

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

**UNITED STATES POSTAL SERVICE**

**and**

**Case No. 28-CA-096422**

**FILIMON PINO, An Individual**

*David Garza, Esq.*, Counsel for the General Counsel.

*Dallas Kingsbury, Esq.*, Counsel for the Respondent.

**DECISION**

**Statement of the Case**

**Joel P. Biblowitz, Administrative Law Judge:** This case was heard by me on July 16, 2013 in Albuquerque, New Mexico. The Complaint herein, which issued on March 29, 2013 and was based upon an unfair labor practice charge and an amended charge filed on January 15, 2013 and March 28, 2013 by Filimon Pino, an individual, alleges that on October 9 and October 12, 2012<sup>1</sup> the United States Postal Service, herein called Respondent, by Eric Martinez, its Postmaster and a supervisor and agent of the Respondent within the meaning of Section 2(11) and 2(13) of the Act, threatened employees with not renewing their transitional employee letter carrier contracts because they engaged in union activities, and on October 9 and November 5 failed to hire/rehire Pino because of his union activities.<sup>2</sup>

**I. Jurisdiction and Labor Organization Status**

Respondent admits, and I find, that the Board has jurisdiction over the Respondent pursuant to the Postal Reorganization Act of 1970 and that the National Association of Letter Carriers, AFL-CIO, herein called NALC, is a labor organization within the meaning of Section 2(5) of the Act.

**II. The Facts**

Pino had been employed by the Respondent in the Albuquerque area as a transitional employee, letter carrier from October 2006 until about October 3. Transitional employees, herein, at times, referred to as TEs, are employed to supplement and to fill in for the regular letter carriers who are on vacation, sick leave or are otherwise absent from work, or to cover over-burdened routes; their principal purpose is to reduce overtime. Although they are usually assigned to a particular station, they are often transferred to other stations when needed. Their work year is comprised of three hundred and sixty days, with a five day break during which the Postal Service determines whether they will be rehired for the following year. Rana Alexander, Respondents supervisor, customer service support for the City of Albuquerque, testified that the national contract and the local agreement do not contain provisions that are applicable to the

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<sup>1</sup> Unless indicated otherwise, all dates referred to herein relate to the year 2012.

<sup>2</sup> Counsel for the General Counsel's unopposed Motion to Include Post Hearing Exhibits in the Record is hereby granted.

working conditions and leave provisions for the transitional employees.

5 In February, Pino was assigned to the Steve Schiff Station in Albuquerque and submitted an annual leave request form to his supervisor, Joe Alberti, to take two hours of leave on March 5. He met with Alberti, told him that the two hours of leave were for a family function, and Alberti said that since it was only for two hours it wouldn't be a problem and he approved the leave request. When he arrived for work on March 5, Alberti told him that he would have a full route plus an extra two hours of another route that day. He told Alberti that he had previously approved two hours leave that day, but the schedule that he gave him would not accommodate the leave. Alberti told him that it was not a good day for him to take leave, that there was a lot of mail to be delivered, and that he should reschedule his family function. He did not take leave that day. He attempted to take leave on March 8 as well. When he arrived for work that day Alberti told him that he had a full route and an additional three hours of work. Pino told Alberti that he had previously said that he would work with him to give him two hours off for a family function, and Alberti asked Pino what was more important, his daughter's game or his job and that he had no rights and Pino did not take leave that day. Later that day Pino approached the Union Steward, Steve McCullough and told him what happened. McCullough told him that if his leave request was granted, the Respondent could not deny him the right to take leave, and that he should file a grievance to protest the denial, and on March 19 he filed the grievance, which was denied. He testified that after he filed the grievance he was given the worst postal routes and was being observed by Alberti and others while on his routes. In order to avoid these problems, he asked for, and was granted, a transfer to the Five Points Station, also in Albuquerque, in June, and worked there until his contract expired in October.

25 John Trujillo is employed by the Respondent as a letter carrier and is the chief shop steward for the Union. He filed the leave grievance for Pino, but in a different manner than most of the grievances the Union files for TEs. He testified that the Union does not like to bring "the limelight" to individual TEs because they are a vulnerable class of employees. Therefore, grievances for the TEs usually take the form of class grievances, except where individual discipline is involved; in those situations, they file individual grievances. Pino's name was included on his grievance because the Union leadership decided to file it in that manner. He testified that the denial of leave for TEs, which is not governed by the contract, could have been filed as a class, rather than an individual grievance, but it was not. During 2012, the Union filed a number of class action grievances on behalf of the TEs. Eric Martinez, the postmaster in Albuquerque, and the official of the Respondent who determined that the decision not to renew Pino's contract would not be reversed, testified that he was unaware of his grievance when he made that decision. Rana Alexander, who is employed by the Respondent as a supervisor, customer service support for Albuquerque, testified that she was not aware of the leave grievance filed on behalf of Pino until after January 1, 2013.

40 Respondent introduced evidence of two other TEs on whose behalf the Union filed grievances in their names. Letter Carrier Charlotte Toledo was terminated by the Respondent and a grievance was filed on her behalf. The parties settled the grievance by the payment of backpay from August through December 2012. In addition, the Union filed a grievance on behalf of letter carrier Lawrence Vargas in December 2010 for overtime. Both Toledo and Vargas are still employed by the Respondent.

50 Gino Martinez who, since April 2013 has been the acting station manager at the Five Point postal station in Albuquerque, was the acting customer service manager for the Respondent in October. His duties in that position were to oversee the twelve stations in the district; he reported to Eric Martinez, the postmaster. He testified that he, Humberto Trujillo, the acting postmaster at the time, and Tara Shackleford, the acting customer service operations

manager, made the decision not to renew Pino's contract for the year 2012-2013. They made that decision after discussing his attendance, performance and safety record. Pino had two accidents over the prior five years, one in 2009 and the other in August 2011, and several station managers said that they had issues with him refusing to follow orders to deliver the afternoon mail. By letter dated October 3 Respondent, by Gino Martinez, notified Pino that his  
5 "...appointment expired on October 3, 2012 and you will not be reappointed after your break in service. You are hereby notified that you will be separated from your employment with the U.S. Postal Service effective October 4, 2012." He also testified that Pino's grievance activity played no part in their determination not to reappoint him for another year.

10 Eric Martinez is presently the postmaster in Albuquerque, and in October was, in essence, the acting postmaster. He had been the postmaster in 1997 and was asked to return to that position because Albuquerque was one of the worst performing post offices in the country with an extremely high overtime rate. He testified that prior to his return, a decision had  
15 already been made not to renew the contracts for Pino as well as the other transitional employees and he arranged to meet separately with these individuals to reconsider the decision not to renew their agreements. At each of these interviews he told the employee why their contract had not been renewed. For example, TE Joseph Jaramillo<sup>3</sup> had a bad accident as well as attendance issues, and he told him that the TEs were hired to reduce overtime and when  
20 they failed to appear for work it added to the overtime: "All of them understood. They were very professional in how they interacted with me, and I gave them a second chance." After these meetings, he reversed the decision about the other transitional employees, and renewed their agreements, but did not reverse the decision about Pino.

25 Prior to meeting with the TEs, his office called each of them to set up an appointment. Although his office had not yet called Pino to arrange for an appointment, Pino made numerous phone calls to Eric Martinez' office asking for an appointment. Shortly before October 9, Pino came to his office to meet with Martinez even though he had not been called to come in. Martinez told him that he was scheduling appointments, but Pino "was very forceful  
30 and...adamant" that he wanted to speak to him. Martinez told him that he was setting up appointments with the TEs, but that he didn't have time to talk to him at that time, but Pino wouldn't leave. Pino asked why he had set up appointments with the other TEs and not him, and Martinez told him that he had not yet had an opportunity to arrange his appointment. He told Pino that he had to leave, but that his staff would call him to set up an appointment, and  
35 Pino left at that time.

They next met on October 9. Martinez told him that the Respondent had decided not to renew him as a TE, and Pino asked why. Martinez told him that the principal reason was his two accidents and Pino started to cry and said that it wasn't fair since he had brought everybody  
40 else back. Martinez told him that he had not yet decided whether he would reverse the decision not to renew his contract as a TE for another year and that he would call him back. Pino asked when he would call and Martinez said that he would call him by the end of the week and he left the office. Eric Martinez testified that Pino's grievance was not mentioned at this meeting. Later that day Cathleen Lujan, his administrative assistant, told him that she had received some  
45 phone calls from Pino and then she came into his office to tell him that Pino was there to see him. Martinez said that he already met with him and he walked out of his office and heard Pino tell Lujan that he wasn't finished and needed to speak to Martinez. Martinez told him that he had said that he would call him and Pino said, "It's not fair, it's not fair." Pino became "very irate," staring and glaring at him: "And then he stood up, and there's a word...it's called mad-dogging.

50 <sup>3</sup> Jaramillo and TE Lawrence Vargas were each involved in accidents in 2012.

He started mad-dogging me...He leaned towards me...His mannerisms were very aggressive, and that's when I told him, "You know what, you got to leave." When Pino didn't move, Martinez repeated that he had to leave and started walking toward the elevator. When they got to the elevator, Pino pointed at him saying, "You're not being fair, you're going to be sorry; you're going to regret it" and Martinez said, "You know what, you need to get out of here." At that time, Pino got on the elevator, and Martinez told Lujan that she should call the inspection service as Pino had threatened him.

Lujan testified that after Pino had his scheduled meeting with Martinez, he left the office and returned shortly thereafter and told her that he wasn't finished speaking with Martinez and wanted to speak to him again. She then went into Martinez' office and asked him if he could speak to Pino again, and he said that he had already spoken to him. While Lujan was speaking to Pino, who was in her office, Martinez overheard them and came out of his office and asked Pino if there was anything that he had to add to what they had discussed earlier. Pino kept repeating that he wasn't finished talking to Martinez, "...and took a real aggressive stance towards Mr. Martinez, put his hands down to his sides in fists, staring at Mr. Martinez, stuck his chest out in a real aggressive stance." She testified that she was afraid of what might happen and Martinez asked Pino to leave, but he didn't move. Martinez again said that he had to leave and Pino walked toward the elevator while Martinez stood in the doorway making sure that he was leaving. Pino said something to Martinez before he got into the elevator, but Lujan could hear what he said. After he left, because she felt threatened, she called the Postal Inspector's office to ask them to have Pino's badge turned off so that he wouldn't have access to the elevators and their office.

Alexander testified that Eric Martinez asked her to call the TEs to arrange appointments for him to meet with them. Prior to arranging an appointment for Pino to meet with Martinez, she saw Pino waiting outside Martinez' office and he said that he was there to see Martinez. Alexander told him that she didn't believe he had an appointment to see him, but she went to her office and got Pino's employee file and went to Martinez' office to see if he was in. When she got there, Pino was already in his office. Martinez asked him who had called him to set up the appointment, and he said that somebody called him and left a message. Martinez asked Alexander if she had called him and she said that she hadn't. Martinez then told Pino that he was lying about somebody calling him to set up the appointment and he was very busy and did not have time to talk to him. Pino said that he wanted to talk about his job and Martinez told him that Alexander would call him to arrange for an appointment. She and Martinez met with Pino on October 9 in Martinez' office. Alexander brought Pino's employee file with her and Martinez looked at the first page and put the file down. He first questioned Pino about his two accidents and then about his attitude. As to the latter, he said that he had reports that Pino sometimes dropped mail at the stations rather than completing his route and delivering all the mail. Pino said that he had worked at stations other than the Steve Schiff Station, and Martinez said that he would check that and that he would call him back by the end of the week. There was no mention of Pino's March grievance at this meeting. She left the office and returned to her office. She was not present with Martinez and Pino when he returned later that day. She could hear them talking, but could not hear what was said. After Pino left, Martinez asked Alexander to call the other facilities where Pino had worked to ask about his work attitude. The Main Office Carrier Annex told her that they had problems with Pino dropping mail as well as his attitude about going back out to deliver mail. North Valley told her that they had trouble with his attitude, without being more specific and at Five Points, Andy Letterhos said that Pino did okay. At the Steve Schiff Station, Alberti and Scott Bissell said that he had behavioral issues and that he was unwilling to do some things.

Pino testified that in early October 9 he met with Alexander in Lujan's office. Alexander

asked him if she could help him and he introduced himself and said that he was a TE on his five day break and he understood that all TEs on their break had appointments with the postmaster before returning to work. He stated that he had not received a call arranging for a meeting with Martinez. She told him that she would get his file and return shortly. Just as she returned with his file, Martinez walked out of his office. Pino told him that he was there to meet with him to discuss his returning to work. Martinez opened the file and told Pino that he was fired and that he was not being renewed to return to work. Pino asked for a few minutes of his time to learn the reason why he was not being returned to worked, and he, Martinez and Alexander went into Martinez' office. He testified that Martinez, "...explained to me that I was not being returned back to work because of my poor work performance, that I called in twice and that no stations in Albuquerque wanted me and that I filed...and that I had problems with management at Steve Schiff, with Scott Bissell and Joe Alberti, and that I liked to file grievance [sic]." Pino responded by saying that Bissell and Alberti had told him the same thing when he wanted to transfer to a different station and that if they were not going to bring him back, why didn't he receive a notice of separation. Martinez responded, "...in a sarcastic way that I should have thought about this six months ago when I filed a grievance against management." Pino said that he had worked the prior six years and always had his contract renewed, and what Martinez was saying about his work was not true. Martinez said that he would call all the stations that Pino had worked at and would call him by the end of the day.

Pino testified that when he did not hear from Martinez, he called his office at 4:00 and left a message for him. Still having received no response, he called again at 4:15 and left a message with Lujan, who said that she would give Martinez the message, and he would return his call. When he still had not heard from him, he went to Martinez' office at 4:50 that afternoon. He initially met Lujan, and while he was explaining the situation to her, Martinez walked out of his office and saw him. Martinez said, "Oh no, I'm done with you. I fired you this morning. You need to leave. You need to get out of here." He also said that Pino liked to file grievances against management. Pino said that he understood that Martinez had taken back the other TEs, and he pleaded with him to give him a chance and call the other stations. Martinez insisted that he leave the office, and he walked out of the office, and Martinez followed him to the door of his office, where he stood until Pino got into the elevator.

Subsequently, Pino applied to other post offices in New Mexico. He was hired by the Carlsbad, New Mexico post office and accepted the position, but prior to beginning work there, he was also hired by the Las Vegas, New Mexico post office, and took that position instead, as it was located closer to his residence.

### III. Analysis

It is alleged that on October 9 and October 12 the Respondent, by Eric Martinez, threatened Pino with not renewing his transitional employee contract because he engaged in Union activity, filing a grievance against the Respondent, and on October 9 and November 5 it failed to hire or rehire him because of the grievance that he filed, in violation of Section 8(a)(1) and (3) of the Act. The sole support for these allegations is Pino's testimony that at each of his meetings with Eric Martinez in which he was told that he wouldn't be rehired, Martinez commented that Pino "liked to file grievances against management." Martinez and Alexander each testified that they were not aware of the grievance that Pino filed in March at the time of these meetings, and that the grievance was not mentioned at the October 9 meeting with him. Although Lujan was not present at these meetings, she was present in the office when Martinez asked Pino to leave, and supports Martinez' testimony about Pino's aggressive attitude at the time.

In order to find a violation herein, I would have to fully credit Pino's testimony, which would require me to discredit the testimony of Martinez, Alexander and Lujan. I cannot do that because I found their testimony credible and believable, and credit their testimony over that of Pino. In addition, I found Pino's testimony at issue here to be neither credible nor believable. He  
 5 filed a grievance in March because Alberti refused to honor his two hour leave request. It is difficult to believe that seven months later the Respondent refused to renew his contract because of this grievance. Unlike the grievances of Toledo and Vargas, also employed by the Respondent as TEs, who are still employed by the Respondent, Pino's grievance did not involve any money or any rule changes, and it is difficult to understand why the Respondent would be  
 10 so angry at Pino seven months later for filing such a grievance. Further, I believe that it is reasonable to assume that in a large postal facility such as this, grievances are a common occurrence. Rather, the credible evidence of Martinez and Lujan supports the conclusion that his contract was not renewed initially because of his two accidents and the reports of some of his supervisors and, later, because of his aggressive attitude toward Martinez and his threat to  
 15 Martinez, at the conclusion of their meeting on October 9. Therefore, based upon these credibility findings, I find that Eric Martinez did not threaten Pino as alleged in the Complaint, and that Counsel for the General Counsel has not satisfied his initial burden under *Wright Line*, 251 NLRB 1083 (1980), and I therefore recommend that the Complaint be dismissed in its entirety.

### Conclusions of Law

1. The Board has jurisdiction over the Respondent pursuant to the Postal Reorganization Act of 1970.

2. The Respondent did not violate Section 8(a)(1) and (3) of the Act as alleged in the Complaint.

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

### ORDER

It is recommended that the Complaint be dismissed in its entirety.

**Dated, Washington, D.C. August 29, 2013**

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**Joel P. Biblowitz**  
**Administrative Law Judge**

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 4 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  
 50 waived for all purposes.