

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 24, 2017

TO: Charles L. Posner, Regional Director
Region 5

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: IAM Local 2424
Case 05-CB-182595

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This case was submitted for advice as to whether the Union violated the Act by agreeing to a grievance settlement that provided no relief for a former employee and waived any other rights the former employee may have had under the collective-bargaining agreement. We conclude that the Union did not violate the Act, given its good-faith reliance on a reasonable interpretation of existing case law that it did not have a duty of fair representation to the former employee, as well as its broad discretion under the duty of fair representation.

FACTS

International Association of Machinists & Aerospace Workers, Local Lodge 2424 (“the Union”) represents a multi-employer bargaining unit consisting of employees of Jacobs Technology, Inc. (“the Employer”) and its various subcontractors at Aberdeen Proving Grounds in Maryland. In September 2014, the Union filed a grievance on behalf of two employees who the Union asserted were due additional pay under the parties’ collective-bargaining agreement because they were working in temporary assignments that should have had a higher job classification. The two employees were similarly situated with respect to the merits of the grievance.

The Employer denied the grievance at the first three steps, taking the position that the work in question should not have been in the higher job classification. Throughout the summer and fall of 2015, the Union proposed that the Employer settle the grievance for 50% of the backpay owed to both employees, with each employee also being “red-circled” at a higher wage rate in the future. The Employer repeatedly rejected the Union’s settlement proposal. In (b) (6), (b) (7)(C) one of the two employees who were the subjects of the grievance (the Charging Party) resigned (b) (6), (b) (7)(D) employment with the Employer in order to take a job with the federal government at Aberdeen.

In early 2016, the Union filed for arbitration of the two employees' pay grievance, and a hearing was set for (b) (6), (b) (7)(F) 2016. In (b) (6), (b) (7)(C) 2016, the Employer and the Union agreed to settle the grievance. Under the settlement, the employee who continued to work for the Employer received \$3,500 (the full amount of (b) (6), (b) (7) lost backpay calculated by the Union), and the Charging Party, who had resigned from the Employer, received nothing. In addition, the settlement provides that, "[i]t is further understood that any other grievant named in this matter who is no longer employed by the Company as a result of voluntary separation of employment, be excluded from this settlement and are [sic] no longer entitled to the provisions [sic] of the Collective Bargaining Agreement."

The Union has offered no explanation of the factors it considered in agreeing to a settlement that provided no relief for the Charging Party and excluded (b) (6), (b) (7) from any future relief under the parties' collective-bargaining agreement, other than noting its belief that it could lawfully do so under the Act. Prior to accepting the settlement, the Union apparently consulted its attorney and was told that the Charging Party could be excluded from the settlement under extant law, and that the Union had no legal obligation to (b) (6), (b) (7), because (b) (6), (b) (7) had voluntarily left the bargaining unit and was no longer paying dues.

In (b) (6), (b) (7)(C) 2016, the Charging Party filed the charge in the instant case, alleging that the Union violated Section 8(b)(1)(A) of the Act in its processing of (b) (6), (b) (7) grievance. The Region's investigation has adduced no evidence of any animus, hostility, discrimination, or bad faith toward the Charging Party.

ACTION

We conclude that the Union did not violate the Act, given its good-faith reliance on a reasonable interpretation of existing case law that it did not have a duty of fair representation to the Charging Party, as well as its broad discretion under the duty of fair representation.

It is well established that a union that is the exclusive representative of bargaining unit employees complies with its duty of fair representation when it serves the interests of all employees in the unit without hostility or discrimination toward any, exercises its discretion with complete good faith and honesty, and avoids arbitrary conduct.¹ In serving the bargaining unit, a union is allowed a wide range of reasonableness, "subject always to complete good faith and honesty of purpose in the

¹ See *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

exercise of its discretion.”² Thus, a union may balance the rights of individual employees against the collective good, or it may subordinate the interests of one group of employees to those of another group, if its conduct is based upon permissible considerations.³ If union conduct resolves conflicts between employees or groups of employees in a rational, honest, nonarbitrary manner, such actions may be lawful under Section 8(b)(1)(A), even though some employees are adversely affected by a union decision.⁴ Likewise, a union’s decision does not offend this standard simply because it does not meet everyone’s perception of fairness.⁵

In evaluating a union’s performance of its duty of fair representation, the Board and the courts must be “highly deferential,” and recognize that a breach of the duty is shown only if it can be fairly characterized as so far outside a “wide range of reasonableness . . . that it is wholly irrational or arbitrary.”⁶ The Board has stated that a union’s duty to avoid arbitrary conduct means “at least that there be a reason for [the] action taken.”⁷

The *Vaca v. Sipes* standard applies to all functions of the bargaining representative, including the settlement of arbitration awards.⁸ For example, in *Letter Carriers Branch 6070 (Postal Service)*,⁹ the Board affirmed the ALJ’s conclusion that a union’s grant of arbitration settlement proceeds to twelve current

² *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

³ See *Vaca v. Sipes*, 386 U.S. at 182.

⁴ See *Ford Motor Co. v. Huffman*, 345 U.S. at 338-39.

⁵ See *Strick Corp.*, 241 NLRB 210, 210 (1979).

⁶ *Air Line Pilots Ass’n v. O’Neill*, 499 U.S. 65, 67 (1991).

⁷ *General Truck Drivers Local 315 (Rhodes & Jamieson, Ltd.)*, 217 NLRB 616, 618 (1975), *enforced*, 545 F.2d 1173 (9th Cir. 1976).

⁸ See, e.g., *Air Line Pilots Ass’n v. O’Neill*, 499 U.S. at 77.

⁹ 316 NLRB 235, 236-37 (1995).

unit members, while excluding certain former unit members, was not arbitrary.¹⁰ The ALJ found insufficient evidence that the union bore animus towards former unit members, or that the union selected the twelve employees, or excluded the others, based on any arbitrary, capricious, or irrelevant reason.¹¹ The ALJ found that, even if the union selected some employees who were less deserving than the former unit employees, a lack of perfection in the selection process is within a union's latitude of reasonableness and margin for honest error.¹²

Moreover, the Board has indicated that it will evaluate a union's exercise of its broad discretion based on, inter alia: (1) the union's good-faith reliance on a reasonable interpretation of existing case law;¹³ and (2) the union's good-faith reliance on reasonable advice of counsel as to whether it owes an individual a duty of fair representation.¹⁴ Thus, in *Government Employees Local 888 (Bayley-Seton Hospital)*, the Board found no breach of a union's duty of fair representation where the union's "decision not to proceed to arbitration on the grievances at issue was pursuant to a good-faith effort to ascertain the extent of its legal obligations and act accordingly. This decision was based on a reasonable interpretation of existing case law, given the scope of the then-current precedent."¹⁵ Similarly, in *Letter Carriers (Postal Service)*, the Board dismissed the complaint after it found that the union relied in good faith on advice of counsel that was reasonable in light of the ambiguous nature of the legal landscape on the issue of whether unions owe any duty of fair representation to retirees.¹⁶ Significantly, while the Board has provided some indication that unions have a duty of fair representation to retired and other former employees who have voluntarily left the workforce where their grievances or the

¹⁰ See *Steelworkers Local Union No. 2869 (Kaiser Steel Corp.)*, 239 NLRB 982, 983 (1978) (union did not breach its duty of fair representation by limiting distribution of settlement compensation to employees in the unit on the date of the settlement).

¹¹ *Id.*

¹² *Id.* at 237.

¹³ *Government Employees Local 888 (Bayley-Seton Hospital)*, 323 NLRB 717, 721-22 (1997).

¹⁴ *Letter Carriers (Postal Service)*, 347 NLRB 289, 289-90 (2006).

¹⁵ 323 NLRB at 717.

¹⁶ 347 NLRB at 289-90.

underlying employer misconduct occurred before their departure from the unit,¹⁷ the Board has expressly declined to reach the issue of whether a union in fact owes a duty of fair representation to such former employees.¹⁸

In the instant case, as there is no other evidence of animus, hostility, discrimination, or bad faith toward the Charging Party, we conclude that the Union could lawfully rely on its reasonable interpretation of existing case law, as in *Bayley-Seton Hospital*, and/or the reasonable advice of counsel, as in *Postal Service*, that it did not owe the Charging Party a duty of fair representation. As in those cases, regardless of whether or not the Union actually owes former employees a duty of fair representation under the Act, the Union's good-faith reliance on a reasonable interpretation of existing case law that it did not have such a duty is sufficient to make its conduct lawful under Section 8(b)(1)(A) of the Act.

In addition, we further conclude that, assuming the Union owed the Charging Party a duty of fair representation regarding the settlement, the Union's exercise of its broad discretion in the instant case was within the lawful limits of that duty. Thus, while the Union has not specifically articulated why it accepted the Employer's proposed settlement, it seems clear that the Employer strongly sought to limit its settlement to the individual it still employed at the time of the settlement, and was not inclined to settle the matter on any other basis. In this regard, we note that the Employer had repeatedly rejected the Union's settlement proposals, including one that would have had the Employer settle the grievance for 50% of the backpay owed to both employees, with each employee being "red-circled" at a higher wage rate in the future. Indeed, the Employer's opposition to providing a settlement for the Charging Party is demonstrated by the settlement language specifically excluding the Charging

¹⁷ See, e.g., *Letter Carriers Branch 6070*, 316 NLRB at 236-37; *Missouri Portland Cement Co.*, 291 NLRB 1043, 1044 (1988) (even after a bargaining unit is dissolved, its union continues to represent bargaining unit employees in the processing of grievances that arose prior to the dissolution of the unit). *But see Merk v. Jewel Cos.*, 848 F.2d 761, 766-67 (7th Cir. 1988) (union did not owe a duty of fair representation to former employees who departed bargaining unit while grievance and Board charge pending), *cert. denied*, 488 U.S. 956 (1988).

¹⁸ See, e.g., *Postal Service*, 347 NLRB at 289-90. The Board has made it clear, however, that unions owe a duty of fair representation to employees who have left the bargaining unit involuntarily and remain statutory employees while they challenge their removal by the employer. See, e.g., *Letter Carriers Branch 529*, 319 NLRB 879, 881 (1995).

Party from the settlement and stating that [REDACTED] was no longer entitled to the provisions of the parties' collective-bargaining agreement. Under these circumstances, where it is not clear that the Union could have settled the grievance on any other basis, and in the absence of any other evidence of Union animus, hostility, discrimination, or bad faith toward the Charging Party, the Union's exercise of its broad discretion was within the wide range of reasonableness that a union is allowed in its bargaining and cannot be appropriately characterized as wholly irrational or arbitrary.¹⁹ Thus, we conclude that the Union's conduct did not violate its duty of fair representation or Section 8(b)(1)(A) of the Act.

Accordingly, the Region should dismiss the charge in the instant case, absent withdrawal.

/s/
B.J.K.

ADV.5-CB-182595.Response.IAM Local 2424. [REDACTED]

¹⁹ See *Steelworkers Local Union No. 2869 (Kaiser Steel Corp.)*, 239 NLRB at 983; *Letter Carriers Branch 6070*, 316 NLRB at 236-37.