

**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-078913**

**NATIONAL POSTAL MAIL HANDLERS UNION,  
LOCAL 300, LUNA**

*Lynda Tooker, Esq.*, Counsel for the  
General Counsel  
*Collette Walsh, Esq.*, Counsel for the  
Respondent

**Decision**

**Statement of the Case**

Raymond P. Green, Administrative Law Judge. I heard this case on September 27, 2012 in Brooklyn, New York. The charge and the amended charge were filed on April 11 and April 26, 2012. On May 31, 2012, a Complaint was issued and as amended at the hearing, alleged as follows:

1. That on January 12, 2012, the Union requested, in relation to an alleged incidence of sexual harassment, (a) statements given pursuant to Respondent's investigation of the incident and (b) the names of witnesses interviewed during the investigation of the incident.
2. That on January 30, 2012, the Union requested that the Respondent furnish any past statements and notes of Joe Soriano relating to the alleged sexual harassment issue.
3. That since on or about January 27, 2012, the Respondent has refused to furnish the union with (a) statements given during the investigation and (b) statements of notes of Joe Soriano.
4. That the Respondent, since about January 27, 2012, has delayed providing a complete list of witnesses and interview dates.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

**Findings and Conclusions**

**I. Jurisdiction**

The Respondent is subject to the jurisdiction of the National Labor Relations Board pursuant to Section 1209 of the Postal Reorganization Act of 1970. It also was conceded and I find that the Union is a labor organization as defined in Section 2(5) of the Act.

## II. The alleged unfair labor practices

The facility involved in this case is a mail processing plant located in Melville, New York and there are approximately 2000 people working at this location. The facility's manager is Keith Fisher. Other managers or supervisors involved in this case are Demetrius Morse and Steve Humin. Joe Soriano, another manager, is mentioned in the Complaint although his involvement was minimal at best.

The National Postal Mail Handlers Union, Local 300, LUNA is the collective bargaining representative for the mail handlers located at this facility. Robert Lussos is the branch president of the Union and Dennis Weinheim is a shop steward.

There is a collective bargaining agreement between the parties and it has a grievance provision which presumably allows for arbitration in the event that a grievance is not resolved at an earlier level. Under the terms of the contract, a grievance has to be filed by an employee within 15 days of an event and the Union has the opportunity to file a grievance within 15 days of an event or within 15 days after it becomes known to it. In addition, the Respondent apparently has a procedure for dealing with racial, sexual and other types of equal opportunity complaints which is separate and apart from the collective bargaining agreement's grievance/arbitration procedures.

On or about January 1, 2011, employee Sharon Murray verbally complained to Dennis Weinheim that she had been sexually harassed by Demetrius Morse. In substance, when she started work and she asked how he was, he responded that he was horny. She also told Weinheim that she had previously complained about Morse about an incident that occurred back in 2009. In that instance, Murray did not actually file a grievance and it seems that the matter was informally resolved when Soriano investigated the matter and assured Murray that he had spoken to Morse and that it would not happen again. Soriano did not record or make any memoranda regarding his actions at the time.

On January 5, 2011, Weinheim spoke to manager Humin and told him of Murray's allegation against Morse and also mentioned the prior complaint that had occurred two years before. Humin said that he would look into the matter and Weinheim helped Murray compose a document describing the incident. This was presented to Humin.

On January 12, 2012, Weinheim sent an e-mail to Humin and Keith Fischer that requested certain information and documents. This read as follows;

1. Request the status of management's investigation to date. Please provide copies of any/all statements to date. Please provide the names of everyone interviewed to date (and the date of interview). Please provide what further investigative stages are expected to continue to date (if applicable).

2. Request whether or not the Postal Inspection Service was contacted; when they were contacted (if applicable); who was contacted (if applicable).

3. Request any/all corrective/disciplinary actions to Demetrius Morse to date. Request copies (if issued).

In January, the Employer interviewed the parties involved plus some individuals who were in the area and who might have heard the remarks. Murray was interviewed by the Company in the presence of the Union's agents and they obtained copies of her statements at

the time they were given. An employee named Kelly DiMassimo was interviewed in the presence of Mr. Lussos because she requested a union representative to be present. A copy of her statement was given to Mr. Lussos at the time of the interview. Another employee, Al Friedberg was interviewed and he apparently stated that he had not heard the alleged statement made by Morse. A union agent was not present when he was interviewed but Friedberg did tell Weinheim that he was interviewed and told him what he had said.

In addition, the Morse was interviewed by Fischer and he admitted the statement that he made to Murray. Additionally, Soriano was interviewed and he said that he had failed to make any reports of the incidents that occurred back in 2009.

On January 27, 2012, Humin responded to Weinheim’s January 12 information requests. In pertinent part, he stated:

The following employees have been interviewed by Keith Fischer, Plant manager and myself: Ms. Murray, Joseph Soriano, Demetrius Morse. Ms. Murray has been interviewed with either Robert Lussos and/or yourself present. Once the investigation is completed, management will take the appropriate actions.

With respect to the requests for witness statements, Humin stated that the Company was not going to “share internal management investigations” as this was not required under Board law. I also note that although naming Murray, Soriano and Morse as persons who were interviewed, the letter, probably inadvertently, left out DiMassimo and Friedberg. (As noted above, the Union was aware that both had been interviewed by management and in the case of DiMassimo, the Union’s branch president was actually present.

On January 30, 2012 Weinheim, in response to the Respondent’s January 17 letter, sent another letter to Humin. In pertinent part, this stated:

Please clarify to me whether or not the investigation was over prior to 1/27/12. Please review the list of employees that you state that you interviewed. I have reason to believe that you may have left some of the names of interviewees out of your letter. I also asked for the date of your interviews that were not addressed in your letter as well as whether or not the Postal Inspection Service was involved...

You cite 2 excerpts from NLRB decisions. I believe you have misinterpreted and/or have inaccurately applied the two cases to my request for the flowing reasons...

This is simply a sexual misconduct case between a supervisor and an employee. I already have the statement of Ms. Murray. I want the statements of Mr. Morse (the alleged sexual offender) and any statements/past notes of Joe Soriano who originally took the employees’ prior complaints and forewarned Mr. Morse of future misconduct. I am looking to see if management investigated/questioned anyone regarding any other past harassing conduct including the singing chants in 2010.

The relevancy of such information is outlined in the following:  
 1. To determine if management conducted a thorough investigation and/or had any part in concealing or protecting the alleged misconduct.  
 2. To determine if the punishment (if any) fits the crime or was consistent with Craft employee’s discipline for same/similar infractions (Disparity. Examples, Butler, Chianese, DeFeo, Elize, Chourdary etc.

3. To determine whether or not Mr. Morse denies any of the alleged misconduct, to allow the Union the knowledge of where to focus/concentrate its investigation.
4. To determine if management's actions were appropriate in order to determine whether or not a grievance exists.
5. To determine whether or not to recommend the grievant to file an EEO complaint.
6. To get closure to the employees' complaint.
7. To see if your investigative actions rose to the same investigative level as when management heard that an unknown employee said they hoped Sharma's plane crashed when she went on vacation.

At some undisclosed time in January or February, Murray filed an EEO complaint pursuant to the Employer's EEO procedures.

On February 14, 2012 the Respondent issued a disciplinary action against Morse based on his admission that he had made the statements alleged by Murray and past conduct involving Murray in September 2009. <sup>1</sup> This involved a 14 day suspension. Also, his hours were changed so that he would not come into contact with Murray. Finally, he was no longer allowed to fill in as an acting manager, albeit keeping his supervisory position.

This disciplinary action was then communicated to the Union by the Company's EEO officer. (Presumably from the Respondent's point of view, this matter had been investigated and resolved as no grievance had been filed over sexual harassment complaint either by Murray or the Union).

On February 20, 2012, Weinheim sent a memorandum to Humin to follow up on the January 30 letter. This stated:

On 1/30/12 I sent you a letter ... relating to Sharon Murray. I have yet to receive a response...<sup>2</sup>

The Union has settled dozens of grievances over the years relating to information requests. Attached are only 3 to support both parties understanding of what is to occur.... I would like the information I requested ASSAP...

In response, Humin wrote to Weinheim on or about February 20, 2012 as follows:

I am in receipt of your letter dated January 30, 2012. The Agency stands by its position as articulated in its letter of January 27, 2012. The Agency is in compliance with Board case law by providing you with the names of the witnesses that were interviewed. As the investigation and any discipline related to a Management employee who is not a member for your bargaining unit, I do not see any relevance to your request. As I previously noted, the Agency has to balance the privacy rights of its employees as against its duty to provide information to the Union which is relevant to their duties. The Agency is fully committed to ensuring that the workplace is free from harassment and will take all necessary steps to make sure that occurs. If you become aware of any conduct on the part of any employees which potentially violated our regulations and

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<sup>1</sup> Soriano also received a disciplinary action based on his failure to document his investigation into Murray's complaint against Morse back in 2009.

<sup>2</sup> This memorandum also refers to a different request for information relating to another matter.

policies as they relate to harassment in the workplace, I would urge [you] to report that conduct to management immediately so it can be investigated.

5 On or about March 13, 2012, Weinheim, on behalf of Murray, filed a grievance at step one of the procedure. This grievance does not allege the actual sexual harassment claim or seek any remedy on behalf Murray. Instead, the grievance claims that the Company violated the contract by not furnishing requested information to the Union regarding the claim. In pertinent part, there is the claim that witness statements are necessary and that the Respondent failed to state in its previous response that management had interviewed Al Friedberg and Kelly DiMassimo. The grievance goes on to state:

15 The Union contends that the Plant manager and Steve Humin has violated the intent and purpose of the National Agreement..., has violated the NLRA, and has violated the parties past understanding and settlements regarding Requests for Information. In addition, management has interfered with the Union's ... rights to conduct a timely investigation and/or to file a timely/thorough/well investigated grievance for a possible violation of the Sexual Harassment and/or General Conduct Policies. It is the Union's objective to investigate whether or not management conducted a thorough or proper investigation to determine if the punishment (if any) fits the crime. The Union also has reason to believe management is showing favoritism toward the AMDO and disparity toward MH Craft employees for violation of "conduct."

25 However, as noted above, by March 13, 2012, the Union had been informed by the Employer that Morse had been suspended on February 14, and that his hours had been changed so that he would not be in contact with Murray. Also noted, is the fact that the Union's local president was present at the interview of DiMassimo and had a copy of her statement. The Union's agents were also aware that Humin had interviewed Friedberg. It seems that there is no dispute that neither DiMassimo nor Friedberg actually heard the alleged remarks made by Morse, but since Morse confessed, their statements would not be relevant.

30 On April 3, 2012, Keith Fischer sent an e-mail to Lussos asking if Weinheim's letter is the position of the Union. He goes on to state: "After discussing this issue several times with you, I believe we both considered the matter closed."

35 On April 9, 2012, Lussos responded by e-mail wherein he acknowledged that he was aware of the disciplinary action taken against Morse and that the Company had taken the Murray sexual harassment allegation very seriously. Lussos stated that although he thought that management had "made an honest investigation into this matter based upon what information you had at the time of the investigation," he expresses a concern that the 2009 incident was not given so much weight. Lussos expresses his opinion that the Union "should have been involved with the investigation and to offer its assistance..."

45 As noted above, the Union never actually filed a grievance that complained about the sexual harassment of Murray. The merits of that claim were investigated by management and the Union's agents were present at the interviews of Murray and DiMassimo. From the beginning of the investigation there was no dispute about the remarks that Russo made to Murray and after she filed an independent complaint with the Company's EEO procedure, Russo received a substantial disciplinary action on February 14, 2012 which was then communicated to the Union. Since there is no evidence to suggest that Murray or anyone on her behalf, sought any type of relief for herself, (such as money damages), it seems reasonable to conclude that the merits of this incident was resolved on February 14, 2012. It therefore is

somewhat difficult for me to imagine what if any relevance, witness statements would have been after that date.

### Analysis

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This complaint alleges that the Respondent violated Section 8(a)(5) by **(a)** refusing to turn over witness statements regarding an incident between supervisor Morse and mail handler Murray and **(b)** by failing to timely turn over a list of witnesses interviewed by the Respondent in relation to the incident.

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As to the first issue, the General Counsel acknowledges that under *Anheuser Busch*, 237 NLRB 982 (1978), the Respondent is not required to provide witness statements in response to a union's request for information that may be relevant to a potential or actual grievance. Nevertheless, the General Counsel seeks to have the Board overrule this decision.

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My role in these proceedings is to receive the facts as expressed by witness testimony and documents and apply the existing Board law to those facts. It is not within my discretion to overrule or modify existing Board law; a matter which is up to the Board itself. I therefore conclude that this allegation of the Complaint must be dismissed by me.

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The second issue involves an alleged delay in furnishing the names of the witnesses who were interviewed by the Respondent in connection with Murray's complaint. Although the *Anheuser Busch* decision does permit a Respondent to refuse to turn over witness statements, it does not allow a company to refuse to provide the names of witnesses. And in this regard, where an incident may give rise to a grievance, the identity of those persons who may have witnessed the event in question would obviously be relevant under *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Nor would the identity of potential witnesses be deemed "confidential" under *Detroit Edison v NLRB*, 440 U.S. 301 (1979).

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In the present case, the incident occurred on January 1, 2012 and the witnesses were interviewed shortly thereafter. The Union's shop steward requested witness statements and the identity of the witnesses in an e-mail dated January 12, 2012. On January 27, 2012 the Respondent replied and stated that the people interviewed were Murray, Joseph Soriano and Demetrius Morse. For some reason, this letter omitted the fact that two other persons, DiMassimo and Friedberg, had also been interviewed. But as to DiMassimo, the Union's representatives were already aware that she had been interviewed because the Union's branch president had been present at her interview and had obtained a copy of the statement. Also, the Union was aware that Friedberg had been interviewed because Friedberg had told a union agent that he had been interviewed and that he did not hear what had been said by Morse.

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It seems to me that notwithstanding the Respondent's delay in furnishing the names of two of the witnesses, this was probably inadvertent,<sup>3</sup> and under the circumstances, not prejudicial to the Union's right and ability to investigate and if necessary, to process a grievance on behalf of Murray. (In fact, no such grievance was ever filed on her behalf as to merits of her complaint). It is clear that the Union already knew the names of all witnesses and indeed had

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<sup>3</sup> I find persuasive Respondent's argument that since Morse had already admitted the transgression and since DiMassimo and Friedberg did not actually hear anything, there was no reason for Fischer to hide the fact that these two witnesses had been interviewed by the Respondent. I therefore find that Fischer's testimony regarding his verbal notification of Friedberg's interview in January or February 2011 was credible.

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5 been present during some of the interviews, including DiMassimo's. It is also clear that by February 2012, the Union was aware that there was no dispute regarding the fact that Morse had made the offensive comments to Murray. I therefore find that the failure to list the names of Friedberg and DiMassimo until months later was, in these circumstances, at most, a de minimus violation of the Act. I therefore conclude this allegation should also be dismissed.

**Conclusions of Law**

10 The Respondent has not violated the Act in any manner alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended <sup>4</sup>

**ORDER**

15 The Complaint is dismissed.

Dated Washington, D.C. December 3, 2012

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Raymond P. Green  
Administrative Law Judge

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<sup>4</sup> 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.