Branch 6000, National Association of Letter Carriers (United States Postal Service, West Islip, N.Y.) *and* Melvin Lauber. Case 29–CB–2364–P

September 21, 1977

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND MURPHY

On January 27, 1977, Administrative Law Judge Phil Saunders issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent, herein also called Branch 6000 or the Union, filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We agree with the General Counsel that the Administrative Law Judge erred in concluding that Respondent did not violate Section 8(b)(1)(A) of the Act by virtue of its exclusion of nonmembers from voting on the question of whether carriers would have fixed or rotating days off. The relevant and material facts are fully set out in the Adminstrative Law Judge's Decision. Briefly, in July 1975, the U.S. Postal Service and the National Association of Letter Carriers executed a National Agreement, including therein provisions for local implementation of various items, one of which was whether carriers would have fixed or rotating days off. In October 1975, the West Islip management and Branch 6000 executed a memorandum of agreement providing that "Carriers shall be allowed to vote each year on having fixed or rotating days off." In December 1975, Branch 6000 stewards conducted an election among all of the carriers, union members and nonmembers alike. Several union members objected to nonmembers participating in the election and, after consultation with higher union officials, the election was set aside and a second election was held at a union meeting from which the nonmember carriers were excluded. By a one-vote margin, the issue was resolved in favor of fixed days off. Thereafter, management put into effect the policy of fixed days off for all carriers in the bargaining unit.

The Administrative Law Judge concluded that Respondent did not violate Section 8(b)(1)(A) because (1) neither management nor the Union envisioned nonmembers' participation in the voting, (2) the matter at issue was exclusively within the internal domain of the Union, (3) assuming there was a breach of contract, the contract violation did not constitute an unfair labor practice, and (4) there is nothing in the record to show that the Union had not fairly represented all of the employees in the unit. We disagree and find that Respondent's refusal to permit nonunion members of the unit to vote on the question of fixed or rotating days off violated the Act.

Contrary to the Administrative Law Judge's rationale, this is not a matter that was exclusively within the internal domain of the Union and any intent of the contracting parties to limit determination of 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] Cf. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 671 (Airborne Freight Corporation of Delaware)*, 199 NLRB 994, 999 (1972).

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. *The Radio Officers' Union of the Commercial Telegraphers Union, AFL [A. H. Bull Steamship Company]* v. *N.L.R.B.*, 347 U.S. 17 (1954). 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.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirma-

[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.

tive action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Branch 6000, National Association of Letter Carriers, is a labor organization within the meaning of Section 2(5) of the Act.
2. By denying nonunion unit employees the right to vote in a referendum conducted to determine specific terms and conditions of employment affecting all employees in the West Islip, New York, collective-bargaining unit, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.
3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Branch 6000, National Association of Letter Carriers, West Islip, New York, its officers, agents, and representatives, shall:

1. Cease and desist from denying nonunion unit employees the right to vote in a referendum conducted to determine specific terms and conditions of employment affecting all employees in the West Islip, New York, bargaining unit represented by Respondent.
2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Set aside, cancel, and invalidate the results of the most recent annual election conducted pursuant to the October 1975 Local Memorandum of Understanding among union members of the bargaining unit to determine whether the days off of the bargaining unit carriers shall be "fixed" days off or "rotating" days off, and, within 30 days of the date of this Decision and Order, conduct another election among all of the carriers in the bargaining unit to determine whether the days off of the bargaining unit carriers shall be "fixed" days off or "rotating" days off.

(b) Post at its business offices, meeting halls, and all other places where notices to members are customarily posted, copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by an authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Furnish the Regional Director for Region 29 signed copies of said notice for posting by the Employer, if the Employer is willing, in places where notices to its employees are customarily posted. Copies of said notice, to be provided by said Regional Director, after being signed by a duly authorized representative of Respondent, shall be forthwith returned to said Regional Director for transmission by him to the Employer.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discriminate against nonmember bargaining unit employees by denying them the right to vote in an election conducted to determine specific terms and conditions of employment affecting all employees employed in the West Islip, New York, bargaining unit represented by us for purposes of collective bargaining.

WE WILL set aside, cancel, and invalidate the results of the most recent annual election conducted pursuant to the October 1975 Memorandum of Understanding among union members of the bargaining unit to determine whether the days off of the bargaining unit carriers shall be "fixed" days off or "rotating" days off, and, within 30 days from the date of the Decision and Order entered in this proceeding, conduct another election among all of the carriers in the bargaining unit to determine whether the days off of the bargaining unit carriers shall be "fixed" days off or "rotating" days off.

BRANCH 6000, NATIONAL ASSOCIATION OF LETTER CARRIERS

DECISION

STATEMENT OF THE CASE

PHIL SAUNDERS, Administrative Judge: Based on a charge filed on January 7, 1976, by Melvin Lauber, herein the Charging Party, a complaint against Branch 6000, National Association of Letter Carriers, (United States) Postal Service, West Islip, New York,[1] herein the Respondent Union, the Union, or Branch 6000, was issued on August 13, 1976, alleging violations of Section 8(b)(1)(A) of the National Labor Relations Act, as amended. The Respondent Union filed an answer to the complaint denying it had engaged in the alleged unfair labor practices, and subsequent to the hearing before me on this matter, the Union filed a brief.

Upon the entire record in this case, and from my observation of the witnesses and their demeanor,[2] I make the following:

FINDINGS OF FACT

The Board has jurisdiction over this matter by virtue of Section 1209 of the Postal Reorganization Act. The facility involved in this proceeding is the U.S. Post Office located at 480 Union Street, West Islip, New York, herein called the Employer or West Islip. The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

The Unfair Labor Practices

The Respondent Union represents letter carriers at approximately 110 post offices on Long Island, but in certain instances each of them conducts separate local negotiations for their own particular office. The sole conduct complained of in the instant case is the refusal of the Respondent Union to allow nonmembers of West Islip to vote on whether or not to accept fixed or rotating days off.

It appears that the regular workweek for Postal Service employees is 5 days. However, days off may be distributed among employees as either "fixed" days off or "rotating" days off. Under the fixed method an individual employee has the same day off each week — e.g., every Wednesday and every Sunday. Under the rotating method the individual has different days off each week — e.g., Wednesday and Sunday 1 week, Saturday and Sunday the next week.

In July 1975, the U.S. Postal Service and the National Association of Letter Carriers entered into a national bargaining agreement, but with provisions therein permitting local implementation of various and numerous items (22 of them) through negotiation of local understandings during the 30 days following October 1975, and included in such items is the establishment of a regular workweek of 5 days with either fixed or rotating days off.

Prior to the October 1975 local negotiation period, Branch 6000 sent to the shop stewards at each of its post offices a letter containing bargaining instructions and statements as to the Union's position on the 22 items, and with respect to days off the letter stated that the Union's position was to negotiate for "Whatever the membership in your station desire." Then in October 1975, pursuant to the national agreement, management and Branch 6000 negotiators at the facility of the Employer, executed a local memorandum of understanding, providing that "Carriers shall be allowed to vote each year on having fixed or rotating days off."

In December 1975, the Union's shop steward, Dennis Van Bomel, conducted an election among all the carriers in the unit working at West Islip, and had then cast a ballot for either fixed or rotating days off. However, several members of the Respondent Union objected to this procedure and the fact that nonmembers of the Union had submitted ballots. Steward Van Bomel then contacted certain officials of the Respondent Union, and upon their instructions the above election was set aside. The Respondent Union then held a meeting, from which nonmembers were excluded, and at this meeting a second vote on the selection of fixed or rotating days off was taken, and the result was in favor by one vote of fixed days off. Shop Steward Van Bomel then communicated this result to the management at West Islip and, in accordance therewith, management initiated fixed days off for the calendar year 1976, and by so doing changed the practice of having rotating days off. A few days after this second vote was taken, Melvin Lauber, the Charging Party herein, working at West Islip and a nonmember of the Union, gave a written objection to the Employer's supervisor, Ed Greene, relative to the outcome of this vote. In turn, Greene forwarded Lauber's complaint to the postmaster of the Employer. The postmaster called the U.S. Postal Service Labor Relations Staff, who, in turn, instructed the postmaster at West Islip to initiate fixed days off, as aforestated.

The General Counsel maintains and argues that the Respondent Union negotiated certain contract benefits, and that the particular benefit involved therein — whether the days off would be fixed or rotating — was a right for *all* the carriers in the unit to determine. The General Counsel also contends that this is not a contract ratification vote as the contract had already been settled and signed, but rather the vote is an implementation of a contract right. The General Counsel further asserts that the decision in *Miranda Fuel Company, Inc.*, 140 NLRB 181 (1962), clearly establishes that the denial by a union to any employee of a contract right is a violation of Section 8(b)(1)(A) of the Act, and that such is particularly acute in the instant case because the denial involved was the protected right of employees to refrain from union membership.

Miranda holds that a bargaining representative and an employer violated Sections 8(b)(2) and (1)(A) and 8(a)(3)

[1] The proper name and designation as corrected at the hearing.

[2] The facts found herein are based on the record as a whole upon my observation of the witnesses. The credibility resolutions herein have been derived from a review of the *entire* testimonial record and exhibits with due regard for the logic of probability, the *demeanor* of the witnesses, and the teaching of *N.L.R.B.* v. *Walton Manufacturing Company & Loganville Pants Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction on the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All* testimony has been reviewed and weighed in the light of the *entire* record.

and (1) of the Act, respectively, when the union attempts to cause or does cause an employer to derogate the employment status of an employee for arbitrary or irrelevant reasons or upon the basis of an unfair classification. Moreover, *Miranda* dealt with a denial of a seniority right.

As pointed out, article XXX of the national collective-bargaining agreement, which establishes the framework for the local negotiations at West Islip, clearly provides that the selection of fixed or rotating days off is to be implemented through local union-management negotiations, and nothing in this provision suggests participation by nonunion carriers.[3] Moreover, immediately prior to the local negotiations, the Respondent Union instructed all of its shop stewards as to the Union's position on the 22 items, and in the same document also specifically informed the stewards that they could read such instructions or guidance suggestions at local union meeting with members in attendance,[4] and I am in agreement that the subsequent second voting on days off at West Islip, as aforestated, is a proper local implementation procedure of these instructions. As also indicated, the overall reactions of the parties reveal that the idea of nonmembers voting on the days-off issue was never seriously considered until the circumstances and events in question here, and management at West Islip obviously never manifested any real concern for nonmember voting rights, but rather delegated the whole process to the Union.[5] Furthermore, individual members of the Union, at the initial balloting, immediately objected to nonmember participation, thus reflecting an expectation that voting was for members only, and higher officials of the Union also shared this viewpoint as they instructed the shop steward to conduct a second ballot at a closed union meeting, as detailed earlier herein. Finally, both the Postal Service Labor Relations Staff and the West Islip management accepted the result of this second vote even though both were fully aware that nonmembers had been excluded from this second voting.

It also appears to me that the Charging Party, by insisting after the terms of the national bargaining contract were agreed upon that the local implementation procedure contained therein, including days off, be voted on by all carriers, including nonmembers of the Respondent Union, is an attempt to bargain not with respect to "wages, hours, and other terms and conditions of employment," but with respect to a matter which was exclusively within the internal domain of the Union. At some point during negotiations, management gave up the right to determine whether fixed or rotating days would be scheduled, and at this stage the Union would have then been entitled to decide this question itself, but instead, it opened the decision to its membership and in so doing reserved the right for members in all the local offices to exercise their vote as to 22 items. This was clearly a collective-bargaining decision, and the courts and the Board have long recognized an unqualified right to exclude nonmembers from collective-bargaining decisions.

The General Counsel seeks to argue this case on the grounds that, in excluding nonmembers from the days off vote, Branch 6000 denied them a specific contract right under the local West Islip agreement. However, even assuming the validity of this contention, it has long been recognized that a contract violation is not of itself an unfair labor practice. Moreover, Section 10(a) of the Act empowers the Board only to prevent statutory unfair labor practices. As pointed out, Congress chose not to grant the Board jurisdiction over disputes of purely contractual origin, and Section 301 specifically vests jurisdiction over suits for violation of contracts between employers and labor organizations in the courts. The Charging Party may possibly have a remedy against the Union and/or the Employer arising under the local agreement, but he does not have a remedy with the Board.

While the decision in *Ford Motor Company* v. *Huffman,* 345 U.S. 330 (1953), teaches that a wide range of reasonableness must be allowed a bargaining representative in serving the unit it represents, the bargaining representative is still always subject to complete good faith and honesty of purpose in the exercise of its discretion. Under the circumstances in the instant case, the Respondent Union, in my opinion, did not violate its duty of fair representation to all the employees in the unit when it restricted the off days vote at West Islip to members of the Union, nor is there any evidence that the motivation in bargaining and then designating the 22 items for local determinations by its members at the various offices, was any more that than a fair and reasonable solution to local wishes and desires, and there is lacking any proof that such was unfair or arbitrary. Moreover, the complaint does not allege that the fixed days off method discriminates against the Charging Party individually or against nonmembers in general. Likewise, the complaint does not allege that Branch 6000 at any time acted with malice or in bad faith.

CONCLUSIONS OF LAW

The Respondent Union has not violated the Act as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

[3] See G.C. Exh. 2.

[4] See Resp. Exh. 1.

[5] The West Islip local memorandum of understanding (G.C. Exh. 3), does contain the provision that "Carriers shall be allowed to vote each year on having fixed or rotating days off." Admittedly, the terms "Carriers" can refer to all carriers, members and nonmembers alike, but, as pointed out, it is equally consistent with the agreement as a whole to interpret this term as designating only the West Islip members of the Respondent Union. For example, at p. 7 the memorandum states that it constitutes an agreement between "the letter Carriers of West Islip, of Branch 6000, NALC AFL-CIO, and the Management . . . at West Islip." Here the term "Letter Carriers of West Islip" is differentiated from the term "Branch 6000, NALC," and yet the phrase quite clearly refers only to the union members of West Islip.