

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

**Advice Memorandum**

DATE: June 27, 1996

TO : Charles Deal, Acting Regional Director  
Region 12

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: United States Postal Service  
Case 12-CA-17568(P)

530-6017-5000

This case was submitted for Advice as to whether the Employer violated Section 8(a)(5) of the Act by implementing an EEO mediation procedure in which the subject of mediation may also be the subject of concurrently filed grievances, by failing and refusing to give notice of same to the Union and by refusing to allow the Union's presence at mediation unless specifically requested by the claimant/discriminatee to be his/her personal representative, thereby denying the Union the opportunity to be present for the adjustment of grievances. Further, is a nationwide remedy appropriate.

FACTS

On September 30, 1986, the Board issued its Decision and Order in United States Postal Service, 281 NLRB 1015, finding a violation of Sections 8(a)(5) and 8(a)(1) of the Act when the Postal Service conducted EEO mediations with bargaining unit employees in Phoenix, Nevada and Columbus, Ohio, when concurrent grievances were filed and pending, but refused to notify the collective bargaining representative or to allow it to be present at mediations in which grievances were resolved. In that case, the Board stated that "the clear statutory mandate of Section 9(a) of the Act must prevail over the EEO administrative regulations," 281 NLRB at 1015, and thus that an employer is not privileged to attempt to adjust or to adjust contract grievances with individual employees without affording their collective-bargaining representative the opportunity to be present at the adjustment. The Board reasoned that the union has a clear statutory right set forth in 9(a) to be present at the adjustment of grievances. Further, the Board noted that nothing in the EEO regulations, including the right to confidentiality, limits the union's right. Indeed, the Board stated that "the anonymity requirement is to protect

the identity of the aggrieved employee from management, not from the union." Id. at 1016. The Board stated:

The Postal Service was doing more in these cases than simply adjusting EEO complaints -- it was also attempting to adjust or, in some instances adjusting, concurrent grievances under the terms of its contract with the Union through its internal EEO procedures. As we found above that the Postal Service was not privileged to resolve contract grievances with individual employees in derogation of the Union's statutory rights, we find that it violated Section 8(a)(5) and (1) of the Act by not affording the collective-bargaining representatives an opportunity to be present at grievance adjustments as required by Section 9(a) of the Act.

Id. At 1018.

Subsequently, on October 19, 1987, while the case was pending before the Sixth Circuit, the Postal Service and the APWU entered into a Settlement Agreement dated October 19, 1987, in which the APWU essentially waived its Section 9(a) rights and which allowed the Postal Service to assert EEO settlements, entered into without the knowledge of the union, as a defense in arbitration to any further remedial relief from the arbitrator. The parties further sought to have the Board vacate its decision. The Board resisted, after which the Sixth Circuit issued an order on February 27, 1989, directing the Board to vacate its Decision and Order and dismiss the underlying complaints. By order dated May 18, 1989, the Board accepted the court's remand and vacated its order of September 30.

Apparently, the Employer has implemented an EEO mediation procedure in Florida. It appears that this procedure was developed to help settle a dispute which arose over certain aspects of the Postmaster General's implementation of the consent decree in Hampton v. Frank issued by the U.S. District Court of the Northern District of Florida, Tallahassee Division. The consent decree issued on July 29, 1986; it settled a class action alleging race discrimination against Black employees of the Employer. The court retained jurisdiction over the action for a period of six years for the purpose of enforcing the decree. Prior to the expiration of the six year period set by the consent decree, a dispute arose over certain aspects of the Postmaster General's implementation of the decree. Following negotiations, an agreement settling the dispute that gave rise to that motion was reached (the Hampton

Agreement). The Hampton Agreement was limited to certain Black employees (the Agreement Beneficiaries). The settlement set up a procedure whereby class members could request mediation in lieu of EEO counselling as a first step in the EEO process. It further allows the USPS to extend these procedures to employees who are not Agreement Beneficiaries. However, the Hampton agreement is silent on who may attend the mediation and thus does not preclude the Union from attending mediation. By order dated May 10, 1994, the U.S. District Court for the Northern District of Florida, Tallahassee Division, issued an order of dismissal, based on the Hampton Agreement.

During September, 1995, at an EEO mediation training session in Atlanta, David Dean, President of the NPMHU Local 318, the Charging Party herein, sought to discuss his concerns regarding the EEO mediation program with Holloway Adair, Manager of Employee and Labor Relations Division. On September 20, 1985, Dean wrote Adair a letter outlining his concerns, citing the Union's rights under Section 9(a), and requesting inter alia, that the Postal Service discontinue grievance adjustment attempts without notice to and attendance by a NPMHU representative.

On December 19, 1995, Dean met with Postal Service representatives who told him that 281 NLRB 1015 meant nothing because of the Sixth Circuit order, that EEO mediations would continue without notice to the Union, and that the Union would not be allowed to be present, and cited the APWU settlements as controlling on the NPMHU.

In a December 21, 1995, letter from Bruce Jacobsohn, Deputy Chief Field Counsel, Jacobsohn reiterated the Postal Service position and that various APWU agreements were controlling with the NPMHU. Jacobsohn's letter further states, in pertinent part:

It is my understanding that during the mediation training sessions all parties were informed that if the mediation issue involved a contractual issue, that the participants were to contact the North Florida District Labor Relations staff or Ron Deason, Pensacola for advice. Further, that at this session, the parties were advised consistent with the earlier memorandum of understanding with the APWU that if the issue at mediation and its possible resolution required agreement of any or all of the unions, the mediation settlement was supposed to contain language that stated "subject to agreement by the local union(s)". If somehow these contractual matters have slipped through the process, they

certainly should be brought to light at the third step of the grievance procedure wherein the representatives of management and the union could easily secure the relevant EEO/redress information from the North Florida District EEO staff - the particular individual having an EEO complaint and its status.

The Union is aware of only one "dual issue" mediation in North Florida, and knows of no instance where the Employer has cited a mediation result as a defense to a grievance.

The Employer makes the following arguments in support of its right to deny the Union notification of or access to EEO mediations that also involve contractual grievances:

- The Union should seek its remedy in court or through legislative enactment.
- USPS cannot modify the EEO process to include the union.
- USPS cannot select the employee's personal representative.
- The regulations implementing the EEO process do not require inclusion of the union.
- The Hampton resolution requires the USPS to utilize mediation.
- The Civil Rights Act of 1964 requires it to participate in mediation.

#### ACTION

Complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by implementing an EEO mediation procedure which is designed to adjust or attempt to adjust contract grievances with individual unit employees without affording the employees' collective-bargaining representative the opportunity to be present at such adjustments as required by Section 9(a). However, a national bargaining order is not warranted at this time since there is no evidence that the Employer has implemented this procedure on a nationwide basis.

First, the tension between EEO processes and Section 9(a) of the Act was examined by the Board in United States Postal Service, 281 NLRB 1015. In that case, the Board stated that "the clear statutory mandate of Section 9(a) of the Act must prevail over the EEO administrative regulations," 281 NLRB at 1015, and thus that an employer is not privileged to attempt to adjust or to adjust contract grievances with individual employees without affording their

collective-bargaining representative the opportunity to be present at the adjustment." Although the Board accepted the court's remand and vacated its Decision and Order in that case, based on a settlement entered into between the USPS and the APWU, the Board has continued to cite that case for the proposition that an employer violates Section 8(a)(5) by attempting to adjust or adjusting grievances without providing the union with an opportunity to be present.<sup>1</sup> Further, the Board's analysis and conclusions in that case represent a well reasoned and legally supportable view of the relationship between EEO and Board law, and should be applied to the facts here.

Second, the charging party here, the NPMHU, is **not** bound by whatever waiver of statutory rights the APWU gave to the Employer in settling the case in 281 NLRB 1015. The NPMHU represents a different unit from the APWU, and was not a party to the settlement agreement in 281 NLRB 1015.

Third, the Hampton Agreement does not preclude issuance of complaint. The Hampton Agreement involved settlement of a class action alleging violation of a consent decree. The class in that case (the Agreement Beneficiaries) was limited to certain Black employees. The settlement set up a procedure whereby class members could request mediation in lieu of EEO counselling as a first step in the EEO process. It further allows the USPS to extend these procedures to employees who are not Agreement Beneficiaries. However, the Hampton agreement is silent on who may attend the mediation and thus does not preclude the Union from attending mediation.

Fourth, the Union's right to be present does not preclude the employee from selecting another personal representative. The Union is there pursuant to its statutory right as the exclusive bargaining representative.

Finally, assuming the Civil Rights Act requires the USPS to participate in the mediation, this does not preclude the Union from being present.

For all of the above reasons, we agree with the Region that the Employer violated Section 8(a)(5) by implementing an EEO mediation procedure which is designed to adjust or attempt to adjust contract grievances with individual unit employees without affording the employees' collective-bargaining representative the opportunity to be present at such adjustments as required by Section 9(a). *[FOIA EXEMPTIONS 2 and 5]*

<sup>1</sup> Van Can Co., 304 NLRB 1085, n.1 (1991).

[FOIA EXEMPTIONS 2 and 5, CONTID,  
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B.J.K.

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2 [FOIA EXEMPTIONS 2 and 5

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