

United States Postal Service and Sara Mae Egli.
Case 36-CA-7532(P)

June 21, 1996

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND FOX

On February 16, 1996, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel filed exceptions¹ and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, United States Postal Service, Estacada, Gresham, Eagle Creek, Dayton, and Portland, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing an employee that she was being retaliated against because of her protected concerted activities.

(b) Laying off and refusing to hire an employee because she filed and won a grievance with the Union and engaged in union and other protected concerted activities in order to discourage employees from engaging in those activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer Sara Mae Egli full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

¹ The General Counsel filed a motion to withdraw exceptions 1 and 2. We grant the General Counsel's motion. Regarding exception 3, we correct the following inadvertent error in the judge's decision. In the fifth paragraph of Sec. B(2) change "Gwo" to Egli" in the ninth sentence.

² We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

We shall also correct the judge's inadvertent omission of narrow injunctive language from her recommended Order.

(b) Make Sara Mae Egli whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoff and failure to hire Egli, and within 3 days thereafter notify Egli in writing that this has been done and that the layoff and failure to hire will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at the facilities in Estacada, Gresham, Eagle Creek, Dayton, and Portland, Oregon, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 25, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
 To form, join, or assist any union
 To bargain collectively through representatives of their own choice
 To act together for other mutual aid or protection
 To choose not to engage in any of these protected concerted activities.

WE WILL NOT inform an employee that she is being retaliated against because of her protected concerted activities, including filing a grievance with the American Postal Workers Union, AFL-CIO.

WE WILL NOT lay off or fail to hire an employee because she won a grievance, with the Union, against us, and engaged in union and other protected concerted activities; in order to discourage employees from engaging in those activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Sara Mae Egli full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Sara Mae Egli whole for any loss of earnings and other benefits resulting from the discrimination against her, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff and failure to hire Sara Mae Egli and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the layoff and failure to hire will not be used against her in any way.

UNITED STATES POSTAL SERVICE

Linda J. Scheldrup, Esq., for the General Counsel.
Fabian Henry, of Burlingame, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. Sara Mae Egli and the American Postal Workers Union, AFL-CIO, the Union, believe that Egli was laid off and subsequently refused further employment because Egli filed and won a grievance against the United States Postal Service, USPS, or the Respondent. USPS admits that Egli filed and won the grievance and that she was also laid off and subsequently refused further employment. However, USPS contends that its actions were motivated by legitimate business considerations, and not due to any discriminatory motive.

One independent 8(a)(1) allegation, denied by USPS, is also alleged.¹

On the entire record including my observation of the demeanor of the witnesses, and after considering the briefs filed by the counsel for the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer subject to the Board's jurisdiction pursuant to Section 1209 of the Postal Reorganization Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts²

1. Egli is employed as a "casual" employee at the Gresham, Oregon post office

Casual employees need not be on a competitive register to be hired. They may be hired off the street. Pursuant to the collective-bargaining agreement casual employees are limited to two 90-day appointments per calendar year plus 21 days during the month of December. Casual appointments can end prior to the 90-day appointment depending on need. Due to the shortness of casual appointments, generally casuals do not "throw"³ the mail in larger post offices, such as Gresham, Oregon, where there are about 93 employees. In Gresham casuals are employed to break down the mail; i.e., sort bags or boxes of mail by carrier, if the bundle is carrier routed, or by five-digit zip code. Throwing the mail is different in that each street is assigned to a specific letter carrier and the "scheme" of these assignments must be learned to "throw" the mail to the correct carrier.

Egli was hired as a casual clerk at the Gresham, Oregon post office in June 1992. She completed two 90-day appointments in calendar year 1992 and another two 90-day appointments beginning January 1993. In addition, she worked during December 1993 and then worked two additional 90-day appointments beginning in January 1994.

¹ This case was tried on October 5, 6, and 11, 1995. The charge was filed March 25, 1995, and amended on April 17, 1995. The complaint was issued June 23, 1995, and amended August 23 and October 5, 1995.

² The recitation of facts reflects my credibility resolution. Many of the operative facts were contested. After studying the comparative testimonial demeanor of witnesses as well as the inherent probability of various statements, I have concluded that some of the differences were due to the lapse of time between the events and trial and others were due to the tendency of individuals to testify to what they concluded was meant rather than to what exactly was said. Bearing these factors in mind, the account set forth in this decision is a reasonable and fair reconstruction of events. Testimony to the contrary is not credited.

³ The term "throw" the mail, refers to sorting the incoming local mail by carrier route for delivery. A different "scheme" is utilized in each office for "throwing."

2. Egli is employed as a "transitional" employee (TE) at the Estacada, Oregon post office

A transitional employee (TE) is contracted for a 359-day appointment and can be renewed for another 359-day appointment after a 6-day break. TE appointments can end prior to the 359-day appointment depending on need. A TE may be obtained from the register or may be a casual employee who has worked for one full casual term.

Che-Chen Carol Gwo became postmaster at Estacada, Oregon, effective May 14, 1994. She reported to work on June 3, 1994. Her employee complement was five clerks and about seven carriers. However, two of her clerk positions were filled by individuals on disability or workers compensation. In June 1994, Debbie Garrett, postmaster of Gresham, had two casual employees whose terms were coming to an end. One of these employees was Egli. Based on the recommendation of her supervisors, the other casual was offered the only available TE position at Gresham. However, Garrett asked Egli if she was interested in a TE position in Estacada, Oregon. When Egli responded affirmatively, Garrett told her to speak to Gwo.

The Estacada post office was extremely short handed at the window. It had been allowed to hire a TE in order that the employee be trained for window work. Casual employees could not be trained for window work just as they are not allowed to have keys to the building, set alarms, or perform other duties requiring accountability. Gwo hired Egli for the TE position. Thereafter, Egli completed a 2-week training course in Vancouver, Washington, for window work. She then reported to work in Estacada in July 1994. Other clerks at Estacada were Jean Cook and Terry Thorud, distribution clerks.⁴ Martha Davenport worked as a casual. On the request of Jean Cook, shop steward, Egli joined the Union.

On her first day of work, the office was extremely short handed. Only Cook and Egli were present. Because Cook had to sort the mail, Egli opened the window by herself and worked by herself until 1 p.m. On the prior Saturday, Gwo had provided Egli a cash drawer for her window duties. It contained stamps, blank money orders, and cash.

In a 30-day verbal evaluation conducted in August 1994, Gwo told Egli that she needed to speed up throwing and focus more. According to Egli, Gwo told her not to worry—that she would improve with time. She added that Egli's attendance was good. On September 16, 1994, Jean Cook provided on-the-job training to Egli as a window clerk. Cook completed the evaluation form noting that Egli's performance was satisfactory. Gwo signed this evaluation on October 3, 1994. On November 9, 1994, Egli passed the "scheme" test for "throwing" mail at Estacada.

3. Egli's cash drawer is audited on November 23, 1994

On November 23, Gwo and Egli counted Egli's cash drawer. They checked the drawer twice and found a shortage of about \$125. Gwo told Egli that after the Thanksgiving break, she would need to pay back the money. Gwo told Egli that this was a common occurrence and Egli should not worry. On returning from Thanksgiving, Egli received an

⁴ At the time Egli was hired, Thorud was a full-time regular distribution clerk while Cook was a part-time flexible (PTF) distribution clerk. In February 1995, Cook won a grievance and became a full-time regular distribution clerk.

audit slip from Gwo. She told Gwo that she would pay the money but she did not believe that it was her error because she had not had proper supervision on the window during her first week. She told Gwo that she was going to file a grievance.

According to Egli, when she told Gwo that she was going to file a grievance, Gwo "turned slightly red and started huffing and puffing, just kind of (witness demonstrates) like that, 'You can't do that.'" Egli testified that Gwo told her she had no right to file a grievance. Thorud, who was present during this conversation, according to Egli, "physically came over and put his arm around [Gwo] and turned her towards her office and said, 'It's okay, Carol. Let's go calm down.'" Thorud confirmed that he was present. Thorud testified that Gwo argued with Egli in front of customers on this occasion. However, Thorud recanted a portion of his affidavit which stated that Gwo was upset because Egli filed a grievance. Thorud testified that Gwo was upset about the manner in which Egli had spoken to her about filing a grievance. Thorud testified he took Gwo away from the window because he did not believe the discussion should occur in front of customers.

On the next payday, Gwo kept Egli's check. When Egli asked for the check to take to the bank, Gwo refused and took Egli to Thorud's window, interrupted regular business at the window, had Thorud cash the check, took the amount owed, and gave Egli the balance. According to a cash receipt which Thorud provided, this transaction occurred on December 16, 1994 at 3:53 p.m.

4. Egli files a grievance

Through shop steward Cook, Egli filed a grievance dated December 12, 1994, alleging a defective letter of demand because of inadequate on-the-job training for window work. According to Egli, until she filed the grievance, her relationship with Gwo was friendly. After filing the grievance, Egli testified that everything she did was wrong, according to Gwo, and that Gwo blamed her for problems whether they were Egli's fault or someone else's. For instance, Egli was faulted for processing change of address forwarding documents before the parcels for the box section were processed even though other employees did the same thing without comment from Gwo. Egli was faulted for calling the Portland post office to obtain an answer to a customer's inquiry about a commemorative stamp issue date. When Egli asked Gwo what was wrong with that, Gwo replied she would think of something later.

5. Egli wins the grievance

On December 23, 1994, Cook was informed that USPS had sustained Egli's grievance at step 2. Gwo had denied it at step 1. Cook was also told that the shortage, which Egli had already repaid, would be refunded. Cook had not seen anything in writing and left for a week of vacation without mentioning this to Egli. However, before Cook left, she had a conversation with Gwo about the grievance in which Gwo told Cook that she was very upset with her and that Cook should have told her the correct way to write the demand let-

ter in the first place.⁵ Later, Gwo informed Egli that the grievance had been sustained.

Cook, who was extremely uneasy testifying because she considered both Gwo and Egli friends and because she did not want to jeopardize her good working relationship with Gwo, testified that Egli and Gwo's relationship was respectful and cordial prior to the grievance. After the grievance was filed, Cook observed changes in Gwo's actions toward Egli in that Gwo watched Egli's actions more often and reprimanded her more often in a tone of voice which was sharp. Moreover, Cook observed that other employees were not similarly reprimanded even though they might be doing the same thing that had caused Egli to be reprimanded. Further, Cook was present when Gwo told Egli not to stop working while Gwo was talking to her. However, when Egli attempted to continue working while Gwo spoke, Gwo complained repeatedly to Cook that Egli was looking at her from the corner of her eye. Gwo also complained both to Cook and Thorud that Egli should pay back the money, because she was short. Gwo mentioned to them that she had been short once and she had repaid the money. Both Cook and Thorud told Gwo that the grievance process allowed Egli not to have to repay the shortage.

Egli spoke to Cook about the further deterioration in her relationship with Gwo on about January 12, 1995. They decided that Egli should ask Gwo if it would restore Gwo's confidence in Egli if she did not accept the money from the grievance. The following day Egli and Cook met Gwo in the safe at the post office. Egli asked Gwo if it would restore her faith in her if she did not accept the money. Gwo said she did not understand the word faith. Cook explained that it meant trust. Gwo said that it would be great if Egli did not take the money. However, when Gwo began remonstrating Egli about her performance. Cook had to leave to answer a phone call at that point. Gwo told Egli that the demand letter which she had given Egli was being used as an example to other postmasters of what not to do. Gwo asked if Egli was going to take the money and Egli, "just hemmed and hawed" because she was waiting for Cook to return. Gwo asked Egli if she was threatening her and Egli responded, "no," and left the safe. Shortly after this conversation, Egli was removed from window work.

Cook spoke to Gwo after Egli left the safe. Gwo told Cook that Egli had threatened her by saying that if Gwo was not nice to her, she would not give the money back. Cook expressed disbelief telling Gwo that she and Egli had rehearsed the words that Egli would use and she had difficulty believing that Egli would stray from the plan. Gwo got on her hands and knees and said, "I swear to you, I swear to you she threatened me."⁶

⁵ Gwo told Cook, "I thought we were friends. Why didn't you tell me how to do it?" When Cook left that day, she had an additional conversation with Gwo for about 1-1/2 hours regarding the grievance in which Cook explained that her responsibility was to the bargaining unit and Gwo should call her peers for information. Gwo expressed anguish over making a mistake and repeatedly stated that Bob Conser had told her it was her fault that the grievance was lost, because she Gwo had written the demand letter incorrectly.

⁶ According to Gwo, Egli told her if she was not nice to her, Egli would file more grievances against Gwo. Gwo responded that this was a threat and a bribe and she did not take threats or bribes. I do not credit this version of the conversation. Not only did Egli deny

6. Egli is laid off at Estacada

In mid-January 1995, Cook told Egli that Cook had won a grievance regarding assignment as a regular full-time clerk. Cook had filed this grievance with the help of Gwo in order to force USPS to fill the position. Cook also told Egli that this meant that Egli's TE position would be eliminated and a new PTF position would be opened. Gwo confirmed this. Prior to Egli's being informed of the decision to eliminate her position, Gwo and Cook discussed whether the casual or TE position should be eliminated. Cook argued that the TE should be retained in order to work the window. Gwo told Cook that her boss, Bob Conser, had told her that she had to get rid of the TE position and keep the casual. Conser testified in accord. He pointed out that the TE position was originally created, because Estacada was short handed. With the grievance resolution in Cook's favor, the office would now be able to bring on another PTF.⁷

According to USPS' human resources specialist, Cynthia M. Wright, if a postmaster needed to eliminate a TE position, it would be up to the postmaster whether to let a casual go and move the TE back into the casual's position, assuming the employee complement allowed this. Gwo agreed that it was her choice to retain the current casual employee rather than placing Egli in that position and letting the casual employee go. According to the personnel records of USPS, Egli's appointment did not expire. Rather, the appointment was terminated because her services were no longer needed. According to Wright, this occurs quite often, "if the work is no longer there to justify the need for a transitional employee, they are released due to services no longer needed."

During the first 2 weeks of February 1995, Egli worked at Gresham on a Saturday at the request of Glenn Rhodes, a supervisor in Gresham, who called and asked Egli if she would close for him. When Egli reported this to Gwo, Gwo stated that it should have been cleared through her. In early February, Darta McCoy, another supervisor in Gresham, called Egli and asked her to close. When Egli reported to Gresham, McCoy asked her to work in Gresham for the next couple weeks. Although Gwo once again stated that this should have been cleared through her, Egli nevertheless phoned McCoy with her hours so that schedules could be coordinated.

On February 6, 1995, Egli spoke with the Gresham postmaster, Debbie Garrett. Garrett stated that Gwo had informed Garrett about the conversation in the safe. Garrett told Egli she should be really nice to Gwo. Garrett recalled the meeting as well and testified that she told Egli to be good, not talk back, and follow the directions of Gwo. According to Egli, Garrett asked Egli if she would like to work a few months in Gresham when she was finished in Estacada. Egli asked whether it would be TE or casual work and Garrett responded TE. Egli accepted the TE position to begin the day after her TE position ended in Estacada. Garrett denied ever

this but, in addition, Cook, who spoke with Gwo immediately afterwards, was not told by Gwo that this was what Egli said.

⁷ Although Conser testified that Cook knew at the outset that if she won the full-time clerk grievance, Egli's position would be eliminated, I credit Cook that she was not told this. In fact, Conser testified that he found out about the background for creation of the Egli TE position in the course of searching for a solution to Cook's grievance.

offering such a position to Egli, testifying that her employee complement would not have permitted such an action. However, Garrett agreed that she had planned to have Egli work as a TE for a few more months. During the following weeks, Egli continued to work in Gresham in addition to her duties in Estacada.

Egli knew that her last day of work at Estacada was to be February 17. On that day, Gwo conducted an exit interview. Gwo read from a piece of paper. Most of Gwo's comments were negative and concerned matters not previously discussed. For instance, Gwo commented on Egli's appearance, personal conduct, cooperation with others, productivity, attitude toward coworkers and supervisors,⁸ understanding and following instructions, willingness to handle all assignments, and attendance. Gwo told Egli that she would never hire her again,⁹ and Egli said she would never work for Gwo again. Gwo concluded stating that Garrett had called her and told her that Egli was not supposed to report to Gresham on Saturday (the next day). In other words, Gresham no longer wanted Egli as a TE.

7. Egli is not hired at Gresham

After leaving the exit interview, Egli reported to the Gresham post office to work on Friday, February 17. Although she knew that she was not to work on Saturday, she assumed that her previous assignment to work on Friday was still intact. On reporting, she spoke to McCoy, who told her that it was true that Egli would not be working in Gresham. Egli asked why and McCoy responded that Gwo had taken Garrett to lunch and told Garrett not to hire Egli.¹⁰ Shortly thereafter, Egli spoke to Garrett in the lunchroom. Garrett told her that she had left the decision to Gwo regarding whether Egli would be working in Gresham. Garrett further told her that she had decided to use a casual to fill in and Gwo had loaned her the Estacada casual. Garrett told Egli this had all been decided several weeks before and that Gwo had probably not told Egli about the decision in order to hurt Egli.

The Estacada casual was thereafter loaned to Gresham. Gwo and Cook had a conversation about productivity at Estacada being down during the time that the Estacada casual was on loan because the sorting and boxing were not being performed as promptly. Cook told Gwo that she should not have loaned the casual to Gresham, and Gwo responded that

⁸A great deal of testimony was elicited regarding Egli's interaction with coworkers, supervisors, and customers. Egli admitted that she could, at times, appear bossy. On the whole, I credit Cook's testimony regarding Egli's interaction, and I find that Egli was cooperative and received no more complaints than other employees.

⁹The exit interview form which Gwo completed and forwarded to USPS personnel, did not state whether Gwo would rehire Egli. The copy retained by Gwo stated that she would not rehire Egli. Exit interview forms state specifically that they are utilized for resignations or terminations.

¹⁰McCoy confirmed that this was her assumption but testified that she had nothing to base this on. In fact McCoy testified that her assumption that Egli was going to be hired to fill a "temporary vacancy" was incorrect and she discovered this when Garrett told her that Gresham would have to use someone other than Egli because Egli's TE appointment was over and Gresham did not have TE hours.

she had promised Gresham the loan and she had to stand by the promise.

Garrett spoke to Gwo every day by phone. Gwo complained to her about Egli's insubordination and about problems that she had with Egli. Gwo denied having any influence over Garrett's decision to use Egli when Egli's position was eliminated at Estacada. Gwo initially stated that she told Garrett that Garrett could not hire Egli. However, she said that she stated to Garrett that she could not hire Egli because Egli was separated from the post office. On further questioning, Gwo stated that what she meant was that Garrett could not borrow Egli because Egli no longer worked at Estacada. Gwo also stated that the only way Garrett could utilize Egli was through borrowing because Garrett did not have authorization to hire a TE due to lack of an employee complement authorization which would have included an additional TE position. Gwo denied any knowledge of Garrett wanting to hire Egli. Finally, Gwo testified that she asked Garrett whether she had a TE position available because she wanted to attempt to transfer Egli to Garrett.

Garrett stated that she did not have a TE position. Moreover, Garrett testified that she never offered Egli a TE position when her position was eliminated in Estacada. Somewhat incongruously, Garrett also testified that she did plan to use Egli but she received a call from Ed Keongin who told her that the TE hours cap for the district had been exceeded and he needed to cut TE hours. Garrett conveyed this information to Egli telling her that she would not be able to use her.

8. Egli is not hired at Dayton

Because Egli had taken the civil service test for distribution clerk, her name was on the register used to fill TE and part-time flexible (PTF) positions. She was notified of vacancies in Dayton and Eagle Creek, Oregon, for PTF positions. On either March 13 or 20, 1995, she interviewed for the PTF distribution clerk vacancy in Dayton with Dwyane Winters, the postmaster. At the time of the interview, Winters was actually working as the officer in charge at the Aurora, Oregon post office. Phil Burris was acting as officer in charge of Dayton.

Winters conducted the interview because Burris had asked him to help and Burris, himself, was quite busy at the window. Winters recalled that Egli was the only one of the top three candidates who had prior USPS experience and he remembered telling her that her window training would be a great benefit at Dayton. Egli told Winters that she and Gwo had a personality conflict. Winters stated that immediately after the interview of Egli, he called Estacada to speak to Gwo. In Gwo's absence, he spoke with Cook who stated that Egli was attentive and had a good attitude. Winters testified that he did not make the decision regarding which candidate to hire, but he did have some input and, in any event, he never spoke to Gwo about Egli. Winters told Burris that Cook gave Egli a positive recommendation. Burris testified that he never received an oral or written evaluation of Egli and specifically did not talk to Gwo about Egli.

Eventually Egli was informed that she was not chosen because she was not one of the top three candidates. USPS records indicate that four eligibles were considered for this appointment. Their scores ranged from 86.6 to 83.9 with

Egli's score, 86.2, the second highest. The highest scoring candidate was hired.

Cook and Egli had seen Winters in Estacada when he trained Gwo in her postmaster duties. Gwo discussed personnel problems at Estacada with Winters and recalled mentioning to him that Egli had "snapped" at Gwo in front of a customer. Gwo also recalled telling Winters that Egli was quite young and a new employee. She thought she probably told Winters that Egli had filed a grievance and questioned him about the proper form of a demand letter following the audit. Garrett recalled receiving a call from the Dayton officer in charge asking whether Garrett would rehire Egli in connection with Dayton's decision regarding who to hire. Garrett told the caller that she would not rehire Egli because she was too slow.

Gwo denied any influence over Winters regarding the Dayton position. She stated that she had no conversation with him about the subject and only learned in June 1995 that he had not hired her.

9. Egli is not hired at Eagle Creek

Egli reported for an interview for a PTF clerk position in Eagle Creek on either March 14 or 21, 1995. This interview was with postmaster, Merle Helsintager. Both Cook and Egli had taken calls from him for Gwo several times a week and they knew that he had lunch and other social outings with Gwo. Egli told Helsintager that she and Gwo had a personality conflict. Egli eventually heard that someone else was hired. USPS records indicate that the top three candidates declined the position. Egli's score was next highest. The lowest of the next three candidates was selected. Helsintager explained that even though he was not required to go in order of score, he offered the job to each of the first three top scoring candidates in order of their scores. All three declined. In the next group of three candidates, he felt, based on the interview, that the lowest scoring¹¹ of those candidates was the most enthusiastic and, accordingly offered that candidate the job.

Gwo recalled that she spoke to Helsintager about once or twice a week. She and Helsintager frequently have lunch together. During their conversations, she told Helsintager about problems she had with Egli. Gwo denied any influence over Helsintager regarding the Eagle Creek position. She recalled a conversation with Helsintager in which he called and said he had hired one of her employees, Sara Egli. Gwo responded, "Oh, wish you luck." Helsintager laughed and said he was just kidding with Gwo. Egli had come in for an interview, but he did not choose her. On the other hand, Helsintager testified that prior to interviewing Egli, the only thing he knew about her was what he read on her job application. He stated that he had talked to no one and read nothing other than her application.

¹¹ The scores were Egli, 86.20; Grant, 84.80; Rider, 83.90, and Yaeger, 83.90. Helsintager testified that because Rider and Yaeger had the same score, he was informed by personnel that the last digit of the social security number controlled which one was considered to be in the next group of three. Helsintager stated that Rider lost out to Yaeger on this basis.

10. Failure to hire at Portland

In approximately May 1995, Egli applied for casual work in Portland. She later spoke with Margaret Collier from personnel who told her that she would not be hired due to her prior supervisor's evaluation. Collier, herself, did not have authority to hire.

B. Analysis

1. Statutory framework

Section 8(a)(1) and (3) of the Act provide:

It shall be an unfair labor practice for an employer—
 (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . .
 (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

In *Wright Line*,¹² the Board outlined the burden and allocation of proof in cases which turn on the employer's motivation in taking personnel action against an employee as follows:

First we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

2. Layoff at Estacada

I find that the General Counsel has shown that Egli engaged in protected concerted union activity by filing the grievance regarding audit of her cash drawer. In addition, the General Counsel has shown animus on the part of Gwo toward Egli's actions. As noted above, Gwo's behavior toward Egli altered dramatically after Egli filed and won the grievance.

I note further that other than Cook's and Egli's grievances, there were no other grievances at Estacada until shortly before the hearing when Cook processed a grievance regarding the postmaster performing bargaining unit work. In the 60 post offices which Cook covered as business agent and shop steward, there had been about 50 or 60 grievances during the year preceding the hearing here.

The General Counsel asserts that Egli was treated disparately due to her union activity noting that Martha Davenport was discharged but was given a transfer to Portland, Oregon. According to Egli, Davenport was reprimanded at least once a week for being too slow or not performing a task correctly. According to Gwo, she received multiple complaints from Egli and Cook regarding working with Davenport. In order to provide a smooth working environment, Gwo asked Davenport if she would like a transfer to Portland. Davenport

¹² *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

agreed and the transfer was effected. USPS records indicated that on October 1, 1994, Davenport was reassigned from Estacada to Portland. According to Davenport, Gwo told her that she would have to be let go in Estacada but Gwo would put Davenport in touch with Portland to see if there were any openings there. I find that Egli was treated differently than Davenport.

USPS relies on elimination of the TE position as well as numerous deficiencies in Egli's performance in its defense that it would have taken the same action in laying off Egli despite her protected concerted union activity. For instance, Gwo discovered that Egli had extended rent for a box renter by a year without payment. This occurred on about October 12, 1994, but was not discovered on February 10. Also discovered at that time was a money order dated October 11, 1994, which was not forwarded for a c.o.d. and a check for \$73.85. According to Gwo, she repeatedly officially reprimanded Egli about deficient performance including failure to forward a c.o.d., failure to complete a c.o.d., failure to process mail according to priority, failure to process forwards correctly, failure to follow instructions regarding the time to consolidate stamp stock disk, failure to properly process rent due on a box,¹³ and failure to unblock a box which had been rented. After hearing verbal complaints from a customer about Egli on three to five occasions, Gwo told the customer to put the complaint in writing. The customer, who according to Cook complained about all the clerks, did put his complaint in writing dated December 21, 1994. No letters of warning were issued. Gwo explained that, "She's just a kid. She's careless, and then I always try to give her more and more chances, as much as she can."

An official discussion regarding deficiencies in one's work is not a type of "discipline" according to Gwo. Discipline begins with a letter of warning. Egli did not receive any letters of warning from Gwo. In fact, Gwo counseled many employees regarding their deficiencies such as being tardy, leaving stamps out, closing doors that were supposed to be left open, and improper sorting. Gwo also recalled that customers had complained and become angry with her on occasion. Gwo also stated that she could have fired Egli on November 23, 1994, when she discovered the two c.o.ds. However, Gwo did not issue a letter of warning for this either. Importantly, at that point Egli had not announced she would file a grievance regarding the shortage. The evidence amply demonstrates that no action was taken against Gwo or any other employee for similar infractions. Accordingly, I find that USPS has not shown that Egli would have been laid off absent her protected, concerted, and union activity.¹⁴

¹³ When Gwo audited the box receipts, she found a great many discrepancies caused by clerks other than Egli.

¹⁴ As to the elimination of the TE position, USPS has not shown that Egli would necessarily have been laid off absent her protected, concerted, or union activity. It is uncontested that Cook was told at the time she was informed that she had won her grievance to become a full-time regular distribution clerk, that the TE position would be eliminated. She denied that she was told this at the time of filing the grievance, and I credit her over Gwo and Conser who testified that Cook knew this at the time of filing the grievance. At the time Cook won her grievance, Gwo's animosity toward Egli was firmly entrenched. I find that this was the cause of the layoff.

3. Failure to hire at Gresham

I find that the General Counsel has proven that Egli was not hired at Gresham, because of Gwo's animosity toward Egli's protected, concerted, and union activity. McCoy told Egli the reason for Garrett's failure to use Egli at Gresham was because Gwo took Garrett to lunch and told Garrett not to hire Egli. Although McCoy recanted her statement to Egli when she testified at the hearing, I find that McCoy's original statement to Egli was more credible. Moreover, Garrett's testimony indicates that she did have plans to utilize Egli beginning February 18, 1995, and that these plans were altered. Accordingly, I find that Garrett left the decision to Gwo and Gwo's animus toward Egli followed Egli to Gresham. Moreover, I note that the casual at Estacada was used instead of Egli to fill the personnel needs at the Gresham office after failure to utilize Egli.

I find that USPS has not shown that the same action would have occurred in any event. Garrett testified that she received a call from the district office stating that she could not utilize TE hours and that was the reason she did not utilize Egli. There is no documentary evidence to back this up and the district office was silent on the matter. This explanation is simply too convenient. Moreover, Gwo's testimony originally was that she told Garrett not to hire Egli. Only when her counsel corrected the testimony to a statement that Gwo told Garrett she could not borrow Egli, because Egli was no longer a USPS employee, did Gwo's testimony change. I find the difference in language too great to be due to language difficulties. Accordingly, McCoy's use of the word "hire" in her note, Gwo's use of the word "hire" in her original testimony, and Garrett's admitted intention to use Egli are construed to indicate a hiring decision at Gresham. I find that failure to hire Egli at Gresham was due to her protected, concerted, and union activity and would not have occurred absent such activities.

4. Failure to hire at Dayton, Eagle Creek, and Portland

Before discussing these allegations regarding failure to hire, certain precepts must be set forth underlying the USPS' personnel policies and the parties' collective-bargaining agreement. There are two methods for hiring employees. One is through the register. From the register, a manual hiring worksheet is created from a canvass. "A canvass is a hiring effort to recruit applicants from the register." according to Cynthia M. Wright, USPS human resources specialist. Applicants are listed in score order. For smaller offices where the number of hours and placement of the office lead to difficulties in recruiting, applicants from the register are prescreened regarding their availability for work in the particular office. Only when the applicant responds that he or she would accept work in that particular office is the name certified to the worksheet, in score order. The top three scoring applicants are considered for the position. There is no requirement that the top scoring of these three applicants be hired. The selecting official may choose any of the first three available and interested applicants.

Both Hilsentager and Winters¹⁵ spoke frequently to Gwo. I find, despite their denials of knowledge regarding Gwo's animosity toward Egli, that they were fully aware of the problems. Gwo, herself, was more forthcoming in her testimony and admitted talking with both of them about many problems including Egli. Accordingly, I find that the General Counsel has shown that Egli's protected, concerted, and union activity was known to both postmasters and that they sympathized with Gwo's problems, i.e., they shared her animus. USPS has not shown that it would not have hired Egli absent her protected concerted activity. In both cases, a more "enthusiastic" applicant was chosen. In both cases, the applicant chosen did not have prior experience with USPS and was not trained to work on the window. Accordingly, I conclude the Egli was not hired at both Eagle Creek and Dayton due to her protected activities.

Similarly, failure to hire Egli as a casual at the Portland post office was attributed by Collier to the recommendation of Gwo. Accordingly, as above, I conclude that failure to hire at that location would not have occurred absent Egli's protected activities.

CONCLUSIONS OF LAW

1. By informing Egli that she was being retaliated against by Gwo because of her protected concerted activities, USPS has engaged in unfair labor practices affecting commerce

¹⁵ Phil Burris, the officer in charge if Dayton at the time the hiring decision was made, consulted with Winters regarding which candidate to hire.

within the meaning of Section 8(a)(1) of the Act and the Postal Reorganization Act.

2. By laying off Egli at the Estacada, Oregon post office and refusing to hire her at the Gresham, Eagle Creek, Dayton, and Portland, Oregon post offices, USPS has violated Section 8(a)(1) and (3) of the Act and the Postal Reorganization Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent has violated Section 8(a)(1) and (3) by laying off and refusing to hire Egli, the Respondent shall be ordered to offer the discriminatee immediate and full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to the unlawful layoff and refusal to hire, including all copies of the exit interview form completed by Gwo, and to notify the discriminatee in writing that this has been done.

[Recommended Order omitted from publication.]