

VERMONT LABOR RELATIONS BOARD

ALBERT ILGES	)	DOCKET NO. 88-16
	)	
v.	)	
	)	
BURLINGTON AREA PUBLIC	)	
EMPLOYEES UNION, LOCAL 1343,	)	
AFSCME, AFL-CIO	)	

FINDINGS OF FACT, OPINION AND ORDER

On March 24, 1988, Albert Ilges ("Complainant"), an employee at the Champlain Water District, filed an unfair labor practice charge against the Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO ("Union"). Complainant alleged that the Union violated 21 VSA §1726(b)(1) and (3) by prohibiting him, as a non-union bargaining unit employee, from attending a bargaining unit meeting where prospective bargaining proposals were going to be discussed and by prohibiting him from voting on bargaining unit positions.

The Labor Relations Board issued an unfair labor practice complaint on May 5, 1988. A hearing was held on May 26, 1988, before Board Members Dinah Yessne, Acting Chair; William Kemsley, Sr.; and Catherine Frank. Complainant appeared on his own behalf. Lindol Atkins, Union President, represented the Union. Neither party filed briefs.

FINDINGS OF FACT

1. At all times relevant, the Union has been the exclusive bargaining representative of employees at Champlain Water District.
2. The current collective bargaining contract between the Union and the District provides in pertinent part as follows:

Section 2.3 The Union recognizes its responsibility as bargaining agent and agrees fairly to represent all employees in the bargaining unit.

Section 2.4 The Union shall not interfere with the right of employees covered by this agreement not to become members of the union, and there shall be no discrimination against any such employee because of such refusal.

3. The contract between the Union and the District does not contain a union shop provision (i.e. a requirement that bargaining unit employees join the union) or an agency shop provision (i.e. a requirement that bargaining unit employees pay the union the equivalent or a percentage of Union dues in lieu of joining the Union).

4. Complainant began his employment with the Champlain Water District on August 3, 1987, and for the first thirteen weeks was in a probationary status. Upon gaining permanent status, Complainant became part of the bargaining unit represented by the Union. Complainant elected not to join the Union. At all times relevant, he has not been a member of the Union.

5. At some point prior to March 1988, the Champlain Water District informed the Union that they wished to negotiate a policy concerning how many weekends employees could "take off" using vacation time.

6. Prior to March 7, 1988, Complainant asked Ken Epstein, Union Steward, whether Complainant would be allowed to attend a meeting convened by the Union to discuss their bargaining position on this weekends policy and whether he would be allowed to vote on this issue. Epstein replied he would need to check with the Union President, Lindol Atkins.

7. Atkins discussed this matter at the March 7, 1988, meeting of the Union Executive Board. The Executive Board decided that if an employee is not paying Union dues than that employee is not allowed to take part in any discussion nor vote on any matter concerning the contract negotiated by the Union. Don Asselin, an Union Executive Board member and Chief Operator at the District, relayed that message to Complainant. Asselin informed Complainant that he would be barred from attending the Union meeting when the weekends policy bargaining proposal would be formulated and barred from voting upon positions taken by the Union.

8. At an April 28, 1988, meeting of the Union Executive Board, held subsequent to the unfair labor practice charge at issue herein being filed, Atkins indicated that it was his understanding that Complainant would not mind paying Union dues, but did not want the dues taken out of his weekly payroll check and did not want to sign a Union card. Atkins stated that, as far as he was concerned, Complainant could "kiss where the sun doesn't shine" and that if Complainant was ashamed to be one of them, then they did not need him. Atkins questioned why Complainant should receive different treatment than the 240-plus Union members who had Union dues taken out of their paychecks.

9. Atkins is chief spokesperson for the Union in Contract negotiations. In negotiating improved working conditions, Atkins considers that he is representing the wishes of Union members and not non-union members. Once the Contract is negotiated, Atkins believes the terms of the Contract have to be applied fairly to Union and

non-union employees alike, and that the Union has to fairly represent non-union employees in administering the contract.

10. The Union has represented the Complainant in two grievances he has brought under the contract.

#### MAJORITY OPINION

Complainant contends that the Union interfered with his rights under law and violated its duty of fair representation by denying him access to a meeting convened by the Union to discuss bargaining proposals due to his non-membership in the Union.

The Union claims that nowhere in law does it state that non-union employees have a right to vote on what bargaining proposals are going to be or a right to vote on ratification of a contract. The Union contends that as long as all bargaining unit members have the terms of the negotiated contract applied to them fairly, there is no breach of the duty of fair representation. The Union denies that its policy of restricting discussions of bargaining proposals to Union members is discriminatory; reasoning that all who pay dues vote and all who do not pay dues do not vote.

The pertinent provisions of the Municipal Employee Relations Act ("MERA") are as follows:

21 VSA §1722(8)

"Exclusive Bargaining Agent" means the employee organization certified by the Board or recognized by the employer as the only organization to bargain collectively for all employees in the bargaining unit, including persons who are not members of the employee organization.

21 VSA §1726

(b) It shall be an unfair labor practice for an employee organization or its agents:

(1) To restrain or coerce employees in the exercise of the right guaranteed to them by law, rule, or regulation. However,

this paragraph shall not impair the right of an employee organization to prescribe its own rules with respect to the acquisition or retention of membership therein, provided such rules are not discriminatory.

... (3) To cause or attempt to cause an employer to discriminate against an employee in violation of this title or fail or refuse to represent all employees in the bargaining unit without regard to membership in such organization.

Thus, MERA makes explicit a duty of fair representation. While we have no cases construing this duty under MERA with respect to non-union bargaining unit employees, and although the National Labor Relations Act (NLRA) does not explicitly impose a duty of fair representation of non-union bargaining unit employees, unlike MERA, decisions of the National Labor Relations Board and federal courts have imposed such a duty. Thus, it is appropriate to look to federal decisions interpreting the NLRA for guidance. Burlington Firefighters' Association v. City of Burlington, 142 Vt. 434 (1983).

Under the NLRA, a breach of the union's duty of fair representation is an unfair labor practice. The Union's duty to fairly and equitably represent all employees in its dealing and negotiations with management extends to all members of the bargaining unit, not just to members of the Union. Abood v. Detroit Board of Education, 431 U.S. 209, 221 (1977). Smith v. Local No. 25, Sheet Metal Workers International Association, 500 F.2d 741, 749 (5th Cr. 1974). The union's duty of representation means that it must serve the interests of all employees, union and non-union, without hostility or discrimination, exercise its discretion in good faith, and avoid arbitrary conduct. Vaca v. Sipes, 386 U.S. at 177, 87 S.Ct. at 909. This duty extends to both the negotiations for a contract and the enforcement of the contract provisions. NLRB v. Jaggars-Chiles-Stovall, Inc., 639 F.2d 1344 (1981).

The Union here contends that Complainant is being fairly represented because the terms of the negotiated agreement with the employer are being applied fairly and equitably to him; that if any terms of the Contract are denied him, the union will represent him in a dispute with the employer regardless of his union status. Central to this argument is the theory that a union acts much like a representative democracy. As exclusive bargaining representative, it negotiates for the good of the whole bargaining unit, much like a representative from a district or state represents constituents in the legislature. Those constituents have elected that representative, and it is the representative's duty to represent them fairly.

This concept of union democracy was discussed in NLRB v. Allis-Chalmers Manufacturing Co. 388 U.S. 175, 180, 87 S.Ct. 2001, 2006 (1967):

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 ... Thus, only the union may contract the employees' terms and conditions of employment ... The employee may disagree with many of the union decisions but is bound by them. The majority-rule concept is today unquestionably at the center of our federal labor policy. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

The Court, in holding that a union did not commit an unfair labor practice by fining its members who crossed the union's picket line, set forth its policy of non-interference in internal union affairs. This policy extends not only to the federal courts, but to employers and non-union members. The Court stated: "Non-union employees have no voice in the affairs of the union." Id 87 S.Ct. at 2012.

At issue herein is whether Complainant simply has been denied a

voice in the internal affairs of the Union, or whether he is not being fairly represented by the Union because he is not allowed a voice or a vote in formulating conditions of employment which affect him. Complainant was denied access to a meeting where the Union's proposal on a policy concerning weekends "taken off" as vacation time was formulated.

Complainant contends that the reasoning in Branch 6000, National Association of Letter Carriers, etc. v. NLRB, 595 F.2d 808 (D.C. Cir. 1979) is controlling here. In Branch 6000, a referendum was held among all letter carriers in the bargaining unit to determine a system for assigning days off throughout the year. When union carriers objected that non-union carriers had been allowed to vote, a second referendum was conducted with union members only voting. Id., at 810. By a one-vote margin, the previous rotating basis days off policy was changed to a fixed basis, and the local post office implemented the policy in accord with the union vote. A non-union carrier filed an unfair labor practice charge with the National Labor Relations Board. The Board concluded that under the circumstances, with the vote based on the individual preferences of union members without any consideration of the interests of the non-union employees, the union breached its obligation to represent fairly the interests of all employees in the bargaining unit.

The D.C. Circuit Court of Appeals upheld the Board's conclusion. It found that violation of the duty was apparent from the "unique circumstances" of the case. The court distinguished the letter carriers referendum procedure from the usual contract ratification processes which may be properly limited to union membership:

"We are in no position to reject as untenable the board's statement that the Branch 6000 procedure is distinguishable from a procedure of contract ratification restricted to union members. A union ratification procedure is consistent with negotiation of a tentative contract by the bargaining agent, acting in a representative capacity, and with observance of the duty of fair representation ... The bargaining representative is not required to carry out the wishes of the non-union employees; it suffices that he is available to ascertain them and take them into account." Id. at 813.

Here, a clear factual distinction exists between the case at hand and the Branch 6000 case. In Branch 6000, a condition of employment was determined by the referendum in unique circumstances, while here the preliminary formulation of bargaining proposals is involved.

In Branch 6000, the court also touched upon the issue directly involved in this case, the right of a non-union employee to be directly involved in formulating employees' terms and conditions of employment. The Court stated:

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. However, the delegatee, once selected, must in turn function as a representative for all the employees in the bargaining unit. Id., at 811.

We concur with the views of the Branch 6000 Court and conclude that the Union did not interfere with Complainant's rights and unfairly represent him by excluding him from the meeting held to formulate a negotiations proposal. As exclusive bargaining representative, the Union has the responsibility to formulate employees' bargaining positions. How the Union formulates such bargaining proposals is an internal union affair from which non-union employees may be excluded. Just as a contract ratification may be properly limited to union



membership, so too the preliminary meetings to formulate proposals which lead to a negotiated contract may be restricted to union members. To fulfill its responsibility to fairly represent all bargaining unit members, unions must allow non-union employees some method of communicating their views to the Union so the Union may ascertain the wishes of non-union employees and take them into account. However, a union does not have to allow non-union employees to attend union meetings where bargaining proposals are formulated. Thus, Complainant's charge that the Union committed an unfair labor practice by excluding him from the meeting is unwarranted and we dismiss the charge.

However, we are troubled by certain aspects of the Union's actions in this case. At the hearing before the Board, the Union President stated that in negotiations he considers that he is representing the wishes of union members and not non-union members. In fact, the Union has the duty under law to fairly serve the interests of all employees, union and non-union, in negotiations for a contract as well as enforcement of contract provisions. While we are not concluding that his views indicate an unfair labor practice because such an issue goes beyond the scope of what was actually charged by Complainant, we caution the Union that such views are inappropriate.

Dinah Yessne  
Dinah Yessne, Acting Chair  
Catherine L. Frank  
Catherine L. Frank

CONCURRING OPINION

I agree with all aspects of the majority opinion with the exception of the last paragraph.

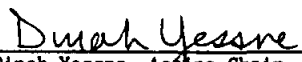
  
\_\_\_\_\_  
William G. Kemsley, Sr.

ORDER

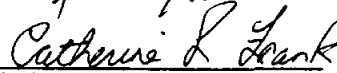
Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the unfair labor practice charge in this matter is DISMISSED.

Dated the 2nd day of September, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
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Dinah Yessne, Acting Chair

  
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William G. Kemsley, Sr.

  
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Catherine L. Frank