

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

UNITED STATES POSTAL SERVICE

and

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

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) **Case 28-CA-230940**
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RESPONDENT’S POST-HEARING BRIEF

Respondent, United States Postal Service (“Postal Service” or “Agency”), pursuant to Section 102.42 of the Board’s Rules and Regulations, as amended, hereby submits its post-hearing brief. According to the order of, Associate Chief Administrative Law Judge Gerald Etchingham, post-hearing briefs must be submitted on or before August 6, 2019.

For the reasons set forth in more detail below, Respondent requests that the allegations set forth in Charge 28-CA-230940 be dismissed. Specifically, the evidence and testimony presented demonstrate no violation of Sections 8(a)(1) and (5) of the Act.

SUMMARY OF ARGUMENT

The supervisory job and selection for that job are not subjects over which management has any obligation to negotiate. The non-discrimination language of Article 2 applies to other matters within the employment relationship, but not to anything that is a non-mandatory subject of bargaining. The union has attempted to bootstrap a non-mandatory issue of promotion under the guise of a discrimination claim (for which other forums are available).

STATEMENT OF FACTS

On Saturday, October 13, 2018, Steward Rodrigues hand delivered a written request for information (RFI) dated October 12, 2018 to Highland Station Acting Manager Marsyla which requested information regarding a supervisor selection at Five Points Station. (GC Exhibit 2). Among the items sought were a selection matrix for evaluating applicants (GC Exhibit 19) and form 991's, which are applications for promotion (See GC Exhibit 20 – Charles Moran's 991) Subsequently, the union filed a grievance with no contract clause or theory cited, on November 2, 2018. (GC Exhibit 5). However, under the provisions of an Intervention Agreement between the Postal Service and the union, there should have been a meeting to discuss the issue before a grievance was filed or information requested "The purpose of this discussion will be an attempt to resolve disputes without the need to request documentation or investigation time unless necessary." (GC Exhibit 7). The uncontradicted testimony is that the union never initiated a discussion at this point in contravention of this agreement. (Tr. p. 44 – Marsyla cross by Respondent).

The request for information was forwarded to Ed Arvizo, who testified that he is the "designated management official for handling information requests". Tr. pp. 49-50. Mr. Arvizo responded to the union's RFI via a letter dated October 23, 2018, in which he questioned the relevance of the union's request. (GC Exhibit 13). Mr. Arvizo also provided unrefuted testimony that he had never seen an RFI for supervisor form 991's (Tr. p. 68), and that the language in the contract (Article 1 – Respondent Exhibit 1) precludes employees from filing grievances over Article 2 discrimination. (Tr. p. 71). Mr. Arvizo also testified that in his 40 years of experience with the Postal Service that he had "never seen a union file a grievance for an employee not being selected for a supervisory position." (Tr. p. 84).

The union responded with an attempted explanation of relevance on October 27, 2018. (GC Exhibit 16). By a letter dated October 30, 2018, Ed Arvizo notified the union that he was forwarding the matter to his superiors at the District level and to the Western Area law department for review. (GC Exhibit 17).

On November 16, 2018, Ed Arvizo responded to the union and wrote:

Notwithstanding the USPS position that the NALC Union has no authority to challenge the non-selection of an employee to an EAS position and rights to the 991 's of employees who applied for the Supervisor Position at 5 Points Station, the USPS is providing you a copy of Mr. Moran's 991 and the matrix used by Ms. Aragon in her selection for the Supervisor Customer Service position at 5 Points Station. (GC Exhibit 18).¹

[Note: GC Exhibits 19 & 20 were attached to Exhibit 18 - Tr. p. 75.]

However, unbeknownst to Ed Arvizo at the time, the union had already filed its unfair labor practice charge in this matter on November 9, 2018. (GC Exhibit 1(a)). Ed Arvizo testified that he believed the union was not bargaining in good faith by filing the charge before receiving his response. (Tr. P. 88)

During the hearing it came to light that Respondent had not produced the grievance at issue, GC Exhibit 5, which had been subpoenaed by the General Counsel, and despite a good faith search by Respondent. Accordingly any further questions from Respondent regarding grievances filed by Mr. Moran were barred under a Bannon Mills sanction. 146 NLRB 611 (2014). (Tr. p. 42). There is no further record of what happened to this grievance. Neither Supervisor Marsyla (Tr. p. 43) nor Steward Rodriques (Tr. p. 144) knew what happened, if anything, to the grievance.

However, the mere fact that a grievance was filed does not undermine Ed Arvizo's testimony that he had never seen a grievance for an employee not being

¹ According to the testimony of the hiring manager, Janell Aragon, the five applicants on the matrix were all bargaining unit employees. (Tr. P. 108).

selected for a supervisory position. Furthermore, Mr. Arvizo credibly testified that he had never previously seen a union RFI for form 991's under the circumstances of this matter. (Tr. p. 85). And his support for why he had never seen a similar RFI was his belief, based on 40 years of experience, that "the Union does not have the right to file grievances for employees where there isn't a contractual cite anywhere that allows the grievance to be initiated by the Union for the non-selection of a supervisory position." (Tr. p. 85). Nor does the Bannon Mills sanction in this matter prohibit Respondent's assertion that the grievance is meritless, and there have been no similar grievances, regardless of the fact that one was filed in this case.

ARGUMENT

A. An Employer's Selection of Supervisors is not a Mandatory Subject of Bargaining and therefore Respondent had no Duty to Provide Information

Neither the decision to create new supervisory positions nor the selection of individuals to fill these positions is a mandatory subject of bargaining. Bridgeport and Port Jefferson Steamboat Co., 313 NLRB 542, 545 (1993), (*citing* Kono-TV-Mission Telecasting Corp., 163 NLRB 1005, 1008 (1967)). *See also* St. Louis Telephone Employees Credit Union, 273 NLRB 625, 627-28 (1984) ("We emphasize first that neither the decision to create new supervisory positions nor the selection of individuals to fill these positions is a mandatory subject of bargaining. Under the Act, neither party may dictate to the other its choice of representatives and, therefore, an employer need not bargain with a union over its selection of supervisors.")

In Pittsburgh Metal Processing Co., 286 NLRB 734 fn. 2 (1987), the General Counsel contended that the employer violated sections 8(a)(5) and (1) of the Act by failing to bargain over the promotions of two bargaining unit employees to supervisory

positions because such promotions were mandatory subjects of bargaining. The Board disagreed. Under the circumstances of the case (none of the promotions resulted in the elimination of any unit classifications) the Respondent did not have an obligation to bargain with the Union over the promotions. “Accordingly, we agree with the judge that the complaint should be dismissed.” (*citing* St. Louis Telephone Employees Credit Union, supra, at 627-628).

The same circumstances apply here – five bargaining unit employees applied for the supervisory position. The fact that they were bargaining unit applicants does not render their applications subject to collective bargaining or information requests from the union. The “duty to furnish . . . information stems from the underlying statutory duty imposed on employers and unions to bargain in good faith with respect to mandatory subjects of bargaining.” Cowles Communications, 172 NLRB 1909 (1968)). Since the decision to promote was not a mandatory subject of bargaining, there was no duty to furnish information concerning a nonmandatory subject of bargaining. Service Employees Local 535 (North Bay Center), 287 NLRB 1223 fn. 1 (1988).

B. Respondent had a Good Faith Belief that the Information Sought was Neither Grievable nor Relevant

The General Counsel went to great pains to ensure the court was aware of the various consent orders in this matter. (GC Exhibits 9-12) Moreover, management witnesses testified that they were aware of the consent orders. This poses the question, then, as to why management took the position that the information sought was not relevant. The answer is that management had a good faith belief that the matter in issue was neither grievable nor subject to an information request. Why else run the risk of further sanctions from the 10th Circuit?

In previous rulings the NLRB Division of Advice has held that “an employer does not violate its bargaining obligation by making a good faith argument, as a defense to a grievance. U.S. POSTAL SERVICE, 10 NLRB AMR 20019. Furthermore, the “fact that an employer makes an argument, in good faith, as a defense to a grievance would not be condemned as an unfair labor practice.” Subject: U.S. Postal Serv., No. Case 9-CA-18712(P), 18770(P), 1982 WL 30093, at *1 (Dec. 13, 1982).

C. The Union Bargained in Bad Faith

Ed Arvizo testified that he believed the union was bargaining in bad faith by filing the ULP prior to receiving his reply to the union’s allegation of relevance. (Tr. P. 88). Further, there is unrefuted testimony that the union circumvented the Intervention Agreement by failing to raise the issue regarding Mr. Moran’s status before filing the grievance. (GC Exhibit 7 & Tr. p. 44). In fact Mr. Moran’s 991 and the matrix requested by the union were provided to the union with Ed Arvizo’s November 16, 2018, letter. (GC Exhibits 18, 19 & 20). This failure to allow the Postal Service to complete information process “may be equated to a refusal to bargain in good faith”, Communication Workers of America (Avaya, Inc.), 45 NLRB AMR 8, *citing* Electrical Workers Local 1186, 264 NLRB 712, 721 (1982).

Notwithstanding the history between the unions and Albuquerque management, the Postal Service in this matter was engaged in good faith bargaining, and the Board’s intervention in this matter prevented the parties from fully resolving the matter between themselves. This implicates the policy set forth under 29 U.S.C.A. § 171, that it is preferable to allow the parties to resolve the issue through the collective bargaining process.

Moreover, the fact that the union filed a grievance does not render that grievance valid. The Board has long recognized the theory of frivolous grievances. Cf. Buffalo Newspaper Guild, 220 NLRB 79 fn. 4 (1975).

CONCLUSION

For the foregoing reasons Respondent respectfully urges dismissal of this Complaint and the underlying charge.

Dated this 6th day of August, 2019.

Respectfully submitted,

A handwritten signature in black ink that reads "Dallas G. Kingsbury". The signature is written in a cursive style with a large initial "D" and a stylized "K".

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing **Respondent's Post Hearing Brief** was sent this 6th day of August, 2019, as follows:

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