

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

**NATIONAL RURAL LETTER CARRIERS
ASSOCIATION (UNITED STATES POSTAL
SERVICE)**

and

Case 27-CB-245422

ADAM BORRELLO, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

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I. STATEMENT OF THE CASE

This case involves the Charging Party Adam Borrello (Borrello), and his numerous attempts to obtain information from his grievance file from the National Rural Letter Carriers Association (Respondent). While Borrello ultimately received the documentation he was entitled to, Respondent did not provide that documentation to him until October 7, 2019, despite his request dating back to July 1, 2019. The only documents at issue in this case are six pages from the United States Postal Inspection Service investigative memorandum.

The Regional Director for Region 27 of the National Labor Relations Board issued a Complaint and Notice of Hearing on October 24, 2019 alleging that Respondent's delay in providing information to Borrello is a violation of Section 8(b)(1)(A) of the Act. The hearing in this matter was heard on January 28, 2020 before Administrative Law Judge Dickie Montemayor.

II. STATEMENT OF FACTS

Borrello was a rural letter carrier for the United States Postal Service (USPS) in Cheyenne, Wyoming in 2018.¹ (Tr. 16). He was a member of and represented by Respondent. (Tr. 17, GCX 1(f) ¶5). In November 2018, Borrello was issued a Notice of Removal for Unacceptable Conduct. (Tr 16-17; GCX 4, p 11). Borrello sought to challenge his removal by filing a grievance with Respondent. (Tr. 18). That grievance

¹ References to the exhibits of the Counsel for the General Counsel and Respondent are cited as "GCX____" and "RX____", respectively, followed by the appropriate exhibit number or numbers, and where appropriate, the page number(s). Joint exhibits are cited as "JTX____", followed by the appropriate exhibit number. References to the official transcript of the instant hearing are cited as "Tr.____", followed by the appropriate page numbers or number(s).

was ultimately resolved in May 2019 in Borrello's favor, with an agreement that he would return to work and receive backpay. (Tr. 18-20; GCX 2, p 1).

At the time of the initial settlement between Respondent and the USPS, Borrello did not know that the Notice of Removal was being reduced to a 14-day suspension that would remain in his file. Because of this, Borrello was not happy with the terms of the settlement agreement. (Tr. 26). He waited until the end of June to receive any of his backpay from the USPS. (Tr. 29). Borrello sought an explanation from Ron Liles (Liles), Respondent's District Representative for Colorado and Wyoming, for how the settlement was reached and backpay was calculated. (Tr. 29 – 30; GCX 1(f), ¶4).

Liles directed Borrello to request, in writing, any information from his grievance file from David Heather (Heather), Respondent's Director of Labor Relations. (Tr. 29-30). Borrello sent an email to Heather on July 1, 2019, requesting, *inter alia*, "the formula used to calculate my back pay," and the "grievance paperwork or full report of this most recent grievance in order to see what (if anything) was said in [his] defense." (Tr. 30, GCX 3, p.2). In response, Respondent sent Borrello a 2-page letter along with 60 pages from the grievance file. (Tr. 33; GCX4). The 60 pages from the grievance file were incomplete, however, with pagination jumping from pages 33 to 45 and pages 50 to 115. (Tr. 34; GCX 4). While Heather's July 2, 2019 letter to Borrello indicated that a 'redacted copy' was being provided, there was no indication of what had been taken out or why. (Tr. 34; GCX 4, p. 1).

On September 10, 2019, Borrello sent a follow-up email request to Heather for any additional documentation that was being withheld from his grievance file. (Tr. 34; GCX 5). Borrello stated "I need a copy of my entire grievance/HR file. Whatever exists that

pertains to my employment and repeated attempts to rectify my pay issues, I need.” (GCX 5). In response, Heather provided six pages from the United States Postal Inspection Service (USPIS) investigation into Borrello’s alleged misconduct from 2018. (GCX 6). Between the July 2, 2019 letter and the October 7, 2019 letter, none of Respondent’s representatives communicated with Borrello about any documents being withheld from his file. (Tr. 35-36).

Respondent’s Director of Labor Relations Heather explained that Respondent’s policy is to provide the “grievance-chain” or “moving papers” to all grievants, whether requested or not. (Tr. 73). Any requests for documentation beyond those must be addressed to the Director of Labor Relations, in this case, Heather. (Tr. 74). Heather testified that this policy has been in place the entire time he has been a member of Respondent, dating back to 1988. (Tr. 74). Witness statements that were taken during the investigation were redacted, as was the entire report of investigation from the USPIS. (Tr. 83-84). Respondent’s “routine and general policy” is to not share that report with anyone. The asserted reason is that they may contain statements or interviews from witnesses and USPIS work product. (Tr. 85). Heather conferred with Respondent’s General Counsel and the Board (presumably meaning the Regional Office) about the initial withholding of the documents, and ultimately, the decision to provide them to Borrello. (Tr. 86, 90). The record is devoid of any mention that Respondent communicated *any* confidentiality interest to the Charging Party. The six pages that were ultimately provided only pertained to Borrello, including his polygraph results, his own interview, and the investigation report. (GCX 3; Tr. 91). One witness’ name was redacted from the report. (GCX 3, p. 3; Tr. 91). Heather admitted that it would benefit Respondent

to provide documentation to a grievance to show all the steps that the union undertook to get to the outcome that was ultimately agreed upon. (Tr. 91).

III. ARGUMENT

As the exclusive representative of a unit of employees, a union must fairly represent its members. *Miranda Fuel Co.*, 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963). One of a union's key duties toward its members is processing their grievances, and the Supreme Court held in 1967 that if a union fails to process grievances under circumstances that are "arbitrary, discriminatory, or in bad faith," it breaches its duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171 (1967). However, a union must necessarily have broad discretion in deciding what grievances to pursue and how to pursue them, as long as these decisions are founded on good faith. See *Humphrey v. Moore*, 375 U.S. 335 (1964). Thus, a union's mere negligence in failing to file a grievance is not enough to constitute a violation of the Act. *Teamsters Local 692*, 209 NLRB 446 (1974).

The issue here is how Borrello could find out whether Respondent fulfilled its statutory duty of fair representation in its handling of his grievance. It is well-settled that an employee may see hiring hall information maintained by a union to determine whether he or she has been treated fairly regarding job referrals, absent some substantial reason for refusing disclosure. *Operating Engineers Local 513*, 308 NLRB 1300 (1992). Similarly, an employee is entitled to receive a copy of the collective-bargaining agreement from the union. *Law Enforcement & Security Officers Local 40B*, 260 NLRB 419 (1982).

In *Letter Carriers Branch 529*, 319 NLRB 879 (1995), the Board considered numerous factors in determining that the union had breached its duty of fair

representation by refusing to provide the charging party in that case with a copy of her grievance file. Those factors are:

(1) the documents requested pertained to a grievance filed by the charging party; (2) she had a legitimate general interest in obtaining the documents (because the documents pertained to a grievance she had filed); (3) her asserted particular legitimate interest was effectively and reasonably communicated to the union; (4) the union raised no substantial countervailing interest in refusing to provide the charging party with copies of the requested documents; (5) the ability of the union to provide copies of the documents; and (6) the relative ease in complying with the request.

These factors must be considered in determining whether Respondent breached its duty of fair representation by refusing to provide Borrello with all of the requested documents. First, Borrello's request pertained to a grievance he had filed with Respondent. That grievance was challenging his termination – the ultimate penalty an employer can confer on an employee. Second, Borrello had a legitimate interest in understanding what information was relied upon to get to the settlement which resulted in his return to work but with a 14-day suspension on his record. Borrello had been out of work nearly seven months and did not believe that the settlement reached was fair. Third, Borrello's asserted legitimate interest was effectively and reasonably communicated to the Respondent. Borrello communicated his request twice, on July 1 and September 10, 2019.

Fourth, Respondent never asserted *to the Charging Party* a countervailing confidentiality interest in not disclosing USPIS reports. At trial, Heather spoke generally about the reasons to withhold such USPIS documents from disclosure: they often contain witness statements or interviews, may contain audio or video recordings, and include

USPIS work product and are only provided to Respondent because they are requested as relevant to a grievance proceeding. (Tr. 85).

Fifth, Respondent had the ability to provide copies of the USPIS documents, because they were within its possession in Borrello's grievance file. Sixth, there is no evidence that there was any burden placed on Respondent in providing copies of six pages of documents from the USPIS investigative file.

As there was only minimal – if any – burden placed on Respondent in providing the six pages from the USPIS report, Respondent's only defense lies in factor four, an asserted countervailing interest in not providing the documents. Respondent's witness Heather indicated generally that the USPIS reports contain statements or interviews of witnesses. The USPIS documents at issue here contain no witness statements or interviews, only the record of the interview conducted with Borrello himself. (GCX 6, pp 5-6). Heather spoke of USPIS reports that contain audio and video recordings. No such recordings existed in Borrello's file

Heather testified that the documents contain USPIS "work product." If Heather meant "work product" to mean documents prepared in anticipation of litigation, such a privilege – if it existed here – is waived if disclosed to an adverse party. *Evergreen America Corp.*, 348 NLRB 178, 187 (2006). Finally, Respondent provided no evidence that the USPS or USPIS had any expectation that such documents would be kept confidential. The Board has previously addressed the USPS' asserted interest in confidentiality of USPIS documents holding that they do not outweigh the union's need for the information to assess the merits of a grievance. *USPS*, 305 NLRB 997 (1991).

Confidentiality concerns are not relevant in this matter, however, when the document was provided voluntarily pursuant to Respondent's request. (Tr. 85).

Finally, Heather spoke about Respondent not wanting to "turn loose to the public those reports" as if Borrello – a member of the bargaining unit – was in the same position as any other member of the public. (Tr. 86). Borrello is owed a duty of fair representation, unnamed members of the public are not. Given the damaging information *as it relates to Borrello* in the USPIS documents, it is highly unlikely that Borrello would himself "turn loose to the public" such information.

To be clear, there is no allegation here that Respondent's handling of Borrello's grievance was in any way deficient or handled in bad faith. However, Borrello had several concerns with how *he reasonably believed* his grievance was handled and his backpay calculated. (Tr. 26). Without being able to see the underlying documents, he would not be able to understand what, if any, arguments were raised on his behalf. (Tr. 30, GCX 3, p.2). The USPIS investigative memorandum includes a record of Borrello's polygraph examination, that, in the opinion of the polygraph administrator, showed deception. (GCX 6, p.3, p. 7). Frankly, the USPIS documentation support Heather's opinion that the *merits* of the grievance had very little likelihood of success in front of an arbitrator. (Tr. 77). Both Respondent and the Charging Party would have been better served with their prompt production, allowing Borrello to see what was done on his behalf and allowing Respondent to spend its time with other grievances. (Tr. 91).

From July 2, 2019 to October 7, 2019, Respondent did not communicate with Borrello regarding his request for grievance documents. In October 2019, Respondent finally decided to provide the USPIS documents after discussing the matter with its

counsel and the Board's Regional Office. (Tr. 86, 90). That is a period of over three months and constitutes an unlawful delay. See *Affiliated Food Stores*, 303 NLRB 40, 40 fn. 2, 45 (1991) (finding that a union's 10-week delay in honoring a resignation request violated Section 8(b)(1)(A)). *Monmouth Care Center*, 354 NLRB 11, 41 (2009) (Board finds, in an 8(a)(5) allegation against an employer, that an unreasonable delay in furnishing information is as much a violation of the Act as a refusal to furnish the information at all.) Further, it is no defense to a delay that a charge was filed with the Board. *Service Employees International Union, Local 50*, 204 NLRB 696 (1973). (Board finds a violation where union threatens to delay processing a grievance because of the filing of Unfair Labor Practice charges).

IV. CONCLUSION

Respondent waited from July 1, 2019 to October 7, 2019 – a period of 98 days – to ultimately provide the Charging Party with the documentation he requested and was entitled to receive. Though the USPIS documents were ultimately provided, the General Counsel urges the Administrative Law Judge to find that the 98-day time period amounted to an unlawful delay in violation of Section 8(b)(1)(A) of the Act.

Respectfully submitted this 3rd day of March 2020, at Denver, Colorado.



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I, Todd D. Saveland, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on March 3, 2020, I served the above-entitled document(s) by **email** upon the following persons, addressed to them at the following addresses:

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