

65 FLRA No. 49

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

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Charging Party/Union)

WA-CA-06-0706

DECISION AND ORDER

October 29, 2010

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

I. Statement of the Case

This unfair labor practice (ULP) case is before the Authority on exceptions to the decision of the Administrative Law Judge (Judge) filed by the Respondent. The General Counsel (GC) filed an opposition to the Respondent's exceptions.

The complaint alleges that the Respondent violated § 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (Statute) when it refused to participate in an arbitration proceeding with the Union in violation of § 7121 of the Statute. The complaint further alleges that the Respondent's participation was required by the parties' negotiated grievance procedure. The Judge concluded that the Respondent unlawfully refused to arbitrate in violation of § 7116(a)(1) and (8) of the Statute.

Upon consideration of the Judge's decision and the entire record, we adopt the Judge's findings, conclusions, and recommended Order.

II. Background and Judge's Decision

A. Background

The Union filed a grievance against the Respondent because the Respondent refused to upgrade the classification level of its Atlanta air

traffic control facility. Judge's Decision at 4. The classification level of a facility determines controllers' pay at that facility. *See U.S. Dep't of Transp., FAA*, 61 FLRA 634, 634 n.1 (2006) (*FAA*).

When the parties were unable to resolve the grievance, it was submitted to arbitration before Arbitrator Jerome Ross, who was selected from the national panel of arbitrators the parties had established pursuant to their collective bargaining agreement (CBA). Judge's Decision at 4. The parties agreed that the Arbitrator would first rule on the grievance's arbitrability, and, if he found it arbitrable, would resolve the grievance's merits in a separate stage of the proceeding. *See id.* Arbitrator Ross subsequently ruled that the grievance was arbitrable and the Respondent filed exceptions. *Id.*

While the exceptions were pending, the Respondent notified Arbitrator Ross and the Union that it was invoking its contractual right to unilaterally remove Arbitrator Ross from the national panel of arbitrators. *Id.* However, the Respondent did not inform the Authority of its action. *Id.*

The Authority subsequently issued its decision on the Respondent's exceptions, remanding the case to the parties. *FAA*, 61 FLRA at 634. In its decision, the Authority identified Arbitrator Ross by name, *id.*, stating further: "The grievance is remanded to the parties for resubmission to the Arbitrator, absent settlement, for further findings consistent with this decision." *Id.* at 636; *see also* Judge's Decision at 5.

When the Respondent refused to resubmit the grievance to Arbitrator Ross, the Union filed a ULP charge against the Respondent. *Id.* at 1. The GC subsequently issued a complaint and a hearing was held before the Judge. *Id.* at 1-2.

B. Judge's Decision

The Judge found that the Respondent committed a ULP when it refused to allow the grievance to be resubmitted to Arbitrator Ross. The Judge based this conclusion on his resolution of three key issues. Those issues are whether the parties' CBA allows a party to unilaterally remove an arbitrator from consideration of a pending grievance, whether the parties established a past practice allowing for the unilateral removal of an arbitrator after his or her selection to hear a grievance, and whether Arbitrator Ross should not continue to arbitrate the grievance because of bias resulting from his removal by the Respondent from the parties' national panel.

The Judge found that the Respondent did not have the contractual right to unilaterally remove the Arbitrator from consideration of the grievance. In the Judge's view, the relevant language of the CBA is unambiguous. That language, set forth in Article 9, § 11, states:

The Parties will create a national panel of three (3) mutually acceptable arbitrators. Each Party may unilaterally remove an arbitrator from the panel and another arbitrator shall be mutually selected to fill the vacancy. Within seven (7) calendar days after receipt of the request [to arbitrate], an arbitrator shall be selected from the panel by the Parties or by alternately striking names until one (1) remains or as otherwise mutually agreed.

Id. at 4 (quoting Respondent Ex. 1 at 26).

The Judge found that this language does not permit a party to remove an arbitrator from his or her assignment to a grievance during the pendency of the grievance. *Id.* at 7. Specifically, the Judge determined that the wording and order of the CBA's language reflect the parties' intent to distinguish the procedure for removing an arbitrator from the national panel, which is unilateral, from the procedure for selecting an arbitrator to hear a grievance, which is a joint process. *Id.* The Judge reasoned that, if the parties had wanted to allow for the unilateral removal of an arbitrator after joint selection to hear a grievance, then the CBA would have specifically stated this. *Id.* Furthermore, the Judge rejected the Respondent's contrary construction, that the CBA allows unilateral removal, because the Respondent's construction would lead to an incongruous result. In the Judge's opinion, "to accept the Respondent's construction . . . would be to allow for the removal of an arbitrator for any reason, including dissatisfaction with his preliminary rulings or a desire to redo the arbitration hearing." *Id.*

The Judge also rejected the Respondent's defense to the ULP complaint that the parties had a past practice of unilaterally removing an arbitrator after his or her joint selection. *Id.* The Judge found that the evidence did not substantiate the Respondent's claim. *Id.* Finally, the Judge rejected the Respondent's argument that Arbitrator Ross should not continue to arbitrate the grievance because of bias. *Id.* at 7. The Judge dismissed the Respondent's claim "out of hand," because "[t]o do otherwise would be to assume that Arbitrator Ross lacks the integrity to put aside any personal feelings

he might have because of his removal from the [national] panel by the Respondent." *Id.*

Accordingly, the Judge found that the Respondent violated the Statute. He recommended as a remedy that the Respondent be ordered either to cease and desist from refusing to participate in proceedings before Arbitrator Ross, or to cooperate in choosing another arbitrator if Arbitrator Ross was unavailable. *Id.* at 8. Finally, the Judge recommended that the Respondent be ordered to post a nationwide notice at all of its facilities where workers are represented by the Union. The Notice would notify the employees that the Respondent would not refuse to arbitrate the grievance before Arbitrator Ross or in any manner interfere with its employees' exercise of their rights under the Statute. *Id.* at 9-10.

III. Positions of the Parties

A. Respondent's Exceptions

The Respondent argues that it did not commit a ULP because it is the Union and not the Respondent that is refusing to arbitrate the grievance. Exceptions at 4. The Respondent claims that it is willing to arbitrate the grievance in accordance with the Authority's decision in *FAA*, 61 FLRA at 634; however, its position is that the arbitrator who hears the grievance cannot be Arbitrator Ross. *Id.* The Respondent alleges that it is the Union that is delaying the process by refusing to select a different arbitrator. *Id.* at 4-5.

The Respondent further claims that the Authority should reject the Judge's determination that the Respondent had no right to remove Arbitrator Ross because the Judge misinterpreted the pertinent contract provision. *Id.* at 5-9. Citing contract language concerning the unilateral removal of an arbitrator from the national panel,¹ the Respondent

1. In its exceptions, the Respondent cites to Article 9, § 9 of the parties' CBA, which provides that "[t]he Parties shall create a panel of three (3) mutually acceptable arbitrators in each FAA Region. Either Party may unilaterally remove an arbitrator from the panel and another arbitrator shall be mutually selected to fill the vacancy. Arbitrators selected for panels must also agree to hear expedited arbitration cases as provided in Section 16." Exceptions, Respondent Ex. 1 at 23. The Judge relies on Article 9, § 11 of the CBA, which is set forth above in section II.B of this decision. Article 9, § 11 is comprised of all of the relevant portions of § 9 regarding arbitrators on the national panel, plus additional language regarding how the parties may choose an arbitrator from the panel to hear a grievance.

asserts that the clear language of the CBA allows it to unilaterally remove an arbitrator from consideration of a pending grievance at any time and for any reason. *Id.* at 6-7, 8.

The Respondent also urges the Authority to reject the Judge's recommended order that the Respondent participate in proceedings before Arbitrator Ross. The Respondent argues that Arbitrator Ross would be biased because of his awareness that the Respondent removed him from the national panel. *Id.* at 11. The Respondent posits that "any reinstatement of a terminated arbitrator would taint the impartiality of the procedures[.]" *id.* at 9, and "would have a negative [e]ffect" upon the outcome of the arbitration. *Id.* at 11.

Finally, the Respondent claims that, even if the Authority finds that the Respondent committed a ULP, the Authority should not order a nationwide posting because this case involves only an alleged contract violation rather than a violation of the Statute. *Id.* at 12. The Respondent argues that a nationwide posting is only appropriate when there is a statutory violation. The Respondent claims that if there is any violation at all here, it concerns only a question of contractual interpretation. *Id.*

B. GC's Opposition

The GC argues that the Judge properly rejected as irrelevant the Respondent's contention that it is willing to proceed with the pending grievance before a different arbitrator. *Opp'n* at 7. The GC notes that, while the Respondent cites cases regarding the need for an arbitrator to be removed where there is wrongdoing on the part of the arbitrator, here there is no such evidence of wrongdoing. *Id.* at 7-8.

The GC also contends that the contract language at issue does not specifically state that a party may unilaterally remove an arbitrator during the pendency of a grievance. *Id.* at 10. Furthermore, the GC alleges that there is no evidence that the parties had a past practice of unilaterally removing arbitrators after they had been selected to hear grievances. *Id.* at 10-11. In this connection, the GC asserts that there is only one documented attempt to do so – by the Union – and that this attempt was quickly rejected by both parties. *Id.* at 11.

The GC urges the Authority to reject the Respondent's argument that Arbitrator Ross should not continue as the arbitrator because he would be biased. *Id.* at 11-13. Specifically, the GC disagrees with the Respondent's position that the Arbitrator

cannot be neutral and unbiased in light of the Respondent's conduct. *Id.* at 11-12. The GC argues that to accept this position means that any time a party asks for an arbitrator to be removed for any reason, the arbitrator should subsequently recuse himself or herself based on bias, a result the GC describes as "highly unusual" and "harsh and inequitable[.]" *Id.* at 12. In addition, the GC points out that there is no precedent supporting this contention. *Id.*

Finally, the GC contends that a nationwide posting is appropriate. *Id.* at 13. In the GC's view, the Judge correctly found that the Respondent violated the Statute and the remedy he recommended is consistent with the relief ordered by the Authority in such situations. *Id.* at 14. Furthermore, the GC contends that a nationwide posting is appropriate because the unit is nationwide, the grievance involved the parties at the national level, and the Respondent's improper conduct emanated from its national office.² *Id.*

IV. Analysis and Conclusions

For the following reasons, we deny the Respondent's first two exceptions and dismiss the third exception.

- A. The Respondent committed a ULP by unlawfully refusing to participate in an arbitration proceeding pursuant to the parties' negotiated grievance procedure.

The Respondent argues that it is not refusing to arbitrate. Rather, the Respondent maintains that it wants to proceed to arbitration, but that the grievance cannot be resubmitted to Arbitrator Ross. The Respondent contends in this regard that the plain language of the contract concerning the right to unilaterally remove arbitrators from the national panel allows the Respondent to unilaterally remove Arbitrator Ross from consideration of the parties' pending grievance.³

2. The GC also argues that the Respondent attempts to bring new evidence before the Authority that was not presented to the Judge. *Opp'n* at 6. The evidence that the GC alleges that the Respondent presents to the Authority for the first time consists of facts such as that the parties have not used Arbitrator Ross since the Respondent removed him from the national panel and that the Union also once unilaterally removed an arbitrator from the panel. *Id.* at 6-7.

3. The Respondent also claims that the Authority's underlying decision upholding Arbitrator Ross's

1. Analytical framework.

Section 7121 of the Statute mandates binding arbitration for grievances that are not satisfactorily settled under the negotiated grievance procedure. *See* 5 U.S.C. § 7121(b)(1)(C)(iii). The Authority has found that an agency's refusal to participate in the arbitration process pursuant to a negotiated grievance procedure is in conflict with § 7121 of the Statute and is therefore a violation of § 7116(a)(1) and (8). *See Army Reserve Command*, 11 FLRA 55, 56 (1983). This is because a party's refusal to participate in the arbitration process results in the hindrance or obstruction of grievance resolution through binding arbitration, which is contrary to the mandate and intent of Congress in enacting § 7121. *Id.* In addition, choosing an arbitrator to hear a grievance, pursuant to the procedures the parties agree to for choosing arbitrators, is a fundamental component of the binding arbitration process. *Cf. AFGE, Local 1457*, 39 FLRA 519, 522, 528 (1991) (affirming Judge's finding that refusal to participate in selecting arbitrator is a ULP).

2. The Respondent's refusal to resubmit this grievance to arbitration before Arbitrator Ross constitutes a refusal to arbitrate.

The language in the CBA does not support the Respondent's claim that it is not refusing to arbitrate. In the matter before us, the process for selecting an arbitrator, set forth in Article 9, § 11 of the parties' CBA, addresses the selection of arbitrators in two different contexts: choosing an arbitrator to serve on the national panel and choosing an arbitrator who serves on the national panel to hear a grievance. As the Judge noted, when choosing an arbitrator to serve on the panel or filling a panel vacancy, Article 9, § 11 provides that the parties will act jointly. Judge's Decision at 4 (quoting Respondent Ex. 1 at 26). Section 11 also states that the parties may act unilaterally when removing an arbitrator from the panel. *Id.* (quoting Respondent Ex. 1 at 26).

However, when choosing an arbitrator to hear a grievance, the parties may only act jointly: they

either mutually agree on an arbitrator who serves on the panel or they take turns striking names until they have one candidate left to hear the grievance. Nothing in the CBA indicates that the parties intended to allow unilateral action regarding the selection or removal of a specific arbitrator to hear a grievance. Specifically, the CBA is silent regarding the parties' right to act unilaterally regarding an arbitrator that has already been jointly selected. This, in conjunction with the fact that the parties are contractually authorized to act alone regarding only the removal of arbitrators from the national panel, supports the Judge's conclusion that taking action regarding an arbitrator already jointly selected requires further joint action. The Respondent was not contractually entitled to unilaterally remove the jointly selected arbitrator. Therefore, the Respondent's refusal to allow Arbitrator Ross to hear the grievance is inconsistent with the procedures the parties have established for choosing arbitrators to hear grievances. Accordingly, we deny the Respondent's exception and find that the Respondent committed a ULP when it refused to resubmit this grievance to arbitration before Arbitrator Ross.

B. A remedy requiring the Respondent to participate in proceedings before the arbitrator would not be inappropriate due to arbitrator bias.

The Respondent claims that the Judge's recommended order that the grievance be submitted to Arbitrator Ross is inappropriate. In support of this contention, the Respondent claims that Arbitrator Ross would be biased because the Respondent removed him from the national panel. Exceptions at 11.

The Respondent provides no evidence or legal support to establish that Arbitrator Ross should be excluded from hearing the grievance based on bias in the circumstances of this case. Specifically, the decisions that the Respondent cites are not binding on the Authority and are inapposite because they contain factual scenarios different from the circumstances presented in this case.⁴ In addition, to accept the

determination that the grievance was arbitrable required the parties to resubmit the grievance to an arbitrator but not specifically to Arbitrator Ross. Exceptions at 2. However, in that decision, the Authority clearly indicated that the parties must resubmit the grievance to Arbitrator Ross. *FAA*, 61 FLRA at 636. Furthermore, upon receiving the Authority's decision in that case, the Respondent did not request reconsideration. *See* 5 C.F.R. § 2429.17.

4. For example, the Respondent relies on *Palmer Plastics, Inc. v. Rubin*, 108 N.Y.S.2d 514 (1951) (*Palmer Plastics*) to argue that Arbitrator Ross should be disqualified. However, this case concerns a very different factual situation. In *Palmer Plastics*, the arbitrator was chosen at a time when he was the personal attorney for both the president of Palmer Plastics and the respondent, who was a shareholder in Palmer Plastics. *Id.* at 516. However, by the time the arbitrator was called on to arbitrate a

Respondent's claim that Arbitrator Ross cannot now hear this grievance would only validate the Respondent's unlawful action. As the GC argues, it would be counterintuitive to find that Arbitrator Ross must now be removed due to bias against the Respondent that is the result of the Respondent's unlawful attempt to remove him. Opp'n at 11-12.

Finally, that the Respondent has vowed to file exceptions if Arbitrator Ross hears the grievance and finds against it has no bearing on the Authority's determination. As the Judge noted, either party may file exceptions to an arbitral award pursuant to § 7122 of the Statute. If the Respondent ultimately exercises its right to do so, its arguments will be considered by the Authority at that time. For these reasons, we deny the Respondent's exception that Arbitrator Ross cannot hear the grievance because he would be biased.

C. A nationwide posting is appropriate.

The Respondent argues that a nationwide posting is not appropriate. Exceptions at 12. Specifically, it claims that a nationwide posting is a remedy for a violation of the Statute, while the issue in this case concerns contractual interpretation. *Id.*

The Respondent's argument that a nationwide posting is not an appropriate remedy in this case is not properly before the Authority. Under § 2429.5 of the Authority's Regulations,⁵ the Authority will not consider issues that could have been, but were not, presented to an administrative law judge. *See, e.g., U.S. Dep't of Transp., FAA, Wash. D.C., 64 FLRA 410, 412-13 (2010).* Where a party makes an argument for the first time on exceptions that could have been, but were not, made before the judge, the Authority applies § 2429.5 to bar the argument. *See, e.g., id. at 413-14; U.S. Dep't of Transp., FAA, Houston, Tex., 63 FLRA 34, 36 (2008).*

Although the Respondent made several arguments before the Judge, there is no indication in

disagreement between the two, he no longer represented the president. *Id.* at 517. In addition, the arbitrator saw the shareholder socially and the arbitrator's wife had become involved in a business venture with the shareholder. *Id.* at 516-17. As a result of these circumstances and relationships, the court removed the arbitrator "in the interests of justice[.]" *Id.* at 520.

5. Section 2429.5 was amended October 1, 2010. *See Fed. Reg. 42,283 (2010).* For purposes of this case, we apply the previous version of the regulation that was in effect at all times relevant to the processing of this case.

the record that the Respondent argued, as it does in its exceptions, that a nationwide posting is an inappropriate remedy in this case. In fact, the Respondent did not address remedies in either the ULP hearing or its post-hearing brief. The Respondent could have, but did not, argue to the Judge what it believed constitutes an appropriate remedy if the Judge were to find that it committed a ULP. Accordingly, we dismiss the Agency's exception that the Judge's recommended remedy is inappropriate.⁶

VI. Order

Pursuant to § 2423.41 of the Authority's Regulations and § 7118 of the Statute, the United States Department of Transportation, Federal Aviation Administration shall:

1. Cease and desist from:

(a) Refusing to participate in proceedings before Arbitrator Jerome Ross in the 2004 grievance concerning the Respondent's failure to upgrade the Air Traffic Control (ATC) level of its Atlanta facility (ATC grievance).

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Participate fully in the proceedings before Arbitrator Ross concerning the ATC grievance.

(b) In the event that Arbitrator Ross is unavailable, cooperate in the selection of another arbitrator and participate fully in the proceedings before that arbitrator concerning the ATC grievance.

(c) Post at all of its facilities at which bargaining unit employees represented by the National Air Traffic Controllers Association are assigned copies of the attached Notice on forms to be

6. Because we are denying or dismissing all of the Respondent's exceptions, we do not need to address the GC's preliminary argument that the Respondent relied on evidence in its exceptions to the Authority that it did not bring before the Judge. The Respondent's exceptions have no merit, even taking into account all of the allegedly new evidence it presents to the Authority.

furnished by the Authority. Upon receipt of such forms, they shall be signed by the Administrator of the Federal Aviation Administration and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by other materials.

(d) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director of the Chicago Regional Office of the Authority, in writing, within 30 days of this Order, as to what steps have been taken to comply.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Department of Transportation, Federal Aviation Administration (FAA) violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT refuse to participate in proceedings before Arbitrator Jerome Ross in the 2004 grievance concerning the FAA's failure to upgrade the Air Traffic Control (ATC) level of its Atlanta facility (ATC grievance).

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL participate fully in the proceedings before Arbitrator Ross concerning the ATC grievance.

WE WILL, in the event that Arbitrator Ross is unavailable, cooperate in the selection of another arbitrator and participate fully in the proceedings before that arbitrator concerning the ATC grievance.

(Respondent Representative)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, then they may communicate directly with the Regional Director, Chicago Regional Office, whose address is: Federal Labor Relations Authority, 55 West Monroe Street, Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: (312) 886-3465.

Office of Administrative Law Judges

U.S. DEPARTMENT OF TRANSPORTATION
 FEDERAL AVIATION ADMINISTRATION
 WASHINGTON, D.C.

Respondent

and

NATIONAL AIR TRAFFIC CONTROLLERS
 ASSOCIATION
 Charging Party

Case No. WA-CA-06-0706

Thomas F. Bianco, Esq.
 John F. Gallagher, Esq.
 For the General Counsel

Patrick Daniel McGlone
 Jessica Bartlett
 For the Respondent

Sandra Riviears, Esq.
 Marc S. Shapiro, Esq.
 For the Charging Party

Before: PAUL B. LANG
 Administrative Law Judge

DECISION**Statement of the Case**

On September 20, 2006, The National Air Traffic Controllers Association, AFL-CIO (Union) filed an unfair labor practice charge (GC Ex. 1(a)) against the U.S. Department of Transportation, Federal Aviation Administration, Washington, DC (Respondent or FAA). On January 31, 2007, the Regional Director of the Chicago Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing (GC Ex. 1(b)) in which it was alleged that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (Statute) by refusing to participate in an arbitration proceeding in violation of §7121 of the Statute. The Respondent filed a timely Answer

(GC Ex. 1(e)) in which it denied that it had committed the alleged unfair labor practice.^{1/}

A hearing was held in Washington, DC on April 18, 2007. The parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of all of the evidence and of the post-hearing briefs submitted by the parties.

Preliminary Issue

The General Counsel moved to exclude all of the Respondent's evidence because the Respondent did not file its Pre-hearing Disclosure 14 days prior to the hearing as required by §2423.23 of the Rules and Regulations of the Authority. In fact, the Respondent did not file its Pre-hearing disclosure until I suggested to its counsel that he do so during the course of the pre-hearing conference which was held one week before the hearing.

Counsel for the Respondent presented two excuses for the late filing. One was that he had "inherited" the case from another attorney; the other was that the case had moved between two regional offices of the Authority. Neither of those excuses have the slightest merit. As to the first excuse, the Respondent's Answer was signed by its current counsel, thus indicating that he had responsibility for the case well before the Pre-hearing Disclosure was due. As to the second excuse, there is no logical connection between the transfer of the case between the Washington and Chicago regional offices and the Respondent's failure to comply with the pertinent regulation.

The above factors notwithstanding, neither the General Counsel nor the Union could identify any significant prejudice arising out of the late filing. Therefore, in order to allow the case to proceed on its merits rather than on a narrow, although important, procedural issue, I allowed the Respondent to submit testimony and evidence in accordance with its Pre-hearing Disclosure. It would be a serious mistake to interpret this ruling as establishing a precedent.

1. Shortly after the commencement of the hearing the Respondent amended paragraph 12 of the Answer so as to admit, with an explanation, that it had refused to submit the grievance to Arbitrator Ross (Tr. 13, 14).

Positions of the Parties

The General Counsel maintains that, by refusing to allow a pending arbitration to be resubmitted to Arbitrator Jerome Ross following a remand by the Authority, the Respondent breached its obligations under §7121 of the Statute. The General Counsel further maintains that the Respondent has failed to establish an affirmative defense under the collective bargaining agreement (CBA) between the parties. While, under the CBA, either party may unilaterally remove an arbitrator from the national panel, the CBA is silent as to the right of a party to unilaterally strike an arbitrator after selection. According to the General Counsel, the past practice of the parties is that an arbitrator may not be removed unilaterally after he or she has been selected to hear a specific grievance.

The Respondent maintains that the Authority's order of remand only requires that the pending grievance be resubmitted to arbitration, but not to any particular arbitrator. Therefore, the Respondent was entitled to exercise its contractual right to unilaterally remove Arbitrator Ross from the panel. The Respondent further maintains that the clear language of the CBA authorizes its action and that the parties have exercised their contractual right to unilaterally remove an arbitrator on numerous occasions.

The Respondent argues that, even if the Authority contemplated the remand of the grievance to Arbitrator Ross, the parties would not have been relieved of their obligation to proceed to arbitration if Arbitrator Ross was unavailable for any reason. The Respondent's exercise of its contractual right of unilateral removal rendered Arbitrator Ross unavailable, thereby obligating the parties to choose a different arbitrator. The Respondent emphasizes that it is not attempting to evade its obligation to resubmit the grievance to arbitration and has consistently expressed its willingness to cooperate with the Union in selecting another arbitrator. Furthermore, the Respondent was not motivated by a desire to influence the outcome of the pending grievance. Rather, it removed Arbitrator Ross because he engaged in unauthorized interest arbitration in another grievance.

The Respondent suggests that, since Arbitrator Ross is aware of his removal from the panel, his reinstatement would have a "negative affect [*sic*]" on the outcome of a future decision involving the

Respondent and cites precedent in support of the proposition that an arbitrator may be removed because of the appearance of bias. The Respondent further states that, if the pending grievance is remanded to Arbitrator Ross and if he sustains the grievance, it will appeal on the grounds of prejudice arising out of this case. Such an appeal would further delay the resolution of the underlying dispute.

Findings of Fact

The Respondent is an agency within the meaning of §7103(a)(3) of the Statute. The Union is a labor organization as defined by §7103(a)(4) of the Statute. At all times pertinent to this case the Union and the Respondent were parties to a CBA (Resp. Ex. 1). Article 9 of the CBA, entitled "**GRIEVANCE PROCEDURE**", states, in Section 11, Step 2 (p. 26):

The Parties will create a national panel of three (3) mutually acceptable arbitrators. Each Party may unilaterally remove an arbitrator from the panel and another arbitrator shall be mutually selected to fill the vacancy. Within seven (7) calendar days after receipt of the request [to arbitrate], an arbitrator shall be selected from the panel by the Parties or by alternately striking names until one (1) remains or as otherwise mutually agreed.

The Order of Remand

The facts surrounding the grievance at issue are undisputed. On March 9, 2004, the Union filed a grievance alleging that the Respondent wrongfully failed to upgrade the level of its Atlanta facility. The grievance was eventually referred to Arbitrator Ross and the parties agreed to bifurcate the grievance between the issues of arbitrability and merits. Arbitrator Ross ruled that the grievance was arbitrable and the Respondent thereupon filed exceptions. On July 27, 2006, the Authority directed the parties to resubmit the grievance to arbitration. (GC Ex. 1(b) and 1(e), ¶¶8-11).

Michael Herlihy, Respondent's Manager of Third Party Services for headquarters, testified that, at some point prior to the Authority's ruling on the Respondent's exceptions, the Respondent notified Arbitrator Ross and the Union that the Respondent

was removing him from the panel (Tr. 32, 34).^{2/} The Respondent apparently did not inform the Authority of the removal (Tr. 18).

The order of remand by the Authority is to be found at 61 FLRA 634 dated July 27, 2006. The first sentence of the decision, under "Statement of the Case", refers to "Arbitrator Jerome H. Ross", but his name is not mentioned again. The decision contains a number of references to "the Arbitrator"; in the final sentence, under "Decision", the Authority states:

The grievance is remanded to the parties for resubmission to the Arbitrator, absent settlement, for further findings consistent with this decision.

Past Practice

Although the evidence regarding past practice is also undisputed, the parties differ as to its significance. Marc S. Shapiro, an attorney for the Union, testified that, to the best of his understanding, the parties have in the past agreed to change an arbitrator after his selection but before he issued a decision. Shapiro further testified that he was unaware of any instance where such removal was effected unilaterally (Tr. 25).

Robert Taylor, the Director of Contract Administration and Training for the Union, described three incidents in which the parties agreed to remove an arbitrator after his selection (Tr. 39, 40).^{3/} Taylor also testified that, on August 21, 2002, as Director of Labor Relations for the Union, he sent a letter (GC Ex. 3) to Arbitrator Robert Harris notifying him that the Union was unilaterally removing him from the panel. Taylor was subsequently informed by William Osborne, outside counsel for the Union, that he could not unilaterally remove an arbitrator after his selection to hear a grievance. Taylor thereupon sent another letter to Arbitrator Harris on August 23 (GC Ex. 4) in which he rescinded the unilateral removal. Some time after Taylor sent the two letters to

Arbitrator Harris he received a letter from Elizabeth J. Head, a Labor Relations Specialist for the Respondent, (GC Ex. 5) protesting the Union's attempt to unilaterally remove Arbitrator Harris and expressing the assumption that the Union would honor its contractual obligations by proceeding with the grievance that was before Arbitrator Harris. According to Taylor, this was the only prior instance in which either of the parties attempted to unilaterally remove an arbitrator after he had been selected to hear a grievance (Tr. 40-45).

Herlihy testified that the parties have unilaterally removed arbitrators on a number of occasions. However, he only cited the instance involving Arbitrator Harris as an example of either party even attempting to unilaterally removing an arbitrator after his selection to hear a grievance (Tr. 31).

Discussion and Analysis

The Authority has long held that the failure of a party to proceed to and participate in arbitration is inconsistent with the intent of §7121 of the Statute and is an unfair labor practice in violation of §7116(a)(1) and (8), *Department of Labor, Employment Standards Administration/Wage and Hour Division, Washington, D.C.*, 10 FLRA 316, 320 (1982). However, this case does not present a classic instance of a refusal to arbitrate since the General Counsel does not contest the fact that the Respondent has consistently indicated its willingness to proceed with the pending grievance before an arbitrator other than Arbitrator Ross. The disagreement between the parties centers on the meaning of the order of remand by the Authority and the intent of Article 9, Section 11 of the CBA.

The Respondent is correct in its assertion that the order of remand does not specifically address the issue of the effect of its unilateral removal of Arbitrator Ross. That is so because, whether by design or oversight, the Respondent did not raise the issue with the Authority. Simple logic indicates that the Authority assumed that the grievance would be remanded to Arbitrator Ross unless he became unavailable for reasons other than the unwillingness of one of the parties to use his services. If the Respondent was convinced that it was contractually entitled to unilaterally remove the Arbitrator during the pendency of the grievance, it could have informed the Authority of its action prior to the issuance of the decision, thus affording the Authority the opportunity to eliminate any purported ambiguity.

2. The General Counsel's Pre-hearing Disclosure (GC Ex. 2) cites a letter from the Respondent to Arbitrator Ross dated October 12, 2005, by which he was removed from the panel. The letter itself is not in evidence.

3. It is unclear whether Shapiro and Taylor were referring to the removal of an arbitrator from the panel or simply from the adjudication of an individual grievance.

The aforementioned factors notwithstanding, the threshold issue is whether the Respondent was contractually entitled to unilaterally remove Arbitrator Ross from the panel or, more precisely, whether his unilateral removal had any effect on his status with regard to the pending grievance. In *Dept. of Veterans Affairs, Ralph H. Johnson Medical Center, Charleston, South Carolina*, 57 FLRA 495, 498 (2001) the Authority held that, in ascertaining the meaning of contractual language, the Administrative Law Judge is to follow standards and principles applied by arbitrators and federal courts. It is axiomatic that contractual intent must, whenever possible, be determined from the language of the contract itself. Extrinsic evidence of past practice may only be considered to resolve ambiguous contract language, *Quick v. NLRB*, 245 F.3d. 231, 247 (3d Cir. 2001).

While the contractual language in question does not specifically state whether the parties may unilaterally remove an arbitrator during the pendency of a grievance, it can hardly be considered to be ambiguous. In the first place, the paragraph which establishes the right of unilateral removal from the panel then goes on to describe the procedure for the selection of an arbitrator from the panel to adjudicate an individual grievance. This language demonstrates the intent of the parties to distinguish the process of removing arbitrators from the panel, which allows for unilateral action, from that of selecting arbitrators for grievances, which requires joint action. It strains credibility to suppose that the parties intended to allow the unilateral removal of an arbitrator from consideration of a pending grievance, a highly unusual procedure, without specifically saying so. There is nothing in the record to rebut the Respondent's assertion that it sought to remove Arbitrator Ross for reasons having nothing to do with the pending grievance. Nevertheless, to accept the Respondent's construction of the CBA would be to allow for the removal of an arbitrator for any reason, including dissatisfaction with his preliminary rulings in a pending grievance or a desire to redo the arbitration hearing.

The Respondent's reliance on past practice is misplaced. The undisputed evidence shows that, although the Union attempted to unilaterally remove an arbitrator after his selection to hear a grievance, it was advised by Union counsel that it could not do so and a responsible representative of the Respondent espoused the same position. Even if I were to accept

the far-fetched proposition, as put forward by the Respondent, that Head, as a Labor Relations Specialist, was not high enough on the management ladder to commit the Respondent to a contractual interpretation, the most that can be said is that past practice is neutral. The fact remains that the Union rescinded its unilateral removal of the arbitrator and that its decision to do so was not merely because it had a change of heart. The fact that the arbitrator later recused himself, almost certainly because of the Union's action, (Tr. 31) reinforces my conclusion that the parties did not intend to allow for unilateral removal of an arbitrator after his selection to hear a grievance.

I have dismissed out of hand any consideration of the Respondent's assertion that it will appeal an adverse decision by Arbitrator Ross because of the possibility of bias and that such an appeal would further delay the resolution of the underlying grievance. To do otherwise would be to assume that Arbitrator Ross lacks the integrity to put aside any personal feelings he might have because of his removal from the panel by the Respondent. The fact that the Respondent has made such an argument raises the question of whether it is attempting to induce the Union to abandon its position and to allow the grievance to go before another arbitrator.

Either party has the right to seek review of an arbitral award pursuant to §7122 of the Statute. However, it is unlikely that the Authority would set aside an award merely because of the possibility of bias arising out of a situation created by the Respondent.

The Remedy

It would be unrealistic not to anticipate the possibility that Arbitrator Ross might be unwilling or otherwise unavailable to hear the remainder of the grievance. I will therefore recommend an Order which requires the Respondent to cooperate in the submission of the grievance to another arbitrator if necessary.

For the foregoing reasons, I have concluded that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (8) of the Statute by refusing to allow the pending grievance to be resubmitted to Arbitrator Ross. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Issued, Washington, DC, July 13, 2007.

Pursuant to §2423.41(c) of the Rules and Regulations of the Authority and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that U.S. Department of Transportation, Federal Aviation Administration, Washington, DC (Respondent), shall:

PAUL B. LANG
Administrative Law Judge

1. Cease and desist from:

(a) Refusing to participate in proceedings before Arbitrator Jerome Ross in the 2004 grievance concerning the Respondent's failure to upgrade the Air Traffic Control (ATC) level of its Atlanta facility (ATC grievance).

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Participate fully in the proceedings before Arbitrator Ross concerning the ATC grievance.

(b) In the event that Arbitrator Ross is unavailable, cooperate in the selection of another arbitrator and participate fully in the proceedings before that arbitrator concerning the ATC grievance.

(c) Post at all of its facilities at which bargaining unit employees represented by the National Air Traffic Controllers Association are assigned copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Administrator of the Federal Aviation Administration and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced or covered by other materials.

(d) Pursuant to §2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Chicago Region of the Authority, in writing, within 30 days of this Order, as to what steps have been taken to comply.