

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 19, 2017

Elisabeth A. Shumaker
Clerk of Court

NATIONAL LABOR RELATIONS
BOARD,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

Nos. 02-9587, 05-9552 & 07-9555

ORDER

Before **TYMKOVICH**, Chief Judge, **EBEL**, and **LUCERO**, Circuit Judges.

This matter is before us upon receipt of Magistrate Judge Fashing's Report and Recommendation ("R&R") recommending (1) approval of the parties' Joint Motion for Approval of Stipulation and Proposed Consent Order, and (2) entry of the Consent Order. While our order of October 28, 2016 contemplated an opportunity for the parties to file written objections to Magistrate Judge Fashing's R&R, that is no longer necessary in light of the parties' joint motion and stipulation. Accordingly, and upon careful consideration of the R&R, the parties' joint motion, stipulation and proposed consent order, we direct as follows.

Magistrate Judge Fashing's R&R is adopted. The parties' Joint Motion for Approval of Stipulation and Proposed Consent Order is granted. A copy of the signed

consent order is attached to this order and incorporated by reference herein. Pursuant to the parties' Stipulation, the allegations set forth in the National Labor Relations Board's ("NLRB") September 19, 2016 contempt petition filed in this court and the NLRB's February 3, 2017 amended contempt petition filed in District of New Mexico Case No. 1:16-cv-01207-LF are resolved by the entry of the attached consent order. The attached consent order supersedes the consent order entered by this court on May 24, 2013.

Entered for the Court,

ELISABETH A. SHUMAKER, Clerk

A handwritten signature in black ink, appearing to read "Chris Wolpert", written over a horizontal line.

by: Chris Wolpert
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	:	
	:	
Petitioner,	:	
	:	Nos. 02-9587
v.	:	05-9552, and
	:	07-9555
UNITED STATES POSTAL SERVICE	:	
	:	
Respondent.	:	

CONSENT ORDER

The National Labor Relations Board ("NLRB") and the United States Postal Service ("Postal Service"), having entered into a Stipulation for the entry of this Consent Order, it is hereby

I. ORDERED that the Stipulation dated October 10 & 11, 2017 is approved and shall be filed. It is hereby

II. FURTHER ORDERED that the Postal Service shall comply with this Consent Order and with this Court's judgments dated January 8, 2003, August 3, 2005, and August 28, 2007 (collectively referred to herein as the "Judgments"), by ceasing and desisting from failing to provide information and/or engaging in undue delay in providing information requested by the National Association of Letter Carriers, AFL-CIO ("NALC"), or its Branch 504 ("Branch 504"), and by the American Postal Workers Union ("APWU") or its Local 380 ("Local 380")

(collectively referred to herein as the “Unions”), in connection with their role as collective-bargaining representatives of employees at Postal Service facilities in the cities of Albuquerque and Rio Rancho, New Mexico.

A. Within thirty (30) days after entry of this Consent Order, the Postal Service shall furnish the Unions with the following documents, which documents were solicited in the Requests for Information copied in Attachment A:

1. Written statements from Kim Liburd, Denise Trujillo, and Jacque Kelii that are responsive to NALC Branch 504’s October 1, 2014 request, identified in paragraph XI.E of amended Contempt Petition, seeking information related to a grievance (AMF-1). See A-1.
2. All documents responsive to NALC Branch 504’s December 20, 2014 request, identified in paragraph XI.F of the amended Contempt Petition, seeking the following: information related to the investigation of a grievance (504 AMF 001-14), including information regarding four Initial Management Inquiry Processes (“IMIP”) letters from Human Resources to the Postmaster (dated between October 15 and November 25, 2014) involving “Michael Brill” and/or “Michael Gill.” See A-2.
3. All documents responsive to NALC Branch 504’s February 26, 2016 request, identified in paragraph XI.M in the amended Contempt Petition, seeking six items of information related to a grievance (UPT 323-16). See A-3.
4. All documents responsive to NALC Branch 504’s February 27, 2016 request, identified in paragraph XI.N of the amended Contempt Petition, seeking information related to a grievance (UPT 703-16). See A-4.

5. All documents responsive to NALC Branch 504's March 29, 2016 request, identified in paragraph XI.O of the amended Contempt Petition, seeking ten enumerated items of information related to a grievance (UPT 726-16). See A-5.
6. All documents responsive to NALC Branch 504's May 13, 2016 request, identified in paragraph XI.Q of the amended Contempt Petition, seeking information related to a grievance (UPT 5416DP-16). See A-6.
7. All documents responsive to NALC Branch 504's September 7, 2016 request, identified in paragraph XI.R of the amended Contempt Petition, seeking "ETC clock ring reports for 8/31/16 - present" for employees Mike Aragon, Raquel Smith, Kevin Gonzales, Ray Asmore, Charlotte Joseph, and Monica Gross. See A-7.
8. All documents responsive to NALC Branch 504's September 14, 2016 request, identified in paragraph XI.S of the amended Contempt Petition, seeking information related to a grievance (HIGH 202-16). See A-8.
9. All documents responsive to APWU Local 380's March 31, 2017 request, identified in Board Case No. 28-CA-199281, seeking "the official report documenting the 'Box Section Scans' (time that the box section mail distribution was completed)" for the period covering March 27 through March 31, 2017. See A-9.
10. All documents responsive to APWU Local 380's April 2, 2017 request, identified in Board Case No. 28-CA-199315, seeking seven enumerated items of information related to a grievance. See A-10.

B. In accordance with the parties' stipulation and the prospective fines schedule set forth in the Court's Consent Orders entered on October 2, 2009, and May 24, 2013, the Court imposes on the Postal Service fines in the amount of \$185,000, representing a compromised determination of the fines

sought for the Postal Service's alleged violations of the Judgments and the October 2, 2009 and May 24, 2013 Consent Orders, and order the Postal Service to pay this amount to the NLRB as follows: 20% (\$37,000) shall be remitted to the NLRB within sixty (60) days of the entry of the Order; the remaining 80% of the compromised amount (\$148,000) shall be subject to the terms set forth in Section V below.

III. FURTHER ORDERED that this Consent Order supersedes the previous Consent Order entered on May 24, 2013, and applies to all Postal Service facilities in Albuquerque and Rio Rancho, New Mexico, and that the Postal Service shall: (a) fully comply with all terms of this Order and with those of the judgment(s) entered by this Court on January 8, 2003, August 3, 2005, and August 28, 2007, to the extent that they do not conflict with the terms of this Order, and not in any way, by action or inaction, engage in, induce, encourage, permit, or condone any violation of said judgments or this Order; (b) refrain from failing to provide information, or from engaging in undue delay in furnishing information, requested by the Unions in connection with their role as collective-bargaining representatives of employees at Postal Service facilities in Albuquerque and Rio Rancho, New Mexico, as required by Section 8 of the National Labor Relations Act, as amended (the "Act"), 29 U.S.C. § 158; and (c) refrain from failing or refusing to bargain in good faith with the Unions vis-à-vis requests for

information; and (d) refrain from, 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, 29 U.S.C. § 157.

IV. FURTHER ORDERED that for the purposes of ensuring and facilitating supervision of the Postal Service's compliance with its obligations under this Order, and without limiting the Unions' rights under the Act or the collective-bargaining agreements:

A. Within fourteen (14) days of any request, the Postal Service shall provide to the NLRB the name(s) of the installation head(s) or designee(s) tasked with overseeing the Postal Service's handling of union requests for information (RFIs) concerning the covered facility(ies), including maintenance of the internal tracking system and logs described in paragraph IV.B.

B. The Postal Service shall maintain a functional internal tracking system for each facility covered by this Order that identifies and logs the following for each request for information submitted by the Unions:

- 1) the date listed on the request;
- 2) the date of receipt by the Postal Service;
- 3) the name of the person and union making the request;
- 4) a general description of the requested information;

- 5) the date(s) the information was provided with a description of the information provided and the position and identity of the responder;
- 6) if any request for information is denied in whole or part, the date(s) of denial together with the reason(s) for each such denial and the position(s) and identity(ies) of the official(s) denying the request.

The internal tracking system shall be maintained in a manner that, at a minimum, will permit retrieval according to the date listed on the request. In the event that an information request is received by or otherwise referred to offices in facilities beyond the local level for assistance, and a response to the request is provided by these offices, the internal tracking system for the facility or office to which the referral is made shall include all the above information pertaining to the request referred to that facility or office.

C. Within thirty (30) days of any request, the Postal Service shall provide, for the time periods so requested, the NLRB with copies of all applicable records from the internal tracking system referenced in paragraph IV.B above.

D. Within thirty (30) days after entry of this Order, the Postal Service shall provide a copy of this Order and a copy of the Notice to Employees referenced below, together with written instructions directing that each shall comply with the provisions of the Order, to each District Manager (or equivalent management official), Albuquerque and Rio Rancho Postmasters

(or equivalent management officials), or other management official to whom other supervisors and managers at each facility covered by this Order report, and to all other supervisors and managers at each facility covered by this Order, including acting supervisors working in such capacity for at least ten (10) consecutive calendar days. Hereafter, the Postal Service shall provide a copy of this Order and a copy of the Notice to Employees referenced below, together with written instructions directing that each shall comply with the provisions of the Order, to any individual appointed, promoted or designated to serve in any of the foregoing positions, within fourteen (14) days of such appointment, promotion or designation. Each person receiving copies of this Order and the Notice to Employees shall acknowledge in writing that he or she has been furnished with copies thereof, understands them, and will conduct himself or herself consistently therewith, and will not in any way commit, engage in, induce, encourage, permit, or condone any violation of this Order. The Postal Service shall retain copies of these acknowledgments and written instructions and shall provide copies to Region 28 or to the NLRB's Contempt, Compliance, & Special Litigation Branch ("CCSLB") within thirty (30) days of any request.

E. The Postal Service shall post, at all facilities covered by this Order in conspicuous places where notices to employees are customarily posted, a

Notice to Employees, prepared by the NLRB, alongside this Order, for a period of three years. The notices shall be signed by an appropriate representative on behalf of the Postal Service, and shall be maintained in clearly legible condition throughout the three-year period. Copies shall also be sent to the Postal Service managers and supervisors at its Albuquerque and Rio Rancho facilities. In addition to physical posting of paper notices, the Postal Service shall distribute notices electronically, by email, posting on an intranet or internet site, and/or other electronic means, if at the Albuquerque and Rio Rancho facilities the Postal Service customarily communicates with its bargaining-unit employees by such means. The Postal Service shall further insure that the posted notices are not altered, defaced or covered by any other material. The Postal Service shall, within fourteen (14) days from the initial date of posting, provide Region 28 with a signed copy of the notice and a certification regarding the posting dates and posting locations. The Postal Service shall also provide agents and representatives of the NLRB reasonable access to inspect the notice postings.

F. Within thirty (30) days from the initial date of posting of the aforementioned Notice to Employees, the Postal Service shall mail a copy of said notice, together with a copy of this Order, to each bargaining-unit employee represented by the Unions at any of the Postal Service facilities

covered by this Consent Order as of the date of its entry. The Postal Service shall, within fourteen (14) days of such mailing, provide Region 28 with a list of those persons to whom the notice was mailed, together with proof of the mailing.

G. Within forty-five (45) days after entry of this Order, and again within fourteen (14) days after completion of the notice-posting period referenced above, the Postal Service shall file with the Regional Director for Region 28 or with CCSLB, a sworn certification on a form provided by the Region attesting to the steps the Postal Service has taken to comply with this Consent Order.

V. FURTHER ORDERED that for conduct occurring during the twenty-four months after entry of this Consent Order, without limiting the NLRB's jurisdiction to proceed administratively on any violations of the NLRA, remedial relief for violations of this Consent Order, including all obligations of Sections II – IV above, shall be limited to those set forth in this Section V. As a means of ensuring and encouraging the Postal Service's compliance with its obligations under this Order and the Court's earlier judgments during that twenty-four month period:

A. The Postal Service shall confer with the NLRB on at least a quarterly basis to review and discuss any concerns regarding its compliance with this

Order. Such discussions shall include the operation and results of, and any significant changes in, any compliance program that, following discussions and any statutorily required negotiations with the affected union or unions, the Postal Service institutes to improve its compliance with its statutory obligations to timely provide to the unions relevant information as required by the Order.

B. For each of the eight three-month quarters following entry of this Consent Order, the NLRB's Assistant General Counsel for the Contempt, Compliance, & Special Litigation Branch, or his or her designee, shall make a determination whether the Postal Service has been in substantial compliance with the terms of this Order. Substantial compliance shall be defined as the absence of allegations of unlawful failures, including refusals and undue delays, to respond to union RFIs at the Albuquerque and Rio Rancho facilities that CCSLB determines both to be meritorious and to allege substantial violations.

C. Without limiting the ability of either party to argue the relevance or irrelevance of any specific factor listed or any unlisted factors in future judicial proceedings, the NLRB's assessment as to whether a violation is substantial will be based on factors including, but not limited to:

(a) The number of RFIs that are the subject of the referred charges and their relation to the number of RFIs submitted by

the unions to the facility at issue during the same period of time.

(b) Whether and to what degree the union was harmed by any alleged delay or refusal, e.g., if the information was relevant to a grievance, whether the parties agreed to extend deadlines for the grievance procedure, and whether the grievance was sustained.

(c) Where a charge alleges a refusal to provide information:

- The reason for the refusal, e.g., need to bargain over alleged confidentiality/privacy interests.
- Whether the request was not actually received.
- Whether the Postal Service has raised a valid concern as to relevance.
- Whether the requested information exists.

(d) Where a charge alleges a delay in providing information:

- The length of the delay.
- Whether the Postal Service kept the union informed of its efforts to locate the requested information.
- Any circumstances that may justify a delay.

D. If the determination of the NLRB's Assistant General Counsel or designee is that the Postal Service was not in substantial compliance during the referenced three-month period, the NLRB shall provide the Postal Service with a written explanation, showing the basis for its determination, including all factors considered, and requesting immediate compliance. The

NLRB shall notify the Postal Service of this initial quarterly determination no later than 365 days after the end of each three-month period. The Postal Service shall have twenty-one (21) days from receipt of the NLRB's determination to file a written request, with all supporting evidence, to the NLRB Associate General Counsel for the Division of Legal Counsel for reconsideration of the determination. Absent a timely request for reconsideration, the determination of the NLRB's Assistant General Counsel shall be final; on reconsideration, the determination of the Associate General Counsel shall be final.

E. If the NLRB determines, either initially or following a reconsideration as provided in paragraph V.D, that during the referenced three-month period the Postal Service was not in substantial compliance, the Postal Service shall remit 10% of the negotiated amount of \$185,000 (\$18,500) to the NLRB within sixty (60) days of notification. Otherwise, 10% of the total negotiated amount of \$185,000 (\$18,500) shall be considered waived and no longer owed by the Postal Service.

VI. FURTHER ORDERED that, to assure against violations of this Order following the two-year period referenced in Section V above, the Court hereby imposes against the Postal Service a prospective fine of up to \$25,000 for each

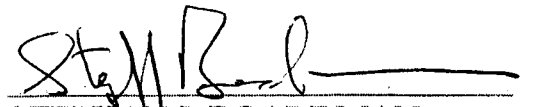
future violation of this Consent Order, and a further fine of up to \$100 per day for each day the Court finds that the violations have continued.

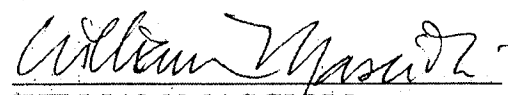
VII. This Order does not preclude the NLRB from requesting such other remedies as it deems appropriate to remedy contumacious conduct.

Approved as to form:

UNITED STATES POSTAL SERVICE

NATIONAL LABOR RELATIONS BOARD


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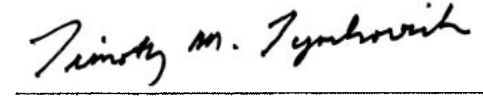

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Dated this 11th day of October
2017 in

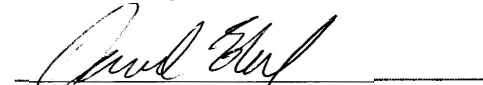
Dated this 10th day of October
2017 in Washington, D.C.]

IT IS SO ORDERED:

Date: October 19, 2017


Circuit Judge

Date: October 19, 2017


Circuit Judge

Date: October 19, 2017


Circuit Judge