No. 06-9912

IN THE
Supreme Court of the United States

DANIEL S. O'SHEA,

Petitioner,

v.

LOCAL UNION No. 639,
International Brotherhood of Teamsters;

UNITED PARCEL SERVICE, INCORPORATED,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 1, 2007

QUESTIONS PRESENTED

1 – Whether a union's withholding of material issues at a panel hearing rises above the "wide reasonableness" standard in a union's duty to fairly represent to a breach of that duty.

2 – Whether a company's termination of an employee for violating statutory law, absent existing policies under a collective bargaining agreement, violates the bargaining requirements of both a company and union under the National Labor Relation's Act and usurps the past precedent of the National Labor Relations Board's definitions of "terms and conditions of employment" and "make whole" precedents.

3 – As a result, can a union member be denied a claim that an arbitration panel or arbitrator exceeded their authority because the employee did not prove or claim the union failed in their duty to represent, a question of first impression.

4 – Absent policy under the "just cause" provisions of a CBA, can a union member be denied a common law claim that a company retaliated against him for filing a workers compensation claim.

PARTIES BELOW

All parties to this proceeding appear in the caption of the case.

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PETITION FOR WRIT OF CERTIORAI

Daniel S. O'Shea ("Petitioner" or "O'Shea") hereby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this action on December 18, 2006.

OPINIONS BELOW

The disposition of the court of appeals for the Fourth Circuit was entered on December 18, 2006 and is unreported and set forth in Appendix ("App.") A at 1a-2a. The memorandum of the United States District Court for the District of Maryland was entered on March 23, 2006 (App. B, pp. 3a-6a). O'Shea v. Local Union No. 639, No. 8:05-cv-00937-JFM (D. Md. Aug. 4, 2006). A petition for rehearing and rehearing en banc was filed on December 28, 2006 and denied on February 8, 2007 (App. C, p. 7a-8a). A motion to stay the issuance of the mandate was filed on December 28, 2006 and was denied on January 3, 2007 (App. D, p. 9a). The order of the United States District Court for the District of Maryland was entered on March 23, 2006 (App. E, p. 10a).

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. § 1331 (federal question) to hear petitioner's claim under Section 301 of the Labor Management Relations Act ("LMRA"), 1947 (29 U.S.C. §185), Section 102 of the Labor Management Reporting Disclosure Act ("LMRDA") (29 U.S.C. §412) and Maryland common law, to recover damages for unlawful actions by United Parcel Service, Inc. ("UPS"), and for breach of its duty of fair representation by International Brotherhood of Teamsters Local Union 639

("Union"). The Fourth Circuit had jurisdiction to hear petitioner's appeal under 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

The National Labor Relations Act ("The Act") defines an unfair labor practice for an employer as:

> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title. 29 U.S.C. §158(a).

The Act defines an unfair labor practice for a labor organization as:

> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section;
>
> (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title. 29 U.S.C. §158(b).

The LMRDA states in relevant parts:

> "Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States…" 29 U.S.C. §412.

And;

> "No person shall be punished for any criminal contempt allegedly committed outside the immediate presence of the court in connection with any civil action prosecuted by the Secretary or any other person in any court of the United States under the provisions of this Act unless the facts constituting such criminal contempt are established by the verdict of the jury in a proceeding in the district court of the United States, which jury shall

be chosen and empanelled in the manner prescribed by the law governing trial juries in criminal prosecutions in the district courts of the United States." 29 U.S.C. §528.

STATEMENT OF THE CASE

This case involves questions fundamental to employee protections and rights with respect to 1 - a union's duty of fair representation in both the administration and negotiation of a contract, 2 - a company's obligation to bargain terms and conditions of employment, 3 - the validity of the efforts of the respondents to replace bargaining obligations with interpretations of criminal law, 4 - denying union employees common law claims and 5 - remedies for unlawful labor violations when a panel committee and arbitrator exceed the collective bargaining agreement ("CBA").

A. National Labor Policy

The NLRA 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).

This Court has affirmed the Act's provisions establishing that an employer and a labor organization's "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 (1991).

This Court also noted that Congress, in amending the Act in 1947, continued to defer to the National Labor Relations Board (hereinafter "the Board" or "NLRB") 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 (1979).

The NLRB sets forth the standard:

> "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." *Randolph Children's Home*, 309 NLRB 341, 343 at fn. 3 (1992).

The NLRB's precedent is that the disciplinary penalty is what transforms the work rule into terms and conditions subject to mandatory bargaining:

> For purposes of determining if bargaining is mandatory, work rules should not be severed from their ensuing penalties, and an employer must bargain over the substance of the rules as well as the penalty, where the Board held that rules and their penalties should not be artificially severed because the attachment of penalties is what transforms the rules from expressions of opinion into terms and conditions of employment. *Peerless Publications*, 283 NLRB 334-35 (1987).

A union's duty of fair representation 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 (1967).

The union has a duty to protect the terms and conditions of employment with respect to mandatory subjects:

> "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 Supreme Court also clarified instances of make-whole remedies where the discipline of an employee appeared to be just cause but the "loss of employment stems directly from an unfair labor practice." *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 217 (1964).

B. Events Leading To Litigation

Petitioner Daniel S. O'Shea, employed by UPS since January 20, 1979 and as a member of the Union suffered a work-related injury on January 22, 2002. After the Maryland Worker's Compensation Board granted benefits to O'Shea in June of 2002, petitioner subsequently filed 24 letters and grievances in response to UPS actions targeted only towards him and not similarly situated employees. As an end result, UPS terminated petitioner's employment on May 13, 2003 for allegedly (1) violating company policy by using a tape recorder, (2) failing to follow instructions, and (3) violating UPS' clean-in/clean-out procedures.

In an effort to defend himself before the Atlantic Area Parcel Grievance Committee ("AAPGC" or "Panel")[1], O'Shea requested from the Union, among other things, evidence to support UPS' presumed policy rendering the

[1] The AAPGC is a panel system or "tribunal" created and agreed to by UPS and the Teamsters Union within the CBA.

use of a tape recorder a violation thereof.[2] Absent a response on the policy, petitioner filed labor charges with the NLRB against both UPS and the Union.

On August 19, 2003 at the AAPGC hearing, UPS never presented a company policy against the use of a tape recorder, relying instead on Maryland's wiretapping act presented by UPS Labor Manager Mark Aaron:

> "Maryland Wiretap and Electronic Surveillance Act 10-402 makes it unlawful to record communications without prior consent of all parties, regardless of who initiates the communication. The Wiretap Act is not a trifling nuisance. A violation of the Act is a felony, punishable by up to five years in prison and a $10,000 fine. More importantly perhaps is the fact that the Act authorizes an aggrieved party to a communication to bring private action against the 'interceptor' seeking to recover actual and punitive damages, attorney's fees and costs. Basically that means that if Mr. O'Shea records my conversations without my consent, I could bring charges against him for set fees and so forth, with criminal charges in the state of Maryland. Company Exhibit #18 is Michie's Annotated Code of Maryland. If you turn to the second page of that in the top Section 10-402 of Codes."[3]

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[2] O'Shea, an undisputed dissident of the local union officers since his initial lawsuit against Teamsters Local 639 and UPS in 1989 in the U.S. District Court for the District of Columbia (Hon. Harold H. Green presiding) used a tape recorder for the ensuing fifteen years during his work-related duties to note delays, verify management instructions and in fear for his job and physical well being to suppress verbal and physical threats by UPS. Petitioner notified UPS by letter on four different occasions that he used a tape recorder. Only after petitioner filed the injury claim did UPS decide a violation of law was committed.

[3] UPS did not present the entire Wiretap Act at the AAPGC. Specifically, the Maryland definition of oral communications applicable to illegal activity is defined as "in private communications". In this Court's opinion

The AAPGC panel denied O'Shea's grievance, stating "discharge was appropriate" but awarded him full back pay and benefits from the time of his discharge on May 13, 2003 until August 19, 2003.

Still having yet to see a policy, petitioner pursued his labor charge against UPS with the Board. The Board, after receiving a determination letter from UPS stating that O'Shea's grievance was denied and was discharged, immediately dismissed his charge stating the "arbitration proceedings appear to have been fair and regular and that the decision is not repugnant to the purposes and policies of the Act."

Petitioner appealed to the General Counsel of the NLRB which in denial stated "we can assure you this matter was adequately investigated and reviewed."

O'Shea filed a Freedom of Information Act ("FOIA") request with the Board for his case file against UPS to continue the attempt to retrieve the company policy. The Board ignored the FOIA request until petitioner filed a FOIA complaint (*O'Shea v. NLRB*, Case No. 2:05-2908-DCN-RSC) on September 28, 2005.

The Board then admitted in paragraph 18 in answer to the complaint "The Board further avers that as to plaintiff's request for 'UPS company policy and procedures' there are no such documents in Board case file 5-CA-31288."

C. The District Court Litigation

On February 11, 2004 O'Shea commenced this action alleging that the respondents violated Section 301 of the LMRA, 1947 (29 U.S.C. §185), Section 102 of the LMRDA (29 U.S.C. §412), that UPS breached the CBA and violated Maryland common law among other things, and the Union

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in *O'Connor v. Ortega*, 480 U.S. 723-724 (1987) there is no right to privacy with respect to work-related conversations or employee misconduct matters.

breached their duty of fair representation in their administration and negotiation of the contract.

In the Union's motion for summary judgment it was disclosed for the first time by the respondents that there was no company policy against the use of a tape recorder. John Catlett, the union officer who represented O'Shea, admitted:

> "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 law."

In UPS' motion in support of the Union's motion for summary judgment, UPS labor manager Mark Aaron stated:

> "In response to Mr. Catlett's request, I informed him that UPS does not need to maintain a specific policy prohibiting the recording of conversations without consent, because Maryland has promulgated a statute which makes such conduct a violation of law."

Critically noteworthy is that the request and admission occurred one month prior to petitioner's AAPGC hearing, yet at the panel hearing UPS, contrary to their admission to the Union one month earlier, misrepresented that O'Shea did violate company policy for using a tape recorder. Just as critical and in bad faith, the Union did not object to UPS' misrepresentation to the panel or arbitrator nor disclose that UPS admitted a company policy was not needed.

Petitioner cross-motioned for summary judgment asserting that there was no longer material facts in dispute, 1 – that UPS by failing to bargain unilaterally implemented policy committed an unfair labor practice, 2 - the Union breached their duty of fair representation by failing in its obligatory duty to bargain, 3 – the Union withheld critical evidence to the AAPGC, 4 - that the AAPGC panel and arbitrator exceeded their authority by interpreting statutory law and determining O'Shea was guilty of criminal law in

violation of his fundamental due process rights and 5 - that O'Shea should be entitled to discovery on his state tort claim of retaliation against UPS.

D. The District Court Decision

On March 23, 2006 the district court denied petitioner's Rule 56(f) motion and for meaningful discovery and motion for summary judgment, granted the Union's motion for summary judgment and entered judgment in favor of the respondents against the petitioner.

1. Grievance Administration

Petitioner contended that the Union's failure to disclose UPS' statement in advance notice[4] or at the AAPGC panel that "no policy was needed" was in complete bad faith and did exceed the "wide reasonableness standard", and such an unreasonable withholding of an admission that was the foundation of petitioner's discharge did cause the derogation of petitioner up to discharge, labor's version of capital punishment.

The district court disagreed, stating that the Union had a "wide range of reasonableness", that "mere negligence, poor judgment, or inefficiency on the part of the Union will not satisfy…[the plaintiff's burden]."

2. Bargaining Versus Statutory Law

The district court rejected petitioner's contention that a company and union are obligated to bargain terms and conditions of employment with respect to the NLRA and

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[4] Advance notice including immediately requesting the company to bargain the use of a tape recorder and filing Board charges for the company's unlawful act of terminating an employee without bargaining the terms and conditions of employment.

precedent established by both the NLRB and the courts, and in doing so affirmed UPS' argument and the panel's decision that violations of criminal statutes committed on company property supersedes the federal labor policy of required bargaining. The district court stated:

> "Plaintiff contends that UPS had no express policy prohibiting such secret taping. However, it is a violation of Maryland law for someone to tape conversations he has with another person without the other person's consent, see Md. Code Ann. §10-402(c)(3), and an implicit provision of any employer's personnel policies is that its employees not violate law." (App. B, p. 5a at V).

UPS presented statutory law to the panel and arbitrator at the AAPGC and petitioner supported his claim that the panel and arbitrator exceeded their authority in interpreting enacted law:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He is rather part of a system of self-government created by and confined to the parties…The special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. *United Steelworkers of Amer. v. Warrior & Gulf Nav. Co.*, 80 S. Ct. 1347, 363 U.S. 574, ¶ 32 and 581-583. (U.S. 06/20/1960.

And:

> The resolution of statutory or constitutional issues is a primary responsibility of courts. Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. See *Bernhardt v.*

Polygraphic Co., 350 U.S. 198, 203 (1956); *Wilko v. Swan*, 346 U.S., at 435-437 (1953); *McDonald v. City West Branch*, 104 S. Ct. 1799, 466 U.S. 30 (1984).

3. A Claim To Vacate A Panel Committee's And Arbitrator's Decision

Petitioner cited *Major League Players Assoc. v. Garvey*, 532 U.S. 504, 509 (2001), in that Garvey was a union employee claiming under §301 that the arbitrator exceeded his authority. Garvey did not and was not required to prove that the union failed in its duty of fair representation to pursue his claim that the arbitrator exceeded his authority.

Petitioner argued that a union's duty to fairly represent and an arbitrator exceeding his authority are not tethered to each other. The district court rejected petitioner's contention.

4. A Common Law Claim

Petitioner's complaint included a claim that UPS violated Maryland common law by retaliating against him by engaging in a pattern of harassment, discrimination and abuse that required O'Shea to file 24 letters and grievances until his discharge.

Petitioner claimed that his Maryland common tort law claim was separate and distinct and the arbitrator's authority stood only within interpretations of the parties CBA, the Atlantic Area Supplemental Agreement (of the Master Agreement) at Article 49:

> "The arbitrator shall have the authority to apply the provisions of this Agreement, and to render a decision on any grievance coming before him, but shall not have the authority to amend or modify this Agreement or establish new terms and conditions under this Agreement."

Petitioner further urged the district court to allow discovery on the Maryland common law violation by UPS by motion of "Meaningful Discovery and Rule 56(f) Discovery" but the court denied O'Shea's motion and claim against UPS without further explanation except to state:

> "A plaintiff may proceed with a §301 claim against his employer only if he has first prevailed on his fair representation claim against the Union…my granting summary judgment to Local 639 on the fair representation claim entitles UPS to summary judgment on plaintiff's §301 claim as well." (App. B, pp. 6a, at VI).

E. The Fourth Circuit's Decision

Petitioner timely appealed to the Fourth Circuit on April 12, 2006 asserting that the lower court ignored applicable federal statute, court and NLRB precedent of national labor policy, due process rights and common law claims.

On December 18, 2006, a panel of the Fourth Circuit affirmed the district court's judgment in an unpublished disposition simply stating there was "no reversible error".

REASONS FOR GRANTING THE PETITION

The district court's decision, affirmed by the Fourth Circuit departs from much of existing national labor policy, due process rights and common law rights and raises a question with respect to union employee rights never addressed before by this Court. The decision is also repugnant to the federal law of the NLRA and LMRDA, and is in direct conflict with this Court's precedents, past NLRB precedent and that of the U.S. Court of Appeals for the District of Columbia.

I. THE FOURTH CIRCUIT HAS DEPARTED FROM THIS COURT'S PRECEDENTS.

In rejecting petitioner's argument – that UPS was required to bargain the terms and conditions of employment O'Shea was terminated for and the Union breached its duty of fair representation by its failure to bargain, the district court stated:

> "Further, even assuming Local 639 had breached its duty of fair representation, the breach would have been immaterial because the outcome of the arbitration would have been the same. Plaintiff's employment was terminated because he secretly taped conversations with UPS officials. Plaintiff contends that UPS had no express policy prohibiting such secret taping. However, it is a violation of Maryland law for someone to tape conversations he has with another person without the other person's consent, *see* Md. Code Ann. §10-402(c)(3), and an implicit provision of any employer's personnel policies is that its employees not violate the law. There is no basis for inferring that any additional witnesses or arguments presented by the union would have persuaded the arbitration panel to reverse UPS' termination decision in light of plaintiff's admitted misconduct." (App. B, p. 5a, at V).[5]

The departure from this Court's precedents establishes that any criminal violation occurring on company property by a union employee, even merely an interpretation of that

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[5] The "implicit provision" the district court cited in its memorandum was unsupported by any evidence of an existing policy. While the district court asserted petitioner admitted to unlawful criminal misconduct, there is no such admission in the record. O'Shea was never charged or convicted of committing a criminal act under Maryland's Wiretap Act and denied the procedural protections and safeguards of confrontation and cross-examination prescribed by law the bill of rights provides.

law, can be a terminating offense and departs from the clear precedents of this Court obligating companies and labor organizations to bargain. The Fourth Circuit's affirmation sets a standard that courts can rise above all national labor policy and labor laws in section 301 claims and declare panel committee and arbitrators the sole interpreters and determiners of criminal statutes against union employees.

The departure is not merely an interpretation or misapplication of this Court's precedent it is a rejection of it and the National Labor Relations Act itself.

With respect to petitioner's common law claim, the Fourth Circuit's sanctioning of the district court's decision also rejects this Court's past precedent, deferring to that of the Maryland Court precedent. UPS cited *Ewing v. Koppers Co.*, 312 Md. 45, 537 A.2d 1173 (Md. 1998), stating that it fully resolves the issue:

> "[i]n order to prove his claim of abusive discharge, [p]etitioner would be required to show that he was discharged without just cause, and in retribution for his earlier filing of a worker's compensation claim. However, a finding that he was discharged without just cause would be inconsistent with the final and binding decision of the arbitrator in this case, and it is manifestly clear that §301 does not permit such as a result."

Petitioner cited this Court's precedent in *Lingle*:

> "To defend against a retaliatory discharge claim, an employer must show that it had a non-retaliatory reason for the discharge…this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement. Thus, the state-law remedy in this case is 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for 301 pre-emption purposes: resolution of the state-law claim does not require construing the

collective-bargaining agreement." *Lingle v. Norge Division Of Magic Chef, Inc.*, 486 U.S. 399 (1988).

The respondents did not hesitate to shake off the shackles of national labor policy to discharge petitioner in alleging a violation of a state law without bargaining policy, but they then quickly jumped back over the fence and pleaded federal preemption protection from petitioner's common law claim.

The decision and affirmation in this action erodes statutory and legal principals for the uniform consistency of national labor policy, violates the fundamental rights and protections of labor employees and discriminates against a specific class of people, union employees, by denying them a right to pursue common law claims of retaliation.

II. THE DECISION IS IN VIOLATION OF THE NATIONAL LABOR RELATIONS ACT AND THE LABOR MANAGEMENT DISCLOSURE AND REPORTING ACT.

The Fourth Circuit's sanctioning of the district court's decision is a violation of the NLRA for several reasons. First, the decision discourages companies and unions from bargaining and second, enables employers and unions to rely on interpretations of criminal statutes to discipline or discharge any union employee absent any protections under the labor statutes.

A. Respondents Relied On Statutory Law In Place Of Bargaining Policy.

Petitioner cited an employer and union's obligation to bargain under the Act, 29 U.S.C. §158(a) and 29 U.S.C. §158(b). However, the district court reasoned that any union employee can merely be alleged to have violated any law and terminated for it as stated in its opinion:

> "[A]n implicit provision of any employer's personnel policies is that its employees not violate law." (App. B, p. 5a, at V).

The district court relied on a criminal statute misquoted and applied only in part and interpreted by the panel tribunal without bargained policy introduced into evidence.

The petitioner was required to confront the AAPGC panel that went well beyond its authority evidenced by the following verbal agreement between union panel member Ronnie Candler and UPS manager Mark Aaron: [6]

> Mr. Candler: That is middle district. Would you agree that the laws of tape recording vary from state to state?
>
> Mr. Aaron: Correct. I know that Virginia is different than Maryland, yes.
>
> Mr. Candler : I am only familiar with North and South Carolina, but I know that. My question was we can always review each state as to what can be recorded, and what cannot?
>
> Mr. Aaron: Correct.

However, the LMRDA provides:

> "No person shall be punished for any criminal contempt allegedly committed outside the immediate presence of the court in connection with any civil action prosecuted by the Secretary or any other person in any court of the United States under the provisions of this Act unless the facts constituting such criminal contempt are established

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[6] The AAPGC is a tribunal agreed to within the "self-government" created by both the employer and the union and composed of a six-member panel involving three UPS management employees and three teamster officials with an arbitrator designated to sit as the seventh and deciding vote in deadlocked cases. The panel and arbitrator's authority is confined to "the provisions of this Agreement, and to render a decision on any grievance coming before him, but shall not have the authority to amend or modify this Agreement or establish new terms and conditions under this Agreement."

> by the verdict of the jury in a proceeding in the district court of the United States, which jury shall be chosen and empanelled in the manner prescribed by the law governing trial juries in criminal prosecutions in the district courts of the United States." 29 U.S.C. §528.

The lower court decisions permits any employer to discharge any union employee on interpretations of criminal statutes over the mandatory obligation to bargain, is a repudiation of the Act and rejects well established national labor policy with respect to the protections and rights of union employees.

B. Respondents Changed The Progressive Discipline Policy Without Bargaining.

The respondents also assert that O'Shea was discharged for "material violations of methods, procedures, and instructions in failing to notify the Company of undelivered stops in a timely manner, and…violation of UPS' clean-in/clean-out policy by his refusal to allow a search of his bags prior to his departure."

Petitioner submitted incontrovertible evidence that similarly situated employees were not discharged for the same alleged violations petitioner was discharged for without first being presented a warning notice as required by the specific terms and conditions of the CBA.

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?

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

While all other drivers received formal letters, the disciplinary structure changed for the petitioner, who was denied the customary warning notice and instead summarily discharged.[7]

In appearing to look as if it was insubordination, discipline that stems originally from an unfair labor practice under the NLRA, as determined by the policies and precedent of the NLRB is "make-whole" and "reinstatement". As the Board simply put it:

> "The Company, unilaterally and without prior notice to or affording the Union an opportunity to bargain, implemented a policy and practice and…pursuant to such policy and practice, the Company discharged [the] employees…for refusing to submit to such testing. The Company thereby further violated Section 8(a)(5) and (1), and Sessler and Smith are entitled to the usual remedies of reinstatement with backpay. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215-217 (1964); *Sandpiper Convalescent Center*, 279 NLRB 1129, 1134 (1986), efd. 824 F.2d 318, 324 (4th Cir. 1987); and *Boland Marine Mfg. Co.*, 225 NLRB 824 (1976, enfd. 562 F.2d 1259 (5th Cir. 1977); cited with approval in *Taracorp Industries*, 273 NLRB 221, 222 fn. 10 (1984)." *Kysor/Cadillac* 307 NLRB 98.

The district court denied petitioner's claim that the arbitrator exceeded his authority by discharging petitioner absent the progressive disciplinary requirements within the

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[7] An 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. UPS issued no discipline to any of these employees one month after discharging O'Shea. (U.S. Dist. Ct. docket number 56, Exh. 13).

CBA thereby altering existing disciplinary rules the CBA did not give the arbitration committee or arbitrator the authorization or power to do.[8]

III. THERE IS A CIRCUIT SPLIT.

The Fourth Circuit's affirmation of the district court's decision creates a split with that of the United States Court of Appeals for the District of Columbia.

In *Anheuser-Busch, Inc. and Local Union No. 6, IBT,* Case 14-CA-25299 ("Anheuser-Busch") 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 criminal misconduct.

The United States Court of Appeals for the District of Columbia Circuit remanded the case for the Board to address the appropriate remedial order for the disciplined employees. Stating in pertinent part:

> "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." *Brewers and Maltsters Local 6* v. *NLRB*, No. 04-1278 (D.C. Cir. July 5, 2005)

The D.C. Circuit's judgment found that the Act and the Board's past precedent requirement of bargaining preempts enacted law. The Fourth Circuit's judgment is in opposite,

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[8] Petitioner had no warning notices in his file in the prior nine month period (U.S. Dist. Ct. Docket No. 60, Exh. 1, pg. 23), the CBA stipulated that a warning notice was required prior to discharge in all non-cardinal infractions (U.S. Dist. Ct. Docket No. 64, Exh. 2) and respondent UPS admitted in their motion to dismiss O'Shea had committed no cardinal infraction. (U.S. Dist. Ct. Docket No. 19, page 7, fn 6).

determining that enacted law and interpretations of enacted law preempts the Board's past precedent and voids the NLRA's bargaining requirements.

Such a split weakens the uniformity of national rights of employee protections under national labor policy. Courts under the Act have jurisdiction to review NLRB determinations, "to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." 29 U.S.C. § 160(f).

Further, the courts will not enforce an order of the Board that is irrational or otherwise inconsistent with the Act. See, e.g., *NLRB v. Fin. Inst. Employees*, 475 U.S. 192, 202 (1986).

Since it is well established that the Board has the "primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain" such an intolerable conflict among circuits creates a confusing "option" for the Board, the primary and exclusive agency authorized under the Act to set labor policy nationally.

IV. THE FOURTH CIRCUIT DECISION DIRECTS THE NATIONAL LABOR RELATIONS BOARD TO DEPART FROM ITS PAST PRECEDENT.

The Union and UPS in this case relied from the beginning on the Board's dismissal of petitioner's labor charge against UPS despite unilaterally imposed "new" and "altered" policy.[9]

The aforementioned Anheuser-Busch case presents a second time recently the Board has departed from its past precedent. While the NLRB found that Anheuser-Busch unlawfully installed surveillance cameras unilaterally

[9] UPS admitted "no policy was needed", but asserted they had a right to unilaterally impose policy because of a "zipper" or "management rights" clause existed, yet never introduced into evidence the specific reference or portion of the CBA that such a clause or right existed or was bargained.

without bargaining, the three-member panel denied the "make-whole" remedy of the five employees because of their illegal misconduct. On review and in remanding, the appeal's court referred to a panel member's dissent:

> "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…Accordingly, I dissent from my colleagues' decision not to order reinstatement and make-whole relief." *Anheuser-Busch, Inc. and Local Union No. 6, IBT,* Case 14-CA-25299.

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 bargaining:

> "Specifically, this means that all reference to…discipline imposed…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 back pay and, where appropriate, be reinstated. To do

> otherwise would be to sanction Respondent's unfair labor practices and discourage collective bargaining." *Bath Iron Works*, 302 NLRB No. 143 at 914 ¶ 8.

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:

> "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.

Further in *Bath Iron Works*, the NLRB explains their precedent rationale for ignoring whether employees do or do not violate law involving unlawful labor practices 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.

The NLRB is the agency Congress deferred to the "primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain". In the recent Anheuser-Busch case and in this case, the NLRB's departure from its past precedent in conjunction with the district court's decision and Fourth Circuit's affirmation discourages unions and employers from bargaining, sanctions unfair labor practices and denies fundamental remedial principles that for so long had protected union employees from harm.

The immediate importance is far beyond the parties involved as it pertains to a serious hindrance to effective administration of federal labor law.

V. THE "WIDE-REASONABLENESS" STANDARD SHOULD BE REVISITED.

It is undisputed the petitioner was a dissident of the Union for almost 20 years. The petitioner exercised his right under the CBA to request an investigation into his discharge. Despite repeated pleas, the Union refused to interview similarly-situated employees to determine why they were not discharged or even disciplined for the same work-related actions petitioner was discharged for. [10] Those same employees would have verified that petitioner was targeted by company policies that were denied, altered or

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[10] In an email by an officer of the respondent Union, business agent Ron Joseph informed the petitioner:

> "Hi Dan…I was talking to some delivery drivers about your case and unlike Mike, they are very disturbed that a 24 year man can be discharged for things they do all the time. As luck would have it, Mike just happened to pull up, rolled his window down and yelled to me…Ron you are wasting your breath. The drivers responded to him that they didn't agree with him…They said they couldn't believe a 24 year man could be discharged for things they do…Ron." (U.S. Dist. Ct. docket number 64, Exh. 12).

never existed in his discharge. While giving the appearance of an investigation petitioner asserts the Union ignored the critical defenses needed. As this Court has stated, "A contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit." *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

Both respondents had much to gain from petitioner's discharge. UPS exterminated an injury liability while the Union relieved themselves of having to pay pending retirement benefits.[11] The wide-reasonableness standard has become, in some instances, a legal defense standard to protect companies and unions from their own consensual actions against union members to the point of doing nothing, up to and including their failure to bargain in protecting their own unlawful acts.

For this reason the petitioner asserts, the wide-reasonableness standard is in itself, a material fact in dispute between the parties and should not be disposed of in summary fashion without the opportunity of discovery. The district court denied petitioner any and all discovery and granted the Union summary judgment relying on the umbrella of "wide reasonableness".

VI. THIS CASE INVOLVES A QUESTION OF FIRST IMPRESSION.

The petitioner claimed under §301 of the LMRA (29 U.S.C. §185) that the panel committee and arbitrator exceeded their authority beyond that imposed by the CBA arguing that such a claim is not tethered to a union member having to prevail on a fair representation claim against a union, a question of first impression with the Fourth Circuit.

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[11] Petitioner was within 2 years of a 25-year and out retirement, saving the Union approximately $1,000,000 in retirement benefits.

In 1999 the Fourth Circuit addressed a substantial question as to whether an arbitrator acted within his authority but refused to address criminal misconduct:

> "We also do not address criminal statutes…in the workplace…[s]uch criminal misconduct may raise concerns not present here, and…a ruling with respect to such issues must await a case presenting them." *Westvaco Corp. v. United Paperworkers International Union*, 171 F.3d 971, 160 L.R.R.M. (BNA) 2844, 79 Fair Empl.Prac.Cas. (BNA) 5 at fn2 (1999).

While the Fourth Circuit's disposition of petitioner's case was an unpublished opinion it carries no less weight than a published opinion and becomes the precedent case throughout the Circuit.

Petitioner's question also is one never presented to or directly addressed by this Court. Petitioner acknowledged that as long as a committee panel or arbitrator is construing or applying the contract a court cannot vacate an award, *United States Postal Svc. v. American Postal Workers Union*, 204 F.3d ¶27 (4th Cir. 2000) or as long as the "arbitrator's decision 'draws its essence from the collective bargaining agreement' and the arbitrator is not fashioning 'his own brand of industrial justice,' the award cannot be set aside." *Misco*, 484 U.S. at 381 (1987).

However, in this action it is undisputed that the panel committee and arbitrator considered and decided petitioner's discharge on interpretation of criminal law:

> "Plaintiff contends that UPS had no express policy prohibiting such secret taping. However, it is a violation of Maryland law for someone to tape conversations he has with another person without the other person's consent, *see* Md. Code Ann. §10-402(c)(3)." (App. B, p. 5a, at V).

Petitioner contended that the panel committee and arbitrator took it upon themselves to engage in judicial fact-

finding to decide that O'Shea committed a criminal act and the scope of their authority under federal labor law and precedent does not allow them to assert themselves as a public tribunal. The courts have paved well-established law with respect to a panel committee and arbitrator's role:

> "The special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land." *United Steelworkers of Amer. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581-583 (1960).

In rejecting petitioner's claim to vacate the panel committee and arbitrator's decision the district court stated:

> "A plaintiff may proceed with a §301 claim against his employer only if he has first prevailed on his fair representation claim against the union. Therefore, my granting summary judgment to Local 639 on the fair representation claim entitles UPS to summary judgment on plaintiff's §301 claim as well." (App. B, pp. 6a, at VI).

Petitioner contends that a union employee's claim to vacate an arbitration decision that did not draw its essence from the collective bargaining agreement and exceeded the powers of that authority are not tethered to a union's duty of fair representation, especially in matters where no duty of representation is owed by that union.

The district court's ruling, affirmed by the Fourth Circuit establishes precedent that a union member has no form of redress when an arbitrator fashions his own brand of justice that is far beyond the scope of the CBA and far beyond the representational duty a union owes to its members. A union employee should not be required to prove the union failed to represent as a union has no duty to defend a union member in such matters as criminal contempt, only a duty

to defend that which was bargained and exists within the collective bargaining agreement.

In denying petitioner's claim that the arbitration decision should be vacated, the lower court's decision permits any employer to discharge any union employee for any allegation and interpretation of criminal statutes without the mandatory obligation for companies and unions to bargain, allowing the employer, union, panel and arbitrator to be the sole instruments of criminal prosecutions - the accusers, prosecutors, interpreters, judge and jury of any criminal statute and to find a verdict of guilt upon a union member at a panel tribunal absent fundamental due process rights under the Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." [12]

There is no dispute between the petitioner and the respondents of the material fact that O'Shea was terminated

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[12] Further, by the Rules of Procedure of the Atlantic Area Parcel Grievance Committee, Section 5 establishes that "Neither side shall be allowed to have attorneys participate in hearings." While denying petitioner the right to an attorney to defend himself against criminal contempt charges, the employer prepared their case on such charges in a statement by labor manager Mark Aaron,

> "[I]n preparation of the Company's case, Matt Webb, who are Labor Manager, and Human Resources Manager for United Parcel Service is also a registered attorney in the State of Maryland[.] Matt did the legal research for me, and we went down and we talked about it and so forth with regards to wire-tapping and Maryland statutes, and Mr. O'Shea is not an attorney."

on the interpretation of statutory law and the purpose of the arbitration hearing the petitioner was forced to confront was to find him guilty of a criminal statute by an arbitration panel and arbitrator without trial or the procedural safeguards under law and the constitution.

The Maryland statute was interpreted at a panel hearing held in the separate state of Virginia, far from the district where the respondents alleged a crime took place, by a majority of panel members who did not reside in the state of Maryland, who admittedly did not know the Maryland law, in a nonjudicial forum not ascertained by law and violated all form and manner the rights guaranteed to every American citizen by the Sixth Amendment.

In another nonjudicial forum against a union member, this Court stated it was:

> "[N]othing more nor less than a scheme for a nonjudicial tribunal to charge, try, convict, and punish people without courts, without juries, without lawyers, without witnesses – in short, without any of the procedural protections that the Bill of Rights provides…without giving them the benefit of a trial in accordance with the law of the land." *Jenkins v. McKeithen*, 89 S. Ct. 1843, 395 U.S. 411 (U.S. 1969)

The panel committee unlawfully indicted and punished the petitioner without due process, denied him the right to call and cross-examine witnesses, the right to effective assistance of counsel, the right to have a jury of his peers and in the end imposed the sanction of discharge on the petitioner that deprived him of his life, liberty and property.

This Court previously held such conduct to be unlawful:

> "In the instant case, petitioner's work opportunities have been severely limited on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure…the respondents were not empowered

> to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Greene v. McElroy*, 360 U.S. 474 (1959).

No congressional act, under the National Labor Relations Act or otherwise, gives American citizens the right to convene a nonjudicial tribunal to interpret and determine another American citizen guilty of a crime and to publicize and brand that citizen as a criminal.

The question in this matter is can a union employee be denied a remedy claim that the panel exceeded its authority. The same question arises here that Justice Black asked:

> "Thus, when Owens attempts to proceed with his pending breach-of-contract action against Swift, Swift will undoubtedly secure its prompt dismissal by pointing to the Court's conclusion here that the union has not breached its duty of fair representation. Thus, Owens…is left remediless, and Swift, having breached its contract, is allowed to hide behind, and is shielded by, the union's conduct. I simply fail to see how it should make one iota of difference, as far as the 'unrelated breach of contract' by Swift is concerned, whether the union's conduct is wrongful or rightful…the employee will have the additional burden of proving that the union acted arbitrarily or in bad faith…It puts an intolerable burden on employees with meritorious grievances and means they will frequently be left with no remedy." *Vaca v. Sipes*, 386 U.S. 206-211 (1967).

However, while this Court was not directly asked the question, the Court indirectly permitted Garvey, as a union member, to claim under §301 that the arbitrator exceeded his authority without claiming or prevailing that the union breached their duty of fair representation. *Major League Players Assoc. v. Garvey*, 532 U.S. 504 (2001).

A union employee should not be restricted, forced or bound to a union's duty of fair representation and denied a remedy claim that the arbitrator or panel exceeded their authority when that panel or arbitrator took unlawful liberty beyond the CBA to trample on protections and rights under national labor policy and rights under the law, including constitutional due process rights.

CONCLUSION

The cornerstone of this case concerns statutory law, mandatory bargaining and remedy. In light of the inability of the respondents to properly respond to the issues presented in the petition without committing violence against national labor policy with respect to the protections and rights of union employees when the conflict between the national labor law requirements of bargaining and statutory law collide, as they did here in this matter and involving a first impression question of remedy, the need for plenary review of the action below is indisputable.

Petitioner respectfully requests that summary reversal or any other determination this Court deems just is in order.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL S. O'SHEA
Petitioner *Pro Se*
12 26th Avenue
Isle of Palms, SC 29451
(843) 696-6961

June 1, 2007

***APPENDIX A* — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED DECEMBER 18, 2006. CASE 06-1460**

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1460

DANIEL S. O'SHEA,

Plaintiff - Appellant,

versus

LOCAL UNION NO. 639, International Brotherhood of Teamsters; UNITED PARCEL SERVICE, INCORPORATED,

Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. J. Frederick Motz, District Judge. (8:05-cv-00937-JFM)

Submitted: December 14, 2006 Decided: December 18, 2006

Before MICHAEL, GREGORY, and SHEDD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Daniel S. O'Shea, Appellant Pro Se. Mark J. Murphy, MOONEY, GREEN, BAKER & SAINDON, Washington, D.C.; Richard J. Hafets, DLA PIPER RUDNICK GRAY CARY US LLP, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Daniel S. O'Shea appeals the district court's order granting summary judgment to the Defendants in his civil action. We have reviewed the record and find no reversible error.

Accordingly, we affirm for the reasons stated by the district court. O'Shea v. Local Union No. 639, No. 8:05-cv-00937-JFM (D. Md. Aug. 4, 2006) We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

***APPENDIX B* — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DECIDED MARCH 23, 2006. CIVIL NO. JFM 05-937**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL S. O'SHEA	*	
	*	
v.	*	Civil No. JFM 05-937
	*	
LOCAL UNION NO. 639, et al.	*	
	*	

* * * * * * *

MEMORANDUM

Plaintiff has brought this hybrid action asserting claims for breach of the duty of fair representation against Teamsters Local Union No. 639 ("Local 639") and for a breach of contract against United Parcel Service ("UPS"). Presently pending, *inter alia*, are motions for summary judgment filed by Local 639 and UPS, plaintiff's cross-motion for summary judgment, and plaintiff's "Rule 56(f) motion and for meaningful discovery."[1] Plaintiff is appearing *pro se* but has fully briefed all of the motions. The motions for summary judgment filed by Local 639 and UPS will be granted. Plaintiff's cross-motion for summary judgment and his Rule 56(f) motion will be denied.

Plaintiff's claims are frivolous, and I will address them only in a summary fashion.

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[1] In light of my disposition of these motions, the other pending motions are rendered moot.

I.

A plaintiff has a very heavy burden to meet in order to prevail on a breach of duty of fair representation claim. He must demonstrate that the union's conduct was "arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Thomson v. Verizon Maryland, Inc.*, 140 F. Supp. 2d 546, 551 (D. Md. 2001).

A union is entitled to a "wide range of reasonableness" in performing its representational functions, *Smith v. Steel Workers*, 834 F.2d 93, 96 (4th Cir. 1987), and "mere negligence, poor judgment, or inefficiency on the part of the union will not satisfy . . . [the plaintiff's burden]." *Thomson*, 140 F. Supp. at 551.

II.

Under Fed. R. Civ. P. 56(f), a continuance of summary judgment proceedings is appropriate where discovery is necessary in order to uncover "facts essential to justify . . . [a] party's opposition." Here, the record in the arbitration proceeding already establishes all material facts necessary to decide the pending summary judgment motions. Therefore, plaintiff's motion under Rule 56(f) is without merit.

III.

There is absolutely no evidence here that Local 639 acted in bad faith or in an arbitrary or discriminatory fashion. Indeed, there is no evidence that the union committed any errors at all in representing plaintiff. To the contrary, it vigorously represented him through the arbitration process. In that regard, two facts are particularly telling.

First, at the conclusion of the arbitration hearing, the chairman of the panel asked plaintiff if he had been properly represented by his business agent and Local 639. In response, plaintiff stated "they made a good presentation." He went on to qualify that concession by referring to an unfair labor practice he had filed against Local 639 claiming lack of fair representation. However, plaintiff withdrew that

charge prior to the arbitration panel rendering its decision.

Second, although Local 639 was not successful in obtaining a reversal of UPS's decision to terminate plaintiff's employment, it did persuade the panel to award plaintiff approximately $15,000 in back pay for the time between his discharge and the issuance of the decision.

IV.

Plaintiff alleges that he did not receive fair representation because he is a political dissident in union affairs. Although Local 639 does not contest that plaintiff was a dissident, that fact alone is not sufficient to establish a breach of representation claim. *See, e.g.*, *Ash v. United Parcel Service, Inc.*, 800 F.2d 409, 411 (4th Cir. 1986); *Hardee v. North Carolina Allstate Serv., Inc.*, 537 F.2d 1255, 1258-59 (4th Cir. 1976). Proof of motive is not enough. There must be evidence of inadequate representation, and, as just stated, the record establishes that it in fact Local 639 provided wholly satisfactory representation.

V.

Further, even assuming Local 639 had breached its duty of fair representation, the breach would have been immaterial because the outcome of the arbitration would have been the same. Plaintiff's employment was terminated because he secretly taped conversations with UPS officials. Plaintiff contends that UPS had no express policy prohibiting such secret taping. However, it is a violation of Maryland law for someone to tape conversations he has with another person without the other person's consent, *see* Md. Code Ann. §10-402(c)(3), and an implicit provision of any employer's personnel policies is that its employees not violate the law. There is no basis for inferring that any additional witnesses or arguments presented by the union would have persuaded the arbitration panel to reverse UPS' termination decision in light of plaintiff's admitted misconduct.

VI.

A plaintiff may proceed with a § 301 claim against his employer only if he has first prevailed on his fair representation claim against the union. *See, e.g.*, *Breininger v. Sheet Metal Workers Int'l Assoc. Local Union No. 6*, 493 U.S. 67, 82 (1989); *Ash*, 800 F.2d at 411; *Thomas v. Siemens VDO Automotive Corp.*, 2005 W.L. 1898373, at *749 (4th Cir. Aug. 9, 2005). Therefore, my granting summary judgment to Local 639 on the fair representation claim entitles UPS to summary judgment on plaintiff's §301 claim as well.

A separate order effecting the rulings made in this memorandum is being entered herewith.

Date: March 23, 2006

/s/
J. Frederick Motz
United States District Judge

***APPENDIX C* — DENIAL OF REHEARING AND REHEARING EN BANC BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED February 8, 2007

No. 06-1460
8:05-cv-00937-JFM

DANIEL S. O'SHEA

Plaintiff -Appellant

v.

LOCAL UNION NO. 639, International Brotherhood of Teamsters;
UNITED PARCEL SERVICE, INCORPORATED

Defendants –Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Michael, Judge Gregory, and Judge Shedd.

For the Court,

/s/ Patricia S. Connor

CLERK

***APPENDIX D* — DENIAL OF PETITIONER'S MOTION TO STAY THE ISSUANCE OF THE MANDATE BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT JANUARY 3, 2007**

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED January 3, 2007

No. 06-1460
8:05-cv-00937-JFM

DANIEL S. O'SHEA
Plaintiff – Appellant

v.

LOCAL UNION NO. 639, International Brotherhood of Teamsters;
UNITED PARCEL SERVICE, INCORPORATED

Defendants – Appellees

O R D E R

Appellant has filed a motion to stay the mandate pending application to the United States Supreme Court for a writ of certiorari.

The Court denies the motion.

For the Court - By Direction

/s/ Patricia S. Connor

_____

CLERK

***APPENDIX E* — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DECIDED MARCH 23, 2006. CIVIL NO. JFM 05-937**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL S. O'SHEA	*	
	*	
v.	*	Civil No. JFM 05-937
	*	
LOCAL UNION NO. 639, et al.	*	
	*	

* * * * * * *

For the reasons stated in the accompanying memorandum, it is, this 23rd day of March 2006

ORDERED

1. Plaintiff's "Rule 56(f) motion and for meaningful discovery" is denied;
2. Plaintiff's motion for summary judgment is denied;
3. Defendants' motions for summary judgment are granted; and
4. Judgment is entered in favor of defendants against plaintiff.

Date: March 23, 2006

/s/
J. Frederick Motz
United States District Judge