

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ADMINISTRATIVE LAW JUDGE DICKIE MONTEMAYOR**

**NATIONAL RURAL LETTER CARRIERS')
ASSOCIATION)
(United States Postal Service))
)
) **and**)
)
ADAM BORRELLO, an Individual)
)
)
_____)**

Case 27-CB-245422

**POST-HEARING BRIEF OF RESPONDENT
NATIONAL RURAL LETTER CARRIERS' ASSOCIATION**

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Dated: March 3, 2020

STATEMENT OF THE CASE

When a bargaining unit member requests information that the member's union obtained while representing him in a grievance, that union has a responsibility to weigh the member's need for that information against any countervailing interests that might be implicated if the information is provided. That is exactly what the National Rural Letter Carriers' Association ("NRLCA" or "Union") did in the instant case when the charging party, Adam Borrello, requested his entire grievance file so that he could see the arguments that the Union made when it *successfully* processed his termination grievance. Yet, despite the fact that the Union had compelling interests in withholding some of those grievance documents, that it had worked with Mr. Borrello to provide non-privileged documents, that it considered the General Counsel's own views on what should be provided, and that even by the General Counsel's standards Mr. Borrello had received everything he was entitled to, the General Counsel issued the instant unfair labor practice complaint.

In issuing the complaint, the General Counsel has eschewed the Union's good faith attempts to provide Mr. Borrello with relevant grievance documents as well as decades of precedent that uphold exactly the type of reasoned consideration that the Union exercised here. It has chosen to utilize the resources of the NLRB to pursue punitive action against a Union because, it argues, six additional pages that were ultimately provided to Mr. Borrello should have been provided sooner. It has ignored the fact that those six pages were part of a larger law enforcement document that contained sensitive information and that reasonable minds could disagree as to whether those pages had to be turned over. Ultimately, even if the General Counsel's interpretation of the law regarding a Union's obligation to provide grievance-related documents to a member is accepted, no violation occurred here, much less one that warrants

remedial action. Pursuing such complaints is simply not what the National Labor Relations Act was intended to do.

FACTUAL BACKGROUND

A. The Union

The NRLCA represents over 120,000 rural letter carriers who work for the United States Postal Service (“USPS” or “Employer”) delivering mail across all fifty states and the U.S. Territories. Tr. 9. David Heather is the Union’s Director of Labor Relations, one of the Union’s nine national officers, and is responsible for overseeing grievances that are handled by an extensive network of stewards and representatives across the country. Tr. 70. He has over thirty years’ experience as a Union representative, was elected to the Union’s national board in 2011, and has served as Director of Labor Relations (“DLR”) since 2018. Tr. 68-69. As DLR, he directly supervises the Union’s four Regional Representatives who handle grievances at Step 3 of the grievance process collectively bargained by the Union and the Postal Service. Tr. 70. Prior to Step 3, NRLCA District Representatives (“DRs”) typically handle grievances at Step 2, while the DRs or their subordinate stewards investigate and process grievances at Step 1. Tr. 70. As part of his many responsibilities, Mr. Heather also reviews the file in every grievance that has been denied at Step 3 in order to determine – in conjunction with Union counsel – whether the grievance has a reasonable likelihood of success in arbitration and, as such, whether it should be appealed to arbitration. Tr. 71, 77-78.

B. The Grievance Documents Policy

For as long as anyone can remember, the NRLCA has maintained a policy governing how it provides bargaining unit members access to information from their grievance files. Tr. 71-75. Throughout the grievance process, the Union gives grievants copies of any and all “moving

papers”, which include documents such as the completed grievance form, the Postal Service’s written denials, appeals, and settlements. Tr. 72. These documents contain both the Union and the Postal Service’s arguments made at each grievance step as well as the rationales for and responses to any denials. Tr. 72-73; *See, e.g.*, GC-4 at 6-9, 14-18.

The Union instructs its representatives to refer any requests for documents beyond the moving papers to Director of Labor Relations Heather who works with counsel to determine whether such additional information can and should be released. Tr. 73-74; R-3. Mr. Heather testified that the Union has several reasons for exercising caution when releasing documents beyond the moving papers. Tr. 74-75. For example, individuals could be inhibited from providing witness statements or otherwise speaking with Union representatives if their statements can be disclosed beyond what is necessary to process a grievance. *Id.* As Mr. Heather explained, the fear of retaliation and publication on social media could discourage cooperation with the Union’s grievance investigations. *Id.*

Mr. Heather also explained that the Union routinely removes Postal Inspection Service Reports of Investigation (“ROIs”) and other Postal Service law enforcement documents which typically contain sensitive information such as witness statements and interviews, recordings, and other investigative material. Tr. 84-86. Importantly, maintaining the confidentiality of those documents also preserves the Union’s bargaining relationship with the Postal Service, by ensuring that the information is kept within the confines of the grievance process as opposed to being released to the public. Tr. 85-86.

C. The Grievance

Adam Borrello was a rural letter carrier in the Cheyenne, Wyoming Post Office. GC-4 at 11. In November 2018, the Postal Service placed him in emergency placement (“EP”) status and

then issued a Notice of Removal (“NOR”) terminating him effective December 21, 2018. Tr. 59-60; GC-4 at 11-13. The Postal Service charged Mr. Borrello with “Unacceptable Conduct”. GC-4 at 11-12. Specifically, Mr. Borrello had a history of confrontations with fellow employees and, on November 2, 2018, was heard threatening another employee. GC-4 at 8, 11. Witnesses heard him saying, among other things, “If she says one thing to me, that I will beat her into a bloody pulp... I would beat the shit out of her until she is no longer breathing then draw a smiley face on the ground with her blood.” GC-4 at 11. The “she” he was referring to was Lisa Hill, another rural carrier in Mr. Borrello’s office who also served as the local steward. GC-4 at 8, 14;

Mr. Borrello filed grievances over his discipline. GC-4 at 14-15; Tr. 59. NRLCA District Representative for the Colorado-Wyoming District Ron Liles handled Mr. Borrello’s EP grievance at Step 2 of the grievance process, and he successfully settled it with full back pay. Tr. 59-60. NRLCA Assistant District Representative David Aldridge handled Mr. Borrello’s NOR grievance at Steps 1 and 2, and he appealed the grievance to Step 3 after the Postal Service issued its denials. GC-4 at 5-6, 10, 14-15. Consistent with its longstanding policy, the Union kept Mr. Borrello informed of its progress and provided him with the moving papers as they were issued. *See, e.g.*, Tr. 46, 48; 72, GC-4 at 3-10; R-1.¹

On May 23, 2019, NRLCA Regional Representative Cindy Burleson entered into a successful grievance settlement with the Postal Service. GC-4 at 3-4. The settlement reduced the NOR to a 14-day suspension and returned Mr. Borrello to work with back pay. GC-4 at 3-4. Mr. Heather testified that Ms. Burleson consulted with him prior to entering into the settlement

¹ Mr. Borrello falsely testified that he had not received any moving papers until the Step 3 settlement. Tr. 47. This statement is controverted not only by Mr. Heather’s testimony, but by the documents themselves, and Mr. Borrello’s later admission that he received moving papers from Mr. Aldridge. Tr. 48; R-1.

agreement and that he believed it to be a good result because he did not believe the Union would prevail should the case have gone to arbitration. Tr. 76-77. He explained that the Union had a weak case on the merits, but that they convinced the Postal Service to settle based on a procedural violation. *Id.*

Ms. Burleson mailed Mr. Borrello a copy of the settlement on May 26, 2019. GC-2; Tr 47. Prior to that, at Ms. Burleson's request, Mr. Liles called Mr. Borrello to notify him of the settlement and discuss his return to work. R-2; Tr. 22, 61-62.² Mr. Liles assisted Mr. Borrello in delaying his return to work to get his affairs in order and also assisted him in getting a transfer as he no longer wished to be in the Cheyenne office. Tr. 61-64. Mr. Borrello testified that he also spoke with Ms. Burleson who explained "[h]ow we got through step 3," the backpay process, and other issues related to his return to work. Tr. 43-45. Mr. Borrello did return to work, but shortly thereafter resigned from the Postal Service.

Notably, On May 22, 2019, Mr. Borrello filed an unfair labor practice against the NRLCA alleging that it breached its duty of fair representation in handling his NOR grievance. Tr. 37. The Region dismissed that charge on October 11, 2019. Attachment A.³

D. Mr. Borrello's Requests for Information

On July 1, 2019, Mr. Borrello emailed Mr. Heather requesting information that would permit him to see how his backpay had been calculated, along with grievance paperwork. GC-3. The two had spoken on the phone previously, but Mr. Borrello had not requested documentation at the time. Tr. 78-80. From his email, Mr. Heather understood that Mr. Borrello wanted the

² Mr. Borrello testified inaccurately that Mr. Liles sent the settlement *after* he requested formal documentation, but he was clearly copied on the May 26 letter. Tr. 22, 24; GC-2.

³ As a publicly available, official NLRB record, the ALJ may take judicial notice of the dismissal. *ILWU Local 12 (Southport Lumber Co.)*, 367 NLRB No. 16, slip op. at 1 fn. 1 (2018).

information to check the backpay calculations and “to see the arguments that had been made [as part of his grievance].” Tr. 80-81. In Mr. Borrello’s words, he wanted “to see what (if anything) was said in [his] defense.” GC-3. Mr. Heather testified that the Union had already provided him with the moving papers, and thus, “he had been notified of all the arguments we’d already made.” Tr. 81-82.

Upon receiving Mr. Borrello’s July 1 email, Mr. Heather discussed the request with Union counsel to determine what documents would be responsive and whether the Union could protect the confidentiality of other Postal employees who had provided statements as part of the grievance investigation. Tr. 81-84, 86. He and counsel removed those statements from the file in accordance with the Union’s policy, confidentiality concerns, and their understanding of the Union’s legal obligations. Tr. 86. Consistent with those considerations, they also removed the Postal Service Inspection Service Report of Investigation (“ROI”) from the file. Tr. 83-86.

Mr. Heather testified that he had particular concerns about Mr. Borrello’s requests that bolstered his policy considerations underlying his decision to redact the grievance file. Tr. 86. He explained that the case involved serious allegations of threats against fellow employees and that he had particular concerns about protecting those employees or witnesses from retaliation. *Id.* Indeed, Mr. Borrello had shown a proclivity to make vicious statements about other Postal employees in the past and Ms. Hill had obtained an order of protection against him. Tr. 32; GC-4 at 7-8, 11. He also posted rants about his Union representatives and issues with the Postal Service on social media, including a video wherein, among other angry statements, he compared Mr. Liles to Harvey Weinstein and called Ms. Hill “the most malicious, vindictive, awful human being on the planet.” Tr. 53. Ultimately, Mr. Heather, in consultation with the Union’s counsel, provided a redacted file to Mr. Borrello. Tr. 86.

On July 2, the day after Mr. Borrello's request, Mr. Heather sent him copies of a redacted grievance file and all of the backpay documentation via Priority and Express Mail. GC-4; Tr. 82-83. Contrary to Mr. Borrello's testimony that he received the documents two-weeks after his request, Mr. Heather testified that he was able to confirm, through Postal Service records, that the documents had been delivered to Mr. Borrello on July 3, 2019. Tr. 32, 82.

In Mr. Heather's July 2 mailing to Mr. Borrello, he included a cover letter that explained the Union's process for providing grievance documents to grievants. GC-4 at 1-2. The letter informed Mr. Borrello that the union redacted the included grievance file and clearly articulated the Union's "significant interest in maintaining the confidentiality of individuals who provide statements to Union representatives in the course of grievance investigations." *Id.*⁴ Mr. Borrello did not inform the Union that he was dissatisfied with its July 2 response until two months later. GC- 5; Tr. 34-35, 87. However, he filed the instant charge on July 24, 2019. GC-1(a).

On September 10, 2019, Mr. Borrello emailed Mr. Heather requesting "a copy of my entire grievance/HR file" and "[w]hatever exists that pertains to my employment and repeated attempts to rectify my pay issues...." GC-5; Tr. 34-35. Mr. Heather testified that he had already provided all documentation relevant to the backpay issues and that, with respect to the redacted documents, he did not feel that Mr. Borrello provided any additional rationale that would outweigh the Union's confidentiality concerns. Tr. 87-88. In any event, he again consulted with counsel as to how to respond. Tr. 89-90. Mr. Heather testified that the Union's counsel had

⁴ The letter also clearly informed Mr. Borrello that he remained "free to file grievances if [he] believe[d] the Postal Service did not properly pay [him] pursuant to the settlement...." GC-4 at 2. Mr. Borrello testified that he did not file or attempt to file any such grievance. Tr. 52.

discussed the matter with Region 27 and that he and counsel “decided that we would provide ... six additional pages as we had been directed by the Board.” Tr. 89-90.

On October 7, 2019, after redacting information from the ROI that identified a witness, Mr. Heather sent Mr. Borrello the six pages identified by the Region. GC-6. In his cover letter, he explained that the Union was providing the information because of the particular circumstances of Mr. Borrello’s case and without prejudice to its position that it is not a violation of the Act to withhold such documents in order to maintain confidentiality and the integrity of the grievance process. *Id.* at 1. Three weeks after the Union sent the additional information to Mr. Borrello, the Regional Director issued the instant Complaint. GC-1(d).

ISSUE PRESENTED

Whether the Union’s delay in providing six pages from a grievance file to the charging party constitutes a violation of Section 8(b)(1)(A) of the Act.

ARGUMENT

I. THE UNION DID NOT UNREASONABLY DELAY PROVIDING DOCUMENTS TO MR. BORRELLO

At the outset, it is necessary to clarify exactly what the General Counsel alleges to be a violation of the Act in this matter: the Union’s delay in providing six pages from a grievance file to Mr. Borrello between July 3 and October 7, 2019. Tr. 56. In order to establish that the delay was unlawful, the General Counsel has the burden to prove that 1) the Act imposed a legal obligation on the Union to provide the six pages in questions to Mr. Borrello in the first place, and 2) that the delay in providing those documents between was unreasonable. Moreover, the General Counsel must show that, even if there was a violation of the Act, such violation is more than *de minimus* and warrants a remedy under the Act.

As discussed below, the Union's decisions and conduct in this case were reasonable, in accordance with a rational policy governing grievance document disclosure, and otherwise consistent with Board law. In addition, given that the Union responded to Mr. Borrello's requests for information in a timely manner, provided dozens of documents to him immediately upon his first request, inquired as to his reasons for requesting documents, explained the Union's policy and countervailing interests in providing the information, consulted extensively with legal counsel, communicated with Region 27 of the NLRB, ultimately provided the six pages in question, and caused no harm to Mr. Borrello, any violation is *de minimus* and no remedy is warranted.

A. Legal Standard

Nobody disputes that Union members have a right to access certain information related to their grievances under a collective bargaining agreement. However, as the Board has held, that right is not unlimited, nor does the individual's interest in obtaining the documents automatically override a Union's legitimate interest in limiting the distribution of information it acquires in the grievance process. *Local 307, National Postal Mail Handlers Union*, 339 NLRB 93, 93-94 (2003) ("*NPMHU Local 307*").

The Board considers several factors when examining a Union's decision not to provide information from a grievance file: 1) Whether the documents pertain to the charging party's grievance; 2) whether the charging party has a "legitimate general interest in obtaining copies of [the] documents;" 3) whether the charging party asserts a "legitimate particular interest in obtaining the documents," and whether that interest was "effectively and reasonably communicated to" the union; and 4) whether the union has a "substantial countervailing interest in refusing to provide the documents;" 5) whether the union is able to provide the documents;

and 6) whether the union can do so relatively easily. *Letter Carriers Branch 529*, 319 NLRB 879, 881-82 (1995) (“*NALC Branch 529*”); *NPMHU Local 307* at 93, fn. 6. At first glance, it may appear that the main issues in this case involve the third and fourth *Branch 529* factors: Mr. Borrello’s interest in seeing the six redacted pages versus the Union’s countervailing interest in confidentiality and its relationship with the employer Postal Service. However, given that the General Counsel essentially concedes that the Union had a substantial interest in keeping a majority of the documentation withheld from Mr. Borrello’s grievance file confidential, and given that the Union ultimately gave the six additional pages to Mr. Borrello, the ultimate analysis here is quite different from other Board cases on this issue. Indeed, it is more akin to a standard duty of fair representation analysis.

The NLRB has held that Unions’ duty to furnish grievance information falls under its general duty of fair representation (“DFR”). *See, e.g., NPMHU Local 307* at 93 (2003), citing *Air Line Pilots Assn. v. O’Neill*, 499 U.S. 65, 76 (1991); *see also, IUOE Local 18*, 362 NLRB 1438, 1444 (2015). Indeed, courts and the Board grant unions substantial deference in handling and responding to requests for information from members, and a union’s actions in representing members is lawful so long as it has acted in good faith and not “so far outside a ‘wide range of reasonableness’ as to be irrational. *NPMHU Local 307* at 93, quoting *O’Neill* at 67 (additional citation omitted); *See also, NALC Branch 529* at 881; *IUOE Local 18* at 1444, 1446; *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Vaca v. Sipes*, 386 U.S. 171 (1967). Even decisions that the courts or the Board deem to be “bad,” “wrong,” or “negligent” do not amount to a breach of the duty of fair representation. *O’Neill*, 499 U.S. at 79.

Of course, the DFR question in this case – whether the Union acted reasonably in delaying the information provided to Mr. Borrello – necessarily requires an analysis of the

Branch 529 factors. Indeed, the ultimate inquiry remains whether the Union's application of those factors to its decision to withhold the entire Inspection Service report – as opposed to immediately excerpting and providing six pages from that report – was reasonable and exercised in good faith. For the reasons stated below, the Union asserts that it was.

B. The Union's Reasonably Applied its Grievance Document Disclosure Policy in Responding to Mr. Borrello's Requests for Information

At hearing, NRLCA Director of Labor Relations David Heather laid out the Union's longstanding policy for handling grievants' requests for documentation from their grievance file and the reasons underlying that policy. Although grievants automatically receive copies of moving papers, they must direct requests for additional documents to Mr. Heather, who weighs the individual's stated interest in obtaining the documents against the Union's interests in principles such as confidentiality and maintaining good relations with the Postal Service. Mr. Heather applied this policy when handling Mr. Borrello's document requests.

Mr. Borrello sent the first of his two requests for documents to Mr. Heather on July 1, 2019. GC-3. The actual request for his grievance paperwork and back pay documentation was buried in his almost two-page email amongst a host of complaints about a number of issues including his coworkers, Union representatives, managers, the settlement of his removal which resulted in his return to work with backpay, and the transfer that he requested and then regretted. *Id.* Mr. Borrello's stated interests for wanting the information appeared to be 1) to account for his backpay, and 2) to determine what arguments the Union made in his defense. *Id.*

Upon receiving the July 1 request, Mr. Heather immediately consulted with counsel, and he provided documentation to Mr. Borrello the very next day. GC-4. That paperwork included everything that pertained to Mr. Borrello's backpay and every document from the grievance file that addressed the arguments made by both parties in the grievance process. *See, e.g.*, GC-4 at 6-

9, 14-18. Consistent with the Union’s policies and interests, and on the advice of counsel, Mr. Heather withheld only two groups of documents from Mr. Borrello: 1) Statements from bargaining unit employees given to the Union during its investigation of the grievance, and 2) the Inspection Service ROI, which also contained statements from Postal Service employees.

i. The Witness Statements

Mr. Heather clearly articulated the Union’s reasons for withholding witness statements. His rationale is entirely consistent with the union’s reasoning in *NPMHU Local 307*. 339 NLRB at 93-94. That case also involved a grievance arising from a confrontation between employees. Like Mr. Borrello, charging party James Yax requested copies of witness statements because he wanted to know what witnesses said and because he believed that he was entitled to backpay as a part of his grievance settlement. *Id.* at 93-94.⁵ However, the Board upheld that union’s refusal to provide those documents because of the union’s “countervailing confidentiality policy regarding witnesses’ statements.” *Id.* at 94. As in that case, here, the NRLCA had a substantial concern in protecting the identity of individuals who made statements because of Mr. Borrello’s aggressive conduct and history with coworkers.

Just as Mr. Borrello testified that he did not accept having a suspension on his record as a result of his grievance settlement, Mr. Yax’s not-so-subtly wanted to force a better settlement than the Union was able to secure for him – one with backpay.⁶ In Mr. Yax’s case, the Board correctly held that the settlement was “final and binding”. *Id.* The same holds true here, and

⁵ Unlike Mr. Borrello, who received full back pay, Mr. Yax’s Union did not secure any back pay in its settlement. *NPMHU Local 307 at 93*.

⁶ A closer look at Mr. Borrello’s letters to the Union and prior ULP charge reveal an additional motive in his case: seeking to have certain employees, supervisors, and Union officials removed or disciplined in some way. GC-3; GC-5; Attachment A.

because grievance settlements are not subject to change, any attempts to amend Mr. Borrello's settlement would necessarily fail. Indeed, nothing that the Union could have provided to Mr. Borrello, from the ROI or otherwise, would have changed the outcome of his grievance in any way.⁷

Ultimately, Mr. Borrello's desire to see his entire grievance file in order to check the Union's work and attempt to reverse his grievance settlement does not outweigh the Union's interest in keeping witness statements confidential.

ii. The Report of Investigation

In this case the General Counsel does not argue that the NRLCA violated the Act by redacting witness statements. It focuses, instead on the six pages from the ROI. Mr. Heather explained the Union's general policy of maintaining the confidentiality of Inspection Service reports in their entirety. Tr. 85-86. For one, those documents contain statements and reports of interviews from Postal employees, and as with the Union's own interviews, the Union has a legitimate interest in protecting others from retaliation or publication beyond the grievance file. In addition, protecting those reports from disclosure enhances the NRLCA's collective bargaining relationship with the Postal Service, a principle that the NLRB has validated in analyzing a refusal to provide information. *See, IUOE Local 18* at 1445 (upholding the ALJ's finding that the union properly restricted access to documents where "[t]he union recognizes that [an] informal but important cooperation between labor and management would be threatened if the union" was forced to provide certain information to members.). The NRLCA has been able

⁷ Indeed, to the extent that Mr. Borrello might argue that he could have somehow made the case that the Union did not properly represent him – despite the positive outcome of his grievance – any such arguments were already adjudicated by the General Counsel when it dismissed his prior charge. Attachment A.

to obtain ROIs and other information created and controlled by the Postal Service without too many obstacles, in part, because it has not released those documents beyond what is required to process a grievance.

Mr. Heather initially withheld the entire ROI from Mr. Borrello's grievance file in accordance with the Union's document disclosure policy and after consultation with counsel. That alone should suffice to demonstrate that the Union acted reasonably. However, when considering Mr. Borrello's proclivity to aggressively air his anger towards the Union, coworkers, and Postal management on social media,⁸ as well as the serious nature of the allegations against him that led to his removal, the Union's initial decision to hold back the ROI becomes all the more understandable. Indeed, should the ROI become public it would likely have exactly the adverse impact on the Union's relationship and ability to obtain information from the Postal Service that the policy seeks to avoid.

Furthermore, it is worth noting that the ROI did not include any additional information related to what Mr. Borrello claimed to be seeking: backpay calculations or arguments that the Union made during the grievance process. Nothing in those pages expounded upon the arguments made by the Union or otherwise would have aided Mr. Borrello's efforts to challenge the binding settlement reached in his case. In that way too, the Union rightfully withheld the entire report. *See, NPMHU Local 307* at 94.

⁸ At hearing, Mr. Borrello initially denied posting a video on Facebook showing him making hateful and profane statements about his Union representatives and management. He ultimately admitted that he had indeed published such a video and that it was still available on social media at the time of the hearing. Tr. 53-55.

iii. The Decision to Provide Six Pages from the ROI

On September 10, 2019, when Mr. Borrello emailed his second request for documents to Mr. Heather, he did not specifically request the ROI. Rather, he continued to assert a general request for his grievance file and “whatever exists that pertains to [his] employment and repeated attempts to rectify [his] pay issues.” GC-5. Nor did he make any additional arguments that would support disclosing any additional information. Notably, the Board has rejected such general, baseless requests for documentation where the requesting party cannot articulate why the information is important. *See, IUOE Local 18* at 1445 (upholding the ALJ’s finding that the union’s refusal to provide documents was lawful where the requestor “seeks [the information] on principle, believing that if it concerns the job, he should see it,” and where he did not explain what the information “will add to his consideration of the grievance.”).

Despite the Union’s firm belief that the entire ROI should remain privileged, the Union provided Mr. Borrello with six pages from the report, which consisted of a summary of the Postal Inspector’s investigation (with witness identities redacted), a summary of the Inspector’s interview with Mr. Borrello, and the results of a polygraph test that concluded that Mr. Borrello was not being truthful when he denied making threatening statements towards his coworker including that he “will beat her into a bloody pulp.” GC -6. Mr. Heather provided this documentation upon the advice of counsel and only after counsel had discussed the issue with Region 27. As explained below, the Union acted reasonably and lawfully in providing these documents in such a way.

C. Even If Mr. Borrello was Entitled to Six Pages from the ROI, the Union’s Delay in Providing those Documents did not Violate the Act

Assuming for the sake of argument that the Union was *not* entitled to withhold the ROI in its entirety, the question becomes whether the Union’s delay in redacting and providing six pages

from that report was reasonable. *See generally, NPMHU Local 307* at 93. More precisely, the issue is whether the Union's failure to provide the six pages until the General Counsel indicated that it disagreed with the Union's reasoning "so far outside a 'wide range of reasonableness' as to be irrational." *Id.*, quoting *O'Neill* at 78; *see also, IUOE Local 18* at 1444, 1446. Any answer to that question must be "highly deferential" to the Union. *Id.* In this case, given that Mr. Heather acted in good faith, based upon an established and reasonable policy, after a back and forth with Mr. Borrello in which his interests were thoroughly considered and weighed against the Union's own interests, in consultation with counsel, and after considering the Region's position, the Union's conduct cannot be said to fall outside the applicable wide range of reasonableness.

Even if the Union *incorrectly* analyzed its obligations with respect to providing those six pages of the ROI, something that is not conceded here, no violation has occurred. A union's decision is not violative of the Act simply because it is wrong. *O'Neill*, 499 U.S. at 79; *see also, IUOE Local 18* at 1446 (upholding the ALJ's determination that the union "is not required to prove an enforceable confidentiality interest in order to win its case" and that "[i]t is enough that the [union's] concerns about disclosure of the [information is] credible, rational, and nonarbitrary.") . The NLRB's role is not to Monday-morning quarterback a union's decisions with respect to its representational activities, but to ensure that the union is acting rationally and in good faith. That the General Counsel would have done things differently should not determine whether a violation has occurred., especially where, once the General Counsel made its position known, the Union fully complied with its finding that six additional pages should be provided.

The Union clearly and reasonably viewed the ROI as a single document, a majority of which contained sensitive information. Its general policy of protecting such documents, in their entirety, is equally reasonable. Despite these facts, the General Counsel's position in this case

suggests it believes that the Union should have looked at and surgically analyzed each page from the beginning. Even if that approach is reasonable, the Union could not be expected to know that the NLRB would take that position. Indeed, there is no way to know how microscopic an examination of each page in a grievance file would be required.⁹ And when this is the case, what good does it do to issue a complaint where, ultimately, the Union concedes to the Region's position? There's simply no basis to suggest that the Union acted in bad faith or outside the wide range of reasonableness afforded to it when making such decisions, and there is even less of a rationale for issuing a complaint in such a situation.

D. Even if A Violation Occurred, it was *De Minimus* and Does not Warrant Remedial Action

The Board has long recognized that under certain circumstances, it does not effectuate the policies of the Act to issue a remedial order when a violation has occurred. *American Federation of Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620, 620-21 (1973)(union's technical § 8(b)(1)(B) violation did not warrant Board involvement where, among other things, the union's subsequent conduct had "substantially remedied" the violation); *Albertson's*, 351 NLRB 254, 256 (2007). Such is the case here where the charging party immediately received 90% of the documents that the General Counsel believed him to be entitled to, where he ultimately received 100% of those documents, and where he has not shown any harm as a result of any delay.

In *Albertson's*, an employer failed to give a union documentation that was clearly relevant to a grievance until the union filed an unfair labor practice charge. 351 NLRB at 256. The Board found these facts to be *de minimus* in light of the fact that the union could not show

⁹ At some point, a standard of document production that required a Union to examine each page of a grievance file becomes extremely burdensome. As such, it would implicate number 6 of the *Branch 529* factors: whether the union can provide the documents relatively easily.

any harm and there was no evidence of a “larger pattern of unlawful conduct.” *Id.* Likewise here, Mr. Borrello has not shown any harm from the delay in receiving six pages from his grievance file. Nor is there any evidence that the NRLCA is engaged in a pattern of refusing to provide information. Moreover, in this case, Mr. Borrello no longer works for the Postal Service, there is no evidence that any other employees in his office were affected by the withholding of the information, and there is no reason to believe that a remedial order would, in any way, effectuate the purposes of the Act. To the contrary, pursuit of such a *de minimus* violation only misdirects resources from the Board and the courts that could be expended on substantive violations.

In the end, even accepting the General Counsel’s position in this case, Mr. Borrello received everything he was entitled to. It should be said that the process worked. There was a back and forth between Mr. Borrello and the Union with respect to his request for documents. The Union acted in good faith, and as soon as the General Counsel indicated that it had a different interpretation of the NRLCA’s obligations to provide documents, the NRLCA acted accordingly. To find a violation here and issue a remedial order would only discourage this type of discourse between Unions and the agency tasked with upholding the Act. Indeed, if the General Counsel will issue a complaint regardless of the Union’s actions, why should the Union accept and comply with the General Counsel’s interpretation of the law in the first place?

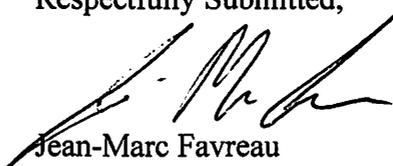
This is not a case in which a union has refused to provide grievance forms or clearly relevant and non-privileged information to a member, such as what occurred in *NALC Branch 529*, 319 NLRB at 881; *see also, Law Enforcement & Security Officers Local 40B*, 260 NLRB 419 (1982)(union violated the act by failing to provide copies of the CBA and health and welfare plan). Nor is it a case involving a union that is a “repeat offender”, nor a case which caused a member harm or chilled members from requesting information. At worst, the NRLCA erred in its

interpretation of the Board's requirements with respect to providing information from grievance files, and it corrected that error when Region 27 made its interpretation of the law clear. Given these circumstances, it simply does not serve the purposes of the Act to find a violation or issue a remedial order in this case.

CONCLUSION

For all of the foregoing reasons, the Union respectfully requests that the Administrative Law Judge dismiss the instant complaint in its entirety.

Respectfully Submitted,



Jean-Marc Favreau
Counsel for Respondent Union, National Rural
Letter Carriers' Association

Dated: March 3, 2020

Attachment

A



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Agency Website: www.nlr.gov
Telephone: (303)844-3551
Fax: (303)844-6249

October 11, 2019



Re: National Rural Letter Carriers Association
(Cheyenne Post Office)
Case 27-CB-241966

Dear [REDACTED]

We have carefully investigated and considered your charge that National Rural Letter Carriers Association (Union) has violated the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have decided to dismiss your charge for the reasons discussed below.

Your charge alleges that the Union failed to fairly represent you in violation of Section 8(b)(1)(A) of the National Labor Relations Act. There is insufficient evidence that the Union that the Union's conduct warrants issuance of complaint in this matter.

The investigation revealed that the Union investigated your removal grievance, reviewed documents, interviewed witnesses, sought and secured your reinstatement, and secured a substantial portion of backpay. The Regional Director has found that the Union's decision to settle for a time-served suspension was based on the evidence available to it and was within the range of reasonableness allowed unions in such matters. Therefore, the Union's investigation and settlement of the grievance did not violate the Act as alleged.

You also dispute the Union's decision to seek a transfer for you to a different post office. However, the investigation revealed that you had requested the transfer both orally and in writing to the Union, and the Union sought to accommodate that request. The Union was not empowered to seek the termination of other employees and supervisors at your request. Therefore, the Union's refusal or failure to do so does not establish a violation of the Act.

You also contend that the Union failed to file grievances on your behalf regarding pay disputes dating back to early 2018. Section 10(b) of the National Labor Relations Act prohibits the Agency from bringing complaints based on unfair labor practices that took place more than six months from the filing of a charge. Your charge was filed on May 22, 2019, more than six months after you could have reasonably been aware that the Union had not filed timely

October 11, 2019

grievances on those issues. As a result, such allegations are untimely, and complaint may not issue regardless of the merits of the allegations.

Lastly, as a remedy for the alleged conduct, you requested that the National Labor Relations Board seek the termination or removal of certain named employees and supervisors of the United States Postal Service. Even assuming that there were meritorious allegations in this charge, the National Labor Relations Board is not empowered to seek such a remedy. Based on the above, I am declining to issue a complaint in this matter.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. To file electronically using the Agency's e-filing system, go to our website at www.nlr.gov and:

- 1) Click on E-File Documents;
- 2) Enter the NLRB Case Number; and,
- 3) Follow the detailed instructions.

Electronic filing is preferred, but you also may use the enclosed Appeal Form, which is also available at www.nlr.gov. You are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect. To file an appeal by mail or delivery service, address the appeal to the **General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

The appeal MAY NOT be filed by fax or email. The Office of Appeals will not process faxed or emailed appeals.

Appeal Due Date: The appeal is due on **October 25, 2019**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than October 24, 2019. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely.** If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

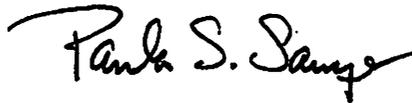
Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before October 25, 2019**. The request may be filed electronically through the *E-File Documents* link on our website www.nlr.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any

October 11, 2019

request for an extension of time to file an appeal received after October 25, 2019, even if it is postmarked or given to the delivery service before the due date. Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,



PAULA S. SAWYER
Regional Director

Enclosure

cc: Jean Marc Favreau, Esq.
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1730 Rhode Island Ave., NW, Ste. 715
Washington, DC 20036-3115

National Rural Letter Carriers Association
PO Box 39742
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Law Department – NLRB Unit
1720 Market St. Rm 2400
Saint Louis, MO 63155-9948

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ADMINISTRATIVE LAW JUDGE DICKIE MONTEMAYOR**

**NATIONAL RURAL LETTER CARRIERS')
ASSOCIATION)
(United States Postal Service))
)
and)
)
**ADAM BORRELLO, an Individual)
)
)
_____)****

Case 27-CB-245422

CERTIFICATE OF SERVICE

I hereby certify this 3rd day of March 2020, that I electronically filed Respondent's Post-Hearing Brief with the NLRB Division of Judges and that I caused it to be served upon the following parties:

Todd Saveland (by electronic mail)
Counsel for the General Counsel
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Jean-Marc Favreau