UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1827 Respondent and CATHERINE BRATTON (INDIVIDUAL) Charging Party	Case No. 7-CO-10029

Pamela Janisch
For the Respondent

Matthew Jarvinen, 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 violated §§ 16(b)(1) or (8) of the Statute by polling only members of the Union, and not all members of the bargaining unit, as to their preference for determining seniority for various purposes including: selection of days off, 8-hour days for Compressed Work Schedules, overtime, training, details and vacation selection. That is, more specifically as stated by General Counsel, "It is this unique combination of circumstances where a condition of employment is left to the Union's discretion and it is thereafter established by a vote limited to dues-paying union

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(b)(1) will be referred to, simply, as "§ 16(b)(1)".

members that the General Counsel today alleges constitute a violation of the Union's duty to fairly represent the interest of all employees in the bargaining unit."

This case was initiated by a charge filed on August 23, 1991, which alleged violations of §§ 16(b)(1),(4) and (5) (G.C. Exh. 1(a)); and by a First Amended charge filed on February 3, 1992, which alleged violations of §§ 16(b)(1) and (8) (G.C. Exh. 1(b)). The Complaint and Notice of Hearing issued on May 29, 1992; alleged violation of §§ 16(b)(1) and (8) of the Statute; and set the hearing for August 24, 1992 (G.C. Exh. 1(c)), pursuant to which a hearing was duly held on August 24, 1992, in St. Louis, Missouri, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, September 24, 1992, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, on timely motion of Respondent, to which the other parties did not object, for good cause shown, to October 1, 1992. Respondent and General Counsel each timely mailed a brief, received on October 5, 1992, which have been carefully considered. Upon the basis of the entire record[2/], I make the following findings and conclusions:

Findings

1. The National Federation of Federal Employees, Local 1827 (hereinafter, "Union") is the exclusive representative of a unit of employees appropriate for collective bargaining at the Defense Mapping Agency, Aerospace Center, St. Louis, Missouri (hereinafter, "DMA"). DMA, with an estimated compliment of 3500 (Tr. 49), has various divisions including the Graphic Arts Negative Engraving Division, variously, and interchangeably, referred to as "GAN"

2/ General Counsel's motion to correct transcript, to which there was no objection, is granted and the transcript is hereby corrected as follows:

Page	From	To
Page 17, line 9 (and all subsequent references)	Forrester	Forster
Page 59, line 13	Soul	Stowall

or "GAB", which has an estimated compliment of 120[3/] (Tr. 49; but see Jt. Exh. 2 which shows substantially fewer employees in GAB) (for the sake of consistency, Negative Engraving hereinafter will, as General Counsel has done, be referred to as "GAN").

2. DMA and the Union are parties to a collective bargaining agreement (Jt. Exh. 1) which confers discretion on the Union to determine the manner of computing seniority in certain circumstances as follows:

"ARTICLE 60
"APPLICATION OF SENIORITY

"60-1 Seniority as determined by the employee's Federal SCD [Service Computation Date] shall be applicable in all instances required by law or government-wide regulations. When the use of seniority as defined by an employee's Federal SCD is not mandated by law or government-wide regulations and is not otherwise specified in this Agreement, seniority will be determined by the employee and/or the Union, at the option of the Union, for the purpose of application of this Agreement.

"60-2 It is agreed that the same method of computing seniority must be applied to all employees in any given work group when the employees would be competing with each other for seniority-based benefits enumerated in the Agreement, such as shift preference, overtime, leave, etc." (Jt. Exh. 1, Art. 60, Sections 60-1, 60-2) (Emphasis supplied).

3. At least five areas of the contract use seniority, as determined by the Union, as a criterion to determine employee rights: Compressed Work Schedules (Art. 25 Section 25-2d; Tr. 25, 26, 27); scheduling of annual leave (Art. 27, Section 27-3b; Tr. 25); overtime (Art. 32, Sections 32-2, 32-4; Jt. Exh. 5; Tr. 20, 21, 22, 42, 43, 44, 54, 55, 60, 61, 62, 66, 83-92); details (Art. 34, Section 34-4; Tr. 22, 23); and training (Art. 39, Sections 39-4, 39-12; Tr. 23, 24).

3/ Although the record is ambiguous, there is a Graphic Arts Department of which the Negative Engraving Division is a part (Tr. 28). It is entirely possible that the number of employees Ms. Bratton referred to (120) as making up GAN, in reality, is the number of employees in Graphic Arts. Nevertheless, since the number is immaterial to any issue herein, no resolution of the disparity is necessary.

4. Prior to October 1, 1991, seniority among GAN employees was based on continuous DMA time (Tr. 39, 53, 59). By letter dated July 30, 1991, to Mr. Clint Walker, Chief of Graphic Arts (Tr. 28; Res. Exh. 2), Mr. Elmer Hacker, President of the Union, advised management that,

> "A number of employees assigned to GAN have requested that the Union poll GAN members to determine the type seniority to be used for seniority based benefits such as shift preference, overtime, leave, etc. (The Union has for many years polled unit employees to determine the type seniority they prefer.)
>
> "It has been approximately three years since the last employee poll and the work force in GAN has changed to a great degree.
>
> "The Union will present members a choice of: Service Computation Date, Time since last hire at DMAAC, Time since last hire in GA. After the poll has been completed and a consensus has been made the Union will present the proposed seniority to be used to management of GA.
>
> "The Union will not allow another poll to be conducted until after one year has passed. The seniority selected by the members will not be used until October 1, 1991 at which time seniority for overtime, shift preference, detail, training, etc. will take affect. Seniority for vacation selection will not be used until 1 Jan 1992. This will allow all employees to continue with their plans until the end of this year.
>
> "The Union will conduct this poll beginning 1 August 1991 with results to be completed by 20 August 1991.
>
> "The Union will meet with you at a time and place of your choice, on 29 August 1991 to negotiate the seniority for use in GAN." (Res. Exh. 2; Tr. 72-73, 75-76).

5. By letter dated August 1, 1991, to Union members, President Hacker stated that,

> "Several Union members who work in GAN have requested the Union to poll GAN employees to find what the majority of members prefer to use as

seniority for overtime, selection for vacations, training details, etc.

"The polling is being conducted among Union members and the majority wishes will be used in GAN beginning 1 October 1991 for everything except vacation selection. Seniority used for vacation selection will be used beginning January 1992.

"Polling will include all members who are presently on TDY and counting the poll will be delayed until all members have had an opportunity to make their choice.

"The poll questionnaire has been sent to your last known address with a stamped self addressed envelope for you to return your ballot.[4/]

"If management does not agree to the seniority selection by the members, the Union will use last hire at DMAAC as the seniority to be used, unless the majority selects Service Computation Date as their choice.

. . ." (Jt. Exh. 3)

5. Ms. Catherine Bratton, the charging party, at the time of the poll was a negative engraver inspector and a member of the bargaining unit, but not, since March, 1991, a

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4/ The attached ballot provided:

"MEMBERS OF GAN:

PLEASE VOTE FOR ONE OF THE FOLLOWING TYPES OF SENIORITY TO BE USED IN GAN

[] GAN TIME
(Time since last assignment to GAN)

[] DMAAC TIME
(Time since last assignment to DMAAC)

[] SERVICE COMPUTATION TIME
(Total time in government service)
. . ." (Jt. Exh. 3, Attachment)

member of the Union,[5/] (Tr. 36) learned of the poll and sought, for herself and for other non-members, a ballot but was told by the Union that, ". . . only the paying union members would be voting." (Tr. 40). Ms. Edna Lovins, a GAN staff inspector and part of the bargaining unit but not a Union member (Tr. 56, 58), learned of the poll and was told by Mr. Ron Stowall that, "If we want to be able to vote on seniority that we should join the union" (Tr. 59). She was not permitted to vote (Tr. 60). Indeed, President Hacker told Ms. Bratton that only members would be allowed to vote (Tr. 99) and the Union admitted that it refused to distribute the poll to non-members (G.C. Exhs. 1(c) and (d)).

6. The first poll was inconclusive and a second poll was taken, as President Hacker stated in his letter of August 21, 1991, to Union members,

> "The results of the Seniority Poll are in and have been counted.
>
> "The Union sent 17 Union members ballots to select your choice of seniority; GAN Time; DMA Time or Service Computation Date. There were 16 ballots returned and you voted as follows:
>
> | | |
> |---|---|
> | GAN Time | 8 |
> | DMA Time | 6 |
> | S.C.D | 2 |
>
> "Because there was not a majority of votes (9) for any one selection we are requesting you vote again. Since SCD was the least selected preference we ask that you vote for one of two choices: GAN Time or DMA Time.
>
> "Please return the ballot[6/] by 3 September 1991 and we will meet with Mr. Walker to negotiate the seniority to be used in GAN.
>
> . . ." (Jt. Exh. 4)

7. Ms. Bratton was shown President Hacker's letter of August 21 by Ms. Brenda Bivens (Tr. 41) but she did not see a ballot and was not given an opportunity to vote (Tr. 41) and

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5/ On September 23, 1991, Ms. Bratton became a supervisor in GAN (Tr. 35).

6/ The ballot was attached (Jt. Exh. 4, Attachment).

the Union admitted that the ballot was not distributed to non-members (G.C. Exh. 1(c) and (d)).

8. By letter dated September 17, 1991, President Hacker informed Mr. Robert McCrain, Chief, GAN, as follows:

> "The Union recently polled it's members and found that the majority preferred GAN Time seniority be used for all seniority privileges.
>
> "It is the Unions decision that GAN Time be used for all employees in GAN and that all employees seniority selections, overtime vacation selections, compressed work schedule off and 8 hour days, training, details, etc. be done according to last GAN Hire date.
>
> "If there is a tie between employees last GAN Hire date then last DMAAC Hire date (including ACIC) then Service Comp. date, and if two or more employees are still tied the date and time personnel first notified the employee of his/her hire.
>
> "GAN time will be used for all employees and will not be changed for at least one year from this date as Members can not be repolled for that period.
>
> "GAN time will be used for selection of CWS days off and 8 hour day will be effective now. Overtime, training, details, temp, promotions, etc. effective beginning Oct. 1, and vacation schedules effective starting Jan. 1, 1992." (Jt. Exh. 7).

9. Also on September 17, 1991, President Hacker informed GAN employees, in part, as follows:

> "A seniority Poll recently conducted among GAN members indicated that the majority wanted GAN time counted for their seniority.
>
> "The Union has informed GA management that the last hire date in GAN will be used for all seniority selection privileges. Starting now, with selection of days off and 8 hour days for Compressed Work Schedule, GAN Time will be used.
>
> "Beginning Oct. 1, 1991 seniority for overtime, training, details, etc. will be GAN Time.
>
> "Effective Jan. 1, 1992 GAN Time will be used for vacation selection.

. . . (Jt. Exh. 6).

10. Mr. Thomas Forster, Labor Relations Officer for DMA (Tr. 18), testified that on September 15 or 16, 1991, before President Hacker's letter to Mr. McCrain, he attended a meeting, called by Mr. Walker, with Mr. Ronald Stowall, a vice president of the Union, to inquire of the Union's desire about seniority. Mr. Forster stated that,

> ". . . He [Walker] had been aware of the -- that a poll of some sort had been conducted, and so he called the meeting and Mr. Stowall represented the union, and basically Mr. Walker inquired of Mr. Stowall as to what the Union's position was.
>
> "Mr. Stowall essentially described the wishes of the union . . . and as I recall, Mr. Walker said, Well, then I would appreciate it if you would definitize those requests into a letter and provide that to me. And apparently this letter [Jt. Exh. 7] is a result of that meeting." (Tr. 29).

Mr. Forster specifically asserted that there were no negotiations (Tr. 29).

11. Since October 1, 1991, GAN management has determined seniority-based benefits on the basis of GAN Time, rather than continuous DMA Time (Jt. Exhs. 5, 7; Tr. 28, 42, 53, 58, 65). The difference in seniority standing was drastically altered by the change from DMA to GAN seniority for some employees. For example, as of August 1992, Ms. Edna Lovins had 8 1/2 years DMA seniority (Tr. 56) but only slightly over 4 years GAN seniority (Jt. Exh. 5, attachment); Ms. Diane Lackey had 19 years DMA seniority (Tr. 51), but only 6 years GAN seniority (Jt. Exh. 5, Attachment); and Ms. Karen Stoessel had 7 years DMA seniority (Tr. 63), but only slightly over one year GAN seniority (Jt. Exh. 5, Attachment). The principal impact on these employees has been the increase of mandatory overtime (Tr. 54, 55, 61, 62, 66).

12. President Hacker's letter of July 30, 1991, to Mr. Walker does conclude with the sentence,

> "The Union will meet with you at a time and place of your choice, on 29 August 1991 to negotiate the seniority for use in GAN." (Res. Exh. 2),

and President Hacker claims he met with Mr. Walker after the poll had been conducted (Tr. 103, 104-105) to "negotiate" the selection of seniority for GAN employees, but was unclear when that meeting occurred or who else might have attended.

According to Mr. Hacker, he informed Mr. Walker that the majority of Union members in GAN preferred GAN time and that was the type of seniority the Union would "propose." (Tr. 74) Mr. Hacker asserted that Mr. Walker expressed concern that all junior people would likely be put on one shift, but Mr. Hacker assured him that management would still be able to staff by grade by seniority (Tr. 74). While Mr. Hacker characterized his meeting with Mr. Walker as negotiations, Mr. Hacker reluctantly admitted on cross-examination that the method of calculating seniority was left to the Union's discretion under the contract and that the Union had the right under the contract to insist on management's use of a given type of seniority without negotiating with management. (Res. Exh. 2; Tr. 72, 73, 92, 93, 94, 102, 103, 104, 105). President Hacker's September 17 letter to Mr. McCrain makes no reference to any negotiations; rather, the letter states that it is the Union's "decision" that GAN time be used for seniority." [Jt. Ex. 7]. Further, Mr. Hacker testified that by his September 17 letter, the Union was "directing" Mr. McCrain to use GAN seniority (Tr. 100-101).

Conclusions

A. Duty of Fair Representation

Under the Statute, the exclusive representative's duty of fair representation is set forth in the second, and concluding, sentence of § 14(a)(1) as follows:

> ". . . 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)).

In Fort Bragg Association of Educators, National Education Association, Fort Bragg, North Carolina, 28 FLRA 908 (1987), the Authority stated, in part, as follows:

> We have reexamined the scope of the duty of fair representation under the Statute. We now conclude, in agreement with the court in NTEU II [National Treasury Employees Union v. FLRA, 800 F.2d 1165 (D.C. Cir. 1986)], that 'Congress adopted for government employee unions the private sector duty of fair representation.' 800 F.2d at 1171. In our view, the manner in which the duty is expressed in section 7114(a)(1) closely parallels the judicial formulation of the duty in the private sector. Similarly, the function and significance of the duty in the labor-management relations system created by

the Statute parallels that of the duty in private sector labor-management relations. Moreover, there is no indication in the legislative history of the Statute that Congress intended the scope of the duty under section 7114(a)(1) to differ from that in the private sector . . ." (28 FLRA at 916).

The Authority further stated that,

". . . we conclude that section 7114(a)(1) is intended by Congress to incorporate the private sector duty. As a result, we will analyze a union's responsibilities under section 7114(a)(1) in this and future cases in the context of whether or not the union's representational activities on behalf of employees are grounded in the union's authority to act as exclusive representative. Where the union is acting as the exclusive representative of its unit members, we will continue to require that its activities be undertaken without discrimination and without regard to union membership under section 7114(a)(1). We will not, however, extend those statutory obligations to situations where the union is not acting as the exclusive representative, nor will we continue to decide these cases based on whether or not the union's activities relate to conditions of employment of unit employees. Previous Authority decisions to the contrary will no longer be followed." (28 FLRA at 918)(Emphasis supplied).

To like effect: American Federation of Government Employees, AFL-CIO, 30 FLRA 35 (1987); Antilles Consolidated Education Association, 36 FLRA 776, 786-789 (1990)(hereinafter, "Antilles"); U.S. Air Force, Loring Air Force Base, Limestone, Maine, 43 FLRA 1087, 1093-1094, 1097 (1992); and American Federation of Government Employees, Local 1857, AFL-CIO (Sacramento Air Logistics Center, North Highland, California), 46 FLRA No. 81, 46 FLRA 904, 909-911 (1992)(hereinafter, "Sacramento ALC"), where the Authority stated, in part, that,

". . . As the court stated in NTEU, 'Congress adopted for government employee unions the private sector duty of fair representation.' 800 F.2d at 1171. The result is that 'a union with an exclusive power cannot use that power coercively or contrary to the interests of an employee who has no representative other than the union.' American Federation of Government Employees v. FLRA, 812 F.2d 1326, 1328 (10th Cir. 1987). . . ." (46 FLRA at 910).

The court stated in National Treasury Employees Union v. FLRA (NTEU II), supra, as follows:

". . . the duty of fair representation was imposed upon the NLRA by courts reasoning from the NLRA's equivalent to the first sentence of section 7114(a)(1). Subsequently, Congress wrote the Federal Service statute and added a second sentence that capsulates the duty the courts had created for the private sector. The inference to be drawn from Congress' use of the language of the judicial rule of fair representation is not that Congress wished to avoid that rule. To the contrary, the inference can hardly be avoided that Congress wished to enact the rule.

The duty of fair representation was first formulated by the Supreme Court in Steele v. Louisville & Nashville R.R., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944). The Court found the duty to be inferred from the union's status as exclusive representative of the employees in the bargaining unit. Thus, the Court said, 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it has also imposed on the representative a corresponding duty.' Id. at 202, 65 S.Ct. at 232 (citation omitted). The Court stated it was 'the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.' Id. at 202-03, 65 S.Ct. at 231-32.

> 'So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.'

Id. at 204, 65 S.Ct. at 233.

. . .

"This view of the duty as arising from the power and hence coterminous with it is expressed again and again in the case law:

> "Because '[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit,' Vaca v. Sipes, 386 U.S. 171, 182[87 S.Ct. 903, 912, 17 L.Ed.2d 842] (1987), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, 'the responsibility of fair representation.' Humphrey v. Moore, [375 U.S. 335] at 342 [84 S.Ct. 363, 368, 11 L.Ed.2d 370 (1964)]. . . . Since Steele v. Louisville & N.R. Co., 323 U.S. 192 [65 S.Ct. 226, 89 L.Ed. 173] (1944), . . . the duty of fair representation has served as a 'bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.' Vaca v. Sipes, supra, 386 U.S. at 182, 87 S.Ct. at 912.

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564, 96 S.Ct. 1048, 1056, 47 L.Ed,2d 231 (1976) . . . ." (800 F.2d at 1169-1170)

The Court concluded that,

> ". . . when Congress came to write section 7114 (a)(1) it included a first sentence very like the first sentence of section 9(a) and then added a second sentence which summarized the duty the Court had found implicit in the first sentence. In short, Congress adopted for government employee unions the private sector duty of fair representation." (800 F.2d at 1171).

In American Federation of Government Employees, AFL-CIO, Local 916 v. FLRA, supra, the Court further stated that,

"'fair representation' means that 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." (812 F.2d at 1328).

The Supreme Court most recently has restated the duty of fair representation as follows:

"'[T]he exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf.' Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 202, 65 S.Ct. 226, 232, 89 L.Ed. 173 (1944).

"The duty of fair representation is thus akin to the duty owed by other fiduciaries to their beneficiaries. For example, some Members of the Court have analogized the duty a union owes to the employees it represents to the duty a trustee owes to trust beneficiaries . . . Others had likened the relationship between union and employee to that between attorney and client . . . The fair representation duty also parallels the responsibilities of corporate officers and directors toward shareholders. Just as these fiduciaries owe their beneficiaries a duty of care as well as a duty of loyalty, a union owes employees a duty to represent them adequately as well as honestly and in good faith. . .

. . .

"Although there is admittedly some variation in the way in which our opinions have described the unions' duty of fair representation, we have repeatedly identified three components of the duty, including a prohibition against 'arbitrary' conduct. Writing for the Court in the leading case in this area of the law, JUSTICE WHITE explained:

> 'The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see Steele v. Louisville & N.R. Co., 323 U.S. 192[65 S.Ct. 226]; Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 [65 S.Ct. 235, 89 L.Ed. 187 (1944)], and was soon extended to unions certified under the N.L.R.A., see Ford

Motor Co. v. Huffman, supra. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. Humphrey v. Moore, 375 U.S. [335], at 342 [84 S.Ct. 363, at 367, 11 L.Ed.2d 370 (1964)]. It is obvious that Owens' complaint alleged a breach by the Union of a duty grounded in federal statutes, and that federal law therefore governs his cause of action.' Vaca v. Sipes, 386 U.S., at 177, 87 S.Ct., at 910.

"This description of the 'duty grounded in federal statutes' has been accepted without question by Congress and in a line of our decisions spanning almost a quarter of a century . . . We have repeatedly noted that the Vaca v. Sipes standard applies to 'challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well.' . . . We have also held that the duty applies in other instances in which a union is acting in its representative role, such as when the union operates a hiring hall . . . Finally, some union activities subject to the duty of fair representation fall into neither category. See Breininger, 493 U.S., at ---, 110 S.Ct. at ---." Air Line Pilots Association, International v. O'Neill, -- U.S. --, 111 S.Ct. 1127, 1133-1135 (1991).

B. Application of duty of fair representation

In this case, the Union, in selecting the seniority to be used, acted as the exclusive representative of unit members and there is no question that it was subject to the duty of fair representation. Antilles, supra; Sacramento ALC, supra, pursuant to which duty, the Union could not act coercively or contrary to the interests of non-members of the Union who have no representative other than the Union. But here, General Counsel's focus is not on the act of the Union but, rather, on how the Union arrived at its decision to act and asserts, in effect, that a Union can not have resort to views of its members concerning the exercise of a delegated power to fix a condition of employment unless it permits all members of the bargaining unit to take part in the decision to act. Thus, General Counsel states,

". . . the General Counsel takes the position that where a condition of employment is left to the sole discretion of the exclusive representative and the union conducts a poll[7/] of unit employees the results of which ultimately determine that condition of employment, the union must poll all members of the bargaining unit, not just union members." (General Counsel's Brief, p. 10).

Section 10(e) of Executive Order 11491, as relevant, was substantially identical to § 14(a)(1) of the Statute.[8/] In a case under the Executive Order, which was highly similar to the present case, it was held that exclusion of non-members of the union from a poll did not violate Section 10(e)'s duty of fair representation. Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, Local 301, Aurora, Illinois, A/SLMR No. 918, 7 A/SLMR 896 (1977) (hereinafter "PATCO") There, the facility employed about 23 data system specialists of whom 16 were employed on a regular 8:00 a.m. to 4:30 p.m. shift. The remaining seven operated in support of air traffic controllers and, because air traffic control was a 24 hour operation, data support was required on a 24 hour basis. Accordingly, the seven support or "operation" data system specialists worked on three rotating eight hour shifts and, because of their schedules, earned substantial additional compensation for premium pay on Sundays, holidays, and work between 6:00 p.m. and 6:00 a.m. The PATCO representative polled specialists who were members as to whether they wished to continue the current work schedules or whether they wanted to have all specialists rotate into the operations work. The complainant requested and was refused an opportunity to vote on the issue because he was not a member of PATCO. PATCO admitted that all five non-union employees were denied the privilege of voting on the matter because of their lack of

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7/ From the authority relied upon by General Counsel, as discussed hereinafter, it is plain that it is immaterial whether there is a "poll" in the normal sense of that term, as there indeed was in this case, or whether the "poll" is merely the vote at a Union meeting.

8/ Section 10(e) provided in relevant part as follows:

"(e) When a labor organization has been accorded exclusive recognition . . . It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. . ." (Executive Order 11491, Section 10(e)).

union membership. The vote tally was narrowly in favor of all specialists rotating into operations work. PATCO thereupon submitted to management a proposal to change shift hours of all specialists but management refused to agree. Thereafter, PATCO used the vehicle of a grievance, on the inequality of opportunity to earn premium pay, to again put the question before management and resolution of the grievance resulted in the desired change in work schedules. Judge Arrigo, whose decision was adopted by the Assistant Secretary, stated, in part, as follows:

> "Section 19(b)(1) of the Order mandates that a labor organization shall not interfere with, restrain or coerce an employee in the exercise of his rights assured by the Order. One of an employee's rights under the Order is, as provided in Section 10(e), to have the exclusive bargaining agent represent his interest in matters concerning working conditions without discrimination for reasons of labor organization membership. Thus, under the Order a union has the duty to fairly represent all members of the collective bargaining unit and discrimination against non-members breaches that duty. [Footnote omitted]. It can be argued therefore that excluding non-members when taking a poll as to what proposals a union will submit to management concerning working hours 'discriminates', in the broad sense of the word, against non-members since union members have an input as to what may become a working condition and non-members do not. However, in the private sector such 'discrimination' is not viewed in isolation. Rather, as seen from the above, a union's actions are weighed against the widely recognized right of a union to maintain control over its own internal affairs. This right includes affording a union broad latitude in fulfilling its representational obligations in negotiating and administering agreements on behalf of all unit employees in a manner it deems appropriate under the circumstances, so long as the union action is not shown to be arbitrary, discriminatory or in bad faith. Even though non-union unit employees may well have a substantial interest in how a particular union policy which directly or indirectly affects working conditions is shaped, that interest standing alone does not guarantee a non-member's participation in determining union policy. [Footnote omitted]. Thus, it does not appear that in the private sector labor laws have been so interpreted to give non-members the right, absent agreement by the union, to determine what the

union's contract proposals will be, participate in contract ratification votes, or participate in strike votes.

"Indeed, an argument might also be made that non-members even have a substantial interest in who will be the union officers since those officers deal with management on matters concerning all unit employees' working conditions. Nevertheless, I know of no case where a voice in these determinations has been given to a non-member.

"In the case herein the employee polling occurred in order to ascertain sentiment for a more equitable sharing of premium pay among all data systems specialists. The Union did not engage in the poll with hostile motive towards non-members. The ultimate change in shifts worked to the benefit and detriment of various unit employees alike, without regard to Union membership. While the Union has a duty of fair representation under the Order, in my view union's in the Federal service should be afforded latitude similar to that given private sector unions while fulfilling their representational obligations. Accordingly, since the actions taken by Respondent herein were neither discriminatorily motivated nor discriminatory in effect and there is no showing of bad faith on the part of Respondent, I conclude that the Union's conduct herein did not violate the Order." (7 A/SLMR at 899-900).

See, also, Professional Air Traffic Controllers Organization (PATCO-MEBA), Indianapolis, Indiana Air Route Traffic Control Center, A/SLMR No. 442, 4 A/SLMR 704 (1974)(reduced air fare program for members was an incident of membership and not inconsistent with union's obligation under Section 10(e)).

In American Federation of Government Employees, Local 2000, AFL-CIO, 14 FLRA 617 (1984), those portions of a complaint were dismissed which alleged violations of the Statute by the union's refusal to permit non-members to vote on the ratification of a negotiated agreement.[9/] In my decision, which was adopted by the Authority, I stated, in part, as follows:

9/ Also dismissed were allegations that the union violated the Statute by denying non-union members of the bargaining unit participation in negotiations.

". . . the second sentence of § 14(a)(1) . . . does not limit or restrict the right and duty of a labor organization, set forth in the first sentence of § 14(a)(1),

'. . . to act for, and negotiate collective bargaining agreements covering, all employees in the unit.'

". . . the exclusive representative has both the right and the duty to negotiate collective bargaining agreements covering all employees in the Unit, provided only that it must represent the interests of all employees in the Unit without discrimination and without regard to labor organization membership. . .

"Philosophically, there is logic to the argument that collective bargaining agreements covering all employees should be voted on by all employees; but this is not the way the law has developed. All employees are entitled to vote in determining whether there is to be union representation; but once a labor organization is chosen as the exclusive representative, the labor organization then acts for, and negotiates collective bargaining agreements covering, all employees and its members ratify and approve such agreements in the manner provided by the labor organization's governing requirements. Although the Statute protects the right of each employee to refrain from joining any labor organization, nonmembers have no right under the Statute to vote or to participate in meetings of the labor organization." (14 FLRA at 630-631).

See, National Labor Relations Board v. Financial Institution Employees of America, Local 1182, et al., 475 U.S. 192 (1985), where the Court held that the NLRB exceeded its authority in requiring that non-union employees be allowed to vote for affiliation it noted, in part, that,

". . . a union makes many decisions that 'affect' its representation of nonmember employees. It may decide to call a strike, ratify a collective bargaining agreement, or select union officers and bargaining representatives . . . dissatisfaction with representation is not a reason for requiring the union to allow nonunion employees to vote on union matters like affiliation. Rather, the Act allows union members to control the shape and

direction of their organization, and '[n]on-union employees have no voice in the affairs of the union.' Allis-Chalmers, 388 U.S. at 191. We repeat, dissatisfaction with the decisions union members make may be tested by a Board-conducted representation election only if it is unclear whether the reorganized union retains majority support." (475 U.S. at 205-206).

Here, interestingly, General Counsel and Respondent each rely on the same case, namely: Branch 6000, National Association of Letter Carriers, 232 NLRB 263 (1977), aff'd 595 F.2d 808 (D.C. Cir., 1979)(hereinafter, "Branch 6000"). In Branch 6000, the Postal Service and the National Association of Letter Carriers had entered into a national agreement which provided that certain provisions, including establishment of a regular workweek with either fixed or rotating days off, were subject to local negotiation. Branch 6000 negotiated a local memorandum of understanding (MOU) which provided:

"Carriers shall be allowed vote each year on having fixed or rotating days off."

In December, Branch 6000 conducted an election among all carriers in the unit at West Islip as to the choice of fixed or rotating days off for the following year; however, some members of Branch 6000 objected to the fact that non-members of the union had voted and the election was set aside. Branch 6000 then held a meeting, from which non-members were excluded, and a second vote was taken on the selection of fixed or rotating days off and the result, by one vote, was in favor of fixed days off. Branch 6000 advised management and, thereafter, the selection of fixed days off was initiated at West Islip for the ensuing calendar year, which changed the practice, existing before negotiation of the MOU, of having rotating days off. In finding a violation of Section 8(b)(1)(A)[10/] of the National Labor Relations Act, which is substantially like § 16(b)(1) of the Statute, the Board held,

". . . this not a matter that was exclusively within the internal domain of the Union and any intent of the contracting parties to limit determination of

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10/ "(b) It shall be an unfair labor practice for a labor organization or its agents --

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7. . . ." 29 U.S.C. § 158(b)(1)(A).

this subject to members could not be controlling. For the subject of the vote was the specific work schedule for the next year, a matter which directly concerned each employee in the unit and one of which all were entitled to express their wishes.1/

1/ This is unlike the ratification of an otherwise agreed-upon contract, in which the required ratification is an integral part of the union's representation process, and thus an internal union matter properly determinable by union members alone, for the same reasons the members alone may choose the negotiators. Here, in contrast, the voting was on the choice of one work schedule or another, so that the voting became a substitute for negotiation and thereby eliminated from the situation the union representation element and with it the propriety of limiting to union members a voice in the choice.

Limiting to union member unit employees only the right to participate in a referendum which determines an aspect of working conditions necessarily discriminates against nonunion unit employees. Where the matter at issue is of importance to all unit employees, a direct consequence of denying the right to participate to nonmembers is to encourage nonmember unit employees to join the Union. Such conduct is clearly proscribed by Section 8(a)(1) and 8(b)(1)(A) of the Act. . . . Accordingly, we find that Respondent, by denying nonunion unit employees the right to vote in a referendum conducted to determine specific terms and conditions of employment affecting all unit employees, violated Section 8(b)(1)(a) of the Act." (232 NLRB at 263).

The Court of Appeals, in affirming the decision of the Board, stated, in part, as follows:

"The duty of fair representation requires the bargaining agent to function in a representative capacity, with a fair understanding of the interests of all represented employees. The union has responsibility as exclusive bargaining agent to formulate the employees' position on terms and conditions of employment. This responsibility may

be delegated by the union membership. Such delegation is an internal union procedure from which non-union employees properly may be excluded. [Footnote omitted]. However, the delegatee, once selected, must in turn function as a representative for all the employees in the bargaining unit. If a representative's negotiating decisions are motivated solely by self-interest, then there is a breach of the duty of fair representation. [Footnote omitted]. The same result obtains when the decision making function is delegated to a group of employees with the understanding that their actions will be motivated solely by their own personal considerations. In the instant case, a negotiating decision had to be made on whether days-off would be fixed or rotating. The local representative could have reached a decision consistent with the duty of fair representation, so long as there was due consideration of the interests of all employees. [Footnote omitted]. However, at this point there was a further delegation of the decision-making function to the union membership.

"In this case it is not controverted and is indeed the common ground of all concerned . . . that it was contemplated that each union member would vote his personal preference. The union had committed itself to adopt the outcome of the union members' referendum as its selection for the days-off policy to be instituted by the employer. There was to be no further negotiation with the employer, who was indifferent to the choice of a days-off policy. The Board did not exceed its discretion to implement the Act when it concluded that this was an abdication of the representative function that violated the duty of fair representation, and constituted an unfair labor practice under section 8(b)(1)(A). In support of its decision is the consideration that the ultimate decisionmaker - the union membership - did not function in a representative capacity. The referendum merely computed the composite personal preferences of individual union members without consideration of the views or interests of non-union employees.

"This does not mean that exercise by the union membership of the decisionmaking responsibility would violate the duty of fair representation under all circumstances. Thus, we do not have before us a case of a procedure, with appropriate safeguards, which contemplated that the union membership would

act as a 'committee of the whole,' and that the vote of each member would reflect some consideration of the interests of all employees." (595 F.2d at 811-812).

The Court of Appeals further stated,

> "The Board's conclusion in this case is fortified by the consideration that there was neither a procedure, nor the intent, to consider the views and interests of non-union employees. . . . There must be communication access for employees with a divergent view, although there is no requirement of formal procedures. [Footnote omitted]. Where, as here, it appears to the Board that as a practical matter one segment of the bargaining unit has been excluded from consideration, it may find a breach of the duty of fair representation." [Footnote omitted](595 F.2d at 813).

General Counsel asserts that, "The results of the Union's members-only polls concerning seniority in GAN in this case similarly became the basis for the seniority system instituted by GAN management, without further negotiations. As Forster explained the rationale underlying management's agreement to the language in Article 60, management is indifferent to the manner in which seniority is calculated so long as qualified and capable employees are available to do the work. The Court in Letter Carriers [Branch 6000] was careful to distinguish its case from 'a poll of the union membership to ascertain its views prior to formulation of the negotiating posture for the bargaining unit,' precisely the basis for dismissal of the Complaint in PATCO. . . ." (General Counsel's Brief, pp. 13-14).

As General Counsel notes, the NLRB applied, and followed, its Branch 6000 decision most recently in International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmith Forgers and Helpers, Local 202 (Henders Boiler & Tank Company) and William D. Colvin, 300 NLRB 28 (1990)(hereinafter, "Boilermakers") and, on the same day, distinguished and explained its non-application in American Postal Workers Union, Pittsburgh Metro Area Postal Workers Union, AFL-CIO (United States Postal Service, and Blair Gorczya, 300 NLRB 34 (1990)(hereinafter, "APW").

In Boilermakers the agreement of the parties, which had expired but the provisions of which the employer continued to observe except for dues checkoff, provided for a "floating holiday" to be,

". . . mutually selected by the Company and the Union."

The past practice in selecting the floating holiday had been to take a poll of all unit employees by the union; but in the current year, the union posted a notice of a meeting, to be held in the plant at about noon, but without announcement of its purpose. Non-union employees were not excluded from the meeting; indeed, the Charging Party, Colvin, was invited to attend but declined because it was the lunch hour, and at least one other non-union employee was aware of the meeting but did not attend. The overwhelming majority of those who attended the meeting, union members all, selected July 3 as the floating holiday. Shortly thereafter, the Secretary-Treasurer of the union, on a lark of his own, conducted a poll of all unit employees because he thought the vote at the meeting was unfair. Apparently recanting, the Secretary-Treasurer destroyed the results of his poll without disclosing the results to the union President or to the employer. The employer rejected the union's selection and told the union to conduct another poll. After consultation with the International, the union polled members only and informed the employer who did not demur. The charge challenged the denial of the right to vote by non-members of the union. The Administrative Law Judge held, in part, that,

". . . As the court stated in Letter Carriers [Branch 6000], evidence of disparate impact upon nonunion employees is unnecessary once it is established that the union members voted their own personal preferences.

". . . I conclude that, by denying nonunion unit employees the right to vote in a referendum . . . of individual preferences concerning specific terms and conditions of employment affecting all unit employees, while allowing union employees to vote, Respondent thereby violated Section 8(b)(1)(A) of the Act." (300 NLRB at 32).

The Board adopted the decision of the Judge except that,

". . . Under the parties' past practice, the Respondent [union] has delegated to employees its role in selecting the floating holiday and has submitted the choice of a majority of polled employees to the Employer . . . we are modifying the judge's recommended Order to require . . . only that, if the contract continues to accord the Respondent a role in choosing the holiday and the Respondent chooses to delegate this role to unit

employees acting through a referendum, the Respondent must allow all unit employees to vote in the referendum." (300 NLRB at 28 n.2)(Emphasis supplied).

APW involved, as applicable, exclusion of non-members from a union meeting to discuss the employer's adjustments and consolidation of special delivery routes. In rejecting application of Letter Carriers Branch 6000, the Board stated, in part, as follows:

> "It is axiomatic that a collective-bargaining agent is required to represent all members of the bargaining unit, irrespective of their membership in the union. . . . Thus, the Act proscribes as discriminatory union practices that effectively deny to unit members fundamental rights of union representation, such as access to grievance procedures [Footnote omitted] and exclusive union hiring halls. [Footnote omitted]. In the case at hand, the judge concluded that a union's exclusion of nonmember unit employees from meetings at which possible reactions to job issues are discussed was tantamount to a denial of those employees' fundamental rights to union representation. We cannot agree.
>
> "Here, neither grievance representation nor any other right fundamental to union representation is at issue. . .
>
> "Clearly, the decisive element that rendered the nonmembers' exclusion unlawful in Letter Carriers -- the substitution of participation in the meeting for negotiation -- is absent here. In the case at hand, the Respondent held the . . . meeting to discuss changes which the Employer had made in special delivery routes, the relevance of the contract's provisions, and possible positions that the Respondent could take regarding the routing changes. The record shows that the Respondent ultimately met with the Employer in a labor/management committee meeting over the changes. There is no evidence that participation in the . . . meeting was a substitute for negotiations over the scheduling or that the Respondent had turned over to the majority vote of members its decision-making power as the representative of all unit employees. [Footnote omitted] The . . . meeting with its attendant discussion of the scheduling issue and possible union responses, then, was an 'integral part of the union's representation process,' and

thus was an 'internal union matter properly determinable by union members alone. . . .' Ibid. For these reasons, we find that the Respondent's exclusion of nonmembers from its . . . meeting was not improper and that this allegation should be dismissed. . . ." (300 NLRB at 34-35).

General Counsel asserts that,

"The case at bar fits precisely within the Board's rationale: the poll of GAN Union members served as a 'substitute for negotiations' with management. The voting concerned the choice of one type of seniority over another, and, since the contract granted the Union complete discretion to determine seniority for purposes of CWS, overtime, etc., the union representation element had been entirely eliminated. Counsel for the General Counsel accordingly submits that the Union breached its duty of fair representation in violation of Section 7116(b)(1) and (8) by improperly limiting to union members 'a voice in the choice.'

"This result should obtain particularly in the federal sector where employees are specifically granted the right to refrain from joining a labor organization 'freely and without fear of penalty or reprisal.' See, 5 USC §7102. By limiting the vote solely to those GAN unit employees who are Union members, the Union effectively told non-members that if they wished to have a 'voice in the choice,' they would have to join the Union. [Footnote omitted]. Since the vote was outcome-determinative on the question of seniority, this tactic could not help but influence an employee's decision whether or not to join the Union." (General Counsel's Brief, pp. 16-17).

Respondent, on the other hand, finds great solace in the Court's statements in Branch 6000, supra, that,

"This does not mean that exercise by the union membership of the decisionmaking responsibility would violate the duty of fair representation under all circumstances. Thus, we do not have before us a case of a procedure, with appropriate safeguards, which contemplated that the union membership would act as a 'committee of the whole,' and that the vote

of each member would reflect some consideration of the interests of all employees.[11/]

> "The procedure employed in this case is distinguishable from a poll of the union membership to ascertain its views prior to formulation of the negotiating posture for the bargaining unit. In that event, the bargaining responsibility remains with an individual or committee charged with the obligation of fair representation, requiring some consideration of the interests of all employees. That the ultimate decision is concordant with the view expressed by the union membership does not establish a breach of the duty. The general presumption is that the representative obligation has been performed in good faith." (595 F.2d at 812).

President Hacker strove mightily to make the Union's selection a mere negotiating proposal but his efforts floundered on the shoals of reality. First, the Agreement plainly gives the Union the absolute right to determine seniority, i.e., it states, ". . . at the option of the Union. . . ." (Jt. Exh. 1, Art. 60, Section 60-1). Having just negotiated for the right, it is highly unlikely that the Union would have remotely considered any suggestion that it "negotiate" the determination of seniority.

Second, the Union, by Vice President Stowall on September 15 or 16 informed the Director of Graphic Arts, Mr. Walker, that the Union had decided to use GAN time. There were no negotiations. Mr. Walker asked that the Union put it in writing and the Union did so by President Hacker's letter dated September 17 (Jt. Exh. 7) in which be stated, in part, that,

> "It is the Unions decision that GAN Time be used. . . ." (Jt. Exh. 7).

11/ Respondent argues that,

> ". . . the Union used the union members in the affected work group as a committee of the whole for the purpose of formulating a bargaining posture . . . ." (Respondent's Brief, p. 4).

But the record shows only that Union members, and none other, were polled twice, the first poll having been inconclusive, and that the second poll, ". . . indicated that the majority wanted GAN time counted for their seniority." (Jt. Exh. 6).

On the same day, President Hacker informed all GAN employees, in part, as follows:

> "A seniority Poll . . . indicated that the majority wanted GAN time counted for their seniority
>
> "The Union has informed GA management that the last hire date in GAN will be used for all seniority selection privileges. . . ." (Jt. Exh. 6)

Third, President Hacker's assertion that he met with Mr. Walker after the poll to "negotiate" the selection of seniority is contrary to the unchallenged and undenied testimony of Mr. Forster, which is fully consistent with President Hacker's letters of September 17 (Jt. Exhs. 6 and 7), and must be rejected.[12/] Mr. Forster's undisputed testimony established that Mr. Walker, knowing that a poll had been conducted, called the meeting to find out what the Union's position was. This firmly discredits any meeting by President Hacker and Mr. Walker about the Union's selection of GAN seniority since Mr. Walker did not know the Union's choice until Mr. Stowall told him on September 15 or 16 and there could have been no meeting after the Union's September 17 written confirmation of its choice, which Mr. Walker had requested, because the September 17 letter, signed by President Hacker, forecloses any such contention. For all the foregoing reasons, I specifically do not credit Mr. Hacker's testimony that there were any negotiations concerning the Union's decision to use GAN time.

Under the NLRB's rationale in Branch 6000, supra, which the United States Court of Appeals for the District of Columbia Circuit affirmed, which rationale the NLRB has further applied in Boilermakers, supra, and APW, supra, Respondent's failure to permit non-union members to vote on the selection of seniority would warrant a finding that

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12/ If the truth be known, I suspect, notwithstanding President Hacker's steadfast insistence to the contrary, that if he met with Mr. Walker it was before the poll and did not concern the choice of seniority but, rather, the effect of the Union's exercise of a choice of seniority under Art. 60. This would have been a logical result of his July 30 letter to Mr. Walker; would have been consistent with his testimony that Mr. Walker's concern was all junior people being put on one shift, which concern he put to rest by assuring Mr. Walker that management would still be able to staff by grade by seniority; would have been consistent with Article 60; and, indeed was indicated by his initial testimony (Tr. 102), which he almost immediately changed (Tr. 103).

Respondent thereby violated §§ 16(b)(1) and (8); however, with all deference, I believe the Board, and the Court in affirming its decision in Branch 6000, supra, have misconceived and/or misapplied the duty of fair representation and I recommend that precedent not be adopted by the Authority.

In Branch 6000, initially there was a poll of all unit employees; but this was set aside and the vote was taken at a union meeting from which non-members were excluded. In its decision, the Board stated,

> ". . . this is not a matter that was exclusively within the internal domain of the Union . . . For the subject of the vote was the specific work schedule for the next year, a matter which directly concerned each employee in the unit and one of which all were entitled to express their wishes. . . ." (232 NLRB at 263). [The Authority cited in support was IBT, Local 671 (Airborne Freight), 199 NLRB 994 (1972), a case wholly distinguishable on the question of the union's violation of its duty of fair representation and while the Trial Examiner (title subsequently changed to Administrative Law Judge) did refer to denial of part-time, non-member employees right to vote, (199 NLRB at 999), plainly the violation found was the failure ". . . to represent (the part-time warehousemen or dock-workers, . . . in a fair and impartial manner . . . ." (199 NLRB at 1001)(The Union eliminated part-time employees)].
>
> The Board continued, stating,
>
> > "Limiting to union member unit employees only the right to participate in a referendum which determines an aspect of working conditions discriminates against nonunion unit employees . . . ." (232 NLRB at 263)(Emphasis supplied).

The Court in affirming the decision of the Board in Branch 6000 viewed the use of a poll of members as,

> ". . . an abdication of the representative function that violated the duty of fair representation . . . ." (595 F.2d at 812)(Emphasis supplied).

Although the Court recognized that membership decision-making was proper in some circumstances,

> "This does not mean that exercise by the union membership of the decision making responsibility

would violate the duty of fair representation under all circumstances." (595 F.2d at 812),

it concluded that the duty of fair representation was violated because,

> ". . . each union member would vote his personal preferences, evidence of disparate impact is unnecessary to prove that the interests of non-members have been ignored. . . . Where . . . it appears to the Board that as a practical matter one segment of the bargaining unit has been excluded from consideration, it may find a breach of the duty of fair representation." 595 F.2d at 813).

In APW, the Board emphasized that in Branch 6000 it found the exclusion of non-members from the union meeting at which the vote was taken unlawful because,

> ". . . the union had essentially taken the decision on days off out of its internal domain as collective-bargaining representative and made the employee vote procedure into 'a substitute for negotiations.' . . . Having thereby 'eliminated from the situation the union representation element,' the union also eliminated 'the propriety of limiting to union members a voice in the choice.'" (300 NLRB at 35).

With all deference, the statements by the Board and by the Court set forth above distort the duty of fair representation, i.e., to represent "the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." Of course, Section 9(a) of the NLRA, 29 U.S.C. § 159(a), provides that, "Representatives designated or selected for the purpose of collective bargaining by the majority of employees in a unit appropriate for such purpose, shall be the exclusive representative of all the employees in such unit. . ." and the first sentence of § 14(a)(1) even more clearly provides, "A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for . . . all employees in the unit." (5 U.S.C. § 7114(a)(1)). Of course, as the Authority has stated, "'a union with an exclusive power cannot use that power coercively or contrary to the interests of an employee has no representative other than the union.'" Sacramento ALC, supra, 46 FLRA at 910. Plainly, as the Supreme court noted in NLRB v. Financial Institution Employees of America, Local 1882, supra, ". . . a union makes many decisions that 'affect' its representation of nonmember

employees . . . dissatisfaction with representation is not a reason for requiring the union to allow nonunion employees to vote on union matters . . . Rather, the Act allows union members to control the shape and direction of their organization, and '[n]on-union employees have no voice in the affairs of the union.'" (475 U.S. at 205-206).

The duty of fair representation does not arise because a matter concerns each employee in the unit; the duty of fair representation does not require that non-union members be allowed to vote on union matters; the duty of fair representation is not breached by exclusion of the views of non-members; and there is no abdication of the representative function, nor a violation of the duty of fair representation, when a union utilizes a poll, or a vote, to determine the union's position. In each instance, these are internal union matters and non-union employees have no voice. The union, however, is obligated to represent the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership. Nevertheless, the desire of non-union members to have their preferences considered by the union is not an interest which must be accorded under the guise of fair representation. Stated otherwise, when a majority of the employees selects an exclusive representative, the exclusive representative is then entitled to act for all employees in the unit; and those who elect not to join the exclusive representative give up their right to a voice in the affairs of the union. Of course, the union may not exercise its power as exclusive representative "coercively or contrary to the interests of" a non-union member; but here, the Union's action was neither discriminatorily motivated nor discriminatory in effect.

The analysis of the Board and of the Court with regard to the duty of fair representation is both specious and founded on quick sand. For example, under the Board analysis, if, here, President Hacker had decided that GEN seniority would be used, there would be no contention that the duty of fair representation had been breached. If President Hacker had submitted the question to the Union's Executive Board, presumably there likewise would be no contention that the duty of fair representation had been breached because the decision had not been taken out of its internal domain as collective bargaining representative. But if the decision were put to a vote of the members at a union meeting there would be a breach of the duty of fair representation.

For all of the foregoing reasons, Respondent's conduct was not contrary to its duty of fair representation, pursuant to § 14(a)(1) of the Statute, and it did not violate

§ 16(b)(1) or (8) of the Statute. Accordingly, pursuant to PATCO[13/], supra, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 7-CO-10029 be, and the same is hereby, dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 30, 1993
Washington, DC

13/ General Counsel would distinguish PATCO as a negotiating proposal, as indeed it was in the first instance; however, it was more than a negotiating proposal. Of course, Branch 6000, supra, and Boilermakers, supra, can also be distinguished. For example, in Branch 6000, although the Administrative Law Judge rationalized to the contrary, the agreement appeared to have been a negotiated agreement that all carriers would vote; and Boilmakers was indeed premised in part on past practice. Moreover, subsequent decisions of the Supreme Court in cases such as Air Line Pilots Association, International v. O'Neil, supra, and National Labor Relations Board v. Financial Institution Employees of America, Local 1182, supra, have further emphasized the limits of the duty of fair representation and the impropriety of intrusion into the internal affairs of a union.