

UNION TIME



THE NEWSLETTER FOR NPMHU OFFICERS & SHOP STEWARDS

Welcome

Dear Officers and Shop Stewards:

Welcome to the first issue of *Union Time*, a quarterly newsletter for officers and shop stewards of the National Postal Mail Handlers Union. This newsletter is dedicated to **you**, all of the hard-working union officers and shop stewards who keep our Union strong by representing Mail Handlers around the country.

Being a union representative is a tough, and sometimes thankless, job. On behalf of the entire National Executive Board, and on behalf of all Mail Handlers, we start by saying **thank you** to all officers and stewards. You are truly the lifeblood of this Union.

We also want each of you to have every possible advantage as you deal with postal management in the grievance/arbitration process. That is why we have started this newsletter. We hope that, in the coming months and years, you will find the articles in this publication not only informative, but also useful in your day-to-day activities on the workroom floor and in your day-to-day dealings with management. So you should consider this newsletter to be a new part of your arsenal as you fight the good fight on the workroom floor.

Union Time will be published quarterly, and will be mailed directly to your most recent address. The newsletter is in addition to, and not a replacement for, the NPMHU's other publications, including our monthly bulletin, the *Mail Handler Update*; the Union's quarterly magazine, *The Mail Handler*; our Union's Semi-Annual Reports from the Contract Administration Department; published materials used in NPMHU training programs; and miscellaneous correspondence that you routinely receive from the National Office.

We urge you to read this newsletter over carefully, and to preserve your copy in case you should want to refer back to an earlier issue. Also, please do not hesitate to contact us should you have any ideas, feedback, and yes, even constructive criticism, as we embark on this new endeavor.

Being a union representative is a tough, and sometimes thankless, job. On behalf of the entire National Executive Board, and on behalf of all Mail Handlers, we start by saying thank you to all officers and stewards. You are truly the lifeblood of this Union.

In closing, thanks again for all that you do to make this Union a powerful voice for the nation's Mail Handlers. The NPMHU is proud to have you working with us to improve the lives and working conditions of our fellow Mail Handlers throughout the country.

In Union Solidarity,

JOHN F. HEGARTY, *National President*

MARK A. GARDNER, *National Secretary-Treasurer*

The Rights of Mail Handlers During Investigations:

One of the most basic, but most important, functions served by each and every NPMHU steward is to represent a mail handler who is being accused of wrongdoing. Suppose, for example, that a supervisor or another manager requires a mail handler to participate in an interview about what that supervisor or manager believes is the mail handler's abuse of the Postal Service's sick leave policies. The employee is told to report immediately.

- What should the mail handler do?
- What are his or her rights?
- Can the employee refuse to report?
- Can the employee refuse to answer questions?
- Can the employee request assistance from his or her union?

What follows is a summary of the basic rights possessed by each mail handler, and a summary of the actions each mail handler is entitled to take. If a steward expects to represent mail handlers properly, a steward should be familiar with these rights.

Weingarten Rights: The Right to a Union Representative

THE RULE: Any time management questions an employee to obtain information *and* the employee has a reasonable belief that discipline may result from what he or she says, the employee has a right to request the presence of a union representative before or during the interview. This is called the so-called *Weingarten* right, named after the Supreme Court decision which held that an employee has a right, under Section 7 of the National Labor Relations Act, to have a knowledgeable union representative present whenever he or she is interviewed by a supervisor, Postal Inspector, or other management official, and the employee has reasonable cause to believe that discipline may result from that interview.

WHAT IT MEANS: Once an employee in this situation — that is, an employee who is being questioned and who reasonably believes that discipline may result — makes a request for union representation, the employer may not simply continue the interview. Instead, in these circumstances the employer *must* either (a) allow a union steward or other representative to attend the interview; (b) stop the questioning or cancel the interview; or (c) ask the employee, if no union representative can be located, to continue the

interview unrepresented. As noted, however, the supervisor or manager may not simply continue the interview once the employee has asked for representation. If the employer goes ahead with the interview, the employer has committed an unfair labor practice.

One of the most basic, but most important, functions served by each and every NPMHU steward is to represent a mail handler who is being accused of wrongdoing.

HOW IT WORKS: The most important aspect of *Weingarten* is that the mail handler *loses his or her right to union representation if the mail handler does not assert it*. The Postal Service is under no obligation to inform the mail handler about his or her right to representation. Moreover, the *Weingarten* right belongs to the individual employee, and not to the union. It is imperative, therefore, that every mail handler know about these *Weingarten* rights in advance, before they have to be asserted.

Once the union representative arrives at the interview, the steward is allowed to confer with the mail handler in private *before* any questioning begins or continues. The employer must inform the steward of the type of misconduct being investigated. Furthermore, the steward is allowed to speak during the interview to ensure, among other things, that the questions being posed are not confusing to the employee. In addition, after questioning is completed, the steward may provide information to the supervisor or manager to justify or explain the mail handler's conduct, or to suggest other potential witnesses who may have knowledge about what occurred.

At the same time, when a union steward is called into an investigatory interview under *Weingarten*, the employer has no duty to bargain with the union representative. The role of the steward during a *Weingarten* interview therefore differs from a formal grievance meeting, where the management representative is required to bargain with the union. (On a practical level, the steward may want to attempt to bargain, by acting as if the interview is a grievance meeting, unless and until the steward is specifically told not to bargain. It is useful to keep this in mind because, if it chooses, management certainly is allowed to waive its legal right to refuse to

Weingarten, Miranda, Garrity, and Kalkines

bargain in these circumstances, and effective communications with management before, during, or after an investigatory interview may go a long way toward resolving the matter amicably, even without discipline.)

Finally, it is useful to know some common situations in which *Weingarten* rights do not apply. First, the *Weingarten* rule does not apply to job discussions held under Article 16.2. Because such discussions are not disciplinary, and must be held in private between the employee and the supervisor, a mail handler does not have *Weingarten* representation rights during an official discussion. Second, employees generally do not have the right to union representation during fitness-for-duty examinations. Third, if a mail handler is called in for questioning as a possible witness, no *Weingarten* rights attach if management states that the mail handler being questioned is not under investigation. And finally, because the *Weingarten* rule applies only when the meeting is an investigatory interview — that is, when management is searching for facts and trying to determine the employee's guilt or to decide whether or not to impose discipline — the employee does not have a right to representation under *Weingarten* when management calls in a mail handler solely for the purpose of issuing disciplinary action. Thus, for example, the right to steward representation does not apply when a supervisor simply is handing a letter of warning to a mail handler, without asking any questions or engaging in other conversation intended to elicit verbal responses useful to a management investigation.

To repeat, each and every mail handler has the right to union representation during an investigatory interview, and all mail handlers should be asserting those rights whenever applicable. It therefore is essential that union stewards are familiar with these rights, and that stewards are certain to educate all members of the NPMHU about *Weingarten* and its implications.

Garrity and Kalkines Warnings: **The Right to Be Free From Coercion**

In addition to the imposition of discipline under the National Agreement — such as a letter of warning, suspension, or removal — some conduct by mail handlers also could lead to criminal prosecution and punishment. That is why, along with *Weingarten* rights, each and every steward must be familiar with the legal rights that might protect any individual

mail handler from having to answer questions, if those answers could later be used against the mail handler in a *criminal* proceeding.

THE RULE: The Postal Service may not force or compel a mail handler (by threatening termination or other discipline) to answer questions during an internal investigation that could potentially incriminate the mail handler, unless it guarantees that *any statements made* will not be used against the mail handler in a later criminal proceeding.

WHAT IT MEANS: The rules applicable in the Postal Service (specifically, ELM Section 666.6) impose a duty upon employees to cooperate with a Postal Service investigation. If a mail handler refuses to answer questions or fails to answer truthfully, the Postal Service can impose discipline, up to and including termination. However, if a mail handler is being asked questions about *his or her own conduct* (such as answering questions about potential drug use or alleged fraud under OWCP), there is a potential that answers later could be used against the mail handler in a criminal prosecution. In these situations, the Postal Service or its investigators have two options while conducting the interview.

First, the Postal Service can give a *Kalkines* warning, under which the Postal Service instructs the mail handler that he or she is *required* to answer all of management's questions and that failure to do so may result in termination of postal employment or other discipline. Because the employee may be terminated for failing to cooperate with the investigation, under *Kalkines* any answers the employee gives *may not be used* in a later criminal proceeding against the mail

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The Rights of Mail Handlers

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handler or other employee who was required to answer the Postal Service's questions. *This does not mean that the mail handler cannot still be charged with having committed a crime; it means only that the statements made by the employee cannot be used against that employee to assist in the prosecution of that crime.*

The second option is for the Postal Service to give a *Garrity* warning. Under *Garrity*, the Postal Service instructs the mail handler that he or she is *not required* to answer the investigator's questions and, thus, if the mail handler refuses to answer the Postal Service's questions, the employee *cannot* be discharged or otherwise disciplined for failure to cooperate with an investigation. When this happens, any answers to the investigator's questions *may be used* in a later criminal proceeding against the employee, because the employee no longer has to choose between his job and making a potentially incriminating statement.

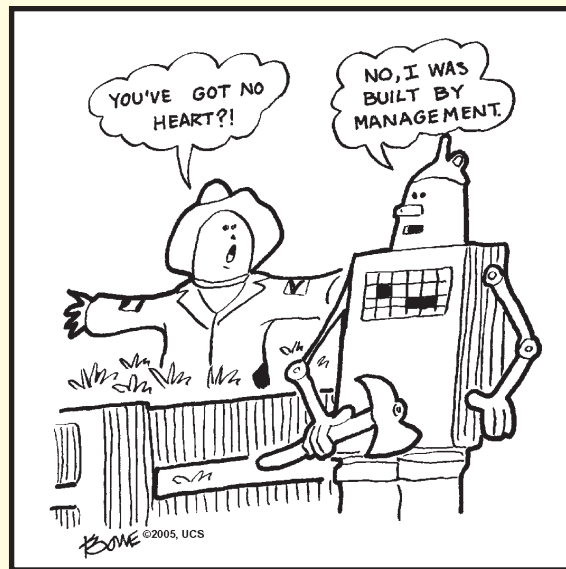
Importantly, although a mail handler provided with *Garrity* rights cannot be discharged for his or her failure to answer questions, the mail handler still may be fired for the underlying misconduct, if any, that he or she has committed.

The difference between the two warnings is subtle but important. Under *Kalkines*, the Postal Service is requiring answers to its investigatory questions but waiving its right to use those answers in a later criminal proceeding. Under *Garrity*, the Postal Service is waiving its right to require answers to its investigatory questions, and its right to discipline the mail handler for remaining silent, but the Postal Service or other government authorities remain free to use any statements voluntarily made by the employee in a subsequent criminal proceeding.

HOW IT WORKS: When is a mail handler required to answer, and when can a mail handler remain silent? The answer depends on two pieces of information:

- Are the USPS investigators *requiring* the mail handler to answer their questions?
- Are the USPS investigators *waiving* the ability to use any answers given in a later criminal proceeding?

If the answers to these questions are YES, then the mail handler has been given a *Kalkines* warning and, if he or she refuses to answer, he or she is subject to discipline for the failure to cooperate in the investigation. If the answers



to these questions are NO, *Garrity* applies, and the mail handler should think carefully about whether to answer any questions, or whether it would be advisable to speak first with an attorney.

Miranda Warnings: The Right to Remain Silent

The potential for criminal prosecution also raises the possibility that the mail handler should be read his *Miranda* rights.

THE RULE: If only from television shows, we all know that *Miranda* rights include: the right to remain silent; a warning that statements made can and will be used against the individual; the right to have an attorney present during any questioning; and the right to have an attorney appointed, if the individual cannot afford his or her own attorney.

WHAT IT MEANS: If a mail handler is in the custody of a law enforcement official (which includes postal inspectors), *Miranda* rights must be read before any questioning can begin.

"In custody" means that a reasonable person would not feel free to leave and to forego the interrogation. While an arrest certainly qualifies as "in custody," other circumstances, such as being called into a room with a supervisor and law enforcement officials, also could satisfy the "in custody" requirement if the mail handler is significantly deprived of his or her freedom to leave.

HOW IT WORKS: Like *Garrity*, if *Miranda* rights are not given, any statements made by the mail handler *cannot* be used against the employee in a later criminal proceeding. *The mail handler can still be charged with having committed a crime, but the government cannot use the statements obtained from the employee to support the prosecution.*

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Recent Arbitration Awards

*Experience is the best teacher;
to borrow a famous quote,
“experience is that marvelous
thing that enables you to recognize
a mistake when you make it again.”*

A good Union representative is always learning, not only from his or her own experience, but also from the experiences of others.

All of our Union brothers and sisters depend on their Union representatives to present their grievances and arbitrations in an effective manner. And one way to keep alert to alternative approaches and strategies is to read the results — the wins and the losses — of actual arbitration decisions. Indeed, frequently the eventual outcome of an arbitration hinges on the quality of the grievance investigation and documentation that is initially completed by the Union steward.

Your best source to obtain copies of actual arbitration awards is the NPMHU's own web-based MAILES system (Mail Handlers Arbitration Interactive Library Search System). If you have not done so already, sign up for your own username and password on the NPMHU webpage. MAILES is fully searchable, and it is a valuable resource that every Union representative should be taking advantage of. Should you need more information about the MAILES system, please feel free to contact the Contract Administration Department at NPMHU Headquarters in Washington, DC.

Disclaimer: The arbitration awards described below might be helpful to you; but remember, these are summaries only. You should review the complete decision before deciding whether and how a particular decision might help in the handling of a pending grievance or arbitration.

Job Reversion (Arbitrator Gordon, 11/19/2005)

GRIEVANT: Class Action (Springfield, MO Center)

CASE NO.: USPS No. E98M 4E C 02179965
Union No. 3965JH

BACKGROUND: This grievance arose at the Springfield, MO Center, after management gave notice to the Union that a job would be reverted because it was “no longer needed.”

ISSUE: Did Management violate the National Agreement by arbitrarily and/or capriciously reverting a particular job; and if so, what is the appropriate remedy?

AWARD: Management violated the National Agreement by arbitrarily and/or capriciously reverting the job. Management is ordered to rebid and repost the job and maintain it until it is reverted, abolished, or otherwise changed in accordance with the National Agreement. Because no monetary relief was sought until the arbitration hearing, and the Union could not show any employee had suffered financial harm from the improper reversion, no monetary relief is granted.

OF NOTE: Although the award sustained the grievance, the arbitrator first rejected the Union's claim that the reversion occurred in retaliation for the filing of prior grievances. The arbitrator also discusses, at considerable length, the narrow scope of the term “arbitrary and capricious.” The Arbitrator indicates that this is “one of the rare cases where a reversion was ‘arbitrary and capricious.’ In a nutshell, Management's explanation that the reversion was ‘needed’ is unsupported by even a modicum of rational explanation, demonstrable fact or reasonable.” In other words, to justify a reversion, “[m]anagement must articulate a good faith, coherent basis for its action, and if the Union properly inquires, provide a fact supported rationale with a minimal nexus to business reality at the time the decision is made or becomes effective.”

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Recent Arbitration Awards

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Bumping (Arbitrator Holley, 9/5/2005)

GRIEVANT: Class Action (Albuquerque, NM)

CASE NO.: USPS No. G00M-1G-C 03164329
Union No. MF-2002-098

BACKGROUND: This grievance arose after the Union learned that, although two bid jobs filled by full-time regular Mail Handlers had been abolished, the duties of those jobs still existed and were assigned to other employees to perform. The Union claimed that management had bumped or displaced mail handlers after abolishing their bids.

ISSUE: Did management violate Article 12.3.E4? [“No employee shall be allowed to displace or ‘bump’ another employee properly holding a position or duty assignment.”]

AWARD: Based on the National Agreement and the evidence presented, the grievance over one bid job is sustained and the other is denied. Management is directed to restore that one job, return the grievant to his previous bid assignment, and pay the grievant for any out-of-schedule hours.

OF NOTE: The different outcomes for the two aggrieved employees were based on the ability or inability of the Union to present evidence of the facts. Where the Union was able to substantiate its claims by presenting supportive documents and testimony of witnesses to show that the bid assignment was abolished, but the work continued to be performed by other employees, the grievance was granted; where such evidence was not presented, the grievance was denied.

Quantity of Proof in Removal Case (Arbitrator Petrie, 10/31/2005)

GRIEVANT: Individual (North Bay P&DC)

CASE NO.: USPS No. F00M-1F-D 05101598
Union No. 042705DOT1

BACKGROUND: This grievance concerned the removal of a mail handler after she had sought and received another paycheck from the Postal Service to replace a prior paycheck

that purportedly was lost, when the “lost check” was thereafter determined to have earlier been cashed and deposited in the grievant’s bank account.

ISSUE: Was the removal supported by just cause?

AWARD: The disputed removal was not fully supported by just cause, despite the presence of some misconduct on the part of the grievant. The removal was reduced to a written warning and the grievant was retroactively reinstated with full seniority and made whole for any lost wages and benefits, less interim wages.

OF NOTE: An employer that discharges an employee for criminal misconduct or moral turpitude must prove both the apparent misconduct and the underlying guilty intent or “*mens rea*” by “clear and convincing evidence.” The arbitrator distinguishes this “clear and convincing” standard with the more common “preponderance of the evidence” standard, and explains why a higher burden of proof should be imposed on management in cases alleging criminal misconduct.

Casuals Cap (Arbitrator Campagna, 11/07/2005)

GRIEVANT: Class Action (Annex, North Reading, MA)

CASE NO.: USPS Nos. B98M-1B-C-99222244
& 99222240
Union Nos. 99-129 & 99-138

BACKGROUND: This case involved two separate grievances challenging the use of casuals. The Union maintained that management used clerk casuals to perform mail handler work on all tours at the facility, and in the process exceeded the 12.5% cap set forth in Article 7.1B of the National Agreement.

ISSUE: To what extent did the Postal Service exceed the casual cap, and what was the period of time encompassed in determining the remedy?

AWARD: The grievances are sustained.

OF NOTE: This arbitration award sets forth a general analysis of the principles for deciding whether the casual cap has been exceeded and the possible remedies for a violation. Of particular interest, the arbitrator confirms that the National Agreement is violated if the number of casuals exceeds the 12.5% cap “at any time” during an Accounting Period.

Cross-Craft Assignment (Arbitrator Trosch, 11/18/2005)

GRIEVANT: Class Action (Charlotte P&DC)

CASE NO.: USPS No. C00M-1C-C 05064080
Union No. CHNC05ETW22NPA

BACKGROUND: A mail handler testified that on most, if not all, days in question, he witnessed a clerk working in the "rabbit box" performing rewrap and address or zip code lookup duties. The Union claimed that the work being performed was the work of the mail handler craft.

ISSUE: Whether the assignment of the clerk to the "rabbit box" constituted a crossing-craft violation under Article 7.2.

AWARD: Based on the record, the assignment of the clerk to rewrap duties was not covered by an exception to Article 7.2A and the grievance was sustained. The grievance was remanded to the parties to determine, for the period at issue, what proportion of the hours the clerk performed these mail handler duties.

OF NOTE: Management asserted that a cross-craft assignment would not violate Article 7.2 if the assignment was a limited-duty assignment and made consistent with the requirements of Section 546 of the ELM. The arbitrator did not decide this issue, however, because the Postal Service did not make documents about the limited-duty assignment available until the arbitration proceedings, notwithstanding the Union's prior request for a copy of that paperwork. On that basis, the arbitrator refused to allow the Postal Service to justify a cross-craft assignment based on limited duty, and remanded the matter to the parties for settlement on a monetary remedy. The lesson to be learned: when you conduct an investigation of a grievance, it is advisable to document all of your requests for information from the Postal Service.

Violence and Behavior in the Workplace (Arbitrator Harris, 12/27/2005)

GRIEVANT: Individual (Dominic V. Daniels P&DC)

CASE NO.: USPS No. B98MA00M-1A-C 04043652
Union No. NO3139

BACKGROUND: An incident occurred between a Mail Handler and an SDO. The Union alleged that the supervisor, angered over having to release the mail handler to a higher-level driving assignment, exploded with verbal abuse towards the employee, and bullied, harassed, profanely intimidated, threatened, and demeaned the mail handler in front of her co-workers. The extent of this abuse was of such a nature as to reduce the employee to tears.

ISSUE: Did the supervisor violate the Joint Statement on Violence and Behavior in the Workplace, and did the Postal Service fail to respond to the complaint made

by the Union on behalf of the grievant? If so, what shall be the remedy?

AWARD: The grievance is sustained, in part. Although the supervisor violated the Joint Statement on Violence and Behavior in the Workplace, the Union did not prove that management failed to respond to the complaint made by the Union on behalf of the employee. Indeed, management promptly investigated the allegations, even if it erred by not keeping the Union informed about the investigation.

Management is ordered to assign the SDO to new duties, which may not include supervising employees, for at least 90 days. The SDO is ordered to write an apology to the grievant, attend anger-management classes, and undergo a fitness-for-duty examination.

OF NOTE: The testimony of credible witnesses both about the event giving rise to the grievance and the prior misbehavior of the supervisor is crucial to proving a case alleging violent or harassing behavior by a supervisor. The arbitrator refuses to order removal of the abusive SDO, to protect the supervisor's due process rights.



The Rights of Mail Handlers

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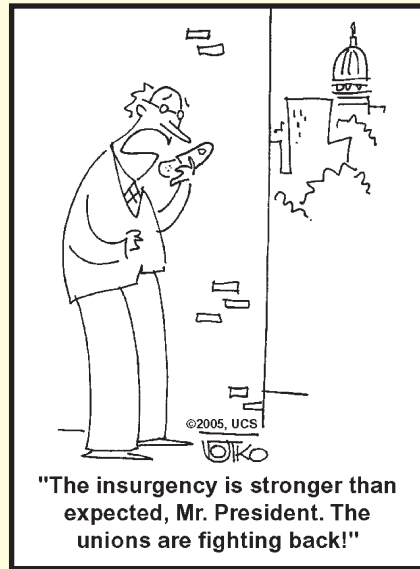
Conclusion

The next time a supervisor — or another postal investigator — wants a mail handler to participate in an investigation, remember the following:

- If a mail handler believes that answering the questions can result in discipline, the mail handler has the right to the presence of a union representative. *The mail handler must assert this right or it will be lost.*
- If the mail handler's answers can lead to criminal prosecution, the mail handler must understand whether he or she is being required to answer and whether any statements can be used in a subsequent criminal proceeding.

We understand that, the Postal Service is currently in the process of amending the warnings that will be given to employees confronted by management investigations. Please watch your bulletin boards for updates as they occur.

For any questions regarding these matters, feel free to call upon the Contract Administration Department for assistance.



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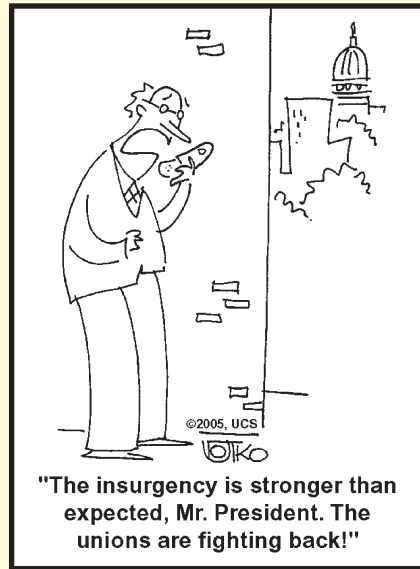
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