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

MAR 2 1 2006

DANIEL S. O'SHEA,

Plaintiff

v.

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

Defendants

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

PLAINTIFF'S REPLY TO UPS'S RESPONSE OF UNITED PARCEL SERVICE TO PLAINTIFF'S RULE (f) MOTION AND PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S REPLY TO RESPONSE OF DEFENDANT TEAMSTERS LOCAL UNION NO. 639 IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

Defendant UPS and Local Union 639 are parties to a valid collective bargaining agreement ("CBA"). UPS fired Plaintiff O'Shea for 1- failure to notify the Company of undelivered stops in a timely manner resulting in service failures, recording meetings with the company in violation of Company Policy and instructions, rendering his conduct insubordinate and violation of the clean-in/clean-out policy. (Exh. 1, AAPGC discharge decision.) The parties CBA contains a binding arbitration provision for settling grievances, discharges and suspensions. (Exh. 2, Art.'s 49 and 50.) Plaintiff grieved his discharge and the Atlantic Area Panel Grievance Committee ("AAPGC") Panel deadlocked three to three and the grievance was decided by an Arbitrator on August 20, 2003 and denied Plaintiff's grievance to be made whole and determined that discharge "was appropriate". However, the Arbitrator also ruled that Plaintiff O'Shea should not have been summarily discharged and should have remained on the job from the date of his discharge, May 13, 2003 until August 19, 2003 and awarded

him back pay. In doing so, the Arbitrator ruled that Plaintiff committed no cardinal infraction. (Pl.'s Statement Of Undisp. Mat. Facts at ¶¶ 11-12.)

Plaintiff filed this action asserting that UPS breached the parties CBA and the Union breached their duty of fair representation. The following is Plaintiff's response to both the Union's Response of Defendant Teamsters Local Union 639 In Support Of Its Motion For Summary Judgment And In Opposition To Plaintiff's Cross Motion For Summary Judgment and UPS's Response Of United Parcel Service To Plaintiff's Rule 56(f) Motion And Plaintiff's Cross Motion For Summary Judgment.

I. Plaintiff's Request For Meaningful Discovery and Rule 56(f) Motion and Cross-Motion

A district court must grant summary judgment if, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an essential element of that party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). [Emphasis added.] Plaintiff filed this action on February 14, 2004, over 760 days at the time of this filing, and there has been no scheduling order entered and subsequently no adequate time given for meaningful discovery. Under Maryland local rule, discovery cannot begin until a scheduling order has been entered. (Plaintiff's Rule 56(f) Motion And For Meaningful Discovery, page 2.)

Now presently, the Plaintiff faces Defendant Union's motion for summary judgment without any meaningful discovery that is a disadvantage to the Plaintiff. In *Settle v. Baltimore County*, the Court explains such a detriment of denied discovery to a Plaintiff in clarity:

> Apparently, the parties here have not wished to assume the full cost and expense of conducting proper discovery as contemplated by Fed. R.Civ.P. 26, et seq. Regrettably, this inability and/or refusal to frame the factual issues appropriately can only ultimately harm the plaintiffs as the parties bearing the burden of projecting admissible evidence sufficient, if believed, to establish their claims by a preponderance of the evidence. *Settle v. Baltimore County*, 34 F.Supp.2d ¶ 37 (D.Md. 01/20/1999) [Emphasis added.]

In this action the Plaintiff has requested an adequate time for meaningful discovery in the face of defendant Union's motion for summary judgment and should not be denied that opportunity.

There is no dispute that the parties agree that as a general rule, Rule 56(f) has a specific purpose. It is intended to allow a party against whom summary judgment is sought to pray for additional discovery, where the party is otherwise unable to respond to the motion for summary judgment without such discovery. The case law UPS quotes in their opposition with respect to denying a party a Rule 56(f) motion has a consistent theme applied to it that some discovery has already occurred. Each case cited indicates discovery has occurred, but still needed - "more", "additional", "further", "previous", etc.

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

II. The Union Can Be Found To Be In Breach Of The Administration Of A Contract Or In The Negotiation Of A Contract.

Both defendants argue that the Plaintiff's move for a Rule 56(f) motion (for discovery) and moving at the same time for a cross-motion for summary judgment are inconsistent, citing *Spira v. Ashwood Financial, Inc.*, 358 F.Supp.2d 150, 156 n.4 (E.D.N.Y. 2005) ("The fact that Plaintiff has filed a cross-motion for partial summary judgment on the very same claims for which she argues she needs further discovery demonstrates the utter weakness of her Rule 56(f) application.") That case cannot apply here for several reasons. First, those parties already had discovery opportunity, as that Court clearly stated:

> Plaintiff also argues that the Court should defer ruling on Defendant's cross motion for summary judgment in order to permit her to conduct further discovery. This application is unpersuasive solely

in light of the discovery which Magistrate Judge Mann supervised, directing Defendant, on Plaintiff's motion, to respond to "pending discovery demands that pertain to issues involved in the parties' dispositive motions." *Spira v. Ashwood Financial, Inc.*, 358 F.Supp.2d ¶ 34 (E.D.N.Y. 2005) [Emphasis added.]

Second, while both the Union's and Plaintiff's motions applied to a breach of duty of fair representation claim, the defendant Union's Motion For Summary Judgment was entirely based on the administration of the contract, entirely different from Plaintiff's cross motion for summary judgment on the negotiation of the contract (or lack thereof.) The Union can be found to breach either its administration of a contract or in breach of their obligation under the Act to negotiate:

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

The Union makes clear in their argument for summary judgment that their move was related to their administration of the contract, ". . . the Union's conduct in processing, preparing and presenting the grievance filed by Mr. O'Shea . . ." (Union's Resp. at 3.) Throughout the Union's motion there was no mention of their duty of fair representation to negotiate, only a move for summary judgment based on their duty of fair representation to administer the contract.

Plaintiff's cross motion for summary judgment involved not the administration of the contract, but that of the breach of the Union's duty of fair representation in fulfilling its obligation under the National Labor Relations Act ("The Act") to negotiate newly implemented or altered policies having to do with "terms and conditions" of employment, which include not only new terms and conditions of work rules and discipline but involving the change in the progressive disciplinary structure of the parties CBA. (See

Pl.'s Opposition To The Union's Motion For Summary Judgment And Pl.'s Cross Motion For Summary Judgment.)

The Union can be found in breach of either its administration or negotiation. The Plaintiff's cross motion addresses the same subject, that of the Union's breach of its duty to represent, but the issues are separable and the Plaintiff's motion is not inconsistent. Plaintiff requests discovery on the administration aspect of the Union's motion, while properly moving for summary judgment on his breach of duty claim with respect to the Union's obligation to negotiate, "and within that area neither party is legally obligated to yield." *Air Line Pilots Association v. Joseph E. O'Neill et al.*, 111 S. Ct. 1127, 499 U.S. ¶ 38 (U.S. 03/19/1991) [Emphasis added.]

The Union asserts "Plaintiff is, and was, fully capable of responding to and opposing Local 639's motion without any additional discovery." [Emphasis added.] This is a false statement. The Union very well knows no discovery order or time-period has been entered or begun.

Plaintiff disputed the Union assertion that "all relevant and factual witnesses testified" in his response to the Union's motion and in his Rule 56(f) motion and affidavit and that no relevant and factual witnesses testified (excluding the grievant) who had personal knowledge of the company standards the Plaintiff was held to, yet did not apply to the rest of the drivers in Plaintiff's center.

Specifically, a current officer of the defendant Union, business agent Ron Joseph, when handing out Plaintiff's campaign material (Exh. 12 of Pl.'s Opp. To The Union's Mot. For SJ And Pl.'s Cross Mot. For SJ, "The Obsolete Contract") to the UPS employees and members of the Union, emailed the Plaintiff after his discharge and stated:

> Hi Dan, Hope everything is going well. The campaign is picking up momentum. 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. The drivers were reading the piece we are passing out from your Website. They said they couldn't believe a 24 year man could be discharged for things they do...Mike screamed...don't believe that they are lies.
The drivers walked off as they were reading your story.
Mike is losing it. I'll talk to you in more detail at a later time.
Ron
(See Exh. 11 of Pl.'s Opp. To The Union's Mot. For SJ And Pl.'s Cross Mot. For SJ, "The Obsolete Contract")

Plaintiff certainly should be allowed the opportunity for discovery in finding what drivers were spoken with and why no driver who had personal knowledge was called by the Union to testify on Plaintiff's behalf that what he did was no different than what other drivers "did all the time".

Plaintiff was specific in his opposition motion, motion for meaningful discovery and Rule 56(f) motion and accompanying affidavits, that meaningful discovery would disclose drivers who had personal knowledge of the discriminatory standards the company placed upon the Plaintiff compared to the other drivers in his center and that the Union refused to call even one of those witnesses to show the disparate treatment.

Upon the acquisition of such evidence, a jury certainly could reasonably determine that the Union's actions of shunning all such witnesses (while at the same time they asserted all relevant witnesses did testify) was indeed dishonest, hostile, discriminatory, perfunctory and in bad faith. It is upon this foundation defendants would deny discovery to Plaintiff and why they fear discovery.

"To sustain a member's action against his union under Griffin standards, it is not necessary that the union's breach be intentional. A union representative could be so indifferent to the rights of members or so grossly deficient in his conduct purporting to protect the rights of members that the conduct could be equated with arbitrary action." *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888 (4th Cir. 1980) also citing *Baldini v. Local Union No. 1095*, 581 F.2d 145 (7th Cir. 1978); *Robesky v. Qantas Empire Airways, Lts.*, 573 F.2d 1082 (9th Cir. 1978); *Hughes v. International Brotherhood of Teamsters, Local 683*, 554 F.2d 365 (9th Cir. 1977); *Ruzicka v. General Motors Corporation*, 523 F. 2d 306 (6th Cir. 1975); *DeArroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO*, 425 F.2d 281 (1st Cir.), cert. denied, 400 U.S. 877, 91 S.Ct. 117, 27 L.Ed. 2d 114 (1970)

III. Plaintiff's Dissident Status And The Union's Ill-Will

While the Union does not contest Plaintiff was a dissident they assert "there is no evidence that [the union representative] shared this ill-will." This is disputed. Plaintiff does describe in detail in his affidavit that in 1988 the failure of the Union to process four grievances (admitting they would be an embarrassment to the Union) that due to the Union's inaction, led to three years of constant abuse and harassment for UPS's retaliatory action after filing a lawsuit against both UPS and the Union.

Further, the Plaintiff's claim of collusion included denying Plaintiff a seniority provision of work everyday led to financial hardship. The dissident relationship began with the lawsuit and the Union officers (including John Catlett) ill-will was apparent after Plaintiff's lawsuit and election campaigns. (Exh. 3, CMS Campaign Flyer.)

On February 28, 2000 Plaintiff filed a grievance against a UPS manager for dishonestly punching Plaintiff off the clock over two hours prior to the Plaintiff finishing work. Two days later, UPS fired Plaintiff for dishonesty in delivering in a manner he was instructed to and followed. (The only discipline Plaintiff encountered in eleven years prior to his termination in 2003.) The Union (specifically John Catlett) denied Plaintiff's February 28, 2000 grievance to the Panel that clearly was the reason for UPS's retaliatory discharge two days later and gave no reason for not processing it. Maryland's unemployment commission paid benefits to Plaintiff when the commission agent requested a copy of the Plaintiff's grievance on the UPS Manager's dishonesty two days prior and acknowledged the award and retaliatory action. (Exh. 4, 2000 Grievance and related doc.'s; Exh. A, Pl.'s Affidavit at ¶ 10.)

On March 5, 2003 Plaintiff filed a grievance concerning the ongoing harassment from UPS since he filed a workers compensation claim in January of 2002. The Union ignored the grievance and gave Plaintiff no reason for not processing it. UPS Labor Manager Mark Aaron admits this grievance was untimely filed by the Union. (Union's Resp. Exh. 1 at 60; Exh. A, Pl.'s Affidavit at ¶ 13.) On May 13,

2003 prior to starting work and one hour prior to Plaintiff's discharge, Plaintiff submitted three more grievances complaining of the ongoing harassment. The Union ignored the grievances and gave no reason for not processing them. (Exh. 5, Pl.'s three grievances filed 5/13/2003; Exh. A, Pl.'s Affidavit at ¶ 15.)

On June 18, 2003 the Plaintiff submitted a grievance over the postponement of his termination grievance. The Union ignored the grievance and gave no reason for not processing it. (Exh. 6, Pl.'s grievance; Pl.'s Affidavit at ¶ 22.)

The Union's refusal to process Plaintiff's grievances, without reason has been a pattern for fifteen years since the filing of his original lawsuit against the Union officers and reflective of their ill-will.

The Griffin standard is clear:

> A union may refuse to process a grievance or handle the grievance in a particular manner for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority. *Griffin v. International U.*, United Automobile, 469 F.2d 183 (4th Cir. 1972.)

The refusal of the Union to process the March 5, 2003 grievance was critically important to Plaintiff's protection of his 24-year career. Plaintiff, after filing a workers compensation injury claim in January of 2002, filed twenty-four letters and grievances over a pattern of harassment that began after that filing. (Exh. 7, Pl.'s list of grievances and letters filed.) Specifically, UPS forced the Plaintiff in a position of continued missed service, the Union did nothing to protect the Plaintiff in ignoring this grievance and UPS fired Plaintiff for missed service on May 13, 2003 that was no different from the manner in which the Plaintiff worked in the prior two years. (Exh. A, Pl.'s Affidavit at ¶ 14.)

The evidence of ill-will is clear, each time Plaintiff filed grievances, in 1988, 2000 and 2003, the Union ignored the grievances and in a relatively short time UPS either terminated or suspended Plaintiff's employment. Union animus can be inferred from circumstantial evidence. *Abbey's Transportation Services v. NLRB*, 837 F.2d 575 (2d Cir. 1988).

IV. Plaintiff Was Asked If He Was Fairly Represented - "I Can't Say That I Have."

Plaintiff disputes the Union's assertion that just because Plaintiff stated the Union "made a good presentation" during the AAPGC hearing that the meaning had anything to do with their fair duty of representation. The Plaintiff submitted a letter to the Union several weeks before the panel hearing raising serious disagreements with the representation provided. (Pl.'s Affidavit at ¶ 16 in his Opp. To The Union's Mot. For SJ And Pl.'s Cross Motion For SJ.) When Plaintiff was asked if he believed he was properly represented he stated, "I can't say that I have." (Union's Resp. Exh. 1 at page 119 ¶ 22.)

Further, any question of what the Plaintiff believed at the Panel hearing becomes moot when, for three months during Plaintiff's grievance process, the Union dishonestly and in bad faith, knowing there was no company policy, allowed Plaintiff's grievance to move to the AAPGC as if the company did indeed have a company policy against tape recording and at their presentation and did not inform the Panel or the Plaintiff that there indeed was not a company policy. (Pl.'s Affidavit at ¶ 13 in his Opp. To The Union's Mot. For SJ And Pl.'s Cross Mot. For SJ.) The Union acknowledges there was no company policy with regard to tape recording and accepted UPS's statement that a company policy against tape recording was not needed because Maryland has promulgated a statute that makes such conduct a violation of the law. (Local 639's Motion for Summary Judgment Exhibit 1 at ¶ 7; Exhibit 2 at ¶ 6.)

In both the Union's presentation and Exhibit 1 of their response, they never mention or argue that UPS admitted to them there was no "specific company policy against tape recording", allowing UPS an uncontested allegation that the Plaintiff violated a company policy. This was an action that was simply dishonest and in bad faith.[1] (Exh. 8, the Union's presentation at the Panel.) Any question to the Plaintiff during the Panel hearing regarding his "belief" of the Union's fair representation is mooted in the face of

[1] UPS in their Response at FN 4 states that the Union did argue the absence of a written policy by UPS. They simply did not. UPS's references only argue that the Plaintiff never saw a written policy. The fact remains, UPS and the Union were aware there was no policy against tape recording conversations months prior to the panel hearing, yet at the panel hearing UPS dishonestly argued there was and the Union allowed UPS to make this argument without one objection.

non-disclosure to him by the Union that UPS admitted to the Union several months earlier that a specific company policy did, in fact, not exist and was not needed.

That both the Union and UPS admit there is now no company policy, the Union, in violation of the National Labor Relations Act ("NLRA"), allowed UPS prior to the panel hearing to unilaterally institute new terms and conditions of employment with respect to Plaintiff only, without bargaining on mandatory subjects such as UPS unilaterally instituting a tape recording policy and changing the disciplinary system. The National Labor Relations Act ("NLRA" or "The Act") requires covered labor organizations, section 8(b)(3), 29 U.S.C. § 158(b)(3), and employers, section 8(a)(5), 29 U.S.C. § 158(a)(5), to bargain collectively about "wages, hours, and other terms and conditions of employment." Section 8(d), 29 U.S.C. § 158(d).

V. The CBA Is Not Binding

Defendant Union argued that the CBA specifies that "[t]he decision of the majority of the [AAPGC] panel hearing the case shall be binding on all parties. Plaintiff disputed such argument. (Pl.'s Mot. For Meaningful Disc. And Disc. Under Rule 56(F), Cross Mot. For SJ, And Opp. To Def.'s Mot. For SJ at page 3.)

UPS asserted in their opposition that Plaintiff's claim, "that the Collective Bargaining Agreement is not binding, is nonsensical" is illogical. The Plaintiff concisely titled the paragraph argument for brevity's sake and the Plaintiff's argument is clear and precise, the parties CBA is not binding with respect to Atlantic Area Parcel Grievance Committee decisions when the union's breach of their duty of fair representation contributed to an erroneous outcome in the contractual proceedings, the arbitral bar is removed. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S.Ct. 1048, 47 L. Ed.

If UPS indeed did read the entire one-sentence paragraph and still asserts it is "nonsensical", their dispute is not only with the Plaintiff but with the quoted Supreme Court language.

VI. The NLRB Does Not Have Exclusive Jurisdiction And Its Dismissal Of Plaintiff's Charge Is Highly Questionable.

Plaintiff disputes that UPS's citation of *Electric Corp. v. International Brotherhood of Electrical Workers Local* has any basis in this case. In that case, Spero Electric had a management rights clause that waived certain unilateral bargaining issues. UPS has shown no article exists that can apply to the parties CBA in this action.

While both defendants inquire why the NLRB dismissed Plaintiff's charge, the Plaintiff also questions the Region 5 Director's dismissal of his charge for two reasons. First, while the NLRB alleged a "full investigation" occurred, the Plaintiff's Freedom of Information Act ("FOIA") lawsuit against the NLRB disclosed that the investigation lasted all of four days and the Board admitted there were no <u>UPS company policies or procedures existing in Plaintiff's NLRB case file</u>. (FOIA lawsuit in the U.S. District Court for South Carolina, case no. 2:05cv2808[2]; Pl.'s Affidavit at ¶ 19 in his Opp. To The Union's Mot. For SJ And Pl.'s Cross Mot. For SJ.)

Second, while the NLRB's Region 5 Director Wayne Gold deferred Plaintiff's charge against UPS, the Board has long held that deferral is not appropriate because the employer's conduct constitutes a "rejection of the principles of collective bargaining." *United States Postal Service*, 27-CA-18936, JD(SF)-64-04, Gregory Z. Meyerson, 8/13/04 citing *United Technologies Corp.*, 268 NLRB 557 (1984).

Specifically, the NLRB admitted (two years after his discharge and one and a-half years after the NLRB's dismissal) no company policies and procedures existed in Plaintiff's case, thus the employer's conduct did constitute a "rejection of the principles of collective bargaining" as shown in Plaintiff's Opposition to the Union's Motion for Summary Judgment, Plaintiff's Cross Motion for Summary Judgment and Plaintiff's Response herein that the parties did not negotiate new policies and did alter

[2] The Region 5 Director's dismissal of Plaintiff's charge should be questioned as many of the citations referenced in Plaintiff's Opposition to the Union's Motion for Summary Judgment, Plaintiff's Cross-Motion for Summary Judgment and Plaintiff's Response herein are references of NLRB cases and decisions which support Plaintiff's arguments.

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

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

Although the Board has occasion to interpret collective bargaining agreements in the context of unfair labor practice adjudication, see *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967), <u>the Board is neither the sole nor the primary source of authority in such matters</u>. "Arbitrators and courts are still the principal sources of contract interpretation." *NLRB v. Strong*, 393 U.S. 357, 360-361 (1969). Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, "authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements." *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448, 451 (1957) (Emphasis added).

VII. Plaintiff's Discharge Was Unlawful As Defendants Union And UPS Changed Disciplinary Measures Articulated In The Parties CBA And Unlawfully Ignored Their Mandatory Obligation To Bargain Over The Change In Terms And Conditions Of Plaintiff's Employment.

A.) UPS Unlawfully Changed The Disciplinary Structure In Plaintiff's Discharge And The Union Unlawfully Yielded Without Bargaining.

Plaintiff's discharge decision determined that Plaintiff was guilty of:

1- notifying the Company of undelivered stops in a timely manner, thereby resulting in service failures,
2- recording meetings with the company in violation of Company Policy and instructions, rendering his conduct insubordinate and;
3- violation of the clean-in/clean-out policy. (Exh. 1, AAPGC discharge decision.)

The parties Supplement, entitled Atlantic Area Supplemental Agreement defines the cardinal infractions as dishonesty, drinking alcoholic beverages during the workday, use or possession of illegal drugs while on duty, recklessness resulting in serious accident while on duty, or the carrying of unauthorized passengers while on the job. (Exh. 2, Art. 50 at ¶ 1.) UPS and the Union do not dispute that the Arbitrator found that Plaintiff O'Shea was not guilty of any cardinal infraction, should have remained on the job and awarded him $15,000 in back wages. (Pl.'s Statement Of Undisp. Mat. Facts at ¶¶ 11-12.) The CBA is clear, that absent a cardinal infraction, the "Employer shall not discharge nor suspend any employee without just cause but in respect to discharge or suspension shall give at least one warning notice of a complaint against such employee to the employee, in writing, and a copy of the same to the Union . . ." (Exh. 2, Art. 50 at ¶ 1.) The parties do not dispute that the Plaintiff had no warning notice in his file. (Union's Resp. Exh. 1, page 23, line 12.) Plaintiff institutes this action not for re-litigation of his discharge, but the unlawful nature of his discharge and the violation of the NLRA.

The parties do not dispute Plaintiff committed no cardinal infraction and that Plaintiff had no warning notice in his file. Yet defendant UPS summarily discharged the Plaintiff for all three offenses when a warning notice was required before discharge. In doing so, UPS unilaterally implemented new "terms and conditions" that were mandatory subjects of bargaining that both parties were not "obligated to yield." *Air Line Pilots Association v. Joseph E. O'Neill et al.*, 111 S. Ct. ¶ 38 (U.S., 1991)

The NLRB's precedent is that the disciplinary penalty is what transforms the work rule from "expressions of opinion" into terms and conditions subject to mandatory bargaining. Citing *Peerless Publications*, 283 NLRB 334-35 (1987):

> 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 <u>terms and conditions of employment</u>. [Emphasis added.]

Both the Courts and NLRB have set well established precedent that unilateral implementation of disciplinary schedules constituted a material, substantial and significant change in a company's disciplinary rules and practices and is unlawful. The NLRB stated in *Star Tribune*:

> The new, fixed schedule of disciplinary penalties for drug and alcohol related offenses which was unilaterally implemented by the Respondent as an element of its substance abuse program constitutes an independent violation of Section 8(a)(1) and (5) of the Act. Imposition of a system of specific disciplinary penalties constitutes a mandatory subject of bargaining. See, e.g., RAHCO, Inc., 265 NLRB 235 (1982); Amoco Chemical Corp., 211 NLRB 618 (1974); Medicenter, supra at 675.
>
> This formalized ladder of discipline represents a marked change from the Respondent's past practice. Previously, discipline had been handled on a case-by-case basis, in accordance with the principles of progressive discipline imposed by the "just cause" provision of the parties' agreement. No penalty schedule existed, with regard to any employee misconduct, drug related or otherwise. The Respondent's previous disciplinary practices had been often inconsistent and in no way tied to a specific penal code. Thus, the unilateral implementation of the disciplinary schedule constituted a material, substantial and significant change in the Respondent's disciplinary rules and practices.
>
> I find that Respondent's unilateral implementation of disciplinary procedures as an enforcement mechanism for its unilaterally implemented drug and alcohol policy is as unlawful as the implementation of the policy itself. *Star Tribune*, 295 NLRB No. 543 at 563 (1989) citing *Peerless Publications*, 283 NLRB 334 (1987); *Tenneco Chemicals*, 249 NLRD 1176 (1980).

It is well established that an employer's disciplinary system constitutes "a term of employment that is a mandatory subject of bargaining." *Migali Industries,* 285 NLRB 820, 821 (1987) (progressive discipline system held to be mandatory subject of bargaining); *Toledo Blade Co.*, 343 NLRB 51 (2004) citing *Electri-Flex Co.*, 228 NLRB 847 (1977) (written warning system of discipline held to be mandatory subject of bargaining), enfd. as modified 570 F.2d 1327 (7th Cir. 1978), cert. denied 439 U.S. 911 (1978). Well established precedent with respect to work rules and discipline can be cited throughout NLRB decisions:

Scepter Ingot Castings, 331 NLRB 1509, 1516 (2000), enfd. 280 F.3d 1053 (D.C. Cir. 2002) where the Board found a Section 8(a)(5) violation where the employer, without bargaining with the union, formalized a rule by adding discipline to the rule, contrary to its past practice.

Murphy Diesel Co., 484 F. 2d 303, the court agreed with the Board that the expanded absentee rules did not merely particularize the employer's previous policy; instead, the revised rules were regarded as a substantial change in the company's practices affecting conditions of employment.

Womac Industries, 238 NLRB 243 (1978), the Board reaffirmed that "the initiation of new and more stringent Rules with respect to absenteeism which represents a significant change from prior practice without bargaining with the Union violates Section 8(a)(5) and (1) of the Act." See also *Ciba-Geigy Pharmaceutical*, supra; *NLRB v. Miller Brewing Co.*, supra, 408 F.2d at 15.

In this action, the parties CBA mandated a warning notice be given to the Plaintiff prior to any discharge in non-cardinal infractions. UPS unilaterally and discriminately implemented a new disciplinary procedure both parties were obligated to bargain and negotiate.

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

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

B.) UPS Unlawfully Implemented Unilateral Work Rules In Plaintiff's Discharge And The Union Unlawfully Yielded Without Bargaining.

The parties do not dispute that the Plaintiff used a tape recorder at UPS for fifteen years and that the Plaintiff notified UPS and the Union between 2001 and 2003 that he was using one. (Union's Resp. Exh. 1, pages 26-27; Pl.'s Exh. 9 at 6; Exh. 10 at 7; Exh. 11 at 5; Exh. 12 at 4.) The parties do not dispute that the Plaintiff believed he was adhering to the law. (Union's Response at 5.) The parties do not dispute that UPS terminated Plaintiff for "illegally tape recording conversations of management without consent in violation of the Maryland Wiretapping and Electronic Surveillance law" and there is no specific policy that prohibits the recording of conversations:

> During my meeting with Mr. Catlett, he requested that UPS produce to the Union a copy of the Company's policy which prohibits the recording of conversations. 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. (Union's Mot. SJ, Exh. 1, page 3 ¶ 7, Affidavit of former-UPS Labor Manager Mark Aaron.) [Emphasis added.]

The Union admits UPS does not have a specific policy prohibiting the recording of conversations:

> During my meeting with Mr. Aaron, I requested that UPS produce to the Union a copy of the Company's policy which prohibits the recording of conversations. Mr. Aaron claimed that UPS did not need to maintain a specific policy prohibiting the recording of conversations without consent, because Maryland had promulgated a statute which made such conduct a violation of law. Accordingly, I did not receive a copy of any such policy in response to my request. (Union's Mot. SJ, Exh. 2, page 2 ¶ 6, Affidavit of former Local Union 639 President John Catlett.) [Emphasis added.]

UPS asserts 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 criminal law." UPS fails to define the range of "all other employers". Those internationally, nationally or in just the state of Maryland and for arguments sake, Plaintiff will make the assumption that it is nationally, as this is a federal question and not a state question. UPS has not factually introduced any evidence that they and every other employer throughout the United States has an unwritten policy of hiring or employing employees who violate criminal law. The only factual evidence presented has been Mark Aaron's affidavit stating "UPS does not need to maintain a specific policy prohibiting the recording of conversations without consent."

While UPS "claims" the company does summarily discharge employees for violating law, less than one month after UPS discharged Plaintiff for tape recording conversations, UPS was allowing other employees, without their consent and in some instances without their knowledge to tape record harassment and abuse of management. This occurred in California, whose Wiretapping law is identical to Maryland's. (Exh. 13 of Pl.'s Opp. To The Union's Mot. For SJ And Pl.'s Cross Mot. For SJ,

Affidavit of Robert Moorhead.) Other employees at UPS never were notified of a tape recording policy, never saw such a policy and have knowledge of employees using a tape recorder. (Exhibits 14 and 15.)

Neither the Union nor UPS have presented any evidence of any written or unwritten policy that employees cannot use a tape recorder or record conversations. Specifically, former-President of Local Union 639 and 20-plus career as Local Union 639 officer admitted there was no such policy in the Plaintiff's local hearing concerning his discharge:

Mark Aaron to Dan O'Shea: Do you know it's against UPS policy to tape record?
Dan O'Shea to Mark Aaron: No.
Mark Aaron to Dan O'Shea: In the [office], John Pinnock asked you to turn it off?
Dan O'Shea to Mark Aaron: John Pinnock never asked me to turn it off in . . .
Frank Gribbon to John Catlett: Ever see policy on tape recorder?
John Catlett to Frank Gribbin: No.
(Pl.'s Exh. 10 in his Opp. To The Union's Mot. For SJ And Pl.'s Cross Mot. For SJ.)

John Catlett would certainly know of any existing written or unwritten policy concerning the recording of conversations as he is also a member of the TEAMSTERS NATIONAL UNITED PARCEL SERVICE NEGOTIATING COMMITTEE. (Pl.'s Exh. 13, Members of the Union's National Negotiating Committee.) John Catlett also stated at the Plaintiff's Panel hearing:

"Page 3, Where it talks about the Court of Maryland, it makes it unlawful to record communications without prior consent of all parties, regardless of who initiates communications. It is in the record here, three letters that the Grievant sent to UPS Corporate Headquarters. (Inaudible) the recording that is not the Grievant's fault. As you can see, he copied Local Management people. You know McLems, the HR Director, ah and Frank Gribbin, who is the Division Manager, who has respect in saying he didn't know that he, was being tape recorded. Mentioned a couple of meetings, I know I attended at least one of them. And I do not remember a thing about where (inaudible) recording. I would certainly remember that. I was in the ah August 9th meeting in 2002, and I don't remember, I don't remember anything being said about, you can't tape-record conversations anymore. And I was in the January 22nd meeting too. I am not sure. That never occurred in my presence-the Grievant being instructed-don't tape-record. (Union's Resp. Exh. 1 at 62.)

Both the courts and the NLRB have set well-established precedent against unilateral changes of work rules:

NLRB v. Borg Warner Corp., 356 US. 342, 348–349 (1958), bargaining about any subject encompassed within the statutory definition of ''wages, hours and other terms and conditions of employment, commonly referred to as "mandatory" subjects of bargaining.

NLRB v. Katz, 369 U.S. 736 (1962), it is well-established that an employer must notify and bargain with its employees' collective-bargaining representative before changes are implemented in mandatory subjects of bargaining and that unilateral changes by an employer during the existence of a collective-bargaining relationship concerning mandatory subjects of bargaining are considered per se refusals to bargain in violation of the Act.

Soopers, Inc., 340 NLRB No. 75, slip op at 1-2 n. 7 (2003), states it is well settled that work rules that can be grounds for discipline are mandatory subjects of bargaining, and an employer may not make or change them without notifying a union and giving it an opportunity to bargain, citing King

Southern Florida Hotel Assn., 245 NLRB 561, 567–568 (1979), enfd. in relevant part 751 F.2d 1571 (11th Cir. 1985), an employer violates Section 8(a)(5) of the Act if, during the term of a collective-bargaining agreement, it implements, without first having bargained with its employees' collective bargaining representative over the matter, changes in its employees' work rules.''

Equitable Gas Co., 303 NLRB 931 (1991), if an employer's unlawfully imposed rules or policies were a factor in the discipline or discharge, then the discipline or discharge violated Section 8(a)(5) of the Act.

Behnke, Inc., 313 NLRB No. 201 (1994), the complaint alleges that the implementation of the new rule violated Section 8(a)(5), and the Respondent admits that employee James Betz was discharged pursuant to the new rule. By implementing the new rule without prior notice to Teamsters Local 7 and affording it an opportunity to bargain, Respondent violated Section 8(a)(5) of the Act. Therefore, the discharge of employee James Betz on August 4, 1992, pursuant to the new rule, also violated Section 8(a)(5) of the Act.

For fifteen years the Plaintiff used a tape recorder with UPS's knowledge and was never informed he was violating a company policy nor disciplined for using one. Between 2001 and 2003 Plaintiff notified UPS on four separate occasions that he was using a tape recorder (seven management personnel in authority) and was never informed he was violating a company policy nor disciplined for using one.

On May 13, 2003 UPS discharged Plaintiff for using a tape recorder in violation of Company Policy. (Pl.'s Statement of Undisp. Mat. Facts, ¶ 6.) In July, 2003, UPS Labor Manager Mark Aaron informed Union President John Catlet that UPS did not need to have a specific policy against the tape recording of conversations. (Pl.'s Statement of Undisp. Mat. Facts, ¶ 7.) There is no factual evidence presented by UPS that they have any such policy, John Catlett, the Union's President admits he's never seen such a policy and neither party has presented any evidence that such a "phantom" policy was ever bargained or negotiated.

UPS discharged Plaintiff for not only using a tape recorder, but for insubordination when they allegedly demanded that he turn it off.[3] However, the NLRB has long held that an employer cannot provoke an employee by its unlawful conduct to a point where he commits an indiscretion and then rely on it to discipline the employee. *Vought Corp.*,273 NLRB 1290, 1295 fn. 31 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986). In Bath Iron Works the NLRB stated:

> Although it is not possible now to state with certainty what bargain the parties might have struck had they negotiated a substance abuse policy in good faith, it is clear that the individuals discussed here were tested and discharged because Respondent insisted on unilaterally implementing its own drug code. Accordingly, make-whole remedies including reinstatement and backpay are appropriate for D.K., C.B., T.B., and R.L. since their ''loss of employment stems directly from an unfair labor practice.'' *Bath Iron Works Corp.*, 302 NLRB No. 143 at 914 (1991) (When an <u>employee refused an order to take a drug test</u> in the face of a company-instituted unilateral change.)

Even had Plaintiff refused to turn off a tape recorder, well-established NLRB policy considers such "insubordinate" discipline unlawful relating to an unlawful implementation of a work rule.

VIII. The AAPGC And Arbitrator Exceeded Their Authority By Ignoring The Plain Language Of The CBA And Because The Award Does Not Draw Its Essence From The CBA.

A.) The AAPGC's Award Did Not Draw Its Essence From The CBA But From Enacted Legislation

The parties do not dispute that both UPS and the Union's basis for Plaintiff's discharge for using a tape recording <u>arose from enacted law</u>:

1. Former UPS Labor Manager Mark Aaron's testimony at the Panel Hearing:

> 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 $10,000.00 fine. More importantly perhaps is the fact that the Act authorizes an aggrieved party to a communication to bring a private action against the "interceptor" seeking to recover actual and punitive damages, attorney's fees and costs. Company Exhibit #18 is Michie's Annotated Code of Maryland. (Union's Resp. Exh. 1, page 17; Exh. 16, Company Exh. #18 at the Panel, Michie's Annotated Code of Maryland.)

[3] Plaintiff and the shop steward denied UPS instructed Plaintiff to turn off the tape recorder. (Union's Response, Exhibit 1 at 25.)

2. Former UPS Labor Manager Mark Aaron's testimony at the Panel Hearing:

"Um in 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. (Union's Resp. Exh. 1, page 53.)

3. Teamsters Union Officer Ron Candler:

MR. CANDLER:
"That is middle district. Would you agree that the <u>laws of tape recording</u> vary from state to state?
MR. AARON:
Correct. I know that Virginia is different than Maryland, yes.
MR. CANDLER:
<u>I am only familiar with North and South Carolina</u>, but I know that. My question was <u>we can always review each state</u> as to what can be recorded, and what cannot? [Emphasis added.]
MR. AARON:
<u>Correct</u>. [Emphasis added.] (Union's Resp. Exh. 1, page 80.)

UPS argues that "common sense dictates that an employer does not need a written policy prohibiting conduct that already has been criminalized by the state legislature." Their argument is unsubstantiated opinion, absent any factual evidence and is contrary to precedent set by the courts and NLRB.

The NLRB has long held that the implementation of a drug testing policy is a mandatory subject of bargaining, *Johnson-Batemann Co.*, 295 NLRB 180, 182-84 (1989). The NLRB also stated:

<u>This is true despite the fact that the underlying employee conduct is not only unprotected, but most often illegal</u>. Thus regardless of whether Hartman's conduct was protected, as the duly designated bargaining representative, the Union had a right to notice of the new rule and an opportunity to bargain with Respondent since the rule certainly impacts employees' terms and conditions of employment. No such notice was given here. *WGE Federal Credit Union*, 25-CA-29101, JD(ATL)-27-05, page 7, Lawrence W. Cullen, 8/10/05.

The NLRB also stated:

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, "<u>While there may be a public policy against criminal drug use, there is no clear public policy against employment of drug users</u>." *Bath Iron Works Corp.*, 302 NLRB No. 143 at 914 (1991)

UPS argues that the Arbitrator simply did not accept the Union's argument in light of the statute and in light of Plaintiff's refusal to cease recording. Plaintiff does not dispute that the Panel and Arbitrator looked outside of the parties CBA and at the Maryland statute. The Plaintiff argues that in doing so, the Panel members and the Arbitrator exceeded their authority and unlawfully terminated Plaintiff's employment. The Plaintiff never admitted violating law and after fifteen years of consent by UPS believed his letters of notification to "the corporation" (required by the statute) was properly obeying the law. UPS's presentation to the Panel was Maryland statute and the Panel Committee and Arbitrator took it upon themselves to engage in judicial factfinding to decide that the Plaintiff committed a criminal act.

The unlawful act to assert themselves as a public tribunal is repugnant to the entire judicial system as most committee members rise through the ranks of package loaders, un-loaders, sorters and truck drivers and are never educated in legal theory, law or legislative history to determine state and federal statutes. The courts have paved well-established law with respect to a Panel Committee's and Arbitrator's role:

> "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 has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . ." *United Steelworkers America V. Warrior & Gulf Navigation Co.*, 80 S. Ct. 1347, 363 U.S. 574 ¶ 32 (U.S. 06/20/1960); *Shulman, Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016.
>
> "Arbitral factfinding is generally not equivalent to judicial factfinding. As we explained in Gardner-Denver, '[the] record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.'" 415 U.S., at 57-58. *McDonald v. City West Branch*, 104 S. Ct. 1799, 466 U.S. ¶ 30 (U.S. 04/18/1984) [Emphasis added.]
>
> "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 America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-583 (1960). [Emphasis added.]
>
> "Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, 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. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to

civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. See *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956); *Wilko v. Swan*, 346 U.S., at 435-437. And as this Court has recognized, "arbitrators have no obligation to the court to give their reasons for an award." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S., at 598. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. *Alexander v. Gardner-Denver Co.*, 94 S. Ct. 1011, 415 U.S. 57 ¶ 38-39 (U.S. 02/19/1974)

B.) Vacating The AAPGC Decision Is Appropriate

Plaintiff understands an arbitration decision arises from the terms of a CBA and judicial review is narrowly limited. Courts do afford great deference to arbitral awards. Accordingly, a court must affirm an arbitral award "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority . . . ." *United States Postal Svc. v. American Postal Workers Union*, 204 F.3d ¶ 27 (4th Cir. 2000). If the arbitrator has not exceeded his authority, a court may not vacate the resulting award just because the court is convinced that he "committed serious error." Id. "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." *Weber Aircraft*, 253 F.3d at 824 (citing Misco, 484 U.S. at 38).

The Arbitrator's powers with respect to Plaintiff's discharge was limited by the parties CBA in ARTICLE 49 – GRIEVANCE PROCEDURE in Section 5 (Pl.'s Exhibit 2):

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

The arbitrator's decision stated:

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

The arbitrator ruled that Plaintiff O'Shea "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" thus rendering the decision that Plaintiff did not commit any "cardinal infraction." (Pl.'s Exh. 1, AAPGC discharge decision; UPS's Memorandum In Supp. Of Def. UPS's Mot. To Dismiss, Or In The Alternative, To Bifurcate And Stay Pl.'s Sect. 301 Claim For Breach Of The CBA, page 7 at n.6.) The CBA's ARTICLE 7. LOCAL AND AREA GRIEVANCE MACHINERY is clear with respect to cardinal infractions:

"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." (Pl.'s Exh. 17, Art. 7.)

The parties CBA at ARTICLE 50 – DISCHARGE OR SUSPENSION states:

"The Employer shall not discharge nor suspend any employee without just cause but in respect to discharge or suspension shall give at least one warning notice of a complaint against such employee to the employee, in writing, and a copy of the same to the Union, except that no warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty, drinking alcoholic beverages during the workday, use or possession of illegal drugs while on duty, recklessness resulting in serious accident while on duty, or the carrying of unauthorized passengers while on the job. The warning notice as herein provided shall have no force or effect for a period of more than nine (9) months from the date of said warning notice." (Exh. 2, Art.'s 49 and 50.)

The CBA is clear, that absent a cardinal infraction, the "Employer shall not discharge nor suspend any employee without just cause but in respect to discharge or suspension shall give at least one warning notice of a complaint against such employee to the employee, in writing, and a copy of the same to the Union . . ."

However, the arbitrator ruled "Discharge is appropriate," exceeding his authority by ignoring the plain language of the collective bargaining agreement, by deciding that discharge is appropriate based

on his own opinions and judgment, and by ignoring Plaintiff's right to have been given at least one warning notice of complaint.

The arbitrator's award should be vacated because it does not "draw its essence" from the CBA. The language of the CBA is specific. Only if an employee is guilty of a cardinal infraction can UPS summarily discharge an employee without a warning notice. Plaintiff O'Shea had no warning notice in the prior nine (9) months and was denied the right to "at least one warning notice of a complaint against such employee to the employee, in writing, and a copy of the same to the Union."

In a similar case, *Hawaii Teamsters v. UPS* (except in that Arbitrator's decision found the employee had committed a cardinal infraction, while Plaintiff in this action did not) stated:

> "When read together, NMA Article 7 and the second clause of Western Supplement Article 28, Section 2 can arguably be construed as prohibiting UPS from discharging an employee for a reason that is not one of the seven cardinal infractions unless the employee has received a warning notice and until the discharge has been sustained in arbitration . . . To be sure, an arbitrator's award is not bulletproof. In Garvey, we summarized the rare circumstances where we may upset an arbitrator's award:
>
> The general rule [of refusal to review the merits of an arbitral award], the [Supreme] Court noted, is inapplicable when an arbitrator "dispense[s] his own brand of industrial justice." [Enterprise Wheel,] 363 U.S. at 597. In those instances — instances in which, by definition, an arbitrator's award draws no legitimacy from the collective bargaining agreement — a court has no choice but to refuse enforcement of the award.
>
> We overturn an arbitrator's award only when it is clear from the arbitral opinion or award that the arbitrator did not base his decision on an interpretation of the collective bargaining agreement or that he disregarded what the parties put before him and instead followed his own whims or biases.
>
> In this case, the arbitrator ruled that Article 28,S 2(A) is not an exclusive list of cardinal infractions for which summary discharge without prior warning may be imposed. The flaw in this interpretation is that it ignores the other relevant CBA provisions. Cf. *United States Postal Svc. v. American Postal Workers Union*, 204 F.3d 523, 528 (4th Cir. 2000) (vacating arbitral award in which the arbitrator relied on one provision of the agreement, but ignored another provision which limited his authority).
>
> The National Master Agreement Article 7 and the second clause of Western Supplement Article 28, Section 2 set out categorical and mandatory rules. Article 28, Section 2 states: "No employee(s) shall suffer . . . discharge without the employee(s) having been given a written warning notice. . . ." (emphasis added). NMA Article 7 states that "Except in cases involving cardinal infractions under the applicable Supplement . . ., an employee to be discharged . . . 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." (emphasis added). Section 2(A) carves out exceptions to these

categorical restrictions on management prerogative. Read together, these provisions unambiguously prohibit UPS from discharging an employee for a reason that is not one of the seven cardinal infractions unless the employee has received a warning notice and until the discharge has been sustained in arbitration.

The only plausible reading of the CBA is that, in an arbitration challenging a summary discharge, the arbitrator is limited to deciding the factual questions whether the employee (1) committed an enumerated cardinal infraction; and (2) received a warning in the preceding nine month period. If these predicate facts do not exist, an arbitrator may not uphold a discharge based on principles of "reasonableness" or "just cause." The arbitrator in this case exceeded the limited factfinding role that the parties bargained for and set forth in detail in the CBA. Therefore, "the arbitrator's award represents an invalid exercise of the power the parties have entrusted to him." Stead, 886 F.2d at 1206 n. 6. *Hawaii Teamsters v. UPS*, 241 F.3d (9th Cir. 1182-1183, 1185-1186.

CONCLUSION

The Union breached their lawful obligation under "The Act" to bargain the terms and conditions of 1- new company policies and 2- existing company policies where UPS changed the disciplinary system upon Plaintiff, the Union caused UPS to derogate the employment status of Plaintiff and the AAPGC exceeded their authority as defined by the CBA and ignored a critical portion of the CBA in the discharge of the Plaintiff. For these reasons, the Unions' Motion for Summary Judgment should be denied and Plaintiff's Cross Motion for Summary Judgment should be granted.

Respectfully submitted,

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Pro Se Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of March, 2006, a copy of the foregoing PLAINTIFF'S REPLY TO UPS'S RESPONSE OF UNITED PARCEL SERVICE TO PLAINTIFF'S RULE (f) MOTION AND PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT and PLAINTIFF'S REPLY TO RESPONSE OF DEFENDANT TEAMSTERS LOCAL UNION NO. 639 IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT was sent via First Class U.S. Mail addressed to:

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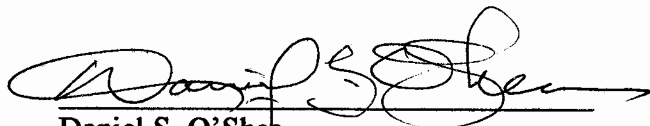

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(NORTHERN DIVISION)

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

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National Labor Relations Act ("NLRA" or "The Act"),
Section 8(b)(3), 29 U.S.C. § 158(b)(3) . . . . Page 10

National Labor Relations Act ("NLRA" or "The Act"),
Section 8(a)(5), 29 U.S.C. § 158(a)(5) . . . . Page 10

National Labor Relations Act ("NLRA" or "The Act"),
Section 8(d), 29 U.S.C. § 158(d) . . . . Page 10

Labor Management Relations Act (LMRA),
29 U.S.C. § 185, Section 301 . . . . Page 12

Misc. Citations

Shulman, Reason, Contract, and Law in Labor Relations. . . . . . . Page 21
68 Harv. L. Rev. 999, 1016.