

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

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DEPARTMENT OF JUSTICE .
UNITED STATES IMMIGRATION AND .
NATURALIZATION SERVICE, .
UNITED STATES BORDER PATROL .
EL PASO, TEXAS .
Respondent .
and .
AMERICAN FEDERATION OF .
GOVERNMENT EMPLOYEES, .
AFL-CIO, NATIONAL BORDER .
PATROL COUNCIL .
Charging Party .
.

Case No. 6-CA-90534

Joseph T. Merli, Esquire
For the General Counsel

Robert S. Hough, Esquire
For the Respondent

Robert J. Marren
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on June 20, 1989, by the American Federation of Government Employees, AFL-CIO, National Border Patrol Council, (hereinafter called the Charging Party or Union), a Complaint and Notice of Hearing

was issued on December 20, 1989, by the Regional Director for Region VI, Federal Labor Relations Authority, Dallas, Texas. The Complaint alleges that the Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, El Paso, Texas, (hereinafter called Respondent), violated Sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by changing a past practice of allowing the Border Patrol Agents located in Fabens, Texas to have their assigned motor vehicles commercially cleaned and thereafter refusing to bargain with the Union over the procedures to be observed in implementing the change and appropriate arrangements for employees adversely affected by the change.

A hearing was held in the captioned matter on April 18, 1990, in El Paso, Texas. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The Respondent, the General Counsel and the Charging Party submitted post-hearing briefs on June 11, June 13, and June 14, 1990, respectively which have been duly considered.1/

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Union is the exclusive bargaining representative for a nationwide unit of nonprofessional employees, which includes, among others, the approximately twelve Border Patrol Agents assigned to Respondent's Border Patrol Station located in Fabens, Texas. While the Union is authorized to negotiate changes in conditions of employment at both the national and local levels, when a change impacts only at one installation the appropriate Local representing the unit employees at the installation is authorized to receive the appropriate notice of any change and be given the opportunity to negotiate the impact of the change on the unit employees, represented by the Local.

1/ In the absence of any objection, the General Counsel's "Motion To Correct Transcript Of The Proceedings," should be, and hereby is, granted.

The Border Patrol Agents at the Fabens, Texas Border Patrol Station perform a myriad of duties in connection with their major responsibility, i.e. apprehending illegal aliens. These duties include patrolling the border, sign cutting or tracking, farm and ranch checks and line watch. In performance of these duties each agent is assigned a government owned vehicle, namely a stripped down Ford Bronco. The same assigned vehicle is used by the respective agents on a continuing basis, except when the vehicle is in the shop for maintenance.

The stripped down vehicles have rubber mats instead of carpeting and a cargo area in place of the rear seats which is used to transport illegal aliens. The cargo area is separated from the cab of the vehicle by a wire mesh screen which insures the safety of the driver from attack by the illegal alien but does not stop dust and dirt from entering the driver's compartment.

According to Border Patrol Agent Robert Marren, who holds the position of Field Services Coordinator with the Union, the Agents operate their vehicles a good deal of the time over unpaved dirt and "caliche" roads which are for the most part bumpy and filled with ruts. Due to the way the vehicles are constructed, when you drive them over the above described roads, a vacuum at the rear of the vehicle brings in dust which covers the cab area. Thus, Mr. Marren, whose testimony in this respect is uncontested, stated as follows:

It [the dust] gets in the head band between the cab and the fiberglass roof, the seat belt retractors, under the dashboard, all over everything. Any place that dust could get, dust gets in these vehicles.

Similar testimony concerning the excessive dust and dirt build up in the vehicles was elicited from Border Patrol Agents William Cleary, III, Robert Ordonez and Reginald Buck.

Prior to May 22, 1989, when the events underlying the instant complaint occurred, the Border Patrol Agents would take their assigned vehicles to a local auto service station called Garay's Texaco for a thorough cleaning approximately twice a month. The cost of the cleaning, which included a thorough washing of the vehicles' interior and exterior was \$9.00, which was billed to the Government through the medium of government credit cards assigned to each vehicle. In addition to the above washings, the vehicles would be washed

in conjunction with the scheduled "A" maintenance performed on the vehicles at 3000 mile intervals.

According to the mutual corroborative testimony of Border Patrol Agents Marren, Cleary and Ordonez, the practice of having the vehicles cleaned, when deemed necessary, and charged to a government credit card had been in existence for at least four and one half years. Chief Patrol Agent Michael Williams, in a letter to the Union dated June 27, 1989, quoted in pertinent part, *infra*, also acknowledged the existence of the practice of having the vehicles washed periodically by Garay's Texaco at Government expense.

On May 22, 1989, Patrol Agent In Charge of the Fabens Station, Charles Roberson, in a memorandum to all Patrol Agents, notified the employees that due to "the dramatic budget cut," effective May 22, 1989, a number of procedures were to be implemented in order to conserve funds. Among the listed procedures, was the limiting of credit card purchases to "purchasing gas only at self service gas stations." The limitation imposed upon credit card purchases eliminated the periodic washing and/or cleaning of the vehicles. It also eliminated the scheduled "A" maintenance on the vehicles.

On June 9, 1988, Field Services Representative Marren wrote a letter to Chief Patrol Agent Williams wherein he demanded to bargain over the impact of the change in procedures relative to the cleaning and washing of the vehicles used by the Border Patrol Agents. The letter reads in pertinent part as follows:

On June 5, 1989, Border Patrol Agent Robert J. Marren of the Fabens station sought to have his Government [vehicle] washed at Garay's Texaco. Service vehicles have been taken to Garay's for cleaning since at least September 1984. Mr. Marren was informed by PAIC Charles Roberson that there was no money to wash vehicles for the remainder of the Fiscal Year. Mr. Marren was then advised by Mr. Roberson that he could wash the vehicle himself, if he wanted it cleaned.

Management's refusal to allow Mr. Marren to have his Service vehicle cleaned at Garay's Texaco and management's requirement that

Mr. Marren should wash the vehicle himself, if he wanted a clean vehicle, constitute changes in an established past practice and condition of employment. Management may claim that budgetary considerations mandated this change and they therefore, had no alternative. Budgetary constraints do not release management from their bargaining obligations. [See AFGE v. FLRA, 251 U.S. App. D.C. 335 (1986)]

Therefore, either management at the Fabens station allow the employees working there to continue to have their Government vehicles cleaned at Garay's Texaco or any other suitable business establishment, at Government expense, or the Union requests bargaining over these changes to the fullest extent permitted by Law. If the bargaining option is your choice, you or your designated representative should contact me at your earliest convenience so that ground rules be established so that bargaining can commence.

On June 27, 1989 Mr. Williams replied to Mr. Marren's letter of June 9, 1989. Mr. Williams' reply reads in pertinent part as follows:

This letter is to acknowledge receipt of your letter dated June 9, 1989.

In your letter you allege that management at Fabens station made a change to an established past practice and condition of employment, therefore, you request bargaining.

After examining your allegation, I find that not one but three accepted practices for cleaning government vehicles are utilized at Fabens station.

The most common practice is the care and protection that each vehicle operator exercises daily. These actions amount to first level vehicle maintenance care. In order to accomplish this operation, the Fabens station is equipped with an air

compressor and water hose. The second practice is when an Agent makes a request to the Supervisor to have his assigned vehicle washed at Garay's Texaco. Approval on this type of request is substantiated by the fact that the vehicle is either heavily muddied, dirty, or the inside is extremely soiled. The final practice is that a vehicle wash is included as part of a cyclical preventive maintenance scheduled service, which normally would be performed at Garay's Texaco.

Therefore, I find that your request to have your vehicle cleaned by someone else at your discretion was properly denied by your Patrol Agent In Charge. Furthermore, your claim that you are now required to wash your own vehicle is incorrect. As a Border Patrol Agent, you have always been required to demonstrate proper care and use of government equipment.

The prohibition on having the vehicles assigned to the Border Patrol Agents commercially cleaned lasted until October 1, 1989, when a new fiscal year began. According to Mr. Roberson, the Patrol Agent In Charge at the Fabens installation, the Agents were not required to clean their vehicles. He further testified that he did not receive any complaints from the Agents that cleaning the vehicles themselves was a burdensome undertaking or that such activity resulted in their uniforms getting dirty faster than usual.

The record reveals that the Fabens installation had water hoses and air compressors available to the Agents for purposes of cleaning out their vehicles and that the Agents were allowed to perform such activities during working hours.

Border Patrol Agent William Cleary, III testified that with or without commercial cleaning his uniform became dirty very easily in the course of his normal work activities. According to Mr. Cleary, the vehicles used by the Agents ". . . were dirty all the time because of the type of work we do." When Mr. Cleary cleaned his vehicle once a week or once every two weeks it took him about 15 minutes to perform such cleaning.

Mr. Robert Ordonez, a Border Patrol Agent, testified that in the period between May 22 and October 1 he

thoroughly cleaned his truck once a month. The cleaning took him one hour. Mr. Ordonez also testified that when his vehicle was cleaned commercially, he was saved from having to clean the vehicle as thoroughly himself. He further stated that if he did not clean it thoroughly there would be so much dust that it would rise and interfere with his driving, irritating his eyes and getting into his food. Mr. Ordonez agreed that even if vehicles were cleaned every half hour there would be some dust in the vehicle after a job was performed. Finally, according to Mr. Ordonez, it took about 15 minutes to sweep out his vehicle every couple days, a period which he did not consider impacted on him either personally or on his job.

Mr. Reginald Buck, another Border Patrol Agent, testified that it took him approximately 15-20 minutes once a month to clean his vehicle during his work shift. Mr. Buck testified that he did not see a major impact on himself during the period in which he had to clean his vehicle himself. He agreed that the vehicles quickly got dirty again after they have been commercially cleaned and have been taken out into the field for a normal work mission.

Border Patrol Agent Marren testified that his allergy and asthma problems, which existed prior to his working for Respondent, were aggravated when he had to clean his vehicle himself. Mr. Marren attempted to clean his vehicle twice during the four-month period in which the trucks could not be commercially cleaned. He further testified that his uniform got dirty and wet and that all the agents' uniforms got dirtier faster when they had to clean the vehicles themselves. Mr. Marren testified that employees receive an annual uniform allowance but only to buy uniforms. Employees pay for the cleaning of their uniforms themselves. Mr. Marren also stated that because he had never cleaned a government vehicle before, he damaged the electronics equipment. He used water to clean out the vehicle rather than using the air hose supplied by Respondent because he assumed it would blow too much dust and cause him to have an asthma attack. Finally, Mr. Marren testified that prior to May 22nd he had observed Border Patrol Agents cleaning out their assigned vehicles with a whisk broom.

Discussion and Conclusions

The General Counsel takes the position that the Respondent violated Sections 7116(a)(1) and (5) of the Statute by virtue of its action in unilaterally changing a

condition of employment which allowed Border Patrol Agents to have their assigned vehicles commercially washed without giving the Union prior notice and subsequently refusing to bargain with the Union over the procedures to be observed in implementing the change and appropriate arrangements for employees adversely affected by the change. In support of its position the General Counsel contends that the impact or foreseeable impact of the change upon bargaining unit employees is more than de minimis. According to the General Counsel the adverse impact on the employees consisted of dirtier uniforms, aggravated allergy conditions and morale.

The General Counsel does not contend that Respondent was obligated to engage in bargaining over the substance of the change.

Respondent, on the other hand, takes the position that it was under no obligation to bargain with the Union over the impact and manner of implementation of the change since the impact of the change upon unit employees was de minimis.

Inasmuch as there is no contention that the commercial cleaning and/or washing of the utility vehicles assigned to the Border Patrol Agents was not a recognized condition of employment, the sole issue to be resolved in this proceeding is whether the prohibition on commercially cleaning the utility vehicles at government expense had a more than de minimis impact on the unit employees.

On the basis of the entire record, particularly the mutually corroborative testimony of Border Patrol Agents Cleary, Ordonez and Buck, the former two being witnesses for the General Counsel, I can not find that the prohibition on having the utility vehicles commercially cleaned at Respondent's expense had more than a de minimis impact on the conditions of employment of the unit employees. Thus, their testimony makes it clear that the prohibition had little or no significant impact upon them since dust and dirt was always a problem and the vehicles would become dusty shortly after the commercial cleaning, which according to them occurred only once or twice a month prior to May 22, 1989. Further according to their testimony, the cleaning, which occurred after May 22, took only fifteen minutes of their working time and did not result in their uniforms getting any dirtier than usual. In this latter connection, Mr. Marren testified that prior to May 22, 1989, he had observed Border Patrol Agents cleaning out their vehicles with a whisk broom.

As to Mr. Marren's allergy problem which was allegedly aggravated by excessive dust in his utility vehicle, I find that, at best, commercial cleaning of his vehicle might have given him some relief for several hours, not days, of any month. Dust in the vehicles, due to their use on dirt and caliche roads was a fact of life, and again according to the testimony of Agents Cleary, Ordonez and Buck, dust began to accumulate on the vehicles immediately after they were cleaned and put into service. Moreover, while the cleaning of the vehicles was considered to be part of the "proper care" to be given by the Agents to the vehicles assigned to them, there is no showing in the record that there was any required amount of times that an Agent was to clean his vehicle between the scheduled 3000-mile "A" maintenance. Nor was there any showing that any Agent had ever been disciplined for failure to clean his vehicle.^{2/}

Based upon the foregoing considerations, I find that the prohibition on commercial cleaning of the utility vehicles at Government expense had a de minimis impact on the conditions of employment of the unit employees.^{3/} Accordingly, it is recommended that the Authority adopt the following order dismissing the instant complaint in its entirety.

ORDER

It is hereby Ordered that the Complaint should be, and hereby is, dismissed in its entirety.

Issued, Washington, D.C., August 22, 1990


BURTON S. STERNBURG
Administrative Law Judge

^{2/} While Mr. Marren alleges that the cleaning of the vehicle by the air hose method would have aggravated his existing allergy condition, there is no showing in the record that he had ever attempted to use the air hose method.

^{3/} Cf. Department of Health and Human Services, Social Security Administration, 24 FLRA 403.