Branch 3126, National Association of Letter Carriers (NALC), AFL–CIO (United States Postal Service) *and* Joe Pitlanish. Cases 7–CB–11194(P), 7–CB–11485(P), and 7–CB–11722(P)

January 31, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On September 30, 1998, Administrative Law Judge George Carson II issued the attached bench decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, and a brief in support of cross-exceptions and in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below.

1. The General Counsel has excepted to the judge's finding that the Respondent did not violate Section 8(b)(2) and (1)(A) of the Act when Union Steward Greg Swindall demanded that a supervisor never again give penalty overtime to Joe Pitlanish, a nonmember of the Union. We find merit in these exceptions.

Swindall was the steward who served as overtime coordinator, charged with monitoring the Employer's assignment of overtime, and representing unit employees in the resolution of overtime disputes. Pitlanish was a unit employee who had resigned from the Union in 1994. Credited testimony shows that Swindall bore considerable hostility towards Pitlanish because of his nonmember status. Swindall often referred derisively to Pitlanish as a "scab" or as "Scab-lanish." In addition, the judge found, and we agree, that on January 14, 1997, Swindall unlawfully refused to file and process a grievance about overtime for Pitlanish because of his nonmember status.

Just a few days earlier, on January 8, Swindall had an encounter with Postal Service Supervisor Lauri Hunsanger about Pitlanish. Unit employee Steven Dolmage witnessed this incident. Swindall believed that Hunsanger was responsible for assigning "penalty overtime" to Pitlanish on January 7.[2] He angrily demanded that Hunsanger explain this assignment. Hunsanger said that Swindall should talk to the supervisor who had actually assigned the work. Still, according to Hunsanger's uncontradicted testimony, Swindall "was adamant about making sure that I did not use Joe Pitlanish for any penalty overtime, at any time in the future . . . he just kept saying not to use Scab-lanish."

The judge offered several reasons for finding that Swindall's conduct did not violate Section 8(b)(2): Swindall did not follow up his complaint with anyone else; he did not talk to the supervisor who made the penalty overtime assignment; he did not direct that only union members receive penalty overtime; no other representative of the Respondent took action; and the assignment of penalty overtime violates the parties' collective-bargaining agreement. We find that none of these reasons present a valid defense of Swindall's conduct.

Acting in his capacity as the Respondent's agent with responsibility for overtime matters, Swindall attempted to cause a management representative of the Postal Service to discriminate against Pitlanish because of his nonmember status. Contrary to the judge, there is no evidence suggesting that Swindall was seeking to enforce a contract ban on the assignment of penalty overtime to all unit employees. He clearly objected only to the assignment of penalty overtime, with the resulting monetary benefit of double hourly wages, to a particular nonmember employee, and he indicated that he was doing so because the employee was not a member. It is irrelevant to an analysis of this conduct that neither Swindall nor any other agent for the Respondent took any other action or sought more broadly to limit overtime assignments to union members. Regardless of whether the Respondent had an unlawful discriminatory policy on penalty overtime assignments—and there is no allegation that it did—it was a violation of Section 8(b)(2) and, derivatively, Section 8(b)(1)(A) for one of its agents to attempt to cause Pitlanish's employer to discriminate against him because he was not a union member, thereby encouraging membership in the Respondent. See Letter Carriers Branch 86 (Postal Service), 315 NLRB 1176, 1177–1178 (1994). This discrimination against a nonmember in the administration of contractual overtime responsibilities also constituted a breach of the Respondent's duty of fair representation and, as such, was an independent violation of Section 8(b)(1)(A).

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In accord with the Respondent's exception, we correct the judge's misstatement of testimony about a statement by Union Steward Ammar. She said that she had been "reamed" in the past for representing a "nonmember," not for representing the Charging Party. This misstatement does not affect the judge's conclusion that Ammar's statement violated Sec. 8(b)(1)(A).

[2] The parties' collective-bargaining agreement prohibited the assignment of additional overtime to employees who had worked 10 hours on their regular workday or 8 hours on their day off or "nonscheduled day." Such assignments did take place, however, resulting in "penalty overtime" also referred to as "double time" or "v-time," where the affected employee was compensated at twice the regular hourly pay rate.

Finally, Swindall's statements to Hunsanger, made in the presence of a unit employee, would reasonably tend to convey to unit employees a union steward's willingness to retaliate against a nonmember employee. His statements therefore had the tendency to restrain and coerce employees in violation of Section 8(b)(1)(A). Letter Carriers Branch 47 (Postal Services), 327 NLRB 529 (1999); Letter Carriers Branch 86 (Postal Services), supra, 315 NLRB at 1178.

2. As indicated above, the judge found, and we agree, that the Respondent violated Section 8(b)(1)(A) by failing and refusing to file Pitlanish's grievance alleging the failure to take into account "overtime missed opportunities" for the fourth quarter of 1996 when determining which employees had 14 fewer hours than the employee with the most overtime hours on December 30, 1996. However, we shall modify the judge's recommended Order for this violation to accord with *Iron Workers Local 377 (California Iron Workers Employers Council),* 326 NLRB 375 (1998). Therefore, "if the grievance cannot be resolved through the usual contractual channels and the question of how the grievant would have fared must be resolved in compliance, a make-whole remedy may be imposed only if the General Counsel shows that [Pitlanish] 'would have won on the merits' if the grievance had been 'properly pursued' by the Union." Id. at 380. [Citations omitted.] Furthermore, if the General Counsel makes the required showing, the Respondent shall only be obligated to make Pitlanish whole for any increase in damages he suffered as a consequence of the Respondent's refusal to process that grievance, together with interest.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Branch 3126, National Association of Letter Carriers (NALC), AFL–CIO, Royal Oak, Michigan, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(e), and reletter the subsequent paragraph.

"(e) Attempting to cause the Employer to discriminate against an employee, because the employee is not a union member, by telling a supervisor, in the presence of a unit employee, not to assign penalty overtime to a nonmember employee."

2. Substitute the following for paragraph 2(b) and reletter subsequent paragraphs.

"(b) Permit Joe Pitlanish to be represented by his own counsel at any grievance proceedings, including arbitration or other resolution proceedings, and pay the reasonable legal fees of such counsel.

"(c) In the event that it is not possible for the Respondent to pursue the grievance, and if the General Counsel shows in compliance that a timely pursued grievance would have been successful, make whole Joe Pitlanish and any other employees for any increase in damages suffered as a consequence of the Respondent's failure to process the grievance, together with interest."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, dissenting in part.

For the reasons fully set forth in my dissenting opinion in *Iron Workers Local 377 (California Iron Workers Employers Council),* 326 NLRB 375 (1999), I would not limit the relief due Charging Party Joe Pitlanish based on the Respondent's unlawful failure to file a grievance on his behalf. As more fully stated in that dissent, I would adhere to the Board's established policy of seeking full relief for victims of unfair labor practices and not the "half-a-loaf" relief my colleagues would afford to victims of this type of 8(b)(1)(A) violation.

APPENDIX B

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to file grievances on behalf of any employee because that employee is not a member of the Union.

WE WILL NOT tell employees that union members will be given preferred treatment over nonmembers, or that stewards will be criticized for representing nonmembers.

WE WILL NOT fail to provide Joe Pitlanish, or any other employee represented by Branch 3126, National Association of Letter Carriers (NALC), AFL–CIO, upon request, with copies of grievances that the requester initiated.

WE WILL NOT refuse to sign requests for temporary schedule change for any employee because that employee is not a member of the Union.

WE WILL NOT instruct or attempt to cause the United States Postal Service to refrain from assigning penalty overtime to any employee because that employee is not a member of the Union.

[3] We shall also modify the recommended Order and notice to include a provision that Respondent bear the reasonable costs of an attorney of Pitlanish's choosing to represent him at any grievance proceedings, including arbitration, that may take place.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL promptly request the United States Postal Service to consider the grievance of employee Joe Pitlanish concerning overtime missed opportunities and, if it agrees to do so, WE WILL process the grievance with due diligence.

WE WILL permit Joe Pitlanish to be represented by his own counsel at any grievance proceedings, including arbitration or other resolution proceedings that may follow from our efforts on Pitlanish's behalf, and WE WILL pay the reasonable legal fees of such counsel.

WE WILL, in the event that it is not possible to pursue the grievance, and if the General Counsel of the National Labor Relations Board shows in compliance proceedings that a timely pursued grievance would have been successful, make whole Joe Pitlanish and any other employees for any increases in damages suffered as a consequence of our refusal to process that grievance, together with interest.

BRANCH 3126, NATIONAL ASSOCIATION OF LETTER CARRIERS (NALC), AFL–CIO

Kristen M. Niemi, Esq., for the General Counsel.
Michelle Dunham Guerra, Esq., for the Respondent.

BENCH DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Detroit, Michigan, on August 20 and 21, 1998. Upon charges filed by Joe Pitlanish, an individual, a consolidated complaint issued on June 8, 1998.[1] The complaint alleges that Respondent violated Section 8(b)(1)(A) and (b)(2) of the National Labor Relations Act. Respondent's timely answer, as amended, admits service of the charges, the jurisdiction of the Board, and the status of its officers and stewards as agents. At the conclusion of the hearing, I issued a Bench Decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations.

Consistent with the allegations of the complaint, I found that Respondent failed and refused to file and process a grievance that Charging Party Joe Pitlanish attempted to file in January 1997, regarding the calculation of "overtime missed opportunities" for the fourth quarter of 1996. Pitlanish's credible testimony established that he was aware of occasions when employees did not work overtime that was available to them but did not thereafter have those hours counted against them on the overtime tracking sheet. Review of the transcript of my decision reveals that I did not specifically state that the grievance was "not clearly frivolous;" however, that finding is implicit in my decision and is hereby made. The merits of the grievance cannot be determined without making various calculations. For that reason, the merits of the grievance were not litigated at the hearing. If necessary, they may be litigated at the compliance stage of this proceeding. *Letter Carriers Local 233 (Postal Service)*, 311 NLRB 541, 542 (1993). Although counsel for the General Counsel argued that Respondent failed to file and process a similar grievance for the first quarter of 1997, I made no finding in this regard since this issue was not fully litigated and there is no charge alleging such a failure. The only charge relating to failure to process a grievance was the charge in Case 7–CB–11194(P) which was last amended on March 24, 1997, prior to the end of the first quarter of 1997.

Although the decision states my finding that Respondent breached its duty of fair representation as to Pitlanish, the transcript, at page 333, line 11, reads as if I agreed that there was no discrimination against him. My ineptly phrased remark was intended to refer to my later finding, reflected at page 339, lines 14 through 25, that, notwithstanding the discrimination against Pitlanish, Respondent does not have a policy of not representing nonmembers.

Even though Respondent does not have such a policy, I found that Steward Linda Ammar informed Pitlanish that she had been criticized for representing him, a nonmember.

I also found that Respondent, notwithstanding the request of the Charging Party, failed to provide him with a copy of a class action grievance that he had initiated. In making this finding, I credited Pitlanish. I noted that Steward Michael Rock, who admitted that Pitlanish requested a copy of the grievance, indicated that he did not have it, but did not identify who did have it. Review of the transcript reveals that Pitlanish requested a copy of the grievance at the time he filed it, whereas, Rock's testimony that he had turned the grievance in to the "branch," without identifying an individual, related to a later time, after the grievance had been settled. The foregoing further confirms my finding that Respondent violated the Act by failing to provide Pitlanish with a copy of the class action grievance that he filed, and of which he requested a copy at the time he filed it. *Letter Carriers Branch 529*, 319 NLRB 879 (1995).

Finally, I found that Acting Steward Greg Swindall failed and refused to sign a request for temporary schedule change for the Charging Party.

I found no merit to the 8(b)(2) allegation since the assignment of penalty overtime violates the parties' collective-bargaining agreement and there was no demand that such overtime be assigned to union members. I also found that there was no evidence of discrimination with regard to the manner in which Respondent settled three grievances with the United States Postal Service.

I certify the accuracy of the portion of the transcript that sets out my decision, attached as Appendix A, page 330, line 1, through page 337, line 11 and page 337, line 22 through page 342, line 5 and lines 12 through 17.[2]

[1] The charge in Case 7–CB–11194(P) was filed on January 24, 1997, and was amended on March 24, 1997. The charge in Case 7–CB–11485(P) was filed on September 12, 1997, and was amended on November 24, 1997. The charge in Case 7–CB–11722(P) was filed on May 1, 1998, and was amended on June 10, 1998.

[2] I have corrected punctuation, capitalization, minor wording mistakes, and case-citation errors in the transcript by making obvious physical inserts and cross-outs. I have inserted the correct citation to art. 8 of the parties' collective-bargaining agreement on p. 330, L. 14. I have corrected wording on p. 340, L. 14, and the identification of the administrative law judge on p. 341, L. 20.

CONCLUSIONS OF LAW

1. The Board had jurisdiction over the United States Postal Service pursuant to the Postal Reorganization Act, Section 1209.

2. Branch 3126, National Association of Letter Carriers (NALC), AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to file and process the grievance of Joe Pitlanish since January 14, 1997, and by failing and refusing to sign a request for temporary schedule change for a nonmember, the Respondent Union breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

4. By informing employees that a steward had been criticized for representing a nonmember and by failing to respond to a nonmember's request for a copy of a grievance he initiated, the Respondent Union has restrained and coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act thereby violating Section 8(b)(1)(A) of the Act.

REMEDY

Having found that the Union has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent failed to file or pursue the grievance of Joe Pitlanish regarding the failure to take into account "overtime missed opportunities" for the fourth quarter of 1996 when determining which employees had 14 fewer hours than the employee with the most overtime hours on December 30, 1996. Respondent shall be ordered to request the United States Postal Service to consider the grievance and, if it agrees to do so, shall pursue the grievance with due diligence. In the event it is not possible to pursue the grievance, this matter shall be shall be resolved at the compliance stage of this proceeding. Respondent shall make whole Pitlanish and any other employees for loss of earnings as a result of its failure to file and pursue the grievance by payment to them for the overtime to which they would have been entitled, if any, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Branch 3126, National Association of Letter Carriers (NALC), AFL–CIO, Royal Oak, Michigan, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to file and process grievances because the grievants are not members of the Union.

(b) Informing employees that a steward had been criticized for representing a nonmember.

(c) Failing to provide Joe Pitlanish, or any other employee represented by Branch 3126, National Association of Letter Carriers (NALC), AFL–CIO, upon request, with copies of grievances that the requestor initiated.[5]

(d) Failing and refusing to sign a Request for Temporary Schedule Change for a nonmember.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Request the United States Postal Service to consider the grievance of employee Joe Pitlanish concerning overtime missed opportunities and, if it agrees to do so, process the grievance with due diligence.

(b) In the event that it is not possible to pursue the grievance, make whole Joe Pitlanish and any other employees for loss of earnings as a result of its failure to file and pursue the grievance by payment to them for the overtime to which they would have been entitled, if any, plus interest.

(c) Within 14 days after service by the Region, post at its union office in Royal Oak, Michigan, copies of the attached notice marked "Appendix B."[6] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Deliver to the Regional Director for Region 7 signed copies of the notice in sufficient number for posting by the Employer at its Troy, Michigan, facility, if it wishes, in all places where notices to employees are customarily posted.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX A

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This case, of course, arises in the context of life at the postal service unit in Troy, Michigan. There is history, as is testified to and as the formal papers reflect, with regard to prior charges having been brought by the Charging Party, Mr. Pitlanish.

Overall, I find few credibility resolutions that I must make in this case. And, therefore, my summarization of the facts

[3] In order to determine whether all overtime missed opportunities were properly counted, it will be necessary to review time records which reflect the hours an employee worked and whether available overtime hours that the employee could have worked were properly counted against that employee on the occasions when the employee did not work the overtime.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] Pitlanish obtained a copy of the grievance after filing an unfair labor practice charge, therefore no affirmative remedy is required.

[6] If this Order is enforced by a Judgment of the 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."

and the application of appropriate law shall basically be coextensive with my discussion of the alleged violations beginning, actually, with the earliest violation which is the focus for the 8(b)(2) charge with regard to comments relating to double time.

I note that Article 8 Sec. 5F indicates that the working of over 8 hours on a non-scheduled day results in penalty overtime. That, of course, is a contract violation.

The testimony from Ms. Hunsanger was that Mr. Swindall indicated that he did not want—I believe one person testified "SOB" and the other person testified "scab-lantis"—to receive any more penalty overtime.

And, Ms. Hunsanger indicated that this was not her problem, that another supervisor, an individual identified, I believe by the name of Chris, had been the supervisor responsible that day and that it was the

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supervisor's responsibility.

With regard to this, certainly Mr. Swindall's language, with regard to his reference to Mr. Pitlanish, was not appropriate. He did not, so far as the record shows, have any contact with anyone other than Ms. Hunsanger. He didn't say anything to the supervisor who had been responsible at the time. And there's no indication that any other representative of the Union took any action whatsoever.

Going back to the specific comments that Mr. Swindall made to Ms. Hunsanger, he did not request that penalty pay be paid only to members. And if, hypothetically, there was a pattern of management and the postal service assigning penalty overtime to nonmembers then there would be the suggestion of a Section 8(a)(3) violation by the postal service in favoring nonmembers over union members.

Specifically as a result of the absence of any follow-up, any contact with the specific supervisor involved and any institutional action, I find no 8(b)(2) violation.

Chronologically, we now come to the 14th of January. That is the date where Mr. Swindall referred, indicated, to Ms. Hunsanger and Mr. Pitlanish that he was not going to assist "that"—and I believe that the word

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is "jerky." In his testimony Mr. Swindall indicated that there were personal differences between him and Mr. Pitlanish.

Notwithstanding those personal differences, the record indicates that Mr. Swindall regularly referred to Mr. Pitlanish in less than flattering terms; referring to him as "scab" and "scab-lanish." How Mr. Pitlanish was to decipher and determine that this refusal was for a personal reason as opposed to his non-membership, in view of the manner in which Mr. Swindall referred to him, is somewhat beyond my comprehension.

I do concur in Mr. Swindall's statement that it is not the prerogative of management to determine which steward will represent which employee. By the same token, a steward may not determine which employee he or she will not represent if the basis for that refusal is the employee's non-membership in a labor organization.

Thereafter, and this was according to the record on or about January the 13th or 14th, he consulted with Ms. Ammar. Insofar as there is no specific evidence in the record with regard to exactly what was conferred about other than concern of overtime in the 4th quarter, that would be a failing on the part of Ms. Ammar to take notes and fill out a grievance form.

The testimony indicates that in the conversation Ms.

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Ammar indicated, at that time anyway, that she would look into it or something to that effect.

She also indicated to Mr. Pitlanish that she had been criticized—the testimony, I believe, was "reamed"—for representing him in the past.

Counsel for Respondent argues that I should look upon this as an isolated instance and further argues that there's no proof of specific discrimination or specific discriminatory intent with regard to the Charging Party.

I agree and that will become clear when I start talking about the August grievances. By the same token, I can not treat this as an isolated instance on the basis of the record in this case and I would note that the failure to include Mr. Pitlanish in class action grievances of which he—in which he most certainly was entitled to a portion of the remedy, the exclusion of him from those, in fact, would establish a specific discriminatory motive with regard to him.

And therefore, I do not consider the inclusion of him to obviate the conclusion of discrimination with regard to the specific grievance that he attempted to file in January.

Relative to that, I note specifically, that the only grievance in the file in the record in this case

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relative to overtime 4th quarter 1996 is Respondent's 1 which on its face shows that it was settled on the 10th of January three or four days before Mr. Swindall determined that he wasn't going to deal with "that jerk" and Ms. Ammar indicated that she was going to look into it.

Ms. Ammar's looking into it resulted in a subsequent conversation in which she indicated that things had changed, but she was not sure exactly what the change was.

Finally, with the assistance of steward Nancarrow, in February, a grievance was filed. The record, however, does not reflect the disposition of that grievance and Respondent has offered no evidence with regard to what became of it.

Moving on to August, the complaint alleges that on or about August 19, Respondent refused to provide the Charging Party with a copy of a grievance he filed regarding approximately two hours of overtime, and then, in paragraph 13, indicates that Respondent by Swindall settled the grievance described above in paragraph ten in favor of unit employees who are members but refused to include the Charging Party.

The evidence, of course, indicates that paragraph 13 is totally wrong; that Mr. Swindall settled two other

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grievances, grievances which when Mr. Pitlanish raised the issue with him, told Mr. Pitlanish just as he told Mr. Esper; "Those are being taken care of."

That is, the union member and the non-union member got the exact same information from the steward. As everyone is aware, a union is privileged to act within a wide range of reasonableness with regard to serving the unit that it represents. *Ford v. Hoffman,* 345 U.S. 330 (1953).

General Counsel has presented no evidence that with regard to non-overtime equalization grievances filed at the end

of the quarter—that is, General Counsel has presented no evidence with regard to specific violation grievances, that the Union historically sought to divvy up the pie among all persons on the overtime list.

There is no question that the remedy for everybody over 14 hours went to all of them and that is what Mr. Pitlanish was included in with regard to, I believe, it was Respondent's 5(b).

But there is no evidence that at any time after 1994, when Mr. Pitlanish ceased to be a member, the Union changed the manner in which it settled overtime-specific grievances.

The testimony of Mr. Swindall with regard to his settling on behalf of the single employee who didn't get

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the overtime or the two employees who were lowest or eight employees who were lowest is certainly within the wide range of reasonableness afforded a collective bargaining agent in representing its unit.

My review of specifically Respondent's 7, the tracking sheet for 8–14–97 indicates that before Mr. Pitlanish would have been reached there was a T. Jenkens who would have been reached.

And I note that if, in fact, I were going to assume some sort of favoritism or non-favoritism, that if it went up to Pitlanish and then went one more person, it would have included Mr. Swindall, himself.

So with regard to paragraph 13, I find no violation of the Act with regard to the manner in which the union elected to settle the grievances.

Going back now to paragraph 10, I found Mr. Rock's testimony to be relatively truthful, what there was of it. His recollection was not particularly clear.

The Charging Party, Mr. Pitlanish, credibly testified to requesting a copy of the grievance. And Mr. Rock, although indicating that it was no longer in his custody, did not identify whose custody it was in, whether he made any attempt to get it or otherwise.

I am aware of no authority that would prohibit a union from providing a copy of a class action grievance

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to the individual who was the moving force behind the filing of that class action grievance.

And certainly in a situation such as this where the individual has had extreme difficulty in filing grievances and, as of August the 19th, still was unaware of what, if anything, had occurred to the grievance that he had filed though Mr. Nancarrow in late February, certainly under those circumstances, I can appreciate his desire to obtain a copy of the grievance, which he understood had been filed on his behalf by Mr. Rock. Relative to that, I would cite *Letter Carriers Branch 529*, 319 NLRB 879 (1995). I note that counsel for Respondent argues in her memorandum to me that the case was wrongly decided. I, of course, am bound by Board law and find that the violation,

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particularly, if nothing else, the lack of inquiry by Mr. Rock with regard to taking the request seriously, constitutes a violation of Section 8(b)(1)(A) of the Act.

I found the testimony of—off the record. **(A brief recess.)**

JUDGE CARSON: On the record. I found the testimony of Mr. Esper, with regard to Mr. Swindall saying something about paying light duty and employees and not scabs to be insufficiently clear upon which to base a Section 8(b)(1)(A) violation. He did not testify that Mr. Swindall made the statement that Mr. Esper, as an employee, made to Mr. Pitlanish.

And in view of his vague testimony, I question the reliability of his recollection. Notwithstanding, what was said, what he did or did not recall, I do not credit that Mr. Swindall made a statement to him to the effect of scabs not being paid.

That brings me, I believe, to the final allegation of the complaint with regard to the arbitrary refusal of an oral request for a request for a temporary schedule change. I do not find Mr. Swindall to be incredible; however, I do note from his testimony that he acknowledges that when Mr. Pitlanish approached him, he questioned whether he had a 2070.

If he was unwilling to sign the document, why did he

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ask the question? And, in that regard, I find consistent with Mr. Pitlanish's testimony that there were no other stewards available, that he did have the authority to sign, and in fact refused to.

If, in fact, other stewards were available, why would he have played games with Mr. Pitlanish by asking him whether he had the form necessary to talk to him?

I note Respondent's argument that Mr. Pitlanish, himself, may have been playing games by waiting until late in the day. However, I credit Mr. Pitlanish's testimony that he got his mail together and that the logical time to attempt to get this done was as he was going out the door.

In view of the foregoing, and the entire record, and contrary to the argument of General Counsel, I do not find that there is a policy by Respondent to discriminate against non-members. However, as this record amply demonstrates, and as my findings indicate, an action occurred and statements were made which clearly interfered with the rights of non-members.

In this regard, specifically, I note that *Letter Carriers Local 233 (Postal Service),* 311 NLRB 541 (1993), concluded, as I am concluding, that notwithstanding the absence of a policy to discriminate, that a failure to fairly represent in fact has occurred.

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With regard to that, I am finding that by refusing to file and process Charging Party Joe Pitlanish's early-January 1997 grievance regarding 4th quarter overtime, the union breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

By refusing to sign the request for a temporary schedule change on April 13, 1998, the Respondent breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

With regard to the latter, there is no remedy. With regard to the former, the remedy will be that set out in *Rubber Workers Local 250 (Mack-Wayne Closures)*, 279 NLRB 1074 (1986), as will be described in my order which will accompany this decision when it is actually issued in hard copy. I will direct that the union seek to have the grievance that Mr. Pitlanish attempted to file processed and if there is a

refusal to process it, then as a matter of compliance the Region would be charged with the responsibility of determining what the applicable back pay is.

Please note, with regard to this; the testimony before me and the documentary evidence indicates that we are dealing with a somewhat convoluted area. It may well be that there is not one penny of back pay due.

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The—Mr. Swindall did not recall when the penalty overtime gimmick, or game—I've forgotten exactly what his word was—ceased to play. And, General Counsel did not present Mr. Pitlanish with regard to his recollection on that.

Insofar as the equalization of penalty overtime aspect was over and done by then, it would seem that there might very well be no back pay whatsoever.

Even if the penalty back pay is there, we have at this point no idea what amounts, if any, are involved. And certainly on the basis of everything that I've seen in this record, it may very well be that even if there is some monetary remedy, Mr. Pitlanish, the Charging Party, would not be included in it.

COURT REPORTER: Hold on and let me change this tape please.

JUDGE CARSON: Off the record. **(Put in new cassette tape.)**

COURT REPORTER: All right.

JUDGE CARSON: On the record. In view of the foregoing, and the entire record, I find, in summary that the Respondent did violate Section 8(b)1(A) of the Act as alleged in paragraphs 7, 10, and 14 of the complaint. And I shall issue an order consistent with that finding. I'm sorry. Also paragraph 8.

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And, the General Counsel has not, by the greater weight of the evidence, established a violation of the Act with regard to paragraphs 9, 11, and 13.

There being nothing further, that concludes my decision.

JUDGE CARSON: I note that I did not indicate specifically that I found that General Counsel had not sustained the burden of proof with regard to paragraph 12 with regard to statements relating to favoring discriminating and my discussion indicates that I've decided that basically on credibility grounds.