



## American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

February 7, 2002

TO: Local Presidents  
National Business Agents  
National Advocates  
Regional Coordinators  
Resident Officers

FR: Greg Bell, Director  
Industrial Relations

RE: Stewards' "Privilege"

The following information is provided to Locals whose stewards are subjected to demands that they testify or otherwise disclose information provided to them by employees in confidence in their representative capacity. A demand by the Postal Service to interrogate union stewards concerning information communicated to them by employees they represent in their capacity as union stewards constitutes a violation of the National Labor Relations Act. These demands which carry explicit or implicit threats of discipline of the steward if the steward does not cooperate, are clearly demands to interrogate employees about their union activities.

In these circumstances, the Local may file an unfair labor practice charge against the Postal Service alleging violations of Section 8 (a) (1). Those Locals should also ask for injunctive relief under Section 10 (j) of the National Labor Relations Act: The damage done by such a demand is irreparable because of the ongoing chilling effect that it has both on an employee's willingness to consult stewards, and on the willingness of employees to serve as stewards. Such harm cannot be repaired with an eventual NLRB cease-and-desist order. For this same reason, the charge should not be deferred to arbitration. Such a charge should allege as follows:

On or about \_\_\_\_\_, the U.S. Postal Service interfered with, restrained and coerced employees in the exercise of their Section 7 rights, by, among other things, demanding under threat of discipline that union officials submit to interrogations about their union activities. Injunctive relief under Section 10 (j) is requested.

The Local should cite *Cook Paint and Varnish Co.*, 258 NLRB 1230 (1981) when contacted by the Board Agent. It is important to remember, however, that, although APWU stewards enjoy a

qualified privilege as stated by the Board in *Cook Paint and Varnish Co., supra*, as employees of the Postal Service, they also have an obligation to cooperate with employer investigations.

Thus, the stewards' "privilege", spoken of above, is not an "attorney-client" privilege, and is not, therefore, absolute. Should a steward be subpoenaed to testify before a grand jury or in court, a steward may well be held in contempt if he/she refuses to testify based upon the NLRB privilege for union stewards spoken of above. Unlike an attorney-client privilege which would be honored, there does not appear to be any judicial authority for a union steward to withhold information when questioned under oath by law enforcement officials.

We contend, however, that the stewards' privilege does apply in the context of investigatory interviews by Postal Inspectors. In these cases, the questioning is not taking place in a judicial forum where a "testimonial" privilege is required for a witness to refuse to answer questions. Thus, we contend that the same rule which should apply in the questioning of stewards by managers or labor relations officials must also apply when stewards are being questioned by Postal Inspectors.

If the Local wants advice from the National's legal counsel, or wishes the National's legal counsel to represent the Local in such a case, please contact me. In addition, please feel free to call me with any questions you may have.

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RE: Legal Issues Surrounding Representation

In response to numerous questions from the field, I have asked APWU's general counsel to provide guidance for locals regarding the potential liability of representing members and/or non-members in forums other than the grievance arbitration procedure. The following represents their advice on these matters.

Locals should be aware of the obligation of the Union to represent members and non-members in various situations and the potential liability of the Union should it decide to represent individuals in these situations.

There are two types of situations, one requiring representation of members and non-members, the other not. They are:

- (1) where the Union is the exclusive representative of the employees, which is when the Union is negotiating a collective bargaining agreement and administering the grievance procedure, the Union has a duty to fairly represent all members and non-members alike, and
- (2) where the Union is not the exclusive representative of the employees, which is when the Union is representing in other forums, such as OWCP, EEO or MSPB, and when the Union is providing access to benefit programs in addition to those provided through collective bargaining, such as a local sponsored or arranged dental plan, the Union has no duty to provide representation services to members or non-members in these forums.

The duty of fair representation was created by the Supreme Court in Steele v. Louisville & Nashville Railroad, 323 U.S. 192, 15 LRRM 708 (1944), in order to make the provisions of the Federal Labor Law, which granted unions the exclusive right to represent employees in negotiation and administration of a collective bargaining agreement, constitutional. The Court reasoned that if unions selected by a majority of the people in the bargaining unit had the exclusive power to represent everyone in the bargaining unit, members and non-members, those who wanted the union as well as those who did not, the union had to have a duty of fair representation towards all in the unit for this legally mandated exclusive representation of non-members to be constitutional. Consequently, where a union is the only one that can represent an employee, the union has a duty to fairly represent all employees, members and non-members alike. This includes negotiating a collective bargaining agreement and subsequently administering it through the grievance arbitration procedure.

Just as clearly, when a union is not an employee's exclusive representative, it has no duty to represent at all.<sup>1</sup> Two Courts of Appeal have considered the situation of whether a union representing federal employees was obligated to represent those in its bargaining units before the Merit Systems Protection Board ("MSPB"), a forum, like OWCP and the EEOC, where the union was not the plaintiff's exclusive representative. In both cases, American Federation of Government Employees Local 916 v. Federal Labor Relations Authority, 812 F.2d 1326, 124 LRRM 3220 (10th Cir. 1987) and National Treasury Employees Union v. Federal Labor Relations Authority, 800 F.2d 1165, 123 LRRM 2129 (D.C.Cir. 1986), the courts held that the union was not obligated to provide representation at the MSPB because the union was not the employee's only representative.<sup>2</sup> Based on this precedent and the logic of the duty of fair representation, unions can refuse to represent members and/or non-members in proceedings in which it is not the exclusive representative.

With respect to benefit plans, such as dental plans, sponsored, endorsed, arranged or permitted by APWU Locals outside of the collective bargaining context, under the duty of fair representation principles in general labor law and under benefits law there is no reason to require the Local to permit participation by non-members. However, these plans do raise many complicated legal issues and no such arrangement should be entered into without consultation

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<sup>1</sup> Of course, should a union chose to represent anyone, member or non-member, in any forum, the union should represent that person fairly.

<sup>2</sup> A third case comes out the other way because it involved representation in the grievance procedure, where the union was the exclusive representative of the employees. In National Treasury Employees Union v. Federal Labor Relations Authority, 721 F.2d 1402, 114 LRRM 3440 (D.C.Cir. 1983), the D.C. Circuit held that NTEU violated the duty of fair representation by providing lawyers to handle grievances under the collective bargaining agreement for NTEU members, while only providing Union staff or non-attorney representatives for grievances concerning non-members. As the forums in which NTEU treated members differently from non-members was the grievance procedure, in which it was the exclusive representative of the employees, the court found this distinction between members and non-members to be a breach of the union's duty of fair representation.

with counsel experienced in labor law, especially employee benefits law. Depending on how a plan is structured, the Local can expose itself to civil liability.

Because the Supreme Court requires unions to represent members and non-members in forums where it is the exclusive representative of the members of the bargaining unit, such as the grievance-arbitration procedure, the Supreme Court has shielded unions from liability for representation in these forums to a certain extent by requiring litigants to meet a high standard in order to establish union liability. A litigant must show that the union breached its duty of fair representation in handling the grievance or arbitration. This means that the litigant must prove that the union acted arbitrarily, discriminatorily or in bad faith in handling the grievance or arbitration in order to establish union liability for the representation. As a matter of law, mere negligence is insufficient to establish a breach of the duty of fair representation.<sup>3</sup> Also, individual union officers cannot be held liable for breaches of the duty of fair representation.

The standard of liability of a union in a non-exclusive forum, such as MSPB, OWCP or EEO, is extremely unsettled. There are no cases on record that address this issue. It is possible that a union would not be found liable for its representation in these forums. The union could argue that these forums were established by federal law and that federal law allows for the representation of these individuals in these forums by non-attorneys. Because federal law establishes the conditions for representation, it could be argued that unions and individuals are not liable for their representation in these forums under state law claims such as negligence.

On the other hand, unions may be held liable for their representation in these forums if the representation was negligent. Because the union does not have to represent individuals in these forums, the union would not get the protection of the duty of fair representation standard that it would get in a forum in which it is the exclusive representative. It is possible that a court would hold a union liable if the representation in these forums was merely negligent. Also, individuals may be personally liable for negligent representation in these forums. Thus, the union is undertaking a certain amount of risk by representing members or non-members in non-exclusive forums.

Therefore, if the union decides to represent members or non-members in these non-exclusive forums, it is important that the union ensure that these claims are being handled by a competent representative and that all deadlines are timely met.

Finally, there is the question of whether a member signing a release of liability waiver form would shield the union from liability. Although such a release may dissuade a member from bringing a lawsuit, it is unlikely that such a release would be upheld in a court of law.

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<sup>3</sup>It is much easier for a litigant to establish negligence than arbitrary, discriminatory or bad faith conduct. Negligence can be found based solely on a mistake, whereas arbitrary, discriminatory or bad faith conduct requires an element of intent on the part of the union to do something wrong.