UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

UNITED STATES POSTAL SERVICE

and **Case No. 29-CA-25099**

AFORTUNADO REYES,

An Individual

Nancy K. Reibstein, Esq., Brooklyn, NY,
for the General Counsel.
Peter W. Gallaudet, Esq., New York, NY,
for the Respondent.

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based upon a charge filed on August 15, 2002 by Afortunado Reyes, An Individual, (Reyes) a complaint was issued on September 27, 2002 against the United States Postal Service (Respondent).

The complaint alleges that in April, 2002, the Respondent, by William Rogers its Flushing, New York postmaster, threatened employees with discharge if they sought the assistance of Local 294, National Association of Letter Carriers (Union).

The Respondent's answer denied the material allegations of the complaint and asserted the affirmative defense that the charge should be deferred to the grievance-arbitration process pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971). A hearing was held before me on November 13, 2002 in Brooklyn, New York. Upon the evidence presented in this proceeding and my observation of the witnesses and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent has provided postal services for the United States and operates various facilities throughout the United States including its Main Post Office facility in Flushing, New York. The Board has jurisdiction over the Respondent and this matter by virtue of Section 1209 of the Postal Reorganization Act. The Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. The Facts

1. Background

Reyes began work for the Respondent in October, 1994 as a letter carrier and became a member of the Union upon his hire. In 1995, Reyes began work at the Main Post Office in Flushing, New York, where he remained during the rest of his employment. The postmaster of the Flushing office is William Rogers, an admitted statutory supervisor. The postmaster is the highest-ranking official in that post office, and is responsible for its operation, which comprises 31 stations and branches and employs about 1700 workers.

Reyes suffered an off the job injury to his shoulder in the Fall of 1997. Reyes testified that he was denied a light duty assignment at that time because the nature of his injury prevented him from performing the duties of a light duty assignment. Instead, he stated that he was told to take sick leave. He requested 160 hours of advance sick leave. Rogers approved the request in August, 1997, stating that his absence would be "counted under the Family Medical Leave Act." The leave was granted through August 29, 1997.

Reyes stated that he injured his shoulder on the job in February, 1999, and filed a workers compensation claim that month. He was out of work for two to three months. He returned to a limited duty position, sorting mail. In June, 1999, the workers compensation claim was denied, with the Department of Labor finding that the injury was not work related. Shortly after, Rogers told him that his case was denied and that he no longer had an obligation to provide him with limited duty assignments and that he had to send him home. Reyes appealed the denial of his workers compensation claim.

In June, 1999, Reyes requested 240 hours advance sick leave because he exhausted all his accumulated sick leave and was suffering financial hardship. Rogers approved advance sick leave for 160 hours through July 30, 1999.

Reyes was out of work for seven months, from June, 1999 through February, 2000. During that period of time he made three requests of Rogers for light duty work, but was denied each time.

On September 7, 1999, he wrote to Rogers, requesting 80 hours advance sick leave because he was unable to return to full duty and suffered financial hardship. In his letter, he stated that Union president Mark Sobel told him that "every effort and alternative to get me a temporary light duty position are being made by you and your office. I would like to thanks [sic] in advance for the time and consideration to this matter. Also I want to apologize to you for any inconvenience I had caused you in your busy and stressful work-time." Reyes testified that he did not believe that this request for advance sick leave was granted.

Reyes testified that he again requested light duty in about February, 2000. At that time he told Union president Sobel that he was writing letters to his senator and congressman because Rogers denied his requests for a light duty assignment and he was suffering financial hardship. Sobel advised him not to write the letters and offered to call Rogers.

Shortly thereafter, Rogers called Reyes and asked about his writing to the politicians. Reyes asked if he was calling to offer him a light duty position and explained that he could not

support his family. Rogers said he would call him back. Shortly thereafter, Rogers called and offered Reyes a light duty assignment beginning immediately in the parking lot guard shack. Reyes accepted that position and worked there for about seven months beginning in February, 2000.

When that position ended, Rogers offered Reyes a position driving a van making deliveries of small parcels. Reyes accepted and he worked at that assignment from November, 2000 to early January, 2001. Reyes quit that position because his shoulder was painful and he was scheduled for surgery. Rogers told him that he would give him a light duty assignment when he returned to work following the operation. In early January, Reyes filed another appeal of the workers compensation denial.

On January 19, Reyes had shoulder surgery. He was out of work until March or April, 2001, and then was assigned to limited duty as the lobby director in the Main Post Office, answering questions and directing patrons. He worked in that position for one year, until May 30, 2002.

In July, 2001, Reyes suffered a knee injury on the job. He filed a workers compensation claim for this injury which the Department of Labor found to be work related.

2. The Fall, 2001 Incident

Reyes testified that in the Fall of 2001, while working as the lobby director, he passed Rogers in the post office parking lot. Rogers called him over and according to Reyes, said "Tony, I'm tired of your shit. If you cannot be a letter carrier I don't need you at all. I'm going to call the Inspector on you. I'm going to get you arrested, and I'm gonna find out when you do something wrong so you can get arrested." Reyes asked Rogers why he was talking to him in that manner and Rogers said that if he could not be a letter carrier he would send him home without pay. Reyes told him to do what he had to do, and Rogers left.

Reyes' testimony as to the date of that conversation was inconsistent. He stated that it occurred in the Fall of 2001 because a few weeks later, in November, 2001, he was assigned to drive the van. However, as set forth above, Reyes testified that he drove the van in November, 2000, one year before this alleged threat. He ceased driving the van in early January, 2001.

Rogers testified that he did not recall having any conversation with Reyes in the Fall of 2001, but then conceded that he may have spoken to him in the parking lot, but specifically denied the conversation that Reyes testified about.[1]

[1] The General Counsel argues that Rogers' testimony establishes that he conceded having the Fall, 2001 conversation with Reyes. I do not agree. The testimony is as follows:
Q. Your testimony is that you don't recall that conversation?
A. I don't know, I've talked to [Reyes] or other people that are in the parking lot. I talk to all my employees, all the time.
Q. So it might have happened and you just don't recall it?
A. I might have talked to him, yeah, maybe.
JUDGE DAVIS: I think the question really is very specific, not that you might have talked to him, but whether or not you had that specific conversation.
THE WITNESS: No, I didn't have that specific conversation with him.

3. The Late April, 2002 Incident

A memo from the U.S. Postal Service Injury Compensation Office dated April 25, 2002 relating to Reyes' knee injury stated that Reyes was fit to return to full duty as of April 24, 2002. Reyes testified that although he was cleared to return to work because his knee was sound, his physician who was treating him for his shoulder injury determined that Reyes was still not fit to return to full duty work due to that injury. Reyes agreed that he could not yet perform the duties of a letter carrier.

Reyes testified that in about April, 2002, while working as the lobby director, he was told by Rogers that "I'm tired of your shit; I'm tired of your shit. I cannot do this anymore because you cannot be a carrier." Reyes interrupted, telling Rogers that they had spoken about this before. Rogers continued "I don't need you if you cannot be a letter carrier. At this moment, you are like excess. Whatever you do is nothing; because if you cannot be a letter carrier, I don't need you at all." Reyes told him to do whatever he had to do. Rogers continued: "You know what, I'm tired of your shit: I'm just going to send you home without pay. If you told [tell] Mark Sobel about this conversation, I [sic] going to fire you on the spot. You know what? I [sic] going to send the paperwork right then and terminate you. I'm going to terminate – I'm going to send the paperwork." Reyes asked Rogers why he was threatening him, and Rogers added "if you say anything to Mark Sobel or any other Union [sic] about this conversation, you're going to be fired right on the spot. I'm going to terminate you; I'm going to send you home without pay. Anything about this conversation, that's going to be the end of you."

Rogers testified that when he saw the April 25 memo stating that Reyes was fit to return to work on April 24, he determined that it was his obligation to return Reyes to full duty as a letter carrier. Reyes was then working as the lobby director. Rogers stated that he asked Reyes' supervisor if he knew that Reyes was fit for full duty, and asked him what work Reyes was doing. The supervisor replied that he did not know that Reyes was fit for full duty, and he was working in the lobby. Rogers saw Reyes walking nearby and told him that he was fit for full duty because of his knee injury and he must return to work as a letter carrier. Rogers told the supervisor that Reyes must be returned to full duty.

Rogers denied threatening Reyes with discharge if he spoke to Sobel about their conversation.

Reyes testified that he did not call the Union immediately after Rogers threatened him because he was afraid inasmuch as Rogers threatened to fire him on the spot, and he had not worked for nine months before that. However, about three months later, on August 8, Reyes told Sobel about the threat, and filed a grievance regarding being sent home.

4. The May 30 Incident

Reyes testified that four weeks later, on May 30, Rogers called him into his office and said "Tony, you know what? I'm tired of your shit. You've been doing whatever you want for a couple of years already. What's going on with your shoulder?" Reyes replied that his workers compensation case is pending since he had appealed the denial of the case to the Department of Labor. Rogers asked for proof, and Reyes said he would have proof in two weeks. Rogers then said "you know what, I can't live with you no more. You know what, I gonna send you home. You have to ask for light-duty." Reyes asked him why he was doing that since he knew that Reyes had children, and remarked that Rogers had sent him home for nine months without pay, and had denied his light duty requests three times, adding that he had sent papers to

Washington. Rogers asked "you turn me in to Washington?" Reyes said he sent all the paperwork to Washington since he believed that what Rogers did to him was unfair. Rogers then said "you know what, send him home; give him a light-duty request. Send him home."

Reyes was given a light duty request form. He completed it and sent it to Rogers. Thereafter, his request was denied. Reyes has not worked for the Respondent since May 30, 2002.

Rogers testified that he saw Reyes in the lobby and he asked his supervisor if Reyes was performing full duty as a letter carrier. The supervisor said no, that Reyes was still working in the lobby. Rogers said "he can't do that," and asked that Reyes report to his office. Rogers checked Reyes' records and learned that he was still listed as performing a limited duty assignment one month after he was supposed to have worked his full duty assignment as a letter carrier.

At the meeting, Rogers told Reyes that he cannot keep working in the lobby. "They put you back to full duty, you need to go back to carrying mail." Reyes replied that he could not return to full duty as a letter carrier since his shoulder still hurt. Rogers replied that if that's the case, "I can't let you do clerk work, you can't do the carrier work … I've got to send you home and you need to apply for light duty and give us some kind of medical restrictions that let us know what you can do and what you cannot do."

Rogers testified that since Reyes' workers compensation claim for the shoulder injury had been denied, he could not continue to employ him as a limited duty employee since he was cleared for full duty by virtue of his healed knee. Rather, inasmuch as Reyes was claiming a continued shoulder injury, he had to be sent home and apply for light duty if he wanted to remain at work. When the light duty request was received, Rogers would determine what work was available and what work Reyes could do based upon his medical restrictions in the light duty request.

Rogers testified that Reyes' failure to return to full duty work did not annoy him. Nor was he bothered by the fact that Reyes had been making light duty requests for five years. He did not think that Reyes was trying to avoid his duties as a letter carrier since many employees frequently request light duty.

5. Later Events

Reyes submitted a request for a light duty assignment dated June 10. Attached to his request was a letter from a physician dated June 14. The physician noted the following recommended medical restrictions: lifting: 0 pounds; reach above shoulder: 0 hours per day; simple grasping: 2 hours per day; walking work tasks: 4 hours per day; operate motor vehicle: 2 hours per day; working eight hours per day: no restrictions. The letter stated that Reyes could perform pushing/pulling, but no length of time was specified. The letter noted that surgical repair of Reyes' rotator cuff would permit him to resume normal activities.

By letter dated June 25, Rogers denied Reyes' request for light duty. Reyes stated that the medical limitations as set forth in the physician's letter "preclude you from performing your job assignment as a city letter carrier and there is no work available within your medical limitations." Rogers testified that Reyes' medical restrictions prevented him from performing the usual light duty assignments such as (a) casing mail which required reaching above his shoulder and grasping for more than two hours per day and (b) lifting trays of mail or buckets of magazines or delivering parcels because he could not lift any weight. Rogers added that these

medical restrictions are the reason that Reyes is not back at work.

Rogers further stated that in 2002 no light duty work was available. He stated that after the September 11, 2001 attacks and the Anthrax contamination of certain mail facilities, the volume of mail in the Flushing Post Office dropped 16% from the previous year, and there was a limited amount of mail to be processed.

In August or September, 2002, Reyes wrote to Senator Hillary Clinton. In the letter, he stated that Rogers threatened him twice: the first time, in mid-Summer of 2001, when Rogers allegedly said "I am going to send you home again and if you talk to Mark Sobel I will terminate you for good." The second threat allegedly occurred in the Spring of 2002 when Rogers said "you got me tired with this. If you cannot be a letter carrier I don't need you at all. I am gonna send you home for good, don't you dare talk to the union because I am gonna fire you, and I am gonna sign the paper to terminate you. I'll send the inspector on you; for anything you do wrong, I'll get you out of the Post Office without pay, etc."

Thus, according to Reyes' letter to Senator Clinton, Rogers threatened twice that Reyes would be discharged if he spoke to the Union. At hearing, Reyes testified that Rogers made that threat only once, in April, 2002, and specifically denied that Rogers threatened him in the Summer of 2001 if he spoke to Sobel.

Neither Reyes nor the Union filed a grievance regarding Rogers' threat to discharge him if he spoke to Sobel.

David Rudy, the Respondent's manager of labor relations, testified that the purpose of advance sick leave is to give employees an opportunity to earn their regular pay while out sick when they have no more sick leave in their account. Postmaster Rogers has the authority to grant advance sick leave. Rogers stated that he bases a determination on whether to grant advance sick leave mainly upon the hardship to the employee and his family, and also upon the employee's prior leave record, and how he used his leave, including whether he has been disciplined for abusing leave.

Rudy testified about the difference between limited duty and light duty. In both cases the employee cannot perform the full duties of his position due to an injury. When an employee suffers an on the job injury as the result of which the employee has medical restrictions on the type of work he can do, and the employee requests limited duty, the Respondent is obligated to find him limited duty work within his medical ability. The Respondent generally does so because when an employee is eligible for limited duty the Respondent has to pay him. Therefore, the Respondent seeks to find work for such people assuming that work is available. Even if work is not available, the Respondent "tends to make work" since the employee will be paid anyway, even if he is at home while eligible for limited duty.

If an employee suffers an off the job injury and applies for light duty, the Respondent is not obligated to find him work, but must make "every effort" to see if there is work available within the medical restrictions placed on the worker, and find such work.

Rogers testified that he granted advance sick leave to Reyes three times for the same reason: he was not able to perform his duties as a letter carrier and had financial responsibilities to his family. He also twice granted Reyes' request for limited duty following his job-related knee injury by assigning him as the lobby director.

Rogers testified that he has had discussions with Union president Sobel many times

over the years concerning employees' requests for light duty that he has denied. They also spoke concerning Reyes' need for light duty.

III. Analysis and Discussion

A. The Deferral to Arbitration

The Respondent argues that the charge should be deferred to the grievance-arbitration provisions of the collective-bargaining contract between it and the Union. The General Counsel opposes deferral. I find that the allegation that Rogers threatened Reyes with discharge if he sought the assistance of the Union cannot be deferred.

In *Jos. T. Ryerson & Sons, Inc*., 199 NRLB 461, 462 (1972), the Board refused to defer a similar threat that a steward would "have a hard time with the company and also the men in the warehouse" if he pursued his grievance. The Board noted that a threat of reprisal for participation in the grievance procedure "strikes at the foundation of [the] grievance and arbitration mechanism…." The Board noted that it will not defer where a "respondent has sought, by prohibited means, to inhibit or preclude access to the grievance procedures."

The Respondent's reliance upon *United Technologies Corp*., 268 NLRB 557 (1984) is misplaced. Although the Board deferred a threat concerning possible adverse consequences if the employee decided to process her grievance to the next step, the Board noted that the threat was "clearly cognizable under the broad grievance-arbitration provision of the parties' contract. *United Technologies*, at 560. Here, however, the parties' contract contains a more limited grievance-arbitration provision restricting grievances to issues "related to wages, hours and conditions of employment." See *Dallas & Mavis Forwarding Co*., 291 NLRB 980, 986 (1988) in which the Board indicated that *Ryerson* remains good law following *United Technologies*.

Although *United Technologies* specifically stated that a contractual provision provided that employees may not be discriminated against in violation of the Act, there is some question as to whether a similar provision in the Respondent's Employee Labor Relations Manual is incorporated into the collective-bargaining agreement.

Based upon the above, I find that the complaint allegation cannot be deferred to arbitration.

B. Credibility Determinations

The complaint alleges that in April, 2002, postmaster Rogers threatened Reyes with discharge if he sought the assistance of the Union. A resolution of that issue depends upon a determination of the credibility of the two main witnesses, Reyes and Rogers.

Although Reyes' testimony was detailed and specific, I have serious questions about his veracity. First, he testified about an alleged threat made by Rogers in the Fall of 2001. Reyes stated that Rogers told him that if he could not be a letter carrier he did not need him and would send him home. Rogers also allegedly said that he would call the inspector and get him arrested. Reyes repeatedly stated that this conversation occurred in the Fall of 2001 and stated that he remembered when it occurred because it was a few weeks prior to his assignment driving the van. However, it is undisputed that he began driving the van in the Fall of 2000, one year earlier. The fact that he based his recollection of this alleged threat on his driving assignment indicates clearly that, at a minimum, his memory was faulty.

In addition, Reyes admitted that he erroneously wrote to Senator Clinton that Rogers threatened him in the Summer of 2001 that he would terminate him if he spoke to Union president Sobel. At hearing he denied that Rogers made that specific threat at that time. The fact that Reyes would make a written allegation to a United States Senator that a top official of the Postal Service had threatened him when he in fact did not, again raises serious questions regarding his veracity. Further, the threat alleged in the letter to Senator Clinton that Reyes later denied occurred is identical to the April, 2002 alleged threat at issue here. Reyes admittedly wrongly accused Rogers of the Summer, 2001 threat. He may similarly have been mistaken about the identical April, 2002 alleged threat.

These two areas of Reyes' testimony, taken together, seriously undermine his credibility with respect to the alleged threat at issue here. One must closely question, given Rogers' denial of the April, 2002 threat, whether he uttered that threat.

I can find no logical reason why Rogers would have threatened to terminate Reyes if he spoke with Sobel. The Union has represented the employees of the Postal Service for more than 30 years. There is no evidence of hostility between this local union and Rogers. In fact, Rogers and Sobel have had numerous conversations over the years concerning employees' requests for light duty including at least one discussion regarding Reyes' request.

Indeed, Reyes acknowledged that Sobel told him that Rogers was making "every effort and alternative" to find a light duty position for him. I do not agree with the General Counsel that since that letter was sent 2 ½ years before the alleged threat it has no bearing on this issue. I believe that it shows the lack of hostility by Rogers toward Sobel or Reyes even during Reyes' extended period of absence from work.

The General Counsel also contends that Rogers was upset and offended in April, 2002 that Reyes was continuing to work in the lobby when he had been cleared for full duty. Rogers admitted that he told Reyes that since he was fit for full duty he must resume such work. In doing so, Rogers was simply acting pursuant to his authority and obligation to ensure that employees cleared for full duty are engaged in such work. Even assuming that Rogers was annoyed that Reyes failed to undertake his duties as a carrier, I cannot infer from that that Rogers would threaten him with discharge if he spoke with Sobel.

The General Counsel further argues that assuming that Rogers was angered by Reyes' failure to assume his carrier duties, he feared that Sobel's intervention would prevent him from sending Reyes home or stopping his limited duty, lobby work. The General Counsel reasons that Rogers resented Sobel's earlier February, 2000 successful request that he assign Reyes light or limited duty, and therefore threatened Reyes with discharge if he sought Sobel's assistance this time. I cannot agree.

Rather than showing that hostility existed because of Sobel's earlier intervention, the earlier assignment to Reyes shows that Rogers readily agreed to Sobel's request, which resulted in a one-year assignment – first in the guard shack and then driving the van. Indeed, Rogers' lack of hostility toward Reyes was shown in Reyes' testimony that Rogers told him that he would give him a light duty assignment when he returned to work following his shoulder operation. Rogers kept his promise by assigning Reyes to the lobby following his return from the operation, a position he worked in for one year. There is no evidence that Sobel's intervention was necessary in Rogers' making that assignment.

For the above reasons, I cannot credit Reyes' testimony that Rogers threatened him with discharge in April, 2002 if he sought the assistance of Sobel. I therefore cannot find that the

complaint allegation has been proven.

Based upon all of the above, I will recommend that the complaint be dismissed.

Conclusions of Law

1. United States Postal Service is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act in any manner, as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaint is dismissed.

Dated, Washington, D.C.

Steven Davis
Administrative Law Judge

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.