OFFICE OF ADMINISTRATIVE LAW JUDGESWASHINGTON, D.C. 20424

. . . . . .AMERICAN FEDERATION OF .GOVERNMENT EMPLOYEES, .LOCAL 1945, BYNUM, ALABAMA .
Respondent .

and Case No. 4-CO-10025

SAM CASH, AN INDIVIDUAL .
Charging Party ... .

Stuart A. Kirsch, Esquire For the RespondentSherrod G. Patterson, Esquire For the General CounselBefore: WILLIAM B. DEVANEY Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, etseq.[1], and the Rules and Regulations issued thereunder, 5 C.F.R. §§ 2423.1, et seq., concerns the allegation that Local 1945, by failing to submit the paperwork necessary to initiate arbitration, deliberately and/or unjustifiably treated member Sam Cash different from other bargaining unit employees; thereby failed to comply with § 14(a)(1) of the Statute; and violated §§ 16(b)(1) and (8) of the Statute.

This case was initiated by charge filed on September 3, 1991 (G.C. Ex. 1(a)) which alleged a violation of § 16(b)(5) of the Statute and a First Amended charge filed on November 6, 1991 (G.C. Exh. 1(c)) which alleged a breach of duty of fair representation in violation of §§ 16(b)(1) and (8) of the Statute. The Complaint and Notice of Hearing (G.C. Exh. 1 (e)) issued on November 20, 1991, and set the hearing for February 5, 1992, pursuant to which a hearing was duly held on February 5, 1992, in Anniston, Alabama, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which was exercised by Respondent. At the conclusion of the hearing, March 5, 1992, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, on joint motion of Respondent and General Counsel, to which the Charging Party did not object, for good cause shown, to April 6, 1992. Respondent and General Counsel each timely mailed an excellent brief, received on, or before, April 11, 1992, which have been carefully considered. Upon the basis of the entire record[2], including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. American Federation of Government Employees, Local 1945 (hereinafter, "Local 1945" or "Union") is the exclusive representative of a unit appropriate for collective bargaining at the Anniston Army Depot,

Anniston, Alabama (hereinafter, "Depot"). The Union and Depot are parties to a collective bargaining agreement, Joint Exhibit 1, Article 33 of which provides, in pertinent part, as follows:

> "Section 1. If the Employer and the Union fail to settle any grievance. . .such grievance shall, upon written notice by the party requesting arbitration to the other part [sic], be referred to arbitration. Arbitration of a grievance may be invoked only by the Employer or the Union and does not require the approval of the employees involved. Written request for arbitration must be served within 20 working days following the conclusion of the last step of the grievance procedure.
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> "Section 2. Within 10 working days after notification, the party desiring arbitration shall request the . . . [FMCS] to submit a list of arbitrators . . ." (Jt. Exh. 1, Art. 33, Sections 1 and 2)

2. The Charging Party, Mr. Sam Cash (a/k/a Sammy N. Cash [G.C. Exh. 5]) is employed as a WG-9 Machine Tool Operator, Step 4, in the Depot's Machine and Fabrication Branch (Tr. 14, 15). Mr. Cash became a member of Local 1945 in 1988; in November, 1989, was elected a shop steward (Tr. 15); and in February, 1990, was appointed Chief Steward on the second shift in the Maintenance Division (Tr. 15, 16).

3. In 1989, Mr. Cash applied for a Toolmaker, WG-3416-13 position (Merit Promotion Announcement No. 272-88, G.C. Exh. 2; Tr. 20). Although among the best qualified candidates, Mr. Cash was not selected.

4. The job announcement (G.C. Exh. 2) does not state that the job was to be temporary (see, also Tr. 66; 109); but it is conceded that the promotions to the WG-13 position initially were made temporary (Tr. 22; G.C. Exh. 5). Thus, Mr. Cash testified that he did not grieve the selection process initially - indeed, in view of the exclusion as a grievance of "non-selection for promotion from a group of properly ranked and certified candidates" [Jt. Exh. 1, Art. 32, Section 2 d. (7)], it does not appear that he could have grieved his non-selection (Tr. 175, 189, 190) - but in May 1990[3] the temporary promotions were made permanent without further competition and consideration (Tr. 23) and on May 21, 1990, Mr. Dale Stracener, Fifth Vice President of Local 1945, filed a Second Step grievance on behalf of Mr. Cash (G.C. Exh. 3; Tr. 23, 24, 100, 101). In pertinent part, the grievance alleged:

> "Two Toolmaker, WG-3416-13, Announcement. . .was converted from temporary to permanent. The conversion went into effect on 6 May 1990. Thus

violating Article 16, Section 1 of the Negotiated Agreement and FPM Chapter 335, Subchapter 1, 1-5, (d)." (G.C. Exh. 3).

Because the grievance involved a personnel matter and not an issue that arose in the work area, on July 17, 1990, Mr. Stracener refiled the grievance, with some stylistic changes, with the Depot's Civilian Personnel Officer (G.C. Exh. 4). The grievance as refiled alleged in pertinent part that,

"According to FPM Chapter 335, Subchapter 1, 1-5, (d)[,] [a] a temporary promotion may be made permanent without further competition provided the temporary promotion was made under competitive procedures and the fact that it might lead to a permanent promotion was made known to all potential candidates. The fact was not made known . . . to all potential candidates. Thus willfully and directly violating this Federal Personnel Manual." (G.C. Exh. 4)(emphasis in original); Tr. 25, 26, 101).

Each grievance, i.e., G.C. Exh. 3 and 4, as remedial action requested, "That Mr. Cash be promoted to WG-3416-13, be paid backpay and time adjusted accordingly to his record." (G.C. Exhs. 3 and 4).

5. The Depot's Acting Director of Personnel and Community Activities, Mr. Billy Gene Bickerstaff, in an undated letter to Mr. David Barnett, President of Local 1945, denied the grievance (G.C. Exh. 5; Tr. 27, 102, 218). Mr. Bickerstaff's response was as follows:

"I have reviewed your Step 3 grievance concern-ing an alleged violation of Article 16, Section 1 of the Negotiated Agreement and FPM Chapter 335. Specifically, you alleged that it was improper to convert two temporary promotion actions to permanent promotions because that potential action was not made known to Mr. Sammy N. Cash. Any time a job announcement is published, it is anticipated that the position will be filled on a permanent basis unless otherwise specified in the announcement. That was the case with Announcement Number 272-88 for a Toolmaker, WG-3416-13.

"Additionally, Mr. Cash was among the best qualified candidates who were referred for

consider- ation both times the certificate was used. Had he been selected either time, this complaint would not have been raised. Your complaint is therefore based on non-selection for promotion which is not a grievable issue. Your complaint is therefore denied." (G.C. Exh. 5)

6. During the period beginning May, 1990, through May, 1991, David Barnett was President of the Union[4], and one of the Union's points of contact in various labor relations matters, including arbitrations, with the Depot's Management-Employee Relations Branch (MER). Mr. Barnett reviewed and signed all Union-initiated correspondence concerning arbitrations before it left the Union Office. (Tr. 16, 17, 100, 108, 138, 147, 209, 214, 246).

During this same time period, David Dail was the Union's First Vice President. In this position, he acted for Mr. Barnett during the latter's absence. Gene Gilliand was the Union's Second Vice President. Mr. Gilliand was the Union officer responsible for processing grievances and drafting documents for Mr. Barnett's review and signature by which the Union invoked arbitration on selected grievances. Mr. Gilliand also acted, along with Mr. Barnett, as the Union's point of contact with MER in labor relations matters. (Tr. 16, 90, 122, 136, 138, 209, 214, 246).

Robert Chapman was the Union's Third Vice President and Jimmy Fortner was its Fourth Vice President. The record does not reveal their designated roles in the Union hierarchy.

(Tr. 16, 188, 200).

Dale Stracener and Charlotte Flowers were the fifth and Seventh Vice Presidents, respectively. They had joint responsibility for overseeing the representational duties of Union stewards and chief stewards and overall responsibility for representing bargaining unit employees in the Depot's Maintenance area. Ms. Flowers became Union President in May, 1991 (Tr. 16-17, 51, 99, 173).

Kenneth Lockridge was the Union's Sixth Vice President. In May 1991, he succeeded Mr. Gilliand as Second Vice President, and, in that position, took over the processing of arbitration cases. (Tr. 16, 41-42, 90-91, 240).

Mr. Barnett and each of the Vice Presidents served on the Union's Executive Board. According to Mr. Barnett, the Executive Board makes binding decisions regarding the merits, or lack thereof, of grievances that unit employees or Union officials propose to arbitrate. (Tr. 29, 102, 206, 208, 213-214).

7. There was considerable variation in the precise details of the handling of Mr. Cash's grievance by the Union. The following scenario is based on the testimony, which I credit, which appears most credible, most probable and represents the preponderant weight of the testimony.

The Union's Grievance Committee, which consists of five officers and was chaired by Mr. Gilliand during the period of May, 1990, until May, 1991, as noted above, considers each grievance not settled at Step 3 (Jt. Exh. 1, Art 32, Section 7, Step 4) to make recommendations to the Executive Board as to whether the Union should arbitrate the grievance (Tr. 173). Mr. Cash's grievance was considered by the Grievance Committee and was turned down (Tr. 137, 141, 176, 189-190, 191, 194, 195)(5) because the Committee viewed it as dealing "mostly" with non-selection which is not grievable (Tr. 189). Convinced that the grievance needed to be arbitrated because it concerned non-compliance with the Federal Personnel Manual (FPM), a point the Grievance Committee seemed not to have fully appreciated, Messrs. Stracener and Cash took the matter to the Executive Board.(6) This was an established procedure (Tr. 141) and there is no dispute either that Messrs. Cash and Stracener appeared before the Executive Board or that the Executive Board recommended arbitration (Messrs. Chapman and Fortner did not recall that the Cash grievance was ever brought up at an Executive Board meeting but was dealt with only by the Grievance Committee (Tr. 193, 202, 203)); however, there is disagreement as to whether the recommendation was conditional i.e., proforma, to buy time, but with no intention to go to arbitration, or was unconditional. Messrs. Cash, Stracener, David Dail, then First Vice President, Gilliand and Lockridge each testified clearly and credibly that the Executive Board recommended arbitration unconditionally without any qualification (Tr. 30, 64, 65, 70, 102, 123, 138, 240); their testimony is supported by President David A. Barnett's letter dated October 29, 1990, to Ms. Lynn Tuggle, Labor Relations Specialist for the Depot, that,

> ". . . four employees . . . agree to let their case be decided by Sam Cash's case
>
> presently in Arbitration . . . you indicated this was all right with management to take
>
> up with arbitrator who is picked for Sam Cash's case . . . . " (G.C. Exh. 6);

by Mr. Gilliand's testimony that he prepared a letter to the Commander of the Depot for Mr. Barnett's signature invoking arbitration (Tr. 138); that he saw such letter in the file (Tr. 148); and the existence of such signed letter was further shown by Respondent's production of the letter (Union Exhibit 2 for identification), although Mr. Barnett had no recollection of it (Tr. 208, 213). Their testimony is also bolstered by various other testimony and evidence including, by way of example, the posting of Mr. Cash's name on the board of pending arbitration cases maintained in the President's office (Tr. 32, 36, 69, 70, 105, 106, 140, 216); the absence of any notation that Mr. Cash's case was "conditional" (Tr. 106, 137, 140-183) whereas, Mr. Gilliand testified without contradiction that if a case were conditional a notation was placed on the back of the file, " . . . to let us know . . . to try to get something done." (Tr. 146, 149); the repeated assurances to Mr. Cash that the Union was waiting on a list of arbitrators before going forward with the arbitration (Tr. 33-36, 37-39, 66, 67, 71, 77, 105, 124-125, 126, 139); etc. Only Ms. Flowers testified that the Executive Board gave only conditional approval of arbitration with the understanding that there was no intent to arbitrate the case but only to provide time to try and settle the case (Tr. 177; 183-184). Indeed, she stated that at that time, ". . . we did not have enough evidence" to go to arbitration (Tr. 184).(7) I do not credit Ms. Flowers' testimony that the Executive Board granted conditional approval of arbitration for the reasons that I did not find her testimony in this regard convincing, her testimony in this regard was directly contradicted by the testimony of Messrs. Cash, Stracener, Dail, Gilliand and Lockridge, her testimony is wholly unsupported, indeed, as she conceded, "There is nothing in the file that says . . . if it's conditional." (Tr. 183), and is contrary to other evidence and testimony as set forth above. Nor do I credit the testimony of either Mr. Fortner or Mr. Chapman that: a) the Cash grievance was not considered by the Executive Committee, as this was directly contradicted by all other testimony, even including that of Mr. Barnett who, although he suffered an almost total lapse of memory, recalled that the Cash grievance did come before the Executive Board (Tr. 206); or b) that the Grievance

Committee approved conditional arbitration, as this testimony is contradicted by all other testimony and I did not find their testimony in this regard credible or convincing. For example, Mr. Fortner first testified that, " . . . it was dealing with non-selection, and we saw not [sic] merit to send it on to arbitration" (Tr. 190) and that this was clearly communicated to Messrs. Cash and Stracener (Tr. 190); but then, being a very suggestible witness and being carefully led by Respondent's attorney, Mr. Fortner then testified, "Yes. We agreed to do that to see if Management would consider talking about a settlement in it." (Tr. 190-191); but later, Mr. Fortner stated that the decision of the Grievance Committee " . . . was to not arbitrate it at all." (Tr. 194). On the other hand, I found the testimony of Messrs. Cash, Stracener, Dail, Gilliand and Lockridge in this regard wholly credible and their testimony is fully consistent with and supported other evidence and testimony as set forth above. Accordingly, I credit their testimony and find that the Executive Board approved arbitration of Mr. Cash's grievance without qualification.

8. As noted above, Mr. Gilliand prepared a letter, for President Barnett's signature, to the Commander of the Depot invoking arbitration of the Cash grievance and I find that, as Mr. Gilliand testified, he saw the letter, signed by President Barnett, in the Union's file (Tr. 148); however the letter invoking arbitration was never received by the Depot (Tr. 154). I further find, as Mr. Gilliand credibly testified and without contradiction, that he prepared, also for President Barnett's signature, a request to FMCS in Washington for a list of arbitrators (Tr. 148); however the record does not show whether this letter was ever signed, mailed or received by FMCS, although Mr. Gilliand found nothing in the file from FMCS (Tr. 148).

Mr. Gilliand placed Mr. Cash's name and the issue involved, "FPM Violation" (Tr. 70), under the "ARBITRATIONS" heading on a board in President Barnett's office. Mr. Cash checked the board frequently to see if the Depot and the Union had set a date for the arbitration hearing. Seeing none, Mr. Cash inquired about the case on repeated occasions. Between September, 1990, and May, 1991, President Barnett assured Mr. Cash on various occasions, often in the presence of other Union officers, that the case would be arbitrated and that all we were waiting for was a list of arbitrators (Tr. 32-33, 105, 125, 139, 140, 216). On one occasion, for example, Mr. Cash testified that President Barnett told him, ". . . there is nothing to worry about, Sam. This is going to be arbitrated. We've got a winner here. We're going to win this one." (Tr. 33).[8] Mr. Cash also repeatedly spoke to other Union officers about the status of his case (Mr. Cash may have been guilty of a bit of hyperbole in estimating the number of times - Stracener, at least 50 times; Gilliand, at least 50 times; etc., but there is no doubt, whatever that he did so on repeated occasions as I have found). At no point prior to Mr. Dail's conversation with Mr. Cash, before he, Dail, left office, which would have placed it about May, 1991 (not, February, and I find nothing in his testimony that suggests that the grievance would not be arbitrated - only that no arbitrator had been "struck"), did any Union officer ever inform Mr. Cash that his grievance would not be arbitrated; nor did the Executive Board at any time rescind, or withdraw, its approval that Mr. Cash's case be arbitrated (Tr. 125, 140, 241)

9. It is conceded that even if a case is conditionally approved for arbitration, the proper procedure is to invoke arbitration (Tr. 183, 186, 209), i.e., in order to provide additional time, the time limitations of Article 33 - written request for arbitration within 20 working days following conclusion of step three; request a list of arbitrators within 10 working days after notification of request for arbitration (Joint Exh. 1, Article 33, Sections 1 and 2) - mandate invocation of arbitration and a request for a list of arbitrators.

10. At the time the Union filed Mr. Cash's grievance, Mr. Cash held a WG-9, Step 3, Machine Tool Operator position. The WG-9, Step 3, Machine Tool Operator rate was $11.44 an hour (Tr. 43); the WG-13, Step 1, Toolmaker rate was $12.55 an hour (G.C. Exh. 7), a difference of $1.11 per hour.

11. Statements by Mr. Jerry Burgess, shop steward in Building 145 (Tr. 71, 85), when Mr. Cash filed his grievance that the ". . . Union was not backing nor supporting me on this grievance issue" (Tr. 86); that President Barnett told Mr. Cash that Mr. Burgess had come to him on several occasions about Mr. Cash's grievance (Tr. 87); that later Mr. Burgess told Mr. Cash, ". . . it would be best if I drop all of this and walk away from it while I could . . . that if I continued . . ., 'if you or anyone else continues in this matter I will beat the God damn hell out of you and put you in the hospital.'" (Tr. 87-88), indicates that strong feelings existed within the Union in opposition to the Cash grievance.

12. Mr. Dail testified that prior to his leaving Union office he had a call from MER about the Cash grievance; that he asked the secretary to pull the file to check its status; that she told him " . . . there had not been an arbitrator struck for the case." (Tr. 133); and that he had told Mr. Cash (Tr. 133, 134). Mr. Lockridge was elected Second Vice President in the May, 1991, election[9] (Tr. 239) at which time he succeeded Mr. Gilliand in charge of arbitration cases (Tr. 246). He testified that after he assumed responsibility for the arbitration cases, Mr. Cash asked about the progress of his grievance and that he told Mr. Cash that, ". . . paperwork - - the complete paperwork - - had not been submitted, and I didn't think it would be going to arbitration because of that." (Tr. 248)[10] Ms. Flowers testified that after her election in May, 1991, she asked Mr. Lockridge to report to her on the status of the pending arbitration cases, which numbered about 20 including Mr. Cash's, and that, "He brought Sam's [Cash] in and said that there was no paperwork sent in for his to go to arbitration." (Tr. 180). Ms. Flowers stated, "There was nothing else I could do. Time was out even if I had wanted to" (Tr. 180). As General Counsel noted, "Apparently, she made no attempt to contact Depot labor relations personnel to attempt to get the Depot to waive the Negotiated Agreement's time limits or to otherwise resuscitate Cash's grievance." (General Counsel's Brief, pp. 15-16) [Article 33, Section 7, of the Agreement, Jt. Exh. 1, does provide: "Section 7. Time limitations in this Article can be extended for unusual reasons if mutually agreed to by both parties."]

Conclusions

Following the Executive Board's unqualified decision to arbitrate his grievance, Mr. Cash repeatedly - over a nine month period - sought and received, from President Barnett and from other officers of Local 1945, unwaivering assurance that it would arbitrate his grievance; nevertheless, Local 1945 failed to file the necessary paperwork to invoke arbitration. The Union's assurances that it would arbitrate his grievance misled Mr. Cash and he reasonably concluded that the Union would arbitrate his grievance - indeed, that the decision in his arbitration case would govern four other grievances which he, as a Chief Steward, had handled (G.C. Exhs. 6 and 8).

Mr. Gilliand, then Second Vice President and responsible for processing grievances, immediately after the Executive Board approved arbitration of Mr. Cash's grievance, placed Mr. Cash's name and the issue involved, "FPM violation", on the "Arbitration" board in President Barnett's office and his name remained on the "Arbitration" board at least through May 14, 1991, the date of Ms. Flowers' election as President of Local 1945. Mr. Gilliand prepared two letters for President Barnett's signature: one, the letter invoking arbitration of Mr. Cash's grievance; the other, the letter to FMCS requesting a list of arbitrators. President Barnett signed the letter invoking arbitration but it was not received by the Depot. The record does not show that the letter to FMCS was ever signed; but it does show that the Union's file contained no response from FMCS. Mr. Gilliand also prepared a letter dated October 29, 1990, for President Barnett's signature to Ms. Tuggle, a Depot Labor Relations Specialist. This letter, General Counsel Exhibit 6, was signed by President Barnett and President Barnett told Mr. Stracener that he had sent the "memo" (G.C. Exh 6) to Ms. Tuggle (Tr. 107). President

Barnett professed to have no recollec-tion of the letter invoking arbitration (Union Exhibit 2 for identification) and refused even to acknowledge or deny his signature. He professed to have no recollection of General Counsel Exhibit 6, but did admit that it looked like his signature. I have found that President Barnett discussed General Counsel Exhibit 6 with both Mr. Cash and Mr. Stracener and that he gave each a copy of the letter to Ms. Tuggle. Not only did President Barnett on repeated occasions tell Mr. Cash that the Union was merely waiting to receive a list of arbitrators, but, on October 29, 1990, Mr. Barnett in his letter to Ms. Tuggle stated, inter alia, ". . . Sam Cash's case presently in Arbitration . . ." and, ". . . take up with arbitrator who is picked for Sam Cash's case . . . ." (G.C. Exh. 6). As Mr. Cash's grievance had been denied at the third step by Mr. Bickerstaff (G.C. Exh. 5) in early September, 1990 (Tr. 28), it is reasonable to assume that Ms. Tuggle would have inquired about a pending Cash arbitration case, if not initially in her discussion with Mr. Gilliand, certainly after receipt of Mr. Barnett's October 29, 1990, letter, for the reason that there was no such arbitration pending as the Depot never received any document invoking arbitration of the Cash grievance and, by then, the time within which to request arbitration had expired. (Tr. 154, 155). Ms. Tuggle was not called as a witness and, in the absence of any explanation for her absence, I draw the adverse inference that she did call to President Barnett's attention the fact that the Depot had received no document invoking arbitration of Mr. Cash's grievance.

With knowledge that arbitration had not been invoked, President Barnett, neverthless, continued, repeatedly, to assure Mr. Cash that his case would be arbitrated - that the Union was merely waiting to receive a list of arbitrators. Why this blatent duplicity? Why did President Barnett "string" Mr. Cash along, to say nothing of his fellow officers, e.g., Stracener (Tr. 105), Dail (Tr. 124, 125, 126), Gilliand (Tr. 139) and Lockridge (Tr. 241, 249)? Why did President Barnett refuse to acknowledge his signature on the letter invoking arbitration and on the letter to Ms. Tuttle? What was behind President Barnett's loss of memory? We do not know. The record does show that shop steward Burgess talked to President Barnett on several occasions about Mr. Cash's grievance and that Mr. Burgess harbored deep animosity toward Mr. Cash over the grievance, but whether this influenced Mr. Barnett's actions, or brought about the failure to invoke arbitration and/or to request that FMCS furnish a list of arbitrators, can only be speculated; but the record establishes, as General Counsel states, ". . . that the Union first misled Cash to believe that it would invoke arbitration; then deceived him into believing that it had, in fact, invoked arbitration; and finally, told him that once it received a list of arbitrators, it would be prepared to move ahead with the arbitration of his grievance (and, indirectly, the four related grievances)." (General Counsel's Brief, p. 18). I fully agree with General Counsel that the Union's actions amounted to more than mere negligence; that they were repeated, deliberate, and unjustified, and caused Mr. Cash to lose his right to pursue his grievance.

The Authority, after reviewing the duty of fair represen-tation, first set forth the standard of fair representation where union membership is not a factor, in National Federation of Federal Employees, Local 1453, 23 FLRA 686 (1986)[(11)] (hereinafter, "NFFE"), as follows:

> ". . . where union membership is not a factor, the standard for determining whether an exclusive represen-tative has breached its duty of fair representation under section 7114(a)(1) is whether the union deliberately and unjustifiably treated one or more bargaining unit employees differently from other employees in the unit. That is, the union's actions must amount to more than mere negligence or

ineptitude, the union must have acted arbitrarily or in bad faith, and the action must have resulted in disparate or discriminatory treatment of a bargaining unit employee." (id, at 691)

In NFFE, supra the Authority dismissed the consolidated complaint because there was no showing that the union's actions constituted other than mere negligence or miscommunication (as to Kenneth A. Crawford) and that General Counsel had not established that the union had deliberately and unjustifiably treated an employee differently from other unit employees (as to Clara Mae Dixon).

Shortly after NFFE, supra, the Authority decided International Associated of Machinists and Aerospace Workers, Local 39, AFL-CIO, 24 FLRA 352 (1986)(hereinafter "IAM"), where it applied the standard set forth in NFFE, supra, and found that the union's actions violated the Statute, stating,

"In agreement with the Judge, we conclude that the Union's actions misled Evans into thinking that the Union was going to file the grievance, and Evans' reliance on the Union caused him to lose the right to file a timely grievance. We agree with the Judge that the Union's actions amounted to more than mere negligence and conclude that the Respondent deliber-ately and unjustifiably failed to file a grievance on behalf of Evans. We further conclude, in the absence of a showing to the contrary, that the Union treated Evans differently from other unit employees by failing to file his grievance. By this conduct, the Union breached its duty of fair representation as required by section 7114(a)(1) of the Statute and thereby violated section 7116(b)(1) and (8) of the Statute." (24 FLRA at 353).

As General Counsel states,

"Even in the absence of proof of any hostile motive, a union may still pursue a course of action or inaction that is so unreasonable and arbitrary as to violate the duty of fair representation. Griffin v. United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, 469 F.2d 181, 183 (4th Cir. 1972), cited with approval, U.S. Air Force, Loring Air Force Base, Limestone, Maine, 43 FLRA 1087,

1099 (1992) (Loring Air Force Base). Arbitrary conduct by a union can violate the duty of fair representation. ALPA v. O'Neill, 111 S. Ct. 1127, 1130 (1991)(a union breaches its duty of fair representation if its actions are either arbitrary, discriminatory, or in bad faith). In this regard, the NLRB has held:

> " . . if a duty to avoid arbitrary conduct . . . means anything, it must mean at least that there be a reason for action taken. Sometimes the 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.
>
> General Truck Drivers, Warehousemen, Helpers and Automobile Employees, Local 315, 217 NLRB 616, 617 (1975), cited with approval, Loring Air Force Base at 1099. See also Local 3036, New York Taxi Drivers Union, SEIU, AFL-CIO, 280 NLRB 995, 996 (1986) (a union violated its duty of fair representation by the manner in which it processed a grievance because the union presented no evidence that it acted reasonably)." (General Counsel's Brief, pp. 20-21)

Here, General Counsel has established that Mr. Cash relied on the repeated misrepresentations of President Barnett and other Union officers regarding the Union's stated intention to arbitrate his grievance. The Union's conduct was arbitrary and at no point did the Union present any credible evidence to explain that conduct. This is not a case of mere negligence as of miscommunication. To the contrary, the record shows a nine-month program of deception and deliberate and intentional misconduct. At no point during this nine-month period did the Union state or imply to Cash that it had no intention of arbitrating his grievance.(12) He relied on these assurances and, as a result of his reliance on these repeated assurances, Mr. Cash has lost the right to have his grievance arbitrated. The Union breached its duty of fair representation under § 14(a)(1) of the Statute and thereby violated §§ 16 (b)(1) and (8) of the Statute.

REMEDY

General Counsel seeks, ". . . a make-whole remedy based on the $1.11 hourly difference (that is, the amount Cash lost as a result of the Union's conduct) running from the date the Union should have invoked arbitration (September 1990) to the date of a ruling in this matter . . . In the alternative, the time period for calculating the make-whole remedy should run from September 1990 until September 3, 1991 (the date Cash filed the unfair labor practice charge." (General Counsel's Brief, p. 24). A make-whole remedy (i.e, a backpay remedy, albeit circumscribed either by the date of decision herein or by the date of filing the ULP charge), is not warranted in this case since the record fails to show that the Union's breach of its duty contributed to any loss which is compensable. Service Employees International Union, Local 556, AFL-CIO, 17 FLRA 862 (1985); United Steelworkers of America, AFL-CIO v. NLRB, 692 F. 2d 1052, 1058 (7th Cir. 1982).

The Grievance Committee rejected Mr. Cash's grievance for arbitration because it appeared to the Committee that his non-selection was being challenged which, under the Agreement, was nongrievable. The Executive Board approved arbitration of the grievance after Messrs. Cash and Stracener made it clear that non-selection was not being grieved but solely the asserted violation of the Federal Personnel Manual. Consequently, had the grievance been sustained the selections for permanent positions would have been set aside, but nothing in the record suggests that Mr. Cash could have been awarded the position. Rather, the selections for the permanent positions would have had to be made through competitive procedures.

General Counsel's further request, that the Union be ordered to seek permission from the Depot to waive the time limits set forth in the Agreement and agree to arbitrate the grievance, will be granted. To assure that the strongest possible case be made to the Depot, I shall order that the Union provide representation by its own legal counsel, or outside legal counsel if appropriate, to seek a waiver of time limits under the negotiated grievance procedure.

Having found that Local 1945 violated §§ 16(b)(1) and (8) of the Statute it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C.§ 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R. § 2423.29, it is hereby ordered that the American Federation of Government Employees, Local 1945, Bynum, Alabama, shall:

1. Cease and desist from:

(a) Failing to fairly represent Sam Cash, or any other employee, as required by § 7114(a)(1) of the Statute.

(b) In any like or related manner interfering with, restraining, or coercing any employee in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Fairly represent Sam Cash, and all other employees in its unit of exclusive recognition, as required by § 7114(a)(1) of the Statute.

(b) Seek permission, through its own legal counsel, or outside legal counsel if appropriate, from the Anniston Army Depot, Anniston, Alabama, to waive the time limits under the negotiated grievance procedure to arbitrate the grievance of Sam Cash and, if the time limits are waived and Anniston Army Depot agrees to arbitrate the grievance, provide Mr. Cash, upon request, with Union representation by its own legal counsel, or outside legal counsel if appropriate, to handle the arbitration proceeding.

(c) Post at its business office, at its normal meeting places, and at all places where notices to members, and to employees of the Anniston Army Depot are customarily posted, copies of the attached Notice or forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the President of the American Federation of Government Employees, Local 1945, and they shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and all other places where Union notices to members and to unit employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to § 2423.30 of the Regulations, 5 C.F.R § 2423.30, notify the Regional Director, Atlanta Region, Federal Labor Relations Authority, 1371 Peachtree Street, N.E., Suite 122, Atlanta, Georgia, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

_____

WILLIAM B. DEVANEY

Administrative Law Judge

Dated: May 14, 1993

Washington, DC

NOTICE TO ALL MEMBERS AND OTHER EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR MEMBERS AND OTHER EMPLOYEES THAT:

WE WILL NOT fail to fairly represent Sam Cash, or any other unit employee, as required by § 7114(a)(1) of the Federal Service Labor-Management Relations Statute.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employee in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL fairly represent Sam Cash, and all other employees in our unit of exclusive representation, as required by § 7114(1)(1) of the Federal Service Labor-Management Relations Statute.

WE WILL seek permission, through our own legal counsel, or outside counsel if appropriate, from the Anniston Army Depot, Anniston, Alabama, to waive the time limits under our negoti-ated grievance procedure to arbitrate the grievance of Sam Cash.

WE WILL, if the Anniston Army Depot, Anniston, Alabama, agrees to waive the time limits and arbitrate the grievance, provide Mr. Cash, upon request, with Union representation by our own legal counsel, or outside legal counsel if appropriate, and will pursue the arbitration in good faith and with all due diligence.

_____

(Labor Organization)

Dated: _____ By: _____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members or employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Atlanta Region, Federal Labor Relations Authority, whose address is: 1371 Peachtree Street, NE, Suite 122, Atlanta, Georgia 30367, and whose telephone number

is: (404) 347-2324.

1. For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statuary reference, e.g., Section 7116(b)(1) will be referred to, simply, as, "§ 16(b)(1)".

2. General Counsel, in n.1, p.1 of his Brief, very correctly notes that Union Exhibit 1 was rejected (Tr. 47). Although I specifically instructed the reporter to place rejected Union Exhibit 1 in a separate "Rejected Exhibit File", no such file accompanied the transcript and exhibits this Office received; nor was the rejected exhibit received by this Office. General Counsel also correctly notes that Union Exhibit 2 for identification was identified (Tr. 187, 207, 209) but never offered as an exhibit. The transcript correctly notes that Union Exhibit 2 was identified but was neither received nor rejected (Tr. 4). Although the Regional Office sent a facsimile copy to this Office, it was never part of the "transcript" so that there is nothing to remove from the transcript as General Counsel requests. To avoid any possible doubt, Union Exhibit 2 for identification was not offered or received as an exhibit.

3. The date stated at pages 22 and 23 as 1991 obviously was wrong (e.g., grievance was filed May 21, 1990 (G.C. Exh. 3)) and later was stated to have been wrong (Tr. 24); however, to avoid any possible misunderstanding, the year 1991 on pages 22 and 23 of the transcript is hereby corrected to read, "1990".

4. Mr. Barnett did not seek re-election in 1991 and his term ordinarily would have expired in February, 1991; but the first election, held in February, was set aside and Mr. Barnett continued to serve as President until May, 1991, when, following the second election, he was succeeded as President by Ms. Charlotte Flowers (Tr. 17, 173, 205, 206).

5. Mr. Gilliand, then Second Vice President and Chairman of the Grievance Committee; Ms. Charlotte Flowers, then Seventh Vice President and member of the Grievance Committee each credibly so testified and I credit their testimony that the Grievance Committee rejected Mr. Cash's grievance for arbitration. Mr. William Kenneth Lockridge, then Sixth Vice President and a member of the Grievance Committee, testified that the Grievance Committee merely recommended that

Mr. Cash's grievance go to the Executive Committee (Tr. 240). Messrs. Jimmy Fortner, then Seventh Vice President, and Robert Lee Chapman, then third Vice President, testified that the Grievance Committee found the grievance without merit

(Tr. 190, 201), but then assessed that the Grievance Committee granted "conditional" arbitration, i.e., no intention to arbitrate but just to buy more time, although Mr. Fortner later testified that the vote of the Grievance Committee "was to not arbitrate it at all." (Tr. 194). For reasons set forth more fully hereinafter, I do not credit the testimony of Messrs. Fortner and Chapman that the Grievance Committee approved or recommended "conditional arbitration". Mr. B. Dale Stracener, then Fifth Vice President and Mr. Cash's designated representative on the grievance, did not recall that Mr. Cash's grievance was ever presented to the Grievance Committee (Tr. 110) and Mr. Cash asserted that his grievance was never presented to the Grievance Committee, i.e., that, as he was advised to do, the Grievance Committee was bypassed and the grievance was presented directly to the Executive Committee (Tr. 28, 61, 62). I do not credit

Mr. Cash's denial, and give no weight to Mr. Stracener's lack of memory, that the grievance was considered by the Grievance Committee, although it is probable that at the Grievance Committee level the grievance was handled in a perfunctory manner largely, or entirely, on the basis of Mr. Bickerstaff's denial (G.C. Exh. 5), since the record shows that it was not until meeting with the Executive Board that Messrs. Stracener and Cash

made it clear that, "We were grieving the fact that they weren't adhering to the procedure laid out in the FPM" (Tr. 112); that, ". . . we wasn't [sic] grieving non-selection. We was [sic] grieving the FPM Chapter 335 violation." (Tr. 112).

6. It is conceivable, as Mr. Gilliand stated (Tr. 137), that the matter was brought to the Grievance Committee a second time at which point the Grievance Committee recommended arbitration; but this is wholly unsupported, was contradicted, and is illogical. Had the Grievance Committee recommended arbitration there would have been little or no reason for Mr. Cash's appearance before the Executive Board since the Executive Board routinely follows the recommendations of the Grievance Committee (Tr. 206-207).

7. Mr. Fortner and Mr. Chapman, as noted above, testified that the Cash grievance was never, to their knowledge, considered by the Executive Committee; and each testified that the Grievance Committee gave only conditional approval of arbitration (Tr. 190, 191, 201, 202, 203).

8. Mr. Cash said he spoke to Mr. Barnett between September, 1990, and May, 1991, at least 50 times (Tr. 33).

Mr. Stracener testified that he heard Mr. Barnett tell

Mr. Cash on a couple of occasions that his case, " . . . was being processed and they were working on a list of arbitrators." (Tr. 105). Mr. Dail testified that he heard President Barnett tell Mr. Cash that " . . . they were waiting to strike an arbitrator." (Tr. 125). Mr. Gilliand testified that, ". . . Sam used to stay over in the mornings sometimes. He would come by there, and me and David Barnett and David Dail would be there. He would want to know from all of us, you know, how his case was going. We told him it was still pending. We was doing what we could . . . I heard David tell him that, you know, his case was still there . . ." (Tr. 139). Mr. Cash testified that in November, 1990, he went to President Barnett's office to check on his case; and

Mr. Barnett ". . . as always, informed me that it was being arbitrated - - waiting for a list of arbitrators. I then asked him about the other four grievances that had come back from third step denied. Mr. Barnett stated to me yes, Sam, I have a document for you. He handed me this document that he had signed where he identified that Management and the Union had made an agreement that my arbitration would be controlling on these other four cases." (Tr. 38; G.C. Exh. 6).

Mr. Stracener testified concerning the other grievances which involved the same FPM violation; testified concerning Messrs. Barnett's and Gilliand's involvement at the third step and their agreement with MER (G.C. Exh.6); that Mr. Barnett gave him a copy of the letter to Ms. Lynn Tuggle confirming the agreement (G.C. Exh. 6); and that he had also given Mr. Cash a copy (Tr. 107). Mr. Barnett denied that he ever talked to

Mr. Cash about arbitration of his case; had no recollection of anyone asking about Mr. Cash's case; had no recollection of talking to Mr. Cash or to Mr. Stracener about the grievances of Jackson, Porter, Elder and Styles; when shown the letter to Ms. Lynn Tuttle (G.C. Exh. 6), he said the signature looked like his but he had no recollection of the document (Tr. 211); and when shown Union Exhibit 2 for identification, the letter invoking arbitration, he had no recollection of the document. I found Mr. Barnett to be a thoroughly unbelievable witness (Tr. 228, 230). I found Messrs. Cash, Stracener, Dail and Gilliand to be wholly credible witnesses and I credit their testimony that Mr. Cash repeatedly inquired about his case from September, 1990 to May, 1991; that Mr. Barnett did repeatedly assure Mr. Cash that his case was being processed and they were waiting on a list of arbitrators; and that

Mr. Barnett discussed G.C. Exh. 6 both with Mr. Cash and

Mr. Stracener as they each credibly testified.

9. Mr. Lockridge in early 1992 resigned his Union office because he, ". . . didn't care for what was going on, the way it was being done and the treatment of the employees."

(Tr. 247, 248).

10. Mr. Cash testified that in the last week of June, 1991, Mr. Lockridge came to his work area and told him that his case would not be arbitrated," . . . That the proper paperwork was not submitted to invoke arbitration." (Tr. 41-42). Mr. Cash further stated, "I asked him why, and he said he didn't know. He couldn't understand it. I asked him has this ever happened before. He said no . . . ." (Tr. 42).

11. Judge Dowd also reviewed at length the genesis of the duty of fair representation; id at 701-710.

12. I am aware, of course, that Mr. Dail testified that prior to his leaving Union office he had a call from MER about the Cash grievance; that he asked the secretary to pull the file and check its status; that she told him, ". . . there had not been an arbitrator struck for the case" (Tr. 133); and that he had told Mr. Cash (Tr. 133, 134). Respondent asserts that, "Mr. Cash failed to acknowledge that back in February 1991, Mr. Dail told him that . . . there had not been an arbitrator struck in his case . . but took no action to personally inquire of his case, despite the clear red flag being raised." (Respondent's Brief, p. 11).

My impression at the time Mr. Dail testified was that this occurred just before he left office. Ordinarily, this would have been February; but because the first election was set aside and a second election ordered, the officers, including Mr. Dail, did not leave office until May, 1991. Accordingly, I have concluded that this conversation with Mr. Cash took place in May, 1991, not February, 1991. But, in any event, this merely confirmed what President Barnett, and other Union officers, repeatedly told Mr. Cash, namely, that the Union was waiting for a list of arbitrators, i.e., that no arbitrator had been "struck".