NATIONAL LEVEL ARBITRATION

UNITED STATES POSTAL SERVICE,	:	
- and -	:	Arbitration Nos.
	:	F90N-4F-C-94024977
NATIONAL ASSOCIATION OF LETTER CARRIERS (AFL-CIO).	:	F90N-4F-C-94024038

NALC's POST-HEARING BRIEF

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STATEMENT OF ISSUE

The parties were unable to agree upon a statement of the issue.

The Union proposed the following statement:

> . . . [W]hether the Joint Statement on Violence and Behavior in the Workplace establishes standards of conduct applicable to supervisors which are enforceable by the union through the grievance procedure; if so, whether an arbitrator may grant as a remedy in an appropriate case of supervisory misconduct an order that the supervisor no longer supervise letter carriers.

(Tr. pp. 9-10.)

The Employer proposed the following:

> . . . [W]hether management has given away exclusive rights under article 3, section B, to hire, promote, transfer, assign, and retain supervisors, by signing the Joint Statement on Violence and Behavior in the Workplace.

(Tr., p. 11.)

At the hearing, the parties agreed that the Arbitrator "... may frame the issue within the context of the moving papers" (Tr. p. 13.)

The parties also agreed that upon determination of the interpretive issue in this proceeding, the underlying grievances will be resolved at the regional level, depending upon the resolution of the interpretive issue. (Tr. p. 9.)

PROCEDURAL BACKGROUND

These cases originally were heard at the Regular (regional) Arbitration level and were removed to the National Level upon the Employer's assertion that "an interpretive issue" is involved. (See, National Agreement, Joint Ex. 1, p. 75, Art. 15(4)(B)(5).)[1]

SUMMARY STATEMENT OF MALC POSITION

1. The Joint Statement on Violence and Behavior in the Workplace (Joint Ex. 4, hereinafter referred to as "Joint Statement," stapled to the inside cover of this brief for ease of reference) is an agreement between the parties ". . . significant to the maintenance of labor peace . . ." and "[i]ts terms affect the working conditions of the employees." Accordingly, it is an enforceable agreement, even though not necessarily a garden

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[1]For ease of reference, citations to the National Agreement hereafter will simply refer to the Article and Section number, and page of the National Agreement.

variety "collective bargaining agreement." See, Retail Clerks International Assn. v. Lion Dry Goods Inc., 369 US 17, 28 (1962).

2. The Employer's refusal to abide by a term of the Joint Statement (e.g., "Those whose unacceptable behavior continues will be removed from their positions") appropriately triggers a "grievance" as defined in Article 15, (1) of the National Agreement (pp. 65-66):

> A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

3. The grievances herein were withdrawn from Regular (regional) Arbitration by the Employer pursuant to Article 15 (4)(B)(5) (p. 75) as ". . . involving an interpretive issue under the National Agreement or some supplement thereto which may be of general application . . ." and was not disposed of at Step 4 by settlement or withdrawal. Accordingly, the National President of NALC was ". . . entitled to appeal it to arbitration at the National level . . .." (Art. 15(2), Step 4, (p. 71).)

4. The Arbitrator should determine the interpretive issue by ruling that the Joint Statement establishes standards of conduct applicable to supervisors enforceable by the Union through the grievance procedure, and that in an appropriate case

of supervisory misconduct an arbitrator may order that the supervisor no longer supervise letter carriers.

ARGUMENT

1. A pledge is a pledge is a pledge

The Employer's position is fairly well summarized by its advocate's opening remarks at the hearing, expressing ". . . The Postal Service's outrage . . . This is an attempt by the NALC to create a contractual right out of a non-contractual setting" (Tr. p. 47).

The advocate went on to argue that, "[T]he Joint Statement is a pledge, nothing more, nothing less". Id., 52 What is the nature of the pledge? ". . . [A] pledge by the parties to change the culture in response to the Royal Oak murders." Id., p. 50. What culture? "And the parties are committed to changing the culture in the workplace." Id., p. 52.

The Employer also argued that "we had no contractual negotiations going on. There is no quid pro quo." Id., p. 50.

The Employer's crabbed notion of the stuff of enforceable agreements is in error.

Just this past week, the United States Supreme Court reaffirmed one of the basic tenets of American labor jurisprudence, noting that "the object of the National Labor Relations Act is industrial peace and stability, fostered by collective bargaining agreements providing for the orderly resolution of labor disputes between workers and employers

[sic]." Auciello Iron Works Inc. v. NLRB, ___ U.S. ___ , BNA Daily Labor Report 6-4-96, p. E-1 (copy annexed as Attachment 1). Mr. Justice Souter's citation for that proposition was to Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 38 (1987): "the overriding policy of the NLRA is "industrial peace."

The Auciello decision also noted that "the Board has developed a number of criteria to assess whether a collective bargaining contract has been formed . . . which may not always coincide with those that would govern in the general area of contract law [citations omitted]." Id., p. E-3.

It is tempting, but unnecessary, to delve into the question regarding the continued intellectual vitality of the notion that a collective bargaining agreement is ". . . more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate." Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960), see, e.g., Snow, Make Whole and Statutory Remedies: Arbitration 1995 New Challenges and Expanding Responsibilities; Proceedings of the Forty-eighth Annual Meeting of the National Academy of Arbitrators (BNA, 1996), pp. 153-156.

The Auciello and Fall River decisions remind us that, at the very least, the analysis of "agreements" in the labor law context does not begin and end with basic hornbook tenets of the first year Contracts Law.

The Auciello and Fall River analysis is not NLRB-specific. In Retail Clerks International Assn v. Lion Dry Goods

Inc., 369 U.S. 17 (1962) the Supreme Court considered the special character of labor agreements in general:

> "We need not decide whether or not this strike settlement agreement is a "collective bargaining agreement" to hold, as we do, that it is a "contract" for purposes of §301(a). "Contract" in labor law is a term the implications of which must be determined from the connection in which it appears. [citations omitted] It is enough that this is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them . . .. Its terms affect the working conditions of the employees . . . It resolved a controversy arising out of, and importantly and directly affecting, the employment relationship."

Id., p. 28.

In an early postal arbitrability ruling, National Arbitrator Howard G. Gamser held:

> The threshold issue of arbitrability must be addressed first. This 1978 National Agreement . . . contains a very broad definition of what constitutes a grievance. [Quoting Art. 15(a)] . . . a grievance is not limited to only complaints which involve the application or interpretation of the Agreement. It may very well be concerned with disputes which arise concerning compliance with explicit or perhaps implicit understandings which are not in conflict with the terms of the Agreement. . . .
>
> * * *
>
> That the employees involved . . . [casuals] are not covered by the terms of the National Agreement does not per se preclude the raising of an arbitrable dispute concerning the impact of the terms of their employment upon the wages and working conditions of employees who are covered by the National Agreement."

(Case No. AD-NAT-0121, etc.; June 25, 1980, pp. 10-11. Copy annexed as Att. 2.)

It should be noted that the Gamser award involved the Unions' claim that the rate of pay and job duties of casual employees -- a class of employees not covered by the collective bargaining agreement -- violated the agreement. There, as here, USPS argued that the employees involved were not covered by the agreement and that the Arbitrator could not modify the agreement.

While Arbitrator Gamser ruled against the Union on the merits of the grievance (for reasons not relevant to this proceeding), his comments regarding the essentials of a grievance, and arbitrability, quoted above, certainly resonate.

2. The significance of "intent" (or, lack thereof) regarding creation of contractual rights

The Employer argues that "[T]here was no intent to alter, amend, or modify the national agreement." Tr., p. 58. It is well established, however, that a party's intent has no bearing on the creation of a contract. Restatement (Second) of Contracts, § 21 (1979) ("Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract."); 1 Arthur L. Corbin, Corbin on Contracts, § 2.13, at 189 (Perillo ed. rev. ed. 1993) ("It is not necessary that the parties should consciously advert to legal relations to make an enforceable contract."); 1 Samuel Williston, A Treatise on the Law of Contract, § 3:5, at 218 (Lord ed. 4th ed. 1990) [hereinafter Williston on Contracts] (same). In fact, "a deliberate promise, seriously made, is quite likely to be enforced" regardless of the promisor's beliefs concerning legal

liability. Id., at 221 (citing Restatement (Second) of Contracts, § 19(2) and comments, § 21). . . . Thus, provided that the Postal Service objectively assented to the Joint Statement's terms, the Postal Service's subjective intent is irrelevant. See, id., at 222 (citing Restatement of Contract §§ 20, 21 and comments; Restatement (Second) of Contracts §§ 19, 21, comments a and b).

Given the solemnity of the events which inspired the Joint Statement, the Statement's clear and unmistakable language, and the level of the Postal Service officials involved in the adoption of the statement, the NALC had no reason to believe that the Postal Service did not intend the Joint Statement to have legal effect. See, Corbin on Contracts, § 4.13 at 636 (stating that even if there is no "meeting of the minds," a contract is enforceable against a party if the "party's words and conduct were in a context giving the party reason to know that the other party would be and was in fact misled").

But, even apart from a traditional legal analysis, the Joint Statement itself speaks rather eloquently to the questions of intent and commitment. The Joint Statement explicitly anticipates that it would be met with skepticism and cynicism, and the language strives mightily to overcome the tendency for words to be treated with "winks and nods." Thus:

> ". . . grief and sympathy are not enough. Neither are ritualistic expressions of grave concern or the initiation of investigations . . ..
>
> The United States Postal Service and all of us who serve that institution must firmly and

> unequivocally commit to do everything within our power to prevent further incidents of work-related violence.
>
> * * *
>
> It is also the time to take action to show that we mean what we say. [emphasis in original.]
>
> * * *
>
> . . . There is no excuse for and will be no tolerance of violence or any threats of violence by anyone at any level of the Postal Service; and that there is no excuse for and will be no tolerance of harassment, intimidation, threats, or bullying by anyone.
>
> * * *
>
> Those who do not treat others with dignity and respect will not be rewarded or promoted. Those whose unacceptable behavior continues will be removed from their positions.
>
> * * *
>
> . . . let there be no mistake that we mean what we say and we will enforce our commitment to a workplace where dignity, respect and fairness are basic human rights, and where those who do not respect those rights are not tolerated.

The Postal Service now claims those words were "a pledge, nothing more, nothing less."

But, on March 18, 1992, immediately after the signing of the Joint Statement, Deputy Postmaster General Michael Coughlin, in a Memorandum to Headquarters Officers, stated:

> I am pleased to announce that we have signed a joint statement committing the Postal Service and eight of its labor and management organizations to eliminate violence and other inappropriate behavior from our workplace. [emphasis added]

USPS Ex. 24.

That is hardly the language of "nothing more" than a pledge. Mr. Coughlin is the second highest official of the Postal Service and a member of its Board of Governors. He is generally not given to frivolous, meaningless, empty rhetoric.

Indeed, before the Joint Statement was signed, Mr. Coughlin had signalled the determination to go beyond mere words and to enter into the give and take of agreement necessary to effect real change.

USPS Exhibit 46 is a report by Kenneth Vliestra, the Executive Director of one of the participating management associations (the National Association of Postmasters of The United States) regarding a January 21, 1992 meeting of the organizations that ultimately signed the Joint Statement.

The report noted that:

> One of the major topics of discussion was the position paper drafted by Vince Sombrotto, President of NALC . . . the final wording of this statement was not yet agreed to by all parties.

The report went on to quote Deputy Postmaster Coughlin's remarks at the meeting:

> . . . in order for us to get where we have to be, each group, each organization, has to be willing to give a little. We have to work together, finding areas of agreement to build on our relationships. I can admit that we have to change here at headquarters. I, and other postal officials here will sign that statement being drafted. We will acknowledge that mistakes were made. We will agree that numbers are not an excuse for abuse . . ..

Even earlier in the process that led to the signing of the Joint Statement, senior representatives of USPS and the other

signatory organizations were talking the talk of change, commitment, and the give and take of agreements. USPS Exhibit 16 is a contemporaneous report by Vincent Palladino, then Executive Vice-President of the National Association of Postal Supervisors, of a meeting the senior representatives of USPS and the involved organizations on December 3, 1991, just weeks after the Royal Oak tragedy.

The report noted:

> Our discussion included a lot of talk of the USPS' goal of treating everyone with dignity and respect and implementing a participative style of management at all levels. All of the organization officials agreed that this was still not the case in many of our divisions, MSCs and post offices.
>
> Another point of agreement . . . was that the Postal Service has repeatedly rewarded (through promotions and bonuses) those who make the 'numbers,' regardless of how they make them. This fault was placed on all levels of management -- all the way to USPS Headquarters.
>
> All present acknowledged that in some places there is an unacceptable level of stress on the workroom floor and that an authoritative style of management too often prevails . . ..
>
> * * *
>
> . . . it is the one point on which we all fully agreed, the Postal Service does nothing to discourage the authoritarians. On the contrary, those who make the numbers are rewarded . . ..
>
> * * *
>
> The meeting ended with an agreement to draft and sign a joint statement that will denounce all forms of violence or threats of violence, and that we will eliminate all forms of intimidation, harassment and disrespect usually associated with authoritarian managers.
>
> * * *

Mr. Palladino then editorialized a bit:

> Top management has to give up some of their power in exchange for the employees' commitment to resolving our differences. It sounds simple, but it won't be easy to implement.

Indeed. Mr. Palladino was prescient.

But, the question remains: given the context of the meetings; the nature of the discussions; the give and take reflected in the Vliestra and Palladino contemporaneous reports; the language of the Joint Statement itself -- did NALC President Sombrotto have reason to believe that the Postal Service did not mean what it said? That is, should he have known that it was "a pledge, nothing more"?

Is it not a more reasonable conclusion that Sombrotto testified accurately about his understanding of what the parties were about:

> Q Was there any discussion at any time regarding whether the joint statement was an agreement?
>
> A No. You mean per se? No. You are talking about agreements. I mean, we sat there for days. They asked me to draft it. I drafted it. You make an agreement when you sit down and you work it through. This is just -- and if you don't call that negotiations, I don't know. I don't know what negotiation is.
>
> People sit down. They express their views. They talk about their own view of what any agreement at the end of the day will be. And then you transpose it into an agreement. And then you sign it. And that, to me, is what an agreement is. And that is exactly what this is. It was an agreement between all the parties.

(Tr., p. 73.)

Q Was there any discussion around the table about what would happen if the Postal Service did not live up to its commitment, to its pledge?

A Well, again, I expected beyond any matter of any question of a doubt within my mind -- I may have said this earlier, but if I have been redundant, so be it. In the meetings, it was an enlightenment to me.

It seemed that for once, the parties were getting together with the resolve that we were going to find some sort of a solution to a problem that was terrible for all of us. These were tragedies that were taking place. And as you sat in that meeting, I got the feeling that everybody was saying, "An end. No more. We've got to do something to stop it."

And so I thought that there would be no question that there would be enforcement of -- maybe I was naive. Others said that entering into this maybe I might be naive. But I was absolutely certain at that time that everyone meant what they said, that there would be no disparate treatment. Violations of this document would be -- those violators would be punished no matter who they were.

(Tr., p. 77.)

Sombrotto's belief was consistent with management's contemporaneous statements regarding its approach to this process. Assistant Postmaster General For Employee Relations Joel Trosch was quoted (pre-Joint Statement drafting) in The Postmasters Gazette as follows: "Can we agree on a plan of action? I would like to ask Vince Sombrotto to draft a proposed position statement . . .." [emphasis added] Union Ex. 4.

Sombrotto drafted a proposed Joint Statement. He forwarded it to USPS senior official Joseph Mahon and the other participating organizations. Sombrotto's December 18, 1991 cover letter stated: "I think it is of critical importance that we

deal with the conditions outlined in the statement, and that we reach an agreement and put our signatures to a statement . . . ." Union Ex. 3. [emphasis added]

The parties negotiated. They each "gave a little." They reached agreement. They put their signatures to it.

That's not a "mere statement." That's not a "pledge, nothing more." That's the stuff of enforceable agreements -- in labor relations, certainly; but, even in "Contracts 101."

3. A note regarding *quid pro quo* -- or classic "consideration."

The Employer has argued that "there is no *quid pro quo*." Tr., p. 50. This argument does not withstand bilateral contract analysis.

Each party's subscribing to the Joint Statement's provisions regarding improper behavior by postal employees' functions as a promise and counter-promise. In consideration of one party's adoption of forthright language governing the measures to be taken if any postal employee does not treat other postal employees with dignity, respect and fairness, the other party has agreed to abide by identical terms. Consequently, each party has incurred a benefit. Because each party has relinquished the right to challenge whether certain behavior is grounds for removal, each party has also incurred a detriment. Thus, the mutual adoption of the Joint Statement is the equivalent of an exchange of promises. Such an exchange creates an enforceable bilateral contract. See, Restatement (Second) of

Contracts, § 71(2); John D. Calamari & Joseph Perillo, Contract, §§ 4-12 (1987); 2 Williston on Contracts, §§ 7:4, 7:6.

The bilateral nature of the commitments exchanged in the Joint Statement is not just a theoretical construct. Nor is the detriment incurred by each party merely metaphysical.

In NALC's reply opening statement at the hearing, counsel represented:

> . . . The Postal Service . . . cite[s] it [the Joint Statement] regularly in imposing discipline on letter carriers, and arbitrators cite it regularly in upholding discipline of letter carriers who have violated its terms." (Tr. 54.)

The Postal Service did not dispute that representation, nor could it. See, e.g., Case No. UPSP # C90N-4C-D 95029546; GTS #9521 (EMER), etc., (Arbitrator Thomas J. DiLauro, July 18, 1995), annexed hereto as Att. 3; note esp. pp. 10, 18).[2]

The Postal Service's implication to the contrary notwithstanding, (Tr. 52), the concurrent adoption of the Joint Statement by several parties does not diminish the Statement's contractual force. One consideration may support many promises. Restatement (Second) of Contracts, § 80(1) and comment a.

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[2]Attachment 4 is a Regular (regional) Panel award, Case No. E90N-4E-C94 054971, Kenneth M. McAffree, 4-16-96, holding that management violated the Joint Statement, and awarding a remedy. See, esp., pp. 4, 19-23.

4. A response to the Employer's "mere statement," argument

The Employer's Step 4 decision (Joint Ex. 2, Heath letter, p. 1) denied NALC's grievances on the grounds that:

a. "Management has not given away the exclusive rights in question" (the asserted exclusive management right under Article 3(B) of the National Agreement, p. 5, to hire, promote transfer, assign and retain supervisors). Heath letter, p. 1.

b. "This mere statement (the Joint Statement) does not vitiate the historical practice of exclusive employer control over these matters." Heath letter, p. 2.

It is clear in postal service jurisprudence that management's rights under Article 3 of the National Agreement include the right to limit management's rights under Article 3.

Thus, in National Arbitrator Mittenthal's seminal Helena, Montana national award (Case N 8-W-0406, 9/21/81, p. 9), annexed hereto, as Att. 5):

> One who holds an "exclusive right" has a wide variety of options. . . . [Management] had a right to do whatever it wished to do.
>
> In short, the "exclusive right" in Article III did not prevent Helena Management from contracting with the Local NALC branch to limit the assignment of particular work to particular employees. That was simply one of the options available.

The Postal Service's asserted exclusive right to control its supervisory workforce included the right to agree with NALC that supervisors may not be violent towards other employees, or harass,intimidate, threaten or bully them; that they must treat other USPS employees with dignity, respect and fairness; that they may not be abusive or intolerant; that those ". . . whose unacceptable behavior continues will be removed from their positions."

5. A response to the Employer's argument based upon NALC's failure to achieve a demand in the 1994 negotiations

The Employer's Step 4 decision (Joint Ex. 2, Heath letter, pp. 2-3) notes that NALC sought and failed to achieve a change in the National Agreement during 1994 negotiations, relating to treatment of employees with dignity and respect.

It is a long-accepted practice in collective bargaining negotiations that unsuccessful pursuit of explicit contractual language to cover a disputed issue does not prejudice ultimate rights arbitration determination of the issue. Compare, Case No. H1N-5-FD-2560 (Ben Aaron, 12-19-84, at p. 4, Att. 6, hereto.)

6. The issuance of an Award in the Union's favor, and the fashioning of an appropriate remedy, would not alter, amend or modify the agreement in violation of Article 15 (4)(A)(6)

In Case No. NC-S-5426 (Rossville, Georgia), National Arbitrator Howard Gamser disposed of the Postal Service's argument that a remedy was improper:

> . . . [T]o provide for an appropriate remedy for breaches of the terms of an agreement, even where no specific provision defining the nature of such remedy is to be found in the agreement, certainly is found within the inherent powers of the arbitrator. No lengthy citations or discussion of the nature of the dispute resolution process which these parties have mutually agreed to is necessary to support such a conclusion.

(P. 8, Annexed hereto as Att. 7.)

National Arbitrator Richard Mittenthal addressed the problem of the parties' silence regarding remedy, as follows:

> . . . But the parties' silence does not mean that I am without power to fashion an appropriate remedy. One of the inherent powers of an arbitrator is to construct a remedy for a breach of a collective bargaining agreement. The U. S. Supreme Court recognized this reality in the Enterprise Wheel case:
>
> > ". . . When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsman may never have thought of what specific remedy should be awarded to meet a particular contingency." (United Steelworkers of America v. Enterprise Wheel & Car Corp., 80 S. Ct. 1358, 1361 (1960).

Case Nos. H4N-NA-C-21 (4th Issue), etc., (6/9/86), p. 5 (footnote omitted), annexed hereto as Att. 8.

See also, Snow, cited supra at p. 5, passim.

CONCLUSION

A pledge is not just a pledge. A commitment is not a hollow expression. In the world of labor relations especially, but in the everyday world as well, pledges and commitments --

solemnly and formally exchanged and expressed -- are understood to, are intended to, and do in fact and law have consequences.

The Joint Statement on Violence and Behavior in the Workplace is such an exchange and expression of mutual and joint pledges and commitments. The simple declarative sentence: "Those whose unacceptable behavior continues will be removed from their positions" is a paragon of clarity.

To fail to provide a remedy for the Employer's failure to abide by that promise, in an appropriate case, would make a mockery of labor-management relations in the United States Postal Service.

The National Arbitrator should determine the interpretive issue presented by ruling that the Joint Statement establishes standards of conduct applicable to supervisors which are enforceable through the grievance procedure, and that an arbitrator may grant as a remedy in an appropriate case of supervisory misconduct an order that the supervisor may no longer supervise letter carriers.

Dated: June 7, 1996

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