candidates.

By letter of August 27 to Doherty, Davis made an information request for information relating to the outside person who had filled the position and, since Doherty had cited Jones' work history, for all information that the Company had used to deny Jones' bid.[25]

By letter of September 23 to Howell, Davis notified the Company that the Union was submitting the grievance to arbitration and that he had requested that Attorney Moore request a panel of arbitrators from FMCS.[26] At all times material, Howell has been the management representative who monitors and keeps a log of the Company's handling of grievances and arbitrations. General Counsel's Exhibit 19 is a printout of his log for the instant grievance. He is also the management official to whom FMCS emails a panel list after the Union has requested such.

Howell responded by letter of October 7 (not mailed until October 25), acknowledging receipt of the September 23 letter.[27] He pointed out that article 43.1 gave the Union 30 days from the date of the receipt of the Company's decision to file for arbitration by notifying FMCS, which would submit the panel to the Company; however, those 30 days had expired on October 5, and Howell had still not received such notification. He went on to state that if the Company did not receive the panel as soon as possible, it would consider the grievance forfeited as per article 43.7. Howell testified without controversion that the Union "frequently" failed to timely submit a panel request to FMCS.[28]

David replied to Howell by letter of November 4, stating that, by letter dated September 23, he had sent in a request to Attorney Moore to request a panel from FMCS.[29]

Doherty, by letter of November 17, responded to Davis' information requests.[30] He explained that it was not until after management took the semiannual bid down did they know that there would be an opening in the C mechanic position (when Moore did not bid for it). Upon knowing of the opening, management asked the three coach servicers who had bid for it to fill out applications and be interviewed, and concluded that none of them had any experience with tire services, the minimum requirement for the job. Because Moore was going to start school within several weeks and would then not be able to work in that position, and with safety being the Company's first priority, management decided to advertise for an external candidate with the minimum experience and knowledge. Masanz had the necessary background and experience and was hired on August 9. Doherty emphasized that safety was the Company's top

[24] GC Exh. 9.
[25] GC Exh. 10. He repeated the requests by letters of September 23 and November 5. GC Exhs. 12, 15.
[26] GC Exh. 11.
[27] GC Exh. 13.
[28] Tr. 224.
[29] GC Exh. 14.
[30] GC Exh. 16.

priority and that article 7.1 gave the Company the sole right to promote. As far as Jones' previous work history and experience, Doherty stated that Jones did not have any previous work history as a tire mechanic or any other relevant experience.

Davis testified that Doherty called him in December to explain why management had made the decision to hire an outside employee, but Davis' description of what Doherty said strongly suggests that the conversation occurred before Doherty's November 17 letter. In any event, Doherty gave the same reasons for why Jones was not given the position: (1) Jones was not qualified; and (2) the Company had no time to train anyone.

Starting in February 2011, because of the Union's pattern in not timely requesting FMCS panels, Howell sent a standard template letter to Davis when the latter notified him that a grievance was being submitted to arbitration. It described the FMCS notification procedure and stated, "Please note that the mere submission to your attorney is not the same as submitting it to the FMCS."[31]

It is undisputed that the Union never requested a panel from the FMCS for Jones' grievance.

3. The Union's internal processes and deliberations

Davis, who works out of JP's Kansas City, Missouri facility, has served as the Union's president since January 1994, and as a full-time interstate driver for JP and its predecessors since May 1965. He is responsible for handling grievances (averaging 35 yearly) and complaints from members in the various J.P. locations, and managing the Union's financial affairs, including filing taxes. Davis conducts union business out of an office at his Joplin, Missouri residence. For this, the Union pays him $110 monthly. He receives no other compensation from the Union. Davis must clock off to conduct union business and thus has to do such on his own time. He has no staff to assist him. In 2010, he was a long-distance driver and also spent about 3 hours daily on union business.

During the past 5 years, the Union ordered 26 arbitration panels. Not all of the subject grievances went to hearing, because of settlement, the Union executive board's decision not to proceed, the affected employee's choice not to go forward, or JP's forfeiture of the grievance by not timely responding. Scheduling an arbitration hearing is often a lengthy process, largely due to difficulties in getting everyone available. Thus, in some cases, a hearing has been held 2 years after the grievance was filed.

Davis and Attorney Moore met all day on about October 28 regarding 16–18 grievances, including Jones', and other matters. They discussed and ordered arbitration panels for some of the grievances, and Davis believed at the end of the meeting that they had one for Jones' grievance.

In late October early November, Davis called Attorney Moore to confirm that a panel had been ordered for Jones' grievance. Attorney Moore said yes, that he had ordered a panel.

[31] See GC Exh. 21.

Almost 2 years later, in mid or late October 2012, Attorney Moore conducted an audit of the status of all FMCS requests over the past 5 years, matching requests with client names. Some panels had employees' names on them, but many others did not (e.g., "mileage grievance" or "tire shop job"). His audit showed which grievances had panels, which were left open for panels, which had been settled, which the employee had withdrawn, and which the Company had forfeited. During the course of the audit, Attorney Moore could not find Jones' name among the panels that the Union had ordered. He informed Davis of this when they met on about October 26 in another all-day session. He also told Davis that he had been speaking with an attorney of the Company about whether one of the several panels that had been ordered but no longer needed could be used for Jones' grievance. This never came to fruition.

Attorney Moore testified that he did not that the Union was missing a panel for Jones until the October 2012 audit, although he "had a suspicion in May because there wasn't one in his file."[32]

Analysis and Conclusions

Did the Union Breach its Duty of Fair Representation?

(1) In failing to timely request an FMCS panel.

In *Vaca v. Sipes,* 386 U.S. 171, 190 (1967), the Supreme Court held that a union breaches its duty of fair representation by conduct toward a member of the collective-bargaining unit that is "arbitrary, discriminatory, or in bad faith." The General Counsel relies primarily on the "arbitrary" criterion. Indeed, there is no evidence that the Union had any animus toward Jones for any reason or that Davis or Attorney Moore acted in bad faith in failing to comply with the agreement's arbitration provision deadline for requesting an FMCS panel. Rather, the issue here is whether the Union's admitted negligence rose to a sufficient level of egregiousness to constitute "arbitrary."

As the Board held in *Teamsters Local 896 (Anheuser-Busch),* 280 NLRB565, 574 (1986):

> Section 8(b)(1)(A) does not proscribe every act of disparate treatment or negligent conduct, but only those which, because motivated by hostile, invidious, irrelevant, or unfair considerations, may be characterized as 'arbitrary, discriminatory or bad faith conduct.' (footnote omitted)

The Board further elucidated this standard in *Pacific Maritime Assn.,* 321 NLRB 822, 823 (1996), stating that "[S]omething more than mere negligence or the exercise of poor judgment must be shown in order to support a finding of arbitrary conduct," citing *Teamsters Local 337 (Swift-Eckrich),* 307 NLRB 437, 439 (1992). See also *Rainey Security Agency,* 274 NLRB 269, 270 (1985). The union's conduct may be "far from model" and yet not so egregious as to find a violation. *Diversified Contract Services,* 292 NLRB 603, 605 (1989). To be found arbitrary, the conduct must be "so far outside a 'wide range of reasonableness' as to be

[32] Tr. 348; see also Tr. 351–352.

irrational." *Gaston v. Teamsters Local 600,* 614 F.3d 774, 778 (8th Cir. 2010) (citations omitted); see also *Airline Pilots v. O'Neill,* 499 U.S. 65, 76 (1991); *Mine Workers, District 65,* 317 NLRB 663, 663–664 (1995).

"Exactly when a union's conduct constitutes 'something more than mere negligence' is not susceptible to precise definition . . .[T]he totality of circumstances in a case must be explored and examined." *Office Employees Local 2,* 268 NLRB 1353, 1355 (1984), affd. sub. nom. 765 F.2d 851 (9th Cir. 1985); see also *District 1 NEBA (Marmarc Marine Transportation)*, 312 NLRB 944, 947–948 (1993).

Clearly, between Davis and Attorney Moore, Jones' grievance inadvertently fell through the cracks as a result of an utterly chaotic and disorganized system of monitoring arbitrations, and of Davis' wrongful assumption that Attorney Moore had requested an FMCS panel. This could be characterized as mere negligence at the outset.

However, Howell's October 7 letter stated that he had not received timely notification that a panel had been requested for Jones' grievance and, starting in February 2011, Howell sent Davis reminders that Davis' requests to Attorney Moore to obtain an FMCS panel were not tantamount to requests for a panel from FMCS. Those communications certainly would have put a reasonable person on notice of a potentially fatal impediment to pursuing Jones' grievance to arbitration, and triggered the duty on Davis' part to further inquire of Attorney Moore the status of the grievance. I further note that Attorney Moore had "suspicions" in May 2012 that no panel had been requested for Jones yet did not conduct an audit until October 2012, after which he so advised Davis. In sum, some delay in the Union's determination that no FMCS panel was requested could be excused, but over 2 years was unconscionable and far outside the pale of reasonable, even taking into account that Davis ran a one-person operation on the Union's behalf and had to conduct union business on his own time.

I note that there is no way to ever know whether, had the Union in fact scheduled Jones' grievance for arbitration, the outcome might have made a difference as far as Jones' May 2012 termination.

Accordingly, I conclude that the Union's conduct amounted to "reckless disregard" for ensuring that it properly handled the grievance, thereby going beyond mere negligence and crossing into the nature of "gross negligence" falling under the penumbra of arbitrary. Cf. *Electrical Workers Local 48 (Oregon-Columbia Chapter of NECA),* 342 NLRB 101, 108 (2004) (Reckless disregard for deviations from a union's hiring hall rules held to be gross negligence). Therefore, I further conclude that, by arbitrarily failing to timely request an FMCS panel under the terms of the collective-bargaining agreement, and causing Jones' grievance to lose by default, the Union violated its duty of fair representation under Section 8(b)(1)(A) of the Act.

(2) In intentionally or arbitrarily misleading Jones.

Crediting Davis and Attorney Moore, I conclude that neither one of them deliberately misrepresented to Jones that an FMCS panel had been selected for his grievance and that it would be going forward to arbitration. On the contrary, Davis was under the good faith but mistaken belief that Attorney Moore had made the necessary arrangements for an FMCS panel.

For the reasons stated above for finding the Union's conduct arbitrary, I further conclude that the Union arbitrarily misled Jones into believing that his grievance was still scheduled for arbitration and thereby breached its duty of fair representation under Section 8(b)(1)(A) of the Act.

Has the General Counsel Shown that the Grievance Would Have Prevailed?

In *Rubber Workers Local 250 (Mack-Wayne Closures),* 290 NLRB 817 (1988), the Board ordered a union that breached its duty of fair representation by arbitrarily refusing to process a grievance to, inter alia, make the employee whole for any loss of pay he may have suffered for that breach of duty in the event that the union could not pursue the remaining stages of the grievance procedure for any procedural or substantive reason (a provisional make-whole order).

The General Counsel correctly points out in its brief (at 30 et. Seq.) that the Respondent failed to offer evidence to show that Jones' grievance would have been unsuccessful. This is not surprising since nothing in the record (including GC Exh. 22) suggests that Davis did not genuinely believe that the grievance had merit. Regardless, the initial burden of evidence is on the General Counsel to show the likelihood of its success.

The Board, in *Mack-Wayne Closures*, above, held that a provisional make-whole remedy was appropriate upon the General Counsel's showing that the grievance was not "clearly frivolous," with the burden on the respondent to counter with proof that the grievance affirmatively lacked merit. Id. at 818–819.

However, the Board imposed a heightened evidentiary burden on the General Counsel in *Iron Workers Local 377(Alamillo Steel Corp.),* 326 NLRB 375 (1998), the case that now controls. Thus, to establish that a union should be required to compensate a grievant for the losses suffered as a consequence of the union's mishandling of the grievance: "[T]he General Counsel must . . . show that the grievance was one presenting a claim on which the grievant would have prevailed if the grievance had been properly processed by the union." Id. at 377. The evidentiary standard is by a preponderance of the evidence. Id. at 381 fn. 10. The Board further stated that in determining whether the General Counsel has met that burden, the standard that an arbitrator would have applied pursuant to the contractual grievance-arbitration procedure will be taken into account. However, the collective-bargaining agreement is silent on this matter, and I have no such information before me.

Determining the probability of success of Jones' grievance is also made more difficult by (1) my not having evidence of any prior arbitration awards involving the contractual provisions at issue, especially any construction of the language in article 48 that "Employees bidding for such positions, **upon being deemed qualified by the shop foreman**, will be selected on the basis of seniority" (emphasis added), or of the management rights clause in article 7.1; (2) my not having a full and complete account of why management decided that neither Jones nor the other two coach servicers who bid for the C mechanic position were not qualified; (3) my not knowing how often JP advertised for, and selected, outside employee over current maintenance department employees who bid for jobs.

I take into account that management went outside of the unit to select an A mechanic on at least one occasion (Moore's testimony); that Moore was given the B mechanic position in 2010 over a more senior employees because he had more experience (GC Exh. 22), reflecting a disagreement between management and the Union over the role of seniority; and that management has solicited online and by newspaper to fill other vacant positions (Howell's testimony). These factors might have seriously weakened the Union's contention that JP was obliged to place Jones in the C mechanic position. I must also consider the flaws in Jones' credibility in his testimony before me, although I cite this only as supplemental, not primary, consideration in making my determination.

Finally, the Union has relied on past practice to argue that Jones should have been awarded the C mechanic position solely because of his seniority and that the Company should not have gone outside the unit to fill the position. However, the contract requires the party asserting a past practice to prove its existence **beyond a reasonable doubt**, a standard that the Union has not met in this case.

In all of these circumstances, I cannot find that the General Counsel has met its burden of showing by a preponderance of evidence that the Union would have been successful had it taken Jones' grievance to an arbitration hearing. On the contrary, I have no idea how an arbitrator would have ruled. Accordingly, I conclude that a provisional make-whole remedy is not appropriate.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(b)(1)(A) of the Act: (1) arbitrarily failing to timely request an FMCS panel, pursuant to the terms of the collective-bargaining agreement, for Jones' grievance; and (2) arbitrarily misleading Jones into believing that his grievance was still in the arbitration process.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. For the reasons stated above, I will not recommend a conditional make-whole remedy.

ORDER

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[33]

The Respondent, Amalgamated Transit Union, Local No. 1498, Joplin, Missouri, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Arbitrarily failing to timely request Federal Mediation Conciliation and Service panels to hear members' grievance, as set out in its collective-bargaining agreement with Jefferson Partners L.P., and thereby causing forfeiture of the grievances.

(b) Misleading members into believing that their grievances are still pending in the arbitration process when they are not.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its office, meeting halls, and any places where notices to members and employees are normally posted, including union business bulletin boards at Jefferson Partners L.P. facilities where members of the bargaining unit are employed, copies of the attached notice marked "Appendix."[34] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees/members are customarily posted. In addition to physical posting of paper notices, notices should be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 14 days after service by the Region, deliver to the Regional Director for Region 18 signed copies of the notice in sufficient number for posting by Jefferson Partners L.P., if it wishes, at its facilities in all places where notices to employees are customarily posted.

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[33] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[34] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER **ORDERED** that those allegations of the complaint as to which no violations have been found are hereby dismissed.

Dated, Washington, D.C. April 4, 2013.

_____
Ira Sandron
Administrative Law Judge

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT arbitrarily fail to timely request arbitration panels from the Federal Mediation and Conciliation Service (FMCS), pursuant to the terms of our collective-bargaining agreement with Jefferson Partners L.P., and thereby cause forfeiture of members' grievances, as we did with Raymond Jones' grievance of July 23, 2010.

WE WILL NOT mislead members into believing that their grievances are still pending in the arbitration process when they are not, as we did to Raymond Jones.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL timely request arbitration panels from the FMCS for members' grievances pursuant to the terms of our collective-bargaining agreement with Jefferson Partners L.P.

AMALGAMATED TRANSIT UNION
LOCAL NO. 1498

(Labor Organization)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Towle Building, Suite 790, 330 Second Avenue South, Minneapolis, MN 55401-2221

(612) 348-1757, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (612) 348-1770.