

29484

REGULAR ARBITRATION PANEL

In the Matter of Arbitration	)	Grievant: Ware, Frank
Between	)	
UNITED STATES POSTAL SERVICE,	)	Post Office: Cupertino Post Office
Employer,	)	
-and-	)	USPS Case No.: F06N-4F-C 10311602
NATIONAL ASSOCIATION OF	)	
LETTER CARRIERS AFL-CIO,	)	DRT Case No.: 01-177000
Union.	)	

BEFORE: Claude Dawson Ames

APPEARANCES:

For the Employer: Pamela Ross, Labor Relations Specialist

For the Union: Brian Voigt, NALC Regional Administrative Asst.

Date of Hearing: March 10, 2011

Date of Briefs: May 3, 2011

Date of Award: May 20, 2011

Contract Provisions: Articles 3, 14 & 19

Contract Year: 2006--2011

Type of Grievance: Contract

**AWARD SUMMARY**

The Postal Service, through the conduct of Postmaster Chirayunon on July 2, 2010, did violate the Joint Statement on Violence and Behavior in the Workplace, the National Agreement and its supplements. Therefore the Postal Service is directed to remove the Postmaster from further supervision of the Carrier Craft at the Cupertino, California Post Office.



CLAUDE DAWSON AMES, Arbitrator

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## I.

### **BACKGROUND**

This case involves a grievance filed on behalf of grievant Frank Ware, Executive Vice President for the National Association of Letter Carriers, Branch 1427, against the Cupertino, California Post Office. The grievance alleges that the Postmaster, David Chirayunon, violated the Joint Statement on Violence and Behavior in the Workplace (JSOV) by his conduct and treatment of Frank Ware on July 2, 2010. The grievance also alleges a violation of the Management of Delivery Services Handbook, M-39. The Union maintains that the Postmaster continues to ignore the principles of the JSOV by his repeated failure to treat employees with dignity and respect.

Ware is a Union officer, Executive Vice President of Branch 1427 of the NALC. On Friday, July 2, 2010, Ware along with two other NALC officers, Robert Madrid, President and Renita Freitas, Senior Vice President, made an official visit to the Cupertino Post Office. The visit was scheduled in advance, prior to the Union officers showing up on the morning of July 2, 2010.

The Union officers were engaging carriers in short conversations, regarding Union matters. According to Ware, he was engaged in conversation with carrier Chen about an upcoming meeting and was giving him directions to the meeting facility and stressing the importance of his participation. The Postmaster was on the workroom floor observing the officers as they made their rounds between the Letter Carriers. Carrier Chen had recently filed a grievance and the Postmaster somehow surmised that this was the topic of conversation between Ware and Chen. The Postmaster informed Madrid of this and asked him to speak to Ware about discussing grievances with the carriers, which he did.

A short time later the Postmaster began walking towards Ware, who was now at carrier Jacobs' case. Upon noticing the Postmaster approaching, Ware began walking toward the Postmaster to meet and speak with him. Exactly what occurred next is unclear, but by all accounts the Postmaster began a shouting tirade at Ware ordering him out of his office. There was apparently a bump, push or some form of contact between Ware and the

Postmaster. Witnesses state that the Postmaster was very animated, gesturing with his arms, and kept yelling 'you hit me'—'you pushed me' and ordering Ware out of the building. Carrier Jacob's statement, whose case was closest to the exchange, indicates that it was actually the Postmaster who accidentally bumped into Ware and began yelling that he had been hit. The Postmasters' version of the incident was that when Ware approached him and was close enough and then leaned into him and called him a 'lying bastard' and bumped him with his shoulder. He states it was at this point he began ordering Ware out of the facility.

Witness accounts state that the Postmaster continued yelling and gesturing wildly at Ware as they crossed the workroom floor heading out of the building to the back dock. What transpired out on the back dock is also different in each party's versions of these events. Ware indicates that the Postmaster continued yelling at him saying 'hit me you lying bastard', 'come on are you a man, hit me'. Ware indicates that he continued backing down the dock ramp towards the Union vehicle, all the while being chased by the Postmaster, who continued berating him. This account of events was supported by the statements of the other two Union officers, who had also exited the building and were on the back dock.

The Postmasters' version of the events on the back dock indicated that he called Ware a coward and said words to the effect of 'why don't you just finish me off here'. There was no explanation for this reference. No witness statement indicates that Ware yelled or raised his voice, but was attempting to leave the building closely followed by the Postmaster. The Postmaster at some point instructed a Supervisor to call 911. The police arrived and subsequently called an ambulance for the Postmaster who was transported to a medical facility.

The Union filed a grievance at Step-A on July 16, 2010, shortly after the incident date. The grievance was denied at formal Step-A on August 31, 2010, and appealed to Step-B on September 7, 2010. The Step-B parties originally impasssed the grievance on October 1, 2010, but because the wrong facility was listed on that decision, issued a modified Step-B

decision on October 10, 2010. The Union appealed the matter to arbitration on November 15, 2010.

A hearing on the grievance was held on March 10, 2011, at the Cupertino, California Main Post Office. The Postal Service was represented by Pamela Ross, Labor Relations Specialist. The Union was represented by Brian Voigt, NALC Regional Administrative Assistant. The parties agreed to submit post hearing briefs, in lieu of oral closing arguments, which were to be postmarked on or before April 11, 2011. However, the parties mutually agreed to extend the submission date to April 29, 2011. The parties' briefs were received on May 3, 2011, at which time the Arbitrator closed the record.

## **II.**

### **ISSUES PRESENTED**

The issue as framed in the DRT decision is:

Did Postmaster Chirayunon violate the cited provisions of the National Agreement/JCAM, as well as the Management of Delivery Services Handbook, M-39, the Employee and Labor Relations Manual, the National Labor Relations Act or the Joint Statement on Violence and Behavior in the Workplace by his conduct on July 2, 2010, or by his repeated failure to treat employees with dignity and respect?

If so, what is the appropriate remedy?

## **III.**

### **STIPULATIONS**

The parties stipulated that if all the employees identified in the moving papers, who have been interviewed and/or submitted statements, were called to testify, they would testify to what is stated in the interviews and/or their statements.

#### IV.

#### RELEVANT CONTRACT PROVISIONS

#### **ARTICLE 3—MANAGEMENT RIGHTS**

The employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

- 3.1 To direct employees in the performance of official duties;
- 3.2 To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;
- 3.3 To maintain the efficiency of the operations entrusted to it;
- 3.4 To determine the methods, means and personnel by which such operations are to be conducted.

#### **ARTICLE 14---SAFETY AND HEALTH**

##### **Section 1. Responsibilities**

It is the responsibility of management to provide safe working conditions in all present and future installations and to develop a safe working force. The Union will cooperate with and assist management to live up to this responsibility. The Employer will meet with the Union on a semiannual basis and inform the Union of its automated systems development programs. The Employer also agrees to give appropriate consideration to human factors in the design and development of automated systems. Human factors and ergonomics of new automated systems are a proper subject for discussion at the National Joint Labor-Management Safety Committee.

##### **Section 2. Cooperation**

The Employer and the Union insist on the observance of safe rules and safe procedures by employees and insist on correction of unsafe conditions. Mechanization, vehicles and vehicle equipment, and the work place must be maintained in a safe and sanitary condition, including adequate occupational health and environmental conditions. The Employer shall make available at each installation forms to be used by employees in reporting unsafe and unhealthful conditions. If an employee believes he/she is being required to work under unsafe conditions, such employee may: (a) notify such employee's supervisor who will immediately investigate the condition and take corrective action if necessary; (b) notify such employee's steward, if available, who may discuss the alleged unsafe condition with such employee's supervisor; (c) file a grievance at Formal

Step A of the grievance procedure within fourteen (14) days of notifying such employee's supervisor if no corrective action is taken during the employee's tour; and/or (d) make a written report to the Union representative from the local Safety and Health Committee who may discuss the report with such employee's supervisor. Upon written request of the employee involved in an accident, a copy of the PS Form 1769 (Accident Report) will be provided.

Any grievance which has as its subject a safety or health issue directly affecting an employee(s) which is subsequently properly appealed to arbitration in accordance with the provisions of Article 15 may be placed at the head of the appropriate arbitration docket at the request of the Union.

### **Section 3. Implementation**

To assist in the positive implementation of the program:

A. There shall be established at the Employer's Headquarters level, a Joint Labor-Management Safety Committee. Representation on the Committee, to be specifically determined by the Employer and the Union, shall include one person from the Union and representatives from appropriate Departments in the Postal Service. Not later than 60 days following the effective date of this Collective Bargaining Agreement, designated representatives of the Union and Management will meet for the purpose of developing a comprehensive agenda which will include all aspects of the Employer's Safety Program. Subsequent to the development of this agenda priorities will be established and a tentative schedule will be developed to insure full discussion of all topics. Meetings may also be requested by either party for the specific purpose of discussing additional topics of interest within the scope of the Committee. The responsibility of the Committee will be to evaluate and make recommendations on all aspects of the Employer's Safety Program, to include program adequacy, implementation at the local level, and studies being conducted for improving the work environment. The Chair will be designated by the Employer. The Union may designate a coordinator who, in conjunction with the Chair, shall schedule the meetings, and recommended priorities on new agenda items. In addition, the coordinator may assist the Chair in conducting the activities of the Committee. The Employer shall furnish the Union information relating to injuries, illness and safety, including the morbidity and mortality experience of employees. This report shall be in form of reports furnished OSHA on a quarterly basis. The Headquarters level Committee will meet quarterly and the Employer and Union Representatives will exchange proposed agenda items two weeks before the scheduled meetings. If problems or items of significant, national nature arise between scheduled quarterly meetings either party may request a special meeting of the Committee. Either party will have the right to be accompanied to any Committee meeting by no more than two technical advisors.

B. There shall be established at the Employer's Area level, an Area Joint Labor-Management Safety Committee, which will be scheduled to meet quarterly. The Employer and Union Representatives will exchange proposed agenda items two weeks before the scheduled meetings. If problems or items of a significant, area nature arise between scheduled quarterly meetings, either party may request a special meeting of the

Committee. Either party will have the right to be accompanied to any Committee meeting by no more than two technical advisors. Representation on the Committee shall include one person from the Union and appropriate representatives from the Postal Service Area Office. The Chair will be designated by the Employer.

C. The Employer will make Health Service available for the treatment of job related injury or illness where it determines they are needed. The Health Service will be available from any of the following sources: U.S. Public Health Service; other government or public medical sources within the area; independent or private medical facilities or services that can be contracted for; or in the event funds, spaces and personnel are available for such purposes, they may be staffed at the installation. The Employer will promulgate appropriate regulations which comply with applicable regulations of the Office of Workers' Compensation Programs, including employee choice of health services.

D. The Employer will comply with Section 19 of the Williams-Steiger Occupational Safety and Health Act.

#### **ARTICLE 19—HANDBOOKS AND MANUALS**

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21. Timekeepers Instruction.

#### **HANDBOOK M-39**

##### **115.4 Maintain Mutual Respect Atmosphere**

The National Agreement sets out the basic rules and rights governing management and employees in their dealings with each other, but it is the front line manager who controls management's attempt to maintain an atmosphere between employer and employee which assures mutual respect for each other's rights and responsibilities.

#### **JOINT STATEMENT ON VIOLENCE AND BEHAVIOR IN THE WORKPLACE**

".....We openly acknowledge that in some places or units there is an unacceptable level of stress in the workplace; that there is no excuse for and will be no tolerance of violence or 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.

We also affirm that every employee at every level of the Postal Service should be treated at all times with dignity, respect and fairness. The need for the USPS to serve the public efficiently and productively and the need for all employees to be committed to giving a fair day's work for a fair day's pay, does not justify actions that are abusive or intolerant. *"Making the numbers" is not an excuse for the abuse of 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."

## V.

### POSITION OF THE PARTIES

#### A. Union's Position:

The Union contends there is substantial evidence that Postmaster Chirayunon on July 2, 2010, lost total control of his faculties to the point that he violated the JSOV. Also, this is the forth such violation associated with the Postmaster since October 2009. The Union contends the only witness to the initial exchange between the Postmaster and Ware on the workroom floor, Carrier Jacobs, indicated it was the Postmaster who made contact with Ware. It was after he bumped into Ware that he began yelling and screaming that he had been hit, but clearly he initiated contact, not the other way around. The Union argues that the Postmaster, upon being questioned by Ware about his conversations with the carriers, became enraged and lost control.

Postmaster Chirayunon also violated Section 115.4 of the M-39 Delivery Services Handbook by his actions on July 2, 2010. The Postmaster was out of control on the workroom floor. None of the witness statements indicate that Ware was the aggressor and many state that he was trying to calm the Postmaster down.

The Postmaster himself corroborated Ware's account of what occurred on the back dock. During his testimony he admitted that he called Ware a liar and coward and said to him words to the effect of 'why don't you just finish me off'. Also the three Union witnesses, who were out on the back dock, claim that the Postmaster was threatening, intimidating, provoking and goading Ware to use physical force. The Union argues that



this type of behavior must not be accepted by the Employer, since employees cannot feel comfortable working for such a 'loose cannon' like the Postmaster.

The Union contends that the corrective action issued to the Postmaster was just a feeble attempt by the Employer to account for one of their bad apples. They argue that the action was taken for his three prior violations of the JSOV, but was not done until this grievance was appealed to arbitration. However, the Employer had known about and had the Step-B decisions, on hand, for those three prior JSOV violation months before taking any action. The Union argues it was merely a half-hearted attempt at truly correcting the problem and not enough to place him back into any position of authority.

The Union contends that in this matter they have proven, through testimonial evidence, Postmaster Chirayunon's actions and behavior on July 2, 2010, violated the JSOV and M-39, which must be seriously addressed by the Arbitrator. The Union requests as a remedy to this grievance that (1) Postmaster Chirayunon be found in violation of the JSOV and that he cease and desist such violations; (2) he is removed from his position as Postmaster of the Cupertino Post Office and barred from supervising letter carriers; (3) he issue a formal written apology to Frank Ware for the behavior he exhibited towards him on July 2, 2010; (4) a copy of the award be placed in the Postmasters' Official Personnel Folder (OPF) indefinitely; (5) that the managers of the Cupertino Post Office cease and desist from interfering with the Union's rights under Article-23 of the National Agreement and (6) any other remedy the Arbitrator deems appropriate.

In support of their position the Union submitted a National Arbitration Award and four Regular Arbitration Awards. The National Award is from Arbitrator Snow, Case Numbers Q90N-4F-C 94024977 and Q90N-4F-C 94024038. The Regular Awards are from Arbitrator Ames, Case Numbers E90N-4E-C 94051426, F94N-4F-C 97066163, F01N-4F-C 03039916 and F06N-4F-C 08237439.

## **B. Employers Position:**

The Employer characterizes the incident of July 2, 2010, as merely the Postmaster and Ware bumping into one another, but argues that the Grievant then called the Postmaster a 'liar' and a 'bastard'. It was after this Ware was ordered out of the building. Also, according to Ware, he was not sure if he had been pushed, bumped or even touched by Postmaster Chirayunon.

The Employer argues the Unions' requested remedy is a serious action and would have damaging effects on the career of Postmaster Chirayunon. To grant the Unions' requested remedy would be to effectively discipline the Postmaster without affording him 'due process rights'. The Employer points out that this was not a disciplinary hearing on the Postmaster, but he has received discipline and the Merit System Protection Board (MSPB) is the proper agency for adjudicating that matter. The grievance procedure does not afford accused managers due process and the JSOV does not and cannot waive management's statutory or regulatory appeal rights. Article-1 of the National Agreement specifically excludes managers and Article-3 grants management the right to manage. To summarily discharge or demote the Postmaster, as requested by the NALC, would effectively deny him his due process rights.

The Union argues the Postmaster has a history of violating the JSOV and submitted two Step-B decisions, dated July 19, 2010, and July 23, 2010, to support this position. However, the Employer contends that these decisions should be ignored by the Arbitrator, since they were made after the July 2, 2010, incident and could not establish a 'history' of this type of behavior. The Employer contends the incident on July 2, 2010, does not rise to the level of a JSOV violation and that every interaction between a manager and employee, not to the employee's liking, is not a violation of the JSOV.

The Employer contends the appropriate discipline has been taken against the Postmaster and this coupled with training are sufficient to prevent any similar future occurrences. On July 2, 2010, the Postmaster believed he had been assaulted by Ware and

feared further harm by him. It was this belief and fear that caused the Postmasters' actions on July 2, 2010.

The Employer argues the Union has failed to demonstrate a violation of the JSOV and requests this grievance be denied.

In support of their position the Employer submitted an appellate decision from the Merit Systems Protection Board, Docket Number DC-0752-03-0516-I-1. They also submitted a National Arbitration Award and nine Regular Arbitration Awards. The National Award was from Arbitrator Mittenthal, Case Number N8-NA-0141. The Regular Arbitration Awards were from the following Arbitrators: Bennett, Case Number H94N-4H-C 97077778; Cenci, Case Number B01N-4B-C 06267739; Dobranski, Case Number C8N-4C-C 5208; Eaton, Case Number F94N-4F-C 97059455; Fischetti, Case Number F90N-4F-C 01213413; Francis, Case Numbers F90N-4F-C 94024977 and F90N-4F-C 94024038; Javits, Case Number A01N-4A-C 06174677; Powell, Case Number K01N-4K-C 02247372 and Wooters, Case Numbers A90N-4A-C 95060188 and A90N-4A-C 95060186.

## **VI.**

### **DECISION**

The Joint Statement on Violence in the Workplace was mutually developed by the national parties and clearly sets forth their agreed intent and "unequivocal commitment to do everything in our power to prevent further incidents of work-related violence." The parties also expressed their national intent "to make the workroom floor a safer, more harmonious, as well as a more productive workplace where every postal employee is treated with dignity and respect." This policy statement is recognized at every Area and District level throughout the Postal Service and is fully enforceable. According to the Joint Statement, "Those whose unacceptable behavior continues will be removed from their positions."

The grievance before the Arbitrator arises from an incident that took place on the workroom floor and dock area of the Cupertino Post Office on July 2, 2010. A group of Union officers, including Frank Ware, were making an office visit, which is their right under Article-23 of the National Agreement. Ware had been talking to a carrier, Chen, who had recently filed a grievance. The Postmaster had somehow surmised that Ware was discussing this grievance with Chen and asked the Union President to speak to Ware about this, which he did. The file is not clear what led the Postmaster to this conclusion, but this appears to have been the catalyst for what subsequently transpired on July 2, 2010.

Both participants' account of the events varies greatly and each blames the other for initiating the incident. There was only one witness to the initial incident, carrier Jacobs, but he was not close enough to hear the words exchanged between Ware and the Postmaster. According to Ware, who was at Jacobs' case, saw the Postmaster approaching and left to speak with the Postmaster to inquire about his determination that he was discussing grievances. Upon doing so the Postmaster yelled "are you calling me a liar, you are a liar! Are you calling me a bastard?" Ware indicated that he had not called him a liar or bastard and was shocked at the accusations. According to Ware he tried to get away from the Postmaster who was screaming at him 'get out of my building you lying bastard'. At some point as he was trying to exit the building the Postmaster yelled 'you bumped me' and kept this tirade going, screaming 'you lying bastard'—'you bumped me'—'you hit me', across the workroom floor and out the building.

The Postmasters' version of this incident was that when Ware approached him and was close enough, leaned into him and called him a 'lying bastard' and bumped him with his shoulder. He states it was at this point he began ordering Ware out of the facility. Carrier Jacobs statement, whose case was closest to the exchange, indicates that it was actually the Postmaster who accidentally bumped into Ware and began yelling that he had been hit. Witness accounts of the events inside the office were consistent. While none were close enough to hear the initial exchange all basically state that the Postmaster appeared out of control and he continued yelling and gesturing wildly at Ware, as they crossed the workroom floor heading out of the building. Witness statements did not

indicate any type of aggressive behavior or yelling and screaming by Ware, only that he was attempting to leave the building closely followed by the Postmaster.

What transpired out on the back dock is also different in each party's versions of the events on July 2, 2010. Ware indicates the Postmaster continued yelling at him saying 'hit me you lying bastard', 'come on are you a man, hit me'. Ware continued backing down the dock ramp towards the Union vehicle, all the while being chased by the Postmaster, who continued berating him. This account of events was supported by the statements of the other two Union officers, who had also exited the building and were on the back dock. The Postmasters' version of the events on the back dock indicated that he called Ware a coward and said words to the effect of 'why don't you just finish me off here'. This account by the Postmaster somewhat corroborates Ware's version of the exchange on the dock. It was apparent the Postmaster was attempting to goad Ware into a physical confrontation. The Postmaster at some point instructed a Supervisor to call 911. The police arrived and subsequently called an ambulance for the Postmaster who was transported to a medical facility.

While the truth of the matter probably lies somewhere between the two participants' version of the initial exchange on July 2, 2010, there is no excuse for the Postmasters' behavior on the workroom floor in front of the carrier workforce and his Supervisors. By all accounts the Postmaster was totally out of control using profanity and exhibiting aggressive behavior which could have led to a violent encounter between him and Ware on the workroom floor. If Ware had called the Postmaster a 'lying bastard' and bumped him, ordering him out of the building was the proper course of action to follow and then report this to the Union President and his superiors to address the situation. The type of behavior displayed by the Postmaster has no place in the work setting, no matter how angry or frustrated he may have been. Someone in his position is expected to maintain their composure and deal with problems in a professional manner. Managers are held to higher standards, since they set the tone for the office and employees and their behavior must be beyond reproach at all times.

The Union argued that the Postmaster had a history of this type of behavior and cited three other Step-B decisions of similar incidents to support this argument. The Employer argues that two of these incidents occurred prior to the July 2, 2010, and do not establish a 'history' of this type of behavior. While it may not establish a 'history', occurring prior to July 2, 2010, it certainly establishes a pattern of behavior by the Postmaster, which appears to be intimidation and yelling at employees. One of the three incidents occurred in September 2009, indicating that this was not the first time the Postmaster had exhibited this type of behavior. The other two incidents certainly establish a pattern of unacceptable behavior by the Postmaster.

There is insufficient evidence to sustain any allegations against the Union officer, Ware, but ample evidence to sustain inappropriate and unprofessional conduct by the Postmaster. There is no doubt that the Postmasters' actions on July 2, 2010 violated the Joint Statement, National Agreement and its supplements. Therefore, the Postal Service is directed to remove the Postmaster from further supervision of the Carrier Craft at the Cupertino, California Post Office.

The Employer submitted an appellate decision from the Merit Systems Protection Board (MSPB), which requires a comment by the Arbitrator. The decision was in support of the Employers' argument that the Arbitrator cannot discipline, remove, demote or reprimand the Postmaster in any fashion without giving him his due process rights. Normally, an MSPB decision carries no weight in an Arbitration forum, other than to establish a material fact, or an argument based on 'res judicata' and may be rejected by an Arbitrator, if objected to by opposing counsel. However, that MSPB appellate decision is instantly distinguishable from this matter. In that case an arbitrator ordered the removal of a Postmaster, based on his violation(s) of the JSOV, with which the Postal Service complied. The Postmaster appealed to the MSPB, which was his statutory right, and the removal was overturned by the MSPB, since the Postmaster was not afforded his 'due process rights'. The Postmaster in this grievance is not being removed from his position by order of the Arbitrator, nor is he being demoted, disciplined or reprimanded by the Arbitrator; he is merely being barred by the Service from supervising the Carrier Craft at

the Cupertino Post Office. What his superiors choose to do with him is their decision to make, not the Arbitrators. Accordingly, for the reasons as stated above, the Union's grievance is sustained.

**AWARD**

The Postal Service, through the conduct of Postmaster Chirayunon on July 2, 2010, did violate the Joint Statement on Violence and Behavior in the Workplace, the National Agreement and its supplements. Therefore the Postal Service is directed to remove the Postmaster from further supervision of the Carrier Craft at the Cupertino, California Post Office.

Respectfully submitted,

Dated: May 20, 2011

  
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CLAUDE DAWSON AMES, Arbitrator