

UNITED STATES POSTAL SERVICE

Washington, DC 20260

DATE: February 25, 1994

OUR REF: LR400:TJValenti:cmv:20260-4125

SUBJECT: Union Requests for Supervisory Records

TO: Human Resources Managers (All Areas)
Human Resources Managers (All Districts)

On August 4, 1993, you were sent a memorandum which included an attachment that addressed the issue of union requests for supervisory records. On page 4 of the attachment, there was a recommendation to have the union sign a confidentiality agreement.

This memo is to clarify that the National Labor Relations Board (NLRB) settlement agreement does not require the union to sign a confidentiality agreement in order to obtain supervisory records that they are entitled to under the necessary and relevant criteria.

The utilization of supervisory records has been discussed with the American Postal Workers Union. I have been assured that the union will instruct their locals that supervisory records obtained pursuant to the NLRB settlement agreement must be used only for the purpose for which these records were obtained.

If there are any questions regarding the foregoing, please contact Thomas J. Valenti of my staff at (202) 268-3831.

William J. Downes

William J. Downes
Manager
Contract Administration (APWU/NPMHU)
Labor Relations

▲
FEB 1994
Received
Office of The
Executive
Vice President

On August 3, 1993, the APWU and the USPS entered into a settlement agreement with the National Labor Relations Board providing for the release of supervisory records, if requested by union representatives. Recent instructions have been issued by USPS legal counsel governing conditions under which such information should be provided to the union. Following is the union's legal interpretation as to a union representatives entitlement to supervisory records.

Such request for information must meet a standard of "relevance" to the purpose for which it is intended to be used. Unlike requests for information concerning bargaining unit employees, which are presumed to be relevant, information about supervisors requires a demonstration of relevance. Such relevance test includes the following:

1. The union must be willing to demonstrate that there is a "reasonable" basis for requesting the information. The factors involved will vary with each such request but may include:

a. A statement by the union explaining the postal policy or rule that is being applied and the information requested is to determine if its application is uniformly applied to supervisors and bargaining unit employees.

b. Did the suspected supervisory violation involve the same or similar policy.

c. Was the suspected supervisory violation during the same general time frame.

d. The source of the unions suspicion that a supervisor was engaged in similar conduct. The union must have a "factual basis" for believing that a supervisor committed a similar infraction -- "mere suspicion" that the requested records will reveal evidence of misconduct will not suffice. The factual basis need not be the first-hand knowledge of the requesting union official. Reports from employees or similar objective information is a sufficient foundation.

After reviewing requested supervisory records, the union is entitled to request and receive other internal postal documents relating to action taken against supervisors. e.g., memorandums, letters or documents (including Inspection Service Memorandum if they exist) relating to the decision for the action taken against the supervisor. You are not limited to copies of disciplinary action taken if other documents exist containing the rationalization for the final action.

You are not required to sign a confidentiality agreement certifying that the use of the requested documents will be limited for the purpose described in the original request. The settlement agreement between the parties does not require the union to sign a "confidentiality agreement" to gain access to the requested information.

Supervisory records received should not be used for any other purpose including publicizing the conduct or action taken against a supervisor. These limitations for use of the information include local or state newsletters, papers and/or bulletins.

When it is intended to use supervisory violations of rules or policy to show either disparate treatment or inconsistencies in discipline for the same or similar infractions, the issue/s should be raised at the earlier steps of the grievance procedure. Article 16 is the appropriate contractual provision to allege violation. Allegations of Article 2 violations should be limited to issues of discrimination as provided in the specific language of the contract.

It is anticipated that, at arbitration, the Postal Service will resist the introduction of evidence about supervisors, contending that, by definition, they are not similarly situated to bargaining unit employees. The attached cases support the unions position that such information is admissible. U.S. Postal Service, 289 NLRB No. 123 (1986), enf'd 888 F.2d 1568 (11th Cir. 1989) and arbitration decision by Arb. Patrick Hardin (S4M-3E-D 42104, et al., Oct 24, 1990).

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M E M O R A N D U M

To: Moe Biller
Bill Burrus
Tom Neill

 From: Anton Hajjar

Date: August 16, 1993

Re: "Supervisory Information" NLRB Settlement

Attached is a copy of the signed NLRB settlement agreement concerning the Union's right to information about supervisors. In this agreement, the USPS gives up on its Privacy Act defense. The last page is the text of the notice. This notice will be posted in the post offices where the cases arose, but the scope of the settlement is nationwide. The USPS is required to distribute the settlement terms to managers throughout the U.S. An official "blue" notice form will come in about a week. The posted notice will be signed by a USPS official, and we will get a copy.

Of course, the USPS is also obliged to provide the various locals with the information which was denied them, and which resulted in the issuance of these complaints. The Postal Service also withdrew its Privacy Act exceptions to ALJ decisions pending on appeal to the Board, withdrew its civil suit to vacate the Snow Award on information about supervisors, and settled several other pending cases. It also sent out a directive to field law offices instructing the staff to desist from pleading Privacy Act defenses to information requests about supervisors.

The below-listed Charging Parties are being sent copies:

Pittsburgh Metro Area Postal Workers Union
APWU Local 2013
Des Moines BMC Local 7027
Kilmer GMF Area Local 149
Trenton Metro Area Local 1020
North Jersey Area Local
Las Vegas Area Local 761

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 22

UNITED STATES POSTAL SERVICE

and

Cases 6-CA-24756(P) and
6-CA-24792(P)

AMERICAN POSTAL WORKERS UNION,
PITTSBURGH METRO AREA POSTAL WORKERS
UNION, AFL-CIO

UNITED STATES POSTAL SERVICE

and

Case 6-CA-24800(P)

AMERICAN POSTAL WORKERS UNION,
LOCAL 2013, AFL-CIO

UNITED STATES POSTAL SERVICE

and

Case 18-CA-12410(P)

DES MOINES BULK MAIL CENTER,
LOCAL NO. 7027, AMERICAN POSTAL
WORKERS UNION, AFL-CIO

UNITED STATES POSTAL SERVICE
(KILMER GENERAL MAIL FACILITY)

and

Case 22-CA-17009(P)

KILMER GMF AREA LOCAL NO. 149,
AMERICAN POSTAL WORKERS UNION,
AFL-CIO

UNITED STATES POSTAL SERVICE

and

Case 22-CA-17769(P)

TRENTON METROPOLITAN AREA LOCAL 1020
AMERICAN POSTAL WORKERS UNION, AFL-CIO

UNITED STATES POSTAL SERVICE
(FRANKLIN OFFICE)

and

Case 22-CA-18007(P)

NORTH JERSEY AREA LOCAL, AMERICAN
POSTAL WORKERS UNION, AFL-CIO

UNITED STATES POSTAL SERVICE

and

Case 22-CA-18544(P)

NORTH JERSEY AREA LOCAL, AMERICAN
POSTAL WORKERS UNION, AFL-CIO

UNITED STATES POSTAL SERVICE

and

Case 28-CA-11627-2(P)
28-CA-11627-3(P)

AMERICAN POSTAL WORKERS UNION,
LAS VEGAS AREA LOCAL 761, AFL-CIO

INFORMAL SETTLEMENT AGREEMENT

In settlement of the above matters and subject to the approval of the Regional Director for the National Labor Relations Board, it is hereby stipulated and agreed by and between the United States Postal Service (herein "Respondent"), the American Postal Workers Union, AFL-CIO (herein "APWU"), on behalf of the charging party locals of the APWU and counsel for the General Counsel of the National Labor Relations Board as follows:

POSTING OF NOTICE: Upon approval of this Agreement the employer will post immediately in conspicuous places in and about its facilities, including all places where notices to employees are customarily posted, and maintain for 60 days from the date of posting, copies of the attached Notice, said Notice to be signed by a responsible official of the employer.

COMPLIANCE WITH NOTICE: The employer will comply with all the terms and provisions of the Notice.

REFUSAL TO ISSUE COMPLAINT: In the event the Charging Parties fail or refuse to become parties to this Agreement, and if in the Regional Director's discretion it will effectuate the policies of the National Labor Relations Act, the Regional Director shall decline to issue a Complaint herein (or a new Complaint if one has been withdrawn pursuant to the terms of this Agreement), and this Agreement shall be between the Charged Party and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 102.19 of the Board's Rules and Regulations if a request is filed within 14 days thereof. This Agreement is contingent upon the General Counsel sustaining the Regional Director's action in the event of a review. Approval of this Agreement by the Regional Director shall constitute withdrawal of all allegations in the subject complaints regarding the employer's refusal to furnish supervisory records or the entire complaint where no other allegations are contained therein, as well as the related portions of any answers filed in response.

PERFORMANCE: Performance by the employer with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Parties do not enter into this Agreement, performance shall commence immediately upon receipt by the employer of advice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE: The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Charged Party has taken to comply herewith. Such notification shall be given within 5 days, and again after 60 days, from the date of approval of this Agreement. In the event the Charging Parties do not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and

provisions hereof, no further action shall be taken in these cases with regard to the supervisory information allegations.

NON-ADMISSIONS: It is understood that Respondent, by entering into this Informal Settlement Agreement does not admit that it has violated the National Labor Relations Act, the Postal Reorganization Act, or any existing collective bargaining agreements between the parties.

All parties agree to an informal settlement agreement pursuant to the NLRB's Rules and Regulations to fully resolve all individual cases to which this settlement pertains as reflected in the case captions and numbers above on the following basis:

1. Respondent will not refuse to bargain with the APWU by refusing to furnish information regarding supervisors which is necessary and relevant to the union's duties as exclusive collective bargaining representative of employees in the units for which it is recognized.

2. Respondent will not affirmatively defend a refusal to furnish supervisory records which are necessary and relevant to the union's duties as collective bargaining representative on the grounds that the release of such records is barred by the Privacy Act of 1974, as amended, and its presently existing implementing regulations.

3. The Postal Service will ensure that this Informal Settlement Agreement is transmitted to the responsible management officials, including all responsible Human Resources personnel throughout the U.S. Postal Service.

4. **SCOPE OF THE AGREEMENT:** This Settlement Agreement settles only the unfair labor practices alleged in the cases referenced herein and does not constitute a settlement of any other case. It does not preclude persons from filing, or the National Labor Relations Board from prosecuting, unfair labor practice charges based on events which precede the date of the approval of this Agreement. The General Counsel shall have the right to use the evidence obtained in the investigation of these cases in the litigation of any other unfair labor practice cases; and any judge, the Board or any other tribunal may rely on such evidence in making findings of fact or conclusions of law.

UNITED STATES POSTAL SERVICE

[Signature]
For Respondent

8/3/93
Date

AMERICAN POSTAL WORKERS UNION, AFL-CIO

William Burrus
For APWU Charging Parties

8-2-93
Date

NATIONAL LABOR RELATIONS BOARD

J. Michael Lytle
Counsel for the General Counsel

8-3-93
Date

APPROVED:

William A. Pascoe
Regional Director, Region 22

8-9-93
Date

**POSTED PURSUANT TO A SETTLEMENT AGREEMENT APPROVED BY
A REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD,
AN AGENCY OF THE UNITED STATES GOVERNMENT**

WE WILL NOT refuse to bargain with the **AMERICAN POSTAL WORKERS UNION, AFL-CIO AND ITS LOCALS OR ANY OTHER LABOR ORGANIZATION** by refusing to furnish them with requested information concerning supervisors which is relevant and necessary to the unions' collective bargaining duties.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish the union or its locals, as applicable, information concerning supervisors which is described or referred to in each of the complaints issued in the subject cases.

UNITED STATES POSTAL SERVICE
(Employer)

Dated: _____

By: _____
(Representative) (Title)

O'Donnell, Schwartz & Anderson

Counselors at Law

1300 L Street, N.W., Suite 200

Washington, D. C. 20005

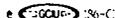
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M E M O R A N D U M

To: Bill Burrus
From: Anton Hajjar
Date: July 30, 1993

Enclosed is the final version of a settlement agreement by which the Postal Service is agreeing to drop its defense that the Privacy Act prohibits disclosure to the Union of information involving supervisors. This settlement is nationwide in scope. It also requires the Postal Service to transmit it to "responsible management officials, including all responsible Human Resources personnel throughout the U.S. Postal Service." I request that you recommend it for signature by the appropriate APWU principal.

Although the NLRB and 3 courts of appeals, in individual cases, have ruled that the Privacy Act is not a valid defense, the Postal Service has refused to acquiesce in these rulings, and has continued to assert this defense. The NLRB, unfortunately, has refused the APWU's invitation to apply "issue preclusion" principles, and we have had to relitigate this issue in case after case.¹ At the Union's request, the NLRB General Counsel sought a way out of this bind by consolidating all known complaints presenting this issue and seeing a nationwide remedy -- that is the consolidated complaint we are settling now.

While the agreement does not recite this, the Union has also insisted that the USPS drop this defense in all pending cases, and the Postal Service has done so. In particular, the USPS withdrew its lawsuit to vacate Arbitrator Snow's award holding that information about supervisors is available under Articles 17 and

¹ Generally speaking, the rule for private litigants is that an issue, once decided in a given case, cannot be relitigated in subsequent cases. The USPS takes the position that, as part of the federal government, it cannot be prevented from relitigating issues lost in other cases. This principle is applicable to the government generally, but the issue of whether it also extends to the Postal Service has not been decided by the courts.

Mr. Burrus
Page 2
July 30, 1993

31, and withdrew its exceptions in the only case pending before the NLRB which raises this issue. In addition, the USPS will have to provide the specific information which is the subject of the consolidated complaints (i.e., it has dropped all defenses in these cases), and will post a notice in each of the 10 cases which are consolidated here.

I should add that the NALC and Mailhandlers are the beneficiaries of the APWU's successful strategy, because one case involving each union was initially consolidated with the 10 APWU cases. Because they had nothing to do with getting the NLRB to issue a nationwide complaint, I thought that their inclusion in a single agreement was inappropriate. Therefore, I had the NLRB sever those cases to be settled separately.

The General Counsel of the NLRB, Jerry M. Hunter, has requested a meeting with a representative of the APWU and USPS at his office, 1717 Pennsylvania Ave., NW, Room 1001, to personally thank the parties for reaching this agreement. For this reason, I request a signature on or before that date.

The other nationwide information cases, pending in Region 5, are close to settlement too. These involve the USPS's defense that Locals cannot request information, and that Locals are not labor organizations, as well as some peripheral issues. When it is settled, I recommend appropriate publicity in the APWU media.

cc. Moe Biller
Darryl Anderson
Lee Jackson

On August 3, 1993, the APWU and the USPS entered into a settlement agreement with the National Labor Relations Board providing for the release of supervisory records if requested by union representatives. Recent instructions have been issued by USPS legal counsel governing conditions under which such information should be provided to the union. Following is the union's legal interpretation as to a union representative's entitlement to supervisory records.

Ordinarily a union request for information concerning supervisors arises in the context of a discipline grievance, and the union's effort to demonstrate disparate application of the rule in question.

A request for information must meet a standard of "relevance" to the purpose for which it is intended to be used. Unlike requests for information concerning bargaining unit employees, which are presumed to be relevant, information about supervisors requires a demonstration of relevance. The NLRB has established the following test:

Requests for information relating to persons outside the bargaining unit [such as supervisors] require a special showing of relevance. Thus, the requesting party must show that there is a logical foundation and a factual basis for its information request. The standard to be applied in determining the relevance of information relating to nonunit employees is, however, a liberal "discovery type standard." ... And in applying this standard, the Board need only find a probability that the requested information is relevant and would be of use to the union in carrying out its statutory responsibilities.

The NLRB will find a "logical foundation" for the union's request if both employees and supervisors are subject to the same or similar rule or policy. The union must also have a "factual basis" for believing that a supervisor committed a similar infraction -- "mere suspicion" that a search of records containing information about supervisors will turn up evidence of misconduct will not do. The factual basis need not be the first-hand knowledge of the requesting union official. Thus, reports from employees that supervisors have violated the same rules, or similar objective information, is a sufficient foundation. These issues are judged on a case-by-case basis. Generally, the more specific the information the union already possesses as to the nature of the infraction, the rule violated, and the time frame in which the offenses occurred, the more likely it is that the NLRB will find that the information must be provided.

After reviewing requested supervisory records, the union is entitled to request and receive other internal postal documents relating to actions taken against supervisors, e.g., memorandums (including Inspection Service investigatory memorandums), letters, or documents relating to the conduct of the supervisor. You are

not limited to copies of disciplinary action taken if other documents exist containing the rationale for the final action (or non-action).

Information about supervisors should be used only for the purpose for which it was originally requested. It should not be used for any other purpose, including publicizing the conduct of or action taken against the supervisor. This includes local or state newsletters, papers, and/or bulletins. However, the union is not obliged to sign a confidentiality agreement to obtain access to such records. The NLRB has consistently rejected the Postal Service's confidentiality claims in such cases.

When it is intended to use supervisory violations of rules or policy to show either disparate treatment or inconsistencies in discipline for the same or similar infractions, the issue(s) should be raised at the earlier steps of the grievance procedure. Article 16 is the appropriate contractual provision to allege. Allegations of Article 2 violations should be limited to the issues of discrimination as provided in the specific language of the contract.

It is anticipated that, at arbitration, the Postal Service will resist the introduction of evidence about supervisors, contending that, by definition, they are not similarly situated to bargaining unit employees. U.S. Postal Service, 289 NLRB No. 123 (1986), enf'd, 888 F.2d 1568 (11th Cir. 1989) was the first NLRB case finding that the Postal Service was obliged to turn over information about supervisors who, in that case, were involved with bargaining unit employees in a gambling activities). In a subsequent arbitration (S4M-3E-D 42104, et al., Oct. 24, 1990), Arbitrator Patrick Hardin relied on evidence of disparate treatment provided in response to the Board's enforced order to partially sustain the grievances of disciplined employees. Although this was a Mail Handler case, it will be useful to cite in reply to USPS objections to the introduction of evidence of disparate treatment.