

63 FLRA No. 122

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
AFL-CIO
(Union)

and

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
POTOMAC TRACON
(Agency)

0-NG-2960

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

May 29, 2009

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Before the Authority: Carol Waller Pope, Chairman
and Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on a negotiability appeal filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and Part 2424 of the Authority's Regulations, and concerns the negotiability of five sections of a single proposal. The Agency filed a statement of position to which the Union did not file a response.

For the reasons that follow, we find that the disputed Sections 2, 3, 4, 5 and 6 of the proposal are outside the duty to bargain. Accordingly, we dismiss the petition for review.

II. Proposal and Meaning

The proposal was submitted in response to the Agency's announced intent to implement the 280 Radial Airspace Project ("Project"). Petition at 1. The Project will change the routes of flight utilized by aircraft in the airspace controlled by the Potomac TRACON (Terminal Radar Approach Control) for arriving into or departing from Reagan National and Dulles International Airports. Post-Petition Conference Summary at 1. The Potomac TRACON

is a radar facility that directs intermediate air traffic in the airspace of a particular geographic sector. *Id.* Within the Potomac TRACON facility, controllers direct air traffic in one of four smaller geographic areas. *Id.* at 1-2. The only two areas affected by the Project are the Shenandoah (SHD) and Mount Vernon (MTV) areas. *Id.* at 2.

The following five sections of the proposal are before us:

Section 2: For a period of 30 days following the implementation of the new 280 Radial Project, where a change in this procedure is determined to be a causal factor in an operational error (OE), operational deviation (OD), technical violation (TV) or any other incident, the Agency has determined that blocks 14 through 18, inclusive, of FAA Form 7210-3, Final Operational Error/Deviation Report, shall not be completed. *For a period of 30 days following the implementation of the new 280 Radial Project*, when a BUE is serving as a CIC and the change to the new 280 Radial Project is determined to be a causal factor in any OE, OD, TV, or any other incident, the Agency has determined that block 37 of FAA Form 7210-3, Final Operational Error/Deviation Report, shall not be completed.

Record of Post-Petition Conference at 2 (changes made at post-petition conference in italics).

Section 3. The Agency shall ensure that all automation issues associated with the new 280 Radial Project have been completed prior to its effective date.

Petition at 4.

Section 4. For a period of 7 days following the implementation of the new 280 Radial Project, the Agency shall maintain at least two (2) Subject matter experts (SMEs) for both the day and evening shift, one in SHD and one in the MTV areas of specialization.

Id.

Section 5. The Agency shall provide a minimum of 8 hours of classroom training to include a minimum of 1 simulated problem in the ETG lab to the SHD and MTV

bargaining unit employees *prior to implementation of the 280 Radial Project.*

Record of Post-Petition Conference at 3 (changes made at post-petition conference in italics).

Section 6. The Agency shall ensure that proper flow control restrictions are in place to ensure that the affected sectors maintain a safe and orderly flow of traffic during the implementation of the new procedure.

Petition at 4.

Regarding Section 2, the Union clarified, at the post-petition conference, that the term "BUE" means "bargaining unit employee" and that the term "CIC" refers to a "controller-in-charge," who is a bargaining unit employee who acts as a supervisor when there is no supervisor on duty. Conference Summary at 2. The parties agreed that FAA Form 7210-3 is an incident report form that must be filled out every time there is an OE, OD, TV, or other incident. *Id.* The parties further agreed that blocks 14 through 18 of the form indicate the controller who is involved in the incident, and block 37 identifies either the supervisor or CIC at the time the incident occurred. *Id.* The parties agreed that supervisors fill out the form. *Id.*

Also at the post-petition conference, the Union explained that, for the first 30 days following implementation of the Project, Section 2 would operate as an immunity clause for controllers. Specifically, if a supervisor determines that an OE, OD, TV, or other incident is causally related to implementation of the Project, then the supervisor would not identify the controller involved in blocks 14 through 18 on FAA Form 7210-3, but instead, would charge the incident to the facility. *Id.* The second sentence of Section 2 would operate as an immunity clause for a CIC who is on duty at the time an incident occurs. *Id.* The Agency agreed with the Union's explanation of the meaning, operation and impact of Section 2 and, as the explanation is consistent with the plain wording of the proposal, we adopt it for purposes of this memorandum. *See AFGE, Local 12, 61 FLRA 209, 209-210 (2005).*

Regarding Section 3, the parties agreed, at the post-petition conference, that the term "automation issues" refers to the necessary computer upgrades/modifications associated with the Project. Record of Post-Petition Conference at 3. The Union explained that this section would require the Agency to resolve all automation (computer) issues prior to the implementation of the Project. *Id.* The Agency

agreed with the Union's explanation of the meaning, operation and impact of Section 3 and, as the explanation is consistent with the plain wording of the proposal, we adopt it for purposes of this memorandum. *See AFGE, Local 12, 61 FLRA at 209-210.*

Regarding Section 4, the parties agreed, at the post-petition conference, that the term "subject matter experts" (SMEs) refers to employees -- either bargaining unit employees or management officials -- who have a high degree of expertise with regard to the Project. Record of Post-Petition Conference at 3. The Union explained that, for the first seven days following implementation of the Project, Section 4 would require the Agency to make available a total of at least four SMEs: one SME in both the SHD and MTV areas per shift (day and evening). *Id.* The SMEs would be existing Potomac TRACON employees who are "pulled off" their normal air traffic control duties so that they can be instantly available to assist controllers during the implementation of the Project. *Id.* The Agency agreed with the Union's explanation of the meaning, operation and impact of Section 4 and, as the explanation is consistent with the plain wording of the proposal, we adopt it for the purposes of this memorandum. *See AFGE Local 12, 61 FLRA at 209-210.*

Regarding Section 5, the parties agreed, at the post-petition conference, that the term "ETG lab" refers to an air traffic control simulator that is used by controllers for training purposes. Record of Post-Petition Conference at 3. The Union explained that Section 5 would require the Agency to provide bargaining unit controllers in the SHD and MTV areas with a minimum of eight hours of classroom training, including at least one simulated problem in the ETG lab, prior to the implementation of the Project. *Id.* The Agency agreed with the Union's explanation of the meaning, operation and impact of Section 5 and, as the explanation is consistent with the plain wording of the proposal, we adopt it for the purposes of this memorandum. *See AFGE Local 12, 61 FLRA at 209-210.*

Regarding Section 6, the parties explained, at the post-petition conference, that the term "flow control restrictions" refers to limits, instituted by the Agency's Traffic Management Unit, for controlling the number and flow of aircraft entering a sector's or controller's airspace. Record of Post-Petition Conference at 3. The purpose of flow control restrictions is to balance the load and capacity of air traffic coming into a sector by, for example, limiting

the number or frequency of aircraft entering the sector per hour, or limiting the number of planes per controller. *Id.* The Union explained that Section 6 would require the Agency to ensure that proper control restrictions are in place so that the affected areas (SHD and MTV) maintain a safe and orderly flow of air traffic during the implementation of the Project. *Id.* The Agency agreed with the Union's explanation of the meaning, operation and impact of Section 6 and, as the explanation is consistent with the plain wording of the proposal, we adopt it for the purposes of this memorandum. *See AFGE Local 12, 61 FLRA at 209-210.*

III. Positions of the Parties

A. Agency

The Agency contends that there is no obligation to bargain over Section 2 for four reasons. First, the Agency argues that the section is "covered by" Article 64 of the parties' collective bargaining agreement. Statement of Position at 4. Second, the Agency argues that the section is contrary to an Agency regulation, specifically, FAA Order 7210.56, which requires an investigation of any operational error. *Id.* Third, the Agency contends that the section conflicts with its right to discipline under § 7106(a)(2)(A) of the Statute. *Id.* Fourth, the Agency asserts that the section is not a permissive subject of bargaining under § 7106(b), arguing that "the abrogation of a management right with a nexus to . . . safety . . . is not negotiable under either Section 7106 (a) or (b)." *Id.* at 5.

As to Section 3, the Agency argues that there is no obligation to bargain on two grounds. First, the Agency asserts that Section 3 involves an "abrogation of a management right with a nexus to the safety of the air traveling public" and, therefore, is not negotiable under either § 7106(a) or (b) of the Statute. Statement of Position at 5. Additionally, the Agency asserts that Section 3 involves matters regarding the "numbers, types or positions assigned to any organizational supervision" and the technology, methods and means of performing work. *Id.*

As to Section 4, the Agency argues that there is no obligation to bargain because it is inconsistent with the Agency's rights to hire, assign, direct and determine the personnel by which agency operations shall be conducted under § 7106(a)(2)(A) of the Statute. Statement at 5. Additionally, the Agency argues that this section of the proposal is

encompassed by § 7106(b)(1) of the Statute, and that it declines to bargain over it. *Id.* at 6.

As to Section 5, the Agency contends that there is no obligation to bargain because it is inconsistent with its rights to hire, assign and direct employees, and assign work under § 7106(a)(2)(A) and (B) of the Statute. Statement at 6. The Agency further asserts that Section 5 is not encompassed by § 7106(b). *Id.*

As to Section 6, the Agency asserts that there is no obligation to bargain for three reasons. Statement at 7. First, the Agency contends that Section 6 interferes with its right to assign work. *Id.* Second, the Agency argues that Section 6 is not a permissive subject of bargaining under § 7106(b) because it would involve the "abrogation of a management right with a nexus to the safety of the air traveling public." *Id.* Finally, the Agency argues that the Project was implemented pursuant to the mandate of Congress. *See id.* In this regard, the Agency argues that 49 U.S.C. § 40101 is an example of how implementing the Project is consistent with Congress' mandate that the Agency promote safety.¹ *See id.* The Agency argues that Section 6 conflicts with the Agency's Congressionally mandated mission regarding safety, as set out, for example, in 49 U.S.C. § 40101.² *See id.*

1. The Agency cites "5 U.S.C. § 40101," as the source of its quoted language regarding Congress' mandate to the Agency. Statement at 7. However, in addition to the fact that no such section exists within Title 5, the language the Agency quotes appears at (and only at) 49 U.S.C. § 40101. As such, we construe the Agency's citation of 5 U.S.C. § 40101 as a citation to 49 U.S.C. § 40101.

2. 49 U.S.C. § 40101 states, in relevant part:

(a) Economic regulation. In carrying out subpart II of this part . . . the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity:

(1) assigning and maintaining safety as the highest priority in air commerce.

. . . .

(3) preventing deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of Congress to further the highest degree of safety in air transportation and air commerce, and to maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public.

B. Union

As noted above, the Union did not file a response to the Agency's statement of position. The Union also did not make any legal arguments regarding the negotiability of the proposal in its petition.

IV. Analysis and Conclusion

As set forth above, the Union made no arguments regarding the negotiability of the proposal in its petition and did not file a response to the Agency's statement of position. Thus the Union does not dispute the Agency's assertions that that the proposals are outside the Agency's duty to bargain for the specific reasons set forth above.

Where a union offers no argument or authority that a proposal does not affect management rights and does not make any argument that the proposal constitutes an exception to management rights, the Authority will find that the proposal is outside the duty to bargain. *See Nat'l Air Traffic Controllers Ass'n*, 61 FLRA 658, 660 (2006) (*NATCA*) (citing *NAGE, Local R1-109*, 56 FLRA 1043, 1044, 1045 (2001)). Applying this precedent here, we find that Sections 2, 3, 4, 5 and 6 are outside the duty to bargain. *See id.* at 660 n.1. In light of this conclusion, it is not necessary to address the Agency's specific contentions. *See NATCA*, 61 FLRA at 660.

V. Order

The petition for review is dismissed.