

**American Postal Workers Union, Local 886 and
Sheryl Bishop.** Case 17–CB–006651

April 27, 2012

DECISION AND ORDER

BY MEMBERS HAYES, FLYNN, AND BLOCK

On December 15, 2011, Administrative Law Judge George Carson II issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Michael E. Werner, Esq., for the General Counsel.
Mr. David James, for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Salina, Kansas, on October 20, 2011, pursuant to a complaint that issued on August 19, 2011.¹ The complaint alleges that the Respondent violated Section 8(b)(1)(a) and (2) of the National Labor Relations Act (the Act) by excluding the Charging Party from grievance settlements because she was not a member of the Union, informing employees that the Union would not file grievances for nonmember unit employees, and requesting that the Employer exclude the Charging Party from

¹ The Acting General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent Union did not exclude Charging Party Sheryl Bishop from a class-action grievance settlement because she was not a member of the Union, we reject the Acting General Counsel's argument on exceptions that the inclusion of employees M. Regnier and John Doll in the settlement demonstrates that the Union included in the settlement union-member employees who were situated similarly to Bishop. John Doll worked as a window clerk, and there is no dispute that window clerks were properly included in the settlement. As for Regnier, the evidence fails to demonstrate that the Union included her in the settlement because she was a member rather than because it had a good-faith belief that she met the inclusion criteria.

¹ All dates are in 2010, unless otherwise indicated. The charge in Case 17–CB–006651 was filed on May 31, 2011, and was amended on August 16, 2011.

grievance settlements because she was not a member of the Union. The answer of the Respondent denies any violation of the Act. I find that the Respondent did not violate the Act and shall recommend that the complaint be dismissed.

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 Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits that the Board has jurisdiction over the United States Postal Service pursuant to Section 1209 of the Postal Reorganization Act, 39 U.S.C. § 1209, and that the American Postal Workers Union, Local 886 (the Union) is a labor organization within the meaning of Section 2(5) of the Act. I find and conclude that the Board has jurisdiction over this matter.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Union represents an appropriate unit consisting of the following employees:

All maintenance employees, motor vehicle employees, postal clerks, including special delivery messengers merged into the clerk craft by memorandum of understanding dated November 20, 1997, mail equipment shops employees, material distribution centers employees employed by the Employer, but excluding managerial and supervisory personnel, professional employees, employees engaged in personnel work in other than a purely non-confidential clerical capacity, security guards as defined in Public Law 91-375, 1201(2), all Postal Inspection Service employees, employees in the supplemental workforce as defined in Article 7, rural letter carriers, mail handlers, and letter carriers.

In May, various clerks observed that some of their work was being performed by other employees. The individuals performing the work of the clerks included maintenance employees, who were in the same unit but not assigned as clerks, letter carriers, supervisors, and at least two postmasters from nearby post offices. The record does not establish whether understaffing of the clerk positions or some other reason necessitated the use of other personnel.

The Union began filing grievances. Initially, the grievances were filed by Union President David James and were specific to the violation and the employee on the overtime desired list who was deprived of work. Relative to that, employees who desired to work available overtime signed a list confirming that they desired to work available overtime. Because individuals other than clerks were performing their work, the income of those clerks was diminished.

In June, Steward Kyle James, who is not related to President David James, "took the initiative" and assumed the responsibility for filing grievances relating to the work of clerks being performed by individuals who were not clerks. He created a document titled "Non-Clerks performing bargaining unit work

in violation of Article 7.2” on which the reporting clerk would place his or her name, the name of the nonclerk performing the work, the work being done by the nonclerk, and the time period involved.

Initially Kyle James filed grievances shortly upon receiving the reports, but ultimately combined the reports and filed grievances weekly. Attached to each grievance were the documents reporting the observed violations and a spread sheet naming the employees and the number of hours involved. Kyle James explained “that it was impossible to match hour per hour, so . . . I just said well let’s just start rotating. And I just started at the top and rotated through all the areas that were being violated.” Unlike the grievances that David James had filed on behalf of clerks on the overtime desired list, Kyle James filed on behalf of all clerks whose work areas were being violated. He explained that, with “almost all areas in the clerk area being violated, . . . I figured everybody would be evenly distributed in time.” Even though a particular violation may have affected only one employee, Kyle James distributed the hours to the next employees on the list in accordance with seniority.

Two clerks were not included upon any spread sheets submitted with the grievances, Rebecca (Becky) Hertel and Charging Party Sherry Bishop. Kyle James explained that the violations underlying the grievances were violations of the clerks’ “principal assignment area and overtime violations.” Hertel is secretary to the manager of postal operations who is domiciled in Salina. She is a member of the Union. There is no evidence that any clerk ever performed her work, thus her principal assignment area was not violated, and she was not included in the grievance. Bishop, who has now retired, was the postage due clerk. She was not a member of the Union. Kyle James explained that he spoke with David James regarding Bishop and explained that he did not think she “should be included because her area was not being violated.”

Supervisor Brian DeVere, with whom Kyle James filed the grievances, initially made no response at step 1, thus the grievances were elevated to step 2. At some point thereafter, the postmaster directed DeVere to grant the grievances. Review of the documentary evidence suggests that this occurred in late July. Regardless of when the directive was given, it is undisputed that the Postal Service agreed to pay for the time that the work of the clerks was being performed by nonclerks. Payment was not made immediately. Although Supervisor DeVere granted the grievances, he took no action to make payment.

Supervisor Troy Rathbun had been working only on weekends for several months. When he returned to full-time work, shortly after Thanksgiving, he was assigned the task of preparing the necessary paperwork in order to pay the unpaid grievances. He did so.

The grievances were actually paid on December 24. Prior to the actual payment of the grievances, there were various events and conversations that were precipitated by a comment made by a clerk who Brad Johnson, president of the National Association of Letter Carriers local at Salina, knew as “Chuck.” David James confirmed that “Chuck” was Chuck Kittrell.

Johnson recalled that a clerk named “Chuck” informed him that all the clerks “but one,” had received a “large settlement.” Johnson responded, “Wow, all of you?” Chuck Kittrell an-

swered, “Well, all but one.” Johnson said, “Who is the one.” Kittrell laughingly said, “Sherry [Bishop], because she’s not in the Union.” Kittrell did not testify.

Kittrell’s report was incorrect. Unit member Becky Hertel, a member of the Union, was not included in the grievances. Kevin Risby was not a member of the Union and was included in the grievances and settlement. Risby was a former letter carrier who transferred into the clerk unit. Kittrell had no involvement in the grievance process. He did not testify, thus the record does not reflect the basis for his erroneous report.

After learning of the settlement, Johnson mentioned it to Supervisor Troy Rathbun. Johnson’s testimony in that regard was not complete. He recalled that Rathbun, who was his supervisor, was speaking with him “about some grievances that we had pending, and I asked him if he had heard about the clerk grievance.” Johnson did not testify to Rathbun’s response. Johnson was asked, “What, if any, further involvement did you have as far as that grievance?” Johnson answered, “None.” Rathbun’s testimony confirms that Johnson did make further comments.

Rathbun reports that Johnson informed him that “one of the clerks was boasting about a Christmas bonus in the form of a grievance settlement that all clerks were going to get except for one individual, which was Sherry Bishop.” In view of what Johnson testified Kittrell told him, it would appear that Johnson also mentioned Bishop’s lack of membership in the Union in view of Rathbun’s explanation regarding his subsequent actions.

Rathbun, without speaking with David James, Kyle James, or any other representative of American Postal Workers Union, Local 886, took it upon himself to amend the Union’s grievance, effectively filing a second grievance that included Bishop. He did so because he understood that Kansas was a right-to-work State and “all employees are to be represented equally and I was trying to prevent a problem with getting the Union in trouble.”

Shortly after the submission of the second grievance, the postmaster at Salina, who is not named in the record and who did not testify, directed Rathbun to “remand that grievance and if payment was made, then I would be fired.” He obeyed the directive and withdrew the grievance that he had filed. As already noted, Rathbun recalled that Johnson told him that the clerks “*were going to get*” a large settlement. That is consistent with the facts insofar as it is clear that Rathbun withdrew the second grievance before payment was made. The directive to Rathbun from the postmaster had to have occurred prior to December 24.

Within a day or two of Rathbun’s submission of the second grievance, President David James spoke with him, questioning why he had filed the second grievance. Rathbun explained that he understood that Kansas was a right-to-work State and that he was just trying to keep everybody out of trouble. David James informed him that Bishop was “not intended to be included.” Rathbun, in a sentence that did not mention David James by name, testified that “[i]t was mentioned that she was a nonunion member and that they were filing on behalf of union members and that if she wanted to be included, she could file her own grievance.”

Rathbun did not name David James when he testified that “[i]t was mentioned that she was a nonunion member.” It would appear that Bishop’s nonmembership was the information that prompted his filing a second grievance because Kansas was a right-to-work State. David James denied that he ever stated that he would not represent a nonmember, and I credit that denial. I am satisfied that Rathbun heard of Bishop’s nonmembership when Johnson reported to him what he had heard from Kittrell. I do not credit Rathbun’s testimony that David James told him that the Union was filing “on behalf of Union members.” Any such statement was contrary to the facts. The grievances included nonmember Kevin Risby and excluded Becky Hertel, a member of the Union.

Counsel for the General Counsel argues that the inclusion of nonmember Risby sheds “no light on Respondent’s motive for excluding Bishop,” that his inclusion in the sharing of the proceeds of the settlement was an effort to persuade the new employee “to join Respondent’s membership.” I do not agree. Risby was included because he was a clerk whose area of work was being violated. Bishop’s area of work was not being violated.

Rathbun admitted, with regard to Bishop, that David James did not tell him to “take her off,” only that “she was not intended to be included,” but if the “Postal Service wanted to pay her, that was fine.” When asked whether the directive to remand the second grievance came from the Union, Rathbun repeated, “It came from the Postmaster.”

Johnson claims that, “a short time” after he heard about the settlement, David James came to him and “accused me of representing Sherry [Bishop] and accused me of telling management that they had to pay her.” Johnson responded that he did “not represent clerks and I did not tell management they had to pay anyone.” He did not tell David James that he had informed Rathbun that he had heard that all clerks were going to get paid except for Bishop nor did he tell him that the clerk who had reported that to him also told him that that Bishop was not included “because she’s not in the Union.”

Johnson claims that the Union placed a letter on the union bulletin board accusing Johnson of coercing management into paying Bishop. The letter was not placed into evidence and there is no testimony regarding its specific wording. Johnson confronted David James with regard to the letter, stating that it was not the truth. David James asked Johnson, “[I]f I didn’t tell them to pay her, then who did?” Johnson responded, “I don’t know.”

The letter was purportedly reposted, and Johnson again confronted David James. He asked, “[H]ow you could file [a grievance] and not pay everyone.” He testified that David James answered that he “has never filed for a nonunion member and he would not.” Johnson says that he answered that he “didn’t know you could do that” and left. On cross-examination, Johnson stated that the comment relating to filing a grievance for a nonunion member was “what I believe [I] heard.” I do not credit the foregoing testimony insofar as Johnson only “believed” that the statement to which he testified was what he “heard.” David James credibly denied that he ever stated that he would not represent a nonmember. As already noted, the class action

grievance included nonmember Risby, and, as hereinafter discussed, David James had, at some point in the past, resolved a situation on behalf of Bishop even though she had refused to file a grievance.

David James, in addition to being president of Local 886, is a district coordinator in which he represents “all postal employees from the Nebraska border all the way to 50 miles southwest and east of Salina, Kansas.” Several years ago he represented two nonmembers who had been removed and got “them back to work at the Postal Service.” When asked whether he ever stated that he “wouldn’t represent a nonunion member,” David James answered, “No, I did not.” When asked whether Sherry Bishop was “not included in this grievance because she is not a union member,” he answered, “No, she was not.”

I credit the testimony of David James. The settled grievances included nonmember Kevin Risby. Risby joined the Union on December 18, but all of the grievances that included him had been granted prior to that date and his name appears on the spread sheets contemporaneously filed with the grievances, which was well before he joined the Union.

Charging Party Sheryl Bishop was the postage due clerk. She worked in a secure “cage” in which “accountables” such as certified and registered mail, for which she was responsible, were kept. The cage was secured “so the accountables mail could be locked up.” Only one other employee, Sarah Bishop, to whom she is not related, performed that work, and she did so only when Sheryl Bishop was absent. No other person performed Bishop’s work.

Bishop learned of the grievance settlement in December from President Johnson of the Letter Carriers who told her that there was “a clerk talking about it [the settlement], laughing because a ‘scab’ didn’t get paid for the settlement.” Johnson did not testify to his conversation with Bishop, thus it is unclear whether he altered what Kittrell told him or whether “scab” was Bishop’s term.

Bishop did not make any complaint to the Union. She recalls that, about a week or two after she learned of the settlement, David James approached her and told her that the Union was “not obligated to represent me unless I file a grievance.” She replied that she was aware of that, and “I didn’t have anything else to say about it.”

On cross-examination by David James, Bishop was asked whether, “in order for there to be a violation of the contract, someone has to be performing your work while you’re doing other things?” Bishop answered, “Yes.” He then asked, “And that never happened, did it?” Bishop answered, “No.”

The class-action grievances filed by Kyle James included only clerks whose work areas had been violated. David James explained that he spoke to Bishop because he “felt that Mr. Johnson was giving her wrong information, and I felt that I needed to explain to her why she wasn’t included with everyone else.” Bishop never asked that a grievance be filed on her behalf. David James testified that, “[I]f she had filed a grievance, we would have represented her.” He also pointed out that, “if an employee feels that they’ve been aggrieved, they can notify a union steward . . . and we’ll file a grievance on their behalf.”

David James, in uncontradicted testimony, recalled that at some point in the past Bishop had complained to him that she, who was not on the overtime desired list, was being required to work mandatory overtime. He asked whether she wanted to file a grievance. She answered that she did not, but “I do want it taken care of.” David James advised the postmaster of her complaint, pointing out that there were clerks on the overtime desired list that “had not been maxed,” i.e., been assigned the maximum hours of overtime that they could be assigned. The postmaster agreed and “maxed everyone on the overtime desired list.” David James then reported what he had done to Bishop.

B. Analysis and Concluding Findings

The complaint alleges that the Respondent Union violated Section 8(b)(1)(a) of the Act by excluding Bishop from the monetary settlement of the grievances because she was not a member of the Union and informing employees that the Union would not file grievances on behalf of employees who were not members of the Union and violated Section 8(b)(2) of the Act by requesting that the Postal Service exclude Bishop from the grievance settlements.

There is not a scintilla of evidence that the Union requested that the Postal Service exclude Bishop from the settlement. Rathbun confirmed that David James told him that, although Bishop was not “intended to be included,” if the “Postal Service wanted to pay her, that was fine.” When asked whether the directive to remand came from the Union, Rathbun testified, “It came from the Postmaster.” There is no evidence that the Union made any request that the Postmaster, who did not testify, direct Rathbun to remand the grievance that he had amended. I shall recommend that this allegation be dismissed.

I address the conversation between President David James and Supervisor Troy Rathbun only as it relates to motivation insofar as Rathbun was a supervisor, not an employee. I have found that it was Johnson, not David James, who “mentioned that she [Bishop] was a non-union member.” I have not credited the testimony of Rathbun that David James also said that the Union was filing “on behalf of Union members.” Any such statement was contrary to the facts. The grievances included nonmember Kevin Risby.

I have not credited the testimony of Johnson, who is an employee, that David James told him that he “has never filed for a nonunion member and he would not.” Upon cross-examination, Johnson stated that the comment was “what I believe [I] heard.” David James credibly testified that, “if an employee feels that they’ve been aggrieved, they can notify a union steward . . . and we’ll file a grievance on

their behalf.” I shall recommend that the allegation that David James stated that the Union would not file grievances on behalf of employees who were not members of the Union be dismissed.

The central issue in this case is whether the Union failed to fairly represent Charging Party Sheryl Bishop because of her nonmembership in the Union. So long as a union acts in good faith, it is endowed with a wide range of reasonableness in the performance of its duties. As the Supreme Court recognized in *Ford Motor Co. v. Huffmann*, 345 U.S. 330, 335 (1953), “[I]nvariably, differences come up in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected.” See also *Air Line Pilots v. O’Neil*, 499 U.S. 65 (1991).

This principle was reiterated in *Firemen & Oilers Local 320 (Philip Morris, U.S.A.)*, 323 NLRB 89 (1997), in which the Board stated: “So long as the union’s conduct . . . is not wholly irrational or arbitrary, or in bad faith or based on impermissible considerations, there is no breach of its duty of fair representation.” *Id.* at 91.

The criterion for inclusion in the class action grievances herein was a violation of work assignments or overtime which determined the identity of the employees to be compensated. Charging Party Bishop’s area of work was not being violated, and she was not deprived of overtime insofar as she was not on the overtime desired list.

Counsel for the General Counsel’s brief argues that Bishop was “held to a different standard” insofar as Bishop was “required to file her own grievance.” I disagree. Bishop never requested the Union to file a grievance on her behalf, and the Union never refused to do so. James credibly testified that, “if an employee feels that they’ve been aggrieved, they can notify a union steward . . . and we’ll file a grievance on their behalf.”

Kittrell, who asserted to Johnson that Bishop was not included “because she’s not in the Union,” did not testify. His assertion was simply an erroneous assumption. Kittrell had no involvement in the grievance process. There is no evidence that he spoke with David James or Kyle James, the steward who filed the class action grievances. The testimony of David James and Kyle James establish that his assumption was incorrect.

The Union did not unlawfully exclude Bishop from the class-action grievances. The work area of member Becky Hertel was not violated, and she was not included in the class-action grievances. Nonmember Sheryl Bishop admitted that her work area was not violated, and she was not included. Bishop did not seek to file a grievance, and the Union did not fail or refuse to represent her.

CONCLUSION OF LAW

The Respondent did not violate the National Labor Relations Act.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended²

² 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

ORDER

The complaint is dismissed.

Board and all objections to them shall be deemed waived for all purposes.