

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

CENTRAL KY BRANCH 361, NATIONAL  
ASSOCIATION OF LETTER CARRIERS,  
AFL-CIO (NALC)  
(UNITED STATES POSTAL SERVICE)

and

Case 09-CB-202214

LESLIE DENISE WELLS, AN INDIVIDUAL

**COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE**  
**ADMINISTRATIVE LAW JUDGE'S DECISION**  
**AND**  
**SUPPORTING ARGUMENT AND CITATIONS**

On May 4, 2018, Administrative Law Judge Andrew S. Gollin issued a Decision dismissing the complaint in the above-captioned matter. Pursuant to the Board's Rules and Regulations, Section 102.46(b)(1), Counsel for the General Counsel hereby submits the following exceptions to the Administrative Law Judge's Decision: <sup>1/</sup>

1. The Administrative Law Judge's finding that Respondent's actions regarding Charging Party Leslie Denise Wells' requests to file and process grievances over her working beyond her temporary medical restrictions and her removal from her 4-hours shift were based on reasonable interpretations of the relevant agreements and a good-faith evaluation of the merits of Wells' complaints. (ALJD p. 11) <sup>2/</sup>

Counsel for the General Counsel submits that the Administrative Law Judge erred in his application of the legal standards in this duty of fair representation case by failing to find that Respondent acted in an arbitrary or perfunctory manner. (ALJD p. 11, ll. 41-45) The Board has consistently held that a union's conduct is arbitrary and perfunctory when a union fails to provide a logical explanation for its conduct, the explanation is post hoc, or if the asserted

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<sup>1/</sup> On May 11, 2018, the Administrative Law Judge issued an Errata to his Decision.

<sup>2/</sup> References to the Administrative Law Judge's Decision will be designated as (ALJD p. \_\_, ll. \_\_); the transcript will be designated as (Tr. \_\_); General Counsel's Exhibits will be designated as (G.C. Ex. \_\_); Respondent's Exhibits will be designated as (Resp. Ex. \_\_) and Joint Exhibits will be designated as (Jt. Ex. \_\_).

explanation could not have been the real reason for the union's conduct. *SEIU Local 3036, (Linden Maintenance Corp.)*, 280 NLRB 995, 996 (1986). The Board in *Teamsters, Local 315 (Rhodes & Jamieson)*, 217 NLRB 616 (1975) explained:

If a duty to avoid arbitrary conduct, as part of an affirmative, fiduciary responsibility, means anything, it must mean at least there be a reason for the action taken. Sometimes a reason will be apparent, sometimes not. When it is not, the circumstances may be such that we will have no choice but to deem the conduct arbitrary if the union does not tell us what it is.

In the instant matter, the Administrative Law Judge correctly found that Wells told Respondent's Steward Mark Whitcomb that she was being required to work beyond her medical restrictions, asked him for assistance and eventually asked him to file a grievance (ALJD p. 10, ll. 21-24, 27-29) Having made these findings, the Administrative Law Judge nonetheless concluded that Whitcomb never committed to filing grievances on Wells' behalf. (ALJD p. 10, ll. 30-31) Judge Gollin offered two reasons for his conclusion. First, he stated that Whitcomb was inept in his communications with Wells on these matters, likely due to his lack of experience and knowledge since he had only filed four grievances in his tenure. Second, the Judge noted that it was Whitcomb's understanding, correctly or incorrectly, that an employee needed to submit a form request for him to be approved for steward time in order to be able to meet and discuss filing a grievance. (ALJD p. 10, ll. 31-34, p. 11, ll. 45-50, fn 12) The Judge based this finding on an answer to a question by Respondent's Counsel. Thus, Respondent's Counsel asked Whitcomb if he was familiar with how the grievance process works in practice. (Tr. 364) Whitcomb, who has been a steward for about 2 years, responded that if an individual wants to file a grievance, he would fill out a form and present it to management and request time to investigate the grievance. (Tr. 364) Whitcomb testified that if management grants the time, he would investigate the grievance and, if the grievance has merit, he would present his grievance to the floor supervisor. (Tr. 364-365)

Whitcomb never testified, and there is no record evidence, that he followed his understanding of the grievance process with regards to Wells' requests of him to file a grievance on her behalf. Similarly, there is no record evidence that Whitcomb ever communicated to Wells how the grievance process works or that he requested that Wells makes a formal request in order to meet with her to discuss filing a grievance. To the contrary, Whitcomb testified that Wells never complained to him that she was being required to work beyond her restrictions and never requested that he should file a grievance on her behalf. (Tr. 373, 380) Even the Administrative Law Judge credited that Whitcomb was aware of Wells' issues because Whitcomb told Wells that he was talking to the Employer about having Wells transferred because of her restrictions. (ALJD p. 10, ll. 28-37) Thus, Whitcomb offers no reason for his actions, or lack thereof, taken in response to Wells' requests to have grievances filed on her behalf.

With respect to Respondent's Vice-President David Blackburn, the Administrative Law Judge correctly found that Wells contacted him on March 15, May 18, 22, 26 and twice on 27. (ALJD p. 10, 12, G.C. Ex. 6, p. 4, 19, 20, 21-23; Tr. 162, 219, 221, 224-225, 285) At the hearing, Blackburn testified that he recalled telephone conversations with Wells, but did not recall what was discussed. The Judge credited Wells that she asked Blackburn to file a grievance on her behalf. (ALJD p. 10, ll.39-43) The Judge also found that Wells' phone records reflect she contacted Blackburn on multiple occasions to ask for guidance or assistance on what she should do. (ALJD p. 10, ll. 23-25) However, there is no testimony from Blackburn that he considered Wells' complaints or made any evaluation as to the merits of those complaints.

Notwithstanding that the Administrative Law Judge found that Wells separately asked Respondent's Vice-President Blackburn to file a grievance on her behalf, Judge Gollin offered two arguments to support his finding that Blackburn never committed to file grievance on Wells' behalf. First, Judge Gollin inferred that Blackburn would not have agreed to file a grievance on

Wells' behalf because Wells' situation was unique: she had not been approved for light duty or limited duty and the Employer was allowing her to work a reduced workload/schedule. (ALJD p. 10, 11, Tr. 225-226) Second, Judge Gollin inferred that Blackburn would have required more information about her restrictions and her status, as well as discussed the matter with management before agreeing to file a grievance. (ALJD p. 11, 12) Judge Gollin found that Blackburn subsequently (on May 26) communicated with the Employer as to whether the Employer was requiring Wells to work beyond her restrictions. (ALJD p. 12) Although the Judge offers various steps Blackburn could have undertaken before committing to file grievances, it is undisputed that Blackburn did none of these and simply testified that he did not recall what Wells wanted. In fact, there is no record evidence that Blackburn considered any of the factors enumerated by the Judge until well after his "inaction."

Counsel for the General Counsel respectfully asserts that Judge Gollin further erred in his reliance on Respondent's Vice-President Blackburn and President Kenneth BeeCraft's conduct months after Wells began seeking assistance, to support his conclusion that Respondent made any good faith evaluation of Wells' complaints. (ALJD p. 12, ll. 10-14) Judge Gollin found that when Wells spoke to Blackburn and Whitcomb on May 27, they never committed to filing a grievance over her removal. (ALJD p. 11, 12; Tr. 418-420; G.C. Ex. 6 p. 23) The Judge reasoned that when Respondent learned that she had been working a modified schedule without being approved for light or limited duty under the contract, Blackburn informed her that she needed to apply and get approved for light duty in order to work a reduced workload/schedule under the collective- bargaining agreement (ALJD p. 11, ll. 2-8, p. 12, ll. 25-32) The Judge found that Respondent President BeeCraft informed Wells in his June 9 text message that what she had been working for the last 3 months was neither light duty nor limited duty; the Employer was letting her work within her restrictions while waiting for clearer instructions and a decision

on her workers' compensation claim; and that, under the contract, the Employer should never have let her work without giving her a light-duty offer. (ALJD p. 12) These findings by the Administrative Law Judge were all "after the fact" and actually involved the Employer's denial of a later filed request for a contractual light duty assignment. Counsel for the General Counsel is of the opinion that Respondent's explanation on June 9, and its conduct thereafter, does nothing to address Respondent's months of inaction to Wells' complaints. Additionally, Respondent's filing and processing of a grievance based on subsequent Employer's conduct does not excuse its failure to act lawfully with respect to such inaction. (ALJD p. 12, ll. 29-41)

Based on the Administrative Law Judge's findings, Respondent simply did nothing for months regarding Wells' complaints because, it claims, she never asked to file a grievance or it did not recall her asking that it do so. (ALJD p. 10) Counsel for the General Counsel submits that the Administrative Law Judge erred in his finding that this inaction was based on any interpretation of any collective-bargaining agreements or any good-faith evaluation of the merits of Wells' grievances. Under established Board law, a union is deemed to have engaged in something more than mere negligence when it abandons an employee's grievance and offers no explanation for its inaction. *Service Employees Local 3036*, 280 NLRB 995 (1986). Similarly, a union is considered to have acted in a perfunctory manner when it fails to properly represent an employee in its investigation of a discharge. *Service Employees Local 579, (Convacare of Decatur)*, 229 NLRB 692 (1977) Respondent's protracted inaction undoubtedly constituted something more than mere negligence. *Service Employees Local 3036*, supra; *Teamsters Local 315*, supra. Characterizing Respondent's inaction as such is clearly warranted when one considers that after Wells initially apprised Respondent of her concerns and requested assistance in March, it wanted until June to address the situation. Accordingly, consistent with these

holdings, Respondent's willful and protracted inaction towards Wells' complaints and grievance requests, without explanation, was perfunctory and violative of Section 8(b)(1)(A) of the Act.

2. The Administrative Law Judge's finding that Respondent did not violate its duty of fair representation owed to Wells because Whitcomb and Blackburn never committed to filing grievances on her behalf.

Counsel for the General Counsel asserts that the Administrative Law Judge erroneously concluded that Respondent did not violate its duty of fair representation because Whitcomb and Blackburn never committed to filing grievances on her behalf. (ALJD p. 10, 11, 12) Counsel for the General Counsel is not aware of any authority that requires Respondent to commit to filing a grievance before its conduct can be evaluated under duty of fair representation standards.

Consistent with the Board's holding in *Service Employees Local 3036*, supra, Respondent's willful disregard of Wells' complaints and grievance requests, without explanation, from March 2 through May 27, was perfunctory and thereby violative of Section 8(b)(1)(A) of the Act. If, as the Judge found, Respondent did not violate the Act because it never committed to file grievances on Wells' behalf, unions can simply avoid its legal obligation by similar non-committal and inaction.

Moreover, Counsel for the General Counsel submits that Respondent had a duty to inform Wells of its decisions regarding her requests and not lead her on. The Board has consistently held that a union's duty to fairly represent includes the duty to neither willfully misinform employees about their grievance or to willfully keep them uninformed about their grievance. See *American Postal Workers Union*, 328 NLRB 281 (1999); *Local 417 UAW (Falcon Industries)*, 245 NLRB 527 (1980).

Here, the Administrative Law Judge credited Wells that she repeatedly asked for grievances to be filed on her behalf. (ALJD p. 10, ll. 39-43) Wells was further credited that in addition to contacting Whitcomb and Blackburn, she contacted other stewards and NALC

representatives to ask for their guidance or assistance. (ALJD p. 10, ll. 23-25; G.C. Ex. 6 p. 4-8, 10, 12, 16-17, 18-23) For example, the Judge found that one of the stewards that Wells contacted was Linda Dunn (ALJD p. 10, ll. 23-25). At the hearing, Wells testified that she contacted Dunn and expressed her frustration with Respondent's failure to address her concerns about her work schedule. (ALJD p. 10, ll. 39-41; G.C. Ex. 6, p. 4; Tr. 163, 164) According to Wells, Dunn exclaimed, "you still don't have a grievance filed?," to which she replied "no." (ALJD p. 10, ll. 21-27, G.C. Ex. 6, Tr. 164) The Judge also credited Wells that she requested assistance from NALC International Representative David Mudd. (ALJD p.10, G.C. Ex. 6, p. 4, 7, 12, 19-20; Tr. 163) Wells maintains that she told Mudd that she had apprised Blackburn of the situation and requested that he file a grievance on her behalf. (ALJD p. 10, Tr. 163) Mudd, according to Wells, led her to believe that he would contact Local Union Branch 361 for purposes of addressing her concerns. (Tr. 163) Mudd did not testify and Wells' testimony about her contact with him was not rebutted. (ALJD p. 10, G.C. Ex. 6, p. 4; Tr. 163)

Based on Wells' repeated complaints and requests, Respondent clearly and willfully misinformed her about its inaction. Respondent did not advise Wells that her complaints were without merit or that it was not going to file grievances. Instead, Respondent misled Wells to believing that it was doing something for her. Counsel for the General Counsel submits that Respondent had a legal obligation not to willfully misinform Wells about her complaints and requests for grievance or to willfully keep her uninformed. *American Postal Workers Union*, supra.

3. The Administrative Law Judge's finding that even if Respondent agreed to file grievances over these matters, there was no persuasive evidence that these grievances would have been successful (ALJD p. 11, ll. 45-47, p. 12, l. 1)

The Administrative Law Judge further erred in his conclusion that even if Respondent had agreed to file grievances over these matters, there is no persuasive evidence in this record that

those grievances would have been successful. Counsel for the General Counsel asserts that the Administrative Law Judge erroneously decided the ultimate merits of the potential grievances. It is immaterial regarding whether Wells' potential grievances had merit at this stage of the litigation and, as alleged in the underlying complaint, such a determination is only relevant in a compliance proceedings. In *Iron Workers Local 377 (Alamillo Steel Corp)*, 326 NLRB 375, 376 (1998), the Board held that once the General Counsel has established (during a trial before an Administrative Law Judge) that a union has unlawfully breached its duty of fair representation by failing properly to process an employee's grievance, then the Board will provide an appropriate cease-and-desist order and an order directing the union to process the grievance in accordance with its duty. Before the Board will require a union to compensate an employee for losses alleged to have been suffered as a consequence of the union's mishandling of a grievance, however, the General Counsel must show at the compliance proceedings 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. Thus, the Administrative Law Judge's determination of the merits of the grievances by stating that "there is no persuasive evidence in this record that those grievances would have been successful" is clearly in error at this stage of the proceeding. (ALJD p. 11, ll. 45-46, 12. 1. 1) Counsel for the General Counsel submits that the only issue before the Judge at this initial stage of the proceeding was whether Respondent acted in an arbitrary or perfunctory manner in its inactions regarding Wells' requests. The determination as to the merits of the grievances can only be made at the compliance hearing. *Id.* at 377. See *General Motors Corp*, 297 NLRB 31 (1989); *Auto Workers Local 2333 (B. F. Goodrich Co)*, 339 NLRB 105, 114 (2003)

Further, Counsel for the General Counsel respectfully asserts that the Administrative Law Judge's in depth evaluation of the merits of the grievance was an attempt to justify Respondent's

inaction. In support of this analysis, the Judge cites *Teamsters Local 814 (Beth Israel Medical)*, 281 NLRB 1130, 1146-1147 (1986), for the proposition that a union does not violate the duty of fair representation when it refuses to file or process a grievance pursuant to a reasonable interpretation of the collective-bargaining agreement and/or a good faith evaluation as to the merits of the employee's complaint. (ALJD p.12, ll. 33-36) However, the case cited by the Judge is inapposite to the instant matter. As discussed in detail above, there is no record evidence that Respondent investigated Wells' complaints and requests or provided her with an honest assessment of the merits of her work-related concerns based on any contractual interpretations.

Finally, the Administrative Law Judge's evaluation of the merits of the grievances is not dispositive of that issue or whether Wells' complaints were legitimate. First, the Judge erroneously found that "...Wells orally communicated with the Employer about her restrictions.." (ALJD p. 12, ll. 5-6) Contrary to the Judge Gollin's finding, Wells testified that on March 1, she submitted her medical restrictions to the Employer. (G.C Ex. 2, Tr. 122-124) The Employer admitted that after reviewing the documents it granted Wells a reduced schedule. (G. C. Ex 2, Tr. 260, 261, 299-300) There is no record evidence that the Employer based the reduced work schedule on an oral representations made by Wells. (Tr. 260, 261, 299) Second, Judge Gollin stated that it is immaterial whether the Employer was requiring Wells to work beyond her verbally-agreed upon temporary medical restrictions, because under the National Agreement and/or the local Memorandum of understanding, there are three types of work status: regular duty, light duty, and limited duty. (ALJD p. 12, ll. 1-9, Jt. Ex 3) The Judge found that Wells was not working regular duty, and she had not been approved by the Department of Labor's Office of Workers Compensation for light duty or limited duty. (ALJD p. 12) As a result, the Judge found the Employer was not contractually obligated to allow Wells to work her reduced

workload/schedule. (ALJD p. 12, ll.1-9, Jt. Ex 3) The credited evidence established that the Employer agreed to reduce Wells' schedule by cutting her hours in half, which does not fall within the contractual regular duty, light duty, and limited duty. (ALJD p. 12; Tr. 124) However, the Administrative law Judge gives no consideration that the contract also provides for "other assignments." (ALJD p.12, ll. 1-6, Jt. Ex. 3) Clearly, not following an agreed to schedule and then being removed from this schedule are legitimate matters that would cause any employee to seek and obtain assistance from its collective-bargaining representative.

**Conclusion:**

Based on the record as a whole, and for the reasons referred to herein, Counsel for the General Counsel respectfully submits that the decision of the Administrative Law Judge should be reversed with regards to the findings and conclusions described above, that the Board find that Respondent violated Section 8(b)(1)(A) of the Act by its conduct regarding Wells' requests to file and process grievances and that the Board order the relief requested by Counsel for the General Counsel.

Dated at Cincinnati, Ohio this 1<sup>st</sup> day of June 2018.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

June 1, 2018

I, hereby certify that I served the attached Counsel for the General Counsel's Brief to the Administrative Law Judge on all parties by mailing true copies thereof by electronic mail and/or regular mail today to the following at the addresses listed below.

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