65 FLRA No. 155

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
LOCAL ZHU
(Union)

and

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.
(Agency)

0-NG-2982

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

April 27, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This case 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). The appeal concerns the negotiability of twelve proposals. The Agency filed a statement of position (SOP), to which the Union filed a response (response). The Agency did not file a reply to the Union's response.

For the reasons that follow, the Authority finds that Proposals 2, 6, 7, 9, 10, 11, and 12 are within the duty to bargain. In addition, the Authority dismisses the petition for review (petition) as to Proposals 3, 4, and 5 because the Agency has not raised a negotiability dispute with respect to those proposals, and dismisses the petition as to Proposals 1 and 8 because they are moot.

II. Background

The Agency component involved is an air route traffic control center. Record of Post-Petition Conference (Record) at 1. The Agency implemented the Lufkin Sector, which is a new sector within the airspace for which the center is responsible. *Id.* A sector is a section of airspace for which air traffic controllers (ATCs) perform separation duties. *Id*. The Lufkin Sector is part of the "Lufkin Specialty." *Id.* A specialty is a broader area of airspace composed of several sectors. *Id.* The Lufkin Sector was created after an existing sector, the Humble Sector, was split into two sectors. *Id.* at 1-2. Thus, the airspace that once composed the Humble Sector is now divided between the Humble Sector and the Lufkin Sector. *Id.*

ATCs are required to obtain certain certifications before working in a sector. *Id.* at 2. ATC pay is governed by the number of certifications obtained. Petition at 5. Once ATCs obtain certifications on all sectors within a specialty, they are classified as Certified Professional Controllers (CPCs). Record at 2. Establishment of the Lufkin Sector created two additional certifications within the specialty. *Id.* at 2-3.

III. Preliminary Matters

A. The proposals will be grouped as requested by the Union.

In its discussion regarding whether its proposals should be severed, the Union requests that Proposals 3, 4, and 5, and 11 and 12, be considered as two sets because the proposals in each proposed set concern the same subject matter.[1] Response at 16-17. This request does not involve "severance" as that term is defined in § 2424.2(h) of the Authority's Regulations because the Union is not requesting that the proposals be divided into separate parts.[2] 5 C.F.R. § 2424.2(h). However, because the Agency does not object to the Union's request, we will consider the proposals in

1. In its petition and response, the Union sometimes refers to the proposals as twelve sections of one proposal. However, the Union provides specific arguments to address each section separately in those documents. Additionally, during the post-petition conference, the Union claimed, without objection by the Agency, that the case involved twelve proposals. Record at 1. We therefore interpret the Union's position concerning severance as a request that the individual sections be treated as separate proposals. Accordingly, the Authority will consider them as separate proposals.

2. 5 C.F.R. § 2424.2(h) provides as follows:

> *Severance* means the division of a proposal or provision into separate parts having independent meaning, for the purpose of determining whether any of the separate parts is within the duty to bargain or is contrary to law. In effect, severance results in the creation of separate proposals or provisions. Severance applies when some parts of the proposal or provision are determined to be outside the duty to bargain or contrary to law.

each set together. *See NATCA, AFL-CIO*, 62 FLRA 174, 174-75 (2007) (Chairman Cabaniss concurring) (analyzing proposals together at union's request when agency did not object). As a result, if we find one of the proposals in a set nonnegotiable, then all of the proposals in that set will be found outside the duty to bargain. *Id*.

B. Proposals 1 and 8 are moot.

Where a proposal addresses an event that has already occurred, the Authority will find that the proposal is moot and will dismiss the petition.[3] *See, e.g.*, *NTEU, Chapter 207*, 58 FLRA 409, 410 (2003) (Chairman Cabaniss dissenting) (*NTEU*); *IFPTE, Local 35*, 54 FLRA 1384, 1387-88 (1998) (Member Wasserman dissenting); *NFFE, Local 1482*, 45 FLRA 52, 65-66 (1992). In this connection, where a proposal has become moot, issuance of a ruling on the merits of the proposal would constitute an advisory opinion, which is prohibited under 5 C.F.R. § 2429.10. *AFSCME, Local 1418*, 53 FLRA 1191, 1195 (1998).

Proposals 1 and 8 address the implementation of the Lufkin Sector that has already occurred. In particular, Proposals 1 and 8 expressly require the Agency to take certain actions prior to that implementation. Accordingly, Proposals 1 and 8 are moot. *NTEU*, 58 FLRA at 410 (dismissing petition as moot where proposal referred to a specific event that had already occurred and required agency to take action by a date that had passed).

For the foregoing reasons, we dismiss the petition as to Proposals 1 and 8.

IV. Proposal 2

A. Wording

> Section 2: No employee currently holding certifications on the Humble Sector at [the Agency] will be required to certify on the Lufkin Sector. The implementation of this sector shall not affect an employee's [CPC] status.

Petition at 4.

B. Meaning

The parties agree that, under Proposal 2, ATCs who had already become certified on the Humble Sector before it was divided would not be required to obtain certifications on the Lufkin Sector. Record at 2. Conversely, ATCs who had not previously been certified on the Humble Sector would be required to obtain certifications on the Lufkin Sector. *Id.* In addition, CPCs' certification status and pay rate, which is governed by the number of certifications obtained, would be determined as if they had obtained the Lufkin Sector certifications. Petition at 5.

C. Positions of the Parties

1. Agency

The Agency asserts that the proposal is contrary to management's § 7106(a)(2)(B) right to assign work. SOP at 8. The Agency claims that the proposal would "restrict the Agency's ability to conduct recertification training." *Id*.

2. Union

The Union acknowledges that Proposal 2 would affect management's § 7106(a)(2)(B) right to assign work. Response at 4. However, the Union argues that the proposal is negotiable as an appropriate arrangement. *Id.* at 5. The Union contends that the proposal would prevent CPCs from losing pay by deeming them certified on the Lufkin Sector, thereby maintaining their fully-certified status for pay purposes. *Id.* at 5. The Union asserts that requiring CPCs to recertify on the Lufkin Sector would have the foreseeable effect of causing CPCs to lose their fully-certified status. *Id.* at 4-5. Because ATC pay is governed by the number of certifications obtained, this would reduce the pay of CPCs assigned to the Lufkin Specialty. *Id.* at 5. The Union further contends that the proposal is tailored to prevent CPCs from experiencing a pay loss. Finally, the Union explains that the proposal would not restrict the Agency from freely assigning certification training for the Lufkin Sector to all ATCs, including CPCs. *Id.*

D. Analysis and Conclusions

1. Proposal 2 affects management's § 7106(a)(2)(B) right to assign work.

The Union acknowledges that Proposal 2 would affect management's § 7106(a)(2)(B) right to assign work. *See id.* at 4. Where a union concedes that its proposal would affect management's rights under

3. The Agency does not argue that the negotiability dispute in this case is moot as to Proposals 1 and 8. However, mootness is a threshold jurisdictional issue and may be raised by the Authority sua sponte. *See, e.g., NTEU*, 52 FLRA 1265, 1278-79 (1997).

§ 7106(a) of the Statute, the Authority will find that the proposal would affect those rights. *See NATCA*, 61 FLRA 437, 439 (2006). Therefore, we find that this proposal would affect management's § 7106(a)(2)(B) right to assign work.

2. Proposal 2 is an appropriate arrangement.

The Union argues that Proposal 2 is negotiable as an appropriate arrangement under § 7106(b)(3). A proposal that would affect management's rights under § 7106(a) of the Statute is nevertheless negotiable if it constitutes an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute. To establish whether a proposal constitutes an appropriate arrangement, the Authority first considers whether the proposal is intended to be an arrangement for employees adversely affected by the exercise of a management right. *See NAGE, Local R14-8*, 21 FLRA 24, 31 (1986) (*KANG*). The claimed arrangement must also be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights. *See NTEU, Chapter 243*, 49 FLRA 176, 184 (1994). If the Authority finds the proposal to be an arrangement, then the Authority will determine whether it is appropriate or whether it is inappropriate because it excessively interferes with management's rights. *Id.* at 31-33. In doing so, the Authority weighs the benefits afforded to employees under the arrangement against the intrusion on the exercise of management's rights. *Id*.

As the Agency does not dispute that Proposal 2 is an arrangement, we find that the proposal constitutes an arrangement. *See* § 2424.32(c)(ii)(2) (agency's failure to respond to an assertion raised by union will, where appropriate, be deemed a concession to that assertion); *AFGE, Local 221*, 64 FLRA 1153, 1157 (2010) (where agency failed to address union's claim that proposals constitute arrangements, Authority determined that proposals constituted arrangements); *NTEU*, 61 FLRA 871, 874 (2006) (same).

With regard to whether the arrangement is appropriate, the Union asserts that Proposal 2 would benefit CPCs who are assigned to the Lufkin Specialty by maintaining their fully-certified status, therefore preventing a reduction in pay. By contrast, the Agency does not contest that Proposal 2 is "appropriate." Weighing the demonstrated benefits to ATCs against the absence of asserted or demonstrated burdens on the right to assign work, we find that Proposal 2 is an appropriate arrangement under § 7106(b)(3) of the Statute. *See AFGE, Local 1367*, 64 FLRA 869, 871-72 (2010) (Member Beck dissenting in part).

Based on the above, we find that Proposal 2 is within the duty to bargain.

V. Proposals 3, 4, and 5

A. Wording

Proposal 3

Section 3: The implementation of the Lufkin Sector will not impact the pay progression of any employee currently undergoing initial qualification training in the Lufkin Specialty.

Petition at 5.

Proposal 4

Section 4: Prior to the implementation of the Lufkin Sector, the Parties at the local level will develop a method for tracking any training delays, for employees undergoing initial qualification training, incurred as a consequence of any training and/or transition activities.[4]

Id. at 6.

Proposal 5

Section 5: Any subsequent promotion(s) for employees will be backdated by the amount of time calculated as a training delay in Section 4.

Id. at 7.

4. Although Proposal 4 requires the Agency to have developed a method for tracking training delays prior to an event that has already occurred — implementation of the Lufkin Sector — the operation of the proposal is not limited by a particular event or timeframe. Rather, the proposal's operation will have a prospective impact on employees undergoing initial qualification training who incur training delays as the result of implementation of the Lufkin Sector. As such, the parties continue to have a legally cognizable interest in the outcome. *See NAGE, Local R1-109*, 64 FLRA 132, 133 (2009) (Member Beck dissenting as to another matter) (finding proposal not moot where proposal could benefit employees in future). Therefore, we find that Proposal 4 is not moot.

B. Meaning

The parties agree that under Proposal 3, any delay in ATCs obtaining certifications resulting from implementation of the Lufkin Sector will not affect such ATCs by reducing their pay, which is determined by the number of certifications obtained. Record at 2-3.

The parties agree that Proposal 4 would require the parties to jointly develop a mechanism for tracking any delays in certification training for ATCs attributable to other training associated with implementation of the Lufkin Sector. *Id.* at 3.

The parties agree that under Proposal 5, ATC pay increases based on the number of certifications obtained would be backdated by the amount of time certification training was delayed, as determined by the mechanism established in Proposal 4. *Id.*

C. Positions of the Parties

1. Agency

The Agency asserts that it has no duty to bargain over Proposals 3, 4, and 5 because ATC pay increases are "covered by" Article 108, Section 5 of the parties' collective bargaining agreement (CBA). SOP at 9-11.

2. Union

The Union contends that Proposals 3, 4, and 5 are not "covered by" the CBA. Response at 7-8.

The Union also argues that, although training generally falls within management's § 7106(a)(2)(B) right to assign work, Proposals 3, 4, and 5 are negotiable as appropriate arrangements. *Id.* at 6.

D. Analysis and Conclusions

The Agency's only claim with regard to Proposals 3, 4, and 5 is that they are "covered by" Article 108, Section 5 of the CBA. This claim raises a bargaining obligation dispute, which is defined in § 2424.2(a) of the Authority's Regulations as "a disagreement between an exclusive representative and an agency concerning whether, in the specific circumstances involved in a particular case, the parties are obligated to bargain over a proposal that otherwise may be negotiable." The Authority's Regulations specify that a bargaining obligation dispute includes a claim that a proposal "concerns a matter that is covered by a collective bargaining agreement[.]" 5 C.F.R. § 2424.2(a)(1). The Authority's Regulations further specify that a negotiability dispute "that concerns only a bargaining obligation dispute may not be resolved [in a negotiability proceeding]." 5 C.F.R. § 2424.2(d).

As the only issue raised by the Agency with regard to Proposals 3, 4, and 5 is a bargaining obligation dispute, we dismiss the petition as to Proposals 3, 4, and 5. *See NATCA*, 61 FLRA 341, 343-44 (2005); *Antilles Consol. Educ. Ass'n*, 61 FLRA 327, 331 (2005).

VI. Proposal 6

A. Wording

> Section 6: For a period of ninety days after the initial implementation of the Lufkin Sector, any and all operational errors or operational deviations occurring in any sector affected by this implementation will be attributed to the facility rather than an employee.[5]

Petition at 8.

B. Meaning

The parties agree that, under Proposal 6, for ninety days following implementation of the Lufkin Sector, bargaining unit members will be granted immunity from discipline or other adverse consequences resulting from any operational errors or deviations in sectors affected by the Lufkin Sector. Petition at 8; *see also* Record at 3.

C. Positions of the Parties

1. Agency

The Agency asserts that the proposal is contrary to management's § 7106(a)(2)(A) and (B) rights to discipline and to assign work. SOP at 12. Specifically, the Agency reasons that this proposal would excuse individual ATCs from responsibility for errors or deviations. *Id.* The Agency asserts that it

5. Although Proposal 6 refers to a timeframe that has already passed — ninety days following implementation of the Lufkin Sector — it will have a prospective impact on employees who are held accountable for any operational errors or deviations that occurred during those 90 days. As such, the parties continue to have a legally cognizable interest in the outcome. *See NAGE, Local R1-109*, 64 FLRA at 133 (finding proposal not moot where proposal could benefit employees in future). Therefore, we find that Proposal 6 is not moot.

would be restricted from requiring re-training for certification and from administering corrective discipline to individual ATCs who commit these errors or deviations. *Id.*

2. Union

The Union acknowledges that Proposal 6 would affect management's § 7106(a)(2)(A) and (B) rights to discipline and to assign work. Response at 9. However, the Union argues that the proposal is negotiable as an appropriate arrangement. *Id.* In support, the Union asserts that the proposal would allow ATCs assigned to the Lufkin Sector a "grace period" to familiarize themselves with the new changes before the Agency imposes performance or disciplinary-based measures on specific ATCs if an error occurs. *Id*. In addition, the Union contends that the proposal would not excessively interfere with management's rights because the proposal is limited to a brief ninety-day period. *Id.* The Union points out that, during the ninety-day period, the Agency could continue to investigate errors or conduct remedial training, but could not impose performance or disciplinary-based action on specific individuals. *Id*.

D. Analysis and Conclusions

1. Proposal 6 affects management's § 7106(a)(2)(A) and (B) rights to discipline and assign work.

The Union acknowledges that Proposal 6 would affect management's § 7106(a)(2)(A) and (B) rights to discipline and to assign work. *See id.* at 9. Therefore, consistent with Authority precedent dealing with a union's acknowledgement that a proposal would affect management's rights, *supra* Part IV.D, we find that this proposal would affect management's § 7106(a)(2)(A) and (B) rights to discipline and assign work.

2. Proposal 6 is an appropriate arrangement.

The Union argues that Proposal 6 is negotiable as an appropriate arrangement under § 7106(b)(3). Based on Authority precedent discussed *supra* Part IV.D, as the Agency does not dispute that Proposal 6 is an arrangement, we find that the proposal constitutes an arrangement.

With regard to whether the arrangement is appropriate, the Union asserts that Proposal 6 would benefit ATCs assigned to the Lufkin Sector by allowing for a "grace period" to familiarize themselves with the new changes before the Agency imposes performance or disciplinary-based measures on specific ATCs if an error occurs. By contrast, the Agency does not contest that Proposal 6 is "appropriate." Weighing the demonstrated benefits to ATCs against the absence of asserted or demonstrated burdens on the right to discipline and to assign work, we find that Proposal 6 is an appropriate arrangement under § 7106(b)(3) of the Statute. *See AFGE, Local 1367*, 64 FLRA at 871-72.

Based on the above, we find that Proposal 6 is within the duty to bargain.

VII. Proposal 7

A. Wording

> Section 7: The Lufkin Sector will be physically located in such a configuration so that the Radar position of the Lufkin Sector is immediately adjacent to the Radar position of the Houston Sector.

Petition at 8.

B. Meaning

The parties agree that Proposal 7 would require the radar scope position for the Lufkin Sector to be physically located next to the radar scope position for the Houston Sector. Record at 3. The radar scopes are in fixed positions, and the parties agree that the proposal is not intended to reposition the radar scopes. *Id.* at 3-4. Rather, the proposal would require that an existing radar scope position next to the pre-existing Houston radar scope position be assigned to the Lufkin Sector. *Id.* at 4. The radar scope position affects ATCs' spatial arrangement in the control center. Petition at 9.

C. Positions of the Parties

1. Agency

The Agency asserts that the proposal concerns a permissive subject of bargaining over which it has elected not to bargain. SOP at 13. In this regard, the Agency contends that the "configuration of an operational work area" concerns the methods and means of performing work under § 7106(b)(1) of the Statute. *Id.*

2. Union

The Union argues that the Agency has failed to explain how the proposal would interfere with the Agency's right to determine the methods and means of performing work. Response at 11. In this regard, the Union contends that the proposal would only require that the physical layout of the Lufkin Sector be adjacent to an existing sector in order to facilitate communication. The Union claims that this would not affect the ATCs' compliance with Agency directives and procedures. *Id.*

The Union also argues that the proposal is negotiable as an appropriate arrangement. *Id.* at 10. In support, the Union contends that the proposal would prevent errors due to poor communication between ATCs in the Lufkin Sector and ATCs in other sectors. *Id.* at 10-12. The Union further argues these errors would be minimized by physically aligning the Lufkin Sector with an existing sector in order to facilitate communication between ATCs. *Id.* at 11-12.

D. Analysis and Conclusions

The Agency argues that the proposal would infringe on management's right to determine the methods and means of performing work. SOP at 14. Even assuming that the proposal concerns the exercise of management's rights to determine the methods and means of performing work under § 7106(b)(1), the proposal is nevertheless negotiable because, for the reasons set forth below, it constitutes an appropriate arrangement. *See AFGE, Nat'l Council of Field Labor Locals*, 58 FLRA 616, 617 (2003) (*AFGE*) (assuming without deciding that proposal concerns exercise of management right to determine means of performing agency's work, but found proposal negotiable as appropriate arrangement).

The Union argues that Proposal 7 is negotiable as an appropriate arrangement under § 7106(b)(3). Based on Authority precedent discussed *supra* Part IV.D, as the Agency does not dispute that Proposal 7 is an arrangement, we find that the proposal constitutes an arrangement.

With regard to whether the arrangement is appropriate, the Union asserts that Proposal 7 would benefit ATCs by preventing errors due to poor communication between ATCs in the Lufkin Sector and ATCs in other sectors. Response at 10-12. By contrast, the Agency does not contest that Proposal 7 is "appropriate." Weighing the demonstrated benefits to ATCs against the absence of asserted or demonstrated burdens on the right to choose the methods and means of performing work, we find that Proposal 7 is an appropriate arrangement under § 7106(b)(3) of the Statute. *See AFGE, Local 1367*, 64 FLRA at 871-72.

Based on the above, we find that Proposal 7 is within the duty to bargain.

VIII. Proposal 9

A. Wording

> Section 9: Should the Agency determine to establish a training cadre, the Agency shall solicit volunteers for participation. The most senior qualified volunteer(s) shall be selected.

Petition at 10.

B. Meaning

The parties agree that, under Proposal 9, the Agency would have the option of establishing a training cadre, which would consist of a group of CPC training instructors. Record at 4. The parties also agree that the proposal would require the Agency to solicit volunteers and to select the most senior qualified volunteers to participate in the training cadre. *Id.* It is undisputed that the Agency would determine the qualifications for volunteers. Petition at 10.

C. Positions of the Parties

1. Agency

The Agency asserts that the proposal is contrary to management's § 7106(a)(2)(B) right to assign work. SOP at 15. Specifically, the Agency reasons that the proposal would restrict the Agency from determining which employees would be assigned to the training cadre. *Id.*

2. Union

The Union contends that the proposal is a procedure intended to minimize the impact of changes associated with the establishment of the Lufkin Sector by creating a training committee chosen by seniority. Response at 14.[6]

6. The Union also argues that, because the Agency did not submit a statement concerning Proposal 9, the Authority should deem the allegation of non-negotiability withdrawn. Response at 14. However, the Agency did submit a statement concerning Proposal 9. SOP at 15. Therefore, the Authority finds that the issue of Proposal 9's negotiability is properly before the Authority.

D. Analysis and Conclusions

1. Proposal 9 affects management's § 7106(a)(2)(B) right to assign work.

It is uncontested that the proposal affects management's § 7106(a)(2)(B) right to assign work. However, even if the proposal concerns the exercise of this management right, the proposal is nevertheless negotiable if it constitutes a procedure. *See NATCA, AFL-CIO*, 61 FLRA 336, 339 (2005) (*NATCA*) (proposal affecting management right under § 7106(a) nevertheless negotiable if it constitutes a procedure under § 7106(b)(2)).

2. The proposal constitutes a procedure under § 7106(b)(2).

It is also uncontested that the proposal is a procedure. The Union argues in its response that the proposal constitutes a procedure under § 7106(b)(2). Response at 14. The Agency did not address this claim in its SOP or file a reply. Therefore, the Authority finds that, consistent with the Agency's concession that the proposal is a negotiable procedure under § 7106(b)(2), this proposal is a negotiable procedure. *See* 5 C.F.R. § 2424.32(c)(ii)(2) (failure to respond to an assertion raised by other party will, where appropriate, be deemed a concession to that assertion); *NATCA*, 61 FLRA at 339 (where union did not dispute that provisions affected a management right, but agency failed to address union's claims that provisions constituted procedures, Authority determined that agency conceded that provisions constituted procedures and were therefore negotiable).

Based on the above, we find that Proposal 9 is within the duty to bargain.

IX. Proposal 10

A. Wording

Section 10: The Agency will provide space at all sectors for the posting of "strips" containing flight plan information for aircraft expected to be "non-radar."

Petition at 11.

B. Meaning

The parties agree that, under Proposal 10, the Agency would have to provide a small work area for ATCs to maintain printed flight plan information for aircraft expected to be outside the ATCs' radar coverage. Record at 4; Petition at 11. Employees are required to maintain this information. Record at 4; Petition at 11.

C. Positions of the Parties

1. Agency

The Agency asserts that the proposal concerns a permissive subject of bargaining over which it has elected not to bargain. SOP at 16. In this regard, the Agency contends that the "configuration of an operational work area" concerns the methods and means of performing work under § 7106(b)(1) of the Statute. *Id*.

2. Union

The Union argues that the configuration of work space to allow for the posting of certain flight plan information does not constitute a method and means of performing work. Response at 15. Rather, the Union claims that the proposal concerns the physical layout of ATCs' work space and ensures that sufficient space is allocated for maintaining the flight plan information. *Id.*

In addition, the Union contends that the proposal is negotiable as an appropriate arrangement. *Id.* In support, the Union argues that the proposal is designed to mitigate the impact of lack of sufficient space in the Lufkin Sector for the posting of such flight plan information. *Id.* In this regard, the Union argues that ATCs could be subject to disciplinary or performance-based action if they fail to post such information. *Id.*

D. Analysis and Conclusions

The Agency argues that the proposal would infringe on management's rights to choose the methods and means of performing work. SOP at 14. Even assuming that the proposal concerns the exercise of management's rights to determine the methods and means of performing work under § 7106(b)(1), the proposal is nevertheless negotiable because, for the reasons set forth below, it constitutes an appropriate arrangement. *See AFGE*, 58 FLRA at 617.

The Union argues that Proposal 10 is negotiable as an appropriate arrangement under § 7106(b)(3). Based on Authority precedent discussed *supra* Part IV.D, as the Agency does not dispute that Proposal 10 is an arrangement, we find that the proposal constitutes an arrangement.

With regard to whether the arrangement is appropriate, the Union asserts that Proposal 10 would benefit ATCs by preventing them from being subject to disciplinary or performance-based action for failing to post certain flight plan information. By contrast, the Agency does not contest that Proposal 10 is "appropriate." Weighing the demonstrated benefits to ATCs against the absence of asserted or demonstrated burdens on the right to choose the methods and means of performing work, we find that Proposal 10 is an appropriate arrangement under § 7106(b)(3) of the Statute. *See AFGE, Local 1367*, 64 FLRA at 871-72.

Based on the above, we find that Proposal 10 is within the duty to bargain.

X. Proposals 11 and 12

A. Wording

Proposal 11

> Section 11: There shall be no local or regional supplements or modifications of this Agreement authorized.

Petition at 12; Record at 4.

Proposal 12

> Section 12: Nothing in this Agreement shall be construed as a waiver of either Party's statutory or contractual rights.

Petition at 12.

B. Meaning

The parties agree that Proposal 11 would require that the agreement not be modified at the local level because it is national in scope. Record at 4.

The parties agree that under Proposal 12, the CBA would not constitute a waiver of either parties' statutory or contractual rights. *Id.*

C. Positions of the Parties

1. Agency

The Agency specifically states that it has no objection to the negotiability of Proposals 11 and 12. SOP at 17 & 18. However, the Agency does assert that the proposals are moot "in the absence of any negotiable proposals that would form the basis of [an agreement]." *Id.*

2. Union

The Union asserts that because Proposals 1 through 10 are negotiable, Proposals 11 and 12 are not moot. Response at 16.

D. Analysis and Conclusions

The Agency's only basis for asserting that Proposals 11 and 12 are non-negotiable is that they are "moot." The Agency's mootness claim is based on the premise that none of the Union's other proposals are negotiable. However, because we have determined that a number of the Union's other proposals are negotiable, we find that Proposals 11 and 12 are not moot, and that they are negotiable.

XI. Order

The Agency shall, upon request or as otherwise agreed to by the parties, negotiate with the Union over Proposals 2, 7, 9, 10, 11, and 12.[7] The petition for review as to Proposals 1, 3, 4, 5 and 8 is dismissed.

7. In finding these proposals to be within the duty to bargain, we make no judgment as to their merits.