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

Advice Memorandum

DATE: December 29, 2015

TO: Charles L. Posner, Regional Director
Region 5

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

SUBJECT: American Postal Workers Union
(United States Postal Service)
Cases 05-CB-150339; 05-CB-150853

DFR Chron
536-2581-3384
596-0420-8700
596-0420-8775

These cases were submitted for advice as to whether the Union violated the Act by: (1) distributing an arbitration award to all employees currently employed in relevant job classifications, regardless of whether or not those employees were employed at the time the grieved bargaining violation occurred; and (2) retaining for itself more than $1 million of the $8.64 million award. These cases were also submitted for advice as to whether the allegation regarding the Union's retention of a portion of the award is barred by Section 10(b) of the Act.

We conclude that the Union did not violate the Act by distributing the award to all employees currently employed in the relevant job classifications, but the Union violated Section 8(b)(1)(A) of the Act by arbitrarily retaining more than $1 million of the $8.64 million award. We further conclude that there is no bar to proceeding on the latter allegation, as it is closely related to the timely-filed allegations.

FACTS

In 1996, the United States Postal Service (the Employer) subcontracted certain technology-upgrade work that could have been done by its own employees, without bargaining with the American Postal Workers Union (the Union). The subcontracted work was completed in 1999. In December 2014, after more than 18 years of grievance-arbitration litigation, the arbitrator issued a final award directing the Employer to "make the bargaining unit whole in the amount of $8.64 million." In particular, the arbitrator said in his award:

> the Union itself maintains that most, if not all, of the work could have been done by the bargaining unit on straight time (i.e., no added labor

> cost) instead of overtime. . . . I will direct the Postal Service to make the bargaining unit whole in the amount of $8.64 million. This is one-third of the Postal Service's calculated labor cost of using bargaining unit employees to perform all this work on overtime.

The arbitrator also stated:

> I decline to award interest in this case for several reasons: the extraordinary delay in processing and completion of this grievance arbitration cannot solely be attributed to the Postal Service; bargaining unit employees all worked their full regular schedule during this period; it is possible that even less than one-third of the work would have been done on overtime; and, due to the long passage of time, many of the employees who would have done this work presumably no longer are employed by the Postal Service. This is an appropriate remedy both in terms of making the bargaining unit whole and providing a meaningful remedy for the Postal Service's failure to comply with important provisions of [the parties' collective-bargaining agreement].

The Union determined that it would itself retain $1 million of the arbitration award, and that the remaining $7.64 million would be evenly distributed among all the current employees, as of the date of the arbitration award, who worked in any of the job classifications that the Union believed would have performed the subcontracted work.[1] The Union identified 7,230 eligible employees, and determined that they should each receive approximately $1,057. The Employer, however, only identified 7,149 eligible employees. As a result, the Employer asked the Union if it should divide the full $7.64 million among the smaller number of employees, i.e., give each employee a higher payout amount, or whether it should remit the amount of the discrepancy to the Union, over and above the $1 million already claimed by the Union. The Union replied that the Employer should proceed to pay employees the smaller amount, and remit the entire balance to the Union, as it was "possible that some of the employees in the numerical difference between our counts will be coming forward." Thereafter, the Employer paid approximately $1,057 to each of the 7,149 employees it had identified, and paid approximately $1,085,580 to the Union. The Union ultimately identified 33 additional eligible employees, and paid them each the same amount as the other eligible employees, for a total of approximately $34,871.

---

[1] The Union has stated that, because of a lack of payroll records dating back to the installation period and the Employer's long history of failing to provide such information when requested, it did not consider defining the class to include only employees who worked during that period.

Thus, after paying all eligible employees, the Union retained more than $1,050,000 of the arbitration award.

In April 2015, two employees who received payouts from the arbitrator's award, and who were also employed when the grieved violation took place in 1996-99, filed the instant charges.[2] They allege that the Union acted arbitrarily or in bad faith by granting award payments to employees who were not employed when the violation took place, and/or by not granting award payments to retired employees, in violation of Section 8(b)(1)(A) of the Act. On September 1, 2015, one of the Charging Parties amended (b) (6), (b) charge to additionally allege that the Union violated Section 8(b)(1)(A) by arbitrarily or in bad faith retaining for itself $1 million of the arbitration award. The Charging Party claims that (b) (6), (b) is not certain when (b) (6), (b first learned that the Union would be retaining $1 million, but (b) (6), (believes it was sometime between late January 2015 and early March 2015.

In the Region's investigation of the instant cases, the Union offered no evidence as to how it determined the portion of the arbitration award it retained, or as to any reasonable or legitimate basis for its determination. The Union claims that it determined to retain for itself $1 million in order to: (1) maintain a contingency fund to make award payouts to any eligible employees identified after the Employer made its award payments; (2) account for any losses incurred by the Union due to the Employer's contract violation, including lost dues; and (3) provide for any future Union expenditures necessary to enforce the arbitration award prospectively.[3]

ACTION

We conclude that the Union did not violate the Act by distributing the award to all employees currently employed in the relevant job classifications, but it violated Section 8(b)(1)(A) of the Act by arbitrarily retaining more than $1 million of the $8.64 million award. We further conclude that there is no bar to proceeding on the latter allegation, as it is closely related to the timely-filed allegations.

---

[2] The Union asserts that one of the two Charging Parties subsequently retired, and is no longer employed by the Employer.

[3] The Union has not asserted that it retained any of the award to compensate for its own attorneys' fees or other litigation expenses associated with the underlying grievance and arbitration. We note that the Union does not appear to have made any request to the arbitrator for litigation expenses, or for any other monetary relief for the Union itself.

The Distribution of the Arbitration Award among Employees Was Lawful

Initially, we conclude that the Union did not violate the Act by distributing the arbitration award to all employees currently employed in the relevant job classifications. 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.[4] 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 exercise of its discretion."[5] 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.[6] 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.[7] Likewise, a union's decision does not offend this standard simply because it does not meet everyone's perception of fairness.[8]

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."[9] The Board has stated that a union's duty to avoid arbitrary conduct means "at least there be a reason for the action taken."[10]

---

[4] *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

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

[6] *See Vaca v. Sipes*, 386 U.S. at 182.

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

[8] *See Strick Corp.*, 241 NLRB 210, 210 (1979).

[9] *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991).

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

The *Vaca v. Sipes* standard applies to all functions of the bargaining representative, including the disbursement of financial benefits to employees and the settlement of monetary portions of arbitration awards.[11] For example, in *Teamsters Local 101 (Allied Signal Corp.)*,[12] the Board held that a union did not act arbitrarily or unreasonably by agreeing to add a craft of employees not designated in an arbitration award as recipients of the award's proceeds, because the union sought to compensate all crafts adversely affected by the loss of work resulting from the employer's subcontracting. Similarly, in *National Ass'n of Letter Carriers (Hinesley)*,[13] the Board affirmed the ALJ's conclusion that the union's grant of arbitration settlement proceeds to 12 current unit members to the exclusion of certain former unit members was not arbitrary. The ALJ found insufficient evidence that the union bore animus towards former unit members, or that the union selected the 12 employees, and excluded others, based on any arbitrary, capricious, or irrelevant reason.[14] 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.[15]

In the instant cases, we conclude that the Union's determination to evenly distribute the proceeds it would pay to employees among all the current employees who occupied any of the classifications that the Union believed would have performed the subcontracted work as of the date of the award was not arbitrary or in bad faith. As made clear in *Allied Signal Corp.* and *Hinesley*, cited above, a union is not required to limit the payment of an arbitration award to the employees working at the time of the violation, but may distribute such payments among current employees, in the absence of a showing of bad faith. Here, the Union's determination was clearly reasonable in light of: (1) the arbitrator's stated intent to "make the bargaining unit whole," rather than provide individualized make-whole relief; (2) the arbitrator's express conclusion that bargaining unit employees all worked their full regular schedule; (3) the extensive period of time that elapsed between the violation and the award; and (4) the Union's concerns about the lack of payroll records dating back to the period of the violation, as well as the Employer's long history of failing to provide such information when requested. Moreover, there is no evidence of any animus

---

[11] *See, e.g., Air Line Pilots Ass'n v. O'Neill*, 499 U.S. at 77.

[12] 308 NLRB 140, 146 (1992).

[13] 316 NLRB 235, 236-37 (1995).

[14] *Id.*

[15] *Id.* at 237.

towards former unit members, or that the union made its determination to distribute the arbitration award to all employees currently employed in relevant job classifications based on any arbitrary, capricious, or irrelevant reason. While it might be argued that the employees who were working at the time of the Employer's violation were "more deserving" of the award's proceeds, in the circumstances here, the Union's choice to distribute the award to all employees in the relevant job classifications is well within the sphere of reasonableness accorded to the Union.[16] Therefore, we conclude that the Union did not violate the Act by limiting the distribution of the award to all current employees in the relevant job classifications.[17]

<u>The Union's Retention of a Portion of the Arbitration Award was Unlawful</u>

We further conclude that the Union violated Section 8(b)(1)(A) of the Act by arbitrarily retaining more than $1 million of the $8.64 million arbitration award. As discussed above, the Board has made it clear that a union violates its duty of fair representation, and Section 8(b)(1)(A), by acting in an arbitrary manner, such as by not having a reason for the action taken. The Board has also cautioned that "to the extent that grievances often involve claims of losses to unspecified employees, it is important that unions not be tempted to pursue these grievances as a source of revenue, as would be the case were we to allow the appropriation of backpay awards to general union funds."[18]

---

[16] *See Hinesley*, 316 NLRB at 236-37.

[17] We would not, however, rely on the Union's contention that it does not owe any duty of fair representation to the retired employees, or that one of the charges in the instant case should be dismissed because the Charging Party retired subsequent to filing the charge. We note that, while the Board in *Letter Carriers Branch 1227 (Postal Service)*, 347 NLRB 289 (2006), declined to reach the issue of whether the union owed a duty of fair representation to former unit members who had retired, the Board and courts have long indicated that unions have a duty of fair representation to retired employees where those grievances, or the underlying employer misconduct, occurred before their departure from the unit. *See, e.g., Hinesley*, 316 NLRB at 236-237; *Missouri Portland Cement Co.*, 291 NLRB 1043, 1044 (1988). In any case, even if the Union did not owe a duty of fair representation to the one Charging Party who retired after (b) (6), (b) (7 filing of the charge in the instant cases, the Union does not dispute that it continues to owe such a duty to the other Charging Party, whom it still employs, as well as to all of the other current unit employees.

[18] *United Mine Workers of America (Pennsylvania Mines)*, 317 NLRB 663, 664 n.8 (1995). In *Pennsylvania Mines*, in which the Board held that a union unlawfully took for itself the entirety of an arbitration award that was clearly intended to go to individual employees, the Board expressly observed that it was "not a case in which

In the instant cases, the Union offered no reasonable basis for why it needed to retain more than $1 million of the $8.64 million arbitration award for itself, and the rationale it has offered is not supported by the evidence. This complete absence of any legitimate rationale or evidentiary basis for retaining a significant portion of the award for itself presents the quintessence of arbitrariness, and clearly establishes a violation of Section 8(b)(1)(A).

The Union claims that it decided to retain for itself $1 million in order to: (1) have a contingency fund to make award payouts to any eligible employees identified after the Employer made its award payments; (2) account for any losses incurred by the Union itself due to the Employer's contract violation, including by its loss of dues; and (3) provide for future Union expenditures necessary to enforce the arbitration award prospectively.

First, as to the Union's claim that it needed the $1 million for a "contingency fund" to make award payments to any not-yet identified eligible employees, it is clear that the amount the Union retained far exceeds any reasonable estimate of how much the Union could need for such a purpose. In this regard, the Union initially calculated 7230 eligible employees, while the Employer calculated only 7149, a difference of 81 employees, whose total payments would equal only approximately $85,580. Thus, even under its own calculation, the $1 million the Union retained was far beyond the amount needed to cover those payments.

More importantly, the Union received from the Employer all of the approximately $85,580 that was the Union's estimate of the most it could have needed for such a contingency fund -- in addition to the initial $1 million it retained. And, even this amount far exceeded what actually was needed for this purpose. As a result, after the Union ultimately made all of its award payments -- to 33 additional employees, not 81 -- the Union ended up with an additional surplus of more than $50,000, above and beyond the $1 million it initially determined to retain. The Union seems to have anticipated this result when it first decided to take the additional money, having noted at the time only that it was "*possible* that *some* of the employees in the numerical difference between our counts will be coming forward" (emphasis added). In any case, it is clear that the Union had little or no basis for anticipating that it

---

the arbitration award was ambiguous so that the [u]nion could exercise some discretion in the final resolution of the grievance." *Id.* at 664. Although the facts in *Pennsylvania Mines* were very different than those at issue here (where most of the award was paid to unit employees, and the intent of the award itself, i.e., to "make the bargaining unit whole," is more ambiguous), as in *Pennsylvania Mines*, the Union here took an exorbitant amount of money for itself, at the expense of the individual grievants, with no plausible reason for doing so.

would need any *additional* money from the $1 million it retained to cover the award payments it would make.

Second, as to any losses incurred by the Union itself due to the Employer's contract violation, including lost dues and any future Union expenditures necessary to enforce the arbitration award prospectively, the Union again has offered no reasonable basis for its claim of losses resulting from the contract violation, or any evidence as to how it determined the amount of those losses. The arbitrator made no findings that additional unit employees would necessarily have been needed to do the work (thus resulting in lost dues), and the Union has not presented any such evidence. Indeed, as the arbitrator noted, the Union contended in the arbitration proceeding that "it is reasonable to conclude that most, if not all, of the work -- if done by the bargaining unit -- would have been done on straight time instead of overtime," with the existing unit employees "find[ing] time" to do the work. Under such circumstances, the Union would not have lost a significant amount of dues, if any. Finally, the Union has offered no rationale or evidence that would support any claim of purported anticipated costs of subsequent enforcement of the arbitrator's award.

In any event, based on the complete absence of any evidence supporting its determination, we conclude that the Union breached its duty of fair representation by arbitrarily retaining for itself more than $1 million of the arbitration award, and thereby violated Section 8(b)(1)(A) of the Act.[19]

<u>Section 10(b) does not Bar Complaint</u>

Finally, we conclude that there is no bar to proceeding on this allegation, as it is closely related to the timely-filed allegations regarding the distribution of the arbitration award among employees. Under Section 10(b), "[n]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." However, the Board will permit litigation of otherwise untimely allegations if they are "closely related" to a timely filed charge. Under the *Redd-I* test,[20] in analyzing whether otherwise untimely allegations are

---

[19] Should the Union proffer evidence that establishes that it had a reasonable basis for retaining some or all of the portion of the award it retained, the Region should resubmit these cases for our consideration of whether such evidence, along with any evidence that the Union actually relied on such a reasonable basis in making its determination, might provide a lawful basis for the Union retaining some portion of the arbitration award.

[20] *Redd-I, Inc.*, 290 NLRB 1115 (1988).

sufficiently "closely related" to timely allegations to be permissible under Section 10(b), the Board considers: (1) whether they involve the same legal theory as the timely allegations, and (2) whether they arise from the same factual situation or sequence of events as those in the timely charge.[21] Additionally, the Board "may look" at whether the respondent would raise the same or similar defenses to both the untimely and timely allegations.[22]

In the instant cases, the initial charges alleged that the Union unlawfully acted arbitrarily or in bad faith by granting arbitration award payments to employees who were not employed when the violation took place, and/or by not granting award payments to retired employees. The amended charge additionally alleges that the Union also unlawfully acted arbitrarily or in bad faith when it retained for itself $1 million of the arbitration award. We note that the Charging Party claims that (b) (6), (b) is not certain when (b) (6), (b) first learned that the Union would be retaining $1 million, but (b) (6), (b) believes it was sometime between late January and early March of 2015. Thus, much of the period in which the Charging Party learned of the alleged violation was more than six months prior to the charge amendment.

The first prong of the *Redd-I* test, i.e., whether the allegations involve the same legal theory, is clearly satisfied here. Thus, both allegations allege that the Union breached its duty of fair representation by acting arbitrarily or in bad faith in its distribution of the arbitrator's award. Both allegations only involve Section 8(b)(1)(A) of the Act. Although the legal theories of violation are not entirely identical, as the initial charge addresses the distribution of award payments among employees and the amended charge addresses the Union's retention of a portion of the award for itself, complete identity is not a requirement for satisfying *Redd-I*'s same-legal-theory prong.[23] Indeed, when the Board has found that the same-legal-theory requirement

---

[21] *Carney Hospital*, 350 NLRB 627, 628 (2007) (citing *Redd-I*, 290 NLRB at 1118).

[22] *Id.* at 628, 628 n.8 (observing that the third prong of the *Redd-I* test is "not a mandatory" requirement for the permissible amendment of an otherwise untimely allegation).

[23] *See, e.g., Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. at 1 (Dec. 16, 2014) (instruction not to talk about wages "concern[ed] the same general legal issues" as a timely allegation of discharge based on talking about wages); *SKC Electric, Inc.*, 350 NLRB 857, 858-59 (2007) (untimely allegation that employer unlawfully interrogated employees arose under same legal theory as timely allegation that employer unlawfully denied employee training where the information obtained during interrogation led to employer's decision); *Trim Corp. of America*, 349 NLRB 608, 608-09 (2007) (8(a)(1) allegation that the employer coerced employees was part of the same legal theory as an 8(a)(5) allegation, timely alleged, because at base, both

was not satisfied, the untimely alleged violations generally were entirely distinct from the legal theories that were timely alleged.[24]

In addition, the second prong of the *Redd-I* test, which concerns whether the allegations arise from the same factual situation or sequence of events, is also clearly satisfied. Both the initial charges and amended charge allegation involve the same determination by the Union as to how to distribute the same arbitration award.[25]

Moreover, although the third prong of the *Redd-I* test may not be required, the Union would raise the same or similar defenses to the timely and possibly untimely allegations. Thus, as to both the initial and amended charge allegations, the Union would argue that its determination as to how to distribute the arbitration award was a reasonable exercise of its discretion, and that it did not act arbitrarily or in bad faith. Thus, this prong of the *Redd-I* test is clearly satisfied, even though the Union may also raise different considerations as to the two allegations.[26]

---

allegations turned on the issue of whether the employer made alleged coercive statements).

[24] *See, e.g., Peerless Pump Co.*, 345 NLRB 371, 374 (2005) (complaint allegation that employer unilaterally implemented striker recall procedures in violation of 8(a)(5) was not same legal theory as charge allegation that employer recalled strikers in violation of 8(a)(3) because employer's bargaining obligation to union is legally distinct from requirement that it not discriminate against strikers); *KFMB Stations*, 343 NLRB 748, 748-49 (2004) (8(a)(1) allegation that the employer solicited employees to resign from the union was not the same legal theory as 8(a)(3) allegations that the employer reduced charging party's compensation, constructively discharged him, and retaliated against him during bargaining); *WGE Federal Credit Union*, 346 NLRB 982, 983 (2006) (8(a)(3) charge allegation that employer discriminatorily discharged one employee not same legal theory as untimely allegation that employer made 8(a)(1) threat against two other employees).

[25] *See, e.g., Fry's Food Stores*, 361 NLRB No. 140, slip op. at 2 (2014) (allegations arose from the same factual situation or sequence of events where they involved the same individuals and arose from the same brief sequence of events during a disciplinary interview).

[26] *See, e.g., Trim Corp. of America*, 349 NLRB at 609 (rejecting argument that *Redd-I*'s third prong was not satisfied because potential defenses to an untimely 8(a)(1) violation had little in common with defenses to a timely 8(a)(5) allegation; the employer's principal defense to both allegations involved attacking the credibility of the same witness).

Finally, our conclusion that the initial and amended charge allegations are closely related is consistent with the purpose of Section 10(b): to "bar litigation over past events "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused."[27] Here, the initial charges gave sufficient notice to the Union that the subject of the allegation was its distribution of the arbitration award, and the Union has certainly had sufficient notice to have preserved evidence on this issue and prepare its case.[28] Thus, the charge served the purposes of ensuring that the Union preserved evidence relating to the possibly untimely allegation. Further, the Union has not claimed that it failed to preserve relevant evidence, or was in any way prejudiced by the timing of the amended charge.[29] Lastly, while a charge must contain a "clear and concise statement of the facts constituting the alleged unfair labor practice" under Board Rule 102.12(d), it is important to note that it is the complaint, not the charge, that gives a respondent notice of the specific claims made against it.[30] For all these reasons, we conclude that there is no bar to proceeding on the allegation in the amended charge, as it is closely related to the allegations in the initial charges.[31]

---

[27] *Machinists Local 1424* (*Bryan Mfg.) v. NLRB,* 362 U.S. 411, 419 (1960).

[28] *See, e.g., Fry's Food Stores*, 361 NLRB No. 140, slip op. at 2 n.5 (noting that the "same or similar defenses" prong of the *Redd-I* test is concerned, at least in part, with "whether a reasonable respondent would have preserved similar evidence and prepared a similar case" in defending against the untimely allegations as it would in defending against the timely allegations).

[29] *Id*, slip op. at 2 n.5 (noting that the employer did not claim that it failed to preserve relevant evidence or was unable to prepare an effective case against the new allegations).

[30] *Redd-I, Inc.*, 290 NLRB at 1116-17, 1117 n.12.

[31] In finding no Section 10(b) bar here, we would not rely on the references in the initial charges to arbitration-award distributions going to "non qualified persons" and "people who are not qualified." While "persons," as defined by the Act, includes labor organizations, the full language and context of the initial charge allegations did not reasonably inform the Union that the initial charge referred to its retention of award money, or to money being distributed to any "non qualified" recipients other than current unit employees. Indeed, the initial charges clearly did not intend to address the Union's retention of money from the arbitration award, and they could not have, as the Charging Parties were unaware of the Union's conduct in that regard.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Union violate Section 8(b)(1)(A) of the Act by arbitrarily retaining more than $1 million of the $8.64 million arbitration award.

/s/
B.J.K.

ADV.05-CB-150339.Response.APWU.[redacted]