

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

NATIONAL LABOR RELATIONS BOARD WASHINGTON, D.C.

Respondent

and

Case No. WA-CA-21088

NATIONAL LABOR RELATIONS BOARD UNION

Charging Party

Nelson A. Levin

For the Respondent

Christopher M. Feldenzer

For the General Counsel

Henrik M. Sortun

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 September 2, 1992, by the National Labor Relations Board Union, (hereinafter

called the Union), against the National Labor Relations Board, Washington, D.C., (hereinafter called the Respondent), a Complaint and Notice of Hearing was issued on November 30, 1992 by the Regional Director for the Washington, D.C. Regional Office, Federal Labor Relations Authority. The Complaint alleges that Respondent violated Sections 7116(a) (1), (5) and (8) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by refusing to furnish the Union a copy of Respondent's "Operating Plan for Fiscal 1992".

A hearing was held in the captioned matter on May 21, 1993 in Washington, D.C. 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. All parties submitted post hearing briefs on July 16, 1993, which have been duly considered.

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 represents four separate bargaining units of Respondent's employees. Two of the units are located in Washington, D.C. at Respondent's Headquarters and consist of (1) approximately 125 clerical or non-professional employees supervised by the General Counsel and (2) approximately 50 clerical or non-professional employees supervised by the Board members. The other two units are located in Respondent's Field Offices and consist of (1) approximately 800 professionals, i.e. attorneys and field examiners and (2) 400 clerical or non-professional employees. Each of the four bargaining units was covered by a collective bargaining agreement during part of Fiscal Year 1992, which commenced on October 1, 1991 and ended on September 30, 1992. The collective bargaining agreements covering the two Field Office units expired on February 27, 1992. The contracts covering the headquarter's units were in effect for the complete 1992 Fiscal Year.

Each of the above mentioned collective bargaining agreements contain provisions which allow Respondent to withdraw certain benefits provided for unit employees if Respondent should determine that money for such benefits does not exist within the budget for a particular year.⁽¹⁾ According to the terms of the collective bargaining agreements and the testimony of Union President Sortun, such contractual benefits subject to the availability of funds include, among other things, educational development, inter-office transfers for purposes of securing work experience, labor publications, per diem expenses for Union officials engaged in representational functions, payment for transfers from one office to another and performance awards.

With respect to the Respondent's budget, which in the first instance is dependent upon a Congressional appropriation, the record discloses that the Respondent's budget office begins around September of each year preparing an operating plan for the fiscal year commencing October 1. The initial preparation of the operating plan is not completed, however, until after the Respondent has received its Congressional appropriation. At such time the suggested and/or proposed operating plan is reviewed first by the Director of Administration who then submits it to the General Counsel, Deputy General Counsel and the Associate General Counsel for the Division of Operations-Management. There-after, the operating plan is revised in accordance with their suggestions and subsequently submitted to the Members of the National Labor Relations Board for their

approval.

The operating plans are guides to managers with respect to the funding of various programs under their supervision for the forthcoming fiscal year. During the course of the fiscal year managers routinely shift the money allocated to them from one program to another as surpluses and deficiencies arise in the various programs. Additionally, managers request and receive additional money from the budget office to fund their programs. The additional money disbursed by the budget office to a particular manager comes from savings accomplished by other managers in the operation of the programs under their respective supervision. Due to various exigencies, excessive case filings, etc., necessitating transfer of funds from one program to another, the operating plan is never set in cement and for all intents and purposes becomes inaccurate once a transfer is made from one program to another or from one manager to another, since such transfers are not reflected on the operating plan. With respect to the operating plan for fiscal year 1992 the record indicates that while such a plan was drawn up, distributed to the managers, and utilized by the managers, according to the uncontradicted testimony of Respondent's witnesses, it had never been approved by the Board members.

In fiscal years 1990 and 1991 due to budget restraints Respondent was forced to discontinue a number of contractual benefits. During fiscal year 1992 Respondent did not discontinue any contractual benefits due to budgetary considerations. In fact, according to the testimony of Mr. Sortun, during November 1991 he had a briefing by Mr. Hardy Darden of the budget office wherein he was informed that Respondent anticipated that there would be full contract benefits for the 1992 fiscal year.

By letter dated May 22, 1992, Union President Sortun requested Respondent to supply the Union with a copy of the Respondent's "FY '92 Operating Plan". The letter further stated that "this information is requested pursuant to 5 USC 7114(b)(4) and analogous provisions of extended/recently expired collective bargaining agreements covering Headquarter and Field unit employees".

By letter dated June 23, 1992, Respondent's Labor Relations Officer formally responded to Mr. Sortun's May 22, 1992 letter. The letter stated in pertinent part as follows:

Inasmuch as, inter alia, negotiated employee benefits have not been diminished or eliminated as the result of budgetary consideration, we have not been able to discern the necessity of information to the NLRBU in fulfilling its representational obligations. . . . Thus, absent clarification as to the necessity of the information, such has not been provided.

Enclosed with the letter was a MOU drawn up in 1991 in settlement of an earlier ULP wherein Respondent had agreed to make future Operating Plans available to the Union where Respondent "has diminished or eliminated negotiated unit employee benefits".

The Union responded by letter dated July 17, 1992, wherein it stated in pertinent part as follows:

. . . the information requested is necessary for, but not limited to, the following reasons:

(1) Various provisions of the extended Headquarters Agreements and the expired Field Agreements are dependent upon budgetary considerations and/or staffing considerations. Staffing consideration is related to budget. Included are training benefits, including Bridge positions, exchange details, transfers, publications and Consultations. The operating plan will permit the NLRBU to evaluate the costs of these benefits vis-a-vis other Agency expenditures and prepare for budget eventualities during this and successive fiscal years.

(2) A number of grievances are pending, including in arbitration, which relate to the Agency budget and/or staffing. The operating plan will permit the NLRBU to better evaluate the merits of such grievances.

(3) Other matters not the subject of specific contractual provisions also depend upon the budget, i.e., overtime compensation, travel authorization, office furniture and equipment to name a few. The operating plan will permit the NLRBU to assess the propriety of Agency decisions in these regards and of possible bargaining demands.

(4) Field Agreements have expired, but, in regard to mandatory subjects of bargaining, the Agency must maintain established levels of benefits, some of which, as above, are conditioned on budgetary and/or staffing considerations. Also, the parties are presently in groundrule negotiations for the negotiation of successor agreements, which groundrule negotiations involve matters of money. Further, in order to prepare for those groundrule and successor agreement negotiations, the NLRBU needs to know the monies available for various matters.

(5) In both Headquarters and the Field we are negotiating Agency space and facilities which relate to budget. The operating plan will permit the NLRBU to make judgments regarding bargaining demands and whether or to what extent those demands which involve money may or may not be negotiable.

The record is devoid of any probative evidence indicating that budgetary considerations were ever advanced by Respondent as the basis for any action it may have taken during the 1992 Fiscal Year with respect to the benefits set forth in the various collective bargaining agreements⁽²⁾. To the extent that a grievance might have been filed concerning the failure to transfer an employee or to allow an employee to switch from full time employment to part time employment, again, there was no probative evidence indicating that budgetary considerations played any part in such actions by Respondent.

With respect to the Union's request for the 1992 Operating Plan and the reasons therefor, during the hearing Mr. Sortun reiterated and elaborated on the necessity for the requested information and went on to point out the numerous provisions of the collective bargaining agreements which were dependent on the availability of funds.

Conclusions

Counsel for the General Counsel and Counsel for the Union take the position that Respondent violated Sections 7116(a) (1), (5) and (8) of the Statute by refusing to furnish the Union with a copy of the Operating Plan for Fiscal Year 1992. Thus, according to the Union and the General Counsel the requested information is necessary in order for the Union to both police the collective bargaining agreements relative to Respondent claims of insufficient funds and to formulate intelligent bargaining proposals for new collective bargaining agreements to replace the recently expired ones covering field operations. Such proposals include, among other things, those aspects of the ground rules for the upcoming negotiations which involve money. Having the Operating Plan, the Union would be in a position to determine its priorities with respect to those contractual items that involve money.

Respondent, on the other hand, takes the position that the Union has not shown any particularized need for the Operating Plan. According to Respondent, due to the fact that the Operating Plan is not set in cement but rather constantly changing it would be of little or no use to the Union since the changes are not recorded on the Plan. Additionally, to the extent that the Union claims that it needs the Plan in order to police the collective bargaining agreements, Respondent points out that there has been no showing that during the 1992 Fiscal Year Respondent had cancelled any employee benefits set forth in the collective bargaining agreements in effect due to lack of funds.

Respondent further argues that release of the Operating Plan is forbidden by OMB Circular A-11 which provides in 12.9(d) entitled "Information available to the public" as follows:

An agency may disclose budgetary records of that agency, if otherwise appropriate, upon a request for such records pursuant to the Freedom of Information Act (FOIA) following the end of the fiscal year to which such information pertains.

Contrary to the contention of Respondent, I find in agreement with the General Counsel and the Union that the release of the Operating Plan for Fiscal Year 1992 is not precluded by OMB Circular A-11. A literal reading of OMB Circular A-11 makes it clear that such circular refers to requests by the public pursuant to the Freedom of Information Act (FOIA). It does not supersede Section 7114(b)(4) of the Statute which imposes a duty upon Respondent to furnish information to an exclusive representative which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of bargaining.

Inasmuch as it is clear from the record that the draft Operating Plan for Fiscal Year 1992 is reasonably available, the sole issue to be decided is whether the Union has a particularized need for the requested information.⁽³⁾

In this connection I find that the Union has established a particularized need for the requested information. Thus, the record establishes that collective bargaining agreements covering the Field Office professional employees contains upward of 10 provisions wherein benefits accorded employees are contingent on the availability of funds and that in prior fiscal years Respondent has failed to grant such contractual benefits to unit employees solely on the basis of unavailability of funds. While Respondent has not been shown to have denied any contractual benefits called for in collective bargaining agreements currently in effect, it has failed supply the publication entitled "Merit Systems Reporter" called for in one of the expired agreements "due to lack of funds".⁽⁴⁾ Additionally the record establishes that parties were negotiating the ground rules for the upcoming negotiations for new collective bargaining agreements covering the Field Office bargaining units.

The availability of funds was an important consideration in the ground rules negotiations since the Union was seeking reimbursement for the travel and accommodations expenses incurred by its designated negotiators.

In view of the foregoing considerations, all of which involve the expenditure of funds, I find that the Union needs the Operating Plan in order to police the existing collective bargaining agreements and to formulate intelligent proposals for both the ground rules and collective bargaining negotiations. With the information the Union would be able to decide whether to forego certain benefits in its current negotiations in order to secure others which would be of greater interest to its members. The same considerations would apply to any contemplated mid-term bargaining proposals with respect to the existing collective bargaining agreements.

As to policing the collective bargaining agreements, while there has been no showing that unavailability of funds has been cited by Respondent in defense of its actions with respect to the subject matter of the pending grievances, having the Operating Plan might well allow the Union to determine that non-availability of funds was indeed the true basis for the actions underlying the grievances and to take appropriate action based thereon. I further find that the Union's need to know outweighs any countervailing interests which Respondent might possibly have favoring non-disclosure of the Operating Plan.

Based upon the foregoing conclusions, I find that by failing and refusing to furnish the Union a copy of the Operating Plan for Fiscal Year 1992, Respondent violated Sections 7116(a)(1), (5) and (8) of the Statute. Accordingly, it is recommended that the Federal Labor Relations Authority issue the following Order designed to effectuate the purposes and policies of the Statute.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that National Labor Relations Board, Washington, D.C., shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the National Labor Relations Board Union (NLRBU), the exclusive representative of certain of its employees, the Operating Plan for Fiscal Year 1992, which was requested by the NLRBU on May 22, 1992.

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

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request, furnish the NLRBU the requested Operating Plan for Fiscal Year 1992.

(b) Post at its facilities in the United States where unit employees are employed, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Chairman of the National Labor Relations Board, 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 any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Washington Region, 1255 22nd Street, NW, 4th Floor, Washington, DC 20037-1206, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, March 31, 1994

BURTON S. STERNBURG

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish to the National Labor Relations Board Union, the exclusive representative of certain of our employees, the information requested by the Union on May 22, 1992, namely the Fiscal Year 1992 Operating Plan.

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 Federal Service Labor-Management Relations Statute.

WE WILL, upon request, furnish to the Union the information requested on May 22, 1992.

(Activity)

Date: _____ 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 any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Washington Region, 1255 22nd Street, NW, 4th Floor, Washington, DC 20037-1206, and whose telephone number is: (202) 653-8500.

Dated: March 31, 1994

Washington, DC

1. A typical contract provision reads as follows:

In the event budgetary considerations prevent the implementation or continuation of any benefit of this Agreement, which is expressly contingent on such considerations, the Board will not be obligated to continue the benefit after notice is given to the NLRBU that budgetary considerations prevent such payment. The Board agrees to notify the NLRBU concerning the decision to limit or discontinue the contractual benefit and, to the extent required by law, will bargain over the decision and effects of such decision. In the event the NLRBU seeks to bargain pursuant to this Section, it will not utilize . . . Grievance Procedure . . . or Arbitration on such matters.

2. The file does contain a letter from Respondent wherein, in answer to the Union's request for information dated March 27, 1992, Respondent listed all the publications and labor services that it had subscribed to. It also listed a number of publications that it had not subscribed to or renewed "due to the lack of funds". One such publication not subscribed to because of lack of funds was required by one of the collective bargaining contracts to be supplied if funds were available. The record indicates that the collective bargaining contract calling for the publication expired in February 1992 and that the Respondent had advised the Union that it had

no intention of adhering to those provisions of the expired collective bargaining agreement which dealt with permissive subjects of bargaining.

3. To the extent Respondent contends that the Operating Plan is not normally maintained and reasonably available because it has not been signed off by the Board members, I find such defense to be without merit since, admittedly, the so-called draft Operating Plan had been distributed to, and utilized by the respective agency managers.

4. The record does not indicate the date that the omitted

publication was due for renewal, i.e. before or after the expiration of the agreement and Respondent's announcement that it had no intention of retaining those provisions of the expired contract dealing with permissive subjects of bargaining. In this connection it is noted that the Authority has held that publications such as the Federal Times are linked to the work of the unit employees because they contain reports of the Court of Claims, FLRA, MSPB and Comptroller General, and as such constitute conditions of employment over which Respondent is obligated to bargain. U.S. Department of

Health and Human Services, Social Security Administration, Region X, Seattle, Washington, 37 FLRA 880.