

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

UNITED STATES POSTAL SERVICE

and

CASE 10-CA-37903(P)

NATIONAL POSTAL MAILHANDLERS  
UNION, LOCAL 317

*John Doyle, Esq.*, for the General Counsel  
*Mr. John Alexander*, for the Charging Party  
*John C. Oldenburg, Esq.*, for the Respondent

**BENCH DECISION AND CERTIFICATION**

**Statement of the Case**

**KELTNER W. LOCKE, Administrative Law Judge:** The hearing in this matter opened before me on September 25, 2009 in Birmingham, Alabama. On that date, the parties presented evidence and rested. I adjourned the hearing to afford counsel the opportunity to review the transcript and exhibits, and they presented oral argument on October 27, 2009, after the hearing resumed by telephone conference call. On October 28, 2009, I issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.<sup>1</sup>

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<sup>1</sup> The corrected transcript volume reporting the bench decision bears the date of October 28, 2009. The bench decision appears in corrected form at volume 3 pages 256 through 267. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

**Further Discussion**

5 The Complaint in this matter alleges that Respondent violated Section 8(a)(5) and  
(1) of the Act by failing and refusing to furnish the Union with requested information  
relevant to, and necessary for, the Union’s performance of its duties as the exclusive  
bargaining representative of an appropriate unit of Respondent’s employees. In this case,  
the Union had requested that Respondent provide it with the “actual numeric number of  
10 Mail handlers needed on all tours at the Annex and Plant for the upcoming Memorial Day  
holiday.”

Based on the credited testimony of Respondent’s labor relations representative,  
Johnnie Jordan, Jr., I found that Jordan repeatedly, timely and truthfully told the Local  
Union’s president, John Alexander, that the requested information did not exist. Because  
15 an employer has neither the duty nor the ability to furnish information which does not  
exist, I concluded that Respondent did not violate the Act.

During oral argument, the General Counsel sought to cast doubt on Jordan’s  
credibility. The General Counsel cited 15 occasions during Jordan’s testimony when he  
20 “articulated a mantra that the [requested] information did not exist.” The General  
Counsel suggested that this repetition manifested “an intention to stress a point” which  
reflected adversely on Jordan’s credibility as a witness.

Moreover, the General Counsel argued that this “repetitious contention is  
25 inconsistent with the fact that he never made a written communication regarding the  
alleged conversation and he did not even alert the plant manager to whom he knew the  
[information] requests were addressed.”

Further, the General Counsel argued that “Mr. Jordan made no inquiry [of Postal  
30 Service personnel] as to what information was available in connection with projecting  
Memorial Day staffing needs. . .Mr. Jordan specifically testified that he did not inquire of  
the production supervisors as to what factors they had considered in making the  
President’s Day schedules.”

Clearly, these arguments relate to Jordan’s credibility as a witness. The law did  
35 not impose on Jordan a duty to respond to the Union in writing and the law also did not  
require Jordan to perform any investigating before responding to the Union. If Jordan  
already knew the correct answer, based upon his experience working for Respondent, the  
law did not require him to seek verification or confirmation from someone else.

40 Therefore, I understand the General Counsel’s arguments to be essentially as  
follows: Jordan, a labor relations representative, would have responded in writing to the

Union's request and would not have told the Union that the information did not exist without first making an inquiry to verify that fact.

5 Moreover, the General Counsel contends that Jordan's reply to the Union lay outside the established procedure by which the Respondent logged and replied to the Union's information requests. However, to determine whether the Respondent satisfied its obligation under the Act, I must determine whether it communicated the correct information to the Union in a timely manner, not whether it followed its own internal procedure in doing so.

10 Notwithstanding the General Counsel's arguments, I credit Jordan's testimony rather than that of Alexander. In addition to my concern that Alexander's recollection was not as good as Jordan's, I note that Alexander testified that at one point, Jordan encouraged Alexander to submit an information request.

15 This testimony seems rather implausible because the information did not exist. The record suggests no reason why Jordan would wish to invite a union to seek nonexistent information. Additionally, other cases involving this same Respondent do not suggest that its managers and labor relations representatives delight in responding to information requests and clamor for more. See, e.g., *Postal Service*, 339 NLRB 400 (2003); *Postal Service*, 339 NLRB 1162 (2003); *Postal Service*, 341 NLRB 655 (2004); *Postal Service*, 341 NLRB 684 (2004); *Postal Service*, 345 NLRB 409 (2005); and *Postal Service*, 345 NLRB 426 (2005). Accordingly, I cannot conclude that Alexander was as reliable a witness as Jordan and resolve conflicts in the testimony by crediting Jordan.

25 In effect, Respondent's agreement with the Union obligated it to determine the number and categories of employees needed to work a certain holiday and post a work schedule by noon on the Tuesday before the "service week" in which the holiday fell. (A "service week" begins on a Saturday and continues until midnight of the following Friday.) The Union's information request sought some of this same information well before the Tuesday deadline. However, I need not determine whether the Union was trying to "rewrite" its agreement with Respondent and do not reach such an issue. Rather, I simply decide that the requested information was not available, because nonexistent, at the earlier time the Union sought it.

35 The General Counsel argues, in effect, that the Union's information request sought an *estimate* of the number of employees needed for the Memorial Day holiday and that it was within Respondent's power to make such an estimate. Thus, the General Counsel stated, "Although Mr. Jordan who is not aware of the scheduling practices claimed that no estimate could be made, Mr. Mulcahy confirmed after lengthy testimony about the matter that a projection could be made but that the projection may not turn out to be accurate."

However, contrary to the General Counsel’s argument, the Union did not request an *estimate* of the number of employees. Quite explicitly, it sought the “actual numeric number” of Mail Handlers needed during the holiday. Thus, on cross–examination by Respondent’s counsel, Alexander testified, in part, as follows:

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- Q. MR. OLDENBURG: But did you ask for an estimate? Were those your words?
- A MR. ALEXANDER: No, no, I actually put down there an actual numeric number. You know.

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Respondent hardly can be faulted for failing to furnish an estimate when the Union did not ask for an estimate. Accordingly, this decision does not address the question of whether Respondent might, or might not, have had a duty to furnish an estimate had the Union requested one. Rather, I find that the Union requested “an actual numeric number” and that Respondent correctly answered that such a number did not exist.

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When, as here, the requested information is presumptively relevant, an employer bears the burden of proving its nonexistence. *Hanson Aggregates BMC, Inc.* 353 NLRB No. 28, slip op. at 3 (September 30, 2008); see also *Letterman Industries, LLC d/b/a Harmon Auto Glass*, 342 NLRB 152, 153 (2008), *Postal Service*, 310 NLRB 701, fn. 4 (1993). For the reasons discussed in the bench decision, I conclude that Respondent carried that burden.

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Indeed, even Alexander’s testimony acknowledged that the volume of mail varied from time to time and that “it’s harder to calculate now sometimes than it used to be.” The record does not establish that Respondent’s managers tried to make any estimate of holiday mail volume until they had to do so to comply with the contractual posting requirement. There would be no reason for them to expend such effort because they might have to do it all over again when more accurate data became available.

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Moreover, the record leaves no doubt that Respondent timely informed the Union that the requested information did not exist. Indeed, Labor Relations Representative Jordan told Local Union Vice President Alexander on April 1, 2009 that the information in question did not exist. That was two weeks *before* Alexander filed the information request.

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In sum, the information the Union requested did not exist and Respondent timely informed the Union of this fact. Respondent did not violate the Act.

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## 40 CONCLUSIONS OF LAW

1. The Board has jurisdiction over the Respondent pursuant to Section 1209 of the Postal Reform Act.

2. The Charging Party, National Postal Mailhandlers Union, Local 317, is a labor organization within the meaning of Section 2(5) of the Act.

5 3. The Respondent did not violate the Act as alleged in the Complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended<sup>2</sup>

10 **ORDER**

The Complaint is dismissed.

Dated Washington, D.C., December 7, 2009.

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**Keltner W. Locke**  
**Administrative Law Judge**

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

**APPENDIX A**

**Bench Decision**

5 This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board’s Rules and Regulations. I conclude that Respondent did not violate that act by failing and refusing to provide information requested by the Union, as alleged.

**Procedural History**

10 This case began on May 28, 2009, when the Union, National Postal Mail Handlers Union Local 317, filed an unfair labor practice charge against Respondent, the United States Postal Service. After an investigation, the Regional Director for Region 10 of the Board issued a Complaint and Notice of Hearing on July 30, 2009.

15 Respondent filed an Answer, dated August 12, 2009 and received in the Regional Office on August 14, 2009, and a First Amended Answer, filed and received on August 25, 2009.

20 A hearing opened before me in Birmingham, Alabama on September 25, 2009. At that time, both the General Counsel and Respondent presented evidence. Both sides rested and the hearing adjourned so that counsel would have the opportunity to receive and review the hearing transcript before presenting oral arguments.

25 On Monday, October 26, 2009, the hearing resumed by telephone conference call, but technical difficulties prevented the hearing from being recorded and transcribed. The hearing then resumed by telephone conference call on October 27, 2009. The General Counsel, the Union, and the Respondent presented oral argument. Today, October 28, 2009, I am issuing this bench decision.

**Jurisdiction**

30 Congress, by enactment of the Postal Reorganization Act, conferred on the Board unfair labor practice jurisdiction over the United States Postal Service, an independent  
35 establishment of the Executive Branch of the government of the United States. I find that the Board possesses and properly exercises that jurisdiction.

40 Further, I find that the Union is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act, which for brevity I will refer to simply as the “Act.”

Additionally, I conclude that the General Counsel has established that the persons alleged in Complaint paragraph 5 are Respondent’s supervisors and agents within the

meaning of Section 2(11) and 2(13) of the Act, respectively.

**The Relevant Facts**

5 At all material times, the Union has represented an appropriate bargaining unit consisting of Respondent’s employees identified in Complaint paragraph 5. Respondent has recognized the Union as the unit’s exclusive bargaining representative and such recognition has been embodied in successive collective bargaining agreements.

10 One of the agreements between these parties, which has been in effect at all material times, defines the unit employees’ “service week” to begin at 12:01 a.m. on Saturday and ending at midnight the following Friday. Another provision of this agreement, Section 11.6, concerns which unit employees will be required to work on official holidays such as President’s Day and Memorial Day. In pertinent part it provides  
15 that

The Employer will determine the number and categories of employees needed for holiday work and a schedule shall be posted as of twelve noon (i.e., 12:00 p.m.)  
20 on the Tuesday preceding the service week in which the holiday falls. As many full-time and part-time regular schedule employees as can be spared will be excused from duty on a holiday or day designated as their holiday.

Some bargaining unit members became concerned that Respondent was requiring more employees than necessary to report to work during a holiday. In part, they were  
25 vexed because Respondent, after requiring them to be available for work, did not actually give work to all of the affected employees, but sent some of them home.

This concern became particularly acute after the 2009 President’s Day holiday, and the Union filed a grievance about it. The vice president of the Local, John  
30 Alexander, became concerned that the 2009 Memorial Day holiday would result in a similar situation. He and Respondent’s Labor Relations Representative, Mr. Johnnie Jordan, Jr., had meetings about the Union’s grievance, and during the course of these discussions, Mr. Alexander communicated his concerns about the coming Memorial Day holiday.

35 Mr. Alexander testified that Mr. Jordan suggested that he file an information request to address this problem. Mr. Jordan denied making such a statement.

40 On behalf of the Union, he filed three information requests, on April 15, April 28 and May 6, 2009. All of these documents sought the following information:

Considering the anticipated volume, threshold of standard mail, dispatch commitments and the number of machines required to run, what is the actual

numeric number of Mail handlers needed on all tours at the Annex and Plant for the upcoming Memorial Day holiday[?]

5 Mr. Alexander testified that Respondent did not reply to these information requests, and the Union decided to file the unfair labor practice charge which began this case. However, Respondent's Labor Relations Representative contradicted parts of Mr. Alexander's testimony.

10 According to Mr. Jordan, he and Mr. Alexander reached an oral agreement concerning how to handle such situations in the future. Mr. Jordan's testimony described a discussion he and Mr. Alexander had on about April 1, 2009, concerning the President's Day grievance and how to avoid a similar problem in the future.

15 Mr. Jordan noted that under the collective-bargaining agreement, management did not have to post a schedule listing which employees would be required to work on a given holiday until the Tuesday before the beginning of the service week in which the holiday took place. Even at that point, he explained, it was not possible to estimate with total accuracy how many employees would be needed. The volume of mail fluctuated too much.

20 Inaccuracies in such an estimate obviously could result in more employees being required to show up for work than would be needed. The collective-bargaining agreement specified when Respondent had to give notice of the holiday schedule, but, Mr. Jordan testified, he proposed conferring with the Union before the posting of the schedule. According to Mr. Jordan, Mr. Alexander agreed to settle the President's Day grievance on this basis. Mr. Jordan testified, in part, as follows:

30 I said as far as us wanting us to avoid something happening Memorial Day, I can agree with that. We should do something. So, I said, this is what we'll do. I said, why don't I just give you some language and a settlement so that way I can say something to the effect that you know management will make an effort to sit down with the union, just prior to posting on the Tuesday before, because you know that information won't be available until the Tuesday before a holiday. I said, so I'll put something in writing and say they'll sit down with you, look it over, if you have any issues you can address it at that point. So he said, okay, that sounds good.

40 Although Mr. Alexander denied such an agreement, for several reasons I credit Mr. Jordan, who impressed me as being more confident of his testimony and more detailed.

Mr. Alexander's memory did not appear to be as complete. On occasion, he would qualify his testimony with words such as "If I remember correctly," "If my memory serves me correctly..." and "if I recall the conversation."

5 When the General Counsel asked Mr. Alexander if Jordan had told him that it wasn't possible for management reliably to estimate manpower needs until just before the posting deadline, Mr. Alexander answered "I don't remember anything like that. Uh, not him making that, I don't recall seeing anything like that until I got a step three decision. And some of that language was in there, but I don't recall him saying anything about that."

10 Thus, Mr. Alexander did not squarely contradict Mr. Jordan on this point but only testified that he could not remember.

15 Moreover, Mr. Alexander himself admitted that the volume of the mail fluctuated and that it fluctuated more now than it had in earlier years. He testified: "It does vary. It's getting kind of harder you know to really pick out how it goes. It used to fluctuate seasonally, you know. It was in distinct patterns it would go. Now, it could be from day to day something going on. You know. So it's harder to calculate now sometimes than it used to be."

20 Therefore, I conclude that Mr. Jordan did indeed tell the Union representative that an accurate estimate could not be made before the posting deadline. The Union therefore did have a timely answer to its information request, and a correct one. The information that the Union requested did not exist.

25 An employer does not have an obligation to furnish information to a requesting union if such information does not exist. Therefore, I further conclude that Respondent did not breach its obligation to furnish relevant and necessary information which the Union requested.

30 When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, and Order. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

35 Throughout this proceeding, all counsel and representatives have demonstrated the highest degree of professionalism and civility, which is truly appreciated. The hearing is closed.