

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

NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO, BRANCH 142 (United States Postal Service)

and

Case 5-CB-11093

DAVID W. NOBLE, AN INDIVIDUAL

Gregory M. Beatty, Esq., for the General Counsel.
Peter Herman, Esq. (Cohen, Weiss & Simon LLP),
of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Washington, D.C., on July 21, 2011. The charge was filed March 4, 2011, and the complaint was issued March 7, 2011. The complaint alleges that the National Association of Letter Carriers, AFL-CIO, Branch 142 (the Union) violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by (1) breaching its duty of fair representation when it refused and failed to process a grievance filed by David W. Noble, the Charging Party and a dissident union member, after he was suspended by the United States Postal Service (the Employer) on July 29, 2010,¹ and (2) by misleading him regarding the status of the grievance. The complaint also seeks an order requiring the Union: (1) to request that the Employer make Noble whole for his economic loss as a result of the July 29 suspension; (2) if Employer refuses, to process a grievance on Noble's behalf seeking the same relief whole; and (3) if such requests fail, to make Noble whole for all losses suffered as a consequence of the Union's refusal to process the July 29 grievance. The Union denied the material allegations and asserted that its officials made a reasonable good-faith decision not to pursue a grievance because it was untimely. It also contends that any misleading statements by Union officials amounted at most to negligence which did not harm Noble.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Union, I make the following

Findings of Fact

I. Jurisdiction

The Employer provides postal services and operates various facilities throughout the United States, including its Friendship Station facility in Washington, D.C. The Board has

¹ All dates are in 2010 unless otherwise indicated.

jurisdiction over the Employer pursuant to Section 1209 of the Postal Reorganization Act of 1970. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

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A. *The Parties*

The Union is a local labor organization, affiliated with the National Association of Letter Carriers, AFL-CIO, which represents city letter carriers stationed at the Friendship Station facility in Washington, D.C. The Union represents letter carriers at 42 facilities in Washington, D.C., and Maryland. Several union officials were involved in this controversy. They include Alton Branson, its Union's President. Leon Tucker and Randy Williams were stewards for Zone 16, where Noble, the Charging Party, is assigned. They would be the union officials initially responsible for processing grievances at the informal Step A level. Emmanuel Senesie was the formal Step A representative assigned to cover grievances arising within Branch 142's jurisdiction until October 2010. Many of his grievance cases were assumed by another formal Step A representative, Louis Minor, in November 2010.²

The Charging Party, David W. Noble, has been a letter carrier for 36 years and has been stationed at the Employer's Friendship Station for over 17 years. Noble has substantial experience working as a union representative, both as a steward and at higher levels of the grievance procedure on behalf of the Union. In 1993, his relationship with the Union's leadership deteriorated and he filed internal charges against the Union's president and other officials. The charges were rejected and Noble was suspended. He was eventually terminated by the Union in 2005.³ As a result, Noble brought suit in United States District Court against the Union, its president and 11 other officers accusing them of misusing Union funds and violating their fiduciary duties under Section 501(a) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 et seq. As a result of a 2008 decision by the Court of Appeals reversing and remanding a portion of the complaint to the District Court, that controversy lives on.⁴

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Since being stationed at Friendship Station, he has commenced numerous grievances which have been processed by the Union at informal Step A of the grievance process. In 2010, he had a substantial number of grievances pending, including at the formal Step A of the grievance procedure.⁵

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B. *The Collective-Bargaining Agreement*

The 2006-2011 National Agreement between the National Association of Letter Carriers and the United States Postal Service is the collective-bargaining agreement between the Union

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² All of the union officials involved in this controversy testified, except for Tucker and Williams. (Tr. 18-22, 61-62, 91-92, 118-119, 127-129; GC Exh. 9-12.)

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³ Although the dates are not disputed, Noble provided no explanation as to whether there was a connection between his filing of internal charges in 1993 and his eventual termination in 2005. (Tr. 13-17.)

⁴ *Noble v. Sombrotto*, 525 F.3d 1230 (D.C. Cir. 2008)

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⁵ Noble does not contend that the Union failed to represent him with respect to any of the other grievances that were filed. (Tr. 61-64, 90-91.)

and the Employer (CBA).⁶ The CBA contains a grievance-arbitration procedure at Article 15. Article 15, Section 1 defines a grievance as follows:

5 A grievance is defined as a dispute, difference, disagreement, or complaint between the parties related to wages, hours and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

10 Article 15, Section 2 sets forth the various steps in the grievance procedure. Informal Step A provides, in pertinent part, that “[a]ny employee who feels aggrieved must discuss the grievance with the employee’s immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably be expected to have learned of its cause. If the grievance is not resolved as a result of such discussion, the Union is entitled to appeal to formal Step A by filing a grievance form within seven (7) days of the discussion. Unresolved appeals at the Step A level may be appealed to the “Step B team.” If still unresolved, the Union may appeal to arbitration.⁷

20 The CBA provides for the submission of a joint grievance form in order for an employee to appeal from informal Step A to formal Step A. However, a joint grievance form cannot be completed where management refuses to meet to discuss the grievance at informal Step A.⁸

25 The CBA also contains an “emergency procedure” permitting the Employer, under certain circumstances, to immediately suspend an employee “on an off-duty status (without pay) by the Employer but remain on the rolls where the . . . employee may be injurious to self or others. The employee shall remain on the rolls (nonpay status) until disposition of the case has been had.”⁹

30 C. The July 29 Disciplinary Incident

30 Noble was sorting mail on Thursday, July 29, when he was approached by Acting Manager Sterling Coulter. Coulter told Noble that he expected him to complete his mail delivery route that day within 8 hours. Noble responded that it was an impossible task because of the difficulty of the route and expressed his annoyance by striking his letter carrier case. Coulter told Noble he was suspended pursuant to Article 16.7 of the CBA and directed him to punch out and leave the premises. Noble complied, went to the timeclock, punched out, and spoke briefly with coworker Barbara Turner, a union steward. He then proceeded to his letter case to retrieve his belongings and was confronted again by Coulter, who admonished Noble to leave immediately without speaking to anyone. Once outside the facility, Noble encountered Brandon Toatley, a supervisor. He informed Toatley that he had just been given an emergency suspension by someone he did not know. Noble also reminded Toatley about an October 2009 incident in which the latter was involved in the issuance of an emergency suspension to Noble; that discipline was later determined to be inappropriate because of Noble’s veteran’s preference status. As a result, the suspension was invalidated and Noble’s wages and benefits were

45 ⁶ GC Exh. 2.

⁷ Id. at 65–72.

⁸ I agree with Noble’s interpretation of the requirement regarding the joint grievance form. If the employer refuses to meet, it is unlikely that its representative will sign the form. (Tr. 137–138.)

⁹ GC Exh. 2 at 80–81.

eventually restored. Noble advised Toatley to contact the Employer's attorney who handled the 2009 suspension in order to avoid another \$10,000 in legal fees.¹⁰

D. Noble's Exchanges with the Employer

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On Monday morning, August 2, Noble faxed and emailed a memorandum to Toatley. The memorandum, addressed to "Zone 16 supervisors," stated that Noble called the facility twice, but no one answered. Again pretending not to know who Coulter was, he recounted the July 29 incident:

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I would like to work today, but last Thursday I was ordered off the floor "on a 16.7" by a person who didn't even give me the courtesy of introducing himself before suspending me. The person didn't bother to tell me why I was suspended, but it was apparently because I complained about management's failure to review the route adjustments I made in Zone 16 last October. Whoever the person was, he was very hostile and belligerent. I described the behavior of the suspender to representatives at Branch 142 and they said it sounded like an acting supervisor named Sterling Coulter. Whether it was Coulter or not I would like to file grievances about the suspension and other aspects of the suspender's behavior as soon as possible. This is the fifth time I've been given an emergency suspension since I returned to carrying mail in 1993. The previous four were all rescinded and expunged. I expect that to be the case here, as well, and I would like to get it accomplished as quickly as possible.

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Please let me know when someone who qualifies as my "immediate" supervisor will be available to discuss my grievances. Please either email me at . . . or call me at . . .¹¹

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Toatley responded abruptly by email a few minutes later: "I need for you to return the keys to route 1611." Noble quickly responded in kind: "1. I'll look for them. 2. I need for you to tell me when someone will meet with me to discuss grievances."¹² Noble followed up the next day, August 3, informing Toatley that he had not been able to find the keys and repeating his request to meet with and discuss his grievances with his immediate supervisor. He concluded the email by warning that [if] you continue to block my access to the grievance procedure by ignoring my request to meet so that I may initiate grievances I will file an unfair labor practice charge.¹³

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On August 4, still not having received a response from the Employer, Noble faxed and emailed another memorandum to "Zone 16 supervisors" via Toatley. He complained that he was suspended 7 days earlier and warned that he would file an unfair labor practice charge if the Employer continued ignoring his request to meet in order to initiate grievances.¹⁴ Toatley responded later in the day:

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¹⁰ Noble's unrefuted testimony was sufficiently credible and corroborated by coworker Nirlep Sidhu. (Tr. 73-74.) However, Noble's reference to Coulter as "somebody I didn't know" seemed calculating and disingenuous. (Tr. 23-27.) I find it unlikely that Noble, an assertive individual and experienced in labor relations, would have provided an explanation regarding his work responsibilities to an unknown employee unless he knew that person was a supervisor.

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¹¹ GC Exh. 3 at 1-2.

¹² Id. at 1.

¹³ Id. at 3-4.

¹⁴ Id. at 5-6.

You can come back to work and you can file a grievance. No one has placed you on a 16.7 you should report to work as soon as you get this message.¹⁵

5 Toatley's directive was only partially accurate, since Noble never received written notices from the Employer, as required under the CBA, confirming that he was suspended on July 29.¹⁶ Nevertheless, Noble did not return to work as directed on August 4. He had a different course of action in mind: grieving the July 29 incident.

10 Noble initially contacted a union representative on August 5. Instead of contacting a union steward, however, he discussed the July 29 incident with Emmanuel Senesie, the Union's formal Step A representative. Senesie requested that Noble email him the pertinent information, but Noble responded that he was "still putting it together. The MSPB site has been down for maintenance. Have a good convention. I'll have it waiting for you when you get back." Senesie's response indicated that he would be away for 2 weeks.¹⁷

15 Noble eventually returned to work on August 12.¹⁸ On that day, he attended a meeting convened by Toatley. A union steward and Coulter also attended the meeting. At the meeting, Toatley informed Noble that this was a predisciplinary interview and that he was being charged with being AWOL during the period of July 29 to August 12. Noble denied the charge and claimed that he had been suspended during that period of time. Toatley acknowledged the July 29 suspension, but Coulter foreclosed any discussion about that incident and stated that Noble was being disciplined for being AWOL. Coulter added, however, that Noble could grieve that discipline and, in response, he would provide a written description of the July 29 incident and forward it to the Employer's second-step grievance representative.¹⁹ Coulter's statements were less than candid, as Noble never received written notice of discipline for being AWOL during the period of July 29 to August 12.

20 On August 26, Noble handed a memorandum to Toatley asserting that management had been "holding some of [his] paychecks for as long as two months" and asking that they be given to him. He also reiterated that he had numerous grievances that he wanted to initiate and accused management of blocking his access to the grievance process for almost 2 weeks. He warned that he would file unfair labor practice charges if Toatley did not meet with him that day. In a handwritten response on Noble's memorandum, Coulter said that they would meet on August 31 and "at that time you will be able to initiate any grievances you want to."²⁰

25 On August 27, Noble called Tucker and informed him of the July 29 incident and suspension, Toatley's directive to return to work a few days later, and the requests to meet with management in the days that followed. Tucker forwarded that information to Branson in a note

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¹⁵ Toatley's email refers to an attachment, but was none attached to the exhibit. (Id. at 5.)

¹⁶ Noble conceded that he never received the customary written notice, whether it was a letter of warning pursuant to Sec. 16.3 or written notice of charges pursuant to Sec. 16.4. of an emergency suspension and was never charged with being AWOL. (Tr. 57-61.) Indeed, written notice is required in either case under the CBA. (GC Exh. 2 at 78-79.)

¹⁷ GC Exh. 4.

¹⁸ Noble was evasive as to why he did not return to work until August 12, even though Toatley directed him to return to work on August 4. (Tr. 58-59.)

¹⁹ The steward who attended the meeting with Noble was not identified. Nor did he explain whom he contacted at the Union to obtain her attendance. (Tr. 30-31.)

²⁰ GC Exh. 19.

on the same day.²¹ Noble did not, however, request that Tucker or any other local union representative file a grievance at informal Step A.²²

5 On August 31, Noble, accompanied by Tucker, met with Toatley and Coulter. Toatley offered to extend the 14-day contractual time limit for Noble to file the informal Step A grievances he attempted to initiate between August 2 and August 26. Noble declined that offer for an extension because it would not have been authorized pursuant to CBA Article 15 and he did not want to delay processing of grievances alleging severe misconduct by Toatley and Coulter.²³

10 *E. Noble's Requests that the Union File a Grievance*

15 On August 30, the day before he met with Toatley and Coulter, Noble sent a fax to Branson on August 30 asserting that his July 29 suspension violated Article 16.7 of the CBA. Noble asserted that management was refusing "to timely discuss the attached grievance" and asked that the grievance be appealed to "formal A today, so that there is will be no issue as to the timeliness of the appeal." Noble recited the July 29 incident, Toatley's directive to return to work on August 4, and added that he was not able to pay his August rent because of the suspension and was now facing eviction. He concluded with a request that Branson expedite processing of the grievance.²⁴ Branson spoke with Tucker and directed that he or the other steward, Randy Williams, file the grievance requested by Noble. However, in a letter to another union official, Tim Dowdy, Branson noted that the requests came in on August 30 and 31, and posed a "timeliness issue for us." He concluded the note with a "QUESTION' Did you still want us to file the grievance?"²⁵

25 Branson also received a fax from Noble the next day, August 31, informing him about Noble's meeting with Toatley and Coulter earlier that day. Noble's memorandum stated that he refused management's offer to extend the 14-day contractual deadline to initiate grievances at informal Step A.²⁶ By then, however, Branson's position had changed. He checked the Union's database and confirmed that there was no record of a grievance for July 29. He then contacted the two stewards, Tucker and Randy Williams, and confirmed that neither had been asked to file a grievance on behalf of Noble. In speaking to Tucker, Branson would also have been informed about the meeting with management earlier that day. On the basis of that information, Branson concluded that the purported grievance was untimely under the 14-day deadline for initiating a grievance at informal Step A (August 12) and the 7-day deadline to appeal to formal Step A (August 19). He did not, however, call Noble by telephone or respond in writing to tell him that the Union would not file Noble's grievance to formal Step A.²⁷

40 ²¹ R. Exh. 1 at 3-4.

²² Noble concedes this fact. (Tr. 61-62.)

²³ GC Exh. 6 at 3; Tr. 140.

²⁴ GC Exh. 5; R. Exh. 1 at 7-8.

45 ²⁵ Dowdy's position is not identified in the record, but it is evident that he outranked Branson within the Union. Otherwise, as president of the Union local, Branson would not have been asking a subordinate for direction as to whether to file a grievance under the circumstances. (R. Exh. 1 at 1-2.)

²⁶ R. Exh. 1 at 9.

50 ²⁷ While Noble's terse denial as to whether he had a telephone conversation with Branson was not very convincing (Tr. 137.), Branson was even less credible. In addition to a demeanor that was generally combative and nonresponsive on cross-examination, Branson's testimonial version was contradicted by the weight of the evidence. First, it is reasonable to infer that

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F. Senesie Misleads Noble

5 Over the course of the next several months, Noble and Senesie exchanged numerous emails. Although Senesie was, at the time, working on several grievances for Noble, the latter specifically inquired about his efforts to get backpay relating to the July 29 suspension. On September 8, Noble mentioned the July 29 backpay issue in conjunction with three other grievances. He concluded with a comment that the Employer's grievance representative was unlikely to agree to any of them, "so let's get him to write denials and see what kind of backbone the B-team has got."²⁸ Senesie's responses generally indicated that he would follow up with the Employer regarding all of Noble's concerns.²⁹

15 Noble and Senesie met at a restaurant on September 13. At this meeting, Senesie urged Noble to accept a union position that Branson offered him in July. Noble responded that he was certain that the Union's national organization would not permit him to be employed while his lawsuit against them was still pending. Senesie agreed and suggested that Noble consider settling the lawsuit. They also discussed Noble's belief that someone connected with the Union's Regional Office told Senesie not to talk to Noble, which Senesie concluded by sharing his view that "they really hate you down there."³⁰

20 On September 25, Noble asked Senesie "[w]hat, if anything, is happening to the grievance about Sterling Coulter's 7/29 suspension of me?" Senesie responded: "Working on getting you paid. Slow week last week. Sorry for no new updates."³¹ The fact is, however, that the Union did not file a grievance; nor did it generate a grievance file relating to the July 29 incident/suspension.³²

30 On October 12, Noble reported increasing workplace pressure from Coulter and urged the Union to either resolve the July 29 issue or move it forward:

35 Tucker, having spoken with Branson about Noble's requested grievance, would have told Branson about management's offer to extend the time to file a grievance. I find that to be the case and that Branson ignored that information. Secondly, Branson testified that he called Noble to tell him that there was no record of a grievance on file and that it was too late to file a grievance. The Union never explained, however, why Noble would then continue inquiring about the status of the grievance, while Senesie would repeatedly assure him that he was still working on obtaining his back pay for the period in question. (Tr. 95-99, 105-108.)

²⁸ GC Exh. 7 at 1.

40 ²⁹ The email stream produced for the record is often confusing as to what certain emails were responding to, but it is clear that Senesie never denied any of Noble's requests or said anything to indicate that he was not advocating Noble's concerns pursuant to Step A of the CBA. (Id. at 2.)

45 ³⁰ Although the Noble "haters" were unnamed, the Union did not refute the clear implication that its regional office staff influenced Senesie's interaction with Noble. (Tr. 22-23, 41-43, 122; GC Exh. 7.)

³¹ GC Exh. 8 at 1.

50 ³² It is undisputed that the Union did not file a grievance on Noble's behalf. (Tr. 98, 128.) More significant, however, is Senesie's incredulous explanation as to why he told Noble that he was working on resolving his backpay issue relating to July 29, even though there was no grievance pending: "in order to keep lines of communication open." (Tr. 121-126.)

5 Sterling Coulter is becoming ever more overbearing. I think that if you pushed the 7/29 suspension case that would have a salutary effect. Coulter thinks that I will not be able to use the grievance procedure to obtain any redress for his misconduct. So far, he's right. Please either settle the suspension case in my favor or get a denial and send it to the next step.³³

10 Noble followed up several hours later with another email opining that Senesie had a "huge amount of leverage in the 7/29 suspension case" because Coulter lied about the incident. He added that the Employer's "formal A representative isn't going to want to defend that kind of lie and send it up to where the B-team or an arbitrator is going to have an opportunity to criticize DC management for tolerating that kind of dishonesty." Senesie responded the following day: "I definitely will."³⁴

15 On November 3, Senesie assured Noble that it had not abandoned his grievances: "Nope. Never, still [a] priority." Noble followed up a few hours later: "What is the second step representative saying to you about the 7/29 suspension case that keeps you from appealing it to the third step?" Senesie did not respond, but replied to Noble's inquiry the following day as to whether there was "[a]ny news" by indicating he would discuss it at an unspecified meeting on November 9.³⁵

20 On November 9, Noble emailed Senesie and asked if there was anything to report.³⁶ Senesie did not respond. Noble emailed him again on November 10 and asked if there was "[a]ny news on the grievance protesting the 7/29 suspension?" Senesie responded a short while later: "Still trying to come to a [consensus]. All the grievances are about caught up." Noble's response a short while later reflected a sense of concern about the Union's efforts on his behalf:

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1. When did you last speak with a management representative about the grievance concerning the 7/29/10 suspension?
 2. Who was the management representative?
 - 30 3. What was the management representative's position?
 4. What was the union's position?

35 For the next 8 days, Noble sent a daily email to Senesie posing the same four questions. Senesie did not respond to any of them.³⁷ On November 18, Noble learned that Senesie was no longer handling grievances at the second step and asked him for confirmation, as well as information as to who was now handling his grievances. A short while later, Senesie responded in his typical, vague manner, simply stating that he had responsibility for some "old ones" and explained that he had "been disabled for the past 2 weeks." Once again, he assured Noble that he would "take care of [his] situation."³⁸ Obviously doubtful as to Senesie's representations, Noble continued to document his inquiries on December 21 and 23, posing the same four

45 ³³ GC Exh. 8 at 5.

³⁴ GC Exh. 8 at 6.

³⁵ GC Exh. 8 at 8-9.

³⁶ GC Exh. 8 at 12.

³⁷ Noble's testimony that Senesie did not respond to any of these inquires was unrefuted. (GC Exh. 8 at 13-20, 22; Tr. 45-47.)

50 ³⁸ Senesie's vague statement that he had been "disabled for the past two weeks" was not credible. (GC Exh. 8 at 23-24.) In testimony, he made no mention about that disability, but did explain that he received all of his emails on his mobile telephone. (Tr. 120.)

questions about the Union's efforts relating to the July 29 incident. Again, Senesie never responded to those inquiries.³⁹

G. Branson Ignores Noble's Requests For Information Regarding the July 29 Incident

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On February 1, 2011, Branson sent Noble copies of the "final grievance resolution/settlement" relating to four grievances. None related to Noble's request for backpay relating to the July 29 incident.⁴⁰ On February 2, 2011, Noble requested copies of the complete files relating to those grievances.⁴¹ On February 4, Noble requested a meeting with Branson and Minor to discuss the four grievance decisions.⁴² On February 7, Noble faxed a request to Branson for a copy of the "complete file of the grievance concerning Sterling Coulter's 7/29/11 suspension of me."⁴³ Still attempting to set up a meeting, Noble emailed Branson on February 25 and again requested copies of the grievance file concerning the July 29 suspension. Consistent with the Union's approach to this issue since late August, Branson ignored the request and never provided Noble with any documentation of a grievance filed on his behalf over the July 29 incident.⁴⁴

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Noble finally met with Branson and Minor on February 28. He explained his dissatisfaction with the four grievance decisions provided to him on February 1. Branson responded by apologizing for the Union's performance and assured him he would personally handle his grievances from that point on. Noble also brought up the grievance relating to the July 29 suspension and another one relating to the Employer's cancellation of his health insurance during the winter of 2010. Branson took notes at that point, but neither he nor Minor said anything about the July 29 suspension. Nor did they or anyone else associated with the Union ever discuss that issue with Noble after February 28. Consequently, Noble has never been paid for the days that he was out of work as a result of the July 29 suspension.⁴⁵

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III. Legal Analysis

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The complaint alleges that the Union violated Section 8(b)(1)(A) of the Act by failing to process a grievance relating to the July 29 incident and then misinforming Noble about it, all because of Noble's dissident union activities. The Union contends that it was lawful for the

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³⁹ GC Exh. 8 at 26–27.

⁴⁰ GC Exh. 9–12.

⁴¹ Noble testified that he sent Branson the fax on February 12, but it is dated February 2. The paper trail and sequence of events are consistent with Noble having sent it on February 2. (Tr. 50.)

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⁴² GC Exh. 14.

⁴³ I credit Noble's testimony that he sent the fax to Branson requesting records relating to the July 29 suspension on or about February 7 and never received a response. (Tr. 52; GC Exh. 15.) Branson's testimony that he never received it, on the other hand, was not credible. Construed in conjunction with his responses or lack of responses to several emails in which Noble requested a copy of the Union's file for the July 29 suspension, it is quite evident that Branson engaged in a pattern of ignoring Noble's requests relating to that incident. (Tr. 112–114; GC Exh. 19 at 3.)

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⁴⁴ GC Exh. 19 at 3.

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⁴⁵ I found Noble's version of what was discussed at the meeting more credible than the inconsistent versions provided by Branson and Minor. (Tr. 53–55.) Branson testified that he simply told Noble that a grievance was never filed, while Minor could not recall any discussion regarding the July 29 incident. (Tr. 113–114, 128–129.)

Union's president to not appeal the July 29 incident to formal Step A of the grievance procedure process at the end of August because the matter had not been pursued timely at the informal Step A level. The Union also contends that President Branson, knowing that Noble refused the Employer's offer to extend the 14-day deadline for filing at informal Step A, reasoned that an appeal to formal Step A would also have been untimely. Finally, the Union contends that Branson had no paperwork to pursue a grievance under the CBA.

A. The Union's Duty of Fair Representation

A union owes a duty of fair representation to all the employees it represents. *Vaca v. Sipes*, 386 U.S. 171 (1967). It breaches that duty if its actions in representing them are arbitrary, discriminatory or in bad faith. *Id.* at 190. *Teamsters Local 553 (Miranda Fuel Co.)*, 140 NLRB 181 (1962). In assessing a potential violation, the issue "turns not on the merit of the grievance but rather on whether the union's disposition of the grievance was perfunctory or motivated by ill will or other invidious considerations." *Bottle Blowers Local 106 (Owens-Illinois)*, 240 NLRB 324 (1979). Moreover, a labor organization may not refuse to properly handle a grievance because of an employee's dissident union activity. *State, County Employees Local 1640, AFSMCE (Children's Home of Detroit)*, 344 NLRB 441, 445 (2005). It is also well settled that a union violates Section 8(b)(1)(A) of the Act when it refuses to process a grievance of an employee because the employee filed unfair labor practice charges with the Board. *Postal Workers Union (Postal Service)* 327 NLRB 759, 768 (1999); *Chemical Workers Local 5-114 (Colgate-Palmolive Co.)*, 295 NLRB 742, 743 fn. 4 (1989); *ITO Corp.*, 246 NLRB 810, 812 (1979); *Graphic Arts Union 96B (Williams Printing)*, 235 NLRB 1153 (1978); and *Penn Industries*, 233 NLRB 928, 942 (1977).

The Union denies that it acted arbitrarily in failing to process the grievance because it reasonably believed that its action, or inaction for that matter, was fully consistent with established law. See *Government Employees Local 888 (Bayley-Seton Hospital)*, 323 NLRB 717 (1997). That contention has virtually no support in the record. Such a view, expressed by Branson at trial, is undermined by the fact that he never called Noble to tell him that—or anything else, for that matter. To the contrary, his initial directive to the stewards, Tucker and Williams, that they file the grievance requested by Noble, hit a wall after Branson communicated with another Union official, Tim Dowdy, as to whether a grievance should be filed.

The credible evidence indicates that the Union's national and/or regional leadership harbored animus toward Noble. He has been battling the national organization's leadership for years, has filed a host of grievances and still has a lawsuit pending in Federal district court. That sentiment filtered on down to Branson, the local Union president, and Senesie, the formal Step A representative. The latter, in fact, confirmed those sentiments in response to Noble's inquiry as to whether anyone at the regional office directed him not to speak with Noble. Such a statement, in and of itself, had the effect of restraining and coercing a union member in the exercise of his Section 7 rights. See *Teamsters Local 886, (United Parcel Service)*, 355 NLRB No. 105 (2010), incorporating the Board's earlier statements reported at 354 NLRB No. 52, slip op. at 4 (2009).

Even absent the animus prevalent at the Union's national and/or regional levels, the misrepresentation and inaction of Senesie and Branson alone confirm an utter disregard for Noble's request to file a grievance. Branson clearly had enough information on August 30, when he directed Tucker and Williams to file a grievance on Noble's behalf. Curiously, Branson failed to explain why neither steward complied with his directive to file a grievance that day. Instead, Branson shifted course the next day, claimed that he had no documentation of a grievance and expressed concern as to the timeliness of a grievance at that point. His course of action

deliberately ignored Toatley's statement on August 31 that the Employer would not invoke a timeliness defense to the filing of a grievance for the July 29 incident. Under the circumstances, the Union's failure to act was so arbitrary and unreasonable that it constituted a breach of its duty of fair representation. *Service Employees Local 579 (Beverly Manor Convalescent Center)* 229 NLRB 692, 695-696 (1977); *Mine Workers District 5 (Pennsylvania Mines Corp.)*, 317 NLRB 663, 664-665 (1995); and *Service Employees Local 87 (Cervetto Maintenance)*, 309 NLRB 817, 820 (1992).

What followed after the initial failure to file a grievance on Noble's behalf at the end of August was not mere negligence or poor judgment. Cf. *Pacific Maritime Assn.*, 321 NLRB 822, 823-824 (1996); *Teamsters Local 337 (Swift-Eckrich)*, 307 NLRB 437, 438 (1999); and *Teamsters Local 692 (Great Western Unifreight System)* 209 NLRB 446, 447-448 (1974). After deciding, unbeknownst to Noble, that they would not file a grievance regarding the July 29 incident, Senesie and Branson engaged in a pattern of deception and nonresponsiveness over the course of the next several months. For over 5 months, Senesie repeatedly assured Noble that he was pursuing a grievance relating to the July 29 incident. When Noble became concerned and requested copies of his grievance file, Senesie simply ignored Noble's emails until he finally admitted that he was no longer handling Noble's cases. Noble's campaign to file a grievance culminated at a February meeting with Branson, where the latter simply took notes in response to Noble's request for his grievance files for the July 29 incident. The Union's behavior under the circumstances amounted to a willful failure to pursue Noble's grievance. *Service Employees Local 3036 (Linden Maintenance)* NLRB 995, 997 (1986) ("the Respondent's continued nonaction, despite statements to the contrary, amounted to a willful failure to pursue the grievance, and was therefore perfunctory.")

Based on the foregoing, it is evident that the Union deliberately misled Noble for over 5 months about the status of his grievance relating to the July 29 discipline in violation of Section 8(b)(1)(A) of the Act.

B. The Remedy

The General Counsel further contends that Noble's potential July 29 grievance was meritorious and, therefore, a make-whole remedy is appropriate pursuant to *Iron Workers Local 377 (Alamillo Steel Co.)*, 326 NLRB 375 (1998). In *Iron Workers Local 377*, the Board, noting a series of inconsistent court of appeals approaches to the remedial formula set forth in *Rubber Workers Local 250 (Mack-Wayne Closures) (Mack-Wayne II)*, 290 NLRB 817 (1988), simplified the process by leaving a determination of merit to the compliance proceeding, if necessary:

Under the modified procedure which we adopt today, we will not provide a remedy requiring the union to make the grievant whole for losses allegedly suffered as a consequence of a union's mishandling of a grievance unless the General Counsel (1) affirmatively pleads for this remedy in the complaint and (2) shows not only that the union breached its duty of fair representation by mishandling the grievance but also that the grievant would have prevailed in the grievance-arbitration procedure had the union not breached its duty. If the General Counsel pleads for this remedy he will not normally be required to establish the merits of the grievance in the unfair labor practice proceeding. Rather, once the General Counsel has established that the union acted unlawfully in breach of its duty of fair representation, we will normally issue an order directing the respondent union to take such affirmative steps as may be necessary, under the facts of the particular case, to pursue properly the grievance in a manner consistent with the union's duty of fair representation. If the grievance is resolved through the contractual machinery, no further proceedings will be required. However, if

5 the union is unable to secure a resolution of the grievance through the contractual machinery (because of time bars or other constraints rendering the process ineffectual), it will then be necessary for the Board, for the purpose of deciding whether make-whole relief is appropriate, to determine whether the grievant would have prevailed on a properly processed grievance. At that point, in the compliance stage, the burden will be on the General Counsel to establish that the grievance was meritorious.

Iron Workers Local 377, 326 NLRB at 380.

10 The Board went on to define the type of case appropriate for a complete resolution during the unfair labor practice portion as those in which the union gives notice, in its answer, that it wishes to litigate the merits of the grievance during the initial unfair labor practice proceeding. *Id.*

15 The General Counsel demonstrated, by a preponderance of the evidence, that the Union breached its duty of fair representation by failing to file a grievance as requested by the Charging Party and then misleading him into believing that one had been filed on his behalf. The General Counsel also sought a make-whole remedy in the complaint. The Union's answer did not, however, include a request to address the merits of the grievance during the unfair labor practice proceeding. Accordingly, the recommended remedy and order will issue in accordance with *Iron Workers Local 377, 326 NLRB at 380* and will require the Union to take certain affirmative steps to pursue the grievance pursuant to the CBA.

CONCLUSIONS OF LAW

- 25 1. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
- 30 2. By arbitrarily and in bad faith failing to process David Noble's grievance concerning his July 29, 2010 suspension and then willfully misrepresenting the status of that grievance, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

REMEDY

35 Having found that the Union 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.

40 Having found that the Union violated its duty of fair representation in handling Noble's grievance, the Union shall promptly request that the United States Postal Service make David W. Noble Jr. whole for all losses suffered as a result of the July 29, 2010 incident that caused Noble to believe he was suspended until August 4, 2010; and, if the United States Postal Service refuses this request, the Union shall promptly initiate and pursue in good faith a grievance on Noble's behalf seeking the same relief, including all reasonable efforts through arbitration or any other dispute resolution proceedings. Noble will be entitled to be represented by his own counsel at any grievance proceedings, including arbitration or other dispute resolution proceedings that may result from the Union's efforts on Noble's behalf, and the Union will pay the reasonable legal fees of such counsel. In the event that it is not possible for the Union to pursue on Noble's behalf the grievance that he sought to file concerning his belief that he was suspended on July 29, 2010, and if the General Counsel shows in compliance proceedings that a timely pursued grievance on that issue would have been successful, the

Union shall make Noble whole for any increases in damages he suffered as a consequence of our refusal to process that grievance, together with interest.

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁶

ORDER

10 The Respondent, the National Association of Letter Carriers, AFL-CIO, Branch 142 (United States Postal Service), Washington, D.C., its officers, agents, and representatives, shall

1. Cease and desist from

15 (a) Arbitrarily, discriminatorily or in bad faith failing or refusing, on request, to process grievances sought to be processed by any employees towards whom we owe a duty of fair representation.

(b) Misinforming any employees about the status of grievances they seek to process.

20 (c) Failing and refusing to respond appropriately to inquiries made to us from any employees regarding the status of grievances they seek to process.

(d) In any like or related manner restraining or coercing members in the exercise of the rights guaranteed them by Section 7 of the Act.

25

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

30 (a) Promptly request that the United States Postal Service make David W. Noble Jr. whole for all losses suffered as a result of the July 29, 2010 incident that caused Noble to believe he was suspended until August 4, 2010; and, if the United States Postal Service refuses this request, promptly initiate and pursue in good faith a grievance on Noble's behalf seeking the same relief, including all reasonable efforts through arbitration or any other dispute resolution proceedings.

35 (b) Permit David W. Noble Jr. to be represented by his own counsel at any grievance proceedings, including arbitration or other dispute resolution proceedings that may result from our efforts on Noble's behalf, and pay the reasonable legal fees of such counsel.

40 (c) In the event that it is not possible for the Respondent to pursue on David W. Noble, Jr.'s behalf the grievance that he sought to file concerning his belief that he was suspended on July 29, 2010, and if the General Counsel of the National Labor Relations Board shows in compliance proceedings that a timely pursued grievance on that issue would have been successful, the Union shall make Noble whole for any increases in damages he suffered as a consequence of its refusal to process that grievance, together with interest.

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50 ⁴⁶ 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.

5 (d) Within 14 days after service by the Region, post at its union office in Washington, D.C., copies of the attached notice marked "Appendix."⁴⁷ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

10 (e) 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.

Dated, Washington, D.C. September 29, 2011

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Michael A. Rosas
Administrative Law Judge

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⁴⁷ 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."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

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

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, discriminatorily, or in bad faith fail or refuse, on request, to process grievances sought to be processed by employees towards whom we owe a duty of fair representation.

WE WILL NOT misinform any employees about the status of grievances they seek to process.

WE WILL NOT fail and refuse to respond appropriately to inquiries made to us from any employees regarding the status of grievances they seek to process.

WE WILL promptly request that the United States Postal Service make David W. Noble Jr. whole for all losses suffered as a result of the July 29, 2010 incident that caused Noble to believe he was suspended until August 4, 2010; and, if the United States Postal Service refuses this request, WE WILL promptly initiate and pursue in good faith a grievance on Noble's behalf seeking the same relief, including pursuing arbitration or any other dispute resolution proceedings.

WE WILL permit David W. Noble Jr. to be represented by his own counsel at any grievance proceedings, including arbitration or other dispute resolution proceedings that may result from our efforts on Noble's behalf, and WE WILL pay the reasonable legal fees of such counsel.

WE WILL, in the event that it is not possible for us to pursue on David W. Noble, Jr.'s behalf the grievance that he sought to file concerning his belief that he was suspended on July 29, 2010, and if the General Counsel of the National Labor Relations Board shows in compliance proceedings that a timely pursued grievance on that issue would have been successful, make Noble whole for any increases in damages he suffered as a consequence of our refusal to process that grievance, together with interest.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights as guaranteed in Section 7 of the Act.

NATIONAL ASSOCIATION OF LETTER
CARRIERS, AFL-CIO, BRANCH 142
(United States Postal Service)

(Employer)

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.nlr.gov

1099 14th Street, NW, Suite 6300
Washington, DC 20570
Telephone: (202) 208-3000
Hours of Operation: 8:15 a.m. to 4:45 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, 202-208-3000