

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

GERALD E. GROFF,)	Case No. 5:19-cv-01879-JLS
)	
Plaintiff,)	
)	5th Floor
v.)	The Gateway Building
)	201 Penn Street
LOUIS DeJOY, <i>POST MASTER</i>)	Reading, PA 19601
<i>GENERAL, UNITED STATES</i>)	
<i>POSTAL SERVICE,</i>)	
)	July 23, 2024
Defendant.)	10:19 a.m.

TRANSCRIPT OF ORAL ARGUMENT
BEFORE HONORABLE JEFFREY L. SCHMEHL
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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APPEARANCES:
(Continued)

For Amicus, National
Rural Letter
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1 THE COURT: Just a reminder, we are audio streaming
2 today, so all mics are live and they're going out so various
3 news organizations can listen to the arguments.

4 So, today is the day we set aside for oral argument
5 in the case of Gerald E. Groff versus -- I guess it's
6 Morgan [sic] J. Brennan who's now the Post Master General of
7 the United States Postal Service.

8 (Technical Difficulties - Reverberation in audio)

9 THE COURT: This is -- is there any way we can get
10 rid of that?

11 THE CLERK: I'm working on it, Judge.

12 THE COURT: This is, in effect, a cross motion for
13 summary judgment. So the way I'd like to conduct the argument
14 this morning is have the defendant argue first, a reasonable
15 amount of time, and then the plaintiff will get to argue,
16 counter argue, or argue the plaintiff's points, and then we'll
17 reserve five or ten minutes for rebuttal. Is that acceptable
18 to counsel?

19 MR. IN DEN BERKEN: It is, Your Honor.

20 MR. CARTER: Yes, Your Honor.

21 THE COURT: Okay. So, while we're doing the
22 preliminary things and trying to get rid of the reverb, we'll
23 have everybody -- we are on the record, so we'll have everybody
24 identify themselves for the record, please.

25 MR. CARTER: Beau Carter on behalf of plaintiff,

1 Gerald Groff. We have Christopher Tutunjian and Aaron Streett
2 also.

3 THE COURT: Good morning, and welcome to Reading,
4 Pennsylvania.

5 MR. CARTER: Thank you.

6 MR. STREETT: Thank you, Your Honor.

7 MR. TUTUNJIAN: Thank you.

8 MR. IN DEN BERKEN: Good morning, Your Honor.

9 Gregory In Den Berken for Louis DeJoy, the Post Master
10 General.

11 THE COURT: Oh, he's still the Post Master General?

12 MR. IN DEN BERKEN: He is, Your Honor.

13 THE COURT: Why is that other person -- was she the
14 Post Master before him?

15 MR. IN DEN BERKEN: She was before him.

16 THE COURT: Okay.

17 MR. IN DEN BERKEN: And I think we've since updated
18 the caption.

19 THE COURT: I'm sorry; that's my mistake. That's
20 right, he did not change during the administration.

21 MR. RIVERA: Good morning, Your Honor. Fernando
22 Rivera for the Government.

23 MS. McCABE: Suzanne McCabe, Postal Service attorney.
24 I'm here for the Postal Service defendant.

25 THE COURT: And who's here for the letter carriers?

1 MR. GISLER: Mark Gisler, counsel for the National
2 Rural Letter Carriers.

3 THE COURT: Okay. I want to recognize you. I
4 understand your arguments are very similar to the defendant's,
5 so you're not going to argue today.

6 MR. GISLER: Correct.

7 THE COURT: All right. And I will not require that,
8 so thank you for attending.

9 All right, maybe we've calmed down here. And it's my
10 understanding that Mr. In Den Berken is going to argue. So you
11 have the floor, sir.

12 MR. IN DEN BERKEN: May I approach and use the
13 lectern?

14 THE COURT: You may.

15 MR. IN DEN BERKEN: Good morning, and may it please
16 the Court.

17 Three years ago, this Court held that summary
18 judgment was warranted in favor of the United States Postal
19 Service based on its undue hardship that it would suffer from
20 accommodating Mr. Groff. Since then, this case went up to the
21 Supreme Court, which clarified *Hardison's* holding, which this
22 Court relied on, and sent the case back down for further
23 proceedings.

24 Your Honor's opinion back in 2021 was never about a
25 mere de minimis hardship. Reading Your Honor's 2021 opinion

1 makes it clear that this Court found that there were
2 substantial costs that the Postal Service would suffer from
3 accommodating Mr. Groff. These included significant effects on
4 his coworkers; on employee morale; a violation of a collective
5 bargaining agreement in the form of the memorandum of
6 understanding. And all those conclusions remain spot on today
7 and warrant the same outcome as back in 2021.

8 The record establishes that accommodating Mr. Groff
9 in the manner he requested, and the only accommodation that
10 would actually be the one that alleviates the conflict between
11 his religious practice, giving him every Sunday off, would
12 violate the memorandum of understanding between the Postal
13 Service and the Union. This Court found that in 2021, that
14 remains true today, that per se establishes an undue hardship.

15 But in addition to that --

16 THE COURT: Well, what about the fact that the
17 memorandum of understanding doesn't address seniority?

18 MR. IN DEN BERKEN: Your Honor, in 2021, this
19 argument was made by plaintiff, as well. The fact that
20 *Hardison* wasn't limited to -- was limited to seniority rights.
21 And Your Honor rejected that rationale in 2021, and found that
22 *Hardison's* plain terms, as it says, "any agreement," means it's
23 not so limited to CBAs involving seniority rights. That
24 conclusion remains true today.

25 And if you think about it, the fundamental

1 rationale --

2 THE COURT: So, in your opinion, the Supreme Court
3 opinion did not alter that in any way?

4 MR. IN DEN BERKEN: It did not alter it in any way,
5 even though it was mentioned during oral argument; it was
6 discussed during briefing; they didn't touch that part of
7 *Hardison*.

8 That being said, if you think about *Hardison*
9 rationale, the rationale there was the reason a CBA
10 involving seniority rights should not be violated is because
11 upsetting the legitimate contractual work expectations of an
12 employee based on another employee's requested accommodation is
13 unfair. *Hardison* represents a holding that that's not
14 required. It doesn't require an employer to essentially
15 violate the rights that other employees have in the name of
16 accommodating another. That isn't just limited to seniority
17 rights, that rationale applies more broadly. It applies in
18 any circumstance in which a valid contractual bargaining
19 agreement provides a right or some manner of privilege to one
20 employee.

21 Here, what Mr. Groff is requesting would upset that.
22 It would force other RCAs to work shifts that they otherwise
23 would not be required to, and it would exempt him from a
24 neutral selection system that was bargained for, entered into
25 by the union, who represents all RCAs, and there's no reason to

1 upset that.

2 But in addition to just the contractual violation
3 that this would give rise to, there are numerous additional
4 burdens and costs that this Court recognized back in 2021.
5 These include the staffing challenges that the USPS was facing
6 at the time that this occurred. As the record establishes, at
7 that time, there were 459 unfilled RCA positions in the central
8 Pennsylvania region.

9 THE COURT: How many?

10 MR. IN DEN BERKEN: Four hundred and fifty-nine.
11 Four five nine. That USPS actively tried to fill, but was
12 unable to.

13 In addition, the very -- the specific station that
14 Mr. Groff worked at, the Holtwood station, had three RCA
15 positions, but for most of the relevant time period --

16 THE COURT: It had three, plus a supervisor? Or is
17 one consider a supervisor?

18 MR. IN DEN BERKEN: It had three, plus Postmaster
19 Hess, who oversaw the whole station, but wasn't, himself, an
20 RCA. There were three RCA positions --

21 THE COURT: So, in Holtwood, there was one postmaster
22 and three --

23 MR. IN DEN BERKEN: Three RCAs. And that's -- that's
24 separate and apart from the full-time career carriers who
25 delivered mail during the week, and had specific routes, and

1 were career employees, as opposed to the RCAs who were sort of
2 as needed, flexible coverage employees who were required to
3 work holidays and fill in as needed.

4 THE COURT: Was there a limit to the RCA hours?

5 MR. IN DEN BERKEN: I don't think there was a limit,
6 but I think, like other employees, once they hit 40 hours, time
7 over that would be paid overtime. And because of how they were
8 scheduled, frequently they wouldn't work more than 40 hours
9 because they would fill in for other employees and other
10 carriers.

11 THE COURT: So they never got time and a half?

12 MR. IN DEN BERKEN: I think they would get time and a
13 half if the scheduling resulted in a schedule in which they
14 ended up filling more than 40 hours per week.

15 THE COURT: Thank you.

16 MR. IN DEN BERKEN: So even though there were three
17 RCA positions in the Holtwood station, for most of the relevant
18 time period in this case, there were only two RCAs, Mr. Groff
19 and one other.

20 During peak season, when the Sunday Amazon delivery
21 was performed out of the Holtwood station, Mr. Groff's
22 requested accommodation of having every Sunday off imposed an
23 undue burden on the Postal Service because it forced it to
24 require one other RCA to carry that burden by himself.

25 THE COURT: For the record, peak season is roughly,

1 like, the last six weeks of the year?

2 MR. IN DEN BERKEN: It's -- I think it stretches from
3 around Thanksgiving to Christmas, yes.

4 As a result, that employee faced burnout, faced
5 longer hours, faced an undue scheduling burden that was
6 supposed to be shared as the MOU provided. But under Mr.
7 Groff's requested accommodation, the load was not shared. It
8 all fell on this other RCA.

9 Now, as the record establishes, there's evidence
10 showing that this caused significant effects on other
11 employees. There were -- there was talk of a boycott. There
12 was an actual grievance filed. One RCA transferred. One RCA
13 resigned because of this. And the grievance, which was
14 actually found to -- well, I'm not sure it was found to be
15 sustained, Your Honor, but the Postal Service settled that
16 grievance after finding that it will sustain in the first
17 instance. It caused significant effects in the region and on
18 the employees.

19 Now, all those things, staffing, the MOU violation,
20 burnout, the scheduling constraints, the shortage of employees,
21 resignations, the grievance, all these things make it
22 abundantly clear that there was a substantial cost to the
23 Postal Service, and that it could not accommodate Mr. Groff
24 without suffering an undue hardship.

25 I think one of the key issues that's been argued in

1 front of Your Honor is whether the evidence about employee
2 effects are admissible or are valid to be considered on summary
3 judgment. We addressed this in our briefing, Your Honor. The
4 real question at this point is whether the evidence at issue
5 can be presented in a form that would be admissible at trial.
6 The standard is not "are you relying on hearsay at this very
7 point?" The question is, would this hearsay be able to be
8 presented in an admissible form at trial?

9 As we pointed out in our briefing, we know the
10 employees at issue. There's no indication that we wouldn't be
11 able to call them at trial if this were to come to trial. So,
12 there really is no evidentiary issue as to this evidence.
13 There is no question that we would be able to call these
14 employees and they'd be able to testify directly as to these
15 things.

16 And on top of that, I think it's important to
17 consider -- to remember that there is no contrary evidence that
18 Mr. Groff has presented here.

19 So on summary judgment, the burden is you must
20 rebut factual contentions by introducing some contrary evidence
21 that establishes a dispute of material fact. They haven't done
22 so.

23 So on the employee issue, in particular, there is no
24 contrary evidence whatsoever, meaning it's undisputed for
25 purposes of summary judgment.

1 As to the MOU, Your Honor, it's the same point. The
2 MOU, the language speaks for itself. There is no dispute
3 factually about what the MOU requires.

4 THE COURT: Right, the Court can rely on the four
5 corners of the MOU.

6 MR. IN DEN BERKEN: Right, Your Honor. And in 2021,
7 this same issue was addressed.

8 Now, reading Your Honor's 2021 opinion makes it clear
9 that there were significant strains that USPS was facing, and
10 that this was never a case of mere de minimis hardship. This
11 was always a case of substantial costs.

12 And I think bolstering that conclusion is the amicus
13 brief that the union submitted in this case, who represents all
14 RCAs nationwide, which at length details the significant
15 material effects that Postal would have suffered if it had been
16 required to accommodate Mr. Groff. They echo the points we
17 make in our brief, and they underscore that this wasn't merely
18 an employer trying to not accommodate its employee out of
19 disrespect for some sort of, you know, animus toward religion.
20 That was not going on. There is no contention here that there
21 was any religious animosity, that Mr. Groff was ever cited
22 specifically for his religion. Most of his coworkers shared
23 his general faith, were people of faith, respected his
24 religion, and it was not about that in the slightest.

25 This is fundamentally a case of an employer trying to

1 do its best. For two years, Postmaster has voluntarily tried
2 to find coverage for Mr. Groff's shifts and was unable to in
3 most cases. It shows that they tried. They considered
4 options, but the accommodation Mr. Groff requested, skipping
5 shifts every Sunday, was fundamentally inconsistent with his
6 position. It was fundamentally inconsistent with a temporary
7 coverage employee who was required by his job duties to work
8 Sundays and holidays and weekends.

9 And once that became apparent, there was no other
10 real course for Postal to take. They tried to accommodate him.
11 They were unable to do so without suffering undue hardship.
12 And I think, Your Honor, this case should be resolved the exact
13 same way Your Honor resolved it back in 2021. The Supreme
14 Court's opinion clarified *Hardison's* standard, but Your Honor
15 never applied a mere de minimis test. Your Honor's 2021
16 opinion makes clear that it was always a matter of substantial
17 costs.

18 Now, I'm happy to answer any other questions the
19 Court may have.

20 THE COURT: No; thank you. I think I understand your
21 position. I'd like to hear from the plaintiff now, and reserve
22 any other time you have for any other arguments you have for
23 rebuttal.

24 MR. IN DEN BERKEN: Thank you, Your Honor.

25 MR. CARTER: Thank you, Your Honor. May it please

1 the Court.

2 I want to start with the MOU and the CBA issue, then
3 we can turn to the undue hardship. The Postal Service contends
4 that the Supreme Court's decision made no difference in this
5 case, but that couldn't be farther from the truth. The Supreme
6 Court specifically states 18 different times that *Hardison* was
7 about seniority systems, and that is not the seniority system
8 that we have here.

9 Now, this Court's original opinion in this case
10 specifically stated that it didn't make a difference whether it
11 was about seniority systems because it was the violation of the
12 MOU. The first point about that is that the CBA is
13 specifically dedicated to saying that the employer and the
14 union agree that they are dedicated to nondiscrimination on the
15 basis of religion.

16 Here, we have a scheduling order that is silent about
17 making accommodations. So, there's no question -- there's no
18 issue about whether potentially Title VII could step in and
19 create that obligation.

20 But specifically with the change in the law, two
21 significant changes:

22 First, *Hardison* was about scheduling -- excuse me.
23 *Hardison* was about seniority rights; and

24 Second, that it doesn't take a mere de minimis harm
25 to establish an undue hardship. Rather, you have to show

1 substantial increased costs. And here --

2 THE COURT: I think that is the key term,
3 "substantial increased costs."

4 MR. CARTER: And here, the Postal Service has not
5 produced evidence to meet their burden to show those
6 substantial increased costs.

7 Specifically, the evidence that they do rely on is
8 almost entirely conjecture or hearsay. And what they have
9 shown, as far as what it would take to accommodate Groff, is
10 that during the 46 weeks out of the year, they had to take him
11 off the list from the Lancaster hub. And during the two peak
12 seasons that we've talked about, there were three RCAs, and
13 there was always somebody to cover his shift. Every time. No
14 packages went undelivered because of Groff. And accommodating
15 him, thus, did not impose substantial costs on the conduct of
16 the Postal Service's business.

17 Now, the other big things that the Supreme Court
18 clarified was that before denying Groff's accommodation
19 request, they had to assess any and all accommodations. Here,
20 they did not assess at least two.

21 The first was during the peak season, the MOU allows
22 for the Postmaster to borrow RCAs from other stations. Here,
23 there's no evidence in the record, and the Postal Service did
24 not produce any evidence to show, that the Postmaster Hess
25 considered borrowing from other stations.

1 Now, the second issue, and this is one the Supreme
2 Court specifically stated, borrowing and also incentive pay.
3 There's no evidence -- the Post Service has not produced any
4 evidence to show they considered incentive pay. Therefore,
5 that's dispositive.

6 Their failure to consider --

7 THE COURT: You mean incentive pay for other workers.

8 MR. CARTER: For other workers, correct.

9 THE COURT: Yes, right.

10 MR. CARTER: Who get to cover his shifts.

11 THE COURT: Right.

12 MR. CARTER: And the perfect example of how they
13 could --

14 THE COURT: Well, that would definitely be increased
15 costs, right?

16 MR. CARTER: It may be increased costs, sure, and
17 that would be taken into consideration. But whether it would
18 be --

19 THE COURT: And the issue would be whether it's
20 substantial increased costs.

21 MR. CARTER: But the problem is that they didn't try.
22 They didn't even try to see how much would it take to
23 incentivize somebody to cover Groff's shifts. And if ever
24 there was an example of doing this, the Postal Service did it
25 in 2016. They had trouble filling those spots, and so they

1 amended the MOU to allow full-time carriers to volunteer, and
2 they provided overtime pay to deliver on Sundays. So, they did
3 it in 2016. We know that they can do it. They did not do it
4 to try and accommodate Groff.

5 And I want to note one more thing, too, is that after
6 this case, the Third Circuit held that the USPS did not even
7 try -- did not provide any accommodation to Groff. The only
8 accommodation would have been allowing him to not work on
9 Sundays. And they have not provided any accommodation, even
10 though there were others available that they could have
11 considered and did not.

12 Now, on the hardship's point, they say -- they talk
13 about co-worker grumbling. That's another big thing the
14 Supreme Court harped on. They specifically stated there are
15 some things -- co-worker grumbling is not, in and of itself, an
16 undue hardship. It has to go on to substantially increase the
17 costs on the --

18 THE COURT: Well, what are costs? I mean, the
19 Supreme Court didn't define costs. Are we supposed to use a
20 Black's Law dictionary definition of costs? Or Funk &
21 Wagnalls' definition of cost? I mean, I guess it's my
22 decision, right?

23 MR. CARTER: It could go -- I mean, it's about
24 affecting the conduct of USPS's business, so it could be costs
25 -- I think for the Postal Service, it would be -- an easy

1 example is mail went undelivered or -- you know, that's the
2 conduct of the Postal Service's business. Delivering packages
3 on Sunday.

4 Here, the Postal Service hasn't produced any evidence
5 that accommodating Groff would have led to packages going
6 undelivered and on time. Every time that Groff could not make
7 his shift in the peak season, there was somebody to replace
8 him. In the non-peak season, it was clear that all they had to
9 do was take him off the rotation. There are 39 other people
10 that can cover that shift. And --

11 THE COURT: So, you're saying when Amazon told
12 somebody it was going to get there on Sunday, it got there on
13 Sunday?

14 MR. CARTER: It got there on Sunday, yes.

15 Now, we note that it didn't impose an undue hardship
16 because Postmaster Hess said in an email in 2018
17 contemporaneously that taking him off the -- taking Groff off
18 the roll imposed no hardship, and thus they had to put him back
19 on the roll to manufacture a hardship.

20 We also have the corporate representatives' testimony
21 where they said there's no evidence of increased costs due to
22 accommodating Groff. That should be dispositive but it, at
23 least, on their motion, creates a fact issue with their own
24 testimony. But here, we would say it's dispositive in our
25 favor.

1 If the Court doesn't have any more questions on this
2 motion, I'm happy to circle back.

3 THE COURT: It seems to me, though, that what you're
4 saying in most of the arguments you're making, are less towards
5 summary judgment in favor of the plaintiff, but more towards
6 something that has to be proven at a trial.

7 MR. CARTER: This Court could decide it as a matter
8 of law because the difference between -- for the de minimis
9 and a substantial increased cost is a significant difference;
10 the Court said so itself.

11 There's also the threshold issues about the fact that
12 they didn't consider the accommodations. So this doesn't need
13 to go to a trial because they were given the opportunity to
14 reopen the record to adduce more facts to meet these new
15 standards.

16 THE COURT: So, there's like a scale on the wall, and
17 here's de minimis and here's substantial, and I've got to
18 decide whether it either fits between these two, or over above
19 a certain bar?

20 MR. CARTER: I would say the evidence that's been
21 induced by the Postal Service, it's de minimis, at best,
22 especially based on the conjecture and hearsay that's
23 throughout, as you'll see in our response to their motion for
24 summary judgment. A lot of the evidence --

25 THE COURT: Yeah, but don't they have an opportunity

1 to prove it at trial? Convince a jury of their position?

2 MR. CARTER: I'd -- to meet the substantial increased
3 costs test, they needed to adduce far more evidence to meet
4 that standard.

5 THE COURT: Okay. That's your position.

6 MR. CARTER: This Court can set that as a matter of
7 law, yes.

8 THE COURT: Okay; thank you.

9 MR. CARTER: Thank you, Your Honor.

10 THE COURT: Counsel, rebuttal.

11 MR. IN DEN BERKEN: Your Honor, I'd like to take my
12 friend's points in order. So, I think his first point was that
13 the CBA --

14 THE COURT: Yeah, dealing with the CBA and the MOU.

15 MR. IN DEN BERKEN: The CBA says that it's directed
16 at avoiding any illegal discrimination and respecting general
17 employee rights. We agree with that. Under our position here,
18 as we've explained, because there's an undue hardship, there is
19 no discrimination. His interpretation of the CBA provision
20 that says Postal and the union respect employee rights puts the
21 cart before the horse.

22 Under Title VII, if we establish an undue hardship,
23 which our evidence in this record has done, there is no illegal
24 discrimination. There is no contractual violation.

25 THE COURT: There has to be a substantial undue

1 hardship.

2 MR. IN DEN BERKEN: Right. So, that's the, I think,
3 the next point.

4 THE COURT: Right.

5 MR. IN DEN BERKEN: Which is whether there's evidence
6 of substantial cost. Like Your Honor noted, there is no
7 definition of what that really means in the Supreme Court's
8 opinion. And I think if you read the Supreme Court's opinion,
9 you see that what they meant was you do a context-specific
10 reasonable analysis of what the costs would be or were. I see
11 nothing in the Supreme Court's opinion that sort of imposes a
12 straightjacket on Your Honor that only dollars and cents may be
13 considered. There's no language like that in the Supreme
14 Court's opinion. And both before and after the Supreme Court's
15 opinion, courts have generally recognized that both financial
16 and non-financial costs are considerations.

17 Now, on the financial costs, there was already a
18 shortage here. As we noted, 459 RCA shortage. The Holtwood
19 station, for most of the relevant time period, only had two
20 RCAs, and that includes Mr. Groff. So, there was only one
21 other employee.

22 And we've introduced evidence that the effects on
23 these employees were to cause this one other employee to have
24 to work every shift for Mr. Groff on days where Mr. Groff would
25 be scheduled; not share the load.

1 We've established that other employees didn't just
2 grumble. It's true that mere grumbling obviously cannot be a
3 substantial cost, but this is not a mere grumbling case. We
4 had an actual grievance filed in this case based on exempting
5 Mr. Groff.

6 One of the RCAs at the Holtwood station transferred,
7 in part because of the strain that this was imposing on him.
8 Another RCA resigned, in part because of this. Those are
9 substantial. Those are actual bottom line effects, not mere
10 grumbling around the water cooler. There was talk of a
11 boycott. There was actual concrete coworker action that was
12 taken by employees based on Mr. Groff's request. So I don't
13 think this is a mere grumbling case.

14 THE COURT: But what about his argument that there
15 were things that you could have done or could have tried, but
16 you didn't do?

17 MR. IN DEN BERKEN: So it's true the Supreme Court's
18 opinion in this case makes it clear that consideration of
19 alternatives is necessary. And the two specific alternatives
20 they identify in their opinion, in general terms, are shift-
21 swapping and incentive pay.

22 So looking at the record, it's clear that shift-
23 swapping was considered. Every time Mr. Groff was scheduled to
24 work on a Sunday, Postmaster Hess voluntarily emailed all the
25 surrounding Postmasters to see if alternative coverage could be

1 find [sic] for his shift. He did that without fail, and in
2 some cases was able to find coverage. So the notion that
3 shift-swapping wasn't considered, they did it. They actively
4 did it.

5 Now as far as incentive pay, I think my friend's
6 argument sort of shows where they're being a little cute. They
7 note that back in 2016 there was an amendment of the MOU where
8 they allowed certain career carriers to voluntarily take a
9 Sunday shift, but that's the key point. It required amending
10 the contract to allow it. It's the same with incentive pay.
11 If you scrutinize the CBA in this case, Article 1, you'll see
12 that wages and pay was set by collectively bargained agreement.
13 They were precluded from unilaterally, on their own accord, for
14 one employee shift offering incentive pay for other employees.
15 That would have also required contractual negotiations with the
16 union, which represents all RCAs, and very well may have been
17 opposed.

18 THE COURT: What do you mean "all RCAs"?

19 MR. IN DEN BERKEN: They represent RCAs writ large.
20 They represent the class.

21 THE COURT: All over the country?

22 MR. IN DEN BERKEN: Yes. So offering incentive pay
23 wasn't even a valid option in this case because they were
24 precluded from doing so. And holding that an employer is
25 obligated in a collective bargaining agreement context to

1 negotiate a contractual amendment for an individual employee
2 when we're dealing with thousands of employees that are
3 governed by the contract, I think, is unreasonable and itself
4 also a cost.

5 So consideration of alternatives, I think, is
6 relevant to the extent that there are viable alternatives. But
7 as you heard, the only accommodation that would have actually
8 alleviated the assertive conflict with his religion was to give
9 him every Sunday off.

10 So the only possible alternatives that require
11 consideration are ones that would have given him every Sunday
12 off. The only one that was available to the Postal Service was
13 to find coverage, and that's exactly what Postmaster Hess did
14 in this case. Every week, he would email surrounding
15 Postmasters to find coverage.

16 Now, there's talk about how the MOU allows borrowing
17 from other stations. The record establishes that there was
18 such a severe shortage that most stations were short-manned in
19 the region, and they tried to get alternative coverage, as
20 established by Postmaster Hess's emails, and weren't able to do
21 so.

22 So to the extent that the argument is "well, the
23 Postal Service didn't consider alternatives, therefore, they
24 are automatically precluded from establishing an undue
25 hardship," I think that's factually wrong because the record

1 establishes that there were considerations of alternatives.
2 But also, the record establishes the undue hardship, and
3 there's no contrary evidence that calls it into question.

4 I think fundamentally, our position is not that the
5 Supreme Court's opinion in this case made no difference. The
6 Supreme Court clarified an important standard.

7 THE COURT: Well, they could have said that.

8 MR. IN DEN BERKEN: Right. But they also very
9 clearly in their remand language at the very end of the
10 opinion, Your Honor, remanded with clear instructions on which
11 they said, "Without foreclosing the possibility that USPS will
12 prevail" on remand. They did not opine in any way on the
13 actual outcome in this case or on the record. They clarified
14 the standard and no more.

15 And rereading Your Honor's 2021 opinion makes clear
16 that this was never a case of a mere minor, trifling, de
17 minimis hardship. There was a litany of costs that USPS
18 suffered as a result: MOU violation; short-staffed; forcing
19 another RCA to cover every shift; a grievance; burnout; longer
20 shifts for the employees that were required to cover. The list
21 goes on. So the same result is warranted.

22 Now, I also heard talk about we haven't established
23 sort of dollar and cents evidence on what the costs were. I
24 don't think that's what the law requires, Your Honor. I think
25 reading the Supreme Court's opinion and reading the EEOC

1 guidance in this area and precedent, there's no requirement
2 that an employer prove its hardship by a spreadsheet
3 establishing with clear dollar amounts what the costs were. I
4 think it's a context-specific reasonable inquiry. And what the
5 evidence establishes, that there were tangible, substantial
6 costs, even if not reduced to a dollar spreadsheet, that
7 suffices. Your Honor recognized as much in 2021. The same
8 conclusion follows today.

9 If the Court has no other questions --

10 THE COURT: No; thank you. I want to give counsel
11 from Houston who came all the way here a chance for
12 surrebuttal.

13 MR. CARTER: Surrebuttal, sure.

14 THE COURT: And then we're done.

15 MR. IN DEN BERKEN: Thank you, Your Honor.

16 MR. CARTER: So on that last point, just about the
17 dollars and cents, that's not something we said, and would note
18 that the Postal Service has not produced any evidence that a
19 package went undelivered. Period. Bar none. That's enough.

20 On the borrowing issues and on the incentive pay.
21 First of all, there's no -- they have not produced any evidence
22 that they considered borrowing under the MOU during the peak
23 season. All they're providing is post hoc conjecture about
24 "well, other stations were short-staffed, too, you know, they
25 couldn't have been able to do it."

1 In reality, Holtwood was a small station, but other
2 stations in the Lancaster hub were bigger, had more RCAs, they
3 very well could have considered it. But it doesn't matter,
4 because at the time before rejecting Groff's accommodation
5 requests, they had to consider them. And then they had to put
6 forth evidence here that they did consider them; and they
7 didn't.

8 On the incentive pay issue, again, we went back and
9 forth about this a minute ago. But the important fact is that
10 they have not produced evidence that they considered at the
11 time, even though they considered it back in 2016.

12 THE COURT: Well, their point is incentive pay would
13 be almost impossible. They would have to negotiate some sort
14 of an agreement with the entire country and the National Letter
15 Carriers just to apply to one person in rural Pennsylvania.

16 MR. CARTER: I think that they could have framed it
17 more broadly, first of all, just because they were having
18 short-staffing problems across the country. They did it in
19 2016. They could have done something similar here that would
20 have alleviated the burden and potentially couldn't have caused
21 any kind of hardship to USPS at all. But they didn't produce
22 any evidence at the time that they did it anyway, so it's just
23 dispositive.

24 They did not try, for instance, to amend the MOU to
25 allow for accommodations and to allow other full-time carriers

1 to take on those shifts. And they have not produced the
2 evidence to say they did do that. That's dispositive under the
3 Court's reading of Title VII. They had to assess any and all
4 accommodations.

5 Talking briefly, just back to the CBA and about
6 *Hardison*. If you look at the Supreme Court's opinion, they
7 harp over and over again about how *Hardison* was specifically
8 about seniority rights. Why is that? It's because Title VII
9 has a specific carve-out for seniority rights, that's why. And
10 the court said, as it turns out when they viewed all the
11 accommodations, the only way to accommodate the employee in
12 that case would have violated other employees' seniority
13 rights. That's why seniority rights are important.

14 Contractual rights, more generally, are not --
15 there's no carve-out for that in Title VII. And, thus, there's
16 no per se harm. The Supreme Court was very clear that
17 grounding *Hardison* in Title VII's text required limiting it to
18 those systems. Here, there are no seniority rights. RCAs have
19 no choice about taking certain days off, about Sundays.

20 And it's important also to note that Groff did work
21 holidays, non-Sunday holidays. And so it's not just
22 necessarily that he was getting out on all Sundays. It was --
23 the reality was he was still taking part in his role.

24 THE COURT: Well, I mean, your point is he worked on
25 the 4th of July, or whatever.

1 MR. CARTER: There are a lot of non-Sunday holidays,
2 yeah. And more importantly, when you're talking about the
3 peak season, we talked about that a second ago, we're talking
4 about two Sundays out of the year. In the non-peak season,
5 taking him off the roll made little difference, and that's
6 shown by the fact that Hess, at the time, said taking him off
7 the roll --

8 THE COURT: Well, the peak season would be more than
9 two Sundays.

10 MR. CARTER: Excuse me?

11 THE COURT: The peak season would be more than two
12 Sundays.

13 MR. CARTER: So on the -- on the six-week period when
14 there were three RCAs at the Holtwood station, Groff had to
15 work --

16 THE COURT: Oh, he had to work two days out of them.

17 MR. CARTER: He would have to work two days.

18 THE COURT: All right.

19 MR. CARTER: We're talking about two days.

20 THE COURT: Okay.

21 MR. CARTER: Right.

22 THE COURT: I understand your argument.

23 MR. CARTER: Okay. If there any further questions --

24 THE COURT: No; thank you. Thank you. All right.

25 We'll close the record in this case. The argument is

1 over, and court is in recess. Thank you, Counsel, for your
2 arguments.

3 MR. IN DEN BERKEN: Thank you, Your Honor.

4 MR. CARTER: Thank you, Your Honor.

5 (Whereupon, at 10:55 a.m., the hearing was adjourned.)
6

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