FILED BY [illegible] D.C.
01 SEP 28 PM 4: 16
ROBERT R. DI TROLIO
CLERK, U.S. DIST. CT.
W.D. OF TN, MEMPHIS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES POSTAL SERVICE,

Plaintiff,

vs. No. 00-2651 GV

NATIONAL ASSOCIATION OF LETTER
CARRIERS, AFL-CIO,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On July 24, 2000, plaintiff United States Postal Service ("the Postal Service"), brought this action against defendant National Association of Letter Carriers, AFL-CIO ("the Union") seeking declaratory and injunctive relief and asking the court to set aside an arbitration award by Arbitrator Leonard C. Bajork based on its claim that Bajork acted outside the scope of his authority when he ordered the Postal Service to demote one of its supervisors. On September 11, 2000, the Union filed a counterclaim asking the court to enforce Arbitrator Bajork's award and seeking costs and attorney fees. The court now considers motions from both parties for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The material facts in this case are undisputed, and both parties agree that the case can be resolved on the parties' cross-motions for summary judgment. (Pl.'s Mem. in Supp. of Mot. for Summ. J. at 1-2; Def.'s Mem. in Supp. of Mot. for Summ. J. at 1.)

This document entered on the docket sheet in compliance
with Rule 58 and/or 79(a) FRCP on 10/1/01

22

The Postal Service and the Union are parties to a collective bargaining agreement called the National Agreement,[1] which regulates the terms and conditions of employment for Union members. The National Agreement sets out in Article 15 the grievance and arbitration procedures employees must follow when an aggrieved employee has a complaint or dispute related to conditions of employment. On January 1, 1995, the Union filed a grievance with the Postal Service claiming that a Postal Service supervisor, Herbert Boyd, physically detained one of the Union's members, J.A. Barnett, and challenged him to a fight. (Pl.'s Mem. in Supp. of Mot. for Summ. J. at 2, ¶ H; Def.'s Mem. in Supp. of Mot. for Summ. J. at 4-5, ¶ 9.) Barnett, a city letter carrier, is president of the Union's Branch 27 in Memphis, Tennessee. (Def.'s Mem. in Supp. of Mot. for Summ. J. at 4-5, ¶ 9.) According to the Union, Boyd, then a customer service supervisor at the Postal Service's office in Raleigh, Tennessee, yelled at Barnett, obstructed Barnett's exit from a small office, and made threatening gestures. Id. The Postal Service denied Barnett's grievance, and, shortly thereafter, promoted Boyd to a managerial position. Id. at 5, ¶¶ 10-11. Following the denial of Barnett's grievance, the Union appealed to arbitration.

Arbitrator Leonard C. Bajork found that Boyd's actions violated the Joint Statement on Violence and Behavior in the

---

[1] The Union claims that the 1990-1994 Agreement was applicable at the time relevant to this action. (Ben Johnson Decl. ¶ 2.) The Postal Service avers that the 1994-1998 Agreement was applicable. (Pl.'s Mem. in Supp. of Mot. for Summ. J. at 2.) The court finds the relevant sections of both Agreements to be substantially the same, and its decision in this case is the same whatever Agreement was in place.

Workplace ("Joint Statement"), a document condemning violence in the workplace and signed by the Postal Service and the Union on February 14, 1992, in response to a number of violent episodes at postal facilities around the country which resulted in the deaths of Postal Service employees. (Pl.'s Mem. in Supp. of Mot. for Summ. J. at 2, ¶ F; Def.'s Mem. in Supp. of Mot. for Summ. J. at 2, ¶ 4.) In making his decision, Arbitrator Bajork relied heavily on a 1996 decision by Arbitrator Carlton J. Snow, a National Level Arbitrator. Using fundamental principles of contract analysis, Arbitrator Snow held that the parties modified the National Agreement when they mutually entered into the Joint Statement. Specifically, Snow found that the Joint Statement "constitutes a contractually enforceable agreement between the parties", and that, accordingly, "[t]he grievance procedure of the National Agreement may be used to enforce the parties' bargain, and arbitrators have available to them the flexibility found in arbitral jurisprudence when it comes to formulating remedies, including removing a supervisor from his or her administrative duties." (Snow Award at ii, 22.)

After considering the facts, the arguments of both parties, and the testimonies of both the grievant and Supervisor Boyd, Arbitrator Bajork held that Boyd's conduct violated the Joint Statement: "Without question here, Supervisor Boyd's December 29, 199[4] gestures and words combine to comprise a clear violation of the Joint Statement." (Bajork Award at 6-8.) As a remedy for this violation, Bajork ordered that Boyd be demoted from his managerial position and that he not be rewarded or promoted for a period of five years. _Id._ at 10. Bajork based the sanctions against Boyd on

what he referred to as the "twin remedies" language of the Joint Statement, which reads as follows: "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." Id. at 11. Since Bajork found no record of Boyd's having violated the Joint Statement before the December 29, 1994 incident, he elected to impose against Boyd the penalty for a first offense (demotion) instead of the penalty for continued offenses (removal). Id. at 5, 10. After receiving Arbitrator Bajork's order, the Postal Service brought this action.

Summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986). The moving party can meet this burden, however, by pointing out to the court that the respondents, having had sufficient opportunity for discovery, have no evidence to support an essential element of their case. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989).

When confronted with a properly supported motion for summary judgment, the nonmoving party must set forth specific facts showing

that there is a genuine issue for trial. A genuine issue for trial exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party opposing the motion must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmoving party may not oppose a properly supported summary judgment motion by mere reliance on the pleadings. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Instead, the nonmoving party must present "concrete evidence supporting its claims." Cloverdale Equip. Co. v. Simon Aerials, Inc., 869 F.2d 934, 937 (6th Cir. 1989). The district court does not have the duty to search the record for such evidence. Interroyal Corp. v. Sponseller, 889 F.2d 108, 110-11 (6th Cir. 1989); Street, 886 F.2d at 1479-80. Respondents have the duty to point out specific evidence in the record that would be sufficient to justify a jury decision in their favor. Interroyal Corp., 889 F.2d at 111.

Finally, the fact that the court is presented with cross-motions for summary judgment "does not mean that [it] must grant summary judgment as a matter of law for one side or the other . . . . Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Taft Broad. Co. v. United States, 929 F.2d 240, 248 (6th Cir. 1991); see also Mingus Constructors, Inc., v. United States, 812 F.2d 1387, 1391 (Fed. Cir. 1987); Dean Foods Co. v. United Steelworkers of Am., 911 F. Supp. 1116, 1122 (N.D. Ind. 1995).

The Postal Service moves for summary judgment vacating the arbitration award on three grounds: (1) Arbitrator Bajork did not have the authority to order sanctions against supervisor Boyd; (2) the arbitration award deprives Boyd of his due process rights under the United States Constitution; and (3) the award deprives Boyd of his statutory right to appeal to the Merit Systems Protection Board.

In reviewing an arbitrator's decision, the court must follow a very narrow standard of review. This narrow, deferential standard of review is grounded on the rationale that the parties bargained for and sought the decision of the arbitrator on the merits and that arbitrators have expertise about workplace practices that courts do not have. In 1960, the United States Supreme Court announced its decision in the third case of the Steelworkers Trilogy, United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960),[2] which considered the issue of

---

[2] While Enterprise sets the standard of review in a case involving a private company and a labor union, the case at bar involves a public employer (the United States Postal Service) and a labor union. Arbitral disposition of federal sector grievances will often be governed or materially affected by laws, rules, regulations, and public policy considerations apart from the collective bargaining agreement. Other than these considerations, however, courts have generally adopted the Enterprise standard for reviewing an arbitrator's decision in a case involving a public employer. For examples of cases in the Sixth Circuit involving public employers in which courts have adopted the Enterprise standard of review, see, e.g., Tennessee Valley Authority v. Tennessee Valley Trades and Labor Council, 184 F.3d 510 (6th Cir. 1999); National Post Office Mailhandlers v. United States Postal Service, 751 F.2d 834, 839-40 (6th Cir. 1985); Local Union No. 307, National Postal Mailhandlers Union v. United States Postal Service, No. 96-CV-73018-DT, 1997 WL 397718, at *1 (E.D. Mich. June 18, 1997). In addition, both parties and Arbitrator Snow in his award cite to Enterprise as the appropriate standard of review. (Pl.'s Mem. at 4; Def.'s Mem. in Supp. of Mot. for Summ. J. at 8; Snow

enforcing arbitration awards after they have been rendered. In Enterprise, the Supreme Court overturned an order of the lower court, which had denied enforcement of part of an arbitration award, by holding that the lower court had erred because its judgement was "not based upon any finding that the arbitrator did not premise his award on his construction of the contract. It merely disagreed with the arbitrator's construction." Id. at 598. The Supreme Court held that courts must refuse to review the merits of arbitral awards lest they undermine the federal policy of settling labor disputes peaceably through arbitration:

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

Id. at 599. The Court in Enterprise went on to state that "mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is no reason for refusing to enforce the award." Id. at 598. As a result, an arbitrator's decision is entitled to great deference and generally should be affirmed unless the decision is irrational or the arbitrator has clearly disregarded plain and unambiguous language in the collective bargaining agreement. See, e.g., Gen. Tel. Co. of Ohio v. Communications Workers of Am., 648 F.2d 452, 457 (6th Cir. 1981); Detroit Coil v. Int'l Ass'n of Machinists & Aerospace Workers, Lodge No. 82, 594 F.2d 575, 579-81 (6th Cir.

---

Award at 13.)

1979), cert. denied, 444 U.S. 840 (1979).

The Court in Enterprise ultimately granted to courts a limited power to set aside arbitration awards by allowing them to refuse to enforce awards when the arbitrator has clearly strayed from the collective bargaining agreement:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Id. at 597; see also Timken Co. v. Local No. 1123, United Steelworkers of Am., 482 F.2d 1012, 1014 (6th Cir. 1973).

The Postal Service first argues that Arbitrator Bajork's award exceeded the scope of his authority because the award conflicts with and cannot be rationally derived from the terms of the National Agreement and because Bajork's award is based on general considerations of fairness and equity instead of on the precise terms of the National Agreement.

According to the Postal Service, Arbitrator Bajork exceeded his authority to act under the National Agreement when he ordered that supervisor Boyd be demoted from his current managerial position and returned to the supervisory position he had before the alleged incident took place because the National Agreement does not apply to supervisory or managerial employees. In Article 1, Section 2, the National Agreement specifically states that "this Agreement does not apply to: 1. Managerial and supervisory personnel . . . ."

An arbitrator's power to hear and decide a case is given to him by the parties in the collective bargaining agreement, and a court may vacate an arbitrator's award which purports to resolve a dispute that the parties, through their contract, have not actually empowered him to hear. The arbitrator's ability to hear and decide a case is known as substantive arbitrability. If there is a dispute about whether a particular claim falls within the power of the arbitrator to hear and decide a case, the parties may ask the arbitrator to rule, not only on the merits of the case, but on the issue of substantive arbitrability as well. See, e.g., First Options of Chicago v. Kaplan, 514 U.S. 938 (1995); Local 719, Am. Bakery and Confectioner Workers of Am. v. Nat'l Biscuit Co., 378 F.2d 918 (3d Cir. 1967). Through Article 15, Section 4.A(9) of the National Agreement, the parties in the instant case have empowered arbitrators to decide questions of arbitrability. That section reads: "Any dispute as to arbitrability may be submitted to the arbitrator and determined by such arbitrator. The arbitrator's decision is final and binding."

When parties empower an arbitrator to decide a question of arbitrability, the standard for a court reviewing his decision is the same narrow, deferential standard set out in Enterprise. First Options of Chicago, 514 U.S. at 943. If one of the parties specifically objects to the arbitrator's power to decide arbitrability and reserves the question for review, the court may then consider the issue of arbitrability afresh, without using the Enterprise standard. See, e.g., Local 719 Am. Bakery and Confectioner Workers of Am., 378 F.2d at 922.

In this case, both parties acquiesced to arbitration, and

neither specifically objected to arbitrability or reserved the issue for appeal. Although the parties disagreed about the number of questions to be submitted to the arbitrator, they both agreed to submit to Arbitrator Bajork the question, "Did Supervisor Boyd violate the Joint Statement?" (Bajork Award at 4.) By submitting the question, they presumably expected Bajork to issue a remedy if he found that Boyd had violated the Joint Statement. However, asking the arbitrator whether Boyd violated the Joint Statement implicitly presents a question of arbitrability even though neither party specifically addressed arbitrability. This is because, if Abritrator Bajork relied only on the language of the National Agreement, and not on the Joint Statement as urged by the Postal Service, he would not have had arbitral jurisdiction to hear the case since the language in the National Agreement clearly prevents him from doing so. (National Agreement, Article 1, Section 2.) Thus the court finds that the parties implicitly raised the question of arbitrability by proceeding to arbitration on an issue, the determination of which required the arbitrator to decide arbitrability. Because the parties did not object to or reserve the question of arbitrability for appeal, the court must review Arbitrator Bajork's determination on both the merits of the case and on the issue of arbitrability under the deferential Enterprise standard.

The Postal Service's argument that Bajork exceeded his authority ignores the issue of abitrability and instead raises a question of whether Bajork exceeded his arbitral authority to impose sanctions against Boyd. The case of Magnavox Co. of Tennessee v. International Union of Electrical Radio and Machine

Workers, 410 F.2d 388 (6th Cir. 1969), is illustrative of the difference between arbitral jurisdiction and exceeding arbitral authority. In Magnavox, the Sixth Circuit affirmed a district court's decision to vacate an arbitrator's award, finding that he had exceeded the scope of his authority. An employee of Magnavox had taken extensive time off from work for health reasons. Id. at 389. When he returned, he refused orders to work in an environment with intense heat, asserting that his doctor had advised him not to work in extreme heat. Id. The employee was discharged for his refusal, and the parties proceeded to arbitration. Id. The collective bargaining agreement between the parties explicitly withheld from the arbitrator the right to "consider, rule or enter any award with respect to disciplinary action imposed upon an employee"/for refusal or failure to perform assigned job tasks, except where the employee can positively establish that the performance of such task would have created a serious health hazard to him." Id. The arbitrator decided that the work assigned to the employee actually would not have imperiled his health but found the employee's belief that it would to be in good faith. Id. The arbitrator concluded that discharging the employee was too severe a penalty and ordered that he be reinstated. Id. The Sixth Circuit held that, although the arbitrator could hear the case, once he decided that the employee had refused to work and that working in the heat-intensive environment would not have created a serious health hazard to the employee, he was powerless to reinstate the employee. Id. However, had the arbitrator in Magnavox determined that working in intense heat would have caused a serious health hazard to the employee, he could have ordered the employee's

reinstatement. See also Truck Drivers & Helpers Union Local 784, v. Ulry-Talbert Co., 330 F.2d 562, 563-64 (8th Cir. 1964) (an arbitrator found employee's discharge for dishonesty too severe, in spite of finding that employee had committed the offense; the court vacated the arbitrator's award since the collective bargaining agreement forbade the arbitrator from reversing a discharge unless the employer's complaint against the employee was not supported by the facts and was arbitrary and in bad faith).

In contrast, before Arbitrator Bajork could review the merits in this case, he had to determine that the Joint Statement amended the National Agreement to allow arbitrators to hear grievance claims and impose remedies, including demoting a supervisor. Once Bajork made that determination, the remedy he imposed did not violate the parties' contract as Bajork interpreted it. Under the deferential Enterprise standard of review, the court finds that Bajork's award "draws its essence" from the parties' contract - the contract being the National Agreement as modified by the Joint Statement. Bajork relied on Arbitrator Snow's award[3] to determine

---

[3] The Union claims that the Snow Award, as a decision by a National Arbitrator, is binding on Bajork, a Regional Arbitrator. (Ben Johnson Declar. ¶ 4.) In support of its argument, the Union cites a letter dated January 13, 1999, from Richard A. Murmer, a Labor Relations Specialist, to Vincent R. Sombrotto, the President of the Union. The fourth paragraph of the letter reads as follows:

> We further agreed to the following . . . "The whole purpose of the national arbitration scheme is to establish a level of definitive rulings on contract interpretation questions of general applicability. National decisions bind the regional arbitrators, and not the reverse."

Id., Ex. 2.

The court, however, cannot find anywhere in the sections of the National Agreement provided to it by the parties a provision stating that Regional Arbitrators are bound by the decisions of

that the National Agreement had been modified by the parties to allow arbitrators to hear grievances on violations of the Joint Statement and to issue remedies for such violations, including imposing sanctions against a supervisor. The court must, therefore, give deference to Bajork's interpretation of the contract and to his award.

In addition, the court finds no merit in the Postal Service's argument that Arbitrator Bajork's award is unenforceable because it is based on general considerations of fairness and equity instead of on the precise terms of the National Agreement. As previously determined, the court finds that Arbitrator Bajork based his award on the National Agreement as modified by the Joint Statement and

---

National Arbitrators. On this point, the Postal Service argues merely that the Snow Award did not order the type of relief (demoting a supervisor) awarded by Bajork. It does not argue that Bajork is not bound by Snow's opinion, which held that the parties modified the National Agreement when they entered into the Joint Statement, that the grievance procedures set out in the National Agreement may be used to enforce the parties' bargain, and that arbitrators have available to them the flexibility found in arbitral jurisprudence when it comes to formulating remedies, including removing a supervisor from his or her administrative duties. Moreover, the Postal Service states as an undisputed material fact that "[i]n 1996, Arbitrator Carlton Snow issued an award holding that the Joint Statement was a modification of the parties' labor contract and was enforceable through the CBA's grievance procedures." (Pl.'s Mem. in Supp. of Mot. for Summ. J. at 2, ¶ G.)

Without making any ruling as to whether Bajork was bound by Snow's opinion, the court finds that Bajork, at the very least, was entitled to rely on Snow's opinion as persuasive authority in reaching his conclusion that the National Agreement had been modified by the parties when they entered into the Joint Statement.

It is also noteworthy that, under Step 4 of the grievance procedure, either party could have argued that the questions presented in this case involved an interpretive issue under the National Agreement, and the case could then have been appealed to a National Arbitrator instead of to a Regional Arbitrator. (National Agreement, Article 15, Section 2, Step 3(d).)

that the remedy he imposed came directly from the language of the Joint Statement. In fact, Bajork specifically states that the remedy is based in contract, not equity: "Unlike those cases involving charges against carrier employees, remedies for supervisor/manager infractions are contractual, not grounded in equity . . . ." (Bajork Award at 9.)

The court now turns to the Postal Service's argument that Bajork's award deprives Boyd of his constitutionally protected property right in continued employment without due process. The court finds that the Postal Service lacks standing to bring this claim. Generally, a litigant may not assert the rights of a third party. Dept. of Labor v. Tripplett, 494 U.S. 715, 720 (1990). To do so, "a [litigant] must show that (1) it has suffered an injury in fact; (2) it has a close relationship to the third party; and (3) there is some hindrance to the third party's ability to protect his or her own interests." Mount Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398, 404 (6th Cir. 1999) (citing Powers v. Ohio, 499 U.S. 400, 410-11 (1991)); see also In re Perlin, 30 F.3d 39, 41 (6th Cir. 1994). "'Injury in fact' means concrete and certain harm. . . . [T]he harm must be certain to happen. There must also be reason to think that the harm can be redressed by relief the court can grant. Such injury in fact is the one constant element in the judicial statements about standing." Nat'l Collegiate Athletic Ass'n v. Califano, 622 F.2d 1382, 1386 (10th Cir. 1980).

The court finds that the Postal Service does not have standing because it has failed to establish injury in fact. In its reply memorandum opposing the Union's motion for summary judgment, the Postal Service asserts that it has standing because "[t]he Bajork

Award directs the Postal Service to violate Boyd's constitutional and statutory employment rights," because "[l]iability often arises from such violations," and because the award "exposes the Postal Service to the risk of inconsistent orders that might issue from Boyd's Merit Systems Protection Board appeal or a similar order from a reviewing court." (Pl.'s Reply at 1.) All of these claims are speculative. Even if enforcing the Bajork award caused the Postal Service to violate Boyd's constitutional rights, there is still no certainty as to whether Boyd would file suit against the Postal Service or, if he did, whether the Postal Service would be liable. Further, as will be discussed in more detail below, Boyd himself has not yet suffered an injury and has not, therefore, appealed his case to the Merit Systems Protection Board ("MSPB"). Even if Boyd did appeal his case, there is no assurance that the MSPB would rule contrary to Bajork and thus expose the Postal Service to conflicting rulings. Because the Postal Service cannot show that it has suffered an injury in fact, it does not have standing to assert Boyd's due process rights on his behalf. The court need not address the merits of any alleged violation to Boyd's due process rights since it has determined that the Postal Service lacks standing on this issue.

The Postal Service's third argument against enforcing Arbitrator Bajork's award is that doing so would deprive Boyd of his statutory right to appeal adverse employment actions against him to the MSPB. Created by the Civil Service Reform Act of 1978, the MSPB has jurisdiction over a broad range of grievance claims and issues involving federal agency actions affecting employees. 5 U.S.C. § 1205(e). Postal Service supervisors may appeal adverse

employment actions taken against them, including actions for a reduction in grade or pay, under 5 U.S.C. § 7512 and § 7513(d). (See also Pl.'s Mem. in Supp. of Mot. for Summ. J., Ex. 4, Employee Labor Relations Manual, Section 650, 652.1.) Boyd may not appeal, however, to the MSPB until the Postal Service attempts to enforce Arbitrator Bajork's award by demoting him. Therefore, this claim by the Postal Service is not ripe for the court's review. Boyd has not yet suffered any injury as the Postal Service has not yet attempted to enforce Arbitrator Bajork's award.

"Ripeness requires that the 'injury in fact be certainly impending.'" Nat'l Rifle Ass'n of Am. v. Magaw, 132 F.3d 272, 280 (6th Cir. 1997) (internal citation omitted). "Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." Id. at 284. Thus, ripeness is "a question of timing." Id. A ripeness inquiry requires an analysis of two factors: (1) whether the issues at stake are fit for judicial discussion; and (2) the extent of hardship to the parties of withholding court consideration. Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1362 (6th Cir. 1995), cert. denied, 516 U.S. 1140 (1996).

The Postal Service argues merely that Boyd "*may* successfully appeal to the MSPB" and that Arbitrator Bajork's award "has exposed the Postal Service to the *threat* of conflicting orders." (Pl.'s Mem. in Supp. of Mot. for Summ. J. at 8 (emphasis added).) Clearly, these assertions are speculative. This court has no way of knowing whether Boyd will appeal any adverse employment action taken against him to the MSPB, and, if he does, what the MSPB's ruling will be. Accordingly, the Postal Service's claim that

Boyd's statutory rights will be violated by Arbitrator's Bajork's award may not be reviewed by this court.[4]

The parties in this case have agreed that there is no genuine issue as to any material fact. For the above reasons, the court finds, first, that the Postal Service is not entitled to judgment as a matter of law on its motion for summary judgment. Thus its motion is denied. Second, the court finds that the Union is entitled to judgment as a matter of law on its motion for summary judgment, and thus its motion is granted. The court directs that the Postal Service enforce the arbitrator's decision. The Union requested in its counterclaim that it be awarded costs and attorney fees but failed to point to any basis for awarding them. Accordingly, its request for costs and attorney fees is denied.

IT IS SO ORDERED.

Julia Smith Gibbons
JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

September 28, 2001
DATE

---

[4] It appears that the Postal Service may have the same standing problem here in asserting Boyd's individual statutory rights as it did above in asserting his due process rights, but, since the court has already resolved the statutory rights issue on other grounds, it need not address standing.