

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

.....
U.S. NUCLEAR REGULATORY .
COMMISSION .
Respondent .
and .
NATIONAL TREASURY EMPLOYEES .
UNION AND NATIONAL TREASURY .
EMPLOYEES UNION, CHAPTER 208 .
Charging Party .
.....

Case No. 3-CA-00074

Laurence M. Evans, Esquire
For the General Counsel

James E. Cradock, Esquire
For the Respondent

Linda Vespereny, Esquire
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on November 9, 1989, by the National Treasury Employees Union and National Treasury Employees Union, Chapter 208, (hereinafter called the Union), a Complaint and Notice of Hearing was issued on January 31, 1990, by the Regional Director for Region III, Federal Labor Relations Authority, Washington, D.C. The

Complaint alleges that the U.S. Nuclear Regulatory Commission, (hereinafter called the Respondent), violated Sections 7116(a)(1), (3) and (8) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of the actions of Mr. George Barber in participating in Union Executive Board meetings held on or about May 7, June 7, July 5 and August 2, 1989 while, he, Mr. Barber, temporarily held the supervisory position of Section Chief, Office of Nuclear Reactor Regulation Program Management.

A hearing was held in the captioned matter on April 3, 1990, in Washington, D.C. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs on May 18, and the Union submitted a post-hearing brief on May 17, 1989, all of which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Facts

The Union is the exclusive representative of a unit of Respondent's employees and a party to a collective bargaining agreement with the Respondent covering the unit employees.

At all times material herein Mr. James Thomas, a GS-13 Project Manager, was the President of the Union; Mr. George Barber, a GS-15 Reactor Systems Engineer, was Executive Vice President of the Union; Mr. Leon Whitney, a Project Manager, was the Union Steward; and Ms. Margaret Shuttleworth, a GS-11 Licensing Assistant, was the Secretary to the Union's Executive Board.

On or about May 5 or 7, 1989, Mr. Walter Schwink, Chief of the Generic Activities Integration Section, a supervisory position, was detailed to the position of Director of Projects. On May 7, 1989, Mr. Barber, the Executive Vice-President of the Union, who was one of Mr. Schwink's four subordinates, was detailed to fill Mr. Schwink's position as Chief of Generic Activities Integration Section on a temporary basis. According to Mr. Schwink, whose testimony in this respect is credited, he returned from his detail as Director of Projects and resumed his duties as

Chief of the Generic Activities Integration Section on July 7, 1989.^{1/} Subsequently, on July 24, 1989, approximately two weeks after Mr. Schwink's return, Mr. Barber was again sent out on a temporary detail. This time he was detailed to the position of Technical Assistant in the office of the Associate Director For Projects.^{2/}

1/ The General Counsel and the Union relying on Joint Exhibit No. 2, a "Notification of Personnel Action," which indicates that, effective August 13, 1989, Mr. Barber was detailed from the position of Section Chief to the Technical Assistant position, contend that Mr. Barber's detail as Section Chief did not end until August 13, 1989. However, Respondent's Exhibit No. 1, another Notification of Personnel Action and Respondent Exhibit No. 2, a Delegation of Authority signed by Mr. Schwink on July 21, 1989, along with the credited testimony of Mr. Schwink establish that Mr. Schwink resumed his position of Chief on July 7, 1989. The record further establishes that subsequently, on July 21, Mr. Schwink named Mr. Robert Colmar to be Acting Chief, while he, Mr. Schwink, was to be on annual leave for July 24 and 25, 1989. Additionally, Respondent's exhibits Nos. 4 and 5 indicate that Mr. Schwink was back in the unit by July 15, 1989, since the time card for the period ending July 15, 1989, bears his signature. With respect to the August 13, 1989 date referred to above, Mr. Schwink again credibly testified that the Notification of Personnel Action bearing the August 13, 1989, date had Mr. Barber leaving the acting Chief position for the Technical Assistant position because a Form 50 ending his detail to the Chief position had inadvertently not been cut and on paper, but not in fact Mr. Barber appeared to be still holding the position of Acting Chief. Accordingly, contrary to the position of the General Counsel, I find that the preponderance of the record evidence and credited testimony of Mr. Schwink supports a finding that Mr. Barber's detail to the position of Chief ended on July 7, 1989, when Mr. Schwink resumed his duties.

2/ There is no evidence in the record that the position of "Technical Assistant" contains any supervisory responsibility or that it is anything other than a rank and file position. However, there is a dispute as to whether or not the "Technical Assistant" position is in the unit. Respondent claims the position is in the unit.

From at least May 7, 1989, until August 24, 1989, when he withdrew from the Union, Mr. Barber served, as noted above, the NTEU, Chapter 208's Executive Vice-President. As Executive Vice-President, Mr. Barber "held the second [highest] position" in the Union behind President Thomas. Mr. Barber, as Executive Vice-President, had significant labor management responsibilities.

In late May 1989, while serving as Section Chief, Mr. Barber visited the Union office in Respondent's White Flint Building and had a discussion with President Thomas concerning the purchase of office equipment for the Union office. Mr. Barber at such time stated his opposition to the purchase of a Fax Machine.

On the first Wednesday in June, 1989, Mr. Barber, while serving as Section Chief, participated in a Union Executive Board meeting wherein the purchase of office equipment was discussed and a coffee session for unit employees was scheduled for purposes of discussing mandatory training in NRR.

On June 21, 1989, while acting as Section Chief, Mr. Barber participated in a Union-sponsored coffee session, addressed the assembled employees and stated his position on mandatory training in NRR.

Around the second week in June 1989, Mr. Barber, while acting as Section Chief, attended a meeting in the Union's office and entered into a discussion with President Thomas with respect to a forthcoming scheduled bargaining session with management. At such time Mr. Barber made a number of proposals, some of which were adopted by the Union.

On July 5, 1989, Mr. Barber, while Section Chief, attended a Union Executive Board meeting wherein a discussion took place concerning an article being prepared for the Union's newsletter relative to the establishment of a "whistle-blower fund." Mr. Barber stated his opposition to the establishment of such a fund.

During the latter part of July 1989, President Thomas distributed, via the Union's internal mailing system, to the union officers, including Mr. Barber, a "strategy document" for the upcoming negotiations. The document was put in a box or a slot designated for Mr. Barber. Although, there was testimony at the hearing that the documents had been removed from the mail box or slot designated for Mr. Barber, there was no evidence that it was Mr. Barber who had removed the document.

On August 2, 1989, Mr. Barber attended and participated in a regularly scheduled Union Executive Board meeting.^{3/}

Mr. Barber resigned from the Union on August 24, 1989 and thereafter during the months of September and October 1989, attempted to form a non-profit employee association to represent the interests of the unit employees. Thus, on September 25 and October 20, 1989, Mr. Barber addressed "Open Letters" to all "NRC Professionals" wherein he severely criticized the Union.

On November 9, 1989, the Union filed the original charge against the Respondent alleging a violation of Sections 7116 (a)(1), (2) and (3) of the Statute. As the basis of the charge the Union stated as follows:

Mr. George Barber, GG-15 Section Chief technical assistant prepared and circulated a memorandum to NRC Professionals on September 25, 1898 (sic), and October 20, 1989, which was highly critical of NTEU and solicited employees to organize and join a rival organization at NRC. (see Attachments I and II) On August 24, 1989 Mr. Barber advised the NRC Chapter 208 Executive Board that he would be attempting to get Chapter 208 members to sign dues revocation forms. Mr. Barber there after circulated SF-1188's to approximately eight chapter members who subsequently withdrew from the union at his request. Mr. Barber was a supervisor/management when he instigated the above actions. For this reason the

^{3/} The aforementioned facts concerning Mr. Barber's participation in Union Executive Board meetings, etc., are based upon the mutually corroborative testimony of Mr. Thomas and Ms. Shuttleworth, whose testimony I credit. In this connection I note that their testimony was straight forward and specific. While the testimony of Mr. Barber and Mr. Leon Whitney to the contrary, was marked by their inability to recall pertinent meetings. At no time did they absolutely deny attempting any particular meeting. However, Mr. Barber did remember attending meetings with Mr. Thomas in early May and in August 1989. These latter meetings would have been before and after the period he claims to have served as acting chief.

Agency, through Mr. Barber, its agent, has violated section (a)(1), (a)(2) and (a)(3) by discouraging membership in a labor organization and sponsoring and assisting an alternative labor organization.

On January 24, 1990, the Union amended the charge to read as follows:

Basis of the Charge

Mr. George Barber, GS-15 Section Chief technical assistant prepared and Circulated a memorandum to BRC (sic) Professionals on September 25, 1989 and October 20, 1989, which was highly critical of NTEU and solicited employees to organize and join a rival organization at NRC. (see Attachments I and II) On August 24, 1989 Mr. Barber advised the NRC Chapter 208 Executive Board that he would be attempting to get Chapter 208 members to sign dues revocation forms. Mr. Barber there after circulated SF-1188's to approximately eight chapter members who subsequently withdrew from the union at his request. Mr. Barber was a supervisor/management when he instigated the above actions. Fri (sic) this reason the Agency, through Mr. Barber, its agent, has violated section (a)(1), (a)(2), (a)(3) and (a)(8) of the statute [and 5 U.S.C. 7121 (e)] by discouraging membership in a labor organization and sponsoring and assisting an alternative labor organization.

Mr. Barber also attended meetings as an officer of NTEU and participated in decisions on important union issues such as the union's position on drug testing negotiations while a supervisor. Mr. Barber participated in Union meeting on June 4, July 5 and August 2. Mr. Barber also nominated himself to be a delegate to the Union's National Convention while a supervisor.

With regard to the amended charge filed on January 24, 1990, Mr. James Thomas testified that he first learned that Mr. George Barber had been Acting Chief during the period May, June and July in October 1989. He then informed the Union Field Representative who was responsible for filing the unfair labor practice charges. He was without knowledge why an amended charge was filed by the Union on January 24, 1990. Mr. Thomas further testified that he usually received notification from Respondent when an employee left the unit. However, he could not tell from the notification the reasons for the employees departure from the unit. Mr. Michael Fox, Respondent's Chief of Labor Relations, testified, without contradiction, that Respondent did not notify the Union when an employee's departure from the unit was merely for purposes of a temporary detail as opposed to a permanent move. He further testified that he was unaware of any requirement that management must submit a report to the Union "when there is a detail of union personnel."

The record is barren of any evidence indicating that Respondent was aware of the fact that Mr. Barber while functioning as Acting Chief was participating in internal union affairs. In this connection Mr. Schwink testified that prior to the detail he asked Mr. Barber if there was any conflict of interest. Although not clear from the record it appears that he received a negative response.

Discussion and Conclusions

The General Counsel and the Charging Party, relying on the testimony of Mr. Thomas and Ms. Shuttleworth take the position that the Respondent violated Sections 7116(a)(1), (3) and (5) of the Statute by virtue of the activities of Mr. Barber in participating in the management of the Union during the months of May, June, July and August of 1989 while detailed to a supervisory position. As Authority for their position they cite the Authority's decision in United States Department of Labor, 20 FLRA 296; Rev'd, 834 F.2d 174, D.C. Cir. 1987.

Contrary to the contention of the Respondent, they would not find that the events alleged for the first time, i.e. Mr. Barber's participation in the management of the Union while a supervisor, in the amended charge filed on January 24, 1990, were barred by the six month limitation contained in Section 7118(a)(4) of the Statute. According to the General Counsel, a charge is not a pleading, but rather a mechanism to trigger an investigation and, as such, need not set forth each alleged unfair labor practice to be litigated. Thus, it is the General Counsel's position that,

The first amended charge was not a new charge, it related back to the original charge. It cleaned up the original charge by adding a 7116(a)(8) violation and by reciting specific instances of the same kind of conduct engaged in by Barber as set forth in the original charge The original charge gave Respondent enough information to understand the essence of the alleged violation, i.e., that Barber, as a management official, was engaging in conduct in violation of the Statute.

Additionally, the General Counsel, argues that since Respondent concealed Mr. Barber's detail to the position of Acting Chief from the Union, the six month period for filing valid unfair labor practice charges began to run from the date that the Union first became aware of the detail, which was in October 1989. It appears that the General Counsel's concealment argument is based upon Respondent's failure to inform the Union of Barber's detail.

Respondent, on the other hand, relying on credibility determinations favoring its witnesses, takes the position that the General Counsel has not proven the allegations of the Complaint, namely that Mr. Barber, while Acting Chief, participated in Union affairs.

In any event, it is the further position of the Respondent that the first amended charge is untimely with respect to the alleged incidents occurring in May, June, and early July. According to Respondent's Counsel, the first amended charge does not cite events which were related to those relied on in the original charge filed in November, but rather raises a "different and entirely new ULP charge." In support of this position Respondent points out that the original charge relates to organizing efforts by Mr. Barber while the amended charge filed in January involves participating in Union meetings while holding the position of Acting Chief.

Finally, Respondent, which denies concealing the fact that Mr. Barber had been detailed to the position of Acting Chief, points out that since the Union admittedly found out about the detail in October, well within the six month period, it was not entitled to any additional time to file a timely ULP charge.

It is obvious from a reading of the respective positions of the Parties that prior to deciding the merits of the instant Complaint a determination must be made as to the timeliness of the amended charge. In this connection Section 7118(a)(4) of the Statute provides in pertinent part that,

Except as provided in subparagraph (B)
. . . no complaint shall be issued
based upon any alleged unfair labor
practice which occurred more than 6
months before the filing of the charge
with the Authority.^{4/}

Absent a showing that the incident or activity underlying the alleged unfair labor practice charge was concealed from the Union or that the failure to perform a duty prevented the Union from timely filing the alleged unfair labor practice charge, the unfair labor practice charge must be filed within six months from the date of the events underlying the unfair labor practice charge. Here, the original charge was definitely filed less than six months after Mr. Barber's attendance and participation in various union meetings in May, June and early July 1989 while he was held the position of Acting Chief, an acknowledged supervisory position. However, as noted above in the factual portion of this decision, the original charge filed in November did not address Mr. Barber's participation in union affairs on the crucial dates but rather only challenged his actions in October of 1989 in attempting to oust the Union and substitute an association in its place. Moreover, this November charge was limited solely to Mr. Barber's activity, while an alleged management official, in directing several letters to employees in an attempt to oust the Union and substitute an association in its place. In support of the charge the Union even submitted copies of the complained about letters. The charge, did not allege any other activities on Mr. Barber's part or a general pattern or practice on his part to oust the Union or participate in its operation while he held the position of a management official.

^{4/} Subparagraph (B) provides for additional time for the filing of the alleged unfair labor practice charges if there was concealment or failure of an agency to perform a duty which prevented discovery within the six-month period.

On January 24, 1990, the Union filed an amended charge wherein it reiterated the content of the earlier charge filed in November and for the first time alleged that Mr. Barber, while a management official, i.e. Acting Chief, participated in various union meetings held in May, June, July and August 1989. While both actions alleged by Mr. Barber, i.e. attempting to oust the Union and participating in union matters while a management official, if proved, would be violative of identical sections of the Statute, I cannot find that they are sufficiently related to be encompassed within the timely filed November 1989 charge. In my opinion the participation in the operation of a union and an attempt to oust the Union are two separate and distinct activities. In such circumstances, I find, in agreement with counsel for the Respondent, that the allegations of the complaint which were first raised in the amended unfair labor practice charge filed on January 24, 1990, are barred by Section 7118(a)(4) of the Statute since they are based upon events occurring more than six months prior to the filing of the amended charge.^{5/} Accordingly, I shall recommend that the Complaint be dismissed in its entirety. Although not controlling, cf. Millwright and Machinery Erectors, Local Union 720, United Brotherhood of Carpenters and Joiners of America (Stone and Webster Engineering), 274 NLRB 1506, Reversed on other grounds, 798 F.2d 781, wherein the National Labor Relations Board reached a similar conclusion with respect to the application of Section 10(b) of the National Labor Relations Act, which like Section 7118(a)(4) restricts the prosecution of complaints to charges which are based on events occurring within the six-month period preceding the filing of the charge.

To the extent that the General Counsel contends that Mr. Barber's detail to the position of Acting Chief was somehow concealed from the Union, I find that the record evidence fails to support such contention. Moreover, and in any event, since the Union admittedly discovered the fact during October 1989, which was within the six-month period, the six-month limitation in the Statute would not have been tolled by such concealment. Department of Labor and Susan Wuchinich et al., 20 FLRA 296.

^{5/} See Footnote one (1) where my analysis of the record evidence establishes that Mr. Barber's detail to the position of Acting Chief began on May 7 and ended on July 7, 1989. The January 24, 1990 amended charge would only cover the activities commencing on July 24, 1989, and there was no probative evidence to establish that Mr. Barber held a management and/or supervisory position after July 7, 1989.

In view of the above findings and conclusions it is recommended that the Federal Labor Relations Authority adopt the following Order dismissing the Complaint in its entirety.^{6/}

ORDER

It is hereby Ordered that the Complaint should be, and hereby is, dismissed in its entirety.

Issued, Washington, D.C., October 19, 1990


BURTON S. STERNBURG
Administrative Law Judge

^{6/} But for the fact that Section 7118(a)(4) of the Statute prohibits the issuance of a complaint based upon any alleged unfair labor practice occurring more than six months before the filing of a charge with the Authority, based particularly upon the credited testimony of Mr. Thomas and Ms. Shuttleworth, I would find that Mr. Barber did indeed participate in the affairs of the Union while holding the position of Acting Chief. I would further find, based upon the Authority's decision in United States Department of Labor, supra, that by virtue of such activities by Mr. Barber the Respondent violated Sections 7116(a)(1), (3) and (8) of the Statute.