Nos. 05-76031, 05-76391

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE,
Petitioner/Cross-Respondent

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent/Cross-Petitioner

and

NATIONAL TREASURY EMPLOYEES UNION,
Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF A DECISION AND ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority (Authority) on August 10, 2005. The

Authority's decision is published at 61 F.L.R.A. (No. 30) 146. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(G) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000) (Statute).[1] This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute, and to grant enforcement of Authority orders pursuant to § 7123(b) of the Statute.

STATEMENT OF THE ISSUES

Whether the Authority correctly held that the enforcement of an arbitrator's award concerning a collective bargaining agreement between a government agency and a bargaining unit, reached pursuant to the Fair Labor Standards Act and the Portal-to-Portal Act, is not barred by the doctrine of sovereign immunity.

Whether the Authority correctly held that the Department of the Treasury, Internal Revenue Service, committed an unfair labor practice by refusing to implement an arbitrator's award.

STATEMENT OF THE CASE

This case arises out of an unfair labor practice (ULP) proceeding brought under § 7118 of the Statute. The case involves an Authority adjudication of a ULP complaint based on a charge filed by the National Treasury Employees Union ("NTEU," "union," or "intervenor"). In

[1] Pertinent statutory and regulatory provisions are set forth in Addendum A to this brief.

pertinent part, the complaint alleged that the United States Department of the Treasury, Internal Revenue Service ("IRS," "agency," or "petitioner") violated § 7116(a)(1) and (8) of the Statute by refusing to implement an arbitrator's award issued under § 7121 of the Statute.

The arbitrator's award in question ordered IRS to comply with a provision of the then-effective collective bargaining agreement between IRS and NTEU. Under the parties' agreement, employees who suffer increased commuting time as a result of temporary reassignments are entitled to compensation for the additional commuting time. The arbitrator found that IRS was not complying with the parties' agreement, and ordered IRS to identify employees to whom additional compensation was owed, and to make the commensurate compensation.

The Authority held that IRS's refusal to implement the arbitrator's award constituted a ULP, and ordered the agency to comply with the award's terms. IRS now seeks review of the Authority's decision and order in this Court, and the Authority cross-applies for enforcement of its decision and order.

STATEMENT OF THE FACTS

A. The Parties' Collective Bargaining Agreement and Original Dispute

At all times relevant to this case, IRS and NTEU operated under a national collective bargaining agreement known as NORD V. That agreement provided, in relevant part, that

> When an employee travels from his/her residence to a point of destination within his/her official duty station, he/she should not be required to leave home any earlier or arrive home any later than he/she does when he/she travels to and from his/her usual assigned place of business.

Excerpts of Record (ER) at 2. This provision, located at Article 29, Section 3E of the parties' agreement, was designed to address the effects of IRS temporarily reassigning workers from one office to another within an official duty station.[2]

During the 1998 fiscal year, IRS directed a number of its employees – Revenue Officers and Agents customarily assigned to the Tacoma, Everett, and Bellevue, Washington offices – to instead report to the Seattle District Headquarters. These temporary assignments continued through the 1999 fiscal year and at least part of the 2000 fiscal year, and resulted in considerably longer commuting times for a number of employees. ER 2, 4. The union petitioned the agency to fulfill its contractual obligations and

[2] An employee's official duty station is defined as a forty-mile radius around the employee's permanent duty location. The permanent duty location is the customary place of work for an employee. For example, if an employee is customarily assigned to report for work at the Tacoma, Washington office, that is his permanent duty location. His official duty station is any location within forty miles of the Tacoma office including, for instance, the Seattle District office. *See generally* ER 2.

either allow the employees to modify their work schedule consistent with Article 29, Section 3E or, alternatively, compensate the employees for the additional time spent commuting. ER 4. The agency refused to honor the contractual provision, and the union pursued the matter through the contractual grievance process, which resulted in the matter being submitted for arbitration. ER 5-6.

B. The Arbitrator's Award

The arbitrator held that the affected employees were entitled to compensation under Article 29, Section 3E of the parties' agreement. ER 20, 22-23. In so holding, the arbitrator considered the statutory underpinnings of the disputed provision and, specifically, the union's argument that § 254(b) of the Portal-to-Portal Act provides an exception to the general rule that home-to-work travel is non-compensable.

As an initial matter, the arbitrator noted that employees covered by the Fair Labor Standards Act, 29 U.S.C. § 210 *et seq.* (FLSA), as amended by the Portal-to-Portal Act, 29 U.S.C. § 251 *et seq.*, are not generally entitled to compensation for home-to-work travel of the type at issue here. ER 18. In this connection, § 254(a) of the Portal-to-Portal Act provides that

> …[e]xcept as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended … on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for …

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform …

29 U.S.C. § 254(a). However, as explicitly noted in § 254(a), an exception exists to this general rule of non-compensability.

> Notwithstanding the provisions of subsection (a) of this section, which relieve an employer from liability and punishment with respect to an activity, *the employer shall not be so relieved* if such activity is compensable by …
> (1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer …

29 U.S.C. § 254(b) (emphasis added). The union argued, and the arbitrator agreed, that Article 29, Section 3E is precisely the sort of "express provision of a written contract" contemplated by the Portal-to-Portal Act. ER 18. The arbitrator rejected the agency's arguments that Article 29, Section 3E is not an "express" provision, and that the parties did not intend to avail themselves of § 254(b)'s exemption to the general rule of non-compensability. ER 19-20. Having concluded that Article 29, Section 3E was enforceable under § 254(b) of the Portal-to-Portal Act, the arbitrator ordered IRS to identify employees who had been required to commute to alternate duty locations within their permanent duty stations, and to

implement Article 29, Section 3E with respect to those employees.[3] ER 22. IRS filed exceptions to the award with the Authority.

C. The Authority's Decision on Exceptions to the Arbitrator's Award

The Authority denied IRS's exceptions to the arbitrator's award. Before the Authority, IRS argued (a) that the award failed to draw its essence from the parties' agreement, because Article 29, Section 3E does not speak to the issue of monetary compensation for affected employees, (b) that Article 29, Section 3E is not an "express" provision within the meaning of § 254(b) of the Portal-to-Portal Act, and (c) that the arbitrator's award was contrary to law because a federal regulation, 5 C.F.R. § 551.422(b), prohibits federal employees from being compensated for home-to-work travel. *Dep't of the Treasury, Internal Revenue Serv.*, 57 F.L.R.A. 444, 445-46 (2001) (*IRS I*). The Authority considered, and rejected, each of these arguments.

[3] The arbitrator's award discussed two sets of bargaining unit employees: one, Revenue Officers, are covered by FLSA; the other, Revenue Agents, are generally FLSA-exempt, and thus covered by the Federal Employees Pay Act (FEPA), 5 U.S.C. § 5542 *et seq*. ER 4-5. The Arbitrator's remedy was addressed principally to Revenue Officers, all of whom are FLSA employees. However, the arbitrator also recognized that some Revenue Agents (normally covered by FEPA) may have been assigned temporary duties under 5 C.F.R. § 551.208(c)(1)-(3), in which case those Agents would be covered by FLSA and eligible to receive the same award as the Revenue Officers. In light of the uncertainties concerning Revenue Agent eligibility, however, the arbitrator directed the union to demonstrate which, if any, Revenue Agents would be covered by his award. ER 20.

First, the Authority held that the arbitrator's contemplated compensation was a "plausible interpretation of the agreement." *IRS I* at 447 (applying the "deferential standard of review that Federal courts use in reviewing arbitration awards in the private sector," *id.* at 446 (citations omitted)). As a result, the award did not fail to draw its essence from the parties' agreement.

Second, the Authority rejected the agency's argument that Article 29, Section 3E is not an "express provision" under § 254(b) of the Portal-to-Portal Act. "Nothing in § 254(b) requires that a contract … be set forth with any particular degree of precision or specificity. Further, we find nothing in judicial opinions involving the Portal-to-Portal Act that set forth a standard by which contracts … are to be evaluated [to determine if the language is sufficiently 'express.']" *IRS I* at 447.

Finally, the Authority refused to consider IRS's argument that Article 29, Section 3E is contrary to 5 C.F.R. § 551.244, and that that regulation, in turn, bars the provision's enforcement under § 254(b) of Portal-to-Portal Act. The Authority noted that this argument had not been raised to the arbitrator, and under the Authority's regulations (5 C.F.R. § 2429.5), "the Authority will not consider any issue that could have been, but was not, presented to the arbitrator." *IRS I* at 448. The agency's exceptions were

denied, as was its subsequent motion for reconsideration. *Dep't of the Treasury, Internal Revenue Serv.*, 57 F.L.R.A. 592 (2001) (*IRS II*).

D. The Unfair Labor Practice Complaint and Decision

More than a year and a half after the arbitrator's award was issued, IRS still had not implemented the award. In order to obtain compliance, NTEU filed a ULP charge, and the General Counsel issued a ULP complaint, alleging that IRS had violated § 7116(a)(1) and (8) of the Statute. ER 26.

Initially, the Authority granted IRS's motion for summary judgment, finding that the union's underlying ULP charge was untimely filed. *Dep't of the Treasury, Internal Revenue Serv.*, 59 F.L.R.A. 282 (2003) (*IRS III*). On petition for review, however, the Court of Appeals for the District of Columbia Circuit reversed the Authority's timeliness holding and remanded the case for consideration of the merits of the ULP complaint. *Nat'l Treasury Employees Union v. FLRA*, 392 F.3d 498 (D.C. Cir. 2004).

On remand, the Authority held that IRS had committed a ULP by unlawfully failing to comply with the arbitrator's award. The Authority noted the agency's admission that "it has not implemented the award's requirement that the [a]gency pay overtime to certain employees for time spent commuting." *Dep't of the Treasury, Internal Revenue Serv.*, 61 F.L.R.A. 146, 149 (2005) (*IRS IV*) (ER 36).

The Authority also considered the agency's argument that the doctrine of sovereign immunity shields it from liability for its non-compliance. In an effort to collaterally attack the arbitrator's award, *IRS IV* at 151 (ER 40), IRS recast its earlier 5 C.F.R. § 551.422 regulatory argument (which the Authority had ruled was not properly raised in *IRS I*) as a sovereign immunity argument. In this new argument, IRS contended that "there is a government-wide regulation that expressly forbids compensating employees for their commute time as long as the travel occurs within their official duty station[,]" and that this regulation's existence is proof that § 254(b) of the Portal-to-Portal Act does not waive the government's immunity from suit. Respondent's Opposition to the General Counsel's Motion for Summary Judgment; Cross-Motion for Summary Judgment at 15 (Certified List at 1g).

> The Authority rejected this argument. First, the Authority observed that sovereign immunity requires a statutory, not regulatory, inquiry. *IRS IV* at 151 (ER 41). As a result, the language of 5 C.F.R. § 551.422 is inapposite; it "provides no basis for finding that the award violates the Federal Government's sovereign immunity[.]" *IRS IV* at 151 (ER 42). Instead, the Authority held that the more appropriate focus was on the language of the Portal-to-Portal Act as it amends the FLSA. There, "in the circumstances presented," § 254(b) of the Portal-to-Portal Act "waive[s] the Government's sovereign immunity." *IRS IV* at 151 (ER 42). Because sovereign immunity does not preclude government liability for wages due under the FLSA as amended by the Portal-to-Portal Act, the Authority refused to excuse the IRS from compliance with the arbitrator's award, and found that a ULP had been committed.

The agency now petitions this Court for review of the Authority's decision and order, and the Authority cross-applies for enforcement of its decision and order.

STANDARD OF REVIEW

Authority decisions are reviewed "in accordance with the Administrative Procedure Act," and may be set aside only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 n.7 (1983); *see also Dep't of Veterans Affairs Med. Ctr. v. FLRA*, 16 F.3d 1526, 1529 (9th Cir. 1994). "If the [Authority's] action is none of the above, we must affirm the FLRA's decision and order." *Dep't of Veterans Affairs Med. Ctr.*, 16 F.3d at 1529-30 (internal quotations, citations omitted).

Courts have noted that "[w]e accord considerable deference to the Authority when reviewing an unfair labor practice determination, recognizing that such determinations are best left to the expert judgment of the FLRA." *Fed. Deposit Ins. Co. v. FLRA*, 977 F.2d 1493, 1496 (D.C. Cir. 1992) (internal quotations omitted). As a result, "[o]ur scope of review is limited." *Pension Benefit Guaranty Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992). So long as the Authority "provide[s] a rational explanation for its decision," it will be sustained on appeal. *Fed. Deposit Ins. Co.*, 977 F.2d at 1496.

The Authority is entitled to enforcement under the same standard applied to the National Labor Relations Board: so long as the Authority "correctly applied the law and … its factual findings are supported by substantial evidence in the record as a whole," enforcement will be granted. *Sierra Pub. Co. v. NLRB*, 889 F.2d 210, 215 (9th Cir. 1989) (citations omitted). *See generally NTEU v. FLRA*, 701 F.2d 781, 782 n.3 (9th Cir. 1983) ("the FLRA's role in labor relations within the federal civil service is analogous to the [NLRB's role under the] National Labor Relations Act.")

SUMMARY OF ARGUMENT

The Authority correctly held that the doctrine of sovereign immunity does not bar the enforcement of Article 29, Section 3E of the parties' collective bargaining agreement. Specifically, the Authority properly

identified § 254(b) of the Portal-to-Portal Act, read in conjunction with the rest of the Portal-to-Portal Act and the Fair Labor Standards Act, as an unequivocal waiver of the government's immunity in this case.

The plain language of the two acts indicates that Congress's 1974 amendments to the FLSA – adding federal employees and the federal government to the Acts' coverage – created for federal employees all the rights of, and for the federal government all the liabilities of, their private sector counterparts. One such right, relevant to this case, is found in § 254(b) of the Portal-to-Portal Act: the right to, by express provision of a written or unwritten contract, make compensable otherwise non-compensable home-to-work travel. Where employees and an employer reach such an agreement, the right to compensation for the agreed-upon travel becomes wholly enforceable, regardless of whether the employer is a private business or the federal government. The Authority's contention in this regard is supported by the plain language of the Acts and by judicial precedent interpreting the Acts as having waived the government's sovereign immunity.

The petitioner's arguments on this point are unconvincing. Although IRS argues, for instance, that immunity is not waived because federal employees' right to bargain derives from the Statute rather than the Portal-to-Portal Act – the fact remains that the federal government, by virtue of

Congress's 1974 amendments, is treated as any other employer under the FLSA and Portal-to-Portal Act for the purpose of enforcing employees' compensation rights. Moreover, IRS has not asserted that the employees here involved lack a statutory right to bargain, or that IRS and the rest of the federal government are somehow immune from enforcement of federal agency employer obligations created by Congress when it enacted the Statute. IRS's arguments should be rejected.

Because sovereign immunity does not bar the enforcement of the arbitrator's award at issue in this case, and because IRS concedes that it has failed to implement the award in violation of § 7116(a)(1) and (8) of the Statute, the Authority's cross-petition for enforcement should be granted. IRS attempts to raise, before this Court, the same collateral attack that the Authority has previously rejected as untimely; namely, that an OPM regulation makes enforcement of the parties' agreement unlawful. Such collateral attacks may not be raised on petition for review of an Authority ULP order and, as explained herein, IRS's argument is also incorrect on its merits.

> For these reasons, the agency's petition for review should be denied, and the Authority's cross-application for enforcement should be granted.

ARGUMENT

THE AUTHORITY CORRECTLY HELD THAT THE ENFORCEMENT OF AN ARBITRATOR'S AWARD CONCERNING A COLLECTIVE BARGAINING AGREEMENT BETWEEN A GOVERNMENT AGENCY AND A BARGAINING UNIT, REACHED PURSUANT TO THE FAIR LABOR STANDARDS ACT AND THE PORTAL-TO-PORTAL ACT, IS NOT BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY; MOREOVER, THE AUTHORITY CORRECTLY HELD THAT THE DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, COMMITTED AN UNFAIR LABOR PRACTICE BY REFUSING TO IMPLEMENT AN ARBITRATOR'S AWARD.

A. The Authority Correctly Held that Sovereign Immunity Does Not Bar the Enforcement of an Arbitrator's Award Directing Compensation Under Article 29, Section 3E of the Parties' Agreement.

The Authority correctly interpreted § 254(b) of the Portal-to-Portal Act, itself part of the FLSA's comprehensive statutory scheme, as waiving the government's sovereign immunity against enforcement of "express provision[s] of a written or nonwritten contract" permitted under the Portal-to-Portal Act. As discussed below, the Authority's holding is supported both by the unequivocal language of the relevant statutes and precedent from this and other courts. Furthermore, IRS's arguments to the contrary are unpersuasive.

1. The Portal-to-Portal Act, amending the Fair Labor Standards Act, waives sovereign immunity as to enforcement of "express provision[s] of a written … contract" under § 254(b).

IRS concedes that the Authority applied the correct analytical framework to the question of sovereign immunity: "Sovereign immunity can be waived by statute, but a waiver will be found only if 'unequivocally expressed in statutory text[.] [Waiver] will not be implied.'" *IRS IV* at 151 (ER 41), citing *Lane v. Pena,* 518 U.S. 187, 192 (1996); Petitioner's Brief (Pet. Br.) 19. Here, the Authority properly held that the relevant statutes unequivocally waive the government's immunity against enforcement of "express provision[s] of a written or nonwritten contract" under the Portal-to-Portal Act.

a. The Fair Labor Standards and Portal-to-Portal Acts must be read in conjunction

As an initial matter, the Portal-to-Portal Act – by its own terms and by legislative history – is part of a larger system of minimum wage and overtime regulation anchored by the FLSA. The Fair Labor Standards Act of 1938 was enacted to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for . . . [the] general well-being of workers." 29 U.S.C. § 202(a). The FLSA granted covered employees statutory rights to minimum wages, 5 U.S.C. § 206, and, most relevant here, overtime compensation. 5 U.S.C. § 207. Under the original legislation, these rights were enforceable by FLSA-covered

employees against their FLSA-covered employers through litigation authorized under 29 U.S.C. § 216(b).

In response to "wholly unexpected liabilities, immense in amount and retroactive in operation," the extensive minimum wage and overtime compensation rights conferred by the FLSA were curtailed in 1947 by the Portal-to-Portal Act. 29 U.S.C. § 251(a). Among other things, the Portal-to-Portal Act relieved employers from "liability or punishment under the [the FLSA]," 29 U.S.C. § 252(a), for failure to pay minimum wage and overtime benefits for employees' home-to-work travel. 29 U.S.C. § 254(a).

However, the Portal-to-Portal Act was enacted with several exceptions to § 254(a)'s general rule of non-compensability for home-to-work travel. One such exception, 29 U.S.C. § 254(b)(1), provides that employers are *not* relieved from liability for compensating employees for home-to-work travel "if such activity is compensable by … an express provision of a written or nonwritten contract[.]" Section 254(b), then, allows employees and employers to create rights under the FLSA by contractually negating § 254(a)'s curtailment of minimum wage and overtime compensation rights for home-to-work travel.

The FLSA and the Portal-to-Portal Act were applied in their entirety to federal employees in 1974. The FLSA was amended to include federal government employees within the FLSA's definition of "employee," and to

include the federal government within the statute's definition of "employer." 29 U.S.C. § 203(e)(2)(A). Because the Portal-to-Portal Act is based upon, and draws its definitions from, the FLSA, the 1974 amendments also operated to apply the Portal-to-Portal Act to federal employees. *See* 29 U.S.C. § 262 (Portal-to-Portal Act's definition of "employer" and "employee" "shall have the same meaning as when used in [the FLSA]").

As is clear from the face of the two statutes, and their legislative history, the FLSA and the Portal-to-Portal Act are meaningless in isolation; they must be read together. The Portal-to-Portal Act was expressly crafted to modify liability under the FLSA, while the FLSA provides an enforcement mechanism for the Portal-to-Portal Act's provisions: 29 U.S.C. § 216(b). *See also Dep't of the Army, United States Army Commissary, Fort Benjamin Harrison, Indianapolis, Ind. v. FLRA*, 56 F.3d 273, 277 (D.C. Cir. 1995) (noting, in a waiver of sovereign immunity context, the Circuit's holdings that the remedial provisions of the Statute "exude indications of a broad congressional delegation of discretion to the FLRA to fashion appropriate remedies for an unfair labor practice"). *See generally United States v. Boyd*, 214 F.3d 1052, 1055 (9th Cir. 2000) (holding that two provisions of Speedy Trial Act "must be read together; to hold otherwise would provide a right without a remedy"); *see also Letelier v. Republic of Chile*, 748 F.2d 790, 792 (2d Cir. 1984) ("a statute should not be interpreted

to create a right without a remedy"). In the case of the FLSA and Portal-to-Portal Act, the courts have recognized this interconnection. *See, e.g., Adams v. United States*, 2003 U.S. Claims LEXIS 238, *3 (Fed. Cl. 2003), *aff'd by Adams v. United States*, 391 F.3d 1212 (Fed. Cir. 2004).

b. The Acts' waiver of sovereign immunity is unequivocal, and recognized by the courts

The FLSA and the Portal-to-Portal Act unequivocally waive the government's sovereign immunity and allow the enforcement of "express provision[s] of a written or nonwritten contract" entered into under 29 U.S.C. § 254(b)(1).

As noted above, the FLSA originally created enforceable employer liability for payment for preliminary and postliminary activities and certain travel to and from the worksite. *See, e.g., Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691 (1946). Upon amendment by the Portal-to-Portal Act, the FLSA's general rule regarding home-to-work travel became one of non-compensability. However, the Portal-to-Portal Act also permitted employees and employers, by "express provision of a written or non-written contract," 29 U.S.C. § 254(b)(1), to create a rule of compensability, enforceable under 29 U.S.C. § 216(b) as a payment of minimum wages (29 U.S.C. § 206) or overtime pay (29 U.S.C. § 207). The discretion to provide through contract or custom for a rule of compensability is afforded to all

FLSA employees and employers, including those in the federal sector; none are excluded. 29 U.S.C. § 262 (definition of employee and employer under Portal-to-Portal Act is same as under the FLSA).

By including, in the 1974 amendments, federal employees within the FLSA definition of "employee," and the federal government within the FLSA definition of "employer," Congress created for federal employees the same rights, and for federal employers the same liabilities, as their private sector counterparts. Neither the FLSA nor the Portal-to-Portal Act differentiates between federal employees and other employees, or federal employers and other employers, in terms of their rights and liabilities under the Acts or the enforceability of those rights and liabilities in court.[4]

The courts unanimously agree that the 1974 amendments waive the government's immunity against actions seeking to enforce FLSA rights. *See, e.g., El-Sheikh v. United States*, 177 F.3d 1321, 1323-24 (Fed. Cir. 1999) ("[W]aiver is found in the 1974 amendments to the Fair Labor Standards Act[.] Because the Act thus authorizes [plaintiff] to sue his

[4] FLSA draws one narrow distinction between federal employees and other employees, by charging OPM (then, the Civil Service Commission) with "administering the provisions of" FLSA with respect to federal employees. However, Congress was clear in this delegation that federal employees' ability to sue their employer, the federal government, was in no way restricted: "Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages" under FLSA. 29 U.S.C. § 204(f).

'employer,' the United States, the Act waives the United States' sovereign immunity from such suits."); *Cosme Nieves v. Deshler*, 786 F.2d 445, 450 (1st Cir. 1986) ("In the FLSA the United States has clearly waived the sovereign immunity of federal agencies … to suit by their employees.")[5]

Furthermore, when Congress expanded the FLSA's and the Portal-to-Portal Act's coverages by including federal employees, it granted those employees the exact same rights to recover under the FLSA against their employer, the federal government, as those enjoyed by private sector employees against their employers; nothing in the text of either statute creates a lesser or distinct remedial right for federal employees. If Congress had intended for federal employees to have different rights against their employer than other employees have against their employers, then the FLSA and the Portal-to-Portal Act would have to indicate such differences. However, they do not.

In this latter regard, Congress's approach in extending the FLSA's and the Portal-to-Portal Act's coverage to federal employees contrasts with Congress's approach when it included federal employees within the

[5] This Court has recognized that the Portal-to-Portal Act is itself a waiver of sovereign immunity. "Congress has passed several acts granting claimants rights against the Government which theretofore had been denied them under the doctrine of sovereign immunity. Notable have been … the Portal-to-Portal Act of 1947[.]" *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 99 n. 13 (9th Cir. 1970).

coverage of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* As discussed by the Court of Appeals for the Second Circuit, "Congress … did not merely add the government to [ADEA's] definition of employers subject to the Act, which would have subjected claims against the government to two- and three-year limitations periods. Rather, it added a relatively self-contained section, 29 U.S.C. § 633a … [and t]o ensure the insularity of § 633a … added a subsection … [which] expressly forbids incorporation of any other ADEA provision into § 633a." *Bornholdt v. Brady*, 869 F.2d 57, 65 (2nd Cir. 1989). This insularity makes clear that "§ 633a is independent of any other section of the ADEA … including those governing procedures applicable in actions against private employers." *Id.* (changes, quotations, citations omitted). In this manner, Congress created a statutory scheme whereby federal employees were covered by ADEA, but had distinct rights and remedies.

Congress did not create such an exception here. The federal government, as an employer, is subject to the same liabilities as private employers. One such liability – the liability for home-to-work travel – may be created by contract or custom under § 254(b) of the Portal-to-Portal Act. If the government and its employees choose to enter into an agreement that makes otherwise non-compensable home-to-work commuting time compensable, then the employer has disavowed § 254(a)'s protection from

liability, and the federal employee may, barring other obstacles, enforce his right to compensation in the appropriate forum.

In sum on this point, Congress has unequivocally waived the federal government's sovereign immunity against the enforcement of contracts entered into under § 254(b). The plain language of the FLSA and the Portal-to-Portal Act indicates that Congress intended for federal employees and the federal government to be treated as other employees and employers under the Acts, including with respect to the enforceability of § 254(b) agreements for compensation of home-to-work travel.

2. The agency's arguments on this point are unpersuasive.

IRS raises a number of sovereign immunity arguments to this Court that were not presented to the Authority. As discussed above, pp. 9-10, the agency's sole sovereign immunity argument before the Authority was that the language of an OPM regulation, 5 C.F.R. § 551.422, conclusively proves that Congress has not waived sovereign immunity under 29 U.S.C. § 254.[6] As a result, IRS's new arguments, Pet. Br. 18-23, would normally be barred by § 7123 of the Statute. "No objection that has not been urged before the Authority … shall be considered by the court … ." 5 U.S.C. § 7123(c); *see also EEOC v. FLRA*, 476 U.S. 19, 23 (1986) (§ 7123(c) is jurisdictional in nature); *Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 820 (D.C. Cir. 1987)

[6] IRS had attempted to raise this same regulation in an untimely contrary-to-regulation argument on exceptions to the arbitrator's award. *IRS I* at 448.

(every "twist" of an argument must be presented to the Authority). *But see Dep't of the Army, United States Army Commissary, Fort Benjamin Harrison, Indianapolis, Ind. v. FLRA*, 56 F.3d 273, 275 (D.C. Cir. 1995) (D.C. Circuit holding that sovereign immunity arguments, even when not properly raised, may survive § 7123(c)).

In any event, IRS's new arguments are without merit. First, the IRS claims that the Authority's decision "confuse[s] an express provision of a contract with an express waiver of immunity in a statute." Pet. Br. 19. This accusation is simply incorrect. The Authority's decision identifies the Portal-to-Portal Act as the source of the waiver of sovereign immunity pertinent here. There is no suggestion that the Authority relies on Article 29, Section 3E as the authority for its determination. *IRS IV* at 151 (ER 41-42). To the contrary, the Authority's decision shows that it understands what the agency refuses to acknowledge: that § 254(b) of the Portal-to-Portal Act allows all FLSA-covered employees and employers to contractually modify the general rule of § 254(a), and thereby reestablish liability for, among other things, the sorts of home-to-work employee compensation from which § 254(a) would otherwise shield them.

The agency further argues, Pet. Br. 20-21, that "[n]othing in [§ 254(b)] expressly grants federal employees the affirmative right to bargain … and it follows that [§ 254(b)] does not unambiguously waive the

government's immunity against any award made pursuant to a collective bargaining agreement" (citations, quotations omitted). IRS's conclusion does not follow from its premise. Where the Portal-to-Portal Act affords a right to all FLSA employees, including federal employees, it is immaterial that those federal employees derive their authority to bargain from a different statute, here, the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* In this connection, IRS has not asserted that the employees here involved lack a statutory right to bargain, or that IRS and the rest of the federal government are somehow immune from enforcement of federal agency employer obligations created by Congress when it enacted the Statute.

IRS also questions, Pet. Br. 21, whether § 254(b)(1) "even applies to federal employees." Here, too, the agency turns a blind eye to the language of the Acts. As explained above, p. 17, the 1974 amendments included federal employees and the federal government within the statutory definition of "employee" and "employer" under the FLSA and the Portal-to-Portal Act, and did so without limitation. Thus, no exception-making language is to be found, save for § 204(f) (concerning OPM's role in administering the FLSA for federal employees). Even there, as discussed in n.4, *supra*, Congress took pains to clarify that nothing therein should be construed as limiting a federal employee's ability to recover against the federal government to

enforce their FLSA and Portal-to-Portal Act rights. *See also Adams v. United States*, 65 Fed. Cl. 217, 224 (Fed. Cl. 2005) (considering federal employee plaintiff's § 254(b) claims on their merits).

B. The Authority Correctly Held that the Agency Committed a ULP when it Failed to Comply with the Arbitrator's Award.

As discussed above, IRS admits that it has not implemented the arbitrator's award and that it remains in non-compliance with the Authority's order directing it to do so. Because failure to comply with an arbitrator's award is a ULP, the Authority correctly held that IRS had violated the Statute. Moreover, the IRS's arguments discussed below are barred as collateral attacks on the arbitrator's award, and are also without merit.

1. The Authority correctly applied the Statute in holding that IRS committed a ULP.

Agencies are required, as a matter of law, to comply with and implement arbitrators' awards. "[I]t is well established that, under section 7122(b) of the Statute, an agency must take the action required by an arbitrator's award when that award becomes 'final and binding.' … Disregard of an unambiguous award is an unfair labor practice under section 7116(a)(1) and (8) of the Statute." *United States Dep't of Transportation, Fed. Aviation Admin., Northwest Mt. Region, Renton, Wash.*, 55 F.L.R.A. 293, 296 (1999) (citations omitted). As this Court has commented, "[w]e

have little difficulty in holding that the studied refusal of the employer to abide by an F.L.R.A. order enforcing a final arbitration award is an unfair labor practice." *United States Marshals Serv. v. FLRA*, 778 F.2d 1432, 1437 (9th Cir. 1985) (*Marshals Service*).

Before the Authority, and now before this Court, IRS admits that it has refused to comply with a final arbitrator's award. *IRS IV* at 149 (ER 36), Pet. Br. 2. In light of this admission, the Authority properly applied the Statute and its own precedent, and held that the agency committed a ULP.

Because the Authority correctly held that IRS is in violation of the Statute as a result of its non-compliance, the Authority's cross-application for enforcement should be granted. "This court will enforce an NLRB order if the Board correctly applied the law and if its factual findings are supported by substantial evidence in the record as a whole." *Sierra Pub. Co. v. NLRB*, 889 F.2d 210, 215 (9th Cir. 1989) (citations omitted). Because the Authority correctly applied the law, holding that IRS violated § 7116(a)(1) and (8) of the Statute by refusing to implement the arbitrator's award, and based its factual finding – that IRS has, in fact, failed to implement the award – on substantial and uncontroverted evidence, the Authority is entitled to enforcement of its order.

2. The agency's contentions are without merit

As discussed below, the agency's remaining contentions, Pet. Br. 24-26, constitute collateral attacks on the arbitrator's award. As such, they are not properly before the Court and should not be considered. In any event, however, the agency's contentions are without merit.

IRS argues that the Authority's decision "lacks a reasoned basis." The agency contends in this regard that 5 C.F.R. § 551.422 renders Article 29, Section 3E "unlawful and non-negotiable." Consequently, IRS argues, the Authority's decision that it seeks to enforce in this proceeding (*IRS IV*) is inconsistent with its negotiability decision in *National Treasury Employees Union*, 59 F.L.R.A. 119 (2003) (*NTEU I*), *aff'd, NTEU v. FLRA*, 418 F.3d 1068 (9th Cir. 2005) (*NTEU II*). These arguments relate solely to the arbitrator's award and the Authority's decision on exceptions to that award; they have no connection to *IRS IV*'s ULP determination, which is based exclusively on noncompliance with an arbitrator's award.

This Court has previously disapproved of attempts to utilize judicial review proceedings to collaterally attack arbitrator's awards: "This roundabout way of obtaining appellate review of a nonreviewable arbitration award has little to commend it in terms of judicial economy. It also flies in the face of legislative intent." *Marshals Service* at 1436. Instead, "[w]e review the [terms of the arbitrator's] award only to determine whether an

unfair labor practice was committed [through the alleged non-compliance] … we decline to review the original FLRA award for deficiencies within the meaning of § 7122(a)." *Marshals Service* at 1437 (citations omitted); s*ee also Dep't of Justice v. FLRA*, 792 F.2d 25, 28 (2d Cir 1986) ("[T]he Statute's language and … certain indicia of congressional intent set forth below, convince us that Congress meant to foreclose direct and indirect judicial review of Authority orders granting or denying exceptions to an arbitral award even when an unfair labor practice claim is later appended thereto.")

In any event, IRS's contentions should be rejected. The agency's argument, that the Court should not enforce the Authority's order because 5 C.F.R. § 551.422 renders the parties' agreement, on which the award is based, unlawful and non-negotiable, is untimely. As the Authority held in *NTEU*, the OPM regulation does, indeed, operate to make express provisions like Article 29, Section 3E non-negotiable. If the agency had raised 5 C.F.R. § 551.422 at the proper stage of proceedings – to the arbitrator, pursuant to the Authority's regulations, not to the Authority on exceptions, and certainly not to this Court on appeal – an arbitrator's award enforcing the agreement might well have been found contrary to government-wide regulation. However, the Authority's regulations require parties to raise their arguments

to the arbitrator, and provide that any argument not presented to the arbitrator may not be raised in later proceedings. 5 C.F.R. § 2429.5.

Moreover, 5 C.F.R. § 551.422 does not render Article 29, Section 3E unlawful. To the contrary, the law – the Portal-to-Portal Act – explicitly permits such agreement provisions. Phrased differently, § 254(b) of the Portal-to-Portal Act enables employees and employers to circumvent the general rule of § 254(a); 5 C.F.R. § 551.422, in turn, directs executive agencies not to enter into such agreements.

Thus, although IRS may have run afoul of OPM's regulatory guidance, that does not change the facts that: (a) Article 29, Section 3E and similar agreements are both contemplated and permitted by the FLSA and the Portal-to-Portal Act, and (b) it is not the responsibility of the Authority, or an arbitrator, to *sua sponte* "locate, analyze and apply all arguably pertinent regulations from the myriad of federal regulations governing the numerous federal agencies within the Authority's jurisdiction." *Nat'l Fed'n of Fed. Employees v. FLRA*, 681 F.2d 886, 891 (D.C. Cir. 1982).

CONCLUSION

The agency's petition for review should be denied, and the Authority's cross-application for enforcement should be granted.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATE DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Petitioner/Cross-Respondent	)	
v.	)	Nos. 05-76031, 05-76391
FEDERAL LABOR RELATIONS AUTHORITY, Respondent/Cross-Petitioner	)	
and	)	
NATIONAL TREASURY EMPLOYEES UNION, Intervenor	)	

CERTIFICATE OF SERVICE

I certify that copies of the Brief for the Federal Labor Relations

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