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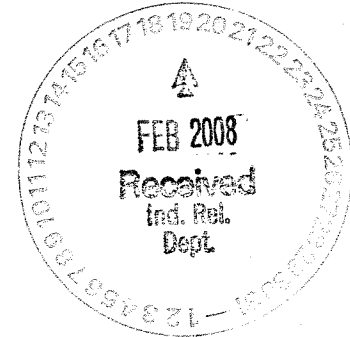


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John Higgins
Deputy General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Re: Revised Proposed Contempt Settlement - U.S. Postal Service v. NLRB & APWU, No. 91-1373

Dear Mr. Higgins:

The American Postal Workers Union, AFL-CIO, strenuously objects to the Contempt Litigation and Compliance Branch's latest revisions to the proposed settlement with the Postal Service in lieu of contempt proceedings. Indeed, the changes make the draft worse than the draft to which the APWU objected initially. The APWU was not notified when the CLCB sought court approval of the last settlement (which the CLCB deemed a failure). The APWU expects to be notified when the CLCB asks the Court of Appeals to approve a consent order embodying any new settlement agreement. The APWU contends, moreover, that the proposed settlement and the filing of a motion to the Court of Appeals to enter the consent decree requires Board approval and cannot be done unilaterally by the CLCB.

Under separate cover Greg Bell, APWU Director of Industrial Relations, will also be commenting on the draft. I would add the following points:

The prior draft prohibited the Postal Service from retaining information it obtained through an unlawful interrogation in "any records system." The APWU pointed out that this restriction was too narrow. But now, in several places in the draft, the CLCB

proposes to permit the Postal Service to retain information obtained through an unlawful interrogation in "attorney files." There is no justification for doing so. Postal employees are covered by a variety of criminal and civil statutes, which are prosecuted by the Justice Department (see 39 U.S.C. § 109(d)). Postal employees are subject to investigations by the Postal Inspection Service and the Office of the Inspector General on matters involving these criminal and civil statutes. The clear implication of this Postal Service-requested change is that the Postal Service is keeping open the option of taking legal action against employees based on unlawfully obtained information.

In this connection, we ask again whether the Office of the Inspector General of the Postal Service is covered by this proposed settlement, and whether the Postal Service claims the right to bind the OIG. These questions still remain unanswered.

The new draft also carves out an exception for retention of unlawfully obtained information if it is "required by law or statutory regulation." What are these laws and statutory regulations? If the Postal Service has specified these laws and regulations, the APWU asks for full disclosure of them. We doubt that the Postal Service has disclosed this information to the CLCB; rather, it appears to be holding this loophole in reserve for later use. I would add that to our knowledge there has been no instance in which the Postal Service has been ordered to expunge files and it has argued successfully that laws or regulations prevented it from doing so.

The draft settlement continues to suffer from numerous other ambiguities. For example, at several places the draft mentions "non-disciplinary action[s]." What are those? It is unclear to what the settlement agreement is referring.

In addition, throughout the draft where the subject is mentioned, the Postal Service is accorded the same exceptions as in the previous subparagraph, and "consistent with ... its decision on reconsideration." This phrase is at best unclear. It may refer to the Postal Service's reservation of a so-called "right" to be able to "conduct a new meeting," even if neither a labor organization nor the employee complains. (See pages 6 n. 8, 11 n. 12 and 12 n. 14.) Similarly, the Postal Service asserts that it has the "option" before the Region completes its investigation to conduct "another interview" (See page 10 n. 11.) Inclusion of these footnotes constitutes blatant interference with collective bargaining. The APWU reiterates its position

that re-interviews are prohibited by the National Agreement at any point following the investigatory interview stage (see Greg Bell letter dated Nov. 15, 2007, at p. 2).

We note, too, that the CLCB has further weakened the former provisions in paragraph V ("Exclusions"), which had purported to preclude the Postal Service from defending in other forums on the basis of the settlement. The new draft includes an exception for situations in which "a Union" or "employee" or "other plaintiff/grievant" refers to the settlement. This proviso should be stricken because it permits the Postal Service to argue that the NLRB has given its imprimatur to actions which violate the National Agreement. Even more egregiously, the CLCB would give the Postal Service permission to defend on the basis of the settlement agreement to argue that the NLRB has allowed what the National Agreement prohibits when a party other than the APWU brings up the settlement agreement in another forum.

The proposed changes to subparagraph B(3) (page 8), obligating the Postal Service to respond within 20 calendar days to a request by the CLCB with a "summary of the steps taken in compliance with" the settlement, including results of any reconvened meeting." As noted, so-called "reconvened meeting[s]" are prohibited by the National Agreement. In addition, this abbreviated reporting obligation is a far cry from adequate policing of Postal Service's respect for employees' Weingarten rights.

The new draft settlement does not address a number of the issues raised by the APWU. An example is the timing of the steps in the settlement. According to the draft, the Postal Service is required to take certain measures when a charge is filed and the Region determines that there is a prima facie case and/or the Postal Service appeals to the CLCB and the Regional determination stands.¹ It would appear that if discipline was issued and the Postal Service takes the specified steps (e.g., re-interview and reconsideration of discipline, etc.), the violation is deemed to be remedied. The CLCB has not addressed the point previously made by the APWU about the disposition of charges when there was a Weingarten violation and the discipline has been overturned in the grievance procedure within the Section 10(b) period, and a charge alleging a Weingarten violation is filed afterwards. Even if the discipline has been reversed, a violation has still

¹ We note that there is no provision for a charging party to appeal to the CLCB when a Region finds that there is no prima facie case.

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occurred and requires a Board remedy. Just as it is the case that reversal of discipline is not a Weingarten remedy under Board law, so too there is no legal authority for the proposition that reversing discipline cures a Weingarten violation.

We note, also, that the Postal Service has never clarified the "special circumstances" which would relieve it of the prohibition against imposing discipline when it relies on information gathered in violation of Weingarten rights.

The mild measures agreed to with a recidivist employer as proposed by the CLCB are no substitute for the statutory processes of the Act, namely, seeking contempt adjudications. If approved in its current form, the APWU intends to oppose this settlement in the appropriate forums, both legal and legislative.

Respectfully submitted,



Anton Hajjar

cc. Greg Bell, Director of Industrial Relations, APWU