IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(NORTHERN DIVISION)

DANIEL S. O'SHEA,

Plaintiff

v.

LOCAL UNION NO. 639
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, et al.

Defendants

Civil Action No.: JFM 8-05-CV-937

**PLAINTIFF'S RULE 56(F) MOTION
AND FOR MEANINGFUL DISCOVERY**

Defendant Local Union has moved for summary judgment. Pursuant to Rule 56(f) of the Federal Rules of Civil Procedure and without waiving his right to oppose defendant's motion on the merits at a later time – Plaintiff hereby requests that the Court stay Defendant's motion and grant Plaintiff discovery that is necessary to the adjudication of his claims.

For the foregoing reasons, Local 639's motion for summary judgment should be stayed and continued so that the Plaintiff may have time to conduct meaningful discovery under Rules 16, 26 and 28-36 of the Fed. R. Civ. P. and discovery under Rule 56(f) of the Fed. R. Civ. P..

Under Rule 56(f) of the Federal Rules of Civil Procedure, summary judgment cannot be granted where the party opposing the motion can show that he needs discovery in order to establish his defenses or to pierce the defendant's allegations.

Summary judgment is not available where the opposing party sets forth specific facts that demonstrate the existence of a genuine dispute on a material issue of fact (id, 56(e)), or where the opposing party makes an amply supported showing that it "cannot for reasons stated present by affidavit facts essential to justify [its] opposition" (id, 56(f)). In the latter circumstance, the Court may deny summary judgment or "order a continuance to permit . . . discovery to be had or make such other order as is just." Id., 56(f).

Plaintiff filed this action in February of 2004 and two years later discovery has yet to begin. Discovery is essential to Plaintiff for reasons set forth in his Rule 56(f) Affidavit.

As a general rule, summary judgment is appropriate only after "adequate time for discovery," *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 719 (4th Cir. 1991), cert. denied, 502 U.S. 1095, 117 L. Ed. 2d 417, 112 S. Ct. 1172 (1992) and summary judgment must be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson*, 477 U.S. at 250 n.5.

While in this action discovery is not exempt, discovery cannot commence until a scheduling order has been entered. Under the U.S. District Court for the District of Maryland's Local Rule 104 it states:

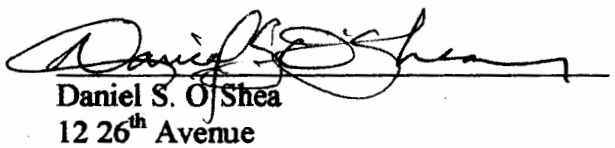
> **4. Commencement of Discovery**
> Unless otherwise ordered by the Court or agreed upon by the parties, discovery shall not commence and disclosures need not be made until a scheduling order is entered.

The Court has not yet issued a scheduling order and until it does so, discovery under Rules 16, 26, 28 through 36 has not begun and should not be waived or denied under a Rule 56(f)

denial.[1] Plaintiff respectfully requests a stay of Defendant Union's motion for summary judgment and for a period of discovery. The Defendants have raised a number of issues with respect to witnesses, witnesses that work at UPS and witnesses that are from the Union and witnesses that are from the National Labor Relations Board.

As shown in the accompanying Rule 56(f) affidavit of Daniel S. O'Shea, Plaintiff O'Shea has not had the opportunity to obtain the discovery that upon personal knowledge will procure evidence needed to show that disputed material facts do exist to survive the Union's motion for summary judgment.

Respectfully submitted,



Daniel S. O'Shea
12 26th Avenue
Isle Of Palms, SC 29451
(843) 696-6961

Pro Se Plaintiff

February 23, 2006

[1] It is worthy to note that despite Local Rule that discovery cannot begin, nor Rule 26 Disclosure be submitted until a scheduling order is submitted by the Court, the Defendants have already, by the sharing of affidavits begun discovery while the Plaintiff has been denied the same opportunity.

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Defendants

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STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiff O'Shea began working for UPS on January 20, 1979 as a part-time package pre-loader/sorter. He held that position until 1981 when he was promoted to a full-time package delivery driver and worked at the Company's facility in Laurel, Maryland. See Complaint at ¶¶ 3, 4; Local 639's Motion for Summary Judgment Exhibit 1 at ¶ 3.

2. Plaintiff O'Shea was also a member of Local Union 639. See Complaint at ¶ 5, Local 639's Motion for Summary Judgment Exhibit 1 at ¶ 5.

3. UPS is a party to a Collective Bargaining Agreement ("CBA") with Teamsters Local Union 639 governing the terms and conditions of Plaintiff O'Shea's employment with UPS. See Complaint at ¶ 4, Local 639's Motion for Summary Judgment Exhibit 1 at ¶ 3.

5. Article 3 of the parties CBA recognizes and acknowledges that the National Union Committee and Local Unions affiliated with the International Brotherhood of Teamsters are the exclusive representatives of all employees of the Employer in covered classifications which includes Local Union 639. O'Shea Exhibit 1.

6. On May 13, 2003, UPS discharged Mr. O'Shea for failure to "follow UPS methods, procedures and policies and the dishonest use of a tape recorder." Complaint at ¶ 18, Local 639's Motion for Summary Judgment at Factual Background, ¶ 3, first sentence.

7. UPS's District Labor Manager Mark Aaron informed Local Union 639's John Catlet that UPS did not need to maintain a specific policy prohibiting the recording of conversations without consent, because Maryland has promulgated a statute that makes such conduct a violation of the law. Local 639's Motion for Summary Judgment Exhibit 1 at ¶ 7.

8. Local 639's President John Catlett requested that UPS produce to the Union a copy of the Company's policy which prohibits the recording of conversations. Mr. Aaron claimed that UPS did not need to maintain a specific policy prohibiting the recording of conversations without consent, because Maryland had promulgated a statute which made such conduct a violation of the law. Accordingly, John Catlett did not receive a copy of any such policy in response to his request. Local 639's Motion for Summary Judgment Exhibit 2 at ¶ 6.

9. UPS maintains a separate policy regarding employee honesty. Local 639's Motion for Summary Judgment Exhibit 1 at ¶ 7.

10. On August 20, 2003 the arbitration panel issued a determination upholding Mr. O'Shea's termination. Local 639's Motion for Summary Judgment Exhibit E.

11. In reaching its decision, the panel also found that UPS had committed a technical violation in the manner in which it removed Mr. O'Shea from the payroll prior to the conclusion of the grievance process. Local 639's Motion For Summary Judgment Exhibit 1 at ¶ 13.

12. The arbitration panel found that Plaintiff was not terminated for committing a cardinal offense. Memorandum in Support of Defendant, United Parcel Service, Inc.'s Motion to Dismiss, or in the Alternative, To Bifurcate and Stay Plaintiff's Section 301 Claim For Breach of the Collective Bargaining Agreement, page 7, at FN 6.

13. The parties CBA under Article 7 contains details Local and Area Grievance Machinery to cardinal infractions, discharges and suspensions. O'Shea Exhibit 2.

14. The parties CBA under Article 50 explains terms and conditions of discipline. O'Shea Exhibit 3.

STATEMENT OF ADDITIONAL DISPUTED MATERIAL FACTS

The CBA specifies that "[t]he decision of the majority of the [AAPGC] panel hearing the case shall be binding on all parties. Memorandum Page 2 at A.

Local 639, on Mr. O'Shea's behalf, pursued the grievance protesting and represented Mr. O'Shea throughout all of the steps of the grievance process – including at an arbitration hearing before the AAPGC panel. Memorandum Page 5 at 1.

During the course of its representation of Mr. O'Shea and its investigation of the circumstances surrounding his discharge, the Union spoke with various factual witnesses in order to prepare its case. Memorandum Page 5 at a.

The Union also sought to review numerous documents related to Mr. O'Shea's termination. Memorandum Page 6 at b.

As a result, the Union then withdrew its ULP charge against UPS as being rendered moot. Memorandum Page 8.

At the hearing, testimony was presented by all relevant witnesses, including Mr. O'Shea, who was given the full opportunity to testify. Memorandum Page 9 at c.

The Union made all arguments available to it, and submitted all documents that it considered helpful to Mr. O'Shea's case. Memorandum Page 8.

At the hearing, Mr. O'Shea admitted that he had the opportunity to present all the evidence available to him in his defense. Memorandum Page 9 at c.

At the conclusion of the hearing, Mr. O'Shea also conceded on the record that the Union made a "good presentation" on his behalf. Memorandum Page 9 at c.

As a direct result of the Union's vigorous representation, the arbitration panel awarded Mr. O'Shea approximately $15,000 in back pay for the time period between his termination and the issuance of the arbitration decision. Memorandum Page 9 at c.

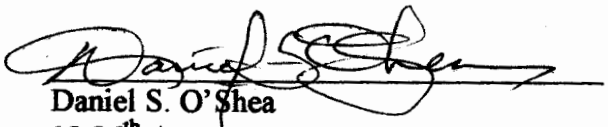
On January 29, 2004, the NLRB adopted the arbitrator's award as appropriate, and dismissed Mr. O'Shea's charge. Memorandum Page 10 at D.

In dismissing the charge, the NLRB explicitly determined that "the arbitration proceedings appear to have been fair and regular and ... the decision is not repugnant to the purposes and policies of the [NLRA]." Memorandum Page 10 at D.

On September 23, 2003, approximately one month after the AAPGC decision was issued, Mr. O'Shea elected to withdraw his ULP charge against the Union, in obvious recognition of the inherent weaknesses of his allegations. Memorandum Page 10 at D.

Thus, after Mr. O'Shea witnessed the representation that the Union provided for him at the AAPGC hearing, Mr. O'Shea apparently acknowledged that his claim of unfair representation against the Union was unfounded, and decided voluntarily to withdraw his ULP charge against the Union. Memorandum Page 10 at D.

Respectfully submitted,



Daniel S. O'Shea
12 26th Avenue
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Pro Se Plaintiff

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LOCAL UNION NO. 639
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Defendants

Civil Action No.: JFM 8-05-CV-937

PLAINTIFF'S MOTION FOR MEANINGFUL DISCOVERY AND DISCOVERY UNDER RULE 56(f), CROSS-MOTION FOR SUMMARY JUDGMENT, AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Daniel S. O'Shea respectfully moves for the Court to stay Defendant Union's motion for summary judgment to conduct meaningful discovery and discovery under Rule 56(f) of the Federal Rules of Civil Procedure and cross-moves for summary judgment in this action.

Respectfully submitted,

DANIEL S. O'SHEA
12 26th Avenue
Isle Of Palms, SC 29451

Plaintiff Pro Se
Dated: February 22, 2006.

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT, AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

1. INTRODUCTION

Plaintiff Daniel O'Shea brings this action under Section 301 of the Labor Management Relations Act of 1947 to recover damages for unlawful actions by Defendant United Parcel Service, Inc. ("UPS"), and for breach by Defendant Local Union 639, International Brotherhood of Teamsters ("Union" or "Local 639") of its duty of fair representation owing to Plaintiff O'Shea and for violating his rights.

Plaintiff moves for meaningful discovery and Rule 56(f) discovery, to stay Defendant Union's motion for summary judgment and cross-moves for summary judgment.

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is appropriate where there are no genuine issues as to any material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

For the foregoing reasons, Plaintiff's cross-motion for summary judgment should be granted and Local 639's motion for summary judgment denied.

I. SUMMARY OF ARGUMENT IN OPPOSITION TO SUMMARY JUDGMENT

In all events there are many genuine issues of material fact that are in dispute in Defendant Local 639's motion for summary judgment as a matter of law and should not be entitled to

judgment. For the interests of brevity, Plaintiff's Affirmative Case For Summary Judgment and inclusive arguments should also be considered both in support of his cross-motion for summary judgment and his opposition to Defendant Local Union 639's motion for summary judgment.

A. The Parties Collective Bargaining Agreement Is Not Binding

While Defendant Union asserts that the CBA specifies that "[t]he decision of the majority of the [AAPGC] panel hearing the case shall be binding on all parties" the legal standard holds that where there is a substantial reason to believe that a union's breach of their duty of fair representation contributed to an erroneous outcome in the contractual proceedings, the arbitral bar is removed. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.

B. Local 639's Breach Of Its Duty Of Fair Representation

Local 639 attempts to dismiss their illegal conduct for three reasons, first being that they "pursued" Plaintiff's grievance to arbitration, second being that they interviewed "all relevant witnesses" and "various factual witnesses", and third being that they "sought to review numerous documents."

The undoubted broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation." *Humphrey v. Moore*, 375 U.S. 335, 342 (1964). See *Communications Workers v. Beck*, 487 U.S., at 739; *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976); *Electricl Workers v. Hechler*, 481 U.S., at 861-862.

The 4th Circuit maintains that a union must conform its behavior to each of three separate standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual

members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represent a distinct and separate obligation, the breach of which may constitute the basis for civil action. *Griffin v. International Union, United Automobile A. & A.I.W.*, 469 F.2d 181 (4th Cir. 1972) [Emphasis added.]

A union may refuse to process a grievance or handle the grievance in a particular manner for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority. A union must especially avoid capricious and arbitrary behavior in the handling of a grievance based on a discharge – the industrial equivalent of capital punishment. *Griffin v. International U., United Autoomobile*, 469 F.2d 183 (4th Cir. 1972).

The union's discretion for a "wide range of reasonableness" does not exist in evaluating grievances as it does in contract negotiation. *Thomas v. United Parcel Service, Inc.* clarified the two Supreme Court standards between *Vaca v. Sipes* and *Ford Motor Co.*:

> When assessing a union's conduct in processing a grievance, the Supreme Court, while also using a 'good faith' standard, has not purported to grant the union 'a wide range of reasonableness.' Schultz, 696 F.2d at 515. In the administration of a collective bargaining agreement, Vaca v. Sipes, 386 U.S. at 171, sets the standard, and, in this context:
>
> > "The Court did not . . . focus on the inherent difficulties of satisfying the demands of diverse employees as it had in [Ford Motor Co.]. Instead, the Court emphasized the union's statutory obligation to represent each individual employee fairly, with a nonperfunctory concern for his complaints and with a nonarbitrary exercise of judgment in evaluating grievances. The application of the Vaca standard in the context of grievance procedures does not provide for union discretion within 'a wide range of reasonableness' – in contrast to the collective bargaining standard of [Ford Motor Co.] Schultz, 696 F.2d at 515." *Thomas v. United Parcel Service, Inc.*, 890 F.2d at ¶'s 43 and 44, (7th Cir. 1989).

There are sufficient facts in dispute that a jury could find the Union did breach their duty of fair representation.

1. Pursuit of Plaintiff's Grievance Was Arbitrary, Discriminatory, Capricious and in Bad Faith

Defendant Local 639 asserts that on Mr. O'Shea's behalf it pursued the grievance protesting and represented Mr. O'Shea throughout all of the steps of the grievance process – including at an arbitration hearing before the AAPGC panel.

Plaintiff denies that Local Union "pursued" the grievance throughout all of the steps of the grievance process and in fact turned their back not only on the Plaintiff but the only critical witnesses who had the personal knowledge and in a position to testify for the following reasons.

a. The Assertion by the Local Union as to "All Relevant Witnesses" and "All factual Witnesses" Is Dishonest and In Bad Faith.

The Union assertions that, "at the hearing, testimony was presented by all relevant witnesses" and "during the course of its representation of Mr. O'Shea and its investigation of the circumstances surrounding his discharge, the Union spoke with various factual witnesses in order to prepare its case" is disputed by the Plaintiff.

The Plaintiff asserts in his complaint that UPS's discharge was discriminatory and that the Union ignored the key witnesses who would have verified that the Plaintiff was denied the same policies (such as service failures and clean-in and clean-out) that in what he was doing was no different than other employees in his center. Complaint at ¶ 29; O'Shea Affidavit at ¶ 20 and O'Shea Exhibit's 11 and 13.

This makes those employees "relevant witnesses" and materially disputes Local 639's statement in their motion for summary judgment that "all relevant witnesses" had testified.

Plaintiff on personal knowledge asserted immediately after he was discharged that he was discriminately discharged for using the same company policies and procedures other employees

were using and who were not disciplined and that there are a number of "relevant witnesses" that were the only ones with the personal knowledge to have been interviewed and called as witnesses. See Plaintiff's Rule 56(f) Affidavit at 2.

Through discovery, Plaintiff asserts that credible evidence will be disclosed that the Union did discriminately treat Plaintiff in bad faith by arbitrarily and capriciously ignoring the only relevant employee witnesses able to testify and by ignoring those witnesses shunned their testimony from the panel. Plaintiff's Rule 56(f) Affidavit at 2.

b. The Union's Actions In Their Information Request Was Bad Faith.

The Union acknowledges there was no company policy with regard to tape recording and accepted UPS's statement that a company policy against tape recording was not needed because Maryland has promulgated a statute that makes such conduct a violation of the law. Local 639's Motion for Summary Judgment Exhibit 1 at ¶ 7; Exhibit 2 at ¶6.

While the Union does not give a date, John Catlett admits that UPS Labor Manager Mark Aaron informed him that the company did not have a policy against using tape recorders yet the Union kept such information from the Plaintiff. Plaintiff's Affidavit at ¶ 13.

The Union took UPS Labor Manager Mark Aaron's words that "UPS does not need to maintain a specific policy prohibiting the recording of conversations" and plainly accepted that unlawful position, ignoring the clear and plain language of The Act:

> . . . that the employer and the union may violate §§ 8(a)(3) and 8(b)(2), respectively, "when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee." *Vaca v. Sipes*, 386 U.S. 177-178 (1967)

Yet at or about the same time the Union accepted Mark Aaron's statement that a company policy against tape recording was not needed, the Union received UPS Manager John Morris' statement under oath in-part:

> "The meeting was led by John Pinnock, who asked Dan whether or not he was taping the conversation. He said he was, that the tape had not run out. John informed him Dan that it was against UPS policy and against the law to tape someone's conversation without their approval. He instructed Dan not to tape any conversations. Dan responded that he has a letter on file in corporate stating he was taping all conversations and that he would continue to do so."[1] O'Shea Exhibit 4. [Emphasis added.]

For three months during Plaintiff's grievance process, the Union dishonestly and in bad faith, knowing there was no company policy, allowed Plaintiff's grievance to move to the AAPGC as if the company did indeed have a company policy against tape recording and at their presentation, did not inform the panel there indeed was not a company policy. Plaintiff's Affidavit at ¶ 13.

Further, while Labor Manager Mark Aaron informed the Union that "UPS did not need to maintain a specific policy prohibiting the recording of conversations" he stated to the AAPGC panel that there was a company policy against tape recording conversations. Plaintiff's Affidavit at ¶ 13.

While both UPS and the Union represent to this Court that the company "did not need to maintain a specific policy prohibiting the recording of conversations" UPS represented in front of the AAPGC that there was an existing company policy and the Union did not represent to the AAPGC that the company had no tape recording policy and UPS had admitted to them there was no existing company policy. Plaintiff's Affidavit at ¶ 13.

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[1] In fact, Plaintiff has been using a tape recorder at UPS for 15 years and between 2001 and his discharge on May 13, 2003 submitted four letters to UPS and the Union that he was indeed doing so. Plaintiff's Affidavit at ¶ 10.

The AAPGC panel agreed with the company presentation ruling "the company proved Grievant guilty of recording meetings with the company in violation of Company Policy and instructions."

That both the Union and UPS admit there is now no company policy, the Union, in violation of the National Labor Relations Act ("NLRA"), allowed UPS prior to the panel hearing to unilaterally institute new terms and conditions of employment with respect to Plaintiff only, without bargaining on mandatory subjects such as UPS unilaterally instituting a tape recording policy and changing the disciplinary system.

The National Labor Relations Act ("NLRA" or "The Act") requires covered labor organizations, section 8(b)(3), 29 U.S.C. § 158(b)(3), and employers, section 8(a)(5), 29 U.S.C. § 158(a)(5), to bargain collectively about "wages, hours, and other terms and conditions of employment." Section 8(d), 29 U.S.C. § 158(d).

The document request by the Union and the filing of their unfair labor charge was a perfunctory action by the Union, "going through the motions" and purporting to protect the rights of the Plaintiff while yet in the three months leading up to Plaintiff's discharge they violated their obligation and their duty of fair representation in bargaining and negotiating terms and conditions of mandatory subjects that were unilaterally instituted and led to Plaintiff's discharge.

> "To sustain a member's action against his union under Griffin standards, it is not necessary that the union's breach be intentional. A union representative could be so indifferent to the rights of members or so grossly deficient in his conduct purporting to protect the rights of members that the conduct could be equated with arbitrary action." *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888 (4th Cir. 1980) also citing *Baldini v. Local Union No. 1095*, 581 F.2d 145 (7th Cir. 1978); *Robesky v. Qantas Empire Airways, Lts.*, 573 F.2d 1082 (9th Cir. 1978); *Hughes v. International Brotherhood of Teamsters, Local 683*, 554 F.2d 365 (9th Cir. 1977); *Ruzicka v. General Motors*

Corporation, 523 F. 2d 306 (6th Cir. 1975); *DeArroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO*, 425 F.2d 281 (1st Cir.), cert. denied, 400 U.S. 877, 91 S.Ct. 117, 27 L.Ed. 2d 114 (1970)

C. Panel Hearing Transcripts and Plaintiff's Assertions That the Union Did Not Fairly Represent Him.

Defendant Union argues that "at the hearing, Mr. O'Shea admitted that he had the opportunity to present all the evidence available to him in his defense. Plaintiff was asked if he was able to submit all of his evidence. Plaintiff stated that he was able to present evidence in his possession but there was a lot of evidence that has been denied him. Plaintiff's Affidavit at ¶ 16.

Defendant also argues that "at the conclusion of the hearing, Mr. O'Shea also conceded on the record that the Union made a 'good presentation' on his behalf." The Plaintiff's response was in the manner in which the Union spoke and read. At no time did the panel explain to the Plaintiff that a presentation had anything to do with agreeing with the Union's representation. Plaintiff's Affidavit at ¶ 16.

The Plaintiff was then asked if he believed the Union fairly represented him. The Plaintiff emphatically stated that they did not. Plaintiff's Affidavit at ¶ 16.

Further, Plaintiff submitted a letter to the Union several weeks before the panel hearing raising serious disagreements with the representation provided. O'Shea Exhibit 6.

The Union argues that "accordingly, as a direct result of the Union's vigorous representation, the arbitration panel awarded Mr. O'Shea approximately $15,000 in back pay for the time period between his termination and the issuance of the arbitration decision." Plaintiff argues that had the Union lawfully adhered to the NLRA in its duty to bargain, it would not have caused UPS to derogate the employment status of Plaintiff.

D. The NLRB Does Not Have Exclusive Jurisdiction and the NLRB's Actions In Plaintiff's Case Contradicts Their Own Past Decisions

On September 23, 2003, Plaintiff O'Shea withdrew his ULP charge against the Union. Local 639 argues that it was "in obvious recognition of the inherent weaknesses of his allegations." The Union's repeated position is unsupported inference and has no factual basis. Indeed, the affidavit referencing the assertion does not even allude to such inference and thus their argument cannot be regarded as fact. Local 639's Motion for Summary Judgment Exhibit 1 at ¶ 14.

The only reason the Plaintiff withdrew his charge was that he decided to seek restitution through the federal courts and not with the NLRB, which is confirmed by the NLRB's agent. O'Shea Exhibit 5; Plaintiff's Affidavit at ¶ 16.

The defining moment when the Plaintiff understood the NLRB was not going to do anything for him was in a meeting attended by Plaintiff and his wife where the Board agent could not give them a justification for UPS's, the Union's and the AAPGC's violation of Article 50 (that a warning notice must be given prior to discharge in non-cardinal infractions) when the Plaintiff had no warning notice in his employment file. The Board agent also made it clear to the Plaintiff the NLRB was not going to pursue this case. Plaintiff's Affidavit at ¶ 19.

In support of the Union's position that the NLRB adopted the arbitrator's award as appropriate, the Union argued that:

> "On January 29, 2004, the NLRB adopted the arbitrator's award as appropriate, and dismissed Mr. O'Shea's charge. In dismissing the charge, the NLRB explicitly determined that 'the arbitration proceedings appear to have been fair and regular and ... the decision is not repugnant to the purposes and policies of the [NLRA].'"

After the Plaintiff filed a lawsuit against the NLRB with respect to the denial of his Freedom of Information Act request (in the U.S. District Court for South Carolina, case no. 2:05cv2808)

the Board did not know of the status of Plaintiff's panel hearing until January 20, 2004. On January 25, 2004 the NLRB demanded the Plaintiff to withdraw his NLRB charge or his case would be dismissed. Four days later the NLRB dismissed Plaintiff's charge after "an investigation." Plaintiff's Affidavit at ¶ 19.

The Board also admitted, after Plaintiff's FOIA lawsuit, that "no company policies or procedures exist" in case number 5-CA-31288, the Plaintiff's case charge against UPS. In light of the result already of the Plaintiff's FOIA lawsuit, the very fact that the Board's "investigation" recovered no company policies should have raised a red flag to the Board that not only was the arbitration proceeding repugnant to the purposes and policies of the NLRA but UPS's and Union's violation of its lawful obligation to bargain the terms and conditions are mandatory subjects upon which the Plaintiff was discharged. Plaintiff's Affidavit at ¶ 19; See Plaintiff's Affirmative Case For Summary Judgment.

The courts are not foreclosed, nor does the NLRB have exclusive jurisdiction in matters concerning an employee's complaint against his Union for breach of their duty of representations:

> ". . . the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. Were we to hold, as petitioners and the Government urge, that the courts are foreclosed by the NLRB's Miranda Fuel decision from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. See *United Electrical Contractors Assn. v. Ordman*, 366 F.2d 776, cert. denied, 385 U.S. 1026." *Vaca v. Sipes*, 386 U.S. 171 (1967)

Although the Board has occasion to interpret collective-bargaining agreements in the context of unfair labor practice adjudication, see *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967),

the Board is neither the sole nor the primary source of authority in such matters. "Arbitrators and courts are still the principal sources of contract interpretation." *NLRB v. Strong*, 393 U.S. 357, 360-361 (1969). Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, "authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements." *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448, 451 (1957) (emphasis added).

E. Plaintiff's Criticism of the Union's Handling of His Arbitration Was Not *Post Hoc*.

Local 639 asserts that Plaintiff's criticism was "post hoc". Plaintiff disputes the Union's inference with fact.

Plaintiff submitted three certified letters to the Union for an investigation into his discharge and for the Union to acquire documents and statements that Local 639, as Plaintiff's bargaining representative could only do. Plaintiff's Affidavit at ¶ 14.

On July 27, 2003, three weeks prior to Plaintiff's arbitration hearing he submitted the third certified letter to the defendant criticizing and disagreeing with the Union's processing of the Plaintiff's grievance. Plaintiff's criticisms, pleas and requests were not post hoc, only ignored. O'Shea Exhibit 6; Plaintiff's Affidavit, *Id.*

Discovery is necessary for the Plaintiff to acquire evidence that would factually show by subpoena of hearing testimony and deposition that in response to the AAPGC panel's question whether the Plaintiff believed he was fairly represented, Plaintiff stated "No." Plaintiff's Affidavit at ¶ 16.

F. Plaintiff's Status as a Political Dissident Motivated Local 639's Breach of the Duty of Fair Representation Action.

Plaintiff's fifteen-year dissent and political animosity was publicly known throughout the membership in the Laurel, Maryland complex which included the following:

- In 1989 the Plaintiff filed a lawsuit against Local 639 officers for refusing to submit four grievances to arbitration and the case last five years in the U.S. District Court for the District of Columbia. (O'Shea v. Local Union 639, et. al. case number 89-2864.)
- Plaintiff's DFR lawsuit was always raised as an issue as being the largest duty of fair representation suit to ever come against the Local Union in every Union election after it was filed.
- Plaintiff ran against the Union officers and in almost every election assisted opposing slates campaigning against the Local Union officers.
- Plaintiff filed several lawsuits as a dissident member against the Local Officers, questioning not only their representation but Local Union finances. O'Shea Exhibits 7, 8 and 9.
- During the three-months between Plaintiff's discharge and AAPGC panel hearing, Plaintiff was informed by an employee who stated, "Your case is a slam dunk against you because the Union won't do anything for you." The employee also stated this was the prevalent belief among the employees in Plaintiff's center. Plaintiff requires discovery to pursue this statement and what may have been said by either UPS or the Union to portray that belief.

Courts have found that an employee's position of its Union officers can create a legitimate claim of unfair representation:

> "It is well-established that 'the use of forbidden grounds of decision . . . creates a legitimate claim of 'unfair' representation.'" *Antrim v. Burlington Northern, Inc.*, 847 F.2d 375, 378 (7th Cir.), cert. denied, 488 U.S. 891, 109 S. Ct. 226, 102 L. Ed. 2d 216 (1988). "Among these 'forbidden grounds of decision' are the 'employee's position on the union and its leaders,' *Adams*, 846 F.2d at 433." *Thomas v. United Parcel Service, Inc.*, 890 F.2d at ¶ 62, (7th Cir. 1989)

In *Grant v. Burlington Industries* the Court made clear that discrimination based on the employee's dissident status would constitute a breach of the duty of fair representation. 832 F2d at 80 (7th Cir.); also citing *Mangiaguerra v. D & L Transport, Inc.*, 410 F. Supp. 1022, 1023-24 (N.D. Ill. 1976).

Union conduct motivated out of distaste for the member's political views may constitute a breach of the duty of fair representation. *Thomas v. United Parcel Service, Inc.*, 890 F.2d at ¶ 64 (7th Cir. 1989). See, e.g., *Antrim*, 847, F.2d at 378; *Adams*, 846 F.2d at 433; *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 244 (7th Cir.), cert. denied, 477 U.S. 908, 91 L. Ed. 2d 571, 106 S. Ct. 3282 (1986).

II. PLAINTIFF'S AFFIRMATIVE CASE FOR SUMMARY JUDGMENT

INTRODUCTION

The Plaintiff hereby moves for cross-motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that there is no genuine issue as to any material fact as to Plaintiff O'Shea and that the Plaintiff is entitled to judgment as a matter of law.

ARGUMENT

On May 30, 2003 a local area grievance hearing was held concerning Plaintiff's termination. Present were UPS Labor Manager Mark Aaron, UPS Division Manager Frank Gribbin, Local Union President John Catlett and Plaintiff O'Shea. In that meeting, the following conversation occurred:

Mark Aaron to Dan O'Shea:	Do you know it's against UPS policy to tape record?
Dan O'Shea to Mark Aaron:	No.
Mark Aaron to Dan O'Shea:	In the [office], John Pinnock asked you to turn it off?
Dan O'Shea to Mark Aaron:	John Pinnock never asked me to turn it off in . . .
Frank Gribbon to John Catlett:	Ever see policy on tape recorder?
John Catlett to Frank Gribbon:	No.

O'Shea Exhibit 10.

In that meeting, the Union's representative, John Catlett, acknowledged he had never seen a company policy concerning employee use of a tape recorder.

John Catlett admits that UPS Labor Manager Mark Aaron informed him that a company policy against tape recording was not needed because Maryland has promulgated a statute that makes such conduct a violation of the law. Local 639's Motion for Summary Judgment Exhibit 1 at ¶ 7; Exhibit 2 at ¶6.

The Union took UPS Labor Manager Mark Aaron's words that "UPS does not need to maintain a specific policy prohibiting the recording of conversations" and plainly accepted that unlawful position, ignoring the clear and plain language of The Act:

> ". . . that the employer and the union may violate §§ 8(a)(3) and 8(b)(2), respectively, 'when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee.'" *Vaca v. Sipes*, 386 U.S. 177-178 (1967)

Both the Union and UPS admit there is no company policy, the Union, in violation of the National Labor Relations Act ("NLRA"), allowed UPS prior to the panel hearing to unilaterally institute new terms and conditions of employment with respect to Plaintiff only, without bargaining on mandatory subjects such as UPS unilaterally instituting a tape recording policy and changing the disciplinary system.

The National Labor Relations Act ("NLRA" or "The Act") requires covered labor organizations, section 8(b)(3), 29 U.S.C. § 158(b)(3), and employers, section 8(a)(5), 29 U.S.C. § 158(a)(5), to bargain collectively about "wages, hours, and other terms and conditions of employment." Section 8(d), 29 U.S.C. § 158(d).

The Union had a duty of fair representation as Plaintiff's exclusive bargaining agent to negotiate and bargain over terms and conditions of employment that are mandatory subjects.

A Supreme Court opinion noted that Congress, in amending the Act in 1947, refused to enact draft legislation which "contained a specific listing of the issues subject to mandatory

bargaining," and, instead, "make a conscious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 99 S. Ct. 1848-1849, 60 L. Ed. 2d 420 (1979).

"Employee work rules and particularly those that can lead to disciplinary actions constitute mandatory subjects of bargaining." It is immaterial "whether the rule change is good, bad, or indifferent. Whether the rule change was intended to accomplish a worthwhile result is not relevant." *Randolph Children's Home*, 309 NLRB 341, 343 at fn. 3 (1992). [Emphasis added.]

Vaca v. Sipes was clear:

> Although N. L. R. A. § 8(b) was enacted in 1947, the NLRB did not until *Miranda Fuel* interpret a breach of a union's duty of fair representation as an unfair labor practice. In *Miranda Fuel*, the Board's majority held that N. L. R. A. § 7 gives employees "the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment," and "that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair." 140 N.L.R.B., at 185. The Board also held that an employer who "participates" in such arbitrary union conduct violates § 8(a)(1), and that the employer and the union may violate §§ 8(a)(3) and 8(b)(2), respectively, "when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee." *Vaca v. Sipes*, 386 U.S. 177-178 (1967) [Emphasis added.]

In this Plaintiff's action, UPS terminated Plaintiff not on any existing company policy against tape recording, but UPS asserts it was for violating law.[2]

The Board has clearly established that it is unlawful for a company to discipline an employee, even with respect to misconduct or violations of law, if terms and conditions of

[2] Plaintiff disputes any unlawful act. Between 2001 and 2003 he notified the corporation under the terms of the statute four separate times by letter that he used a tape recorder, UPS never replied to his letters with respect to the use of a tape recorder. Plaintiff's Affidavit at ¶ 10.

employment changed without bargaining a mandatory subject. In Union of Marine and Shipbuilding Workers of America, AFL–CIO v. Bath Iron Works Corp. the Board stated:

> The principle nicely stated in Fibreboard is that a make-whole remedy is appropriate where the "loss of employment stems directly from an unfair labor practice." Taracorp, supra.
>
> On applying Fibreboard to the instant case, it is evident that employees who were disciplined for refusing to take a drug test, or who tested positively were disciplined as a direct consequence of Respondent's unlawful implementation of its Substance Abuse Policy. Therefore, in the ordinary course, such employees should be entitled to backpay and recission of any discipline imposed. *Bath Iron Works,* 302 NLRB 143, 1991 at page 914, ¶ 1-2.

Further, as the General Counsel observed in his brief,

> "While there may be a public policy against criminal drug use, there is no clear public policy against employment of drug users."

Likewise, in holding to the Board's position, while there may be a public policy against tape recording, there is no clear public policy against employment of those who tape record.

Not only does the Board find that mandatory bargaining subjects involve any new conditions of employment dealing with discipline, but with any unilateral change to the disciplinary system.

In *Toledo Blade Co.*, 343 NLRB 51, 2004 the Board found that Toledo had an existing policy of progressive discipline, yet changed the policy unilaterally to be decided on a "case-by-case" basis. The Board found that "those changes had a material, substantial, and significant impact on the employees' terms and conditions of employment."

Plaintiff was discharged for violating company policies with respect to service failures and failure to follow the clean-in/clean-out policy.[3] All three allegations (including the use of a tape

[3] Plaintiff through this memorandum disputes there was any misconduct, that Plaintiff's discharge was discriminatory in that Plaintiff was using the policies put forth to the other employees in his center.

recorder) were, as the AAPGC panel ruled and UPS admitted, non-cardinal offenses. Plaintiff's Statement of Undisputed Material Facts at No. 12.

In non-cardinal infractions, progressive discipline in the form of a written warning notice is required prior to suspension or discharge:

> Article 7. LOCAL AND AREA GRIEVANCE MACHINERY
>
> Except in cases involving cardinal infractions under the applicable Supplement, Rider or Addendum, an employee to be discharged or suspended shall be allowed to remain on the job, without loss of pay unless and until the discharge or suspension is sustained under the grievance procedure. Notwithstanding the foregoing, any superior provisions in Supplements, Riders or Addenda shall prevail.

The parties Supplemental Agreement stated:

> Article 50 – DISCHARGE OR SUSPENSION
>
> The Employer shall not discharge nor suspend any employee without just cause but in respect to discharge or suspension shall give at least one warning notice of a complaint against such employee to the employee in writing, and a copy of the same to the Union, except that no warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty, drinking alcoholic beverages during the workday, use or possession of illegal drugs while on duty, recklessness resulting in serious accident while on duty, or the carrying of unauthorized passengers while on the job. The warning notice as herein provided shall have no force or effect for a period of more than nine (9) months from the date of said warning notice.

In Plaintiff's case, the company ignored the clear and prior-bargained disciplinary system for non-cardinal infractions and summarily discharged the Plaintiff absent a warning notice not only in violation of the parties CBA but in violation of the National Labor Relations Act by unilaterally changing the terms and conditions of Plaintiff's employment as it was a mandatory subject involving the change in the progressive disciplinary structure of the parties CBA.

The Union likewise is not exempt. From the inception of Plaintiff's termination, the Union took UPS Labor Manager Mark Aaron's words that "UPS does not need to maintain a specific policy prohibiting the recording of conversations" and plainly accepted that unlawful position, ignoring the clear and plain language of The Act:

> ". . . that the employer and the union may violate §§ 8(a)(3) and 8(b)(2), respectively, 'when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee.'" *Vaca v. Sipes*, 386 U.S. 177-178 (1967) [Emphasis Added.]

The Union's duty of fair representation applies to negotiation as well as administration:

> ". . . we have repeatedly noted that the Vaca v. Sipes standard applies to 'challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well.'" *Communications Workers v. Beck*,487 U.S. 735, 743 (1988) (internal citation omitted); see also *Electrical Workers v. Foust*, 442 U.S. 42, 47 (1979); *Vaca v. Sipes*, 386 U.S., at 177.

The Union had a duty to protect the terms and conditions of Plaintiff's employment with respect to mandatory subjects such as protection of rights and protection from unlawful unilateral changes, an ongoing process which is day-to-day covering working conditions:

> "The bargaining representative's duty not to draw 'irrelevant and invidious' distinctions among those it represents does not come to an abrupt end, as the respondents seem to contend, with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement." *Conley et al. v. Gibson et al.*, 78 S. Ct. 99, 355 U.S. 46 (U.S. 11/18/1957)

The Union, in its duty of fair representation in bargaining terms and conditions of employment cannot yield:

> "Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment . . . .' The duty is limited to

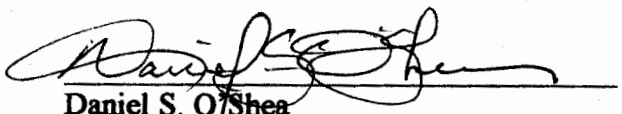
those subjects, and within that area neither party is legally obligated to yield. *Air Line Pilots Association v. Joseph E. O'Neill et al.*, 111 S. Ct. 1127, 499 U.S. ¶ 38 (U.S. 03/19/1991) [Emphasis added.]

CONCLUSION

The Union was the Plaintiff's sole provider for Representation, Administration, Negotiation and Arbitration. In ignoring their lawful obligation under "The Act" to bargain the terms and conditions of 1- new company policies and 2- existing company policies where UPS changed the disciplinary system upon Plaintiff, the Union caused UPS to derogate the employment status of Plaintiff and in doing so breached their duty of fair representation.

These facts are not in dispute and Plaintiff should be awarded summary judgment as a matter of law.

Respectfully submitted,



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February 23, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(NORTHERN DIVISION)

DANIEL S. O'SHEA,

Plaintiff

v.

LOCAL UNION NO. 639
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, et al.

Defendants

Civil Action No.: JFM 8-05-CV-937

CASE CITATIONS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of February, 2006, a copy of the foregoing **PLAINTIFF'S MOTION FOR MEANINGFUL DISCOVERY AND DISCOVERY UNDER RULE 56(f), CROSS-MOTION FOR SUMMARY JUDGMENT, AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT,** was sent via First Class U.S. Mail addressed to:

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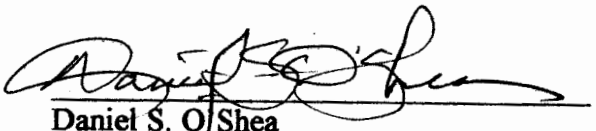

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