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

OALJ 25-10

NATIONAL AIR TRAFFIC CONTROLLERS
ASSOCIATION, LOCAL ZDV, AFL-CIO
Respondent

And

JOSHUA HERRERA, AN INDIVIDUAL
Charging Party

DE-CO-23-0200

Adam Johnson
For the General Counsel

Natalie C. Moffett
For the Respondent

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

This case involves the duty of a union to communicate with all employees in its bargaining unit about important work-related matters, in an environment where its ability to fully communicate with those employees is limited.

Specifically, the events here unfolded during the period when employees were engaged in the annual process of bidding on their schedules, leave, and days off; at the same time, they had the opportunity to change their preference as to whether or not to volunteer for overtime. The Agency and the Union had recently negotiated a new overtime procedure, under which employees would no longer be able to move from one overtime roster to another at will throughout the year; instead, they would only be able to do so prior to the start of a four-month trimester. Toward the end of the period for changing rosters, one Union representative asked the manager of his area if the employees in this area could have an extra week to decide whether to change rosters. The manager agreed, and the Union rep sent an email to Union members (but not to nonmembers) advising them of the one-week extension. He insisted that he also posted a handwritten notice of the extension for all employees to see on the area supervisor's desk. The question now is whether his actions satisfied the Union's duty of fair representation, or whether they unfairly discriminated against nonmembers.

In the specific factual circumstances of this case, I conclude that the Union's actions fell short. While the General Counsel attempts to challenge the Union's general practice of sending emails only to its members, my decision does not address that issue; rather, I address only the Union's inadequate notification regarding the extension. Unlike the overall procedures regarding the bidding process and the time period for changing overtime rosters – for which employees received considerable notice and explanation from both the Agency and the Union – no employees had previously been made aware of the extension, and it was only valid for one week. In these circumstances, the Union was under a heightened obligation to inform all employees, and to do so quickly; the paper notice, buried in a thicket of other documents, could not reasonably be expected to reach nonmembers, who had not been sent an email on the subject. Therefore, the Union violated its duty of fair representation.

The Union's failure to properly notify some employees of the extension cannot, however, be identified as the cause of any employee's loss of overtime. The evidence shows that the Charging Party -- who had not heard about the briefing sessions about the bidding process and was unaware that he had only a short time to change from one overtime roster to another -- had no interest in changing rosters. The General Counsel never adequately explained why the Charging Party was assigned less overtime at the start of 2023 than he had the previous year, nor did it demonstrate that he would have been assigned more overtime if he had been made aware of the one-week extension for changing rosters. It would therefore be inappropriate to order the Union to make the Charging Party whole financially for his lost overtime.

STATEMENT OF THE CASE

This is an unfair labor practice (ULP) proceeding under the Federal Service Labor-Management Relations Statute (the Statute), Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Federal Labor Relations Authority (the FLRA or the Authority), 5 C.F.R. part 2423.

On March 13, 2023, Joshua Herrera (the Charging Party) filed a ULP charge against the National Air Traffic Controllers Association, Local ZDV, AFL-CIO (the Union, Local ZDV, or Respondent), and on July 28, 2023, the Charging Party filed an amended charge against the Respondent. Joint Exhibits 1(a) and 1(c). After investigating the charge, the Regional Director of the Denver Region of the FLRA issued a Complaint and Notice of Hearing, on behalf of the FLRA's General Counsel (GC), against the Respondent on July 28, 2023. The Complaint alleged that the Respondent had failed to comply with its duty of fair representation under § 7114(a)(1) of the Statute and had thereby violated § 7116(b)(1) and (8) of the Statute. Jt. Ex. 1(d). On August 22, 2023, the Respondent filed its Answer to the Complaint, admitting some of the factual allegations but denying that it had violated the Statute. Jt. Ex. 1(g).

A hearing was held in this matter on October 9, 2024, with parties participating on the MS Teams platform. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses; a court reporter prepared a transcript of the hearing. The General Counsel and the Respondent have filed post-hearing briefs, which I have fully considered.

On April 9, 2025, I issued an Order Reopening Record to Receive Position Statements regarding the impact, if any, of Executive Order 14251, "Exclusions from Federal Labor-Management Relations Programs," issued on March 27, 2025. The Executive Order purported to exclude a wide variety of federal agencies from the coverage of the Statute, and I asked the parties whether they viewed the Executive Order as depriving the FLRA of jurisdiction to decide this case. On April 15, 2025, the General Counsel, the Respondent, and the Charging Party submitted a Joint Position Statement in Response to Order Reopening Record. They noted that the Secretary of Transportation has not issued any order, pursuant to Section 5(b) of the Executive Order, excluding any subdivisions of the Federal Aviation Administration (FAA) (of which Mr. Herrera is an employee) from the coverage of the Statute. Therefore, the parties agree that the Executive Order does not affect or limit the FLRA's jurisdiction over this case

I agree with the parties that the FAA and its employees remain covered by the Statute. I will, therefore, proceed to adjudicate the case. Based on the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The National Air Traffic Controllers Association (NATCA) is a labor organization within the meaning of § 7103(a)(4) of the Statute. It is the certified exclusive representative of a unit of employees of the Department of Transportation, Federal Aviation Administration, that includes employees of the Federal Aviation Administration, Denver Air Route Traffic Control Center (Denver ARTCC or Denver Center),[1] Longmont, Colorado, an agency within the meaning of § 7103(a)(3) of the Statute. Respondent Local ZDV is an agent of NATCA for the purpose of representing the unit employees employed at the Denver Center.

Joshua Herrera is an air traffic controller at Denver Center, an employee within the meaning of § 7103(a)(2) of the Statute, and in the bargaining unit described above. At all times relevant to the events in this case, Megan Nowak, an employee at the Denver Center, was Local ZDV's President, or Facility Representative, and Ryan O'Hare, an employee at Denver Center, was Local ZDV's Area Representative for Area 2.[2]

NATCA and the FAA are parties to a nationwide collective bargaining agreement. Article 38 of that agreement contains general guidelines for the assignment of overtime, and it authorizes parties at the local level to negotiate procedures for distributing overtime. Tr. 173-74; Jt. Ex. 5. Every year, management at the Denver Center and Local ZDV negotiate a new Memorandum of Understanding regarding overtime procedures, and at the same time they negotiate MOUs for basic watch schedules, annual leave, and controller-in-charge, as they are all related. Tr. 174-75. Assignment of overtime is done by management at Denver Center, which maintains all overtime records, but Union representatives work with the managers to ensure that the procedures are followed and overtime is distributed equitably and in accordance with the contract. Tr. 156-57, 182, 217.

[1] The terms ARTCC, Denver Center, and ZDV are all used interchangeably. Tr. 145.

[2] Area 2 is one of six areas where air traffic controllers are stationed at the Denver Center. Tr. 146. About 40 bargaining unit employees work in Area 2. Tr. 216.

On October 21, 2022,[3] management and the Union at the Denver Center completed negotiations on the MOUs for overtime, basic watch schedules, annual leave, and controller-in-charge. *See, e.g.* GC Ex. 10; the overtime MOU is Jt. Ex. 2. The basic procedures for overtime did not change much from previous years:[4] the Agency maintains two overtime rosters, one for employees who have indicated a desire to work overtime and one for those who do not want to work overtime. *See* Jt. Ex. 2 at Section 4c and U. Ex. 2 at Section 4b. Witnesses referred to these as the "Yes Roster" and the "No Roster." When management needs to assign overtime, it looks first to employees on the Yes Roster who have the fewest number of overtime hours; if more employees are needed, management then assigns overtime to employees on the No Roster. Jt. Ex. 2 at Section 5; U. Ex. 3 at Section 5; *see also* Tr. 32.

The most significant difference between the overtime procedure in 2023 and previous years was in the timing for employees to change their overtime status. In previous years, employees could move from the Yes Roster to the No Roster, or vice versa, at any time throughout the year, by submitting an OT Roster Change Form to a management or Union official. Tr. 116-18; 176; U. Ex. 2. But the 2023 MOU split the year into trimesters, and employees could not move from one roster to the other after the schedules were posted for that trimester. For the first trimester of 2023, this meant that employees wishing to switch rosters had to do so when they bid on their regular days off (RDOs), which occurred in late October of 2022. Jt. Ex. 2 at Section 4c; Tr. 35, 218, 221-22. At the end of each trimester, the number of overtime hours each employee had worked was "zeroed out," but they remained on the same overtime roster unless they submitted a timely change request. Tr. 34-35, 220. The Union felt that the trimester system would be more fair, as it would prevent employees from gaming the system to get assigned overtime when they wanted it. Tr. 176.

During the entire week of October 23 to 29, members of the management and Union negotiating teams conducted briefings for all employees regarding the bidding process for days off, watch schedules, and annual leave, as well as the process for changing overtime rosters. Tr. 40-41, 183-88; Jt. Ex. 6. Employees were required to attend a briefing, and it was the responsibility of supervisors to ensure that their employees attended one. Tr. 183-86, 220. The Agency also sent out notices of the entire bidding process, and the dates and times on which bidding would take place, on its CEDAR communications platform. Tr. 183-86, 189-90. Meanwhile, the Union also sent out email communications, advising employees of the new MOUs, the upcoming bidding process, and the briefing sessions, but it only sent these emails to Union members. Tr. 186; *see* GC Ex. 9, 10.

Despite the above-cited testimony regarding publicity about the bidding process, the Charging Party, Mr. Herrera, testified that he was unaware of the briefings regarding the bidding process and the overtime MOU, and as a result he did not attend any of them. Tr. 38-45. He was not a member of the Union, and as a result, he did not receive any of the email communications sent by the Union on these issues. *Id.* Similarly, he did not realize that the new overtime MOU required employees who wished to switch from one overtime roster to the other to notify the Agency by the time they bid on their RDO. Tr. 38-39.

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[3] Unless otherwise noted, all dates are in 2022.

[4] The overtime MOU for 2022 was admitted as Union Exhibit 3.

The bidding for employees' schedules began on October 30. Jt. Ex. 6 at 9, GC Ex. 10 at 2; Tr. 188-90. Through the Agency's CEDAR platform, all employees were notified of the available schedules, and they were assigned specific windows of time for submitting bids for their regular watch schedule, RDO, and annual leave. GC Ex. 10 at 2; Tr. 35, 188, 190, 227-29.[5] Employees do not bid on overtime; rather, they simply notify management regarding their overtime availability, but for the first trimester of 2023 the deadline for doing so was in conjunction with their RDO bid in October. Tr. 188-89, 227-29. The bidding process is conducted entirely on a nationwide website, BidATC, that is managed by the national NATCA union. When employees submit their bids for leave, RDOs, and watch schedule, they receive automated acknowledgement of their bids from the BidATC website. Tr. 179-80. Local Union officials are not involved in those BidATC communications. *Id.*

The main point of contention in this case arose during Thanksgiving week of 2002, a month after bidding had concluded, when Area 2 Representative O'Hare made a special request to Area 2 Operations Manager Kristina Buelo. Based on his apparently-mistaken belief that employees had until November 19 to change from one overtime roster to another, O'Hare realized that he had intended, but forgot, to remind Area 2 employees of this ahead of time. Tr. 221. So on November 22, he texted Buelo: "Is it ok if we give everyone the rest of this week to decide their OT status for trimester 1 (pp2)? It's a new process and now it's more than just skipping a pay period cuz it's frozen for 4 months now." Jt. Ex. 3; *see also* Tr. 148-49, 221. After Buelo asked him for clarification, O'Hare texted, "Request to change lists is 14 prior to PWS. That was 11/19. I'd like to give everyone this week and send a reminder." Jt. Ex. 3; Tr. 231-32. O'Hare testified that "PWS" represented the date the watch schedules are posted. Tr. 232. With this clarification, Buelo approved the one-week extension. Tr. 149, 232.[6]

After obtaining Ms. Buelo's agreement to extend the time for employees to change overtime rosters, O'Hare sent an email to all Union members in Area 2 on November 23, advising them that they could change rosters "until the end of this week . . . . But remember you'll be on that roster for 4 months." Jt. Ex. 4. With regard to this email, the General Counsel

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[5] Mr. Herrera was of the impression that the Union posted notices regarding the bidding process and other matters on CEDAR (Tr. 35-36), but Union President Nowak testified that the Union is not permitted to post anything on CEDAR, only Agency officials. Tr. 184. Given the overlap between the Agency's control of CEDAR and the Union's operation of the bidding process on BidATC, Mr. Herrera's confusion on this point is understandable; but I credit Ms. Nowak that only the Agency posts information on CEDAR, as she was in a better position to know.

[6] O'Hare testified that in fact, employees were supposed to submit overtime roster changes back in October, concurrent with their RDO bids, but he asked Buelo for an extension on November 22, because he thought the "deadline" was November 19. Tr. 221. This doesn't entirely make sense, as Union President Nowak testified that even after RDO bidding was complete, employees could change overtime rosters at any time until the watch schedules were posted. Tr. 188-89. And O'Hare's November 22 text to Buelo referred to "14 prior to PWS" as the date for changing overtime rosters. Jt. Ex. 3. While employees submitted their RDO and watch schedule bids in October, the schedules were not posted until later. Tr. 231-32. With this context, it appears that O'Hare correctly understood that employees could still change overtime rosters in November, and he wanted to give them an extra week to make up their minds. It does not actually matter, however, whether the deadline for changing rosters was in October or November. O'Hare sincerely sought to obtain an extension of time for his employees from the operations manager, and the manager agreed to that extension.

and the Respondent stipulated to the following at the start of the hearing: "O'Hare intended to send this email only to dues-paying NATCA members." Tr. 7; *see also* Tr. 240-41. The propriety of this action represents the primary bone of contention in our case.

In addition to sending the November 23 email to Area 2 Union members, O'Hare testified that he also taped a handwritten version of it, for all employees to see, on the Area 2 supervisor's desk. Tr. 223. Each area supervisor has a desk at the front of the hallway leading to the other controllers' stations, and Area 2 employees need to walk past it every day, coming and going. Tr. 150, 223. The desk is about three feet by six feet, with several monitors and phones on it, and management sometimes posts notices there for employees to see, such as for schedule changes, on an elevated plastic sheet that sits at an angle. Tr. 60-61. O'Hare testified that he frequently placed notices to employees there, particularly during the bidding periods (Tr. 224), but Herrera testified that he had never seen a Union notice there, not even when he was stationed at the supervisor's desk for forty minutes on November 25. Tr. 59-60. As operations manager in 2022 for Areas 2 and 5, Ms. Buelo walked the aisles regularly in those areas, and she could not recall ever seeing a Union-related notice posted there for employees. Tr. 150-53. She described the area around the desk as having "a hodgepodge of stuff . . . It's where things get placed, but it's not someplace that we do official things from." Tr. 153. O'Hare did not save a copy of the notice. Tr. 233.

Witnesses also testified about Local ZDV's methods of communicating with bargaining unit employees. Union President Nowak stated that it was the Agency's responsibility for making sure that information relating to working conditions is disseminated to the workforce, usually through notices posted on CEDAR and sometimes in hard copies as well. Tr. 183, 192. The Agency and the Union also conducted the aforementioned briefings for all employees regarding the bidding process for an entire week in October. Tr. 185-86. At the hearing, the Union representatives were quite candid in admitting that they sent email communications and updates only to members. Tr. 186. According to Nowak, nonmembers "[g]enerally . . . don't want to hear from the Union anymore. . . . And then if it is something that is an agreement between the Agency, the FAA Agency and NATCA, they will disseminate that information because they're required to notify people of those things." *Id.* She further testified that while the Union has email addresses for some nonmembers who had left the Union, it does not have email addresses for other nonmembers, and the Agency does not provide that information to it; for those people, the Union does not have a means of communicating. Tr. 192; *see also* Tr. 259-60. Controllers do not have their own assigned computers, and the Union is not permitted to communicate with employees at their government email addresses.. Tr. 263-64. The GC pointed out that employees conduct their bidding on the BidATC website, which sends messages to employees at their personal email address; the Union noted, however, that Local ZDV plays no part in that process and does not have those addresses. Tr. 178-80, 195-96. Herrera and Buelo also testified that when the Covid pandemic broke out in March 2020, the Union quickly assisted management in reaching every employee in order to adjust their schedules. Tr. 81-82, 154-55.

After the bidding for schedules, days off, and leave had concluded in late 2022, and employees had made any changes to their overtime availability, the Agency was able to create schedules for the employees, and as the year progressed, it assigned both voluntary and mandatory overtime to employees pursuant to the collective bargaining agreement. Herrera

testified that in 2022 and even before, he had placed himself on the Yes Roster for overtime and had been consistently assigned overtime. Tr. 57-58. He estimated he worked about 700 hours of overtime in 2022, and the GC introduced records showing that Herrera earned more than $30,000 over his base salary in 2022, which he attributes to overtime pay. Tr. 83-86; GC Ex. 3. Starting in January of 2023, however, Herrera's overtime decreased drastically; he testified that when he noticed he was not being assigned overtime, he began to investigate why. Tr. 39. He asked O'Hare why he was not getting overtime, but he "got nowhere with that." Tr. 58. Pay records for the first few months of 2023 (GC Ex. 4) show him earning about $6,800 per pay period, with no overtime identified, but after he was able to have himself placed back on the Yes Roster in mid-2023, his August 2023 pay records show him earning over $9,000, with about 16 hours of overtime, per pay period. Tr. 92-96.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel alleges that the Union violated its duty to fairly represent all bargaining unit employees by failing to adequately notify nonmembers of the Union of a benefit it negotiated in November of 2022. GC Brief at 4. It both tries to paint with a broad brush, criticizing the Union's general practice of sending email notices and updates only to members (*see, e.g., id.* at 9-11), and to narrowly target the way Mr. O'Hare notified employees in Area 2 of the one-week extension he negotiated with Operations Manager Buelo for employees to change their overtime preference (*id.* at 22).

The GC first submits that the Union's duty of fair representation applied to O'Hare's negotiation of the one-week extension for making overtime changes. *Id.* at 23. It argues that a union must represent nonmembers fairly when performing representational activities "grounded in the union's status as exclusive representative." *NFFE, Local 1827*, 49 FLRA 738, 746 (1994) (*Local 1827*). This means that "when a union uses a power which it alone can wield," it owes this duty to all members of the bargaining unit. *NATCA, AFL-CIO*, 66 FLRA 467, 472 (2012) (*NATCA*). This was the capacity in which O'Hare contacted Buelo and obtained her permission to extend the period for requesting overtime: he was in reality negotiating a change in the contractually established timeframe for changing overtime availability, and therefore he had to treat nonmembers equally to members in notifying employees of this benefit. GC Brief at 23-24.

The GC then argues that O'Hare's method of notifying Area 2 employees of the extension unfairly discriminated against nonmembers. *Id.* at 24. Applying the analytical framework for discrimination allegations set forth in *Letterkenny Army Depot*, 35 FLRA 113, 117-23 (1990), the GC argues that Herrera's decision not to join the Union was protected activity, and that his nonmembership was a motivating factor in O'Hare's exclusion of nonmembers from the email notice he sent on November 23. GC Brief at 24-25. The Union stipulated that O'Hare "intended to send this email only to dues-paying NATCA members." Tr. 7. This, in the GC's view, is sufficient to establish a prima facie case of discrimination. GC Brief at 25. Additionally, the Union's explanations for its exclusion of nonmembers from the email notice were either not credible or inadequate. The GC scoffs at O'Hare's insistence that he sought to notify nonmembers by posting a paper notice on the Area 2 supervisor's desk. *Id.* at 26. His testimony was contradicted by that of Herrera and Buelo, neither of whom saw

such a notice, either during the week of November 23 or at other times for other notices. Thus even if O'Hare did post the notice on the 23rd, it is apparent that it was so inconspicuous, or obscured by other papers, as to be meaningless as an adequate form of notifying employees of an important benefit. *Id.* at 28-29. The GC also rejects the Union's explanations for its failure to include nonmembers on its email, most notably the Union's insistence that it doesn't have the email addresses of nonmembers. *Id.* at 29-30. The GC points to evidence that the national Union has all employees' email addresses on its BidATC website; that the Union has sent emails to at least some nonmembers, soliciting them to join the Union; that the Union was able to reach all bargaining unit employees when the Covid pandemic required immediate changes in everyone's schedules; and that management has, on occasion, given employee email addresses to the Union. *Id.*

The GC also argues that the Union "has a history of animus and disparate treatment towards nonmembers." *Id.* at 31. In other words, O'Hare's exclusion of nonmembers from his November 23 email was not an isolated incident, but rather that it was consistent with the Union's longstanding practice of sending emails only to members. In this regard, Nowak testified that this was her practice, as it was the responsibility of the Agency, not the Union, to notify employees about work assignments and working conditions. Tr. 191; *see also* Tr. 261-62. The evidence of the Union's longstanding practice of communicating only with members reinforces the conclusion that O'Hare's exclusion of nonmembers from his November 23 email was an intentional effort to discriminate against nonmembers. GC Brief at 34-25.

Finally, the GC argues that the Union should be required to pay backpay to Herrera for the overtime he lost in the first four months of 2023. *Id.* at 37 (citing *Local 1827*, 49 FLRA at 748-49). In the GC's view, "Herrera would have been on the overtime roster for the first trimester of 2023, but for Respondent's discriminatory treatment of him." GC Brief at 37. If the Union had sent its several email communications in October of 2022 to all bargaining unit employees, Herrera would have been aware of the briefings held by management and the Union, and Herrera would have been aware of the need to renew his availability for overtime for 2023; and if O'Hare had included nonmembers in his November 23 email, it would have prompted Herrera to check and renew his status on the Yes Roster. *Id.* at 37-38. Citing the evidence that Herrera had worked an average of sixteen hours of overtime per pay period in August and September of 2023, he should be entitled to that amount of overtime for January through April of 2023, or a total of 144 hours. *Id.* at 38.

Respondent

The Union agrees with the GC that the first step in determining whether it violated its duty of fair representation is ascertaining whether its actions were undertaken in its role as the exclusive representative of the bargaining unit. *Antilles Consolidated Education Association (OEA/NEA) San Juan, P.R.*, 36 FLRA 776, 786-80 (1990). Respondent acknowledges that O'Hare's request to Buelo to extend the time for employees to change their overtime roster status was made in this capacity. Union Brief at 4. But it argues that it did not interfere with the rights of nonmembers, because the alleged failure to notify nonmembers was not coercive. Union Brief at 4-5 (citing *AFGE, Local 1931, AFL-CIO,* 34 FLRA 480, 487 (1990)). It insists that O'Hare credibly testified that he sent his email only to members because those were the only addresses he had in his listserve. Tr. 244-45. The Union didn't communicate with

nonmembers regarding working conditions, because it was the Agency's responsibility to do so, and the Agency did not provide the Union with home or email addresses of bargaining unit employees. Tr. 111, 192. The Agency similarly does not communicate with employees concerning working conditions by email, because employees don't have reliable access to email during most of their workday; instead, communications are conducted by posting information on the Agency's CEDAR platform, on which the Union is not able to post. Union Brief at 6.

While O'Hare's email was consistent with this standard practice, he also reached out to nonmembers by posting the notice "in a standard location that BUEs regularly passed multiple times during their shift." Union Brief at 6. The Union defends the credibility of O'Hare's testimony on this point, and it challenges Herrera's insistence at the hearing that he didn't see the notice back in 2022, when he didn't realize until 2024 that he had worked on the day the notice was posted. *Id.* at 7.

The Respondent further argues that it did not cause Herrera to miss out on any overtime, even if it violated its duty of fair representation in its manner of notifying employees. Therefore, even if the Union committed an unfair labor practice, it should not be required to pay Herrera backpay. *Id.* at 8. All witnesses at the hearing testified that if an employee fails to change his overtime status before the start of a new trimester, his status "rolls over" to the same roster in the new trimester as it had been. Tr. 57, 165, 182, 218; Union Brief at 8. Herrera was insistent that he had been on the Yes Roster for a period of years up to and including 2022. Tr. 141. Therefore, he should have continued to be on the Yes Roster in 2023, and he would have been called for voluntary overtime in the first trimester of 2023. The Respondent submits that Herrera must have been confused as to his status: he must have been on the No Roster in 2022, which would explain why he didn't get assigned voluntary overtime at the start of 2023. Union Brief at 8. This would be consistent with O'Hare's belief that Herrera had been on the No Roster in 2022. Tr. 246-49. The Union argues that O'Hare's testimony is more reliable on this point than Herrera's, because O'Hare worked with management as the Union's Area 2 scheduling representative in overseeing overtime assignments. Union Brief at 8-9. Regardless of what roster Herrera was on at the end of 2022, Respondent submits that it had nothing to do with Herrera's loss of overtime in early 2023; Herrera would not have changed his status even if he had received multiple email notices from the Union. *Id.*

ANALYSIS AND CONCLUSIONS

The second sentence of Section 7114(a)(1) of the Statute sets forth what has come to be called a union's duty of fair representation: "An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." 5 U.S.C. § 7114(a)(1). This obligation predates the passage of the Statute and even the Executive Order, as it incorporates in federal labor relations the duty of fair representation owed by unions in the private sector. *See, e.g., Vaca v. Sipes,* 386 U.S. 171, 177 (1967); *NATCA,* 66 FLRA 467, 472 (2012); *Tidewater Va. Fed. Emps. Metal Trade Council/IAM, Local 441*, 8 FLRA 217, 230 (1982). Under the duty of fair representation, unions are required to "serve the interests of all members [of a bargaining unit] without hostility or discrimination toward any, to exercise discretion with complete faith and honesty, and to avoid arbitrary conduct." 8 FLRA at 230 (quoting *Vaca v. Sipes* and other decisions). To put it more succinctly, "when a union uses a power which it alone can wield, it

must do so for the benefit of all employees within its bargaining unit." *NATCA, MEBA/AFL-CIO*, 55 FLRA 601, 604 (1999) (quoting *AFGE v. FLRA*, 812 F. 2d 1326, 1328 (10th Cir. 1987)). If a union violates this duty, it commits an unfair labor practice in violation of § 7116(b)(1) and (8) of the Statute.

A union's duty of fair representation is coextensive with its representational responsibilities. This may sound obvious, but in practice it often isn't. In *NTEU v. FLRA*, 800 F.2d 1165 (D.C. Cir. 1986), the court held that the Authority had defined the duty too broadly when the Authority ruled that if the union provided attorneys to represent members during statutory appeal proceedings challenging their removal, it must also do so for nonmembers. The court noted that the union was the exclusive representative of all employees for grievances under the collective bargaining agreement, but that employees are free to obtain their own representative in statutory appeals such as those before the MSPB. *Id.* at 1170. Tracing the history of the duty of fair representation back to 1944, the court interpreted the Statute as requiring federal sector unions to provide the same services to members and nonmembers alike concerning matters in which the union is the exclusive representative, but not beyond. *Id.* at 1169-70. Thus even though NTEU provided attorneys for members challenging removal at the MSPB, it was not required by the Statute to do so for nonmembers.

The Complaint filed by the General Counsel specifically alleges that the Union violated its duty by notifying only dues-paying Union members of the extension of time O'Hare received for changing overtime rosters. Jt. Ex. 1(d) at ¶ 7. The GC offered considerable evidence on this point, but it has also argued, both in its brief and at the hearing, that the Union had a "pattern-and-practice of discriminating" against nonmembers by sending communications only to members. *See, e.g.*, GC Brief at 10. GC Exhibits 9 and 10, newsletters emailed by the Union to members in the weeks leading up to bidding, were offered as evidence of this favoritism. The Union president freely admitted at the hearing that she sent email updates only to members, and the GC has seized on this to attack all of the Union's communications as discriminatory. I will not take the bait offered by the GC to expand this case beyond the parameters of the Complaint. The issue before me is whether O'Hare fairly and honestly communicated with all Area 2 employees about the overtime extension, not whether the Union's overall communication practices are unlawful.

Both the GC and the Respondent agree that the first step in analyzing this issue is determining whether the Union's disputed activities were undertaken in its role as exclusive representative. *See AFGE Local 3354*, 58 FLRA 184, 188 (2002). Both sides also agree that O'Hare, in his capacity as the Union's Area 2 representative, approached Buelo and got her agreement to allow employees an extra week to change overtime rosters. The overtime MOU negotiated by Local ZDV and the FAA established a timeframe for employees to change rosters; O'Hare felt it would be helpful for employees to have an extra week to make this decision, so he negotiated a one-week extension. Everyone agrees that this was a benefit the Union obtained for all employees (or at least all employees in Area 2), and that O'Hare wanted to remind employees of this extension. Tr. 231; Jt. Ex. 3. It is clear, therefore, that the Union's duty of fair representation applied to O'Hare's activities regarding the extension. The parties disagree, however, as to whether O'Hare satisfied that duty.

The Union fully admits that O'Hare sent Union members an email on November 23 advising them of the extension (Jt. Ex. 4) and did not send it to nonmembers. But it argues that O'Hare provided the same notice to nonmembers (whose email addresses he did not possess) by posting it on the Area 2 supervisor's desk, where he regularly posts work-related notices, and where all employees could see it. In this manner, it submits that nonmembers received functionally equivalent notice of the overtime extension that members did. The GC, on the other hand, argues that O'Hare fabricated his story of posting the notice, and that even if he did post it, the notice was buried in a jungle of papers in a location that employees were unlikely to see.

If the outcome of this case turned on whether to believe O'Hare's testimony that he posted the November 23 notice at the supervisor's desk, I would be hard-pressed to decide. I am skeptical of O'Hare's story, since he didn't bother to keep a copy of the notice, and the Union was unable to produce any witnesses who could say that they saw the notice. Fortunately, I do not have to untie this knot. Even if O'Hare did indeed place the notice at the desk on November 23, it is clear to me that it might as well have been invisible; it was not functionally adequate to accomplish its stated purpose of putting employees on notice of a time-sensitive matter affecting how much overtime they would work for the upcoming four months. As described by the witnesses who worked in the area, there was a jumble of papers placed in a small area, some of which may have been employment-related and many of which were not. There was no specific location set aside for Union matters, and there was no measure for protecting such notices. No witness corroborated O'Hare's testimony that he regularly posted notices there. The additional week that O'Hare had negotiated for the extension was also Thanksgiving week, a hectic time for everyone at an airport. While all employees working in Area 2 would have walked past that desk, if they were working, some employees may have been off that week, and those who were working could easily have failed to see the notice in the "hodgepodge" of papers. Tr. 151-53. Posting the notice in this manner simply is not the functional equivalent of sending employees an email.

It is important here to emphasize the uniqueness and significance of the information that O'Hare communicated in his November 23 email. It is also important not to over-emphasize its significance, in terms of its impact on Herrera's apparent loss of overtime. The evidence reflects that the bidding process receives considerable publicity; it is an annual affair that affects every employee, and it comes to a climax in October as employees are advised of their time slots for picking their schedule, annual leave, and days off, in addition to their overtime availability. Employees do not bid on overtime, but for the first trimester of 2023, employees desiring to change overtime rosters were supposed to do so along with their RDO bid. FAA management, along with the Union, had publicized the upcoming bidding period and had organized briefings for employees. (Herrera testified that he was unaware of these briefings, but I am quite skeptical that he, or any employee, could have been oblivious to the publicity or unaware of the bidding procedures.)

The main difference between the 2023 overtime MOU and those in prior years was the establishment of trimesters, with each employee's overtime hours being "zeroed out" at the end of each trimester. Under this system, employees could only change overtime rosters prior to the start of a trimester, which meant that for the first trimester of 2023, employees had to submit a roster change form before the January schedules were set. O'Hare wanted employees to have extra time to make such a change, and that is why he asked Buelo to give the employees an

extra week. Thus while the Agency and the Union had made considerable efforts to brief employees on the entire bidding process, that publicity and those briefings did not refer to the additional week's extension that O'Hare and Buelo had agreed upon in November. The only way that employees in Area 2 could learn of the extension was from O'Hare, their Union representative. He made sure that all Union members received notice of the opportunity by sending them each an email, but nonmembers would only have learned about it if they happened to stumble on the paper notice on the supervisor's overstuffed desk. This was an inherently unequal way of informing the bargaining unit: one group received notice of the extension by a personal email notice, and another group received it only by accident or coincidence. The extension of time was only meaningful if an employee learned of it quickly, as it was only for a one-week period. Thus, while the Agency and the Union had made sure that employees were well informed about most aspects of the bidding process and the newly negotiated MOUs prior to the bidding that began on October 30, employees had no way of learning about the extension for changing overtime rosters unless O'Hare notified them. In light of these facts, O'Hare's method of informing nonmembers of the extension was wholly inadequate.[7]

While I am unaware of any Authority decision that addresses precisely the question of a union's duty to communicate to employees, an NLRB case that is at least comparable is *Teamsters Local 282*, 267NLRB 1130, 1131 (1983). There, the NLRB found that the union violated its duty of fair representation by failing to notify some employees of the terms of an arbitration award that directly affected their seniority and recall rights. Although employees were told of the award at "shape-up" meetings, such notification could not have informed laid-off employees, and the failure to properly notify all employees violated the union's statutory duty. *Id.* A comparison might also be made to the Authority's decision in *NTEU*, 18 FLRA 299, 301-02 (1985), where the union violated its duty by allowing members to call in to obtain information about their eligibility for a cash settlement over an eight-hour period daily, while nonmembers could only call fifteen minutes a day.

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[7] I cannot draw the same conclusion regarding the Union's overall pattern of communicating, however. The GC argues that the Union's practice of sending email updates only to members similarly demonstrated its neglect of nonmembers regarding important matters relating to their conditions of employment, but there is insufficient evidence in the record to show that employees were dependent on those updates to keep abreast of matters affecting their conditions of employment – certainly not as dependent as the Area 2 nonmembers were in order to know about the overtime extension negotiated by O'Hare. Testimony showed that the Agency was primarily responsible for informing employees about matters relating to their employment, and that it did so through the CEDAR platform, which the Union did not have access to. The October-November bidding process was publicized in this manner. The issues addressed in the Union's email updates sent to members primarily reinforced issues that the Agency had publicized on CEDAR, or dealt with internal Union business. The evidence of record does not support the GC's allegation (not alleged in the Complaint) of a pattern and practice of neglecting the interests of nonmembers. To put it another way, I cannot say that the Union is required to send all of its email updates and communications to the entire bargaining unit.

Having said this, however, I would caution the Union that by excluding nonmembers from its regular communications, it risks precluding those nonmembers from learning about important work-related matters that the Agency has not publicized. While the Agency may be responsible for notifying the entire workforce of most work-related matters, situations can arise – as happened here with the overtime extension O'Hare negotiated – where employees need to obtain the information from the Union. In such situations, the Union has a duty to ensure that members and nonmembers alike are informed.

The Union defends its conduct by arguing that it didn't have email addresses for at least some of the nonmembers, and that the Agency does not provide it with those addresses. This may be true, but there was evidence that the Union had emailed some if not all nonmembers, including Herrera, on prior occasions, and that management had cooperated with the Union in communicating with nonmembers in urgent situations such as the Covid crisis. The crucial fact, however, is that O'Hare and Buelo created the need for communicating with nonmembers by their negotiation of a time-sensitive benefit which was otherwise unknown to employees. Having done so, O'Hare (perhaps with Buelo's assistance) was obligated to ensure that all Area 2 employees were made aware of the benefit. O'Hare testified that there were only a few (perhaps as few as four) Area 2 employees who were not Union members, so that should have simplified his task. He could have personally approached those nonmembers and notified them of the overtime extension, or he could have tasked other Union or management officials to approach those employees who worked on different shifts. Whether or not it was possible to reach every nonmember, it was his statutory duty to try; a paper notice on a crowded desk was not a satisfactory effort. This possibly illustrates the truth of the adage, "no good deed goes unpunished," but it also illustrates the premise of the duty of fair representation: "with great power comes great responsibility." This was the principle invoked by the Supreme Court in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944), and quoted above by the Court of Appeals in *NTEU v. FLRA*, 800 F.2d at 1170.

For these reasons, I conclude that the Union violated its duty of fair representation by failing to adequately notify nonmembers of the one-week extension it negotiated for employees to change overtime rosters. The Union negotiated this extension in its capacity as exclusive representative, and it was obligated to inform affected bargaining unit employees of the benefit in a nondiscriminatory manner. The Union admitted that it used a different method of communicating the benefit to members than it did to nonmembers, and the method used for notifying nonmembers was not adequate. Since the Union has admitted that it discriminated in this manner against nonmembers, it is unnecessary to perform the evidentiary analysis laid out in *Letterkenny Army Depot*, 35 FLRA 113 (1990). The failure to adequately inform nonmembers violated its duty of fair representation and § 7116(b)(1) and (8) of the Statute.

Remedy

In addition to the traditional remedies of a cease-and-desist order and the posting of a notice to employees, the General Counsel requests that the Respondent be required to make Herrera whole for his lost overtime by paying him backpay. While I agree that the first two remedies are appropriate here, the backpay remedy is not appropriate.

When a party has committed an unfair labor practice, the Authority has broad discretion under §§ 7105(g)(3) and 7118(a)(7) of the Statute to fashion remedies that are "appropriate to carry out the policies" of the Statute. *See NTEU v. FLRA*, 910 F.2d 964, 967 (D.C. Cir. 1990). The Authority has, at times, ordered a union to pay backpay or to otherwise make an employee whole for the loss of pay, benefits, or entitlements that were caused by the union's unlawful action. The GC correctly points to the *Local 1827* decision as addressing the parameters for a make-whole remedy such as backpay for the violation of a union's duty of fair representation: "[T]he purpose of a make-whole remedy is to place individuals who have been adversely affected by an improper action in the situation that they would have been if the improper action

had not occurred." 49 FLRA at 748. The Authority went on to find that since the union's unlawful conduct interfered with employees' terms and conditions of employment by retroactively reducing their seniority, it was appropriate to order the union "to make whole any employee who is determined to have suffered a loss of pay, benefits or differentials as a result of the Respondent's unlawful conduct." *Id.* at 749.

The key phrase, for purposes of our case, is that the employee lost pay "as a result of the Respondent's unlawful conduct." Similarly, under the Back Pay Act, 5 U.S.C. § 5596(b)(1), an employee is entitled to backpay when an unjustified personnel action "has resulted in" his loss of pay or benefits. This is where the GC's case falls short, as it has not demonstrated that O'Hare's failure to notify Herrera of the one-week overtime extension resulted in Herrera's loss of overtime.

This leads us directly into the heart of a mystery that was never resolved at the hearing: why was Herrera's overtime nearly eliminated at the start of 2023, if he had been on the Yes Roster in 2022 (as he insists) and never changed it? The evidence does show that Mr. Herrera earned considerably less overtime pay in the first trimester of 2023 than he did in 2022, or in the latter part of 2023. One possible, perhaps likely, reason for this was that Herrera was on the Yes Roster in 2022 (as he insists) but was somehow moved to the No Roster for the first trimester of 2023. But nobody could explain how or why this happened.

All witnesses agreed, and the overtime MOU implicitly corroborated, that employees didn't need to take any action regarding their overtime availability unless they wanted to change rosters. If they were satisfied with their current status, their status would carry over automatically to the next trimester. Thus, while the MOU added a new provision that employees could not change their status in the middle of a trimester, it didn't change anything for employees who were satisfied with their roster status. And Herrera testified that he was satisfied with his roster status: he believed that he was on the Yes Roster in 2022 and wanted to continue in that status in 2023. Tr. 57-58.

O'Hare, however, testified that he understood that Herrera had been on the No Roster in 2022. Tr. 246-49. Although all employees can access the rosters to see which roster they are on, O'Hare was directly involved with management's scheduling official throughout the year to ensure that overtime was assigned properly for Area 2 employees; in that capacity, he could see that Herrera was on the No Roster for all or most of 2022. Tr. 247. Even on the No Roster, Herrera may well have been assigned overtime anyway in 2022, because employees on the No Roster are also regularly needed to work overtime, but it was O'Hare's understanding that Herrera was on the No Roster in 2022.

From the evidence of record, it is impossible to determine which roster Herrera was on during the latter part of 2022; the rosters themselves for 2022 and the first trimester of 2023 were not entered into evidence, and there is no objective basis for determining whether Herrera or O'Hare was correct regarding Herrera's roster status. If indeed Herrera was on the No Roster at the end of 2022, that would certainly explain why he didn't get assigned overtime for the first few months of 2023, but it does not explain why Herrera had been assigned a significant amount of overtime during 2022 but not at the start of 2023. If, on the other hand, Herrera was on the Yes Roster in 2022, his lack of overtime in early 2023 could only have occurred if he had been taken off the Yes Roster and moved to the No Roster. There is no evidence whatever that

anyone in the Union removed him from the Yes Roster, and it doesn't appear that the Union could have done so unilaterally. The rosters are actually maintained by the Agency, and Agency officials are in charge of assigning overtime.

Herrera's lack of overtime in early 2023, therefore, was caused by one of two possible factors: either he had been on the No Roster at the end of 2022 and remained on it in 2023, or he had been on the Yes Roster at the end of 2023 and somehow was moved to the No Roster. In either case, O'Hare's failure to notify Herrera of the extension of time to change roster status did not "cause" Herrera to be on the No Roster.

The GC's attempt to rebut this conclusion falls short. It argues that if Nowak had included nonmembers in her October updates to members about the upcoming bidding process, or if O'Hare had included nonmembers in his November 23 email about the extension, Herrera "would have been aware of the new rules governing assignment of overtime," and "would have prompted Herrera to check his overtime roster status and correct it before it was too late." GC Brief at 37-38. I think this is assuming far too much, and neglects to attribute any responsibility to Herrera himself in this process. I find it incredible that Herrera could have been unaware of the briefing sessions that were occurring the entire last week of October. The Agency had been publicizing the briefings and was attempting to persuade all employees to attend one, and I do not believe Herrera was oblivious to this. Testimony established that the bidding process was a period of intense employee interest, and the basics of the process had not changed for years. Herrera is at least partly responsible for his apparent ignorance of the new rule prohibiting changes to the overtime rosters mid-trimester. But more importantly, it appears that Herrera had no interest in changing overtime rosters in late 2022 because he was satisfied with his roster status: he believed he was on the Yes Roster and wished to stay there, so he took no action to change his status. Attending the October briefings or reading O'Hare's November 23 email would not have prompted him to check his roster status. But it isn't necessary for me to read Herrera's mind or speculate as to his motivations in late 2022; it is the GC's burden to show that the Union caused Herrera to lose overtime in 2023, and it has failed to do that. Thus it is not appropriate to require the Union to repay Herrera for the overtime he may have lost in 2023.

Accordingly, I recommend that the Authority issue the following Order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the National Air Traffic Controllers Association, Local ZDV, AFL-CIO (Local ZDV), shall:

1. Cease and desist from:

    (a) Failing or refusing to notify nonmembers of Local ZDV concerning benefits negotiated by Local ZDV that employees would not otherwise be aware of.

(b) Interfering with, restraining, or coercing bargaining unit employees in the exercise of their right to form, join, or assist any labor organization, or to refrain from such activity, freely and without fear of penalty or reprisal.

(c) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured under the Statute.

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

(a) Post the attached Notice on forms to be provided by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the President of Local ZDV and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken, in coordination with FAA management at the Denver ARTCC, to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) In addition to the physical posting of paper notices, request that FAA management at the Denver ARTCC disseminate a copy of the Notice electronically, on the same day as the physical posting, through the FAA's email, intranet, or other electronic media customarily used to communicate with bargaining unit employees.[8] The message of the email transmitted with the Notice shall state, "We are distributing the attached Notice to you pursuant to an order of an Administrative Law Judge of the Federal Labor Relations Authority in Case Number DE-CO-23-0200."

(c) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Denver Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., May 14, 2025

RICHARD A. PEARSON
Administrative Law Judge

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[8] It is evident from the record that Local ZDV does not have a reliable method of communicating with all bargaining unit employees, and that FAA management restricts the Union's ability to communicate by government email. FAA management utilizes its TEAM platform (formerly CEDAR) to communicate with employees, and it should be feasible for management to facilitate the use of TEAM for disseminating this Notice. Any logistical issues in this regard can be resolved with the GC's Denver Region's compliance office.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the National Air Traffic Controllers Association, Local ZDV, AFL-CIO (Local ZDV), violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail or refuse to notify nonmembers of Local ZDV concerning benefits negotiated by Local ZDV that employees would not otherwise be aware of.

WE WILL NOT interfere with, restrain, or coerce bargaining unit employees in the exercise of their right to form, join, or assist any labor organization, or to refrain from such activity, freely and without fear of penalty or reprisal.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured under the Statute.

____
(President, NATCA Local ZDV)

Date: ____________________ By: ____
(Signature) (Date)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Denver Region, Federal Labor Relations Authority, whose address is 1244 Speer Boulevard, Suite 446, Denver, CO 80204, and whose telephone number is: (303) 225-0340.