UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF AGRICULTURE FOOD SAFETY AND INSPECTION SERVICE WASHINGTON, D.C. Respondent and NATIONAL JOINT COUNCIL OF FOOD INSPECTION LOCALS, AFGE Charging Party	Case No. WA-CA-01-0181

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his/her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JUNE 10, 2002**, and addressed to:

Office of Case Control Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 7, 2002

Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: May 7, 2002

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
WASHINGTON, D.C.
Respondent

and Case No. WA-CA-01-0181

NATIONAL JOINT COUNCIL OF FOOD INSPECTION LOCALS, AFGE
Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ

02-37

WASHINGTON, D.C.

U.S. DEPARTMENT OF AGRICULTURE FOOD SAFETY AND INSPECTION SERVICE WASHINGTON, D.C. Respondent and NATIONAL JOINT COUNCIL OF FOOD INSPECTION LOCALS, AFGE Charging Party	Case No. WA-CA-01-0181

Ms. Cheryl R. Dunham, Esquire
Mr. Jonathan C. Theodule
For the Respondent

Mr. David Rodriguez, Representative
For the Charging Party

Thomas F. Bianco, Esquire
Richard Bernstein, Esquire
For the General Counsel

Before: 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, et seq.[1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent sent an e-mail on September 6, 2000, to bargaining unit employees at a plant in Austin, Minnesota, ". . . stating that the private plant manager wanted to pull out of the HACCP Inspection Models Project (HIMP) unless the Union negotiated a modification to HIMP that was more acceptable to plant management" and that Respondent thereby, ". . . encouraged local union officials to contact a national level officer to tell him . . . they supported HIMP and that they wanted the union to negotiate . . . on modifying the program . . . .", all in violation of § 16(a)(1) and (5).

This case was initiated by a charge filed on December 26, 2000, by the American Federation of Government Employees, AFL-CIO (hereinafter, "AFGE"), which asserted, in part, that Respondent told the then President of AFGE Local 368, ". . . to influence higher-level union officials to support the HACCP Inspection Models Project (HIMP) . . . to influence the Charging Party to change its position regarding the number of bargaining unit members who should be assigned to work on a HIMP processing line" and, "By its actions FSIS bargained in bad faith with the NJC and attempted to control the NJC . . . ." (G.C. Exh. 1(a)). The charge alleged violation of §§ 16(a)(1), (3), (5) and (8) of the Statute.

A first amended charge was filed on July 18, 2001, by the National Joint Council of Food Inspection Locals, AFGE (G.C. Exh. 1(b)) which alleged that Respondent, "On or about September 6, 2000 . . . bypassed the Union and interfered with the right of employees to rely on the Union for representation by sending an email message to bargaining unit employees encouraging them to put pressure on the National Joint Council . . . to change its position in negotiations over . . . [HIMP]" in violation of §§ 16(a)(1) and (5) of the Statute. (id.)

The Complaint and Notice of Hearing issued on July 30, 2001 (G.C. Exh. 1(c)), alleged violation of §§ 16(a)(1) and

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[1]

1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71" of the statutory reference, i.e., Section 7116 (a)(5) will be referred to, simply, as, "§ 16(a)(5)."

(5) and set the hearing for November 21, 2001. Respondent's Motion to Postpone Hearing (G.C. Exh. 1(f)), to which there was no objection, for good cause shown, was granted by Order dated October 26, 2001, and the hearing was rescheduled for December 12, 2001, pursuant to which a hearing was duly held in Washington, D.C., on December 12, 2001, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence hearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, by agreement of the parties January 14, 2002, was fixed as the date for mailing post-hearing briefs and Respondent timely mailed an excellent brief, received on January 16, 2002. General Counsel did not file a post-hearing brief. Upon the basis of the entire record, I make the following findings and conclusions.

PRELIMINARY MATTER

On November 30, 2001, Respondent filed a Motion for Summary Judgment (G.C. Exh. 1(h)); General Counsel filed an Opposition on December 7, 2001, which was not received until January 2, 2002, after the hearing; nevertheless, General Counsel's position was fully stated at the hearing (Tr. 50-56). Because there appeared to be material issues in dispute, the Motion for Summary Judgment was not ruled on and Respondent made a Motion to Dismiss (Tr. 57; 116) which was not ruled on at the hearing. Respondent has pursued the Motion to Dismiss in her brief.

The Statute, structurally, was patterned after the National Labor Relations Act (hereinafter, "NLRA"). Under each, a proceeding is instituted by a "charge", which is investigated and if reasonable cause to believe that an unfair labor practice may have occurred, a Complaint may issue; NLRA, § 10(b), 29 U.S.C. § 160(b); Statute, § 18(a)(1), 5 U.S.C. § 7118(a)(1) and each provides,

> ". . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge . . . . (NLRA, § 10(b), 29 U.S.C. § 160(b)).

> ". . . no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge . . . . (Statute, § 18(a)(4)(A), 5 U.S.C. § 7118(a)(4)(A)).

Quite early under the NLRA, the Supreme Court had occasion to address the relationship between a charge and the Complaint and, stated, in pertinent part, as follows:

> "Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow of out of them while the proceeding is pending before the Board. The violations alleged in the complaint and found by the Board were but a prolongation of the attempt to form the company union and to secure the contracts alleged in the charge. All are the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects. The Board's jurisdiction having been invoked to deal with the first steps, it had authority to deal with those which followed as a consequence of those already taken. We think the Court below correctly held that 'the Board was within its powers in treating the whole sequence as one.' [104 F.2d 658.]" National Licorice Co. v. National Labor Relations Board, 309 U.S. 350, 369 (1940) (Emphasis supplied)

In, National Labor Relations Board v. Indiana & Michigan Electric Co., 318 U.S. 9 (1943), the Court introduced the phrase that a charge, ". . . merely sets in motion the machinery of an inquiry." 318 U.S. at 18. The Court repeated this in National Labor Relations Board v. Fant Milling Company, 360 U.S. 301, 307 (1959); but the Court specifically stated,

> "What has been said is not to imply that the Board is, in the words of the Court of Appeals, to be left 'carte blanche to expand the charge as

> they might please or to ignore it altogether.' 258 F.2d at 856. Here we hold only that the Board is not precluded from 'dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.' National Licorice Co. v. National Labor Relations Board, 309 U.S. 350, at page 369 . . . ." (id. at 309) (Emphasis supplied).

The Authority has also so described a charge, Department of Defense, Dependents Schools Mediterranean Region, Naples American High School (Naples, Italy), 21 FLRA 849, 861 (1986) ("The charge serves merely to initiate an investigation and to determine whether a complaint in a matter should be issued. A charge has consistently been held to be sufficient . . . if it informs the alleged violator of the general nature of the violation charged against him . . . ." (id.); U.S. Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania, 40 FLRA 449, 455 (1991) (". . . the allegations in the complaint bear a relationship to the charge and are closely related to the events complained of in the charge. The charge put the Respondent on general notice of the allegation that it had violated the Statute by refusing to furnish the requested crediting plan . . . and that the General Counsel would be initiating an investigation on that allegation." (id.))

An amended charge is barred by § 10(b) of the NLRA if not sufficiently related to the timely filed original charge, Glaziers, Architectural, Metal and Glass Workers Local Union No. 558, 279 NLRB 150, 122 LRRM 1045 (1986); Dayton Auto Electric, Inc., 278 NLRB 551, 121 LRRM 1207 (1986); or alleges a new and different unfair labor practice, Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749 (4th Cir. 1949) and is barred by § 18(a)(4)(A) of the Statute, when the amended charge was raises a new and separate cause of action which must independently satisfy the limitation of § 18(a)(4)(A), Immigration and Naturalization Service, Washington, D.C., 4 FLRA 787, 794-95 (1980); U.S. Department of Energy, Western Area Power Administration, Golden, Colorado, 27 FLRA 268 (1987) ("The Union filed [a] . . . charge . . . on May 23, 1983, alleging that Respondent violated section 7116(a)(2) and (5) . . . by (1) refusing to consult or negotiate . . . on or about February 8, 1983, and

(2) interfering with the rights of supervisory craftsmen to participate in the Union's affairs since February 8, 1983. . . The Union filed a second . . . charge . . . on October 28, 1983, alleging that by creating a task force on pay rates for supervisory craftsmen . . . Respondent had bypassed the Union and bargained directly with employees . . . in violation of section 7116(a)(1) and (5) . . . ." (id. at 270-71). The Authority stated, "We conclude that the allegations in the complaint concerning the alleged bypasses are barred from further processing under section 7118(a)(4)(A) of the Statute." (id. at 271)).

Here, the original charge filed December 26, 2000, basically, was of control or domination in violation of § 16 (a)(3) and alleged, in part, that Respondent on, or about, September 6 and 9, 2000, by contacts with the then President of Local 368 [Patrick Maher] sought to have Maher influence higher-level union official to support HACCP. The original charge was filed by Mr. Bobby L. Harnage, Sr., AFGE.

The first amended charge was filed on July 18, 2001, and alleged that on, or about, September 6, 2000, Respondent, ". . . bypassed the Union and interfered with the right of employees to rely on the Union for representation by sending an email message to bargaining unit employees encouraging them to put pressure on the National Joint Council . . . to change its position in negotiations over HACCP Inspection Models Project (HIMP)." The first amended charge was filed by the Chairman, Mr. Delmer Jones, National Joint Council of Food and Inspection Locals, AFGE, and asserted violation of § 16(a) (1) and (5). The allegation of a by-pass was a new and separate cause of action; was not related to the unfair labor practice alleged in the original charge; and did not grow out of them while the proceeding was pending before the Authority; and was filed by an independent entity, the National Joint Council. Because the new allegation of by-pass occurred more than six months before the first amended charge was filed it is barred by § 18(a)(4)(A) of the Statute; and, inasmuch as the Complaint is based solely on the first amended charge, the Complaint must be dismissed.

In the event the Authority should disagree that this proceeding is barred by § 18(a)(4)(A) of the Statute, in the alternative, I make the following findings and conclusions:

FINDINGS

1. The HACCP Inspection Models Project (HIMP) was implemented in about 18 plants in the United States as a pilot project (Tr. 15, 23-24). The plants in the HIMP pilot project slaughter chickens or hogs (Tr. 15). Quality Pork Processors (QPP) is a large hog slaughter plant in Austin, Minnesota which volunteered to enter the HIMP project in 1999 (Tr. 17, 83-84).

2. Mr. Patrick Maher is a federal employee of the Food Safety Inspection Service (FSIS) and is a Consumer Safety Inspector at QPP. Mr. Maher was President of the Austin Local from 1997 until December, 2000 (Tr. 63, 64-65).

Dr. David Needham was the veterinary medical officer in charge of the FSIS at QPP (Tr. 26). Dr. Needham is now retired (Tr. 65). Mr. Richard Wolff has been a Relief Consumer Safety Inspector since 1986 in the Minneapolis District which consists of Montana, Wyoming, North and South Dakota and Minnesota (Tr. 13-14). Mr. Wolff is President of the Northern Council and is Vice-Chairman of the National Joint Council (Tr. 16).

Mr. Kelly Wadding owns and runs QPP (Tr. 83). He is not a federal employee (Tr. 82).

Mr. Michael J. Grasso, Jr. is the Director of the new Initiative Staff of FSIS and is the Project Manager for HIMP (Tr. 97).

3. Respondent and the National Joint Council entered into a Memorandum of Understanding (MOU) on May 19, 1999, to implement HIMP (G.C. Exh. 4; Tr. 18, 100). Before implementation of HIMP there had been seven federal inspectors at fixed positions (GS-7), and one floor inspector (GS-8) on each shift (Tr. 19, 20). The basic concept of HIMP was to place the responsibility for inspection on the plant and its employees and to convert federal inspection to verification activities anywhere on the line (Tr. 102, 103). Under HIMP there were four verification inspectors (GS-8) and one lead inspector (GS-9) who assisted the Veterinarian and did oversight verification (Tr. 21), on each shift (i.e., a reduction in numbers from 8 to 5 per shift; but increase in grade from GS-7 to GS-8; and GS-8 to GS-9).

4. Charging Party was dissatisfied with the elimination under HIMP of fixed location inspectors and requested AFGE to file suit under the Federal Meat and Poultry Inspection Act. Initially, the United States District Court ruled against AFGE; the Court of Appeals reversed and remanded; HIMP was modified, based on the decision of the Court of Appeals, to provide for three fixed location federal inspectors; the District Court approved the re-design; AFGE appealed; and the case was to be argued on January 11, 2002. Under the re-design, there are three on-line fixed positions, one verification inspector and two relief inspectors on each shift (i.e., now 6 instead of 5 as HIMP was originally implemented) (Tr. 21).

5. Mr. Wolff testified that the National Joint Council and Respondent had entered into an Agreement, known as "Relationship by Objective" (RBO), which is still in effect and provides, in part, as follows:

> "Management will reemphasize to all supervisors the importance of having an open line of communications with employees." (Tr. 42).

Mr. Maher said he communicated with Dr. Needham verbally and by e-mail (Tr. 75) and occasionally, ". . . we might write something up on the bulletin board . . . ." (Tr. 75).

6. Mr. Maher testified credibly, and without contradiction, that he, on his own volition, conducted a poll of all bargaining unit employees on the last week of August and the first week of September, 2000 (Tr. 72-73); that no representative of Respondent influenced his decision to conduct a poll--it was his, ". . . idea and a couple of other local officers."; that FSIS management was changing the program (HIMP) [as the result of the decision of the U.S. Court of Appeals] and, ". . . Nobody was asking our opinion" (Tr. 73) and we needed, "To let people know what we thought." (Tr. 73). Mr. Maher sent the results of his poll, "HIMP Injunction" by fax on September 8, 2000, to: the President of AFGE, Bobby Harnage; Senator Tom Harkin, U.S. Senator for Iowa, where Mr. Maher lives (Tr. 74); Mr. Wolff; and Mr. Tom Bailey, Administrator of FSIS (G.C. Exh. 3; Tr. 74-75).

7. Dr. Needham on September 6, 2000, sent an e-mail to bargaining unit members in which he reported that Mr. Wadding had told Mr. Grasso that if three fixed position inspectors were put on the line he, Wadding, wanted to pull out of HIMP; and if they wanted to see HIMP continue they should let Mr. Wolff know and try to work out a more acceptable modification (G.C. Exh. 2).

CONCLUSIONS

General Counsel has failed to show by a preponderance of the evidence that Respondent on September 6, 2000, by Dr. Needham's e-mail to bargaining unit employees by-passed employees; or that he unlawfully urged them to contact their union representative. To the contrary, Dr. Needham, pursuant to the establish procedure under the National Joint Council's RBO merely informed the employees that Plant management (Mr. Wadding) had told Mr. Grasso, Project Manager for HIMP, that if three fixed position inspectors were required to comply with the Court decision he, Wadding, wanted to pull out of HIMP, and if they wanted HIMP to continue, they should let Mr. Wolff, their National Council representative, know they supported HIMP and ask that he try to find an alternative to save HIMP. Respondent did not coerce any employee to do anything; did not by-pass employees; and did not interfere with the exercise of any right afforded employees by the Statute. President Maher's poll was taken by him, on his own volition, during the last week of August and the first week of September, 2000, and had been completed before Dr. Needham's e-mail of September 6, although he, Maher, did not send his fax until September 8, 2000. Mr. Maher said that Respondent did not encourage him to go to AFGE or the National Joint Council.

Having found that Respondent did not violate §§ 16(a)(1) or

(5), I recommend that the Complaint be dismissed.

Having found that the Complaint is barred by § 18(a)(4)(A) or, in the alternative, that Respondent did not violate §§ 16(a)(1) or (5) of the Statute, I recommend that the Authority adopt the following order.

ORDER

The Complaint in Case No. WA-CA-01-0181 be, and the same is hereby, dismissed.

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WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 7, 2002
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. WA-CA-01-0181, were sent to the following parties:

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_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: MAY 7, 2002
WASHINGTON, DC