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SUPREME COURT OF THE UNITED STATES

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UNITED STATES POSTAL SERVICE, :
Petitioner, :
v. : No. 87-59
NATIONAL ASSOCIATION OF LETTER :
CARRIERS, AFL-CIO :
-----X

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v. : No. 87-59
NATIONAL ASSOCIATION OF LETTER :
CARRIERS, AFL-CIO :
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Washington, D.C.
Wednesday, April 20, 1988

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

GLEN D. NAGER, ESQ., Assistant to the Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the Petitioner.
KEITH E. SECULAR, ESQ., New York, New York; on behalf
of the Respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: We will hear argument
3 first this morning in No. 87-59, United States Postal
4 Service v. National Association of Letter Carriers.

5 Mr. Nager, you may proceed whenever you are ready.

6 ORAL ARGUMENT OF GLEN D. NAGER

7 ON BEHALF OF PETITIONER

8 MR. NAGER: Thank you, Mr. Chief Justice, and may it
9 please the Court:

10 This case comes to the Court on a writ of certiorari
11 from the Court of Appeals for the District of Columbia Circuit.
12 That Court held that the Postal Service must comply with an
13 arbitration award that orders to reinstate to a letter carrier
14 position an individual who has been criminally convicted of
15 failing to deliver over 3500 pieces of mail, and who an
16 arbitrator found posed a risk of again delaying the mail in the
17 future.

18 We have sought review by this Court, because we
19 believe that the Postal Service cannot comply with the decision
20 below without defaulting upon its statutory obligations to
21 ensure that the mail is reliability delivered.

22 The facts of the case are relatively simple. In June
23 of 1984, postal inspectors made a lawful search of the personal
24 automobile of the Grievant in this case, Mr. Edward Hyde. In
25 the course of that search, they found over 3500 pieces of mail

1 in the back seat of the car. Some of the mail contained United
2 States Treasury checks, and some of those checks were dated
3 April 1, 1983 indicating that the mail had been delayed, some
4 of the pieces of the mail had been delayed at least a year and
5 a half.

6 The Postal Service immediately had Mr. Hyde arrested,
7 and charged him with unlawful possession and unlawful delay of
8 the mails in violation of 18 U.S.C. --

9 QUESTION: May I ask you a factual question,
10 Mr. Nager.

11 How much mail would he normally carry? This is not a
12 year and a half's accumulation of mail obviously, 3500 pieces.
13 Would that be a couple of day's mail?

14 MR. NAGER: Justice Stevens, I really do not know the
15 answer to that. His route was in Long Island, New York, in
16 Jericho, New York, and I really do not know how many houses
17 that covered.

18 QUESTION: It is kind of hard to understand how mail
19 that old could be. He must have delivered some of it since
20 that period.

21 MR. NAGER: I think that is probably right, but the
22 record does not reflect it, and I just do not know.

23 QUESTION: Was any of that junk mail, or was it all
24 good mail?

25 MR. NAGER: The U.S. Treasury checks, I doubt were

1 junk mail.

2 The Postal Service charged Mr. Hyde with unlawful
3 possession of the mail and unlawful delay of the mail. And he
4 pled guilty to the latter offense, and was sentenced to
5 eighteen months probation, a condition of which that he enter a
6 complete rehabilitation program for compulsive gamblers.

7 Now because of his criminal dereliction of duties,
8 the Postal Service sought to discharge Mr. Hyde. The
9 Respondent, the National Association of Letter Carriers, filed
10 a grievance on Mr. Hyde's behalf under the collective
11 bargaining agreement that the Postal Service and the Letter
12 Carriers have entered into.

13 And they argue that the Postal Service was without
14 just cause to discharge Mr. Hyde, and that he should be
15 reinstated to his letter carrier position.

16 QUESTION: Mr. Nager, I take it that there has been a
17 stay entered, so that this employee has not been back on the
18 job?

19 MR. NAGER: Yes, Justice O'Connor. The Solicitor
20 General sought a stay from the Chief Justice of the
21 D.C. Circuit's mandate.

22 QUESTION: And the case is not moot, because the
23 employee still wants to return to being a letter carrier?

24 MR. NAGER: Yes, that is right. And in addition, I
25 am sure that the Union would file a grievance seeking back pay

1 from the date which the Postal Service was supposed to start
2 complying with the arbitration order.

3 QUESTION: Mr. Nager, what is the connection between
4 compulsive gambling on the one hand and not delivering mail on
5 the other?

6 MR. NAGER: Justice Blackmun, the record does not
7 reflect it. I have speculated on it. The arbitrator found
8 that his failure to deliver the mail was attributable to his
9 compulsive gambling problem. He did not say how it led to his
10 failure to deliver the mail. And the Postal Service's
11 collective bargaining agreement with the Letter Carriers does
12 not provide and in fact prohibits use of transcripts during the
13 arbitral proceeding. So there is no record of testimony on
14 that point.

15 QUESTION: It is a little easier to understand if it
16 was alcoholism.

17 There is no accusation here and certainly no
18 conviction of stealing government checks, is there?

19 MR. NAGER: No. He pled guilty to unlawful delay.
20 He was charged with unlawful possession, but he was not charged
21 with stealing the mail.

22 An arbitrator convened a hearing with respect to the
23 grievance, and ruled in Respondent's favor for Mr. Hyde. The
24 arbitrator found that Mr. Hyde had in fact unlawfully delayed
25 the mails, but he also found that it was attributable to what

1 he characterized as the Grievant's mental disease, his
2 affliction for compulsive gambling.

3 He thus saw his own task as what he termed balancing
4 the needs of society, the needs of the mentally ill, and the
5 needs of the employee. And he identified the differentiating
6 factor in that balance what he called and I quote, "The
7 possibility of rehabilitation."

8 He then found that he did not know what the future
9 prospects of rehabilitation were for Mr. Hyde. And indeed,
10 this was a tough decision for him, because he saw that there
11 was a threat of recurrence of the misconduct.

12 But in that balance where there was a possibility of
13 rehabilitation, he concluded that this is not a risk free
14 society. And thus, it is the Postal Service and the
15 Postal Service's patrons who should bear the risk of that
16 future misconduct while there was a reasonable hope of
17 rehabilitation for Mr. Hyde.

18 QUESTION: Mr. Nager, in this case, there is a
19 statute that provides that delivery of the mail is the highest
20 priority of the Postal Service.

21 MR. NAGER: That is correct.

22 QUESTION: On the other hand, there are statutes
23 saying that the Postal Service will engage in collective
24 bargaining, and there are statutes reflecting that
25 rehabilitation is also appropriate for the employer to

1 consider.

2 Now is it only where there is a statute that says
3 that one has the highest priority that it would be justifiable
4 then to rely on that as the public policy?

5 MR. NAGER: I think that it is clearly the case where
6 Congress has indicated what the highest priority is among
7 several competing statutes. That the statute Congress has
8 indicated has the highest priority should prevail.

9 QUESTION: And if there were not such language?

10 MR. NAGER: If there were not such language, I think
11 that the Court would, as it does in every case in which it is
12 faced with statutes.

13 QUESTION: With competing public policies?

14 MR. NAGER: Correct. In cases in which there were
15 competing public policies, the Court would have to reconcile
16 those statutes, as it does in any case where there are statutes
17 that point in different directions. That, of course, is not
18 this case.

19 QUESTION: But Mr. Nager, labor arbitration has a
20 high priority, too, does it not?

21 MR. NAGER: It does, Justice Brennan. And we have
22 tried to make it as clear as we can in our brief that we are
23 not seeking in any way to destabilize the labor-arbitration
24 process. The Postal Service is committed to its
25 labor-arbitration process. Last year, for example, it had

1 45,000 grievances.

2 QUESTION: You are arguing for a public policy
3 exception?

4 MR. NAGER: Yes, as this Court has recognized. And
5 we believe that the --

6 QUESTION: It has been recognized, but to be kept in
7 very narrow limits, is it not?

8 MR. NAGER: That is correct. But let me address why
9 it is so important that the Court not only recognize that it
10 pay attention to the public policy exception.

11 The argument in this case is that somehow allowing a
12 public law to trump an arbitration decision would somehow
13 destabilize the arbitration process. But quite the opposite is
14 true.

15 The Court has to remember how collective bargaining
16 agreements are negotiated, and how arbitration provisions get
17 put into collective bargaining agreements.

18 Typically, in a collective bargaining context, an
19 employer and a union will have approximately ninety days upon
20 which to agree. If an agreement is about to expire, they will
21 give notice ninety days before the expiration of the agreement.
22 And the union will come forward with a series of demands on
23 numerous topics that they would like the employer to agree to.

24 And the employer will respond to those demands. And
25 over the course of ninety days, they will deal with provisions

1 dealing with the various economics of their relationships, and
2 the various work rules that govern their relationships.

3 Every one of those proposals can and oftentimes do
4 have legal ambiguities in them. And the fact of the matter is
5 that if the parties had to resolve every legal ambiguity, just
6 as they had to resolve every contractual ambiguity, before they
7 entered into the contract, they would never be able to enter
8 into a contract in the first place.

9 The public policy exception simply greases the wheel,
10 so to speak, of the collective bargaining process. It allows
11 the parties to reach agreement on general contract language
12 like a just clause provision. And if the language is
13 subsequently interpreted in a way that one or the other party
14 thinks would put them in violation of public law, if they had
15 to comply with it, they have the freedom to go to Federal Court
16 and to seek to have that provision declared unlawful.

17 This Court's decision in Kaiser Steel v. Mullins
18 where the United Mine Workers and the steel company had agreed
19 to contribute to the UMW's pension plans for every ton of coal
20 that the non-UMW steel producer sold to Kaiser. Kaiser entered
21 into that agreement. And in fact, it had filed unfair labor
22 practice charges with respect to an identical provision under
23 previous agreements. It agreed to the provision, and then it
24 refused to contribute to the pension plans.

25 QUESTION: Well, Mr. Nager, I do not think that your

1 opposition challenges the existence of a public policy
2 exception. The real question is does the public policy
3 exception warrant overturning the particular arbitrator's
4 decision in this case.

5 MR. NAGER: I think that is correct, Justice White,
6 and let me turn to that. I was just trying to address
7 Justice Brennan's question about why the public policy
8 exception existed and how broad or narrow it should be.

9 QUESTION: Let me ask before you get to that, because
10 this is brought to my mind by your reference to the Kaiser
11 case.

12 Do you dispute the fact that if we did not have a
13 public policy problem in the case, that the arbitrator's award
14 would be one that would be a permissible reading of the
15 collective bargaining agreement?

16 MR. NAGER: We have not disputed that in this case.

17 QUESTION: So the case that we have to decide is one
18 in which we could assume arguendo that the parties had spelled
19 out that if this particular problem should arise in the future,
20 that this solution will be given, that this will be the
21 solution. Then we say would that contractual provision be
22 against the public policy.

23 MR. NAGER: That is correct. And we tried to brief
24 the case that way. We said by hypothesis we assume and we have
25 agreed to this provision. And the question is whether or not

1 our statutory obligations preclude us from complying with it.

2 And the reason why I say that that hypothesis is a
3 realistic one is not just because of the contract and the
4 reasonableness or unreasonableness of the arbitrator's award,
5 but because that is the nature of collective bargaining and the
6 types of situations that employers and unions find themselves
7 in having to agree to ambiguous or unambiguous provisions on
8 the recognition that either one of them can subsequently go to
9 court and point out that that provision is inconsistent with
10 public law.

11 Because it may not be important to the employer, even
12 if it is illegal. And it may be very important to the union.
13 And the employer does not want to end up having a strike over
14 whether or not the provision is legal or illegal.

15 QUESTION: Do I understand from what you say that it
16 would have been illegal for the Postal Department to have
17 complied with this arbitration award?

18 MR. NAGER: That is absolutely correct,
19 Justice White, and let me turn to why that is the case.

20 QUESTION: Before you do, it really might help both
21 the employer and the union in those situations as well as help
22 the courts if we made it pretty clear, as I thought that we had
23 done in Misco, what the lines are. So that the employer will
24 very well know when he concedes something like this what he is
25 getting himself into.

1 Do you not think that would be helpful, I mean you
2 are not urging us that just because employers typically throw
3 in the towel and say, well, I will fight that when it comes,
4 that we have to decide these things case by case forever?

5 MR. NAGER: No.

6 QUESTION: I thought that we just had a case that is
7 very much like this.

8 MR. NAGER: We think that it is fundamentally
9 different from this case. But to answer your question, we do
10 think that clearer roles would be helpful to everyone. We are
11 saying that the Misco analysis applies in full force if there
12 is a well defined and dominant public policy in existing law
13 and legal precedent which is the standard that the Court used
14 in Misco. And if the arbitration award compromises or
15 conflicts with that well defined and dominant public policy,
16 then the award is unenforceable. That is the legal standard
17 that we are asking for.

18 The question in this case, as Justice White has
19 asked, is what is the public policy and how does it conflict.
20 And the public policy in this case, we would submit, which the
21 Respondents have conceded, is the public's interest and
22 Congress' mandate that the mails be maintained, secure, and
23 reliably delivered.

24 I think that it goes without saying that it is a
25 fundamental premise of our entire economic and political system

1 that the mails will be reliably and securely delivered. The
2 right to establish a post office and maintain it is recognized
3 in the Constitution.

4 The government every day relies on the sanctity and
5 integrity of the mails to ensure that the taxes are collected,
6 and that benefit checks are delivered to the needy. Businesses
7 rely on the sanctity and integrity of the mails every day to
8 ensure that their business transactions are timely conducted.
9 And the courts rely on the sanctity and integrity of the mails
10 to ensure the safe conduct of judicial business.

11 And in recognition of that public interest, Congress
12 has enacted a series of statutes, the first of which grants a
13 limited public monopoly to the Postal Service. It mandates
14 that the Postal Service shall ensure the prompt, reliable, and
15 efficient delivery of the mail.

16 QUESTION: Of course, that mandate if broadly read
17 could certainly override anything. I mean it delays the mail
18 to go to arbitration. It would be more efficient to let the
19 Post Office to dismiss the employee on the spot. So you have
20 got to have some line drawing within the line drawing.

21 MR. NAGER: That is absolutely correct,
22 Justice O'Connor. And that is why we have not suggested that
23 the language of Section 101(a) of Title 39 which requires the
24 Post Office to ensure a prompt, reliable, and efficient
25 delivery of the mail by itself establishes not only the public

1 policy which it does, but also the dominance and definition
2 that this Court in Grace and Misco said was necessary.

3 The definition and the dominance which comes from
4 Section 410(b) and from 18 U.S.C. 1701, which 410(b) makes
5 applicable to the Postal Service in conjunction with 101(a)
6 mandates that the Postal Service preserve the security and
7 sanctity of the mails in preventing the kinds of actions by its
8 own employees that Mr. Hyde engaged in in this case in the
9 unlawful delay of the mail. We have not argued that any award
10 which the Postal Service thinks isolated and by itself
11 might --

12 QUESTION: But how about an employee who is just
13 slow, just not very efficient; he did not steal the mail, but
14 the employee just moved slowly?

15 MR. NAGER: That is an act of misfeasance by the
16 employee, but it is not an act of statutory malfeasance. It is
17 not something that we read the statute as prohibiting the
18 Postal Service from tolerating. We do read the statute as
19 prohibiting the Postal Service from tolerating the employment
20 of an individual who it knows there is a reason to believe that
21 that person will intentionally not delay the mail again in the
22 future.

23 QUESTION: Well, the Court of Appeals certainly did
24 not think that it violated any statute.

25 MR. NAGER: The Postal Service looked at the statute

1 and said that in order -- the Court of Appeals said in order
2 for us to agree not to enforce this arbitration award that we
3 have to find a provision in the statute which says in its terms
4 that the Postal Service cannot employ an individual who has
5 committed this act or who presents a threat to the
6 Postal Service.

7 But that specificity has never been required by this
8 Court. It was not required by the Court, for example, in
9 Hurd v. Hodge where the Court read the equal protection.

10 QUESTION: It was not required in Misco either.

11 MR. NAGER: It was not required in Misco. It was not
12 required in Hurd v. Hodge.

13 QUESTION: I thought that you said that it would have
14 been illegal, illegal for the Postal Service to rehire this
15 fellow.

16 MR. NAGER: That is how we read our own statutory
17 obligations, to preclude us from employing an individual.

18 QUESTION: The Court of Appeals certainly rejected
19 that notion, I think.

20 MR. NAGER: Well, it did, we think incorrectly. But
21 the reason that it did was that it said that there has to be
22 specific statutory language that in terms precludes the
23 reinstatement of this individual. But this Court has never
24 required in order to refuse to enforce an arbitration award
25 that degree of specificity in statutory language.

1 QUESTION: Maybe not, but have we not required a
2 judgment on the part of the person who has been given that call
3 that is so outrageous that no reasonable person could come to
4 it.

5 I mean are you arguing that the arbitrator could not
6 possibly have thought that the chances of rehabilitation
7 outweighed the chances of any impairment?

8 MR. NAGER: No, we are not arguing that at all. What
9 we are arguing is that the letter carrier position in the
10 Postal Service is not a testing ground for the arbitrator's
11 judgments about whether or not Mr. Hyde will eventually become
12 fully rehabilitated.

13 QUESTION: What is the rule then, that whenever any
14 Postal Service employee has committed a crime involving the
15 mails that he must be dismissed?

16 MR. NAGER: Unless the arbitrator makes a factual
17 finding based on the evidence presented at the arbitration
18 hearing that he finds that there is not a risk that the
19 misconduct will occur again in the future.

20 QUESTION: No risk, zero risk. You cannot make that
21 finding for any postal employee.

22 MR. NAGER: When I say no risk, that he does not find
23 on the basis of the facts before him that there is a undue risk
24 that that misconduct will occur again in the future.

25 QUESTION: Well, did he not make that finding here,

1 undue in the sense of the policy of trying to rehabilitate
2 people?

3 MR. NAGER: What the arbitrator said in this case was
4 that he found the risk. What he said is, well, I think that if
5 you keep him off employment for another sixty days and he shows
6 some initial commitment to rehabilitating himself that you
7 should assume the risk that he will commit misconduct in the
8 future.

9 You are asking for a clear rule. Let me give you an
10 analogy where there is a clear rule that exists. In the
11 airline industry under the statutes regulating the safety of
12 the airline industry, airlines are required to maintain the
13 highest possible degree of safety.

14 And with respect to the alcoholics that
15 Justice Blackmun mentioned before, the Federal Aviation
16 Administration has said if there is a pilot who we know is an
17 alcoholic, we will not recertify him to fly a plane and he
18 cannot be employed to fly a plane, unless there is an
19 established clinical evidence of his recovery and he has
20 abstained from drinking for two years.

21 That is the kind of evidence and finding that we are
22 suggesting that the arbitrator should be required to make a
23 finding with respect to about a letter carrier who has
24 committed a criminal act in failing to deliver or delaying the
25 mail, that he will not do that again.

1 That is the degree of safety, and sanctity, and
2 integrity of the mails that we believe Congress imposed the
3 obligation upon the Postal Service to ensure.

4 QUESTION: Here the arbitrator's findings, if I
5 remember correctly, were to the effect that the arbitrator is
6 not totally persuaded that the employee presently has the
7 emotional ability to perform the work in an acceptable manner.
8 And the arbitrator is not able to foretell what the future
9 prospects of his rehabilitation may yield. And you say that
10 those findings are not sufficient.

11 MR. NAGER: That is correct. Those findings
12 indicated, the first one that you read about, that he was not
13 totally persuaded that Mr. Hyde has the present emotional
14 stability to perform the job, is why he did not put Mr. Hyde
15 back in initially. He postponed it for sixty days.

16 But then he did not say that at the end of sixty days
17 that I will reconvene and see what Mr. Hyde's mental status is.
18 He would not ask for additional evidence on whether or not
19 Mr. Hyde was rehabilitated. He said that at the end of sixty
20 days, if he meets the following three conditions, you have to
21 reinstate him.

22 QUESTION: Well, suppose we agreed with you, what is
23 the remedy, is it to remand to the arbitrator for a more
24 appropriate remedy or new findings?

25 MR. NAGER: I do not think so, Justice O'Connor. The

1 question before the arbitrator is what are the facts and what
2 does the contract provide. He found the facts, and he also
3 found what the contract provided. He found that the
4 contractually appropriate remedy was reinstatement to a letter
5 carrier position at the end of sixty days.

6 That is the question, whether or not that
7 interpretation of the contract, as Justice Stevens has
8 hypothesized, that we assume that the Postal Service agreed to,
9 is against public policy. There is no need for remand.

10 QUESTION: It just seems to me that your rule is
11 really going to displace the arbitrator's judgment in most
12 cases of discharge for wrongful acts. If an employee fights a
13 lot, if he is often late, if he is an alcoholic. We are just
14 not use to making a finding that there is a zero risk or that
15 there is an insignificant risk that this will reoccur. And
16 clinical psychologists certainly will not make that finding
17 with reference to alcoholics, unless you have a two year period
18 like we do for pilots.

19 MR. NAGER: Justice Kennedy, let me make two
20 comments. With respect to your first point about what other
21 kind of cases would come in within the rule that we are talking
22 about. You have to again distinguish between acts of
23 misfeasance and statutory malfeasance. Here we see that
24 Congress has prohibited for criminal sanction and definition
25 particular acts that Postal Service employees shall not engage

1 in.

2 QUESTION: What was your answer with respect to the
3 question about theft from the mails?

4 MR. NAGER: Theft from the mail is statutorily
5 prohibited. And unless there is a finding that the individual
6 will not do it again, we believe that we are not under the
7 statute.

8 QUESTION: My point is that realistically that
9 finding simply cannot be made, can it?

10 MR. NAGER: I do not dispute the difficulty of making
11 clinical judgments, Justice Kennedy. On the other hand, the
12 Postal Service makes them in their initial discharge decisions.
13 The arbitrator makes them in cases where the arbitrator is
14 entitled to do it. And when there has been no arbitrator
15 appointed in contractual disputes about the propriety of
16 discharges, courts have to make them. Somebody has got to make
17 them.

18 The question for this Court to decide in our argument
19 is that Congress has said that for this small class of cases
20 that the courts have the final say on whether or not the risk
21 is undue. The arbitrator has the final say on whether or not
22 there is in fact that risk. But someone has to make the
23 initial call as to whether there is in fact that risk. And
24 then someone else, maybe the arbitrator, or maybe the Postal
25 Service and then the courts, and we say that it is the Postal

1 Service and then the courts, has to make the decision about
2 whether it is undue.

3 But the fact that it is difficult to make those
4 findings does not relieve anyone of the obligation of having to
5 make them, because the Postal Service has to make them
6 initially. And when they got to arbitration, the arbitrator
7 still has to make them.

8 QUESTION: I thought that you agreed that the
9 arbitrator would make decisions like this.

10 MR. NAGER: We have agreed that the arbitrator would
11 make the decision as to whether or not there is a future risk.
12 Once he defines what he believes the future risk to be, then we
13 say that is up to the Postal Service in the first instance, but
14 ultimately to the courts, as this Court said in Misco and
15 W.R. Grace, as to whether or not the risk is undue.

16 QUESTION: I know, but that is up to him to decide
17 whether there was cause for the discharge.

18 MR. NAGER: That is correct.

19 QUESTION: That is not only making these findings,
20 but construing the word cause in the contract.

21 MR. NAGER: That is correct.

22 QUESTION: And that is his job, and he did it.

23 MR. NAGER: That is correct, he did. We are not
24 disputing that he misinterpreted the contract. What we are
25 saying is that he found that there was a risk, and he also

1 found that there were offsetting mitigating factors. He found
2 the fact that Mr. Hyde's father had died the year before, the
3 fact that his brother had come close to nearly dying, the fact
4 that he had cancer the year before, and above all else he found
5 that there was compulsive gambling.

6 But if the risk that he found is one that the Postal
7 Service is statutorily not permitted to incur which is what we
8 suggest here, then we suggest that it is up to a court to
9 vacate that arbitration award, even though the arbitrator
10 correctly interpreted the contract.

11 QUESTION: Would you be here if he had not been a
12 compulsive gambler, but he just had been negligent, he just was
13 a lousy Postal Service man?

14 MR. NAGER: If he had just been a negligent or lousy
15 Postal Service employee, he would not have met what we consider
16 to be the threshold standard for these cases, that he had
17 engaged in conduct that would have put him in violation of
18 18 U.S.C. 1703 and that there would not be a risk for him.

19 QUESTION: Well, he certainly would have these 3500
20 letters undelivered which would have been a crime.

21 MR. NAGER: Not if he were just negligent in doing
22 so.

23 QUESTION: In the findings in this case, there is no
24 causal connection between his gambling and the non-delivery.

25 MR. NAGER: That is what the arbitrator found. The

1 arbitrator said that there was a causal connection. We do not
2 know that it was, but he found it. That is the arbitrator's
3 findings. There is nothing that we can do about it.

4 That is the important point here. That the Postal
5 Service is bound by the arbitrator's findings. And given those
6 findings, it is told that --

7 QUESTION: You are bound by some of them, and you do
8 not want to be bound by some others.

9 MR. NAGER: We think that we are bound by all of
10 them.

11 QUESTION: Given those findings, you could not put
12 him in a job where he could not steal mail, you really say that
13 there is no way that you can accept his findings without
14 violating the law?

15 MR. NAGER: That is correct.

16 QUESTION: I cannot believe. It is a big operation,
17 the Post Office. That there is not some place that you could
18 put this man, who had been there for thirty years with a clean
19 record before this happened.

20 MR. NAGER: We are not suggesting that if the Letter
21 Carriers in their grievance had said he did it, but he has got
22 a problem, would you put him in another job where he does not
23 have access to the mails, that if the arbitrator found that
24 that was contractually appropriate, that that would put us in
25 violation of our statutory mandate.

1 QUESTION: To prevent that?

2 MR. NAGER: His order says reinstatement. And
3 reinstatement in the ordinary English language means put the
4 person where he was before. And it certainly means that in the
5 accepted understanding in the labor relations context.

6 QUESTION: May I clear up one factual thing. We have
7 talked about theft.

8 This is not a theft case, is it; he did not open any
9 mail, did he, there is no evidence of that?

10 MR. NAGER: This is not a theft case.

11 QUESTION: It is just a delay case.

12 MR. NAGER: Unlawful delay.

13 QUESTION: He just left unopened and undelivered mail
14 in his case.

15 MR. NAGER: And did not report it back to the Postal
16 Service that he has failed to deliver it at the end of the day.

17 QUESTION: And the criminal proceeding did not
18 involve any theft, it was just delay?

19 MR. NAGER: It was a guilty plea for unlawful delay.

20 QUESTION: And did that criminal proceeding require
21 scienter, does the statute require an intent to violate?

22 MR. NAGER: I believe it does.

23 QUESTION: My reading is that gross negligence would
24 suffice for a violation.

25 MR. NAGER: Well, again, if you put the term gross

1 negligence on it, Justice Kennedy, you have got one of those
2 statutory acts of misfeasance. Whatever the standard is under
3 1703, our position is that we are statutorily obliged to
4 enforce 1703 to prevent the recurrence of violations of 1703.
5 And if this person was identified by the arbitrator as a person
6 who has violated 1703 and that there was a risk of him doing it
7 again, our hands are tied. We read our statutory obligations
8 as precluding us from reinstatement.

9 QUESTION: Maybe you have not had the opportunity to
10 do this, but can you tell me, is this an unusual statement of
11 mission, or does every agency have a statement that its primary
12 mission is to perform certain functions?

13 MR. NAGER: Every agency --

14 QUESTION: Because it seems to me that what you are
15 saying is, as we go through the statutes, that we could find
16 this in every agency in the government. Maybe I am wrong.

17 MR. NAGER: You will find it with respect to every
18 employer who has statutory obligations, some of whom do not
19 have to be agencies in government. For example, the airlines
20 and the airline industry that I made reference to before have
21 statutory obligations.

22 Anytime that Congress passes a statute, there may be
23 an arbitration award out there that could be brought in
24 conflict with that statute. Hopefully, arbitrators will not
25 issue too many of those kinds of awards. And you will not be

1 put in the position that we are in here very often. But as we
2 read the arbitrator's award and as we read the statute, that
3 conflict exists in this case.

4 With the Chief Justice's position, I would like to
5 reserve the remainder of my time for rebuttal.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nager.

7 We will hear now from you, Mr. Secular.

8 ORAL ARGUMENT OF KEITH E. SECULAR, ESQ.

9 ON BEHALF OF RESPONDENT

10 MR. SECULAR: Thank you, Mr. Chief Justice, and may
11 it please the Court:

12 I would like to begin by referring to one specific
13 point that Justice Scalia raised. And that is the question of
14 whether there is an alternative job.

15 This arbitrator's decision requires the Grievant,
16 Mr. Hyde, to be reinstated to the payroll of the Postal Service
17 and that is all. At that point, the Postal Service is free to
18 implement the full range of its managerial rights. And among
19 those rights is to make a reasonable determination that someone
20 is disabled for physical or psychological reasons, and cannot
21 perform the functions of his position.

22 At that point, the Postal Service can assign a man to
23 other duties. It can put him on medical furlough. It can
24 require him to be examined by a psychiatrist. All of those
25 things can happen.

1 QUESTION: Well, they can happen, but I am not sure
2 that the Union would lie down for having him reinstated in some
3 other job on the grounds that there is a risk of his repeating
4 his conduct.

5 MR. SECULAR: Justice White, I do not think that is a
6 fair presumption. The central premise of our labor law
7 jurisprudence is that the parties have a healthy constructive
8 collective bargaining relationship.

9 QUESTION: Maybe we ought to dismiss the case as
10 improvidently granted then.

11 MR. SECULAR: Well, I think that the point is that
12 the risk to the security of the mails that is posed by the
13 government does not exist here, because there are other things
14 that can happen here.

15 Whether the Union grieves or not, if management is
16 right, that will be established through the grievance
17 procedure. This kind of procedure is something that happens
18 every day in the Postal Service.

19 QUESTION: Does not reinstatement require
20 reinstatement to that job or an equivalent one, and is not this
21 person a letter carrier?

22 MR. SECULAR: Yes, this person is a letter carrier.

23 QUESTION: So he has got to go back into a letter
24 carrier's position that is equivalent, that position of an
25 equivalent one.

1 MR. SECULAR: The answer is that he can be kept in
2 the office. A lot of what a letter carrier does is in the
3 office.

4 QUESTION: You are saying that the Post Office can
5 just keep him on the payroll and not give him any duties.

6 MR. SECULAR: No, he can sort mail within the office.
7 I think that it is a real stretch to say that Hyde, even if he
8 remains as disturbed as he was at the time of these incidents,
9 is going to mishandle the mail in the office in full view of
10 his supervisors and coworkers.

11 QUESTION: Are you saying that you would not be here
12 if the order said that he is reinstated to his previous
13 position, subject to the conditions?

14 MR. SECULAR: Even if the award said that, what I am
15 in effect conceding is that under our contract and under postal
16 regulations that the Postal Service is not locked into sending
17 this man out on the street. There is more that can happen.

18 QUESTION: Does the case turn on that?

19 MR. SECULAR: I think that is one possible
20 disposition. I think that there is a lot more to the case, and
21 I will address that now.

22 Let me begin by making the point that I think that
23 the case, as it has been defined in the briefs, is
24 extraordinarily narrow. The Postal Service has conceded that
25 it may employ persons who have been convicted of crimes,

1 including persons who have convicted crimes in his phrase
2 against the mails.

3 It concedes that it can employ persons who have had
4 physical and mental disorders. And there is even a concession
5 in the reply brief that the Postal Service can employ an
6 individual with a history of compulsive gambling.

7 QUESTION: The Postal Service says that it would have
8 been illegal for them to retain this man on the payroll.

9 MR. SECULAR: That is right. That is now the issue.
10 The issue is that this is a special case. That Edward Hyde has
11 been found to be so dangerous, that to continue employment with
12 the Postal Service is literally a violation of the Postal
13 Service's duties under the Act.

14 Now we think that this case can be disposed of on the
15 basis of a very simple proposition. That there has been no
16 clear showing of the kind of explicit conflict between the
17 Postal Service's duties under the statute and the requirements
18 of the award, which is the kind of conflict that is required in
19 Misco.

20 Let me begin with the Act. The relevant provisions
21 of the Act consist initially of the mission defining
22 provisions, which are essentially Sections 101 and 403. Those
23 provisions tell the Postal Service in effect to deliver the
24 mail promptly, reliably, and efficiently, deliver the mail.

25 The statute does not contain any provisions which

1 specify who the Postal Service is to employ to deliver the
2 mail. It does not specify any minimal qualifications. And it
3 does not specify who the Postal Service must discharge, with a
4 couple of very specific exceptions for striking and in some
5 instances for unlawful political activity.

6 The statute leaves those decisions to the discretion
7 of the Postal Service with one obvious and highly significant
8 qualification. The Postal Service must exercise its right to
9 hire and discharge in a manner that is consistent with its
10 collective bargaining agreements.

11 The statute also provides that collective bargaining
12 agreements may include provisions for resolution of adverse
13 actions through binding third party arbitration.

14 Now that is all that the specific language of the
15 statute says on these issues. The actions of the parties and
16 the arbitrator are completely consistent with this framework.
17 The Postal Service and the Union negotiated an agreement which
18 preserves the Postal Service's authority to manage the Postal
19 Service, to discipline, and even discharge employees for
20 offenses against the mail, with the one qualification which is
21 provided for in the statute, that any disputes over whether
22 someone should be discharged are to be submitted to an
23 arbitrator for binding resolution. That is what happened here.

24 Hyde unquestionably committed a serious offense. We
25 do not challenge that at all. But the Union presented a very

1 substantial case that there had been a material change in
2 circumstances. That the dereliction of duty occurred during a
3 period in which Hyde was suffering extreme emotional
4 instability, and that he was now in therapy.

5 QUESTION: I thought that the evidence showed that
6 some of these pieces of mail found in his personal automobile
7 had been there for a year. We are not talking about a one day
8 delay here.

9 MR. SECULAR: That is true. I think that it is
10 undisputed.

11 QUESTION: I mean this was an extended period of
12 time, and we are not talking about junk mail.

13 MR. SECULAR: Well, actually, for the most part, we
14 are talking about junk mail. That is clear from the criminal
15 case file which we lodged with the Court. Most of the mail
16 apparently was junk mail that arrived during the Christmas
17 rush.

18 Hyde could not complete his route, put the mail in
19 the trunk of his car, and his car was stolen. Now obviously,
20 he should have reported that. He should never have brought the
21 mail back home. But what emerged in the criminal case and what
22 led ultimately to a very favorable report from the probation
23 department and the sentence of probation was that at this point
24 that the gambling had taken over his life. That was the
25 accepted fact.

1 And that is consistent with what the literature
2 reports about compulsive gambling. That it can lead to this
3 kind of distraction and dereliction of responsibilities on the
4 job.

5 So that was the factual posture of the case. The
6 arbitrator was then called upon to determine whether there was
7 just cause for discharge, and with the understanding that he
8 could not foretell the future. Now I recognize that the
9 arbitrator said that I cannot foretell the future and that
10 there is a risk.

11 But I would submit that if anything that those
12 sentences which I think are the foundation of the government's
13 entire case strengthen the argument for enforcing the award.
14 Because what they show is that this arbitrator recognized the
15 problem and thought about it before he made his decision.

16 And I think that it is important if we are really
17 going to focus on exactly what the arbitrator said to emphasize
18 that those sentences which establish that he cannot foretell
19 the future occur essentially in the middle of the opinion,
20 which consists of a general discussion of the evidence and the
21 issue before him.

22 The arbitrator's actual conclusions are on the last
23 page of the award. And they consist first of a reference to
24 another arbitrator's decision for the proposition that society
25 must be prepared to take a small risk, and a conclusion that

1 Hyde's emotional problem did not render him unfit for further
2 employment. And the ultimate conclusion that he was not
3 totally convinced that Hyde presently had the ability to
4 perform in an acceptable manner.

5 Now that may be doubt, but I would respectfully
6 submit that that is a very small doubt. And the arbitrator
7 dealt with that doubt.

8 QUESTION: Mr. Secular, at page 22(a) of the award,
9 of the arbitrator's opinion, it says, "The arbitrator is not
10 able to foretell what the future prospects of a grievance
11 rehabilitation may yield. Now that is not saying that there is
12 a tiny doubt in my mind. He is saying I just do not know, as I
13 read it.

14 MR. SECULAR: That is right. Well, at this point, I
15 think that he is accepting as a given that no one can know for
16 certain what the future would bring. I think that a clear
17 indication of how he looked at the specific facts of this case
18 are found in what he said on page 23(a). And I think that the
19 award in Samuel Bingham which involved the dangers of
20 reinstating an epileptic employee in a manufacturing situation
21 is important. Because that is the analogy, as I see it, that
22 the arbitrator found here.

23 And the Cone award speaks in terms of very small
24 risks because of the management options and the availability of
25 treatment. That I think is the fairest construction of this

1 award.

2 QUESTION: Yes. But here, you do have a statute
3 placing highest priority on the security of the mail and the
4 prompt delivery. And that might mean that in the face of such
5 an uncertain finding by the arbitrator, that this is one of
6 those instances in which the judiciary can bring to bear its
7 judgment.

8 QUESTION: Well, let me respond to that question,
9 which I think goes to the heart of the case in this manner. If
10 we had a crystal ball that we could peer into and we could see
11 that if Hyde were placed back on the job that a significant
12 amount of mail would be placed in the trunk of his car or
13 otherwise mishandled, yes, this award would violate public
14 policy.

15 The problem is that obviously we cannot foretell the
16 future, which is exactly what the arbitrator recognized.
17 Because we are dealing with uncertainty, the question is
18 whether the statute prohibits the employment of individuals who
19 may be a greater risk than the average employee, or in this
20 case the next employee hired off the employment register.

21 I do not think that that statute creates any
22 prohibition against the employment of high risk employees. Now
23 it could be argued, I suppose, as a matter of policy, that that
24 would be a good idea, to prohibit the employment of high risk
25 employees in the Postal Service.

1 But the fact is that Congress did not do that, and
2 that is absolutely clear from the legislative history.
3 Congress intended these matters to be decided by arbitrators.

4 Now frankly, I do not think that there is more
5 mishandling of the mail now than there was before the Postal
6 Reorganization Act when the Postal Service had the authority to
7 do exactly what it is seeking to do here, to walk away from an
8 arbitration award on the ground that it is inconsistent with
9 its statutory responsibilities.

10 Prior to 1970, the old Post Office Department
11 pursuant to executive order had the authority to conduct
12 advisory arbitrations in its dealings with unions. But the
13 Department always retained the authority to overturn an award
14 for whatever reason that it chose.

15 And what Congress found, and this was after extensive
16 studies of the Post Office Department, is that that system did
17 not work. It led to extremely low morale, low productivity,
18 and tremendous frustration among the workers, which actually
19 culminated in 1970 in a nationwide postal strike. That was the
20 context in which Congress reorganized the Postal Service.

21 I think that it would be completely inconsistent with
22 congressional intent to attribute to Congress a purpose which
23 is not stated anywhere in the language of the statute to give
24 either management or the courts the authority to in effect
25 substitute their judgment for an arbitrator's that the risks

1 involved in reinstating an employee are too great.

2 QUESTION: This public policy exception to the
3 enforcement of arbitration awards has existed for a long time.

4 You are not saying that it does not have any
5 application in Post Office matters, are you?

6 MR. SECULAR: No, no. We acknowledge that there is a
7 public policy doctrine in the Post Office. But I think that
8 that touches on an important point which goes to the posture of
9 this appeal. In Misco obviously, in the last footnote of the
10 Court's opinion, the Court left open the question of whether
11 the public policy doctrine is limited as the D.C. Circuit saw
12 it to violations of positive law.

13 Now the government has told us in its brief that that
14 question, which was left open in the footnote, is not raised
15 here, that the Court does not have to look at it. Because it
16 sees this case as involving nothing more than a violation of
17 positive law.

18 So as I see this case, if there is no violation of
19 the statute per se, that is the end of this appeal. There is
20 no further inquiry into any possible common law theory, because
21 I do not see the government raising it.

22 QUESTION: Suppose the arbitrator said that there was
23 a high risk of recurrence?

24 MR. SECULAR: That goes to how the statute is
25 interpreted. I have suggested that even that statement would

1 not be the basis for finding a conflict between the statute and
2 the award. I am prepared in the limited time that I have
3 available --

4 QUESTION: But we interpret the statute, I take it?

5 MR. SECULAR: That is right. As a second position, I
6 would grant that if an arbitrator made a finding like that, a
7 public policy inquiry could be generated.

8 Now let me state before I go any further that if this
9 arbitrator had made that finding, I do not see how under our
10 contract that the employee would have been reinstated.

11 I think that it is entirely unfair to assume that
12 postal arbitrators exercising their functions under a statutory
13 scheme are putting back to work people who they find pose a
14 high risk to the security of the mail. That is not happening,
15 and there is no reason for it to happen under a just cause
16 provision.

17 What should happen ideally if the Postal Service
18 feels that someone has a psychological problem and his
19 treatment is not sufficiently effective to reduce the risks of
20 further misconduct, that it should pose that question to the
21 arbitrator.

22 The regulations that we have cited, which are used
23 day to day in the Postal Service, permit the Postal Service to
24 have an employee examined to generate psychiatric reports. The
25 Postal Service knows how to build a case that an employee is

1 unfit for further employment because of a psychological
2 impairment.

3 The Union can contest that. And if the case is posed
4 to the arbitrator that way, the arbitrator will make findings.
5 One of the problems in this case is that the Postal Service
6 never really made that case here.

7 QUESTION: But you are saying that just cause will
8 always be synonymous with the public policy?

9 MR. SECULAR: I think that it can be in the Postal
10 Service.

11 QUESTION: But that is up to the arbitrator, I take
12 it?

13 MR. SECULAR: Well, I think that the arbitrator will
14 not interpret or does not have to say that just cause means
15 that I will read the statute. But I think that the factual
16 inquiry which is rather basic, whether an employee is going to
17 mishandle the mail, is essentially the same. So it does not
18 matter whether the arbitrator is deciding the case under a just
19 cause standard or under a statutory standard.

20 If there is a difference, and if it is the kind of
21 difference which justifies overturning the award here, I am
22 afraid that you are setting the threshold of risk so low that
23 virtually any case involving misconduct can be brought into the
24 courts for a second look.

25 As I see it, what the Postal Service envisions is a

1 bifurcated process, whereby first the arbitrator plays the role
2 of something akin to an insurance actuary and figures out what
3 the statistical likelihood that this fellow will commit further
4 misconduct is. And then management and then the courts pass
5 judgment on whether that risk is acceptable.

6 QUESTION: You do have a plea of guilty to a criminal
7 offense.

8 MR. SECULAR: That is right. There is no question
9 that looking at this case retrospectively that Hyde committed
10 an offense involving the security of the mail. But I think
11 that it is important to point out that that statute,
12 18 USC 1703, which applies exclusively to employees and
13 officers of the Postal Service, and they are the only ones who
14 can be convicted of that statute, does not provide for loss of
15 employment as a sanction.

16 So I think that the answer to that point is exactly
17 what then Circuit Judge Marshall said in Otis Elevator in 1963.
18 That the policy that is embodied in that criminal statute was
19 vindicated in precisely the manner that Congress intended, by a
20 criminal conviction and by the imposition of a criminal
21 penalty.

22 QUESTION: But that is usual punishment that Congress
23 provides for the violation of a criminal statute. Either a
24 term on probation, or in prison, or a fine. It does not
25 usually go on to specify that if you are a federal employee and

1 have done this, you lose your job. That is left to other
2 authorities to decide.

3 MR. SECULAR: Well, there are actually some statutes
4 which do provide for loss of federal employment, and the
5 striker example is one key example here. But obviously, the
6 answer to your question is yes. My only point was a limited
7 one. That for purposes of a Misco analysis, I do not think
8 that it is appropriate to rely on the criminal statute here.
9 Because that policy and this award cannot be said to be in
10 conflict. That policy was wholly vindicated.

11 QUESTION: You could say the same of someone who was
12 convicted of theft from the mails. That the policy of the
13 statute prohibiting theft was fully vindicated when he was sent
14 to prison for two years and fined \$10,000. And I daresay that
15 the reaction of most courts would be quite different in that
16 case to the one that you suggest.

17 MR. SECULAR: I would suggest that the criminal
18 statutes are not a basis for that kind of public policy
19 inquiry. We do acknowledge that the Postal Reorganization Act
20 is a basis for the inquiry. And I did not read the
21 government's brief as suggesting anything more than that. The
22 policy that it is looking to at least in the brief is the
23 policy that emanates from the Postal Reorganization Act itself.

24 And the theory, as I stated before, is a limited
25 theory, that the Act imposes on management certain duties, and

1 that this award requires management to violate those duties.

2 QUESTION: Mr. Secular, on the other side of the
3 coin, there have been instances where people have been
4 acquitted of a postal violation and still discharged from the
5 Postal Office.

6 MR. SECULAR: That is correct. Obviously, the
7 standard of proof under a criminal statute is higher. So that
8 an arbitrator could decide that even if the proof did not rise
9 to the level that a man could be convicted under the reasonable
10 double standard, that there was still sufficient reason to
11 discharge the employee.

12 I would like to respond now to certain specific
13 contentions that the Postal Service advanced in its reply
14 brief.

15 The government makes reference to cases which involve
16 contracts which have been held to violate public policy,
17 because of their tendency to induce improper conduct. And that
18 perspective, I think, underlies the argument that enforcement
19 of this award may encourage misconduct by Hyde's coworkers.

20 I do not think that that is a fair interpretation of
21 the award or of the Union's position. The beginning of the
22 award makes clear that the Union acknowledged throughout that
23 delay of the mail is improper and that it is cause for
24 discipline, and that it could be the basis for discharge.

25 The Union's argument here was that there was a change

1 in circumstances, a material change in circumstances, based on
2 the fact that Hyde is now being treated. I do not see how by
3 any rational calculus, that whatever benefits a reasonable
4 employee might determine he would derive from delaying the
5 mail, and I do not know what they are, would not be outweighed
6 by the costs recognized by this award, which include criminal
7 conviction, a suspension of almost one year in length without
8 pay, and the possibility of discharge, if he is unable to
9 convince the arbitrator that there are grounds for
10 reinstatement based on mitigating circumstances.

11 In addition, I want to make the point that at this
12 point that to assert that the award may encourage others, may
13 set a bad example for other employees, is in Misco's language
14 sheer speculation. Because there has been no evidence no way
15 or the other on that issue, none presented to the arbitrator
16 and none presented to the court below.

17 The reply brief also makes reference to the balancing
18 test which was enunciated as an element in a public policy
19 inquiry. I just want to state the position that under the
20 Town of Newton v. Rumery, we would take the position that in
21 any case involving the public policy doctrine that a balance of
22 the interests at stake is appropriate and necessary.

23 QUESTION: Do I understand that you say that the
24 public policy exception is limited as to the circumstances that
25 the Court of Appeals stated, that the award must actually

1 command illegal conduct?

2 MR. SECULAR: I think that is the issue in this case
3 given the way that it has been postulated.

4 QUESTION: That is your standard for the public
5 policy exception?

6 MR. SECULAR: Yes.

7 QUESTION: It has to command it, it would not be
8 enough if no reasonable person could believe other than it
9 would result in illegal conduct? Give us a break. It has to
10 command illegal conduct?

11 MR. SECULAR: I used the crystal ball example before.
12 If we could predict the future with certainty, and we would
13 know that enforcing this award would result in a delay of the
14 mail.

15 QUESTION: If a reasonable person would have to come
16 to the conclusion that it would result in the violation of a
17 statute, surely, that would be enough, would it not, if that is
18 the only conclusion that a reasonable person could draw?

19 MR. SECULAR: I would agree with that proposition in
20 the abstract. I would suggest though that it is unrealistic
21 that a discipline case is ever going to come before the Court
22 in that posture. I can envision work rule cases where the
23 arbitrator commands management or the Postal Service to operate
24 in a certain way which is inconsistent with the statute.

25 We gave a rather silly example in our brief. Suppose

1 an arbitrator found that the entire Postal Service had to shut
2 down in the summer months, so that letter carriers could have a
3 vacation. Well, that would be precisely the kind of
4 hypothetical that Justice Scalia proposed.

5 QUESTION: But do you not think that the Court of
6 Appeals has adopted in several cases the standard that there is
7 no violation of public policy in enforcing an award, unless the
8 award orders illegal conduct?

9 MR. SECULAR: Yes. The D.C. Circuit has taken the
10 so-called narrow view. And I agree that there are other Courts
11 of Appeals which have adopted a broader formulation. And that
12 this Court has not resolved the issue.

13 QUESTION: But what if it is not limited to
14 commanding illegal conduct?

15 MR. SECULAR: Well, I do not see how a possibility of
16 a theory based on the broader view of the public policy
17 doctrine helps the government here. I agree with that
18 government. This is not the case in which to address that
19 issue.

20 Because the argument is, as I understand it, that
21 compliance with this award would be a violation of management's
22 statutory duties. So I see this case as requiring a finding of
23 a direct conflict between the statute and the award.

24 QUESTION: May I ask you one last question. The
25 award says that at the end of the sixty day period that if it

1 is shown that he has done these various things.

2 To whom was that showing to be made, do you
3 understand, who was to make the findings after sixty days?

4 MR. SECULAR: Well, I assume that it would be shown
5 initially to management. And if there were a dispute, that
6 would be resolved through the grievance procedure.

7 QUESTION: To go back before the arbitrator if you
8 had to?

9 MR. SECULAR: That is right. I have nothing further.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Secular.

11 Mr. Nager, you have one minute remaining.

12 ORAL ARGUMENT BY GLENN D. NAGER, ESQ.

13 ON BEHALF OF PETITIONER - REBUTTAL

14 MR. NAGER: I would like to use the minute to address
15 three quick points. One is there has been a lot of discussion
16 of junk mail. And let me stress that the reason why we have
17 come to this Court with this case is because the Postal Service
18 feels that every piece of mail that is given to the Postal
19 Service, that the Postal Service is obligated to deliver and
20 safeguard against undue risk of non-delivery.

21 Whether the mail in junk mail or whether it is checks
22 for AFDC benefits to unwed mothers, all of the mail is
23 important from the Postal Service's perspective. And what we
24 are trying to do is to ensure that it is delivered.

25 Justice Scalia, I fumbled your question a little bit

1 about how much risk, and let me try to readdress that. What we
2 consider to be an undue risk is an employee who there is a
3 finding made is a significantly greater risk than the average
4 employee. That the average employee is not one that we have
5 any indicia to know other than just systematic risk, that
6 someone may commit misconduct. But here we had
7 identified for us --

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nager. Your
9 time has expired. The case is submitted.

10 (Whereupon, at 11:08 a.m., the case in the
11 above-entitled matter was submitted.)

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REPORTERS' CERTIFICATE

DOCKET NUMBER: 87-59

CASE TITLE: United States Postal Service v. National Association of Letter Carriers, AFL-CIO

HEARING DATE: April 20, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Supreme Court, and that this is a true and accurate transcript of the case.

Date: April 20, 1988

Margaret Daly

Official Reporter

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