

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH

UNITED STATES POSTAL SERVICE

and

28-CA-230940

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

Katherine E. Leung, Esq., for the General Counsel.
Dallas G. Kingsbury, Esq., for the United States Postal Service.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. The National Association of Letter Carriers, Sunshine Branch 504, affiliated with National Association of Letter Carriers, AFL-CIO (the Union, or NALC) filed the underlying unfair labor practice charge against Respondent United States Postal Service (the Respondent or the Postal Service) on November 9, 2018. After investigation of the charge, the Region 28 Regional Director issued a complaint and notice of hearing on April 12, 2019. The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), by failing to furnish the Union in a timely manner with information needed to perform its good faith collective-bargaining duties. The Respondent answered the complaint on April 26, 2019, generally denying the critical allegations and affirmatively denying that the Union has a right to the requested information; or, alternatively, if it does, that the matter should be deferred to arbitration. In addition, the Respondent maintains that the Union's discrimination claim is an attempt to bootstrap a nonmandatory issue of promotion. This case was tried in Albuquerque, New Mexico, on June 18, 2019.

FINDINGS OF FACT

Upon the entire record within,¹ including the briefs from counsel for the General Counsel

¹ Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

and the Respondent, I make the following findings of fact.

I. JURISDICTION

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Respondent admitted, and I find, that it provides postal services for the United States of America. In performance of that function, the Respondent operates facilities throughout the United States. Facilities include the Albuquerque Postal Installation in Albuquerque, New Mexico. Based upon the above, the Board has jurisdiction over the Respondent under Section 1209 of the Postal Reorganization Act of 1970. (GC Exh. 1(e).)²

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II. LABOR ORGANIZATION

Respondent admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act. (GC Exh. 1(e).)

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III. ALLEGED UNFAIR LABOR PRACTICES

A. USPS-NALC CBA and the 10th Circuit Court of Appeals' Consent Orders

The Respondent recognizes the Union as the exclusive representative of its city letter carriers in the Albuquerque Postal Installation.³ The collective-bargaining agreement (CBA) applicable to city letter carriers became effective January 10, 2013. (R Exh. 1.) The parties use a Joint Contract Administration Manual (JCAM) to assist with applying the CBA. (GC Exh. 15.)

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Article I of the CBA defines which Respondent employees are in the bargaining unit. The bargaining unit specifically *includes* city letter carriers and city carrier assistants. Article I specifically *excludes*: managerial and supervisory personnel; professional employees; employees engaged in personal work in other than a purely nonconfidential clerical capacity; security guards defined in Public Law 91-375 1201(2); AH Postal Inspection Service employees; employees in the supplemental work force as defined in article VII; *rural* letter carriers; mail handlers; maintenance employees; special delivery messengers; motor vehicle employees; or postal clerks. (R Exh. 1.) (Emphasis added.)

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The CBA allows bargaining unit employees to file grievances over any violations of the CBA, including violations of the antidiscrimination and civil rights protections established by article 2 of the CBA. (GC Exhs. 14 and 15.) Article 2.1 of the CBA specifically provides that “[t]he Employer and the Union agree that there shall be no discrimination by the Employer or the Union against employees because of race, color, . . . [etc. and] there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act.” *Id.*

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Article XV of the CBA contains the grievance-arbitration procedure the parties use to resolve issues that arise under the agreement. (GC Exh. 6; Tr. 127.) Any bargaining unit employee

² Transcript citations are denoted by “Tr.” with the appropriate page number. Citations to the General Counsel and Respondent exhibits are denoted by “GC” and “R,” respectively.

³ The Albuquerque Postal Installation has 12 city stations, including the Five Points Station and Highpoint Station located in Albuquerque, New Mexico. (Tr. 51.)

may file a grievance alleging unlawful discrimination against handicapped employees. (GC Exhs. 14, 15.) Section II of article XV articulates the grievance procedure steps. The grievance process begins with Informal Step A (Step A).

5 Step A requires an aggrieved employee discuss the grievance with his immediate supervisor within 14 days of which either the Union or the employee learned of the problem. A NALC representative may use a form titled, “Request for Information” (RFI) when a potentially aggrieved employee approaches him. The RFI provides space for a representative to detail documents needed to investigate the possible grievance. The RFI also has a section where a supervisor can
10 acknowledge receipt of the information and document request. (GC Exhs. 2, 4.)

If there is no resolution at Step A, the matter advances to Formal Step A (FSA). FSA requires that an installation head or designee meet with the union representative or steward within 7 days of receiving the Step A Grievance Form. A NALC representative may give an installation
15 head or designee an informal second opportunity to produce requested information. (Tr. 126.) The procedure moves to Step B and arbitration if the parties cannot agree. (GC Exhs. 6, 7.)

From 2007 to 2017, the General Counsel and Respondent entered into four consent orders involving the Albuquerque Postal Installation. The Tenth Circuit Court of Appeals enforced the
20 consent orders. See, e.g., *United States Postal Service*, 345 NLRB 426 (2005), enfd. 486 F.3d 683 (10th Cir. 2007); *United States Postal Service*, 28-CA-017383 et al., unpublished order issued November 4, 2002, enfd. Case 02-9587 (10th Cir. 2003). The consent orders require the Respondent to maintain detailed RFI process records. The Court may impose fines for failing to provide the
25 Albuquerque Postal Installation employees who routinely communicate with the Union - Ed Arvizo (Arvizo) and Janell Aragon (“Aragon”), supra—have some familiarity with the recordkeeping and fines of the Tenth Circuit Orders. (Tr. 60–65, 105–106.) Arvizo has worked in the management of the Albuquerque Postal Installation since 1997, and Aragon since July 2018 (Tr. 50, 94.)

30 *B. The Union’s Requests for Information for Charles Moran*

This litigation centers on employment applications submitted by disabled veteran Charles Moran (Moran), a city letter carrier reporting to Highland Station, Albuquerque Postal Installation to Respondent in the summer of 2018.⁴ (GC Exhs. 20, 21; Tr. 97, 132.) Moran applied for “about
35 three or four” supervisory positions since mid-2018. (Tr. 97.) Moran did not get hired for any of the applied positions and he requested information from Respondent about its decision not to award Moran any of the applied positions in October.

This charge refers to Moran’s application on August 1, for the position “SUPV CUSTOMER SERVICES EAS—953465!3 EAS—17 ALBUQUERQUE NM NC\0215069”, and
40 his October 20 application for the position “SUPV CUSTOMER SERVICES EAS—17 ALBUQUERQUE NM NCI0241223” (the supervisory position(s)). (GC Exhs. 20, 21.)

The Union filed a grievance on behalf of unit employee Moran alleging unlawful
45 discrimination against the Postal Service under article 2 of the CBA when it denied handicapped city letter carrier Moran an interview for a supervisor position at Five Points Station. The

⁴ All dates refer to 2018 unless otherwise stated.

Respondent maintains that Moran was not eligible to use the grievance process to allege unlawful discrimination in the handling of the two supervisory position applications despite contrary language in section 2 of the parties' CBA. (See GC Exhs. 14 and 15 at art. 2, sec. 2.1.) According to the Respondent, Moran would be ineligible to file a grievance and to request information related to the alleged unlawful discrimination for Respondent not hiring a handicapped veteran unit employee because Moran was not applying for a union member position. (Tr. 14–15.)

On October 13, NALC Steward Marcelino Rodrigues (Rodrigues) submitted an RFI to Acting Station Manager Joey Marsyla (Marsyla) on behalf of Moran regarding his August 1, 2018 application (the "October 13, 2018 RFI"). (GC Exh. 20; Tr. 20, 23, 26–27, 125, 129; R Br. at 2.) The October 13, 2018 RFI originated from a meeting between Rodrigues and Moran on October 12. At that time, Rodrigues evaluated and prepared a statement for Moran's article II discrimination grievance (GC Exh. 14; Tr. 128–129, 132.) The October 13, 2018 RFI sought USPS Form 991, *Application for Promotion or Assignment*, and the matrix used to evaluate Moran. (GC Exh. 19.)

Rodrigues hand-delivered the RFI to Marsyla on October 13, which Marsyla signed and dated at the bottom of the form. (Tr. 26.) Marsyla then called Manager of Customer Service Operations (MCSO) Janell Aragon (Aragon), in which he informed Aragon of the October 13, 2018 RFI. Marsyla told Rodrigues after the call that Rodrigues would need to submit the RFI to the Designated Management Official (DMO) Ed Arvizo (Arvizo). (Tr. 55, 129.) Grievance RFIs are normally submitted to Arvizo. (Tr. 28, 32, 53.) Aware of the 14-day informal grievance timeline and processing by Arvizo, Rodrigues took the unusual step of concurrently requesting an extension of time for the Respondent's response. (GC Exhs. 2, 3, 4.; Tr. 46, 130.) The Respondent now had through October 26, later November 2, to respond to the October 13, 2018 RFI. (GC Exh. 3.; Tr. 31.)

Rodrigues also emailed an electronic copy of the October 13, 2018 RFI to Aragon on October 13 (Tr. 100.) I find that the Respondent either improperly refused to produce the electronic copy of this email maintained in the regular course of business, or that the Respondent destroyed this October 13, 2018 RFI that Aragon received from Rodrigues as it is also unavailable for the record as not properly produced by Respondent in response to the General Counsel's subpoena.⁵ (Tr. 102–103.) After receiving the email, Aragon printed the October 13, 2018 RFI and hand-delivered the form to Arvizo's office on "the day that [she] received it." (Tr. 100–106.)

Rodrigues had not received a response by October 22 for his October 13, 2018 RFI. He then submitted a second RFI by photocopying the first and notating the new form with "2nd Request October 22, 2018" (the October 22, 2018 RFI). (GC Exh. 4; Tr. 33–34, 133.) Rodrigues again hand-delivered the form to Marsyla on October 22 and had him sign for it. (Tr. 33–34.)

Arvizo did not acknowledge receipt of Marsyla's RFI October 22, 2018 until October 23, in which Arvizo sent him certified mail. (GC Exh. 13; Tr. 64, 134–135.) Arvizo's certified mail acknowledgment requested the Union provide relevance for the RFI. (Tr. 68.) The acknowledgment receipt argues for the first time that Moran did not fall under the CBA because he applied for a supervisory position. (GC Exh. 13; Tr. 71–72.) Arvizo also reasoned withholding the matrix on the same grounds (GC Exh. 13.; Tr. 89.)

⁵ See fn. 6 immediately below as Respondent contumaciously failed to produce copies of Moran's grievance and Aragon's emails concerning the October 13, 2018 RFI.

Arvizo testifies that he did not even *receive* Rodrigues' initial October 13, 2018 RFI from Marsyla until October 22. (GC Exh. 13; Tr. 65.) Arvizo memorialized this date in an October 23 memo and RFI log entry. (Tr. 61, 65.)

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When questioned about the date discrepancy, Arvizo stated, "Mr. Marsyla received the request on the 13th, but that does not reflect the date that I received that I'm aware of." (Tr. 64.) Arvizo said he used holiday time and leave from October 15 to October 22, and did not personally take steps to ensure RFI coverage during his absence. (Tr. 66.) Instead, Arvizo claims that it is for the postmaster to designate a temporary DMO while Arvizo is away. (Tr. 66–67.) However, Aragon testified that she receives notice when Arvizo is out of the office, and she takes Arvizo's place and responsibility to provide requested information for RFIs in his absence. (Tr. 98–99.)

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Rodrigues and Arvizo exchanged further correspondence on October 27 and 30. (Tr. 136–137; GC Exh. 16, 17.) Rodrigues explained the grievance's discrimination basis in his October 27 letter to Arvizo. (GC Exh. 16.) Arvizo replied by certified mail that he would forward the RFI according to NALC's Western Area Law Department's instructions. (Tr. 136–137; GC Exh. 17.) Rodrigues had not received the requested information by November 2. (Tr. 137.) The Union proceeded with Step A, and filed the ULP charge on behalf of Moran on November 9. (GC Exh. 1(a); 35–36.)

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On November 2, the Union filed a Step A Grievance Form and met with Respondent's manager, Marsyla, about Moran's Step A grievance that he did not receive interviews for the supervisory positions he had applied to because of unlawful discrimination based on his handicapped status under article 2 of the CBA which are directly related to the October 13, 2018 RFI. (GC Exhs. 3–5; Tr. 29–30, 35–36, 132.)⁶ The Respondent maintains that Moran was not eligible to use the grievance process to allege unlawful discrimination in the handling of the two supervisory position applications despite contrary language in section 2 of the parties' CBA. (See GC Exhs. 14 and 15 at art. 2, sec. 2.1.) According to the Respondent, Moran would be ineligible to file a grievance and to request information related to the alleged unlawful discrimination for Respondent not hiring a handicapped veteran unit employee because Moran was not applying for a union member position. (Tr. 14–15.)

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⁶ Respondent failed to produce Moran's November 2 Jt. Step A Grievance Form signed by Marsyla and Rodrigues (GC Exh. 5) in response to the General Counsel's subpoena and I granted the General Counsel's request for an evidentiary sanction regarding the circumstances surrounding Moran's grievance as I concluded that Respondent's blocking of first-hand information and failure to produce the grievance document was intentional and warranted evidentiary sanctions of an adverse inference against Respondent, a bar against Respondent as the noncomplying party from presenting evidence about the grievance sought by the subpoena, I precluded Respondent's counsel from cross-examining witnesses about the same grievance, and I permitted the introduction of secondary evidence by the General Counsel as the party who had been disadvantaged by Respondent's noncompliance. See Tr. 36–47, 103–107; see also e.g., *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 1 fn. 1, and 15 fn. 29 (2018) (respondent's contumacious failure to produce subpoenaed records regarding the duties of its floor captains warranted adverse inference that they would have corroborated the testimony of employees and provided additional evidence that the floor captains had Section 2(11) supervisory authority); *Bannon Mills*, 146 NLRB 611, 614 fn. 4, 633–634 (1964); and *American Art Industries*, 166 NLRB 943, 951–953 (1967), *affd.* in pertinent part 415 F.2d 1223, 1229–1230 (5th Cir. 1969) (permitting the General Counsel to present secondary evidence, including employee testimony, regarding the number of employees in the unit in lieu of employee payroll and other records that the respondent failed to produce).

On November 16, Arvizo provided some documents in response to the October 13, 2018 RFI. (GC Exhs. 18, 19, 20; Tr. 140.) The certified mail contained Moran’s 991 and a supervisory position hiring matrix from Aragon, neither of which contained handwritten notations. (GC Exhs. 18, 19, 20; Tr. 75–78.) However, the matrix did note that Moran had a lower score compared to the other candidates. (Tr. 113.)

Aragon is the selecting official responsible for reviewing 991s, conducting interviews, calculating candidate scores from the hiring matrix, and making the final selection. (Tr. 107, 109–110.) Aragon regularly takes notes on hiring papers to remember details about an applicant’s skills or experience. (Tr. 110–112.) The 991s are only kept in a physical file, not electronically. (Tr. 111.)

ANALYSIS

I. THE CREDIBILITY DETERMINATIONS

A credibility determination may rely on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness’ testimony. *Daikichi Sushi*, 335 NLRB at 622.

My observation during the trial was that Union steward Rodrigues appeared truthful and honest in his demeanor, and that he testified in a consistent and convincing manner on direct and cross-examination. In addition, I also found Respondent acting station manager Marsyla was the most credible witness who testified as he answered questions directly and he did not appear rehearsed or following any script. In addition, I further found Respondent’s manager of customer service operations Aragon was also straightforward and appeared not to be hiding anything but her “lost” and unproduced emails as Aragon actually admitted that she and her supervisor, the Postmaster, always knew when Respondent’s designated management official Arvizo was using his leave because his leave slip went to directly to Aragon. Thus I find there is no dispute that Respondent received the Union’s October 13, 2018 RFI on 10/13/18.

Respondent’s designated management official Arvizo, however, was the least credible witness as he presented testimony that was vague and appeared less than forthright. Also, Arvizo has been employed with the Postal Service in management for more than a decade, aware of the various consent orders against the Albuquerque Postal Service, and I find that he directly delayed responding to the October 13, 2018 RFI at issue here and that his excuse for the delay that he was: (1) off work on Columbus Day; (2) using leave the week of 10/15/18; and (3) he did not have his backup process the October 13, 2018 RFI, is not believable.

II. LEGAL PRINCIPLES

The Supreme Court recognizes that an employer has a duty to furnish relevant information when requested by a union under Section 8(a)(5) and (1) of the Act. See *NLRB v. Truitt Mfg. Co.*,

351 U.S. 149, 156 (1956)(employer has duty to furnish relevant information, whether it can actually comply with union demands); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436 (1967) (employer’s duty to furnish relevant information enables the union to perform its statutory duties). The Board determines relevance using a liberal “discovery-type standard.” *Acme Industrial Co.*, 385 U.S. at 437. Without the duty to furnish relevant information, it would be more difficult for unions and employers to determine grievance merit. *Acme Industrial Co.*, 385 U.S. at 437–438; *Ormet Alum. Mill Products, Inc.*, 335 NLRB 788, 790 (2001) (employer fulfilling duty to furnish relevant information benefits the grievance procedure); *Ohio Power Co.*, 216 NLRB 987, 991 (1975) (employer furnishing relevant information helps union determine further grievance processing). The duty to furnish relevant information exists for the entire collective-bargaining agreement term. *Acme Industrial Co.*, 385 U.S. at 435–436 (not only initial bargaining period).

Unavailable or unattainable information does not extinguish the employer’s duty to furnish relevant information. See *Postal Service*, 361 NLRB 283 (2014) (duty breached when employer delayed and failed to provide the union certain requested information); *Hospital Employees District 1199E (Johns Hopkins)*, 273 NLRB 319, 319–320 (1984) (duty includes exploring alternative means of providing requested information when originally unavailable). The employer must provide the union with an adequate explanation if it decides not to furnish the requested, relevant information. *Spurlino Materials, LLC*, 335 NLRB 1198, 1200 (2009) (noting employer’s duty to supply information in a timely fashion, or adequately explain why it will not be furnished). The Board evaluates the totality of the circumstances to determine an explanation’s adequacy, including the “complexity and extent of the information sought, its availability and the difficulty in retrieving the information.” *Id.*

The duty to furnish relevant information includes an employer responding to a union’s request for information in a timely manner. *Woodland Clinic*, 331 NLRB 735, 736 (2000); see also *West Penn Power Co.*, 339 NLRB 585, 587 (2003), *enfd.* in pertinent part 349 F.3d 233, 248–249 (4th Cir. 2004) (use totality of the circumstances to determine unlawful delay). An unreasonable delay to furnish relevant information violates Section 8(a)(5) and (1) of the Act. *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989) (equivalent to a refusal to provide the information). The Board has found delays from 2–16 weeks to be unreasonable. See *Capitol Steel & Iron Co.*, 317 NLRB 809 (1995) (2 weeks unreasonable); *Butcher Boy Refrigerator Door Co.*, 127 NLRB 1360, 1362 (1960) (20 days unreasonable); *Aeolian Corp.*, 247 NLRB 1231, 1245 (1980) (3 weeks unreasonable); *Woodland Clinic*, 331 NLRB at 737 (7 weeks unreasonable); *Regency Service Carts*, 345 NLRB 1286 (2005) (16 weeks).

III. APPLICATION

A. Respondent’s Duty to Furnish Information for Supervisory Position

The Respondent contends that the handicapped unit member information request related to Moran’s rejected applications for promotion to a supervisory position on unlawful discrimination grounds did not implicate the Respondent’s duty to furnish relevant information under the Act. In the alternative, the Respondent asserts that it had a good-faith belief that the information sought was not relevant.

At hearing, the Postal Service emphasized and argued that unit member Moran was somehow excluded from coverage under the CBA to receive information related to the October 13,

2018 RFI. The Respondent further argues that the information sought involves a promotion not covered by the CBA. In addition, Respondent argues that supervisory positions are not a mandatory subject of bargaining and because of this, the Postal Service can ignore the October 13, 2018 RFI related to Moran’s unlawful discrimination claim and not for mandatory bargaining purposes. (See
 5 Tr. at 17); *Bridgeport & Port Jefferson Steamboat Co.*, 313 NLRB 542, 545 (1993) (The general rule is that employers are entitled to make their own nondiscriminatory decisions as to how best to supervise their operations); *St. Louis Telephone Employees Credit Union*, 273 NLRB 625, 627–628 (An employer need not bargain with a union over its decision to create new supervisory positions or the selection of individuals to fill these positions.)

10 The Respondent analogizes Moran’s case to *Pittsburgh Metal Processing Co.*, 286 NLRB 734 fn. 2 (1987). The facts in *Pittsburgh Metal Processing* are distinguishable from this case as the unit employees who applied for supervisor positions were accepted into managerial positions at a very substantial increase in pay, the unit employees did not allege unlawful discrimination against
 15 the employer in the application process, and the Board found under the circumstances there that the employer did not violate Section 8(a)(5) and (1) of the Act because in that case the Board determined that the promotions did not have a substantial impact on the bargaining unit to be a mandatory subject of bargaining.⁷ *Id.*

20 However, the information sought by the Union here on Moran’s behalf is not requested for mandatory bargaining purposes. Instead, as cited by the Postal Service above in *Bridgeport & Port Jefferson Steamboat Co.*, supra at 545, the general rule is that employers are entitled to make their own *nondiscriminatory* decisions as to how best to supervise their operations and the Act protects
 25 against discriminatory decisions for selecting supervisors which is the determinative issue here. Moreover, a simple reading of the CBA’s articles I, sections 1 and 2 reveals the Respondent’s arguments have no merit when applied against a nonexcluded city letter carrier’s contractual rights under a CBA allowing him or her to request information and file a charge alleging unlawful discrimination under article 2, section 2.1 of the CBA in the selection process. Article I, sections 1
 30 identifies the bargaining unit, and section 2 identifies the exclusions:

ARTICLE I UNION RECOGNITION

Section 1. Union

35 The Employer recognizes the National Association of Letter Carriers, AFL-CIO as the exclusive bargaining representative of all employees in the bargaining unit for which it has been recognized and certified at the national level – *City Letter Carriers*. [Emphasis added]

Section 2. Exclusions

⁷ Although Congress excluded “supervisors” from the statutory definition of “employee,” the Board has held that supervisors who file charges alleging discrimination based on their union activity are, for purposes of processing the charge, “employee[s]” protected by Sec. 8(a)(4) of the Act. *Hi-Craft Clothing Co.*, 251 NLRB 1310, 1317 (1980), enft denied 660 F.2d 910 (3d. Cir. 1981). Similarly, here, Moran as a bargaining unit employee can file a charge alleging unlawful discrimination in the rejection of his application for a supervisor position as the CBA specifically allows this at Article 2 and related requests for information must be answered in a timely manner.

The employee group set forth in Section 1 does not include, and this Agreement does not apply to:

1. Managerial and supervisory personnel;
- 5 2. Professional employees;
3. Employees engaged in personnel work in other than a purely non-confidential clerical capacity;
4. Security guards as defined in Public Law 91-3 75, 1201 (2);
- 10 5. AH Postal Inspection Service employees;
6. Employees in the supplemental work force as defined in Article 7;
7. Rural letter carriers;
8. Main handlers;
- 15 9. Special Delivery Messenger;
10. Motor Vehicle Employees; or
11. Postal Clerks.

(R. Exh. 1.)

20 In this case, Moran is a city and *not* rural letter carrier, a class of bargaining unit employee covered by the CBA. The CBA does not exclude employees who are city letter carriers who have applied for supervisory positions from filing unfair labor practices charges or grievances. The 991 does not show that Moran's title changed when he applied for supervisory position.⁸ I find that
25 Respondent's argument that handicapped employee Moran is somehow excluded from the applicable CBA employee group is frivolous.

I further find that the Union filed a grievance on behalf of unit employee Moran alleging unlawful discrimination against the Postal Service under article 2 of the CBA when it denied
30 handicapped city letter carrier Moran an interview for a supervisor position at Five Points Station. I also find that comparator evidence related to the October 13, 2018 RFI showing the qualifications of other applicants and documents showing how the Postal Service evaluated the applications of other similarly situated applicants are relevant to Moran's grievance.

35 Moreover, I further find that given the specific CBA language here allowing handicapped bargaining unit employees like Moran to pursue unlawful discrimination claims, Respondent's additional argument that Moran, as a handicapped bargaining unit employee, cannot pursue his contractual rights under the CBA and allege unlawful discrimination against Respondent in the handling of his applications for supervisor also lacks merit. This is because the information sought
40 by the Union here on Moran's behalf is not requested for mandatory bargaining purposes but, instead, in support of Moran's unlawful discrimination claim against the Postal Service in its application and selection process for supervisor positions. As a result, I find that the Respondent has a duty to furnish the relevant information in response to the October 13, 2018 RFI.

⁸ Contrary to the Postal Service's unfounded assertions voiced by its Manager Arvizo, I find that there is no language in art. 1.2 of the CBA to support its frivolous argument that city letter carriers like Moran lose their right to file unfair labor charges and grievances under the CBA when they apply for supervisory positions. See GC Exhs. 14 and 15.

B. Information Relevant to Collective-Bargaining Need

5 The General Counsel asserts that the information sought in the October 13, 2018 RFI on Moran helps the Union perform its statutory duties and representation under the CBA. The information requested—copies of 991s and a hiring matrix—would help the Union determine how to proceed in a discrimination grievance. Aragon testified that she used the 991s and hiring matrix to determine which applicants to interview or otherwise evaluate. (Tr. 107, 109–110.)

10 The Union’s October 13, 2018 RFI passes the liberal “discovery-type standard” for relevance under *Acme Industrial*. 385 U.S. at 437–438. The Union explicitly sought information to investigate an article 2 nondiscrimination and civil rights Violation in the October 13, 2018 RFI. The hiring papers have clear relevance to the Union’s investigation of potential unlawful discrimination in how the Respondent evaluated handicapped Moran with other candidates for the supervisory positions.

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C. Respondent’s Failure to Timely Provide Requested Information

20 The General Counsel also argues that the Respondent failed to timely provide the requested information on Moran. The General Counsel also cites to the Respondent taking 34 days, or just short of 5 weeks, to provide responsive documents to the Union’s initial October 13, 2018 RFI. Within the 34 days, there were two time extensions on the underlying grievance. Respondent made its first response on October 22, only 4 days before the parties’ first extension of time was set to expire and when 10 days passed between the initial October 13, 2018 RFI and Arvizo asking the Union about relevance. The Respondent maintains that the ten-day delay occurred due to a coverage gap when Arvizo went on vacation.

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30 I find that under the totality of circumstances here and considering that the Albuquerque Postal Service was under multiple consent orders from the Tenth Circuit Court of Appeals to avoid prospective violations of Section 8(a)(5) of the Act or the consent orders, the Respondent Postal Service breached its duty under Section 8(a)(5) and (1) of the Act when it failed to timely furnish the relevant requested information to the Union. See *Spurlino Materials*, 335 NLRB at 1200 (employer’s duty to timely supply information, or adequately explain why it will not be furnished); *Woodland Clinic*, 331 NLRB at 736 (timeliness considered when a respondent furnishes information). As the General Counsel notes and I take administrative notice of, the Respondent Postal Service has a “rich history of responding to information requests with denial and delay.” *Postal Service*, 364 NLRB No. 27 (2016); see also *Postal Service*, 363 NLRB No. 11 (2015); *Postal Service*, 362 NLRB 598 (2015); *Postal Service*, 361 NLRB 8 (2014); *Postal Service*, 360 NLRB 762 (2014); *Postal Service*, 360 NLRB 181 (2014); *Postal Service*, 360 NLRB 160 (2014); *Postal Service*, 354 NLRB 412 (2009); *Postal Service*, 345 NLRB 409 (2005); *Postal Service*, 337 NLRB 820 (2002). The initial 34-day delay falls within the range the Board recognizes as an unreasonable delay. See *Capitol Steel & Iron Co.*, 317 NLRB 809 (2 weeks); *Butcher Boy Refrigerator Door Co.*, 127 NLRB 1360, 1362 (20 days); *Aeolian Corp.*, 247 NLRB at 1245 (3 weeks); *Bituminous Roadways of Colorado*, 314 NLRB at 1014 (6 weeks). Moreover, Arvizo and Aragon both recognize that the Postal Service here in Albuquerque is under four consent orders from the Tenth Circuit Court of Appeals from their long collection of recidivist practices when responding to RFIs. I further find that rather than continue its past unlawful practices, Respondent should respond to all requests for information with urgent vigilance and quick response. Respondent’s attempt to have

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Aragon backup Arvizo when he missed work was wholly inadequate. (GC Exhs. 9, 10, 11, 12; Tr. 60–61, 62–65, 105–106.)

5 I find that under the circumstances of this case, the Respondent’s explanation about the delay is spurious. Arvizo and the Respondent Postal Service were aware of the grievance process. They also knew that a gap in coverage for RFIs could result in significant fines under the four Tenth Circuit consent orders. The information requested—copies of the 991s submitted by the applicants for the supervisory position to which Moran applied, and a copy of the matrix used to evaluate the matrix—is neither unduly complex nor extensive. The Respondent retrieved and supplied Moran’s
10 991 and hiring matrix approximately 1 month after the initial October 13, 2018 RFI. This timing supports the requested information being available and readily retrievable.

15 Even Respondent’s delayed argument that the requested information is confidential lacks merit as I find that Respondent has not proven that it is confidential. Even so, where an employer has proven a legitimate and substantial confidentiality interest, it may not simply deny the union’s request; it must propose a reasonable accommodation of its concerns and the union’s need. *Kaleida Health, Inc.*, 356 NLRB 1373, 1379 (2011)(citing *Pennsylvania Power Co.*, 301 NLRB 1104, 1105–1106 (1991); *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004)). Respondent also failed to propose any reasonable accommodation of its concerns and the union’s needs for the information
20 requested in the October 13, 2018 RFI.

25 The Respondent also asserts that the Union bargained in bad faith by filing the ULP charge before receiving a reply to the grievance. However, the record shows that the Postal Service itself bargained in bad faith through its inadequate RFI responses and unexplained missing emails and grievance copies in response to the General Counsel’s trial subpoena. The Respondent does not provide an explanation as to why it cannot or will not furnish the other applicants’ 991s. Also, the 991 supplied to the General Counsel had no annotations, even though Aragon testified to taking notes on hiring papers. (Tr. 110–112.)

30 CONCLUSIONS OF LAW

1. The Board has jurisdiction over the Respondent by virtue of Section 1209 of the Postal Reorganization Act (PRA).
- 35 2. The National Association of Letter Carriers, Sunshine Branch 504, affiliated with National Association of Letter Carriers, AFL–CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.
- 40 3. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the following unit of employees:

45 All regular full-time employees in the bargaining unit, including city letter carriers and city carrier assistants. Article I specifically excludes: managerial and supervisory personnel; professional employees; employees engaged in personal work in other than a purely non-confidential clerical capacity; security guards defined in Public Law 91-375 1201(2); AH Postal Inspection Service employees; employees in the supplemental work force as defined in Article VII; rural letter carriers; mail handlers; maintenance employees; special delivery messengers; motor vehicle employees; or postal clerks.

4. By refusing to bargain collectively with the Union by failing and refusing to respond appropriately to an October 13, 2018 information request made by the Union, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

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5. The unfair labor practices stated in Conclusion of Law 4, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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Having found that the Respondent United States Postal Service has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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Based on the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.⁹

ORDER

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The Respondent United States Postal Service, Five Points Station and Highpoint Station Branches, Albuquerque, New Mexico, its officers, agents, and assigns, shall

1. Cease and desist from

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(a) Refusing to bargain collectively and failing or refusing to provide, or unreasonably delaying in providing the Union, National Association of Letter Carriers, Sunshine Branch 504, affiliated with National Association of Letter Carriers, AFL–CIO, or its agents, in a timely manner, with requested information that is relevant and necessary to the Union’s performance of its duties as the exclusive collective-bargaining representative of the Respondent United States Postal Service’s bargaining unit employees within the meaning of Section 9(b) of the Act in the following unit:

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All regular full-time employees in the bargaining unit, including letter carriers and city carrier assistants; excluding managerial and supervisory personnel, professional employees, employees engaged in personal work in other than a purely non-confidential clerical capacity, security guards defined in Public Law 91-3 75 1201(2), AH Postal Inspection Service employees, employees in the supplemental work force as defined in Article VII, rural letter carriers, mail handlers, maintenance employees, special delivery messengers, motor vehicle employees, or postal clerks.

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(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

⁹ 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.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, provide the Union with the entire October 13, 2018 information requested.

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(b) Upon request from the Union, provide the Union with necessary and relevant information that it has requested in a timely and appropriate manner.

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(c) Waive any contractual deadlines for filing and pursuing grievances related to the requested information, where the Union missed those deadlines due to Respondent's delay in providing the information.

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(d) Within 14 days after service by the Region, post at its Five Points Station and Highpoint Station Branches in Albuquerque, New Mexico, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, and its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 13, 2018.

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(e) Within 21 days after service by the Region, file with the Regional Director for Region 28, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated at: Washington, D.C. November 15, 2019



Gerald Michael Etchingham
Administrative Law Judge

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¹⁰ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT interfere with, restrain, coerce you, or do anything to prevent you from exercising the above rights.

WE WILL NOT refuse to bargain in good faith or fail or refuse to provide, or unreasonably delay in providing the National Association of Letter Carriers, Sunshine 504, affiliated with Association of Letter Carriers, AFL–CIO (Union) with information that is relevant and necessary to its role as your bargaining representative in the appropriate unit set forth below:

All regular full-time employees in the bargaining unit, including letter carriers and city carrier assistants; excluding managerial and supervisory personnel, professional employees, employees engaged in personal work in other than a purely non-confidential clerical capacity, security guards defined in Public Law 91-3 75 1201(2), AH Postal Inspection Service employees, employees in the supplemental work force as defined in Article VII, rural letter carriers, mail handlers, maintenance employees, special delivery messengers, motor vehicle employees, or postal clerks.

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

WE WILL promptly provide the Union with the information that it requested from us on or after October 13, 2018, and thereafter, consisting of copies of 991s for all employees that applied for the Five Points Station supervisor position, and a copy of the matrix used to evaluate all applicants' 991s.

WE WILL waive any contractual deadlines for filing and pursuing grievances related to the requested information, where the Union missed those deadlines due to Respondent's delay in providing the information.

UNITED STATES POSTAL SERVICE

(Employer)

Dated _____

By _____

(Representative)

(Title)

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 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.

421 Gold Avenue SW, Suite 310, Albuquerque, NM 87103-2181
(505) 248-5125, Hours: 8:15 a.m. to 4:45 p.m. MT

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/28-CA-230940> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



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, (720) 598-7398.