

**OFFICE OF THE GENERAL COUNSEL  
Division of Operations-Management**

MEMORANDUM ICG 18-09

September 14, 2018

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Beth Tursell, Associate to the General Counsel /s/

SUBJECT: General Counsel's Instructions Regarding Section 8(b)(1)(A) Duty of Fair  
Representation Charges

The following memorandum explains the General Counsel's position regarding certain cases alleging union violations of the duty of fair representation under Section 8(b)(1)(A) of the Act.

We are seeing an increasing number of cases where unions defend Section 8(b)(1)(A) duty of fair representation charges at the Regional level by asserting a "mere negligence" defense. Under extant Board law, a union breaches its duty of fair representation to the bargaining unit it represents by engaging in conduct which is arbitrary, discriminatory or in bad faith. See *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). It is well established that a union's mere negligence, alone, does not rise to the level of arbitrary conduct. See *Teamsters Local 692 (Great Western Unifreight)*, 209 NLRB 446 (1974). On the other hand, perfunctory or arbitrary grievance handling can constitute more than mere negligence, and thus violate Section 8(b)(1)(A). See *Service Employees Local 579 (Convacare of Decatur)*, 229 NLRB 692 (1977) (little or no investigation in connection with a discharge grievance); *Retail Clerks Local 324 (Fed Mart Stores)*, 261 NLRB 1086 (1982) (willfully misinforming or keeping a grievant uninformed of grievance after committing to pursue arbitration). Similarly, a union's failure to provide information relating to a bargaining unit member's grievance also may violate Section 8(b)(1)(A). See *Branch 529 Letter Carriers (USPS)*, 319 NLRB 879 (1995) (failure to provide grievance forms pertaining to a grievance filed by the employee making the request violated the Act where the employee communicated her interest in the information to the union and the union raised no substantial countervailing interest in refusing to provide the documents). Additionally, non-action may amount to a willful and unlawful failure to pursue a grievance. See *Union of Sec. Personnel of Hospitals and Health Related Facilities*, 267 NLRB 974 (1983). The Board examines the totality of the circumstances in evaluating whether a union's grievance processing was arbitrary. See *Office Employees Local 2*, 268 NLRB 1353, 1354-56 (1984).

The General Counsel is committed to fair enforcement of the above-cited doctrines and cases. However, the case-by-case approach has made it difficult to predict when the duty of fair representation will be breached. In an effort to enable employees to better

understand the duty owed by a union representative and to help unions discern their duty owed to employees, the General Counsel offers the following clarification for Regions to apply in duty of fair representation cases. In cases where a union asserts a mere negligence defense based on its having lost track, misplaced or otherwise forgotten about a grievance, whether or not it had committed to pursue it, the union should be required to show the existence of established, reasonable procedures or systems in place to track grievances, without which, the defense should ordinarily fail.<sup>1</sup> Regions issuing a complaint in these cases should argue that generally, a union which loses or misplaces a grievance engages in gross negligence unless it has a system or procedure in place which, while reasonable, was not effective in a particular case for an identifiable and clearly-enunciated reason.

Similarly, a union's failure to communicate decisions related to a grievance or to respond to inquiries for information or documents by the charging party, in the General Counsel's view, constitutes more than mere negligence and, instead, rises to the level of arbitrary conduct unless there is a reasonable excuse or meaningful explanation.<sup>2</sup> This is so irrespective of whether the decisions, alone, would violate the duty of fair representation. Regions issuing a complaint in these cases should argue that a union's failure to return phone calls or emails or other efforts by the charging party to inquire about a grievance or attempt to file one, constitutes more than mere negligence and, instead, willful and arbitrary conduct. In addition, where a union ultimately communicates with the charging party in a Section 8(b)(1)(A) duty of fair representation case only after he/she filed the ULP charge, such post-hoc communications should not furnish the basis for dismissal on grounds that the union's conduct was mere negligence, nor should it be found to cure earlier violations resulting from a failure to communicate. Regions issuing a complaint in these cases should argue that failure to communicate with the charging party amounts to more than mere negligence, and that after-the-fact communications are insufficient to remedy the earlier violation as inconsistent with the Board's decision in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) (repudiation of ULP must be timely, unambiguous, specific in nature to the coercive conduct and free from other illegal conduct to effectively avoid liability). In each of these cases, the theory of the violation should be articulated as gross negligence constituting arbitrary conduct.

The General Counsel is aware that the above-described approaches may be inconsistent with the way the Board and Regional Directors have historically interpreted duty of fair representation law. Going forward, Regions are directed to apply the above principles to Section 8(b)(1)(A) duty of fair representation cases, issue a complaint where appropriate, and make arguments consistent with those set out above. Additional guidance may be derived from the attached Appeals Minutes, which present similar issues.

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<sup>1</sup> As with any case, there may be extenuating or exceptional circumstances that, in considering the totality of the conduct, nevertheless excuses the lack of an established procedure. Regions should carefully exercise their discretion in making such a determination.

<sup>2</sup> For example, where a union has responded to a grievant's inquiry, but where the grievant is dissatisfied with the response, the union's subsequent failure to provide additional explanation to arguments already considered would not, in and of itself, rise to the level of a violation.

Finally, although clarification from the Board is sought in connection with the foregoing, Regions are free to settle or issue merit dismissals in these cases absent additional evidence of animus or arbitrary conduct. Should there be a question regarding whether the Region should pursue a make-whole remedy in these situations pursuant to *Ironworkers Local Union 377 (Alamillo Steel Corp.)*, 326 NLRB 375 (1998), whether in a settlement agreement or in a litigated case, Regions should contact the Division of Advice for further instruction.

If you have a question about any given case, please contact your AGC or Deputy AGC in the Division of Operations-Management.

B. T.

Attachments