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281 NLRB No. 138

D--4064
Columbus, OH
Phoenix, AZ

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION, COLUMBUS AREA LOCAL, AFL--CIO — Case 9--CA--16503(P)

AMERICAN POSTAL WORKERS UNION, PHOENIX METRO AREA LOCAL, AFL--CIO — Case 28--CA--6540(P)

DECISION AND ORDER

On 23 August 1982 Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent, the General Counsel, Charging Parties, and Intervenor [1] filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs [2] and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

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1 American Postal Workers Union, AFL--CIO was granted Intervenor status in this proceeding.

2 The Charging Parties and Intervenor have requested that the Board, sua sponte, authorize injunctive relief under Sec. 10(j) of the Act. We find this is not an appropriate case for such action, and deny that request.

At issue in this proceeding is the question of whether the Union must be given the opportunity to be present when the Postal Service adjusts or attempts to adjust Equal Employment Opportunity complaints [3] with individual unit employees when the same incidents or course of conduct comprising those complaints are concurrently the subject of contractual grievances. The judge engaged in a balancing of what he found to be conflicting statutory policies of Title VII of the Civil Rights Act of 1964 and Section 9(a) of the National Labor Relations Act, and arrived at an accommodation scheme which he found best harmonized the important interests sought to be protected by each. Specifically, he concluded that the Union's right to be present at Equal Employment Opportunity (EEO) precomplaint settlement meetings with unit employees at which individual's grievances are adjusted should yield to EEO processes mandating anonymity of the complainant at the precomplaint stage of that proceeding, thereby limiting the requirements of Section 9(a) of the Act to the extent necessary to be consistent with federally enacted EEO regulations pertaining to the Postal Service.[4] As a necessary consequence of this limitation, he concomitantly guaranteed the Union's right to protect the interests of all unit employees by limiting the Respondent's ability to raise as a defense to the Union's pursuit of a contract grievance based on the same facts the EEO precomplaint settlement reached with the individual employee.

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[3] The term ''complaints'' is used here in its generic sense, to connote matters of concern to employees, rather than as an indication that the individual has filed a formal complaint of discrimination within the meaning of Federal EEO Regulations. See fn. 4 below.

[4] 29 CFR § 1613.213, which applies to this employer and provides for an aggrieved employee's precomplaint right of consultation with an EEO counselor to try to resolve the matter, states, in relevant part:

> The Equal Employment Opportunity Counselor shall not reveal the identity of an aggrieved person who consulted the counselor, except when authorized to do so by the aggrieved person, until the agency has accepted a complaint of discrimination from that person.

Contrary to the judge, we find that the clear statutory mandate of Section 9(a) of the Act must prevail over the EEO administrative regulations. Accordingly, we disagree with the judge's conclusions and find that the Postal Service violated the Act when it adjusted or attempted to adjust contract grievances with individual employees without affording their collective-bargaining representative the opportunity to be present at the adjustments.

Section 9(a) of the Act [5] gives individual employees the right to present and adjust grievances with management, but the second proviso to that section guarantees to the bargaining representative an opportunity to be present at the adjustment of grievances. The explicit language of the Act secures this right to the bargaining representative without qualification. Further, legislative history and the entire statutory bargaining scheme disclose that the second proviso to Section 9(a) was inserted in recognition of the bargaining representative's interest in administering its contract. Bethlehem Steel Co., 89 NLRB 341, 347 (1950). As noted in Bethlehem Steel, the dangers of permitting an employee, or a group of employees, the unqualified right to present and settle grievances were expounded upon in the House debates on Section 9(a) as follows:[6]

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[5] Sec. 9(a) of the Act provides that:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

[6] Bethlehem Steel Co., supra at fn. 8.

> To grant individual employees or a minority group of employees the right to present and settle grievances which relate to wages, hours, and conditions of employment, without permitting the representative of the majority of the employees to participate in the conference and join in any adjustment is to undermine the very foundations of the Act. To create rivalry, dissension, suspicion, and friction among employees, to permit employers to play off one group of employees against another, to confuse the employees would completely undermine the collective-bargaining representative and would be disastrous. [93 Cong. Rec. 3702 (daily ed. Apr. 17, 1947).]

The House version of Section 9(a) did not include any requirement that the bargaining representative be given an opportunity to be present at the adjustment of grievances (see H.R. 3020, 80th Cong. 1st Sess. at 28). The requirement was included in the Senate Bill (S. 1126, 80th Cong. 1st Sess. at 19) and was retained in the Conference Agreement (H.R. Conf. Rep. 80th Cong. 1st Sess. at 46). Thus, by including the second proviso to Section 9(a), Congress clearly indicated an intent to insure that the institutional role of the collective-bargaining representative of all the employees in a bargaining unit is not subordinated to that of individual employees.[7]

Balanced against this clear statutory imperative of Section 9(a) is the EEO regulation requiring an EEO counselor not to reveal the identity of an aggrieved person except when authorized to do so by that individual. This anonymity right obtains only at the precomplaint stage, before a formal complaint of discrimination has been filed by an aggrieved person. The EEO regulations provide for initial precomplaint counseling, which is a required

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[7] The Supreme Court has recognized the importance of majoritarian rights in the statutory scheme, noting in Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 62 (1975):

> In establishing a regime of majority rule, Congress sought to secure to all members of the unit, the benefits of their collective strengths and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority. Vaca v. Sipes, 386 U.S. 171, 182 (1967); J.I. Case Co. v. N.L.R.B., 321 U.S. 332, 338--339 (1944); H.R. Res No. 972, 74th Cong. 1st Sess., 18 (1935).

first step in the EEO complaint procedure. Within specified time limits the aggrieved person must contact an EEO counselor who, following an initial consultation, makes whatever inquiry he deems appropriate into the matter, seeks a solution on an informal basis, and counsels the aggrieved person concerning the issues in the matter. While selection of EEO counselors is a responsibility of management, the EEO counselor may be a bargaining unit employee. Applicable Federal Personnel Bulletins provide that an EEO counselor "should not serve as a representative for a complainant or for an agency in connection with the processing of a discrimination complaint."[8]

Guidance as to the reason for the anonymity requirement was provided in the Federal Personnel Manual at section 713-B--2, issued on December 21, 1976. As stated there, this provision "serves to protect the identity of an employee who wants to discuss a problem but who does not want the attention of agency management attracted to him." While the Appendix containing this statement in the Federal Personnel Manual was revoked when the EEOC assumed enforcement responsibility for EEO in the Federal Government and Postal Service, the anonymity provision was retained in regulations adopted by the EEOC, and there is no evidence that the reason for inclusion of the provision has altered by virtue of the change in enforcement authority. Hence, it would appear that the anonymity requirement is to protect the identity of the

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[8] Federal Personnel Manual Letter No. 713--21, issued September 21, 1973, adopted by the EEOC on December 29, 1978, following transfer to that agency of the EEO enforcement functions formerly vested in the Civil Service Commission pursuant to Title VII of the Civil Rights Act of 1964, as amended, under the Reorganization Plan #1 of 1978 and Executive Order 12106. Federal Personnel Manual Bulletin 720--5, issued November 29, 1979.

The judge states that EEO counselors are agents of the Postal Service. No party has excepted to this finding. While the EEO counselors involved in this proceeding may have been agents of the Postal Service, we make no finding that EEO counselors are generally management agents.

aggrieved employee from management, not from the union. Moreover, since contract grievances were also filed with regard to the matters which are the subject of the EEO inquiries in the cases before us, the Union was already aware of the identities of the aggrieved employees.[9] Accordingly, whatever validity the confidentiality requirement may have in general, we do not find that it is sufficient to outweigh the Union's clear statutory rights set forth in Section 9(a) of the Act.

This consolidated proceeding encompasses United States Postal Service cases arising in two different geographical regions. In Case 28--CA--6540, the Phoenix Metro Area Local Union filed contract grievances with the Postal Service on behalf of four employees who had received notices of termination.[10] These grievances allege distinct and specific violations of sections of the Respondent's collective-bargaining agreement with the Union. The parties' contract provides for the filing of grievances because of alleged discrimination on the basis of race, color, religion, and sex, inter alia, and the grievances in dispute raise, among other issues, alleged discrimination on the basis of these factors. Each of the clerks additionally filed an EEO

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[9] Nor were all of these employees who had filed contract grievances concerned with remaining anonymous to the Postal Service management. Phoenix EEO Counselor Max O'Canas testified, for instance, that employees Anita Ortis and Ramona Tovar had sent a telegram to the Postmaster requesting a meeting with regard to their grievances. A meeting among the two employees, O'Canas, Postal Service Employee and Labor Relations Sectional Center Director Leo Gutierrez, and the Postmaster resulted from this contact. O'Canas testified that this meeting, which occurred before the two employees were offered an EEO settlement, was part of the EEO counseling stage.

[10] The notices, issued on various dates in 1981, notified four distribution clerks that their performance on the letter sorting machine was unsatisfactory and that they would be terminated by a certain date unless they could qualify on the machines before then. Each clerk asserted that her inability to achieve proficiency resulted from not being given as much training time as others, and that the Postal Service's action was unjust and discriminatory.

request for counseling with respect to the termination notices, pursuant to the Postal Service's EEO regulations providing an EEO precomplaint adjustment mechanism. Each employee was offered a settlement at the precomplaint meeting with the EEO counselor, which provided for additional training time and purported to settle all grievances. The employees were advised that acceptance of this settlement offer would resolve all grievances concerning the matter; three of the four signed the settlement agreements offered. The Union was neither notified of nor invited to participate in the EEO grievance adjustment process.

With the exception of one of the grievances which was resolved at step two of the contractual grievance procedure, the Union has continued to process the contract grievances filed on behalf of the clerks. At the time of the hearing, the remaining three grievances were pending arbitration. The Postal Service has not to date attempted to raise the EEO settlements as a bar to further proceedings under the contract, but counsel for the Postal Service stated at the hearing that Respondent would reserve the right to assert the settlements as a defense at the pending arbitrations.

The judge, based on his conclusion that the Union's right to be present at EEO precomplaint settlement meetings should yield to EEO processes assuring anonymity to the complainant at the EEO precomplaint stage, dismissed the General Counsel's complaint alleging that the Respondent bypassed the Union, acted in derogation of the Union's representative status, and otherwise failed to comply with Section 9(a) of the Act in violation of Section 8(a)(5) and (1). For the reasons stated above, we disagree, and therefore find that the Respondent violated the Act in the Phoenix case.

In Case 9--CA--16503, Columbus, Ohio, distribution clerk Joan Otler, who asserted that a 5-day suspension without pay for parking in an unauthorized

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In Case 9--CA--16503, Columbus, Ohio, distribution clerk Joan Otler, who asserted that a 5-day suspension without pay for parking in an unauthorized

area resulted from discriminatory and unfair treatment by the Postal Service,[11] filed both an EEO precomplaint form with the Respondent's EEO authority and a contract grievance regarding the suspension. The Respondent's EEO precomplaint procedure resulted in a meeting at which Otler executed an EEO precomplaint resolution providing for expunction of the suspension from her personnel record, but no backpay. This settlement did not purport to settle any other grievances, stating merely that:

> It is agreed between Joan L. Otler and Postal Officials, Main Post Office, that pursuant to E.E.O Pre-Complaint filed on September 3, 1980, the following constitutes an acceptable resolution.

The Columbus Area Local Union was not notified of the EEO settlement meeting, and did not participate in those proceedings. It continued processing Otler's contractual grievance through the normal steps, and the grievance was set for arbitration. Otler sought to recover backpay through the contractual procedure, and she was not told that the EEO settlement would affect her contract grievance. The settlement was not raised by the Postal Service when it denied the grievance at step 3 of the contractual grievance procedure, although the EEO resolution had been accepted by Otler almost a month before. When Otler's case came to arbitration, the Postal Service asserted the EEO settlement as a defense to the grievance under the contract. The arbitrator ruled that the matter was not arbitrable "as the arbitrator is without authority to abrogate a contract freely entered into between Joan Otler and the Postal Service."

The judge found that the Respondent sabotaged the grievance process and, in effect, repudiated the arbitration clause of its contract by asserting the

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[11] Otler claimed in the EEO form that the suspension was in reprisal for a previous EEO filing.

Otler settlement agreement as a defense to contract arbitration in violation of Section 8(a)(5) and (1) of the Act. We agree with the judge that the Respondent violated that section of the Act in the Columbus case, but find that the violation occurred when the Respondent entered into a grievance resolution without the Union's notification or participation.[12]

The Postal Service was doing more in these cases than simply adjusting EEO complaints---it was also attempting to adjust or, in some instances adjusting, concurrent grievances under the terms of its contract with the Union through its internal EEO procedures.[13] As we have found above that the Postal Service was not privileged to resolve contract grievances with individual employees in derogation of the Union's statutory rights, we find that it violated Section 8(a)(5) and (1) of the Act by not affording the

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[12] The complaint alleges that the Respondent violated Sec. 8(a)(1) and (5) of the Act by asserting the precomplaint resolution of Otler's EEO claim as a defense to arbitration proceedings on the contract grievance. However, it also seeks a remedy for the "unfair labor practices alleged above in paragraphs 8 and 9" of the complaint, and par. 8 alleges (a) that Otler filed the EEO precomplaint form on 3 September 1980; (b) that Otler filed a contract grievance with respect to the same subject matter on 29 September 1980; (c) that Otler and the Respondent entered into a resolution with regard to the EEO precomplaint matter on 12 November 1980, and (d) that neither the Union nor any of its representatives participated in the proceedings culminating in the resolution of Otler's EEO claim. At the hearing counsel for the General Counsel moved to amend the complaint to delete the reference to par. 8 in the remedy section, but later withdrew that motion to amend. In these circumstances, we find the complaint allegations sufficiently broad to support our finding that the violation occurred at the time of the grievance adjustment, rather than at the time the settlement was asserted as a contract grievance defense.

[13] We need not decide here whether the Union would have a right to be present at grievance adjustments with individual employees in which no contract grievance had been filed. In all of the incidents at issue contract grievances had been filed, and the collective-bargaining representative was never given the notice and opportunities to be present at the adjustments of the grievances as mandated by the second proviso to Sec. 9(a).

collective-bargaining representatives an opportunity to be present at grievance adjustments as required by Section 9(a) of the Act.[14]

Conclusions of Law

1. The United States Postal Service is an employer over whom the Board has jurisdiction by virtue of Section 1209 of the Postal Reorganization Act, 39 U.S.C. § 101, et seq.

2. The Phoenix Metro Area Local, the Columbus Area Local, and the American Postal Workers Union are labor organizations within the meaning of Section 2(5) of the Act.

3. By adjusting or attempting to adjust contract grievances with individual unit employees without affording the employee's collective-bargaining representative the opportunity to be present at such adjustments as required by Section 9(a) of the Act, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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[14] E.g., Top Mfg. Co., 249 NLRB 424 (1980), and cases cited therein, cited in U.S. Postal Service, 268 NLRB 876 (1984).

Member Johansen does not agree that "an attempt to adjust grievances" at an employee's request, without more, transcends Sec. 9(a)'s reservation of the right of employees to present grievances to their employer without the intervention of the bargaining representative.

Members Babson and Stephens do not dispute that under the first proviso to Sec. 9(a) of the Act employees have the right to present grievances to their employer without the intervention of the bargaining representative. However, they conclude that under the second proviso to that section, the collective-bargaining representative must be given an opportunity to be present at a conference with an individual employee at which the individual is offered a final settlement of a pending contract grievance, whether this attempt at adjustment results in the employee's acceptance of the settlement or not. They intimate no view on what other circumstances might bring a conference on a grievance within the second proviso.

Amended Remedy

Having found that the Respondent has engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, we shall order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As we have found that the Respondent unlawfully adjusted or attempted to adjust contractual grievances without giving the employee's collective-bargaining representative the opportunity to be present at the adjustments, we shall order it to cease and desist from this conduct. We shall also prohibit the Respondent from raising or otherwise asserting the unlawfully obtained EEO grievance settlements reached with the individual employees as a bar to the contractual grievance and arbitration procedures, so that in those cases where the Respondent negotiated settlements with individual employees without the Union's notification or participation but has not yet asserted the settlements as a defense to contract grievance processing that unlawful conduct may be effectively remedied. With respect to the case in which the Respondent successfully asserted an EEO settlement as a defense in a contract arbitration proceeding, we shall adopt the judge's recommended remedy. Thus, we shall order the Respondent to take all appropriate steps to reconvene the Otler arbitration or to hold the arbitration de novo, as provided by the judge, and to pay the Union for all reasonable increased expenses resulting from its assertion of the Otler EEO settlement as a contract defense in the manner set forth in his recommended remedy. In this way the status quo ante may be restored. We shall also order the Respondent to afford the Union the opportunity to be present at any attempts to adjust contractual grievances.

A new notice which conforms with our Order shall be issued, and we shall require its posting at both the Phoenix and Columbus facilities. Like the judge, we do not find nationwide posting to be warranted.

ORDER

The National Labor Relations Board orders that the Respondent, United States Postal Service, Phoenix, Arizona, and Columbus, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Adjusting or attempting to adjust contract grievances with individual unit employees without affording the employee's collective-bargaining representative the opportunity to be present at such adjustments.

(b) Giving contractual effect to, raising or otherwise asserting in the contractual grievance process, grievance settlements reached with individual unit employees where the employee's collective-bargaining representative was not afforded the opportunity to be present at such adjustment.

(c) 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.

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

(a) Afford the employee's collective-bargaining representative the opportunity to be present at any attempts to adjust contractual grievances with unit employees through any forum.

(b) Petition the arbitrator in the Joan Otler arbitration, jointly with the Union be it willing, to reopen the arbitration or, the arbitrator being unavailable or unwilling, convene a de novo arbitration to consider the issues in the Otler grievance on their merits, waiving all defenses not ripe at the

time of the original arbitration and, further, withdrawing at the reconvened arbitration, or not advancing at a de novo arbitration, the EEO settlement reached with Otler as a defense to the Union's asserted contract violation.

(c) Pay all reasonable increased expenses of the Union and the arbitrator specifically resulting from the delay in the arbitration caused by the successful assertion of the EEO settlement as a defense in the original arbitration of the Otler grievance, with appropriate interest, as more fully set forth in the section of the judge's decision entitled ''Remedy.''

(d) Post at its Phoenix, Arizona, and Columbus, Ohio facilities, copies of the attached notices marked ''Appendix.''[15] Copies of the notices, on forms provided by the Regional Directors for Regions 28 and 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[15] 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.''

(e) Notify the Regional Directors for Regions 28 and 9, in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 30 September 1986

Wilford W. Johansen, Member

Marshall B. Babson, Member

James M. Stephens, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

D--4064

APPENDIX A

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with the American Postal Workers Union and the Phoenix Metro Area Local and Columbus Area Local by adjusting or attempting to adjust contract grievances with individual unit employees without affording those Unions the opportunity to be present at such adjustments.

WE WILL NOT give contractual effect to, raise or otherwise assert in the contractual grievance process, grievance settlements reached with individual unit employees where the employee's collective-bargaining representative was not afforded the opportunity to be present at such adjustment.

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 afford the employee's collective-bargaining representative the opportunity to be present at any attempts to adjust contractual grievances with unit employees through any forum.

WE WILL petition the arbitrator of the Joan Otler grievance, jointly with the Union if they agree, to reopen the Otler arbitration. If reopening is not possible, we shall seek a new arbitration of the Otler grievance. At the reconvened or the new arbitration we shall withdraw or not raise the EEO settlement between Otler and the Postal Service as a defense to the Union's grievance; nor will we assert any other defense which was not ripe at the time of the original arbitration.

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WE WILL pay all reasonable increased expenses of the Union and the arbitrator caused by the delay in the arbitration which resulted from our improper assertion of the EEO settlement as a defense in the original arbitration, with appropriate interest.

UNITED STATES POSTAL SERVICE

(Employer)

Dated ---------- By ----------
(Phoenix, Arizona, Representative) (Title)

Dated ---------- By ----------
(Columbus, Ohio, Representative) (Title)

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 Board's Office, 3030 North Central Avenue, Second Floor, Phoenix, Arizona 85012, 602--241--2362; Federal Office Building, 550 Main Street, Room 3003, Cincinnati, Ohio 45202, 513--684--3663.

APPENDIX B

NOTICE TO EMPLOYEES

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An Agency of the United States Government

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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 afford the employee's collective-bargaining representative the opportunity to be present at any attempts to adjust contractual grievances with unit employees through any forum.

WE WILL petition the arbitrator of the Joan Otler grievance, jointly with the Union if they agree, to reopen the Otler arbitration. If reopening is not possible, we shall seek a new arbitration of the Otler grievance. At the reconvened or the new arbitration we shall withdraw or not raise the EEO settlement between Otler and the Postal Service as a defense to the Union's grievance; nor will we assert any other defense which was not ripe at the time of the original arbitration.