07-0360-cv

To Be Argued By:
LAUREN M. NASH

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-0360-cv

DANIEL ROSADO,
Plaintiff-Appellant,

-vs-

JOHN POTTER, POSTMASTER GENERAL FOR THE UNITED STATES POSTAL SERVICE, NATIONAL RURAL LETTER CARRIERS ASSOCIATION AND MAGELLAN HEALTH SERVICES, INC.,
Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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BRIEF FOR THE DEFENDANT-APPELLEE
JOHN POTTER, POSTMASTER GENERAL

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STATEMENT OF JURISDICTION

The district court (Peter C. Dorsey, J.) had subject matter jurisdiction under 28 U.S.C. § 1331, because this action arose under federal law – namely, 39 U.S.C. § 1208(b) of the Postal Reorganization Act. *See infra* at 22-24 n.2. The district court entered final judgment on January 4, 2007. *See* Docket entry #126 (reproduced on unnumbered page of Joint Appendix filed by Rosado). On January 29, 2007, Rosado filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a)(1)(B). *See* Docket entry #127; *see also* JA at 1. This Court has appellate jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The Postal Service terminated Rosado's employment after he made threatening statements about his supervisors on an employee assistance hotline, and disobeyed a direct order from his supervisors. Did the district court err in granting summary judgment for the Postal Service based on its conclusion that Rosado failed to establish a genuine issue of fact showing that the Postal Service breached the collective bargaining agreement when it dismissed him from employment on those two bases?

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Preliminary Statement

The plaintiff-appellant, Daniel Rosado, was a letter carrier working for the post office in Monroe, Connecticut when he contacted his employer's Employee Assistance Program line and made a threat against his female

supervisors. The Postal Service fired him for this conduct and other insubordination. Rosado appeals from a grant of summary judgment against him with respect to his claim of wrongful discharge. After review of a detailed evidentiary record, the district court concluded that Rosado failed to establish the existence of a genuine issue of fact necessary to show that the Postal Service breached the collective bargaining agreement. Because the undisputed evidence defeated all of Rosado's claims, this Court should affirm the grant of summary judgment.

Statement of the Case

This is a civil appeal from a final judgment granting summary judgment by the United States District Court for the District of Connecticut (Peter C. Dorsey, J.). The district court dismissed a claim of wrongful discharge against the defendant-appellee John Potter, Postmaster General. Joint Appendix ("JA") at 17-19.

On May 6, 2004, Rosado filed a federal court complaint arising from his dissatisfaction with certain actions of his union; his former employer, the Postal Service; and his employer's Employee Assistance Program (EAP). On November 16, 2005, Rosado filed an amended complaint. Government Appendix ("GA") at 164.

The amended complaint contained four counts. Count One alleged that the defendant-appellee, John Potter, Postmaster General (hereinafter, the "government" or the "Postal Service") breached the applicable collective bargaining agreement when it fired him. Count One also

alleged that the defendant-appellee, National Rural Letter Carriers Association (hereinafter, the "NRLCA" or the "Union"), the union to which Rosado belonged, had breached its duty of fair representation in violation of that agreement. Both claims in Count One are predicated upon Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Counts Two, Three and Four alleged claims of tortious interference, negligent misrepresentation and violation of privacy against the defendant-appellee Magellan Health Services, Inc. (hereinafter, "Magellan"), the entity responsible for the Postal Service's EAP. JA at 164.

All three defendants-appellees moved for summary judgment. The government so moved on February 14, 2006, pursuant to Fed. R. Civ. P. 56, seeking judgment as to Count One of the amended complaint.

On January 3, 2007, the district court granted all three motions for summary judgment. The court granted the government's motion as to the claims against it alleged in Count One of the amended complaint. JA at 17-19.

Final judgment for the government entered on January 4, 2007. JA at 4. On January 29, 2007, Rosado filed a timely notice of appeal. JA at 1.

Statement of Facts and Proceedings Relevant to This Appeal

A. General Background

At all relevant times, the Postal Service and the Union were bound by a collective bargaining agreement known as the "USPS–NRLCA 2000 National Agreement." Pursuant to the National Agreement, the Postal Service recognizes the Union as the exclusive bargaining representative of all postal employees in the bargaining unit, including part-time flexible rural carriers, substitutes, rural carrier associates, rural carrier relief employees, and auxiliary rural carriers. Article 16 of the National Agreement provides that "[n]o employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations." GA at 28.

Rosado began his employment with the Postal Service in December of 2000. By letter dated December 15, 2000, Rosado was offered the position of Rural Carrier Associate ("RCA") with the Monroe Post Office in Connecticut. GA at 32. On February 16, 2001, Rosado's supervisors at the Monroe Post Office prepared a document entitled "Employee Evaluation and/or Probationary Report" in connection with Rosado's job performance since his hire in December of 2000. This document reflects that Rosado received a rating of

"Unacceptable" in thirteen of the eighteen categories rated. GA at 34.

Rosado reported to a number of supervisors while working at the Monroe Post Office. During 2002, the Officer in Charge (OIC) of the Monroe Post Office was Deborah Kendzior, and the supervisors included William Henry, Ann-Marie Daugherty, and Alex Liptak. These supervisors could be assigned supervisory duty over RCAs, city carriers, and mail handlers as needed. GA at 8, 44, 132, 139-40.

B. Rosado Engages in Wrongful Conduct and Is Fired

On September 5, 2002, Rosado was issued a Letter of Warning on the charge of "Failure to Follow Instructions." GA at 36. In this letter, Daugherty, Rosado's supervisor, charged that on August 26, 2002, Rosado was instructed that when he reported to work on August 27, 2002, he was to sort the mail for rural route two in the Monroe section for another carrier who was attending a class, and that once the employee returned, Rosado was to deliver route three in the Easton unit. According to the Letter of Warning, Rosado did not follow these instructions. Instead, when he arrived at work on August 27, 2002, he decided to sort and deliver rural route three in Easton first, and then on his return began sorting rural route two in Monroe. Daugherty indicated that this impacted the departure of the route and denied the other carrier the assistance to which he was entitled. *Id; see also* GA at 51.

This letter reflects that when questioned about his failure to follow instructions, Rosado stated that there would not be any trucks later, and that it did not make any difference. Daugherty explained to Rosado that he did not have to agree with the decisions of his supervisor, but must follow orders unless the action would place him in danger of injury. Rosado replied that he did not respect his supervisor or any of the managers in the building. In response, Daugherty reminded Rosado that the Postal Service has a Code of Conduct for its employees and a Hostile Work Environment statement that must be followed. She also instructed him to treat all employees and customers with dignity and respect. GA at 37; 62-63.

In this Letter of Warning, Rosado was charged with violating two sections of the Employee and Labor Relations Manual (the "ELM"). The first was Section 666.1, entitled "Discharge of Duties," which provides that "[e]mployees are expected to discharge their duties conscientiously and effectively." The second cited provision was Section 666.51, entitled "Obedience to Orders," which states that "[e]mployees must obey the instructions of their supervisors. If an employee has reason to question the propriety of a supervisor's order, the individual will nevertheless carry out the order and immediately file a protest in writing . . . ." The Letter warned Rosado that "future deficiencies will result in more severe disciplinary action being taken . . . [which] may include suspension, or removal from the Postal Service." GA at 36-37; 39-41.

On December 5, 2002, at approximately 4:45 p.m., OIC Kendzior walked to the back office at the Monroe Post Office and noticed mail that needed to be delivered. She saw Rosado and asked him if he was aware that he had to take out that mail. He did not respond to her. Kendzior then approached the delivery supervisor on that shift, Daugherty, and asked her to make sure that the mail was delivered. She also asked a new supervisor, Liptak, to assist Daugherty in this task, since Kendzior knew that Daugherty had experienced problems with Rosado in the past. GA at 140.

Thereafter, another RCA returned to the Post Office. Both he and Rosado were given instructions by Daugherty and Liptak that they were to go out on the road. Both employees were resistant to these instructions, but were advised that they had been given an order which had to be followed. Following this direction, the first RCA took three trays of mail and returned to the road as instructed. GA at 45-50, 140-41.

Rosado was instructed to go back out and find a new carrier to assist her in delivering the mail, and then to return to the Post Office in time for dispatch. He did not comply with this directive, purportedly because of the weather conditions. Kendzior recalls that at the time, there was snow on the ground and it was snowing. While she was concerned about the carriers returning to the office safely, the roads were passable, and there was no reason that Rosado could not return to his route. Rosado was also an experienced carrier, and he could complete the new

carrier's delivery in far less time than the new carrier could. GA at 46, 141.

Shortly thereafter, Daugherty approached Kendzior and indicated her concern that Rosado had simply left the Post Office to go home, and had taken the keys to his postal vehicle with him. In response to Daugherty's concerns, Kendzior and Liptak went out to the parking lot of the Post Office to determine if Rosado's postal vehicle was still in the parking lot, or if Rosado had in fact returned to his route. When they arrived in the parking lot, Rosado was observed brushing snow off of his personal vehicle, which was running. This indicated to Kendzior that Rosado was intending to leave the Post Office and go home. She asked Rosado where the keys to his postal vehicle were, and he replied that the keys were where he had left them. GA at 60, 141.

Liptak advised Rosado that he was disobeying a direct order. Liptak told Rosado to report to him first thing the next morning. Rosado refused the order, refused to go back out into the snow, and eventually went home. GA at 60-61; 105-06.

The next morning, December 6, 2002, Kendzior was on her way to work at the Monroe Post Office when she received a telephone call from William Henry, one of her supervisors. Henry told her not to enter the Post Office at that time because the EAP Hotline had received a telephone call from a Monroe Post Office employee threatening two female supervisors at the facility. Henry

told Kendzior that the employee at issue was Daniel Rosado. GA at 136-38; 142.

When Rosado had called the EAP hotline, he eventually spoke with Michael Ruck, a crisis clinician with Magellan and a mental health clinician with a master's degree in social work. GA at 64. During his conversation with Ruck, Rosado expressed anger about his female supervisors, and stated that he felt like harming them. During the call, Ruck heard Rosado say that maybe people will find out how bad the Postal Service is when they read the morning paper. The call was then terminated by the caller, and Ruck was unable to re-contact Rosado. Immediately thereafter, Ruck conveyed this information to Postal Service officials. GA at 65-70.

At the time of this call, there were only two female supervisors at the Monroe Post Office: Daugherty and Kendzior. Daugherty was not scheduled to work on that day. As a result of Rosado's threatening statements to the EAP Counselor, the Monroe Post Office was placed on lock down that morning. Kendzior waited in her vehicle down the road from the Post Office until she was notified that the building was safe to enter. GA at 55, 137, 142.

Representatives of the U.S. Postal Inspection Service spoke with Rosado on that same day, December 6, 2002, concerning his statements to the EAP counselor. During this interview, Rosado told the Postal Inspectors that he did call the EAP counselor; that his remarks were addressed to Daugherty and Kendzior; that he recalled saying that he "would not mind hitting her," and that "If I

don't have a job I might do something." Gabriel Rosado, Rosados' twin brother who also attended the interview, told the Postal Inspectors that he had been present when his brother made the call. The Postal Inspectors advised Rosado and his brother not to go to the Monroe Post Office or they would be subject to arrest. GA at 72-73.

Nowhere in the Postal Inspectors' interview report does it reflect that Rosado made any statement that anyone other than he had made statements on his behalf to the EAP Counselor on December 5, 2002. *Id.*

As a result of his conduct on December 5-6, 2002, Rosado was the subject of Emergency Placement in Off-Duty Status pursuant to Article 16.5 of the National Agreement. By this placement, Rosado was put in an off-duty status without pay beginning on December 6, 2002. GA at 75, 134

Following the incident on December 6, 2002, Rosado called Daugherty by telephone a number of times while she was working at the Monroe Post Office. Rosado was angry with Daugherty, and called her a "bitch." Daugherty was so upset by Rosado's call that she feared for her safety and contacted the Monroe Police Department. GA at 52-53, 108.

On December 10, 2002, Rosado was notified that he had to undergo a Fitness for Duty Examination in accordance with the ELM, Section 864.32. The stated purpose of this referral was "to make a determination regarding your ability to perform the duties of your

position and to obtain a current assessment of your condition." GA at 77. On January 12, 2003, a report was prepared by Douglas A. Berv, M.D. following Rosado's Fitness for Duty Examination which was conducted on December 12, 2002. GA at 79. This report reflects that when asked why he thought he was being seen by the doctor that day, he replied, "I guess I said something I should not have said." Throughout the examination, Rosado "repeatedly expressed a great deal of anger towards the USPS supervisors." *Id.* at 79-80.

After this examination, which included psychological testing, Dr. Berv concluded that while there was no evidence that Rosado posed an imminent threat of harm to anyone at the Postal Service,

> [I]t is clear that Mr. Rosado made a threatening statement, and he continues to harbor anger towards his supervisors and others at the United States Postal Service. He strongly feels that he and other substitute employees are taken advantage of by the United States Postal Service, and that his supervisors demand too much from him. His anger has caused anxiety and distress. There is no indication of any decrease in his anger towards the United States Postal Service. In the past this anger has led to extreme emotional and physical anxiety, and led to the telephone threat. While Mr. Rosado is not an immediate risk to others, it is quite likely that if he perceives that he is provoked or feels that he is provoked, this will lead to increased anxiety, acting out. Violent behavior is a possibility.

GA at 81. Nowhere in Dr. Berv's report does it reflect that Rosado said that anyone other than himself had spoken to the EAP Counselor on December 5, 2002.

On January 14, 2003, Postal Supervisor Henry sent Rosado a letter directing him to report for a Pre-Disciplinary Interview on January 17, 2003. The referral letter stated that the interview would be in connection with Rosado's conduct on December 5-6, 2002, including his failure to follow instructions and the allegation that he made a threatening remark directed to supervisors at the Monroe Post Office. GA at 83.

Henry conducted that interview with Rosado on January 17, 2003. Rosado admitted that he told the EAP counselor he felt like harming the female supervisors in the office. At no point during the interview with Henry did Rosado say that anyone other than himself had made statements on his behalf to the EAP Counselor on December 5, 2002. GA at 85-86, 133, 143.

Following this Pre-Disciplinary Interview, Henry requested Kendzior's concurrence in his recommendation that Rosado be terminated from employment for Unacceptable Conduct in violation of the Postal Service Code of Conduct Regulations and the Connecticut District Zero Tolerance Policy, and for Failure to Follow Instructions. Henry also noted that Rosado had received the Letter of Warning on September 5, 2002, from Daugherty, also for Failure to Follow Instructions. GA at 40, 88, 135, 143.

Kendzior concurred in Henry's recommendation that Rosado be terminated on those bases, and indicated her agreement in writing on January 22, 2003. GA at 143. The next day, on January 23, 2003, the Postal Service sent Rosado a Notice of Removal based on the foregoing charges, of Unacceptable Conduct in violation of the Postal Service Code of Conduct Regulations and the Connecticut District Zero Tolerance Policy, and for Failure to Follow Instructions. GA at 90-93.

Following Rosado's termination, the Union pursued grievances on Rosado's behalf to arbitration. On January 6, 2005, an Arbitrator issued a decision finding that the Postal Service had just cause for terminating Rosado's employment. GA at 110-29.

C. The District Court Grants Summary Judgment for All the Defendants

By written ruling dated January 3, 2007, the district court granted the Postal Service's motion for summary judgment. The court initially addressed the government's argument that Rosado had failed to plead a proper jurisdictional basis for his claims against the Postal Service. The court noted that Rosado invoked Section 301 of the Labor Management Relations Act ("LRMA"), 29 U.S.C. § 185, in support of his claim that the Postal Service wrongfully discharged him. The court also noted that Rosado relied on Section 301 in connection with his claim that the Union breached its duty of fair representation by failing to fully represent him in the grievance process, and that both actions were alleged to be

in violation of the applicable collective bargaining agreement. JA at 17.

The court agreed with the government that, while in a typical "hybrid" action against an employer and a union, the employer's duties under the collective bargaining agreement are governed by § 301, that section does not apply to the Postal Service. That is so because the Postal Service does not qualify as an "employer" within the meaning of 29 U.S.C. § 152(2). That section states that the term "employer" shall not include "the United States or any wholly owned Government corporation." The court recognized that federal courts have jurisdiction over claims against the Postal Service pursuant to the Postal Reorganization Act, 39 U.S.C. § 1208(b). The court noted that while Rosado invoked Section 1280(b) in his opposition to the Postal Service's motion for summary judgment, this invocation was too late, and that the court lacked jurisdiction over the Postal Service pursuant to the statutory basis relied upon by Rosado in the Amended Complaint. *Id.* at 17-18.

The court turned next to the government's argument that Rosado wrongly named John Potter as the defendant in this action because no claim for breach pursuant to § 1208(b) can lie against the Postmaster General. The court noted that in order for Rosado to state a "hybrid" claim for breach of a collective bargaining agreement, the defendant must be a signatory to the collective bargaining agreement. The court agreed with the government that the Postmaster General is not an individual signatory to the National Agreement between the USPS and the Union.

The court concluded that it did not have jurisdiction over John Potter, Postmaster General, in this case. *Id.* at 18.

The district court then held that even if Rosado had properly named the Postal Service as defendant and had brought his claim pursuant to § 1208(b), it would still enter summary judgment in the government's favor. The court noted that in a hybrid action such as the present case, a plaintiff must prove that the union violated the terms of the bargaining agreement as a prerequisite for his claim of employer liability. The court noted that Rosado had not disputed this premise and it was deemed conceded. And, the court noted, even if Rosado prevailed against the Union, he would still have to establish that the Postal Service violated the National Agreement by firing him without just cause. *Id.* at 18-19.

After a careful review of the record evidence, the court concluded that the Postal Service had not violated the National Agreement when it terminated Rosado's employment. The court found evidence that Rosado had refused direct orders from his supervisors on several occasions, in violation of Postal Service policies. The court found evidence that on December 5, 2002, he improperly refused the requests of three of his supervisors to assist a new carrier in the delivery of her route. And the court found evidence to support the primary reason for his termination, that he had made statements which "the EAP reasonably construed . . . to constitute threats in violation of USPS policies and regulations concerning threats of workplace violence." *Id.* at 19.

The court concluded that Rosado engaged in behavior which constituted insubordination, failure to perform work as requested, and failure to obey safety rules, all of which constituted just cause for his termination within the meaning of the National Agreement. *Id.* Judgment entered in favor of the Postal Service on January 4, 2007. JA at 4.

SUMMARY OF ARGUMENT

The district court correctly held that even if Rosado had brought his claims against the Postal Service under the Postal Reorganization Act, summary judgment was still appropriate as to those claims. Rosado did not meet the first element of his burden under the PRA because he failed to raise a genuine issue of fact as to whether the Union breached its duty of fair representation. As to the second element of proof, there was undisputed evidence that the Postal Service terminated Rosado's employment because he had called his EAP counselor and reported violent feelings towards his female postal supervisors that people would read about in the papers; and because he had disobeyed a direct order from his supervisors. Given that evidence, there was no genuine issue of fact as to whether the Postal Service wrongfully discharged him. Accordingly, the district court properly granted summary judgment in the government's favor.

ARGUMENT

I. The District Court Correctly Held That Rosado Failed to Establish a Genuine Issue of Fact Necessary to Show That the Postal Service Breached the Applicable Collective Bargaining Agreement When it Discharged Him from Employment.

A. Governing Law and Standard of Review

1. Standard Governing Summary Judgment

This Court reviews *de novo* a district court's grant of summary judgment. *Town of Southold v. Town of East Hampton,* 477 F.3d 38, 46 (2d Cir. 2007) (citing *Tufariello v. Long Island R.R. Co.*, 458 F.3d 80, 85 (2d Cir. 2006)).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986).

When ruling on a motion for summary judgment, the district court must construe the facts in a light most favorable to the non-movant, and must draw all reasonable inferences against the moving party. *See Anderson,* 477 U.S. at 255; *see also Sanozky v. Int'l Ass'n of Machinists & Aerospace Workers*, 415 F.3d 279, 282 (2d. Cir. 2005)

(citing *Anderson, supra*, and *Maguire v. Citicorp Retail Servs.,* 147 F.3d 232, 235 (2d Cir. 1998)).

If a defendant contests the bare allegations of a complaint, the plaintiff bears the burden to set forth specific facts sufficient to establish the need for a trial. "If the movant demonstrates an absence of a genuine issue of material fact, a limited burden of production shifts to the nonmovant, who must 'demonstrate more than some metaphysical doubt as to the material facts,' and come forward with 'specific facts showing that there is a genuine issue for trial.'" *Powell v. Nat'l Board of Med. Examiners*, 364 F.3d 79, 84 (2d Cir. 2004) (quoting *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir. 1993)).

"[T]he existence of a mere scintilla of evidence in support of nonmovant's position is insufficient to defeat the motion; there must be evidence on which a jury could reasonably find for the nonmovant." *Powell*, 364 F.3d at 84. Accordingly, "'[c]onclusory allegations, conjecture, and speculation . . . are insufficient to create a genuine issue of fact.'" *Shannon v. NYC Transit Auth.*, 332 F.3d 95, 99 (2d Cir. 2003) (quoting *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998)).

2. Standards Governing the Labor Management Relations Act and the Postal Reorganization Act

In general, claims alleging breach of a collective bargaining agreement are actionable under Section 301 of

the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA"). It is well settled that "[i]n the typical 'hybrid' action, the employer's duty to honor the collective bargaining agreement is governed by section 301 of the [LMRA], and the union's duty of fair representation is implied from section 9(a) of the National Labor Relations Act." *Beckman v. U. S. Postal Service*, 79 F. Supp.2d 394, 400 (S.D.N.Y. 2000) (citing *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 163-64 (1983); *Vaca v. Sipes*, 386 U.S. 171, 185-86 (1967); *White v. White Rose Food*, 128 F.3d 110, 113 (2d Cir. 1997)).

Although the Postal Service (as a governmental agency) is not subject to the LMRA, its labor disputes are covered by the Postal Reorganization Act ("PRA"). Section 1208(b) of the PRA is the statutory analog to § 301 of the LMRA. *See Acosta v. Potter*, 410 F. Supp. 2d 298, 307 (S.D.N.Y. 2006). 39 U.S.C. § 1208(b) provides in pertinent part:

> Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.

In a "hybrid" lawsuit brought under § 1208(b), an individual employee charges that his employer breached a CBA and that a union breached its duty of fair representation. The suit is called a "hybrid" suit because "when a CBA contains a binding grievance and arbitration

process, an employee cannot avoid the private dispute resolution mechanism simply be suing [his] employer in court." *Acosta,* 410 F. Supp. 2d at 308 (citing *DelCostello*, 462 U.S. at 163-64). In order to prevail, the plaintiff must show: "(1) that the union breached its duty of fair representation;" and "(2) that the employer breached the terms of the [collective bargaining agreement]." *Beckman*, 79 F. Supp. 2d at 400 (citing *DelCostello*, 462 U.S. at 163-65). Both elements must be established to prevail against either defendant. *Id.*

The union breach is a necessary prerequisite to consideration of the merits of an employee's claim against his employer for improper discharge, such that if an employee is unable to prove that the union breached its duty of fair representation, there will be no need to consider whether the employer violated the collective bargaining agreement. *Beckman,* 79 F. Supp. 2d at 400; *see also Newby v. Potter*, 480 F.Supp.2d 991, 999-1000 (N.D.Ohio 2007). In other words, the "indispensable predicate" of such an action against the employer is the "demonstration that the [u]nion breached its duty of fair representation." *Flanigan v. International Brotherhood of Teamsters*, 942 F.2d 824, 828-29 (2d Cir. 1991) (quoting *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 62 (1981)). In fact, "courts presented with hybrid claims need not reach the question of whether the employer violated the CBA unless the union has acted arbitrarily, in bad faith, or discriminatorily." *Acosta,* 410 F. Supp. 2d at 309 (citing *Young v. U.S. Postal Service*, 907 F.2d 305, 307(2d Cir. 1990)).

B. Discussion

1. The District Court Correctly Held That the Postal Service Could Not Be Liable Absent a Showing That the Union Had Breached its Duty of Fair Representation.

The district court correctly held that the first reason why Rosado cannot prevail against the Postal Service under § 1208 is because Rosado cannot demonstrate that the Union breached its duty of fair representation. The district court carefully considered Rosado's arguments in support of his claim of a union breach, including the Union's motion for summary judgment, supporting memorandum of law, and accompanying factual statement and evidentiary materials.[1] The propriety of the district court's finding that the Union did not breach its duty to Rosado will be more fully addressed by the Union in its appellate brief, due on this same date. In light of Rosado's failure to establish a union breach, this district court was correct that he could not establish that the Postal Service violated the CBA when it terminated him.

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[1] Given that here, as below, Rosado did "not address the issue of whether union liability . . . is a prerequisite for employer liability," this premise should be deemed conceded. *See* JA at 19.

2. The District Court Properly Found That Rosado Failed to Establish That the Postal Service Violated the "Just Cause" Provision of the National Agreement When it Terminated His Employment.

Even though it found no Union breach, the district court went on the address the merits of Rosado's claim against the Postal Service, and correctly determined that no violation had been proven.[2] The court's reasoning was

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[2] At the start of its ruling, the district court addressed the government's arguments that Rosado had cited the wrong jurisdictional basis and named the wrong party defendant in connection with its claims against the Postal Service. Specifically, the court concluded that LMRA § 301 did not confer subject matter jurisdiction in this case. Section 301 does not apply to the Postal Service because that agency is not an "employer" within the meaning of 29 U.S.C. § 152(2). Given that Rosado did not rely on the PRA as a basis for the district court's jurisdiction, the court properly rejected § 301 as a jurisdictional basis.

However, the erroneous citation to LMRA § 301 rather than PRA § 1208 is a technicality that does not warrant dismissal in and of itself. *See, e.g., Bowen v. U.S. Postal Service,* 459 U.S. 212, 232 n.2 (1983) (White, J., concurring in part and dissenting in part) (noting that "[b]ecause the employer in the present case is the U.S. Postal Service, petitioner Bowen's action technically arises

(continued...)

[2] (...continued)
under § 1208(b) of the Postal Reorganization Act, 39 U.S.C. § 1208(b), which is identical to § 301 in all relevant respects.") *See also Blake v. Potter*, 2007 WL 830072, at *1 n.1 (S.D.N.Y. 2004); *Lettis v. U.S. Postal Service,* 973 F. Supp. 352, 357 (E.D.N.Y. 1997) (merely noting that plaintiffs should have cited § 1208 of the PRA instead of § 301 of the LMRA in connection with their claims against the Postal Service). Section 1208(b) is the statutory parallel of § 301(a), and case law construing § 301 has been consistently applied to § 1208(b). *See, e.g., Fraginals v. Postmaster General,* 265 F. Supp. 2d 1309, 1315 (S.D. Fla. 2003), and the cases cited therein; *see also Acosta v. Potter*, 410 F. Supp. 2d 298, 307 (S.D.N.Y. 2006); *Beckman*, 79 F. Supp. 2d at 400 (citing *Young*, 907 F.2d at 307, and *American Postal Workers Union v. U. S. Postal Service*, 766 F.2d 715, 720 (2d Cir. 1985)). Accordingly, Rosado's citation of the wrong statutory provision is not in itself fatal to his claims.

Similarly, Rosado's naming of John Potter, Postmaster General, as defendant instead of the Postal Service, while an error, was not a mistake which independently warranted dismissal of this case. It is not disputed that it is the Postal Service, not the Postmaster General, who is the proper defendant in an action under §1208(b). *See Lettis*, 973 F. Supp. at 359-60. Well-established law requires that into order to state a "hybrid" claim under § 1208(b), the defendant must be a signatory to the collective bargaining agreement. *Id.* Since the Postmaster General, as an
(continued...)

sound and fully supported its holding.

The district court held:

> [T]he record shows that Plaintiff refused direct orders from his supervisors on several occasions, contrary to USPS policies. The record also show that on December 5, 2002, he refused the requests of three of his supervisors to assist a new carrier in the delivery of her route, and he left the Post Office

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[2] (...continued)
individual, is not a signatory to the collective bargaining agreement, he cannot be found to have violated it. However, this misnomer is of the sort that could have been corrected by amending the complaint. *See id.* at 359 (allowing addition of Postal Service as defendant where naming of Postmaster General was result of "mistake as to the technicalities of labor law" which fell within the purview of Fed. R. Civ. P. 15(c)(3)).

It should be noted, however, that while Rosado avers that he named the Postal Service as a defendant in ¶ 3 of his Amended Complaint, this is not entirely accurate. While that paragraph uses the short-hand phrase of "Defendant Postal Service," the previous paragraph clearly identifies the federal defendant as Postmaster General John Potter. GA at 165-66. Rosado added to the confusion by issuing an individual summons naming the Postal Service, but serving it upon the "United States Attorney" at the main office of the Department of Justice in Washington, D.C. JA at 47.

> rather than following their orders and filing a written complaint as required by USPS policies. The Arbitration decision found that the weather conditions that day were not so unsafe as to justify Plaintiff's refusal of his supervisors' instructions. . . . The record also shows that Plaintiff made statements to the EAP reasonably construed, as discussed above, to constitute threats in violation of USPS policies and regulations concerning threats of workplace violence. Such behavior qualifies as "insubordination, . . . failure to perform work as requested, violation of the terms of this Agreement, [and] failure to observe safety rules and regulations," which constitutes "just cause" under the National Agreement.

JA at 19. The foregoing findings were fully supported by the evidence of record.

Rosado charges that the Postal Service violated the National Agreement when it terminated him on the basis of his conduct on December 5-6, 2002. That agreement sets limits on the Postal Service's ability to discipline and discharge its employees. It provides:

> No employee may be disciplined or discharged except for just cause such as as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations.

See GA at 28. Article 30 of the National Agreement provides further guidance as to the definition of "just cause":

> In addition to the provisions of Article 16, the following actions shall constitute just cause for removal of rural carrier associates and rural carrier relief employees: repeated unavailability for work, failure to maintain the regular schedule within reasonable limits, delay of mail, and failure to perform satisfactorily in the office.

See JA at 392. Accordingly, the National Agreement provides that just cause for discipline or discharge can exist once a Postal Service employee evidences, *inter alia*, insubordination, failure to perform work as requested, or violation of the terms of the agreement.

As the district court determined, the facts in this case revealed that Rosado exhibited a complete disregard for, and disrespect of, his superiors at the Monroe Post Office. On December 5, 2002, Rosado flatly disobeyed a direct order from his supervisors to return to the road to assist a new carrier in the delivery of her route. Instead of following their orders and filing a written complaint as required by the ELM, Rosado got into his car and left the Post Office to go home. This constituted a "failure to perform work as requested," which justifies termination under the National Agreement. GA at 28.

Of even greater concern, though, was Rosado's threatening behavior towards the female supervisors at the

Monroe Post Office. Directly following his failure to follow instructions on December 5, 2002, Rosado went home that evening and made a call to the EAP hotline. There was no dispute that on December 5, 2002, Rosado made a call to the EAP hotline, and eventually spoke with Michael Ruck, a crisis clinician with Magellan Health Services and a mental health clinician with a Master's Degree in Social Work. There was no dispute that during this conversation with Ruck, Rosado expressed anger about his female supervisors, and stated that he felt like harming them. During the call, Ruck heard Rosado say that maybe people will find out how bad the Postal Service is when they read the morning paper. The call was then terminated by the caller, and Ruck was unable to re-contact Rosado. Ruck was clearly left with an impression that Rosado wanted to harm his female supervisors at the Monroe Post Office, and that he was planning to acts on those feelings quite soon.

The district court was correct in concluding that Ruck reasonably construed Rosado's statements as a threat. Once Ruck conveyed this disturbing conversation to officials within the Postal Service, their response was swift and appropriate: lock down the facility; make sure that the female supervisors were out of the way of any potential harm; and make sure Rosado was located, interviewed by Postal Inspectors, and kept away from the postal facility and the supervisors apparently causing his wrath. There was no dispute that Rosado admitted to the Postal Inspectors that he had made the call, and that he had felt like hurting his female supervisors. Rosado made the same admission to William Henry and Dr. Berv. Indeed,

Rosado admitted during his deposition that he felt like hurting them.

The district court properly held that Rosado's actions violated the Postal Service's policies and regulations concerning threats of violence in the workplace. These violations, coupled with Rosado's flagrant disregard for the order of his superiors, provided an ample basis for terminating Rosado's employment. It was clear, then, that the Postal Service had just cause to terminate Rosado's employment and, accordingly, that the termination was consistent with the terms of the National Agreement. *Cf. Korthas v. Northeast Foods, Inc.,* 2006 WL 519401 at *7 (N.D.N.Y. 2006) (noting that employer invoked "just cause" provision of collective bargaining agreement to discharge employee who threatened supervisor and co-workers; not reaching merits of LMRA claim because time-barred). *See also Roeder v. American Postal Workers Union*, 180 F.3d 733, 738 (6th Cir. 1999) (where collective bargaining agreement defines "just cause" as incompetence or failure to perform work as requested, Postal Service did not violate the CBA when it fired an employee for failing to pass a proficiency examination within the time allowed); *Young,* 907 F.2d at 309-10 (upholding district court's finding that Postal Service had just cause for terminating a 14-year employee after a series of unicast absences, and therefore did not violate the CBA).

Strong support for the Postal Service's actions was also found in the arbitration decision of January 6, 2005. On the charge of failure to follow instructions, the arbitrator

found that as a relief carrier RCA, Rosado's job was to assist others in the delivery of their routes, and that under the National Agreement, he could have been assigned to more than one route. The arbitrator also found that the weather conditions on that day were not so unsafe as to justify refusing the instructions of management. *See* GA at 121-24.

On the charge of threats of violence, the arbitrator indicated that Rosado was for the first time claiming that it was his brother Gabriel, and not him, who made some of the statements to the EAP Counselor, including the statement that the counselor "might read about it in the papers someday." The arbitrator noted that Rosado had failed to mention this to the Postal Inspectors, to postal management during the PDI, or during any of the grievance steps, and found that Rosado did not adequately explain this inconsistency in his claims. GA at 124-25.

As to Rosado's statements, the arbitrator found that they clearly constitute a threat of violence against fellow employees, and that the threats placed Kendzior and Daugherty in legitimate fear for their safety, whether Rosado intended to carry them out or not. GA at 126. The arbitrator concluded that Rosado's conduct violated Postal Service policies against workplace violence, and that the Postal Service had a "compelling reason for enforcing its rules and joint statements against violence and threats of violence in the workplace." Noting that "[t]he physical safety of its employees, managers and customers should be of paramount concern to the Service, especially in light of its recent bitter experiences," the arbitrator pointed out that

"the Service's proclamation addressing violence in the workplace should not be blithely ignored." GA 128. He concluded that "the nature and gravity of the [Rosado's] comments in the present case justify his termination from the Service," and that "[t]he fact that his statements placed Postal Service employees in fear for their physical safety and resulted in significant disruption to the workplace support such a conclusion." GA at 129.

In sum, there is ample record evidence supporting the district court's decision that the Postal Service had just cause for terminating Rosado's employment. His conduct reflected a serious disregard for the authority of his supervisors, both personally and professionally. The fact that Rosado readily admitted during his deposition that he telephoned Daugherty after his termination and called her a vulgar name suggests that Rosado is defiant in his disrespect. The Postal Service should not be required to retain such an employee.

Rosado argues that the alleged failure to obey a direct order was not grounds for his "automatic termination" but only for a "progressive disciplinary process." *See* Rosado's Brief at 32. In support of this claim, Rosado relies on the deposition testimony of his supervisor, Ann-Marie Daugherty, about the usual escalation in discipline for employees who engage in misconduct, climbing from letters of warning, to "paper suspensions," to suspensions without pay of increasing duration, and finally to termination. JA at 56-57. What Rosado does not mention is that Daugherty carefully testified that this was only the typical progression: Three times, she emphasized that "it

would all depend on circumstances." *Id.* Rosado presented no evidence showing that the Postal Service breached the National Agreement when it concluded that incremental punishment was insufficient for an employee who had admitted threatening two of his supervisors. Moreover, the record was also undisputed that although the Postal Service did not act precipitously upon Rosado's failure to obey his supervisors' orders. Rather, following the incidents of December 5-6, 2002, Plaintiff was placed in a non-duty status while the charges were investigated. It was only after a thorough review of the events in question that Rosado was fired on January 23, 2003.[3]

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[3] Rosado argues that "[f]or over two years that the Plaintiff worked for the Defendant, Postal Service, he was not subject to any disciplinary action until he was discharged." *See* Rosado Brief at 30. To be clear, Rosado was issued a Letter of Warning on the charge of "Failure to Follow Instructions" on September 5, 2002. GA at 36-37. According to this Letter of Warning, Rosado had violated two sections of the Employee and Labor Relations Manual (the "ELM"). The first was Section 666.1, entitled "Discharge of Duties," which provides that "[e]mployees are expected to discharge their duties conscientiously and effectively." GA at 39. The second cited provision was Section 666.51, entitled "Obedience to Orders," which states that "[e]mployees must obey the instructions of their supervisors . . . ." *See* GA at 40. Rosado is correct that because this Letter of Warning was subsequently reduced to a discussion, it does not constitute prior discipline within the meaning of the National (continued...)

Of no moment is Rosado's renewed argument that hazardous weather conditions justified disobeying his supervisors's order to return to the road. *See* Rosado Brief at 33.[4] Putting aside that Rosado's threatening comments independently justified his termination, the fact remains that Rosado failed to comply with a direct order as

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[3] (...continued)
Agreement. *See* Rosado's Brief at 31; JA at 49. But the mere fact that written discipline was later reduced as a result of union intervention does not preclude the Postal Service or the district court from making note of this past occurrence "to establish that employees have been made aware of their obligations and responsibilities." JA at 49. The entire point is irrelevant, of course, because the Postal Service did not rely upon this prior misconduct as a basis for Rosado's termination.

[4] As the government argued below, this contention is without foundation. While Rosado complains that it was dark and snowy when he was asked to return to the road, and that he did not want to risk his own safety, his assessment of his ability to handle the road conditions was countered by Officer in Charge Kendzior and by the Arbitrator. After hearing the evidence, the arbitrator reasoned that Rosado was a relief carrier, and his job was to assist others in the delivery of their routes. He also found that the weather conditions on that day were not so unsafe as to justify refusing the instructions of management. *See* GA at 121-24. The district court correctly cited this evidence in support of its decision. *See* JA at 19.

required by section 666.51 of the Employee and Labor Relations Manual. GA at 92. And even if there were a genuine dispute of material fact as to whether the weather conditions somehow justified an exception to the obey-now-grieve-later rule, that would not have excused Rosado from his obligation to file an immediate written protest to the official in charge of the Monroe Post Office. GA at 92. Instead of lodging such a protest, Rosado opted to simply go home. Having failed to comply with his obligation to file a written protest, there can be no question but that Rosado violated the terms of his employment.

Finally, Rosado revives his argument that the Postal Service should not have terminated his employment for making "allegedly threatening comments," and claims that whether they were true threats is a question only a jury can decide. *See* Rosado's Brief at 34. This is specious reasoning. Rosado has never contested that he personally called the EAP program, that he had expressed his thoughts of acting out violently against his supervisors, and that he then repeatedly called one of those supervisors at the Post Office, blaming her for his predicament and calling her a "bitch." Regardless of any dispute as to whether it was actually Rosado's brother who said to the EAP counselor that people would read about it "in the papers," Rosado has agreed that he made the remaining statements. Indeed, he admitted as much to the Postal Inspectors, GA at 72 (Rosado recalls stating "I wouldn't mind hitting her"; "If I don't have a job I might do something"), to the supervisor who performed his predisciplinary interview, GA at 85-86, and to the district court in his statement of facts in connection with the

summary judgment pleadings, JA at 471 (representing that "plaintiff indicated [to the EAP counselor] that he had thoughts about hitting someone because he was upset by his employer's treatment"). Rosado's claim is that he never *further* stated that he "planned or intended" to harm anyone. Yet the only question that matters is whether the statements that Rosado undisputedly *did* make could have been justifiably viewed by the Postal Service as threats that constituted just cause for termination. It makes no difference whether – as Rosado seems to claim – he did not truly mean what he said, or whether it was his brother who amplified upon the statements Rosado himself admittedly made. The Postal Service's decision to terminate Rosado turned upon what Rosado said. Given the lack of any dispute over the core set of Rosado's statements, and the clear and unmistakable import of those as threats of physical harm to two identifiable postal supervisors, there can be no doubt that the Postal Service had "just cause" to discharge Rosado.

The undisputed material facts established that the Postal Service has ample just cause for terminating Rosado's employment. The district court was correct in its conclusion that the Postal Service did not violate the collective bargaining agreement.

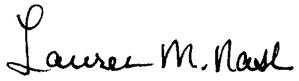
CONCLUSION

For the foregoing reasons, the judgment of the district court for the defendant-appellee John Potter, Postmaster General, should be affirmed.

Dated: August 14, 2007

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,290 words, exclusive of the Table of Contents, the Table of Authorities, and this Certification.

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ADDENDUM

39 U.S.C. § 1208. Suits

(a) The courts of the United States shall have jurisdiction with respect to actions brought by the National Labor Relations Board under this chapter to the same extent that they have jurisdiction with respect to actions under title 29.

(b) Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.

(c) A labor organization and the Postal Service shall be bound by the authorized acts of their agents. Any labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforcible . . . against any individual member or his assets.

(d) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(e) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

29 U.S.C. § 185. Suits by and against labor organizations.

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable

against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

ANTI-VIRUS CERTIFICATION

Case Name: Rosado v. Potter

Docket Number: 07-0360-cv

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 8/14/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: August 14, 2007