C-19475

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	GRIEVANT: Francisco Guzman, Jr.
between	POST OFFICE: Hayward, CA
UNITED STATES POSTAL SERVICE	CASE NO: F94N-4F-C97074830 NALC CASE NO: HAY 349 7C
and	
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	

BEFORE: Donald E. Olson, Jr.

APPEARANCES:

For the U.S. Postal Service: Ms. Terry Bickelmann

For the NALC: Mr. Manuel L. Peralta, Jr.

Place of Hearing: Hayward, CA

Date of Hearing: March 23, 1999

AWARD: The grievance is sustained. Supervisor Barroga is directed to cease and desist from further violating the Joint Statement on Violence in the Workplace. Additionally, the Employer is directed to provide Supervisor Barroga with additional human relations training to assist him in complying with the terms of the Joint Statement on Violence in the Workplace. This training should be provided no later than July 15, 1999. Furthermore, the Employer is directed to post a copy of this Opinion and Award on the Official Bulletin Board for a period of fifteen (15) calendar days at the Hayward postal facility.

Date of Award: May 6, 1999.

Donald E. Olson, Jr., Arbitrator

OPINION OF THE ARBITRATOR

PROCEDURAL MATTERS

This matter was conducted in accordance with the provisions outlined under Article 15 of the parties 1994-1998 National Agreement. A hearing was held before the undersigned on March 23, 1999, in Hayward, California at the postal facility located at 22438 Santa Clara Street. The hearing commenced at 9:00 a.m. and concluded at 11:58 a.m. The case number assigned this matter was F94N-4F-C97074830. The hearing proceeded in an orderly manner. There was a full opportunity for the parties to make opening statements, submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the Arbitrator. The Arbitrator tape-recorded the proceeding as an extension of his personal notes, and not as an official record. The advocates fully and fairly represented their respective parties. The parties were unable to stipulate to the issue(s) to be determined, however, agreed the Arbitrator would frame the issue(s). There were no challenges to the substantive or procedural arbitrability of the dispute. The parties submitted the matter on the basis of evidence presented at the hearing. Ms. Terry Bickelmann, Labor Relations Advocate, represented the United States Postal Service, hereinafter referred to as "the Employer". Mr. Manuel L. Peralta, Jr., Regional Administrative Assistant, represented the National Association of Letter Carriers, AFL-CIO, hereinafter referred to as "the Union", and Mr. Francisco Guzman, Jr., hereinafter referred to as "the Grievant". The parties introduced three (3) Joint Exhibits, all of which were received and made a part of the record. The Union made an oral closing argument in support of its position. Additionally, at the hearing the Union modified the remedy it sought regarding this grievance. The Employer reserved the right to submit a post-hearing brief, which was to be post-marked no later then April 26, 1999. The Union requested an opportunity to file a reply brief. The Union's reply brief was to be sent to the Arbitrator post-marked no later then May 10, 1999. The Arbitrator received the Employer's brief on April 28, 1999, and the Union's reply brief on May 3, 1999,

at which time the hearing record was closed. The Arbitrator promised to render his opinion and award no later then thirty (30) calendar days after the hearing record was closed. This opinion and award will serve as the final and binding decision regarding this matter.

ISSUE(S)

The Arbitrator frames the issue(s) to be determined as follows:

> "Did the Employer violate the National Agreement and/or the Joint Statement on Violence and Behavior in the Workplace, and/or Section 115.4 of the M-39 on March 4, 1997, when Supervisor Barroga allegedly pulled the Grievant's arm, turned him around, and yelled at him? If so, what is an appropriate remedy?"

RELEVANT PROVISIONS OF THE 1994-1998 NATIONAL AGREEMENT

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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 insist management to live up this responsibility. . . .

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. . . . 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 Step 2 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 . . .

* * * *

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, Timekeeper's Instructions.

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RELEVANT PROVISIONS OF THE M-39 HANDBOOK

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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 all grieve for the Royal Oak victims, and we sympathize with their families, as we have grieved and sympathized all too often before in similar horrifying circumstances. But grief and sympathy are not enough. Neither are ritualistic expressions of grave concern of grave concern or the initiation of investigations, studies, of research projects.

The United States Postal Service as an institution 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.

This is a time for a candid appraisal of our flaws and not a time for scapegoating

fingerpointing, or procrastination. It is a time for reaffirming the basic right of all employees to a safe and humane working environment. *It is also a time to take action to show that we mean what we say.*

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 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.

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 give 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.

We obviously cannot ensure that however seriously intentioned our words may be they will not be treated with winks and nods, or skepticism, by some of our over 700,000 employees. But 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.

Our intention is to make the workroom floor a safe, more harmonious, as well as a more productive workplace. We pledge our efforts to these objectives.

* * * *

BACKGROUND

This dispute arose at about 11:00 a.m. on March 4, 1997, after the Grievant had pulled his route and was on his way to the swing room. The Grievant stopped to say something to another carrier, who was performing her duties on Route 4509. Shortly thereafter, Supervisor Barroga approached the Grievant and allegedly grabbed his arm roughly and spoke to the Grievant in a loud voice. The Grievant felt threatened and intimidated by Supervisor Barroga's actions, as well as feeling he had been assaulted. Furthermore, on the day of the incident, the Grievant reported this incident to Mr. Phil Imperial, Manager of Customer

Services, who assured the Grievant he would speak to Supervisor Barroga about this alleged incident. Later, on March 27, 1997, a grievance was filed at Step 2.

On April 15, 1997, Mr. Imperial issued his Step 2 written decision and denied the grievance. Thereafter, on April 24, 1997, the Union appealed the dispute to Step 3. The parties Step 3 representatives met on August 4, 1997, to discuss the Step 3 appeal of the grievance. Later, on that same date the Employer issued its Step 3 written decision, in which the grievance was denied. Eventually, on September 10, 1997, the Union appealed the dispute to arbitration.

POSITION OF THE PARTIES

POSITION OF THE UNION

The Union contends Supervisor Barroga's alleged conduct towards the Grievant on March 4, 1997, constitutes a violation of Articles 14 and 19 of the National Agreement, as well as Section 115.4 of the M-39 Handbook, and the Joint Statement on Violence in the Workplace. In addition, the Union argues the Employer violated Articles 15 and 31 of the National Agreement, when the Employer failed to provide interview notes requested at the Step 2 between the parties respective representatives. Moreover, the Union asserts the Employer through the conduct of its agent Mr. Imperial was attempting to protect Supervisor Barroga and himself by claiming that he had no knowledge of the alleged physical assault on the Grievant until the Step 2 grievance had been filed on March 27, 1997, and by refusing to provide a copy of his interview notes with Supervisor Barroga to the Union. Furthermore, the Union maintains the actions of Employer agent Imperial have been deceitful pertaining to this case. On the other hand, the Union claims the Grievant appropriately reported the incident, acting in good faith. In conclusion, the Union requests that the grievance be sustained, and that Supervisor Barroga be ordered to cease and desist from further actions which violate the Joint Statement on Violence and Behavior in the Workplace. Additionally, the Union requests that Supervisor Barroga be required to prepare a written apology to the Grievant, and that apology be posted on the Official Bulletin Board for period of 30 calendar days. Lastly, the Union avers the Employer must provide additional human relations training to Supervisor

Barroga to assist him in complying with the terms outlined in the Joint Statement on Violence in the Workplace.

POSITION OF THE EMPLOYER

The Employer insists Supervisor Barroga did not violate either the National Agreement or the Joint Statement on Violence in the Workplace, as well as any handbook or manual when he allegedly grabbed the Grievant and addressed him in a loud voice on March 4, 1997. Moreover, the Employer claims the Union has failed to establish by convincing evidence that Supervisor Barroga conducted himself on March 4, 1997, in the manner as alleged by the Grievant. On the contrary, the Employer maintains Supervisor Barroga did in fact have a conversation with the Grievant on March 4, 1997, however, Supervisor Barroga never touched or grabbed the Grievant. Additionally, the Employer claims Supervisor Barroga did not talk loudly to the Grievant during that conversation. Furthermore, the Employer argues the Grievant fabricated the majority of the conversation that took place him and Supervisor Barroga on March 4, 1997. In addition, the Employer asserts local management took appropriate action after the incident was reported by the Grievant, when the next day, the Manager of Customer Services spoke to Supervisor Barroga, and instructed him to treat all employees in a businesslike manner. Likewise, the Employer avers that a statement made by the only witness to the alleged incident does not support the Grievant's claim he was either grabbed or talked to in loud voice by Supervisor Barroga. In conclusion, the Employer requests that the grievance be denied in its entirety.

DISCUSSION

This Arbitrator has carefully reviewed all evidence, pertinent testimony and the parties closing arguments in support of their respective positions, as well as cited arbitration decisions.

To begin, this Arbitrator is cognizant of the parties desire to eliminate violence in the workplace. This attempt is appropriate. As such, Article 14 of the National Agreement and the Joint Statement on Violence in the Workplace clearly sets forth the basic rules and rights

governing management and employees in their dealings with each other, so that acts of threats, intimidation and violence will hopefully not occur. Moreover, Section 115.4 of the M-39 Handbook expressly places the burden on the front-line manager to maintain an atmosphere between employer and employee which assures mutual respect for each other's rights and responsibilities. Clearly, one way to establish this type of atmosphere is for a supervisor/manager when dealing with an employee to treat that individual with dignity and respect. Likewise, the same is true of employees when they enter into a discussion with a manage or co-workers. In fact, this type of social discourse seems to this Arbitrator to be a basic human right that all employees of the Employer should receive, regardless of their standing in the organization. Without doubt, the Joint Statement on Violence in the Workplace affirms that it is expected that all of its employees should enjoy the basic right to a safe and humane working environment.

This Arbitrator notes that in 1996 the Employer's Oakland Performance Cluster issued a document entitled, "PREVENTION OF WORKPLACE VIOLENCE". That policy incorporated provisions which indicated there would be a "zero tolerance" policy regarding workplace violence. In addition, that same policy mandates that all reported incidents involving intimidation, threats or assaults are to be immediately and thoroughly investigated. Obviously, both the Employer and Union are quite serious about eradicating violence in the workplace, which is an admirable goal.

The terms of Article 14 of the National Agreement notwithstanding, this Arbitrator is of the opinion that the direct evidence submitted in this case, as well as the circumstantial evidence adduced at the hearing can only lead to one conclusion, that is, that Supervisor Barroga on March 4, 1997, did in fact violate the terms of the Joint Statement on Violence in the Workplace. Without doubt, this Arbitrator accepts the Grievant's version of the incident of March 4, 1997, regarding Supervisor Barroga coming into contact with the Grievant's arm. Likewise, this Arbitrator concludes that Supervisor Barroga did in fact speak to the Grievant in a demeaning manner. Of course, Supervisor Barroga denied he grabbed the Grievant's arm

on March 4, 1997. As a matter of fact, both his testimony at the hearing and his answers to investigative inquiries made by the Union about the "arm grabbing" incident on March 4, 1997, lends support to a conclusion by this Arbitrator that Supervisor Barroga, answers were both evasive and lacked veracity. For example, on March 7, 1997, Shop Steward Nielsen asked Supervisor Barroga the following questions:

1. Did you grab Mr. Guzman's arm that day? Answer: "I don't remember."

2. Did you touch Mr. Guzman that day? Answer: "I don't remember it."

Strictly speaking, this Arbitrator finds these two responses to lack credence. As it happened, Supervisor Barroga testified that Manager Imperial confronted him during the afternoon on March 4, 1997, and asked him about the incident as reported by the Grievant. During that conversation, Supervisor Barroga testified that Manager Imperial explicitly asked him if had grabbed the Grievant, as well as speaking to him in a loud voice. At that time, Supervisor Barroga, testified that he responded to Manager Imperial by replying, "I don't think so". This inquiry by Manager Imperial was made within a couple hours after the incident had been reported to him. Plainly, those responses by Supervisor Barroga within a couple hours after the reported incident, and again within a couple days thereafter, are just not plausible. Unquestionably, these responses leave this Arbitrator with the impression that Supervisor Barroga was being evasive. Conversely, this Arbitrator takes note of the fact that Manager Imperial testified that he considered the Grievant to be honest, as well as being one of the best Letter Carriers at the Hayward postal facility. As such, there is no reason for this Arbitrator to countenance the Employer's argument that the Grievant fabricated the facts surrounding the incident of March 4, 1997. On the other hand, one can understand why Supervisor Barroga may have attempted to be evasive regarding the incident. As a matter of fact, Supervisor Barroga had received training regarding the Joint Statement on Violence in the Workplace, and testified he was familiar with the document. As such, he was aware of the fact he was not to engage in activity that would result either in an assault or treating employees in a manner that lacked respect. Clearly, Supervisor Barroga knew of the

consequences associated with this type of activity, and had reason to deny the event, as well as to be evasive about his responses to inquiries made both by the Union and management. Albeit Supervisor Barroga testified he and Manager Imperial did not take the incident seriously, this Arbitrator cannot agree. Beyond question, when an individual touches another person without their permission, they have committed "battery". (See Booher v. Trainier, 172 Mo. App. 376, 157 S.W. 848, 850; Commonwealth v. Gregory, 132 Pa. Super. 507, 1 A.2d 501, 503.) In those cases, it was determined the slightest touching of another, or of his clothes or anything else attached to his person, if done in **rude, insolent, or angry manner** constituted "battery". (Emphasis supplied). Battery even if committed in an unintentional manner is not an act which should be supported. This kind of activity can escalate to the level of serious violence. Clearly, Manager Imperial was concerned enough about the Grievant's report of the incident in that he counseled Supervisor Barroga on the manner of speaking with craft employees. Specifically, the evidence supports the fact he spoke with Supervisor Barroga shortly after the incident had been reported, and instructed him to make sure he treated all employees in a businesslike manner. This is evidence that Manager Imperial believed that Supervisor Barroga had in fact spoken to the Grievant on March 4, 1997, "like a little kid".

At the same time, after having reached the preceding conclusion, this Arbitrator does not believe Supervisor Barroga either grabbed the Grievant or spoke to him in such an egregious manner as to warrant a finding of a major violation of either the National Agreement or the Joint Statement on Violence in the Workplace. Additionally, the facts of the case established the Grievant was not in an area where he worked. In fact, the Grievant had been instructed by Supervisor Barroga in an earlier incident not to stop and talk with Letter Carriers under his supervision while walking through the building. Obviously, the Grievant was aware he was not supposed to be the area, and that carriers were not to stop and hold conversations on the way to the break room. The Grievant's own improper conduct partially contributed to the unfortunate, but inexcusable incident of March 4, 1997. Certainly, this is a mitigating factor.

And yet, this Arbitrator concludes the Employer blatantly violated the Grievant's due process rights in the processing of this grievance, and clearly did not properly investigate the matter. Not only is that a violation of the Article 15 of the National Agreement, but Manager Imperial's conduct does not comply with the Oakland Performance Cluster policy on Violence In the Workplace, which mandates **all reported incidents are to be immediately and thoroughly investigated**. (Emphasis supplied). The investigation of the Grievant's complaint was at best cursory. This grievance was initiated on March 27, 1997, at Step 2. A Step 2 meeting was held on April 10, 1997, between the Union and Employer Step 2 representatives. A Step 2 decision was issued on April 15, 1997, denying the grievance. This Arbitrator notes that in that Step 2 decision Manager Imperial claimed the first time he became aware that Supervisor Barroga may have "grabbed" the Grievant was when he received the Union Step 2 grievance on March 27, 1997. This contention flies in the face of testimony given by Supervisor Barroga at the hearing. He testified that Manager Imperial on March 4, 1997, asked him if he had in fact "touched" the Grievant, that morning, as well as having talked to him in a loud voice. Mr. Imperial's testimony regarding when he first became aware of the "grabbing" incident lacks veracity. In addition, there is no evidence that Mr. Imperial ever conducted a fair investigation. There was no evidence he had any further conversations with Grievant regarding his complaint between March 4, 1997, and March 28, 1997. Although Mr. Imperial assured the Grievant on March 4, 1997, that he would speak with Supervisor Barrogo, there is no evidence that Mr. Imperial ever informed the Grievant of what Mr. Barrogo may have said, if anything, regarding the Grievant's claim of being talked to like a child, and having been grabbed. Clearly, Mr. Imperial never spoke again with the Grievant regarding his complaint until the Grievant was invited by the Union to participate in the Step 2 meeting. In that meeting the Grievant once again informed the Step 2 representatives of the basic facts surrounding the incident. The Grievant stated:

> "I told him the same day, on March 4th. I told Phil . . . tell your boy not to be grabbing people. Ace grabbed me and swung me around. He also talked

to me like I was a kid. Phil told me that he would have a talk with Ace."

To say the least, this Arbitrator is somewhat dumbfounded why Mr. Imperial claimed in his Step 2 decision that there were no witnesses to the event, when in fact Letter Carrier Thelma Chavarin overheard part of the conversation between Supervisor Barroga and the Grievant on March 4, 1997. Clearly, Mr. Imperial must have received the witness statement made by Ms. Chavarin dated March 7, 1997, during the Step 2 meeting when all relevant papers or documents necessary to establish the facts surrounding a dispute must be exchanged between the parties. Additionally, the Step 2 grievance sent to Manager Imperial on March 27, 1997, expressly mentions Ms. Thelma Chavarin by name under the section of the grievance form titled "FACTS (WHAT HAPPENED). This fact alone is enough to establish that Mr. Imperial as the Employer's Step 2 representative did not fairly or thoroughly investigate the Grievant's complaint. Moreover, Mr. Imperial's failure to furnish the Union at the Step 2 meeting with a copy of his investigative interview notes regarding Supervisor Barroga's role in the incident of March 4, 1996, contravenes the intent and spirit of Article 15.2, Step 2 (d) of the National Agreement, as well as Article 31, Section 3. Mr. Imperial's conduct regarding the investigation of this dispute blatantly deprived the Grievant of his due process rights. Additionally, Mr. Imperial's refusal to the provide the Union with a copy of his interview notes had a serious impact on the Union's ability to present its case at both Step 3 and eventually at the arbitration hearing. On the face of it, this Arbitrator is of the opinion Mr. Imperial was making an attempt to protect Supervisor Barroga and himself by claiming that he no knowledge of the grabbing incident on March 4, 1997, when he failing to provide a copy of his interview notes to Union. Furthermore, there is no evidence after the Union filed its Additions and Corrections statement on April 23, 1997, with Postmaster Golden that any further investigation was conducted surrounding witness T. Chavarin prior to the parties meeting at Step 3. It appears if any weight was given by the Employer to witness Chavarin's statement, it was not much at any step in the grievance procedure.

Next, this Arbitrator does not agree with the Employer's contention that the Union's reliance on Article 15, Section 2, Step 2(d) should be rejected, since according to the Employer this issue was raised for the first time at the arbitration hearing. Clearly, the record does not support that contention. A cursory glance of Joint Exhibit No. 2 at page 5 (the Additions and Corrections letter) reveals the following:

> "I then asked to look at Mr. Imperial's interview notes and he refused to let me look at them. I then requested a copy of the interview notes which Mr. Imperial refused to provide me. He claimed they were 'his personal notes'. I then informed Mr. Imperial that Article 15.2d (Step 2) guarantees that . . . The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31."

Furthermore, the Union's appeal to Step 3 also includes a mention that Article 15 and 31 were violated by management when it failed to provide relevant documentation. Incontestably, the Employer had been made aware of the additional claimed violations of the National Agreement after the Step 2 meeting had been conducted.

Likewise, this Arbitrator cannot countenance the Employer's objection to the Union changing its remedy request at the hearing. The Employer presented no probative evidence to establish that it would be prejudiced by the Union's change in a request for a new remedy. Obviously, there is no reasonable basis existing for accepting the Employer's challenge as valid.

Finally, without belaboring the point, case law sustains the fact this Arbitrator has inherent, as well as implied authority to grant remedies for a breach of the collective bargaining agreement. However, since this dispute involves the actions of managerial personnel, this Arbitrator is of the opinion that he has no authority to enter an order that discipline be meted out to any of the Employer's supervisory personnel. Article 1 of the 1994-1998 National Agreement expressly states this agreement does not apply to "managerial and supervisory personnel". Nonetheless, this Arbitrator strongly recommends that both Mr. Imperial and Supervisor Barroga receive some form of appropriate discipline for the roles they played in

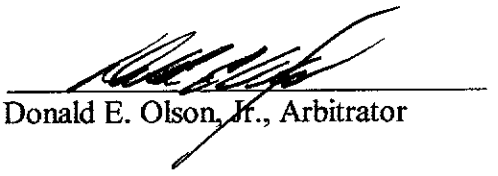
this unfortunate incident. Clearly, if the roles had been reversed and craft employees had been involved in same kind of inappropriate conduct displayed by Supervisor Barroga on March 4, 1997, this Arbitrator would not have hesitated to support the discipline administered by the Employer. In fact, the Joint Statement on Violence in the Workplace, along with the Oakland Performance Cluster policy on the same subject clearly indicates the Employer will not **"tolerate"** workplace violence in any form from either craft personnel or supervisors. Furthermore, both documents provide for **"serious disciplinary action"** to be taken if warranted. There is no doubt in this Arbitrator's mind that some form of discipline as deemed as appropriate by the Employer should be issued to Supervisor Barroga. Likewise, the Employer should give due consideration to discipline Mr. Imperial for his role in supporting Supervisor Barroga, withholding information from the Union at the Step 2 meeting and for his lack of candor regarding the events in general.

Thus, based upon the record and for the reasons set forth above, this Arbitrator concludes the Employer did violate the National Agreement and/or the Joint Statement on Violence in the Workplace, and/or Section 115.4 of the M-39 on March 4, 1997, when Supervisor Barroga pulled the Grievant's arm, turned him around, and yelled at him.

AWARD

The grievance is sustained. Supervisor Barroga is directed to cease and desist from further violating the Joint Statement on Violence in the Workplace. Additionally, the Employer is directed to provide Supervisor Barroga with additional human relations training to assist him in complying with the terms of the Joint Statement on Violence in the Workplace. This training should be provided no later than July 15, 1999. Furthermore, the Employer is directed to post a copy of this Opinion and Award on the Official Bulletin Board for a period of fifteen (15) calendar days at the Hayward postal facility.

Dated this 6th day of May 1999
Tacoma, Washington



Donald E. Olson, Jr., Arbitrator