UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1460

DANIEL S. O'SHEA,

Plaintiff-Appellant

v.

TEAMSTERS LOCAL UNION 639 and UNITED PARCEL SERVICE, INC.,

Defendants-Appellees

Appeal from a Judgment of the
United States District Court
for the District of Maryland

INFORMAL REPLY BRIEF FOR APPELLANT DANIEL S. O'SHEA

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

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O'SHEA'S REPLY TO UPS' AND THE UNION'S INFORMAL BRIEFS

UPS and the Union have been so inconsistent with their positions in this entire episode, clarification is in order.

On May 13, 2003 O'Shea was discharged for violating company policy by recording conversations. (DEN 56, Exh. 4). On May 30, 2003 former-president John Catlett admitted at O'Shea's local discharge hearing he had never seen a policy on recording conversations. (DEN 56, Exh. 10). In July, 2003 prior to O'Shea's panel hearing UPS informed the Union "no policy was needed". (DEN 52, Exh. 2 ¶ 6). On August 19, 2003 UPS represented to the panel and arbitrator that O'Shea "violated company policy by tape recording conversations." (DEN 60, Exh. 1, pg. 19, lines 14-16). The arbitrator's decision determined that "O'Shea violated company policy by tape recording conversations." (DEN 64, Exh. 1). A month after O'Shea's discharge, employees in another State with the same law O'Shea was fired for were allowed without discipline to record conversations. (DEN 56, Exh. 13). The NLRB concluded that the arbitration decision was not "repugnant to the purposes and policies of the NLRB" yet after O'Shea's FOIA lawsuit the NLRB admitted "there were no company policies or procedures in O'Shea's case file." (DEN 56, Exh. B, pg. 6 ¶ 19). The district court in its Memorandum and Order dismissing O'Shea's case stated "an implicit provision of any employer's personnel

policies is that its employees not violate the law". (DEN 67, pg. 3 at V). In UPS' informal brief to this court, UPS and the Union's most recent position now is that UPS "is well within its rights to implement work rules" unilaterally without bargaining or without bargaining a management rights clause.

Also, UPS asserts four Statements of Undisputed Material Facts that O'Shea has disputed. That he "hid on company property", "lied to supervisors", "acknowledged that his claim of unfair representation against the Union was unfounded" and that "the decision of the majority of the [AAPGC] is final and binding on all parties". O'Shea has contended all along that the Union did not call any relevant witnesses who would have testified to the fabrication of these allegations and with meaningful, initial discovery under the Federal Rules of Civil Procedure O'Shea was denied, would prove the first three allegations to be false and the fourth O'Shea disputed in the lower court.

I. The Union's Duty Of Fair Representation Is Both Administration And Negotiation.

The parties contend that because O'Shea filed a cross-motion for summary judgment, discovery was not needed and summary judgment was "ripe". This is disputed. O'Shea clearly addressed on the record that the Union is obligated in their duty of fair representation to both <u>bargain</u> and <u>administer</u> the CBA.

Communications Workers America Et Al. V. Beck Et Al., 108 S. Ct. 2641, 487 U.S. 735 (U.S. 06/29/1988):

> This jurisdiction to adjudicate fair-representation claims encompasses challenges leveled not only at a union's contract administration and enforcement efforts, id., at 176-188, but at its negotiation activities as well.

O'Shea clearly differentiated his need for initial, meaningful discovery with respect to the Union's administration of the CBA while moving for summary judgment with respect to the Union's failure in their obligation to bargain mandatory terms and conditions of the CBA.

A. The Union's Duty Of Fair Representation To Administer The CBA.

All parties do not dispute that a Union's action must be either in bad faith, fraudulent, deceitful, dishonest or invidious. O'Shea showed that the former-president did not inform the panel committee of UPS' admission a month earlier that there was no policy with respect to tape recording, showed that one of the new officers of the Union, Ron Joseph was told by a number of drivers that they were "disturbed a 24-year man can be discharged for things they do all the time"[1] and that

[1] The defendants assert O'Shea does not mention the names of witnesses. O'Shea clearly in his Rule 56(f) affidavit stated that the drivers in his delivery center would testify. O'Shea after over 760 days without discovery also stated he has no access or contact information of current employees. Both defendants have access to seniority lists and membership lists while O'Shea does not. O'Shea, no longer as an employee is allowed on UPS property. Initial, meaningful discovery could

pertinent grievances related to O'Shea's discharge indeed went unprocessed without reason. (O'Shea's informal brief at 6-10).[2]

Courts have found a sufficient causal nexus to warrant the vacation of an arbitrator's decision under section 301 and have addressed instances in which the union has failed properly to inquire into an employee's grievance at all, by refusing to analyze the relevant facts or by refusing to question essential witnesses. See, e.g., *Carpenter v. West Virginia Flat Glass, Inc.*, 763 F.2d 622, 625 (4th Cir. 1985) (finding that the union breached its duty of fair representation by failing to contact the employee's doctor, where the critical issue in the employee's claim for reinstatement turned explicitly on whether he was physically able to work at the plant); *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 585 (6th Cir. 1994) (finding that the union breached its duty of fair representation where the union's representative had completely failed to investigate the site of the accident underlying the employee's

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disclose what drivers remain in his former center that have personal knowledge could testify to.

[2] Let it be noted that Ron Joseph ran on a slate (Members United Slate-MUS) opposing the 20-plus year officers of Local Union 639 (Concerned Members Slate-CMS) and the MUS slate's largest expense was printing O'Shea's 4-page campaign piece called The Obsolete Contract. (Attached as Exhibit 1). The MUS slate supported O'Shea and handed out the injustices of O'Shea's discharge. However, after the campaign and winning the election, the new slate of officers now oppose O'Shea. After representing to the membership during the campaign an injustice was committed to win an election, the new officers now represent to the membership no injustice occurred. (DEN 19, page 11, lines 4-11).

discharge, and where the union had failed to call "the one witness who could have effectively and objectively corroborated [the employee's] testimony on a vital matter").

UPS also contends that "O'Shea misrepresented the facts to the Court, since it is without dispute that the Union did request that UPS produce a copy of a policy prohibiting the tape recording of conversations." (UPS' informal brief at 19). This contention has no basis in fact. O'Shea does not dispute that the Union did request that UPS produce a copy of the policy, O'Shea's argument is that the Union made such a request a month prior to his panel hearing, UPS responded they did not need a policy, yet at the panel hearing UPS argued O'Shea did indeed violate company policy and the Union in bad faith and dishonesty withheld UPS' admission to the panel. (O'Shea's informal brief at page 17).

B. UPS and the Union Argue In Favor Of O'Shea's Discharge A System That Does Violence To National Labor Policy In The Parties Obligation To Bargain.

Congress through the National Labor Relations Act empowers the National Labor Relations Board to prevent any "person" from engaging in any unfair labor practice:

> Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.

Congress delegated to the Board the primary responsibility of marking out the scope of the statutory language of the Act and the duty to bargain. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 99 S. Ct. 1848-1849, 60 L. Ed. 2d 420 (1979) and in citing the precedents by the NLRB and the courts that in this case, UPS and the Union were obligated to bargain the mandatory terms and conditions of employment, specifically work rules and their discipline. (O'Shea's informal brief at pages 13-16).

1. Terminations Based On Unlawfully Implemented Work Rules Violates The Parties Duty And Obligation To Bargain Under The Act.

UPS and the Union contend that a policy is not needed because UPS "is well within its rights to implement work rules" unilaterally without bargaining and cited *Spero Electric Corp. v. International Brotherhood of Electrical Workers Local 1377*, 439 F.3d 324 (6th Cir. 2006). In that case a management rights clause existed within the parties CBA that allowed the company to unilaterally implement work rules. A union may of course consent to a broad management-rights clause and thereby relinquish its right to bargain over terms and conditions of employment, however, only if bargained. *National Labor Relations Board v. American National Insurance Co.*, 72 S. Ct. 824, 343 U.S. 395 (U.S. 05/26/1952). The rights clause was a term and condition of employment that must, and was, bargained in *Spero*.

Absent such a consent of a management rights clause by a union, however, "an employer violates Section 8(a)(5) of the Act if, during the term of a collective-bargaining agreement, it changes its employees' work Rules without first having bargained with its employees' collective bargaining representative over the matter." *Southern Florida Hotel & Motel Assn.*, 245 NLRB 561, 567 (1979). See also *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013 (1983), enfd. *Verizon, NY, Inc., v. NLRB*, 722 F. 2d 1120, 1127. (3d Cir. 1983); *Alfred Lewis, Inc.*, 229 NLRB 757 (1977).

UPS nor the Union has shown no such clause in the applicable CBA that applies in this case and without one, UPS violated the Act the moment O'Shea was discharged on UPS' admitted implementation of the work rule without bargaining. O'Shea put forth on the record that former-president John Catlett had admitted never seeing a company policy on the use of a tape recorder, "doesn't remember anything being said about, you can't tape-record conversations anymore" and when UPS admitted to him that "they don't need to maintain a specific policy prohibiting the recording of conversations" the Union was obligated in their duty to bargain. Instead, John Catlett withheld that vital admission by UPS at the panel. (O'Shea's informal brief at page 7).

2. Terminations Based On Interpreting Enacted Law Shatters Industrial Peace.

a. Interpretation of Enacted Law.

UPS and the Union contend that a policy is not needed because O'Shea violated law based upon their interpretation of enacted

law. Their entire premise violates well established national labor policy.

For fifteen years, the parties do not dispute O'Shea used a tape recorder at work to note delays, verify management instructions and suppress management harassment and abuse. O'Shea also notified UPS of his use of the tape recorder on four separate occasions. [DEN 70, Affidavit ¶ 10, ¶ 15].

O'Shea continually notified UPS corporate to what he believed was adhering to Maryland law. With each notification, UPS remained silent and did not discipline by warning, suspension or termination.

Only after O'Shea's workers compensation injury claim and subsequent twenty-five letters and grievances did UPS then, on May 13, 2003 suddenly and without notice discharge O'Shea for using a tape recorder.

UPS belatedly terminated O'Shea in their belief a violation of law occurred while O'Shea believes the Maryland wiretap law is not violated unless the ex parte interception is done willfully, that is, with intent or reckless disregard of a known legal duty. A Maryland appellate court stated just four years ago that it is "totally incorrect" to say that ignorance of the wiretap statute is no excuse. Unlike some other laws, people are not presumed to know that particular law. *Hawes v. Carberry*, 103 Md. App. 214, 653 A.2d 479 (1995).

The dispute in this instance is the termination of O'Shea based on an interpretation of enacted law absent a policy a company and Union are obligated to bargain when it involves terms and conditions of employment.

b. The Discriminatory Use Of Enacted Law At The Whim Of UPS And The Union To Use At Their Discretion Of When, Where And Against Who.

O'Shea presented three affidavits of employees in various parts of the country who used a tape recorder or saw other employees using tape recorders at UPS for the same purpose as O'Shea, to prevent harassment and abuse especially on the heels of filing a workers compensation claim.

One affidavit, by Rob Moorhead described in detail four employees using tape recorders to expose the abuse of a UPS manager in the state of California, whose laws are further restricted by not only a wiretapping act but an eavesdropping act. California Code Sections 630 through 632.7, 634, 635, 636.5, 637, 637.2. UPS issued no discipline to any of these employees one month after discharging O'Shea. (DEN 56, Exh. 13).

O'Shea was discharged under UPS', the Union's, the panel committee's and arbitrator's interpretation of Maryland law while employees in another state in the country that has the same wiretapping law were not disciplined at all.

The system both UPS and the Union espouse turns the consistent and well established labor policy on its head and would allow

companies complete unrestraint to terminate employees at their discriminatory discretion in interpreting enacted law without bargaining.

c. Discharges Founded On Enacted Law Absent The Statutory Duty To Bargain Would Discourage Collective Bargaining.

Section 10(c) "charges the Board with the task of devising remedies to effectuate the policies of the Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953) and the Board has broad discretionary power in adopting remedies, subject to limited judicial review. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

The task of the NLRB in applying Section 10(c), however, "is to take measures designed to recreate the relationship that would have been had there been no unfair labor practice." *Franks v. Bowman Transp Co.*, 424 U.S. 747, 769 (1976). Specifically, the NLRB's precedent for such "make-whole" remedy was that failure to do so would sanction unfair labor practices and discourage collective bargaining:

> Specifically, this means that all reference to drug tests and to discipline imposed for testing positively or for refusing to take such tests should be expunged from the employees' files as if such actions had not been taken and they should be made whole by payment of backpay and, where appropriate, be reinstated. <u>To do otherwise would be to sanction Respondent's unfair labor practices and discourage collective bargaining</u>. *Bath Iron Works*, 302 NLRB No. 143 at 914 ¶ 8. [Emphasis Added.]

In the labor setting, to imagine the system UPS and the Union argues for, the ability to interpret enacted law and discriminately apply enacted law absent the consistent bargaining requirements of prevailing national labor policy for employee protection and industrial peace is simply frightening.

In O'Shea's situation, to allow the termination to stand even under the unlawful act rewards UPS in relieving them from responsibility for a work-related injury (and the subsequent retaliation) and rewards the Union from paying out a '25-year and out' retirement O'Shea was within two years of earned eligibility, saving the Union approximately one-million dollars in the next twenty years. (DEN 70, O'Shea's affidavit ¶¶'s 13-14, 18-23). For both defendants it was a transaction of convenience.

The NLRB has determined that unilateral impositions of new or altered policies with respect to work rules or the tethered disciplinary structure cannot be sanctioned even if that misconduct was illegal:

> In the absence of evidence demonstrating actual job impairment, the only remaining reason which might justify withholding a make-whole remedy in this case would be to accommodate a public interest in discouraging the use of illegal drugs because of their potentially injurious effects. Drug abuse is unquestionably an exceedingly serious problem of national proportions. In the industrial setting, the use of illegal substances could threaten the health and safety of employees, even those who do not use drugs, and compromise the soundness of the product. Thus, an employer may have a legitimate interest in guarding

against drug use by members of its work force. This interest does not mean that the Board will sanction the unilateral imposition of a new and intrusive drug testing policy or deny relief to employees who submitted positive test results pursuant to that policy. 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.'' *Bath Iron Works*, 302 NLRB No. 143 at 914 ¶ 6. [Emphasis added.]

In *Anheuser-Busch, Inc. and Brewers and Maltsters, Local Union No. 6, International Brotherhood of Teamsters,* Case 14-CA-25299, five employees were discharged for smoking marijuana on company premises. The NLRB found that Anheuser-Busch unlawfully installed surveillance cameras unilaterally without bargaining. The three-member panel denied the "make-whole" remedy of the five employees because of their illegal misconduct.

One of the three dissented in the denial to reinstate the illegal drug users stating:

> Unfortunately, in this case my colleagues have continued a recent trend toward weakening our remedies for unlawful conduct, making them much less effective as a deterrent... the only really effective deterrent in this case would be obtained by applying the fundamental remedial principle that Board orders should "restor[e] the situation, as nearly as possible, to that which would have obtained but for [the unfair labor practice]." *Die Supply*, supra at 1344. The 16 employees in this case were disciplined and discharged solely as a result of the Respondent's unlawful unilateral installation and use of hidden surveillance cameras. Accordingly, I dissent from my colleagues' decision not to order reinstatement and make-whole relief. [Emphasis added.]

In the dissent, once it is determined the company committed an unfair labor practice, that there were any employees engaging

in illegal activity on company property is irrelevant. The Board's fundamental remedial principle at that point was to deter the unlawful activity by the company under the Act.

In this regard Member Walsh's dissent was corrected. The United States Court of Appeals for the District of Columbia Circuit granted Local Union 6's petition to overturn the NLRB's decision and remanded the case for the Board to address the appropriate remedial order for the disciplined illegal drug users that violated law on company property. *Brewers and Maltsters Local 6* v. *NLRB*, No. 04-1278 (D.C. Cir. July 5, 2005). Stating in pertinent parts:

> The court will not enforce the Board's remedial order, however, when it fails to distinguish adequately its applicable precedent. See, e.g., *Gen. Elec. Co. v. NLRB*, 117 F.3d 627, 636 (D.C. Cir. 1997); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 933 (D.C. Cir. 1991); cf. *DaimlerChrysler*, 288 F.3d at 445. [Emphasis added.]

And,

> Here, however, the Board has not adopted a reasoned approach because it has failed to distinguish adequately its prior decisions. *Brewers and Maltsters Local 6* v. *NLRB*, No. 04-1278 (D.C. Cir. July 5, 2005)[Emphasis added.]

The NLRB is authorized by the Act the task of applying Section 10(c), "to take measures designed to recreate the relationship that would have been had there been no unfair labor practice." *Franks v. Bowman Transp Co.*, 424 U.S. 747, 769 (1976).

For UPS to assert in their informal brief on page 20 that "there can be little dispute that it is UPS' policy, just as it is the policy of every other employer, that its employees not violate law" is so contrary to remedial precedent determined by the NLRB as authorized by Congress through the NLRA, that UPS' statement defies logic.

In O'Shea's case, UPS unlawfully discharged O'Shea for using a tape recorder, a term and condition of employment that both UPS and the Union were obligated to bargain. The NLRB's remedial precedent under the Act does not look at whether an employee's misconduct was or was not a violation of law in making an employee whole but whether there was an "unlawful unilateral change" that caused the discipline.

In *Bath Iron Works*, the NLRB explains their precedent rationale for ignoring whether employees do or do not violate law in unlawful actions by companies or unions under the NLRA:

> The Supreme Court held that under the Fourth Amendment, unlawfully seized heroin had to be excluded from evidence and could not be used to convict the defendant. (See Mapp v. Ohio, 367 U.S. 643 (1961), applying Wong Sun's poisoned fruit Rule to illegal search and seizures by state agents under the Fourteenth Amendment). By analogy, evidence "seized" from BIW employees as a result of Respondent's unlawful implementation of the Substance Abuse Policy, also should be excluded as a ground for taking any adverse employment action against them." *Bath Iron Works*, 302 NLRB No. 143 at page 914, fn 22.

3. Adhering to Policy of the Board Makes O'Shea's Termination An Unfair Labor Practice Irregardless Of Just Cause And A Breach Of The Union's Duty Of Fair Representation.

In *Bath Iron Works,* 302 NLRB No. 143 at page 914, ¶ 1, the NLRB clarified circumstances where an employee may have been disciplined for what appeared to be just cause though closer examination reveals the discipline actually stemmed from an employer's unfair labor practice:

> "In *Fibreboard Corp. v. NLRB,* 379 U.S. 203, 217 (1964), the Supreme Court affirmed a make-whole remedy for employees whose discharge stemmed from the employer's failure to bargain with the Union before subcontracting their work. The principle nicely stated in Fibreboard is that a make-whoe remedy is appropriate where the "loss of employment stems directly from an unfair labor practice."

O'Shea was discharged for 1- using a tape recorder, 2- refusing to turn the tape recorder off, 3- violating the clean-in/clean-out procedure and 4- failure to follow instructions.

UPS and the Union did not bargain the use of a tape recorder and other employees in States having the same wiretapping laws are allowed without discipline to use tape recorders in what UPS and the Union interprets to be a violation of law. Without such bargaining, O'Shea has cited NLRB and court precedent that it is an unlawful violation of the Act and an unfair labor practice.

In Bath Iron Works, employees were restored to status quo who were disciplined for refusing to take a drug test or who tested positive, that they "be returned to the position he or she occupied before Respondent unilaterally implemented its

Substance Abuse Policy. *Bath Iron Works*, 302 NLRB No. 143, ¶ 8. See also *Southwest Forest Industries*, 278 NLRB 228 (1986) and *Star Tribune*, 295 NLRB 543 (1989). (Make-whole remedy applies where discipline stems from any unlawful violation of the Act.)

In O'Shea's case, UPS' discipline for refusing to turn off the tape recorder[3] and the subsequent discipline for violation of the clean-in/clean-out policy stemmed from UPS' unlawful unilateral implementation prohibiting the use of a tape recorder. O'Shea would not have been put in a position to refuse to turn the recorder off nor would he have been escorted out to the security gate absent the unlawful discharge.

The last reason for UPS' discharge of O'Shea was for "failure to follow proper work methods, procedures and instructions". (UPS' informal brief, pg. 4 last paragraph). For such a reason, UPS summarily discharged O'Shea without a warning notice. But UPS manager Pinnock admitted in the lower court "It is customary to issue warning letters to people that fail to follow instructions." Mr. Pinnock was also questioned:

> [Panel member] Mr. Bishop: There were other people that day. I heard you testify that there were several packages in your office. I am assuming you talked to the other drivers about not having service crosses on their packages, did you issue them any discipline that you can remember?

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[3] Let it be noted that both O'Shea and the shop steward testified that on the morning of O'Shea's discharge, management never asked O'Shea to turn it off. (DEN 60, Exh. 1, pg. 25 lines 23-24, pg. 26, line 1.)

> [UPS manager] Mr. Pinnock: I made formal letters of all my conversations.

With all other drivers, they received formal letters, yet in O'Shea's case, the disciplinary structure changed. O'Shea was denied the customary warning notice and instead was discharged. (DEN 60, pg. 89, lines 11-19.)

Upon O'Shea's discharge, not only were new rules unilaterally implemented unlawfully, but existing disciplinary rules were unilaterally changed as well, an unfair labor practice violation under the Act and O'Shea set forth precedent by the courts and NLRB that an employer's disciplinary system, whether it is progressive or written warning, is a mandatory subject of bargaining. (O'Shea's informal brief at page 14).

II. Arbitrator's Decision Exceeded His Authority And Should Not Be Enforced.

A. O'Shea Properly Claimed To Vacate The Panel Or Arbitrator's Decision.

Paragraph 34 of O'Shea's complaint did put forth fair notice of its basis. The Supreme Court addressed this issue in *Conley et al., v. Gibson et al.*, 355 U.S. 41 (1957):

> The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and

> the grounds upon which it rests...The Federal Rules reject the approach that pleadings is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. *Maty v. Graselli Chemical Co.*, 303 U.S. 197.[Emphasis added.]

O'Shea in the complaint and throughout the pleadings set forth a statement that gave UPS and the Union fair notice of what O'Shea's claim was and the grounds upon which it rests. (Complaint at ¶ 34; DEN 24 at pg. 1 and 7; DEN 33; DEN 35; DEN 38; DEN 39; DEN 51; DEN 54; DEN 57).[4]

B. The Statute Of Limitations With Respect To The Federal Arbitration Act And Maryland Arbitration Act Do Not Apply.

Maryland's Uniform Arbitration Act cannot apply in O'Shea's case as the parties agreement in this action does not expressly provide that it shall apply and UPS nor the Union have shown on the record any provision in the CBA where it does:

> "arbitration agreement[s] between employers and employees or between their respective representatives unless it is expressly provided in the agreement that [the Act] shall apply." Md. Code Ann., Cts. & Jud. Proc. § 3-206(b)(1974, 1998 Repl. Vol.)

Upheld by the 4th Circuit in *Bryant v. Bell Atlantic Maryland, Incorporated*, 288 F.3d 124 (4th Cir. 04/29/2002).

UPS' argument to apply Maryland's arbitration act to O'Shea's action should also not apply as federal diversity jurisdiction

[4] Let it be noted that at no time in the lower court did UPS or the Union ever argue that O'Shea improperly set forth a claim in his complaint to vacate the panel committee's or arbitrator's decision.

would enable UPS to have successfully transferred this action to the District Court in Maryland and achieve a result it could not have been able to originally in the District Court of Columbia, appropriately addressed in *Van Dusen v. Barrack*:

> "Applying this analysis to § 1404 (a), we should ensure that the "accident" of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed" *Van Dusen v. Barrack*, 84 S. Ct. 805, 376 U.S. 639-640 (U.S. 03/30/1964).

The Federal Arbitration Act expressly states:

> "...but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Federal Arbitration Act,* 9 U.S.C. § 1

Upheld by the 4th Circuit in *Sine v. Local No. 992 Int'l Brotherhood of Teamsters*, 644 F.2d ¶ 33 (4th Cir.),

> "The plaintiffs brought this action to vacate the arbitrator's award under the United States Arbitration Act and § 301 of the LMRA, 29 U.S.C. § 185.[*fn9] The United States Arbitration Act provides for a three month limitations' period for a suit to vacate or modify an arbitration award. 9 U.S.C. § 12. However, the act also expressly states that it is inapplicable to actions concerning contracts of employment of workers engaged in interstate commerce, 9 U.S.C. § 1, and this court has held that the exclusionary provision applies in cases such as the one before us here."

Also see DEN 51 and DEN 57 for further support.

C. The Arbitrator Exceeded The Scope Of His Authority In Viewing Enacted Law.

UPS asserts in their brief on page 22 that:

"The arbitration panel, however, correctly did not accept the Union's argument in light of Maryland criminal statute and in light of Mr. O'Shea's refusal to cease recording, as was well within the panel's power to decide."

O'Shea has put forth NLRB precedent and case law that disputes such an assertion in both his informal brief and this reply. As the Supreme Court stated, an "arbitrator has no authority to rule on a statutory claim." Rather, the source of the arbitrator's authority is the collective bargaining agreement, and the arbitrator "has no general authority to invoke public laws that conflict with the bargain between the parties," and if an arbitral decision is based "on the arbitrator's view of the requirements of enacted legislation, rather than on an interpretation of the collective-bargaining agreement, the arbitrator has exceeded the scope of his submission and the award will not be enforced." *Alexander v. Gardner-Denver Co.*, 415 U.S. 53-54 (1974).

D. O'Shea Did Not Commit Any Exclusive Or Inclusive Cardinal Infraction, Therefore The Arbitrator Did Ignore The CBA Provision That A Warning Notice Must Be Given Prior To Discharge.

Similar to UPS' ever changing stance on having a policy or not having a policy, UPS argues here that the arbitrator determined that O'Shea committed a cardinal infraction. However, in UPS' Motion To Dismiss (DEN 19 at page 7, footnote 6) UPS admitted O'Shea did not commit a cardinal infraction:

> "Pursuant to the parties' CBA, it has been alleged that the Company can only remove an employee from the payroll at the time of his or her discharge if the employee is terminated for a "cardinal offense"; otherwise, the employee must remain on the payroll until the discharge is sustained under the grievance procedure. *See id.* Although the arbitration panel determined that UPS had just cause to terminate Mr. O'Shea, it found that Mr. O'Shea was not terminated for a cardinal offense. See id. Accordingly, the panel determined that Mr. O'Shea should have been permitted to remain on the UPS payroll throughout the processing of his grievance. *See id.*"

Article 7 of the parties CBA supports UPS' assertion that O'Shea committed no cardinal infraction:

> 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. (DEN 64, Exh. 17).

As UPS correctly asserted, that is the reason O'Shea was awarded back-pay, because the arbitrator determined he did not commit any cardinal infraction, exclusive or inclusive.

In the four cases cited by UPS in their informal brief, Appendix 1-3, and in *Hawaii Teamsters and Allied Workers Union, Local 996 v. United Parcel Service*, 241 F.3d 1177 (9th Cir. 2001) each and every one of those employees were found to have committed "inclusive" cardinal infractions and were not awarded back pay while O'Shea was, for one simple reason and admitted by UPS, O'Shea did not commit an exclusive or inclusive cardinal infraction.

O'Shea's reference to Hawaii Teamsters and the dissent opinion in his informal brief on page 23 specifically applies as O'Shea clearly noted the employee in that case had committed an inclusive cardinal infraction and was not awarded back pay, while O'Shea had not committed a cardinal infraction and therefore was awarded back pay. The arbitrator in O'Shea's case ignored the portion of the parties CBA that mandates in non-cardinal infractions a warning notice to be given prior to discharge or suspension. (DEN 64, Exh. 2).

As for response to UPS' Appendix 2, that case appears to simply fly in the face of well established labor policy by the NLRA, NLRB and court precedent throughout this informal reply, specifically in light of the rulings made in *Bath Iron Works*, 302 NLRB No. 143, and *Brewers and Maltsters Local 6* v. *NLRB*, No. 04-1278 (D.C. Cir. July 5, 2005).

O'Shea's informal brief (at page 7), showed clear evidence that the Union never saw a policy prohibiting the recording of conversations. UPS states O'Shea was discharged for violating Maryland law (UPS' informal brief page 20), states that the arbitration panel did not accept the Union's argument in light of the Maryland criminal statute (UPS' informal brief page 22) and states they can unilaterally implement work rules (UPS' informal brief page 24) without bargaining or showing a management rights clause was bargained. Based on these

undisputed facts, the arbitrator simply had nothing to interpret in the contract. There was no policy that was bargained, only unlawfully imposed. The arbitrator acted beyond the scope of his authority and interpreted statutory law.

III. O'Shea's Maryland Statutory Retaliation Claim Is Independent Of Contractual Rights.

In *Alexander v. Gardner*, Harrell Alexander pursued a discharge through the grievance procedure under the parties CBA. The arbitrator found that Alexander was discharged for just cause. Not only did the Supreme Court find that statutory rights conferred on individuals "can form no part of the collective-bargaining process", the Court found that the contractual right to just cause employment and statutory right "have legally independent origins and are equally available to the aggrieved employee." *Alexander v. Gardner-Denver Co.*, 415 U.S. 35 (1974).

UPS and the Union do not hesitate to shake of the shackles of federal labor policy and cling to enacted law to discharge O'Shea but they quickly leap across the fence and plead federal preemption protection from O'Shea's state retaliation claim.

IV. Denying O'Shea Meaningful Discovery In Responding To A Motion For Summary Judgment Is An Abuse Of Discretion.

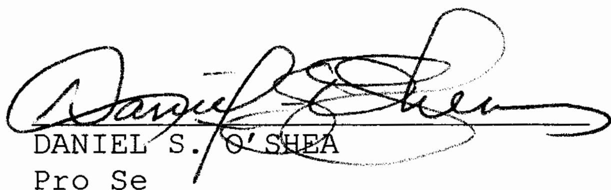
UPS in their response to O'Shea's informal brief (O'Shea brief at number IV at pages ii and 1) materially changes O'Shea's argument and question presented from "meaningful discovery" to "Rule 56(f)" and addressed only Rule 56(f) arguments. O'Shea's

meaningful discovery arguments put forth were ignored. (Informal Brief at 25; DEN 56, Plaintiff's Rule 56(f) Motion and for Meaningful Discovery, pages 1-3, DEN 64 at 2-3).

CONCLUSION

For all of the foregoing reasons, O'Shea respectfully requests the Court of Appeals to grant relief put forth under Conclusion in his Informal Brief.

Respectfully submitted this 6th day of June, 2006.



DANIEL S. O'SHEA
Pro Se

CERTIFICATE OF SERVICE

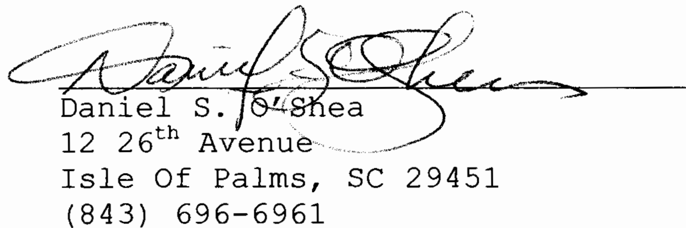
I HEREBY CERTIFY that on this 7th day of June, 2006, a copy of the foregoing Informal Reply Brief was sent via U.S. Express Mail addressed to:

Richard Hafets
DLA Piper Rudnick
6225 Smith Avenue
Baltimore, MD 21209

Counsel for Defendant
UNITED PARCEL SERVICE, INC.

Mark J. Murphy, Esquire
Mooney, Green, Baker, & Saindon
1920 L Street, N.W.
Suite 400
Washington, D.C. 20036

Counsel for Defendant
LOCAL UNION NO. 639 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS.



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

Pro Se Plaintiff

CERTIFICATE OF COMPLIANCE

This Informal Reply Brief of Appellant has been prepared using:

Microsoft Word 2002

Courier New

12 Point Type Space.

EXCLUSIVE of the Table of Contents, Table of Authorities, Attachments, Certificate of Compliance, and the Certificate of Filing and Service, this Informal Reply Brief contains 5,818 words.

I understand that a material representation can result in the Court's striking the brief and imposing sanctions.

Daniel S. O'Shea

Exhibit 1

DanO'Shea.com The Obsolete Contract

Contact: Dan O'Shea **Next Update by: October 30, 2003**

TDU | Teamster.net | Forum New!

The Truth of the Discharge of Dan O'Shea

For UPS Teamster members under Local Union 639
(and the CMS Slate),
the Contract is Obsolete.

"Other drivers are surprised Dan O'Shea put himself in that position."
- Mike Hicks, Trustee candidate on the Teamsters Local 639 CMS slate

What position is Mike Hicks talking about?

Dan O'Shea was fired from UPS after 24 years. For over a year, he was forced to return to the building with almost 2,000 packages in that time to avoid being disciplined for working over the 9.5 hour cutoff.

On May 12, 2003 Dan O'Shea as usual notified UPS at 2:30 p.m. that he would not be able to service all of his packages. On his second day of a new route, reading a map all day, he was loaded with 135 stops. The prior driver, knowing in detail the route for two years, normally had 110.

By 5:30 p.m., no message was sent to Dan O'Shea from UPS that he could stay out past cutoff. As usual, Dan O'Shea left his route to return to the building, punched all of his missed packages in the board, service crossed 50 of 58 packages before rushing to the clock to punch out to avoid discipline.

On May 13, 2003, the next day, Dan O'Shea was fired for missed service and failing to place 8 service crosses on his packages. (Remember the old adage, 'Damned if you do, damned if you don't? In this case it's, 'Disciplined if you do, disciplined if you don't.')

"In reading the provided link on O'Shea, its not hard to see that he was just another malconstructed termination because he wasnt fired for the tape recorder and it was known for over 15 yrs that he carried it.

Nor was he fired for the packages not sheeted up as missed. The company I contend has trumped up a basis for his discharge then the union served him up on a platter.

Its shameful that the union has recieved his dues for as long as he was a member and then in the hearing when he asked to have the message sent to the company relating to his not making service the union failed to attain it in his defense. That in my opinion meets the failure in duty to fairly represent him effectively." - BadMF
- At the UPS Forum

So what kind of position is Mike Hicks talking about? All Dan O'Shea did was notify the company as was procedure, recorded all of his packages in the DIAD as was procedure, and punched out before cutoff as

procedure.

Dan O'Shea on August 20, 2003 lost his case at the panel. What did he do to put himself in that position? All he did was follow UPS instructions as he always did. No warning notice in his file for the past 9 months despite almost 2,000 missed pieces.

So what position is Mike Hicks talking about? Obviously now it wasn't a Dan O'Shea position. So what's UPS' position and the Local Union 639's (CMS Slate- Catlett/Steger/Hicks) postion?

The source can be found in the AAPGC decision of the 'Discharge of Daniel O'Shea', Item 1:

The Company proved Grievant guilty of material violations of methods, procedures and instructions in failing to notify the Company of undelivered stops in a timely manner, thereby resulting in service failures.

Dan O'Shea requested Local 639 President John Catlett for ALL of the DIAD messages showing O'Shea did message into UPS at 2:30 p.m. **Catlett (CMS Slate) refused** to get the 2:30 p.m. DIAD message for the Panel.

Item 2:

The Company proved Grievant guilty of recording meetings with the company in violation of Company Policy and instructions, rendering his conduct insubordinate.

Dan O'Shea has carried a tape recorder in his shirt pocket for 15 years. Management and drivers throughout the College Park center and Burtonsville building had years of knowledge about this. Dan O'Shea asked Local Union 639 President Catlett to acquire the written UPS company policy against tape recording. **Catlett (CMS Slate) refused**.

UPS never produced a company policy against tape recording at the Panel. How did the company prove anything? Dan O'Shea asked Catlett to have ex-management employee supervisors over Dan O'Shea and Buddy Robson, a 21-year shop steward to testify at the panel that they had a 15-year knowledge that Dan O'Shea used a tape recorder.
Catlett (CMS Slate) refused.

Even with UPS' knowledge in that entire time of Dan O'Shea using a tape recorder, he was never called into the office with a shop steward and informed or shown he was violating company policy and would be given a warning notice.

While both UPS and Local 639's CMS Slate member Hicks (CMS Slate of Catlett, Steger, Hicks, etc.) were publicly stating "Dan O'Shea shouldn't have been tape recording, it's against the law", the Unemployment Commission of Maryland, which knows their own laws, awarded O'Shea unemployment benefits:

"The claimant was discharged from United Parcel Service on 05/12/03 because he allegedly recorded a meeting when he was told not to. Insufficient information has been presented to show that the claimant's actions constituted misconduct in connection with the work. As a result, it is determined that the circumstances surrounding the separation do not warrant a disqualification under Section 8-1002 or 8-1003 of the Maryland Unemployment Insurance Law.
Benefits are allowed. If otherwise eligible."

Under the Unemployment Provisions of the Law regarding Benefits, claimants must be totally or partially

unemployed through no fault of his/her own to collect benefits. The Office of Unemployment Insurance determined that Dan O'Shea (Who acknowledged to the Commission he's been using a tape recorder for 15 years) violated no law in taping and was unemployed through no fault of his own.

Item 3:

The Company proved Grievant guilty of violation of the clean-in/clean-out policy by his refusal to allow search of his bags prior to his departure.

Here's the actual occurrance at the Guard House as Dan O'Shea was escorted out of the building immediately after termination:

Dan O'Shea was instructed to return to his package car and collect his belongings. While UPS' manager John Pinnock stood by O'Shea's bags, Dan O'Shea cleared out both his delivery and tractor-trailer (feeder) lockers. Escorted by manager John Pinnock, Dan O'Shea was instructed to turn his identification card in. While the security guard checked his bags, Dan O'Shea searched for his identification card and found it was missing. Dan O'Shea informed manager Pinnock of the missing card. Manager Pinnock's reply was, "I need your ID card." Dan O'Shea said it was either torn off the strap or fell off. Again manager Pinnock's reply was, "I need your ID card." Dan O'Shea stated he could go and see if it's in an area he was at in the building. Manager Pinnock told Dan O'Shea he could go look for it. Dan O'Shea went into the building and searched back past his walk path to both locker rooms and package car and could not find it. Dan O'Shea returned to the Guard House and stated he could not find it. Again, manager Pinnock said, "I need your ID card." Dan O'Shea again went into the building to search and again could not find it. O'Shea went back to the Guard House and stated he could not find it. Again, manager Pinnock said, "I need your ID card." Dan O'Shea, believing at this time that manager Pinnock was harassing him, suggested, "John, I can go into Human Resources, tell them my ID was lost or stolen, have a new one made and come back out here and hand it to you." John Pinnock stated again, "I need your ID card." Dan O'Shea collected his bags and left what he saw as an abusive situation.

Item 4:

The Company thus had just cause to discipline grievant. Discharge is appropriate penalty. Grievant should have been kept on the payroll pending resolution of this grievance; and he shall be made whole for wages and benefits lost for the period from the date of his discharge letter through the date of issuance of this decision. The grievance is otherwise denied.

How is it that the AAPGC discharged Dan O'Shea without it being a cardinal infraction, awarding him full back pay, and ruling to make him 'Whole', yet then states that "Discharge is the appropriate penalty," ignoring the fact this 24-year employee didn't even have a warning notice as the contract requires in Article 50?...

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.

It's not Dan O'Shea's position Mike Hicks should be questioning, he should be questioning why Local Union 639 President John Catlett refused to investigate UPS' false allegations against Dan O'Shea.

It's not that "The Company proved Grievant guilty", it's that Local Union President John Catlett (and the CMS Slate) refused to properly defend Dan O'Shea and his contractual rights that all teamster members

supposedly had.

In effect the CMS Slate (Catlett, Steger, Hicks, et al.) protected the non-contractual issues for UPS than the contractual rights of Teamster Local 639 members!

What Mike Hick's should question is not "Dan O'Shea's position", but parts of the members' contract that Local Union 639 President John Catlett (and the CMS Slate) has now made obsolete.

Now it's all on the record, it's now a panel ruling that can be used over and over.

An employee can now be fired for carrying a tape recorder, despite the fact no UPS policy has ever been seen against it. (Want to bet that UPS will still be video taping teamster members?)

In non-cardinal infractions, UPS no longer needs to progressively discharge a teamster union member.

A warning notice is no longer needed. It is now a case UPS can cite over and over, in any panel hearing, in the Metro D.C. district or any district in the country.

What Teamster Local Union 639 President John Catlett did (and Local Union 639's current officers, the CMS Slate) was make the members' contract obsolete.

Now no one is safe. Everyone is affected.

Want JOB SECURITY?

Vote for the
MEMBERS UNITED SLATE.

Disclaimer:
All opinions and expressions stated herein are open to public opinion in an election year of Local 639 members.