

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: December 19, 2003

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: PROFESSIONAL AIRWAY SYSTEMS
SPECIALISTS, CHAPTER 258
COLLEGE PARK, GEORGIA

Respondent

and

Case No. AT-CO-03-0306

PATRICK HARKINS, AN INDIVIDUAL

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits, and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
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PROFESSIONAL AIRWAY SYSTEMS SPECIALISTS, CHAPTER 258 COLLEGE PARK, GEORGIA Respondent	
and PATRICK HARKINS, AN INDIVIDUAL Charging Party	Case No. AT-CO-03-0306

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JANUARY 20, 2004**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, Suite 201
Washington, DC 20424-0001

PAUL B. LANG
Administrative Law Judge

Dated: December 19, 2003
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

PROFESSIONAL AIRWAY SYSTEMS SPECIALISTS, CHAPTER 258 COLLEGE PARK, GEORGIA Respondent	
and PATRICK HARKINS, AN INDIVIDUAL Charging Party	Case No. AT-CO-03-0306

Paige A. Sanderson, Esq.
For the General Counsel

Michael D. Derby, Esq.
For the Respondent

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On January 22, 2003, Patrick J. Harkins, Jr., an individual, filed an unfair labor practice charge against the Professional Airway Systems Specialists, Chapter 538, College Park, Georgia (Union, Respondent or PASS).¹ On May 23, 2003, the Regional Director of the Atlanta Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it is alleged that the Respondent committed an unfair labor practice in violation of § 7116(b) (1) of the Federal Service Labor-Management Relations Statute (Statute) by distributing a letter from the Respondent's president to Harkins and 57 other bargaining unit employees who, like Harkins, were not members of the Union. The letter purportedly contained a

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At some time subsequent to the filing of the unfair labor practice charge the Respondent's name was changed from Chapter 538 to Chapter 258 at which time its jurisdiction was enlarged. The caption of the case has been changed accordingly.

list of the employees who were not members of the Union and implied that, if they did not join and support the Union, they would be to blame for any job losses caused by the contracting out of the jobs to the private sector.

A hearing was held on September 23, 2003, in Atlanta, Georgia. The parties were present with counsel and were afforded the opportunity of presenting evidence and of cross examining witnesses. This Decision is based upon consideration of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by each of the parties.

Findings of Fact

At all times pertinent to this case Harkins was employed by the Federal Aviation Administration (Agency or FAA) at the Delta Certificate Management Office (CMO) in College Park, Georgia. The FAA is an "agency" within the meaning of § 7103(a)(3) of the Statute. Harkins is therefore an "employee" as defined in § 7103(a)(2)(A) of the Statute. The Respondent is a "labor organization" as defined in § 7103(a)(4) of the Statute and is the representative of the Agency's employees in a unit suitable for collective bargaining. Harkins is a member of the collective bargaining unit represented by the Respondent but is not a member of the Union.

The Letter from the Union

George Gunn is the President of the Respondent. On September 30, 2002, Gunn wrote what was entitled an "Open Letter" (GC Ex. 2). The letter opened with the greeting "Dear Friends." The last sentence of the first paragraph reads:

Make no mistake about it, if your name is on this list, you are urgently advised to contact your PASS Chapter officers or Representatives at once to see what you can do to assist in attempting to stop what is scheduled to happen.

The above statement refers to a list of 60 names following the text of the letter which is entitled "ATL FSDO2 and DELTA CMO" and which is followed by the notation,

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"ATL FSDO" apparently refers to the Atlanta Flight Standards District Office, a unit within FAA which, like CMO, has employees within the bargaining unit represented by the Union.

"ADDITIONAL LISTING - NEW HIRES 90 DAYS after PASS BRIEFING." Harkins' name is on the list.

The Open Letter then goes on to state that:

The FAA will be forced by outsiders to downsize direct business cost over the next few years through contracting out, designating out your work; or through changing your job title classification.

The above language is followed by the prediction of large scale job losses through privatization and states that:

Rest assured before the end of year 2006, the FAA will identify up to 50% of your current work as "commercial." That work will leave the FAA and if you think you can follow it to the contractor, you are in a dream state. . . . Your Union needs your support as it joins with other Unions to battle this grave situation.

The Open Letter further states that:

Others have appeared annoyed by protected language such as "Scab," "Parasite," "Bootlicker," or "Freeloader." That is understandable. You should be up-sit (*sic*). No one wants to express those verbal or written emotions toward any fellow worker. However, when it is apparent some people, union members included, just keep taking and taking the harvest of benefits over the economic and voluntary sweat of others without so much as a "thank you or how can I help," from time to time such language surfaces.

There is no language in the Open Letter which, either directly or indirectly, threatens nonmembers with retaliation for refusing to join the Union. The only suggestion of unequal treatment is the statement that, "if you don't have a change of mind and get Union active, when a new contract is put forward for membership ratification, you will not be allowed to vote. No voice! Nothing!"

The Distribution of the Letter

Gunn testified that he posted copies of the Open Letter on two bulletin boards in the Atlanta Flight Standards District Office, to which he is assigned, and placed copies in employee mailboxes in that office. He also gave a copy to Joe Dolgetta, the Union representative in the Delta CMO,

but did not instruct him to place copies in employee mailboxes.³ However, Gunn did state that, under the collective bargaining agreement, the Union is authorized to place material into employees' mailboxes.

Harkins testified that, on or about October 1, 2002, he found a copy of the Open Letter in his mailbox at the Delta CMO. He also saw copies of the letter in the mailboxes of some, but not all, of his fellow employees at the Delta CMO. Deborah Dillon, Joe Karnich and James Medcalf, also employed at the Delta CMO, testified that they received copies of the Open Letter in their mailboxes. Each of their names is also on the list.⁴

The Impact of the Open Letter

Harkins, Dillon, Karnich and Medcalf each testified that they were angered over the fact that their names were specifically mentioned in the Open Letter. They were relatively unconcerned over the Union's use of terms such as "scab".⁵ Dillon drafted a letter of complaint to their supervisor which was also signed by a number of the other employees on the list; they were informed by the supervisor that it was a matter between the employees and the Union. Harkins refused to sign the letter because he had decided to pursue an unfair labor practice charge against the Union.

Harkins testified that the letter did not put him in fear of losing his job because of his tenure with the FAA. He stated that his major objection to the letter was that it was threatening and that his name was included. He felt that his family was threatened by the reference to "loved ones" in the Open Letter.⁶ When Harkins later told Dolgetta that he felt threatened by the Open Letter Dolgetta replied that the letter was the result of information received by Gunn that certain jobs were going to be contracted out.

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Gunn did not indicate whether he told Dolgetta that he had placed copies in the mailboxes of employees in the Atlanta Flight Standards District Office. Dolgetta did not appear as a witness.

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Dillon was identified by her maiden name as Debbie Romine.

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Karnich testified that he had been in a union in his previous job and that terms of that sort were often used.

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The Open Letter states that employees who do not support the Union's efforts are putting at risk the careers and livelihoods of themselves as well as those of their peers and loved ones.

On cross examination, Harkins acknowledged that the loss of jobs which was predicted in the Open Letter was to take place by action of the FAA or of the Bush administration. Harkins also acknowledged that the Open Letter was a "recruitment letter" in which Gunn asserted that, if he didn't join the Union, he was going to be the cause of the FAA contracting out jobs.⁷

Dillon testified that, while she did not like language such as "scab" and "bootlicker", the principal cause of her anger was the inclusion of her name. She understood the Open Letter to mean that the Union would be unable to successfully oppose the planned privatization of jobs if more people such as her did not join.

Karnich testified that he understood the Open Letter to mean that he would not be offered a job by a private contractor if he were not a member of the Union. He had the feeling that his job was threatened if he did not join the Union.

Medcalf testified that he construed the Open Letter to mean that, if jobs were contracted out, he would not be hired by the contractor if he were not a member of the Union. He also stated that he was told by Dolgetta that the Union would determine who would be hired by the contractor.⁸

Medcalf subsequently decided to join the Union in an attempt to protect his job.

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The General Counsel objected to the admission of Harkins' so-called "Jencks affidavit" following his cross examination. In *Department of the Treasury, Internal Revenue Service, Memphis Service Center*, 16 FLRA 687, n.1 (1984) the Authority adopted the doctrine of *Jencks v. United States*, 353 U.S. 657, 77 S. Ct. 1007 (1957) to the effect that a party offering the testimony of a witness may be compelled to produce a prior written statement by the witness prior to cross examination. However, since the Respondent did not attempt to impeach Harkins by use of his affidavit, its contents will not be considered. Nor will consideration be given to the assertions in the Respondent's post-hearing brief that Harkins' testimony was inconsistent with his affidavit.

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Such a statement by Dolgetta, if actually made, might give rise to a separate unfair labor practice charge under § 7116 (b)(1) of the Statute. However, the alleged statement was not cited either in the Complaint or in the Pre-Hearing Disclosure by the General Counsel. Therefore, it will not be considered.

Gunn testified that he issued the Open Letter out of a sense of frustration at the lack of support of bargaining unit members for the Union's efforts to forestall an impending move to privatize a significant portion of bargaining unit work. Although most of the names on the list were those of nonmembers, it also included the names of about seven or eight members of the Union who were perceived as not being sufficiently supportive of its efforts to prevent the contracting out of jobs. Another criterion for inclusion on the list was criticism of the Union for failure to complete contract negotiations with the FAA.

Discussion and Analysis

The Legal Framework

There was a significant amount of evidence as to the motive of the Union in issuing the Open Letter and as to the reaction of some of the employees whose names were on the list. However, neither of those factors is relevant to the ultimate issue in this case. In *American Federation of Government Employees Local 987, Warner Robins, Georgia*, 35 FLRA 720 (1990) (*AFGE*) the Authority held that an objective standard is to be used in determining whether an oral or written communication by a labor organization is a violation of § 7116(b)(1) of the Statute. The appropriate test is, "whether, under the circumstances, employees reasonably could have drawn a coercive influence from the statement", *AFGE*, 35 FLRA at 724.

Although the application of the standard requires a case by case analysis, the propriety of the Open Letter must be determined in a manner consistent with the provisions of § 7116(e) of the Statute which states, in pertinent part, that:

The expression of any personal view, argument, opinion or the making of any statement which-

. . .

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat or reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter

The "free speech" provisions of the above-cited portion of the Statute are not limited to representational cases, but protect all non-coercive expressions of personal opinion, *Department of Transportation, Federal Aviation Administration, Oakland Air Route Traffic Control Center, Fremont, California*, 14 FLRA 201, 215 (1984). Similarly, neither the accuracy of the expressed opinion nor the merits of the labor relations policies of the current administration play any part in the evaluation of the Open Letter.

The Legal Effect of the Open Letter

An objective examination of the Open Letter indicates that, regardless of its intent, it could not reasonably have been construed as having a coercive effect on its recipients. The listing of the names of nonmembers could have been expected to get their attention (a purpose which obviously was achieved), to frighten them with the prospect of job loss through privatization and to embarrass or shame them into joining the Union. None of those effects establish a violation of § 7116(b)(1) of the Statute.

The General Counsel has acknowledged that his theory of the case is based solely on the proposition that the Union created the reasonable impression among employees that their employment would be threatened if they did not become members (GC brief, note 11).⁹ The evidence does not support this theory. On the contrary, the Open Letter contains no more than a series of noncoercive arguments for joining the Union and, incidentally, for current members to become more active. Such efforts by the Union fall within the scope of protected activity as defined in § 7102 of the Statute.¹⁰ The Open Letter contains two "threats": one is the loss of jobs through privatization and the other is that nonmembers will not be able to vote on ratification of a new collective bargaining agreement. Even a cursory reading of the Open Letter can leave no reasonable doubt that the Union was raising the prospect of job losses by *all* members of the bargaining unit through the action of the FAA or some higher level of governmental authority. There is nothing in the Open Letter that could reasonably be construed as suggesting

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In view of the General Counsel's statement of position it will not be necessary to address the Union's use of the terms "scab", "parasite", "bootlicker" and "freeloader."

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The General Counsel stipulated at the hearing that recruitment of members is a legitimate activity for a labor organization.

that Union members would not be affected equally by the threatened privatization or that they would receive preferential treatment for employment by a private contractor. The statement about not having a voice in the approval of a new collective bargaining agreement is no more than an accurate reference to the fact that unions may exclude nonmembers from contract ratification votes, *National Air Traffic Controllers Association, MEBA/AFL-CIO*, 55 FLRA 601, 605 (1999) (*NATCA*).

The position of the General Counsel is not enhanced by the cases cited in his post-hearing brief. In *NATCA* the union was found to have violated the duty of fair representation as set forth in § 7114(a)(1) of the Statute by distributing flyers which contained the implication that nonmembers would have no influence on union delegates who were authorized to vote on a seniority proposal. In *AFGE* the union submitted an article to a newspaper stating that bargaining unit members should join the union if they wanted effective representation with regard to their grievances. That action was found to have been a violation of § 7116(b)(1) of the Statute. Contrary to the actions by the respondents in those cases, the Open Letter contained neither an express nor an implied threat of unequal treatment based upon union membership.

The General Counsel considers it significant that the Open Letter did not advise the recipients of their right not to join the Union. However, the General Counsel has cited no authority in support of the proposition that the Union had a duty to do so. Furthermore, there is nothing in the Open Letter to suggest that bargaining unit members were required to join the Union. In fact, the principal thrust of the Open Letter is that nonmembers were accepting the benefit of the Union's efforts while refusing to join.

For the foregoing reasons I have concluded that the Respondent did not commit an unfair labor practice in violation of § 7116(b)(1) of the Statute. I therefore recommend that the Authority adopt the following Order:

ORDER

It is hereby ordered that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, December 19, 2003

PAUL B. LANG
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. AT-CO-03-0306 were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

Paige A. Sanderson, Esq.
Federal Labor Relations Authority
Suite 701, Marquis Two Tower
285 Peachtree Center Avenue
Atlanta, GA 30303-1270

7000 1670 0000 1175 3260

Michael D. Derby, Esq.
3277
Professional Airways Systems
Specialists
1150 17th St, NW, Suite 702
Washington, DC 20036

7000 1670 0000 1175

REGULAR MAIL:

Patrick J. Harkins, Jr.
FAA - Flight Standards
1701 Columbia Avenue-Campus Bldg.
College Park, GA 30337

Dated: December 19, 2003
Washington, DC