

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28**

**UNITED STATES POSTAL SERVICE**

**and**

**Case 28-CA-230940**

**NATIONAL ASSOCIATION OF LETTER  
CARRIERS, SUNSHINE BRANCH 504,  
AFFILIATED WITH NATIONAL ASSOCIATION  
OF LETTER CARRIERS, AFL-CIO**

**GENERAL COUNSEL'S BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE**

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TABLE OF CONTENTS

I. PROCEDURAL BACKGROUND ..... 1

II. SUMMARY OF ISSUE ..... 1

III. STATEMENT OF FACTS ..... 2

    A. The Collective Bargaining Relationship ..... 2

    B. The Tenth Circuit Consent Orders ..... 3

    C. The Union’s Request for Information ..... 5

    D. Respondent’s Delay in Acknowledging and Responding to the Union’s Request ..... 7

    E. The Union was Forced to Meet on the Underlying Grievance Without the  
    Information it Requested on October 13 ..... 9

    F. Respondent’s Partial Response to the Union’s Request for Information ..... 10

IV. ARGUMENT ..... 11

    A. General Legal Principals ..... 11

    B. The Requested Information is Clearly Relevant to the Union’s Grievance  
    Processing Responsibilities ..... 13

    C. Respondent Unlawfully Delayed In Responding to the Union’s Request for  
    Information ..... 14

    D. Respondent Willfully Refused to Furnish the Union with a Complete  
    Response to the Request for Information ..... 16

V. REMEDIES REQUESTED ..... 18

## TABLE OF CASES

### Cases

<i>Curtiss Wright Corporation v. NLRB</i> , 347 F.2d 61 (1965).....	11
<i>Finley Hospital</i> , 362 NLRB 915 (2015).....	13
<i>Hospital Employees District 1199E (Johns Hopkins)</i> , 273 NLRB 319 (1984).....	12
<i>Mission Foods</i> , 345 NLRB 788 (2005).....	13
<i>National Steel Corp.</i> , 335 NLRB 747 (2001).....	13
<i>New Process Steel, L.P. v. NLRB</i> , 560 U.S. 674 (2010) .....	12
<i>NLRB v. Acme Industrial Co.</i> , 385 U.S. 432 (1967) .....	11
<i>Ohio Power Co.</i> , 216 NLRB 987 (1975).....	11
<i>Pan American Grain Co.</i> , 343 NLRB 318 (2004).....	12
<i>Postal Service</i> , 332 NLRB 635 (2000).....	12
<i>Postal Service</i> , 361 NLRB 8 (2014).....	11
<i>Regency Service Carts</i> , 345 NLRB 671 (2005).....	12
<i>Shaw’s Supermarkets, Inc.</i> , 339 NLRB 871 (2003).....	12
<i>Spurlino Materials, LLC</i> , 353 NLRB 1198 (2010).....	12
<i>Spurlino Materials, LLC</i> , 355 NLRB .....	12
<i>Valley Inventory Service</i> , 295 NLRB 1163 (1989).....	12
<i>Woodland Clinic</i> , 331 NLRB 735 (2001).....	12

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**I. PROCEDURAL BACKGROUND**

The Complaint and Notice of Hearing in this matter, issued on April 12, 2019 by the Acting Regional Director for Region 28 of the National Labor Relations Board, alleges in Case 28-CA-230940, that Respondent United States Postal Service (Respondent), has failed and refused to respond to requests for relevant information made by Charging Party Union, National Association of Letter Carriers, Sunshine Branch 504, affiliated with National Association of Letter Carriers, AFL-CIO (Union), in violation of Section 8(a)(5) of the National Labor Relations Act. On April 26, 2019, Respondent filed its Answer, denying these allegations.

**II. SUMMARY OF ISSUE**

The legal issue presented is whether Respondent's delay in acknowledging and responding to the Union's request for information, and the Respondent's failure to make a complete response to the request for information, violate Section 8(a)(5) of the National Labor Relations Act.

### **III. STATEMENT OF FACTS**

#### **A. The Collective-Bargaining Relationship**

The Union is the longstanding exclusive collective-bargaining representative of letter carriers employed by Respondent. Respondent has consistently recognized the Union's status as the exclusive collective-bargaining representative of letter carriers employed by Respondent in the Albuquerque Postal Installation<sup>1</sup> in a series of successive collective-bargaining agreements. The parties have entered into a Collective-Bargaining Agreement (CBA). Article 1 of the CBA recognizes the Union as the exclusive collective bargaining representative of the bargaining unit, and defines the bargaining unit as all letter carriers and city carrier assistants, while excluding all managerial and supervisory personnel; professional employees; employees engaged in personnel work in other than a purely non-confidential clerical capacity; security guards as defined in Public Law 91-375, 1201(2); all Postal Inspection Service Employees; employees in the supplemental work force as defined by Article 7; rural letter carriers; mail handlers; maintenance employees; special delivery messengers; motor vehicle employees; and postal clerks. (RX 1)<sup>2</sup>

The Grievance and Arbitration procedure is described in Article 15 of the parties' CBA, and requires that at the Informal Step A level, the parties meet on a grievance within fourteen days after a contractual violation occurs. (GCX 6 at 65; GCX 7) If the parties cannot reach an agreement at Informal Step A, the Union has seven days to advance the grievance to Formal Step A. (GCX 6 at 65) Once a grievance has been appealed to Formal Step A the parties have seven

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<sup>1</sup> The Albuquerque Postal Installation includes approximately 12 City Stations and 9 subunits and annex facilities, for a total of 21 facilities, including the Five Points Station located at 1050 Sunset Road SW, Albuquerque, New Mexico. (Tr 51:17-21; GCX 1(e))

<sup>2</sup> General Counsel Exhibits shall be designated herein by GCX along with the identifying number of the exhibit. Respondent Exhibits shall be designated herein by RX along with the identifying number of the exhibit. References to the Transcript shall be designated by Tr., followed by the relevant page number, where appropriate, the specific line numbers on that page.

days to meet on the grievance before the grievance becomes untimely. (GCX 6 at 66) If the parties are unable to resolve the grievance at Formal Step A, the Union then has seven days to appeal the grievance to Step B. (GCX 6 at 67) At Step B, the parties have fourteen days to meet on the grievance. (GCX 6 at 67) If the parties still are not able to reach an agreement at Step B, they may send the grievance to arbitration. Each party has an obligation to fully develop its case before the grievance is advanced to Step B. (GCX 7) If the Union wishes to its their statement of disputed facts, it must do so in writing contemporaneously with its appeal to Step B. (GCX 7 at 4)

The CBA provides for bargaining unit employees to file grievances over any violations of the CBA, including violations of the non-discrimination and civil rights protections established by Article 2 of the CBA. (GCX 14, GCX 15) Article 2 of the CBA specifically applies to employment decisions made by Respondent, and any actions that might be taken by the Union in the context of the employment relationship. (GCX 14, GCX 15)

#### **B. The Tenth Circuit Consent Orders**

In the past twelve years, the General Counsel and Respondent have entered into four consent orders involving Respondent's Albuquerque Postal Installation. Each of these consent orders has imposed significant fines on Respondent for any prospective failures to provide the Union with relevant information. Each consent order has also required that Respondent create and maintain logs showing when requests for information are received, when a representative of Respondent replies to each request, and the nature of the response. Each order has further required that Respondent post an official Board notice to employees and compensate the Union for any time actually spent pursuing requests for information or attempting to enforce the Respondent's statutory obligation to furnish the Union with requested information.

In 2007, the Board and Respondent entered into the first of these four consent orders involving Respondent's Albuquerque Postal Installation. (GCX 9). Under the terms of the 2007 Consent Order, the Tenth Circuit Court of Appeals imposed a \$10,000 fine per future violation of the Order, which could be combined with an additional fine of \$1,000 per day for each day the Court found that violations had continued. (GCX 9) These fines were to be levied based on an evaluation of the scope and severity of any prospective violations.

The 2007 Consent Order was followed by another consent order in 2009, which was also designed to address Respondent's history of Section 8(a)(5) violations. (GCX 10) The 2009 Consent Order required Respondent to take affirmative steps to remedy past violations of the Act and to prevent such violations in the future, including distributing the 2009 Consent Order to all of its managers and supervisors, posting an official Board Notice to Employees, and paying fines for prospective violations of the 2009 Consent Order. (GCX 10) Respondent was subject to fines of up to \$17,500 per future violation of the 2009 Consent Order, with additional fines of up to \$1,500 per day for each day that the Court found violations had continued, with further fines of up to \$1,000 per violation against each individual supervisor, manager, or acting supervisor, who, with notice and knowledge of the 2009 Consent Order, violated the 2009 Consent Order. (GCX 10 at 9) The 2009 Consent Order specified that no fines imposed against individual managers, supervisors, or acting supervisors could be reimbursed by Respondent. (GCX 10)

A mere four years later, in 2013, Respondent and the General Counsel once again entered into a new consent order related to Respondent's repeated violations of Section 8(a)(5) of the Act. (GCX) Under the 2013 Consent Order, Respondent's managers and supervisors remained subject to individual fines of up to \$1,000 per violation. Respondent also remained subject to fines of up to \$17,500 per prospective violation of the 2013 Consent Order, with additional fines

of up to \$1,500 per day for each additional day that the Court found violations had continued. (GCX 11) The Consent Order directed that these fines be levied after evaluating the number and severity of prospective violations. (GCX 11)

The most recent consent order between Respondent and the General Counsel was entered in the Tenth Circuit in 2017. Under the 2017 Consent Order, Respondent was fined \$185,000 related to violations of the 2009 Consent Order and the 2013 Consent Order. (GCX 12). The terms of the 2017 Consent Order also provided for the imposition of further fines in the event of prospective violations of the 2017 Consent Order. (GCX 12) While the 2017 Consent Order does not include individual fines for postal managers and supervisors who commit repeated violations of Section 8(a)(5) of the Act or of the 2017 Consent Order, it does impose prospective fines of up to \$25,000 per violation with further fines of \$100 per day for each day the Court finds that the violations have continued. (GCX12)

Each of these four consent orders required that Respondent distribute the order to its managers, supervisors, and acting supervisors in the Albuquerque Postal Installation. (GCX 9, GCX 10, GCX 11, GCX 12). Respondent's Designated Management Official Ed Arvizo, and Manager of Customer Service Operations Janell Aragon both acknowledge that they were aware of these four consent orders, and the steep fines that could result from violating these orders. (Tr. 62-65, Tr. 63:21-64:5, Tr. 105:9-106:2)

### **C. The Union's Request for Information**

On October 13, 2018<sup>3</sup> Union Steward Marcelino Rodrigues submitted a request for information to Acting Station Manager Marsylla, seeking a copy of PS Form 991 submitted by each employee who applied for the Supervisor of Customer Service position at Five Points

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<sup>3</sup> All dates are in 2018 unless otherwise noted.

Station, and a copy of the matrix used by Manager of Customer Service Operations Aragon in evaluating the 991's submitted for this Supervisor Customer Service position. (GCX 2, GCX 8) Steward Rodrigues personally drafted this request for information. (Tr. 128:15) Steward Rodrigues hand delivered the request for information to Marsylla, who signed the request to acknowledge receipt of the document. (Tr. 26:7) After Marsylla signed and dated at the bottom of the Union's request for information, Rodrigues made a copy of the document, kept the original, and gave the copy to Marsylla. (Tr. 129:11-12) Marsylla testified that he has received about 70 such requests during his time as a supervisor and station manager. (Tr. 26:15)

Acting Station Manager Marsylla and Steward Rodrigues were standing at the supervisor's desk at the Five Points Station when Steward Rodrigues handed Acting Station Manager Marsylla Respondent's copy of the signed request for information. (Tr. 129:14) Before Steward Rodrigues left, Acting Station Manager Marsylla had a phone call with MCSO Aragon at the supervisor's desk. (Tr. 129:15). During that conversation, Acting Station Manager Marsylla notified MCSO Aragon that Steward Rodrigues had submitted a request for information, and that the request sought the 991's and matrix related to the Supervisor Customer Service position at Five Points Station. (Tr. 129:15-18) After Acting Station Manager Marsylla hung up the phone, he told Rodrigues that he would have to send this request to DMO Arvizo. (Tr. 129:18-20)

After learning that the request for information would need to be processed by DMO Arvizo, Steward Rodrigues concluded that it might take additional time for Respondent to retrieve and provide the requested information. (Tr. 130:2-3) Rodrigues knew that the grievance and arbitration process established in the CBA required him to meet on any grievance within fourteen days after the underlying incident occurred. (Tr. 130:4-8; GCX 6 at 65) Based on this

assessment, Rodrigues requested an extension of time to give Respondent additional time to respond to the Union's request for information without adverse consequences for the Union and any grievances they might file in relation to this request for information. (Tr. 130: 3-8, 22-25, Tr. 131 1-4; GCX 3)

Both the request for information and the extension of time that Steward Rodrigues and Acting Station Manager Marsylla signed reflected the Union's intention to file an Article 2 grievance in this matter. (GCX 2, GCX 3) Article 2 of the parties' CBA deals with discrimination against bargaining unit employees on the basis of race, sex, national origin, religion, disability, and other protected characteristics. (Tr. 132: 25) Steward Rodrigues was seeking the 991's and matrix to determine whether the grievant, Charles Moran, was in fact less qualified for the Supervisor Customer Service position than other applicants who received interviews. (Tr. 132: 3-14)

At some point later that same day, Acting Station Manager Marsylla sent an electronic copy of the Union's request for information to MCSO Aragon by e-mail. (Tr. 100) Aragon printed the request for information out and walked it over to DMO Arvizo's office. (Tr. 106:6-9)

#### **D. Respondent's Delay in Acknowledging and Responding to the Union's Request**

On October 22, Steward Rodrigues had not received any response to his October 13 request for information. (Tr. 134: 5-11) Recognizing that he was running out of time before the parties' original extension of time expired, Steward Rodrigues submitted a second request for information to Acting Station Manager Marsylla by photocopying his original request for information, writing in lines for an NALC representative and USPS representative to initial, and writing "2<sup>nd</sup> Request" at the top of the document. (Tr. 132:5- 133:3, GCX 4) Steward Rodrigues took this new request for information to the Highland Station where he hand delivered it to

Acting Station Manager Marsylla on the workroom floor. (Tr. 133:16-22) After Acting Station Manager Marsylla initialed the new request for information, Steward Rodrigues made a photocopy and handed the copy to Acting Station Manager Marsylla. (Tr. 133:24-25; GCX 4) Acting Station Manager Marsylla still was not able to provide any information to Steward Rodrigues at this time.

DMO Arvizo testified that he did not receive Steward Rodrigues's October 13 request for information until October 22, when he returned from annual leave. (Tr. 65:5-18) DMO Arvizo was unable to identify any specific individual who was responsible for responding to requests for information in his absence, and admitted that he does not personally take any steps to ensure that there is coverage to respond to requests for information in his absence. (Tr. 65:15) DMO Arvizo testified that he was on vacation for the entire week of October 15. (Tr. 65:8-10)

On October 23, Steward Rodrigues finally received an acknowledgement of his request for information from DMO Arvizo. (Tr. 134:23; GCX 13) In this response DMO Arvizo wrote:

Your request asking for the 991's for all employees who applied for the SCS position which C Moran was denied an interview is unclear. You allege an Article 2 Violation and Article 2 of the National Agreement (Non-Discrimination and Civil Rights) establishes that there will be no discrimination by the employer or union against employees because of race, color, creed, religion, national origin, sex, age or marital status.

Which of these purveys is Mr. Moran alleging was violated by the employer or union during the selection process?

Mr. Moran was not denied an interview he was not selected for an interview based on the criteria established in Handbook EL 312 Employment and Placement. In addition employees 991's contain confidential personal information.

What is the relevancy of your request seeking personal confidential information of employees who applied for the Supervisor-Position for which Mr. Moran applied?

How is the personal confidential information related to an alleged Article 2 violation? (GCX 13 at 1)

DMO Arvizo went on to assert that the grievant, Letter Carrier Charles Moran, was excluded under Article 1 Section 1 of the CBA because he had applied for a supervisory position. (GCX 13 at 2). DMO Arvizo's letter also addressed the second item in Steward Rodrigues's October 13 request for information, stating simultaneously that a matrix was confidential, and that the matrix did not exist. (GCX 13 at 2)

Steward Rodrigues responded to DMO Arvizo by letter, dated October 27. (GCX 16) In his letter, Steward Rodrigues explained that comparator information was relevant for a grievance related to retaliation or discrimination, identified Grievant Charles Moran's protected characteristics as disability and retaliation, and informed Respondent that Letter Carrier Moran was a member of the bargaining unit as defined by Article 1 Section 1 of the parties' CBA. (GCX 16)

On October 30 Steward Rodrigues received another certified letter from DMO Arvizo, stating that he would send Steward Rodrigues's October 27 letter on to the AZ/NM District and Western Area Law Department for review, and respond to Rodrigues's October 13 request for information based on the Western Area Law Department's instructions. (Tr. 136:20-137:13; GCX 17)

**E. The Union was Forced to Meet on the Underlying Grievance Without the Information it Requested on October 13**

On November 2, Steward Rodrigues and Acting Station Manager Marsylla met on the underlying grievance related to Steward Rodrigues's October 13 request for information. (Tr. 137:20-138:17; GCX 5) As of that date, Rodrigues had not received a substantive response to his request for information.

On November 16, Steward Rodrigues finally received a partial response to his request for information by certified mail. (Tr. 140:1; GCX 18, GCX 19, GCX 20) In this final letter, DMO Arvizo wrote that he was enclosing Letter Carrier Moran's 991 and the matrix used by MCSO Aragon in evaluating the applications for a Supervisor Customer Service position at Five Points Station. (GCX 18) DMO Arvizo did in fact enclose two documents with his November 16 letter, a copy of Mr. Moran's 991, which did not contain any handwritten notations, and a copy of a matrix used to evaluate applicants for a Supervisor Customer Service Position.

#### **F. Respondent's Partial Response to the Union's Request for Information**

MCSO Aragon regularly evaluates applications for Supervisor Customer Service positions, and other supervisory positions. (Tr 106:14-107:4) When evaluating applications for supervisory positions MCSO Aragon often makes notes on individual applicants' 991's, referencing job requirements that a particular section of their 991 satisfies, or noting her questions about an applicant's skills or experience. (Tr. 110:8-10; Tr. 110:23-112:6) When scoring 991's submitted by less experienced or weaker applicants in particular, MCSO Aragon is more likely to make notes on the application and makes an effort to save her notes. (Tr. 111:1-8)

MCSO Aragon also evaluated multiple 991's submitted by Letter Carrier Moran for supervisory positions in the Albuquerque Postal Installation. (Tr. 111-112) On one of the 991's submitted by Letter Carrier Moran, for a different supervisory position, MCSO Aragon made extensive handwritten notes, referencing specific job requirements and raising questions about his experience based on the work described in his 991. (GCX 21; Tr: 112:16-25) There were no such notes on the 991 that Respondent provided to the Union on November 16. (GCX 20; Tr. 142:11)

The Matrix which the Respondent provided to the Union on November 16 shows five applicants<sup>4</sup> who were considered for the supervisor customer service position related to this request for information. (GCX 19 at 1). Respondent did not provide any of the other employees' 991's to the Union. (GCX 18; Tr. 142:12-23)

#### **IV. ARGUMENT**

##### **A. General Legal Principles**

An employer has a duty to furnish potentially relevant information to the union where that information would enable the union to perform its statutory duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436 (1967). Relevance should be determined by a liberal "discovery-type standard." *NLRB v. Acme Industrial Co.*, 385 U.S. at 437. The duty to furnish information is not limited to the initial bargaining period and carries through the term of the existing collective-bargaining agreement. *NLRB v. Acme Industrial Co.*, 385 U.S. at 435-36. Information that would help the union determine how to proceed with a grievance or possible grievance is considered relevant even if no grievance currently exists or if the information requested would clearly dispose of the grievance. *Ohio Power Co.*, 216 NLRB 987, 991 (1975); *See also, Curtiss Wright Corporation v. NLRB*, 347 F.2d 61 (1965).

When an employer has lost, destroyed, or for any other reason cannot locate the requested document, it is still obligated at the very least to inform the union of whether or not the requested information relates to bargaining unit members. *Postal Service*, 361 NLRB 8, 8 (2014). Furthermore, when the employer no longer has access to the requested information, the employer still has a duty to investigate alternative sources of that information and to obtain the information

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<sup>4</sup> All five applicants were City Letter Carriers when they submitted their applications for the Supervisor Customer Service position at issue. (Tr 108:17-24)

from an alternative source if such an alternative source is available. *Hospital Employees District 1199E (Johns Hopkins)*, 273 NLRB 319, 319-20 (1984).

If an employer is not going to provide the requested information, the employer has a duty to adequately explain why it will not furnish the requesting labor organization with the requested information. *See, Regency Service Carts*, 345 NLRB 671, 673 (2005). *See also Spurlino Materials, LLC*, 353 NLRB 1198, 1200 (2010), *remanded* in light of *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), 2010 WL 4069478 (7th Cir. 2010), *affd. and incorporated by reference* 355 NLRB 409 (2010), *enfd.* 645 F.3d 870 (7th Cir. 2011). In evaluating whether an employer has adequately explained why information will not be provided, the Board looks at the totality of the circumstances. *Spurlino Materials, LLC*, 355 NLRB at 1200. The employer has a comparable obligation to timely inform the requesting labor organization that requested information does not exist. *Postal Service*, 332 NLRB 635, 638-39, 642 (2000).

Employers have an obligation to respond to requests for information in a timely manner. *Woodland Clinic*, 331 NLRB 735, 736 (2001); *See also, Shaw's Supermarkets, Inc.*, 339 NLRB 871, 875 (2003). The timeliness of an employer's response is evaluated by examining the totality of the circumstances. *Spurlino Materials, LLC*, 355 NLRB at 1200. An unreasonable delay in furnishing requested information is as much a violation of Section 8(a)(5) as an out right refusal to provide the information. *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). The Board has found delays of varying lengths unlawful based on the complexity of the request, availability of information, and diligence with which the employers pursued the requested information. *See, e.g., Pan American Grain Co.*, 343 NLRB 318, 343 (2004), *enfd. in relevant part* 432 F.3d 69 (1st Cir. 2005) (3 month delay unreasonable); *Woodland Clinic*, 331 NLRB at 737 (7-week delay unreasonable).

If an employer is concerned that a request may be unduly burdensome, the employer has an obligation to inform the union and work towards a mutually agreeable accommodation within a reasonable time. *Mission Foods*, 345 NLRB 788, 789 (2005). The same is true where the employer has concerns about privacy or confidentiality with respect to the requested information. *See, Finley Hospital*, 362 NLRB 915, 922-23 (2015), *enf. denied on other grounds* 827 F.3d 720 (8th Cir. 2016); *National Steel Corp.*, 335 NLRB 747, 748 (2001), *enfd.* 324 F.3d 928 (7th Cir. 2003).

**B. The Requested Information is Clearly Relevant to the Union’s Grievance Processing Responsibilities**

When applying the broad discovery like standard established in *Acme Industrial*, it is clear that documents reflecting Respondent’s decision-making process with respect to the Supervisor of Customer Service position at Respondent’s Five Points Station, and comparator evidence showing other applicants’ qualifications would be reasonably likely to help the Union determine how to proceed in a discrimination grievance. While Respondent has consistently denied that Letter Carrier Moran could file such a grievance related to the application process for a supervisory position, all of the evidence shows that the Union did in fact file such a grievance.

The Union’s October 13 request for information sought :(1) copies of the 991’s submitted by all applicants for the Supervisor of Customer Service position at Five Points Station for which Letter Carrier Moran applied, and (2) a copy of the matrix used by MCSO Aragon to evaluate the applicants. These documents would show the thinking of the decisionmaker, MCSO Aragon, in determining which applicants to move forward to the interview stage and would provide evidence about other applicants who would be useful comparators to consider when evaluating whether any discrimination took place. Clearly, both categories of requested documents are relevant under the *Acme Industrial* standard.

### **C. Respondent Unlawfully Delayed in Responding to the Union's Request for Information**

In this case, Respondent delayed for approximately ten days before seeking the requested information, requesting information about the relevance of the information described in the request, or attempting to negotiate an accommodation with the Union to address any concerns about burdensomeness or privacy. Despite his admitted knowledge of the time limitations imposed by the parties' grievance and arbitration process, which requires each party to fully develop its case and establish all relevant facts by the time the grievance is advanced to Step B, approximately 35 days after any alleged contractual violation occurs, and the four Tenth Circuit Consent Orders, which impose significant fines on Respondent for each prospective violation, DMO Arvizo failed to obtain coverage for his responsibilities responding to requests for information from the Union while he was on leave. This failure to obtain coverage resulted in Respondent effectively waiting ten days after receiving the request for information before taking any steps to respond to the Union.

When Respondent finally made an initial response on October 22, only four days before the parties' first extension of time was set to expire, it sought further information about the relevance of the information and the contractual permissibility of any underlying grievance. Respondent sought this further information even though the request for information clearly indicated on its face that its purpose was to investigate an "Article 2 [Non-Discrimination and Civil Rights] Violation," making it apparent on the face of the request that the Union was investigating potential discrimination in selection for the Supervisor Customer Service position at Five Points Station. (GCX 2) Moreover, even when the Union responded and reiterated its specific justification for the relevance of comparator evidence and identified Letter Carrier Moran as a bargaining unit employee, Respondent failed to provide the information. Instead,

DMO Arvizo sent the request for information off to the Arizona-New Mexico District Office and Western Area Law Department for further evaluation, delaying the production of any information by an additional 16 days.

Respondent did not produce any responsive documents until 34 days after the Union's initial request for information. Because the parties agreed to two extensions of time on the underlying grievance in this case, Respondent's first substantive response to the October 13 request for information came fourteen days after Acting Station Manager Marsylla and Steward Rodrigues met on the underlying grievance at Informal Step A, and seven days after the deadline for the Union to appeal the grievance to Formal Step A. Had the parties not agreed to these extensions of time, Respondent's first production of responsive documents in this matter would have come only one day before the deadline to appeal the grievance to Step B, by which point the parties are required to have fully developed their cases.

While Respondent did ultimately furnish the Union with the matrix used by MCSO Aragon to evaluate the applications for the Supervisor Customer Service position at Five Points Station, Respondent's managers and supervisors waited 34 days to provide that information. The Union responded promptly to each of Respondent's inquiries about the relevance of the requested information and the contractual basis for any grievance the Union might file in relation to this request for information, while Respondent took weeks to acknowledge the Union's request for information, and several additional weeks to furnish information which is readily accessible to DMO Arvizo and MCSO Aragon. Each delay related to this request for information occurred at the hands of Respondent's managers and supervisors, all of whom acknowledged their obligations under the Act and under the 2017 Consent Order to make timely responses to

any request for information submitted by the Union, and despite the contractual language which provided a clear basis for Letter Carrier Moran to file a grievance.<sup>5</sup>

Respondent's repeated delays in responding to the Union's request for information and ultimately furnishing the Union with the requested matrix containing MCSO Aragon's notes evaluating the applicants' qualifications is a clear violation of Section 8(a)(5) of the Act.

**D. Respondent Willfully Refused to Furnish the Union with a Complete Response to the Request for Information**

Item 1 of the Union's request for information sought "a copy of 991's for all employees that applied for the SCS position at 5 points station which C. Moran was denied an interview." (GCX 2) While Respondent eventually furnished the Union with a copy of Letter Carrier Moran's 991 on November 16, 34 days after the Union's initial request for information, Respondent has consistently refused to furnish the Union with the 991's of the other four letter carriers listed on the Matrix for the relevant Supervisor Customer Service position.

The record shows that Respondent failed to seek an accommodation for any privacy concerns related to the production of application materials submitted by other bargaining unit employees. Furthermore, Respondent never raised an inability to produce the requested documents and has not notified the Union that it would not produce these documents, as required under *Regency Service Carts*, 345 NLRB at 673 (employer duty to adequately explain why requested information not provided).

The Union filed a discrimination grievance on behalf of Letter Carrier Charles Moran, alleging that Respondent violated Article 2 of the CBA by denying Letter Carrier Moran an

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<sup>5</sup> Despite DMO Arvizo's repeated assertions to the contrary, there is no language in Article 1.2 of the CBA to indicate that Letter Carriers lose their right to file grievances under the CBA when they apply for supervisory positions.

interview for a Supervisor of Customer Service position at Five Points Station. Comparator evidence, showing the qualifications of other applicants and documents showing how Respondent evaluated the applications of other similarly situated applicants, would clearly provide the Union with some guidance on how to proceed with the grievance in question.

Despite the existence of this grievance, Respondent has consistently asserted that it is not obligated to produce this requested information because Letter Carrier Moran was excluded under Article 1.2 of the CBA, and therefore not permitted to file a grievance over any discrimination he may have experienced in the job application process related to the Supervisor Customer Service position at Five Points Station. Respondent has argued that the information cannot be relevant if there is no grievance for which the Union might require comparator evidence. But Article 1.2 of the CBA does not create a separate class of excluded employees for letter carriers who have applied for supervisory positions, and there is no evidence that Letter Carrier Moran's title changed when he submitted his 991 and applied for a supervisory position. In fact, all of the evidence in this case shows that Letter Carrier Moran remained a City Letter Carrier throughout the fall of 2018, and that the Union filed an Article 2 discrimination grievance on his behalf.

Given the existence of an anti-discrimination grievance, and the absence of any communication from Respondent to the Union attempting to negotiate an accommodation related to privacy concerns, Respondent clearly has an obligation to furnish the Union with the requested 991's for all of the applicants for the underlying Supervisor of Customer Service position. Respondent's failure to do so is a violation of Section 8(a)(5) of the Act.

There is also some question as to the authenticity of the copy of Letter Carrier Moran's 991 that Respondent produced on November 16. While Aragon testified that she frequently

makes notes on the 991's of weaker or less experienced applicants, and that the copy of Moran's 991 entered in the record as General Counsel's Exhibit 21 was representative of her practice of marking job requirements and questions on low-scoring applicants' 991's, Respondent produced a pristine copy of Letter Carrier Moran's 991 on November 16. Aragon's own testimony about her practice of making specific and detailed notes on the 991's of weaker applicants, and the Matrix for the relevant position which showed Letter Carrier Moran receiving a score of 2, as compared with the score of 21 awarded to the highest scoring applicant, suggest that Respondent withheld the copy of Letter Carrier Moran's 991 containing MCSO Aragon's notes, also a clear violation of Section 8(a)(5) of the Act.

#### **V. REMEDIES REQUESTED**

Counsel for the General Counsel respectfully seeks a remedial order requiring that the Respondent: furnish the Union with all requested information and post proposed Notice to Employees attached as Appendix A at its Albuquerque, New Mexico facilities and on its LiteBlue intranet. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

Dated at Albuquerque, New Mexico, this 6<sup>th</sup> day of August 2019.

Respectfully submitted,

/s/ Katherine E. Leung

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(To be printed and posted on official Board notice form)

**FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

**WE WILL NOT** interfere with, restrain, or coerce you in your exercise of the above rights.

**WE WILL NOT** refuse to bargain in good faith with **National Association of Letter Carriers, AFL-CIO (the National Union)** as the exclusive collective-bargaining representative of our City Letter Carriers.

**WE WILL NOT** refuse to provide the Union or its local union designees with information that is relevant and necessary to their role as your collective-bargaining representative

**WE WILL NOT** in any like or related manner interfere with your rights under Section 7 of the National Labor Relations Act.

**WE WILL** provide **National Association of Letter Carriers, Sunshine Branch 504, affiliated with the National Union**, with the following information it requested on October 13, 2018:

A copy of 991s for all employees that applied for the SCS position at 5 Point Station which C. Moran was denied an interview.

A copy of the matrix used by Jennell Aragon on all applicants 991s that has grades given to each.

**UNITED STATES POSTAL SERVICE**

\_\_\_\_\_  
(Employer)

**Dated:** \_\_\_\_\_

**By:** \_\_\_\_\_

(Representative)

(Title)

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*The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).*

2600 North Central Avenue  
Suite 1400  
Phoenix, AZ 85004

**Telephone:** (602)640-2160  
**Hours of Operation:** 8:15 a.m. to 4:45 p.m.

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**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing General Counsel's Brief to the Administrative Law in *United States Postal Service*, Case 28-CA-230940, was served via E-Gov, E-Filing, and E-Mail, on this 6<sup>th</sup> day of August 2019:

### **E-Filing:**

The Honorable Gerald M. Etchingham  
Associate Chief Administrative Law Judge  
National Labor Relations Board  
Division of Judges—San Francisco Branch  
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