DEFENSE DISTRIBUTION REGION WEST DEFENSE DISTRIBUTION DEPOT BARSTOW, BARSTOW, CALIFORNIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1482, AFL-CIO Charging Party	Case Nos. SA-CA-20491 SA-CA-20522

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **MAY 30, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

ELI NASH, JR.
Administrative Law Judge

Dated: April 28, 1995

Washington, DC

MEMORANDUM DATE: April 28, 1995

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: DEFENSE DISTRIBUTION REGION WEST
DEFENSE DISTRIBUTION DEPOT
BARSTOW, BARSTOW, CALIFORNIA

Respondent

and Case Nos. SA-CA-20491
SA-CA-20522

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1482, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

DEFENSE DISTRIBUTION REGION WEST DEFENSE DISTRIBUTION DEPOT BARSTOW, BARSTOW, CALIFORNIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1482, AFL-CIO Charging Party	Case Nos. SA-CA-20491 SA-CA-20522

R. Timothy Shiels, Esq.
For the General Counsel

Susan J. Pixler, Esq.
For the Respondent

Dale E. Boyce, President
For the Charging Party

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Pursuant to an unfair labor practice charge filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority, by the Regional Director for the San Francisco Regional Office, issued a Complaint and Notice of Hearing, as amended at the hearing, alleging that the Respondent violated section 7116(a)(1) and (5) of the Statute by unilaterally eliminating the compressed work schedule/ alternate work schedule for unit employees in five of its divisions without bargaining with the Union over the substance or the impact and implementation of the changes.

Respondent filed an answer denying that it had violated the Statute as alleged, and raising certain affirmative defenses.

A hearing in this matter was conducted before the under-signed in Barstow, California. Respondent and the General Counsel of the Authority were represented and afforded a full opportunity to be heard, to examine and cross examine witnesses, to introduce evidence and to argue orally. Briefs were filed by the Respondent and the General Counsel and have been carefully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and my evaluation of the evidence, I make the following:

Findings of Fact

A. Bargaining at Marine Corps Logistics Base, Barstow

Prior to March 16, 1992, the employees located at the Marine Corps Logistics Base, Barstow, California (MCLBB), were part of a nationwide bargaining unit of Marine Corps employees exclusively represented by the American Federation of Government Employees, AFL-CIO (AFGE). AFGE Local 1482, the Charging Party herein, was the authorized agent of AFGE to represent the employees located at MCLBB. In that capacity, and as authorized by the Master Labor Agreement (MLA) between AFGE and the U.S. Marine Corps, AFGE Local 1482 negotiated a local supplemental agreement (LSA) with MCLBB which became effective January 22, 1991. The LSA provided, in part, as follows:

> **Article 41: Compressed Work Schedule/Alternate Work Schedule**
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> Section 1. The Base will implement a work schedule of the 5/4/9 Plan. The Division Director will designate which work areas will implement or be excluded from the 5/4/9 Plan. In determining the basic work requirement for the 80 hour work period, the Division Director has the discretion to deter-mine the scheduled day off, Mondays or Fridays, to include alternating the work force on days off to provide work coverage for mission accomplishment.
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> Section 2. The basic work requirement of the 5/4/9 Plan will consist of 8 days at 9 hours and 1 day of 8 hours for the 80 hour pay period. Management will consider scheduling the first Monday or second Friday of the pay period as the

scheduled day off. Employees will be notified in advance of their basic work requirement (the number of hours and days of work).

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Section 4. If a shop or individual employee desires reconsideration of the Division Director's decision, the request will be submitted to the Division Director in accordance with Article 13, Section 8d(1) of the MLA.

* * * * * * * *

Section 8. If during the life of this LSA, this alternate compressed work schedule is determined to adversely affect finances or impair mission accomplishments, the base will notify the union in advance of their intent to effect a change in accordance with Article 4, Section 1 of the MLA.

Article 4, Section 1 of the MLA, referred to in Article 41, Section 8 of the LSA quoted above, states as follows:

Article 4: Bargaining During the Term of the Agreement

Section 1 The employer will notify the council of policy changes originating above the activity level that give rise to a bargaining obligation under the Statute. Where such changes originate at the activity level, the activity will notify the appropriate local union.

B. Creation of Defense Distribution Depot, Barstow at MCLBB

On March 16, 1992, as part of an ongoing realignment in the Department of Defense, the Defense Distribution Depot, Barstow--Respondent herein--was created as a separate activity within the Defense Logistics Agency (DLA) located

at the MCLBB.[1] As a result of the realignment, approximately half (i.e., 220) of the employees in the MCLBB unit represented by the Union were transferred to the Respondent and became part of the nationwide DLA bargaining unit. Accordingly, they became covered by the Master Agreement between DLA and AFGE but also remained covered by the LSA negotiated between MCLBB and the Union in January 1991 (see n.1).[2] More particularly, the transferred employees remained subject to the provisions of Article 41 in the LSA pertaining to Alternate Work Schedules (AWS).

C. Respondent Unilaterally Cancels AWS for Unit Employees

The parties stipulated, and the record shows, that between May 17 and June 1, 1992, the Respondent changed conditions of employment for unit employees by removing the employees in the Inventory Division, Systems and Procedures Section, Warehouse Division, Packaging and Shipping Division, and Product and Evaluation Division from their compressed work schedule/alternate work schedule. Specifically, the Respondent notified the Union in writing that all employees in the above-named divisions and sections would work an eight-hour shift, Monday through Friday, rather than continue on the 5/4/9 Plan then in effect.

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Organizationally, the Respondent became part of the DLA's Defense Distribution Region West (DDRW), headquartered in Stockton, California, which was formed on June 24, 1990 from components of the Army, Navy, Air Force and DLA. On that occasion, a Memorandum of Understanding (90-2) was executed which specified that all present and future bargaining unit employees represented by AFGE locals and incorporated into DDRW would be subject to the terms of the Master Agreement between DLA and AFGE (Joint Ex. 1), and that all other agreements applicable to these employees prior to their move to DLA would become supplements to the Master Agreement after the realignment and remain in effect until either a new supplement was agreed to by the parties, or for 18 months, whichever came first. The Memorandum of Understanding further provided that if no agreement were reached at the end of 18 months from the signing of the MOU (August 6, 1990), the parties would be considered at impasse.

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The employees transferred from MCLBB to DLA were warehouse personnel, and continued to perform the same functions in the same locations except that before the transfer they were exclusively responsible for distributing materiel to, and working on equipment for, components of the Marine Corps, whereas after the transfer they performed the same functions for the other military services as well.

Although the Union immediately requested bargaining with respect to the Respondent's decision to change the employees' work schedules, the Respondent notified the Union by letter dated June 1, 1992, that it refused to negotiate inasmuch as its actions were consistent with the terms of the LSA. More specifically, the Respondent relied upon (1) the LSA between the Union and the MCLBB that AWS may be terminated upon appropriate notice to the Union when the AWS schedule impairs mission accomplishments, a situation which the Respondent believed to be applicable to the employees in question; (2) MCLBB's similar position under the LSA, which was then
the subject of an arbitration case initiated by the Union; and (3) the sufficiency of its notice to the Union that AWS would be terminated for the affected employees. Respondent also stated that the Union could file a grievance if it wished to challenge management's decision to terminate AWS. Instead, the Union filed an unfair labor practice charge against the Respondent which led to the instant proceeding.

D. Events Occurring After the Respondent's Unilateral Termination of AWS for Unit Employees

On August 16, 1992, the arbitration proceeding referred to in the Respondent's June 1 letter was decided. In his award interpreting the identical contract provisions involved in this case, the arbitrator concluded (in agreement with the Union) that Article 41, Section 8 of the LSA requires notification and bargaining (in accordance with Article 4, Section 1 of the MLA) when management determines that AWS is "adversely affect[ing] finances or impair[ing] mission accomplishments" and therefore intends to effectuate a change in AWS. In so concluding, the arbitrator rejected MCLBB's contention that Article 41, Section 8 of the LSA is applicable and requires bargaining only when AWS is eliminated Base-wide rather than for certain groups of employees.[3] The arbitrator further rejected the contention that each Division Director's discretion under Article 41, Section 1 of the LSA to decide whether to initiate AWS for that Division's employees is applicable to situations where

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[3] Esther Gonzales, MCLBB's chief negotiator of the LSA, also testified in this proceeding. Specifically, she testified that Article 41, Section 8 of the LSA was intended to allow management to cancel the 5/4/9 Plan for the entire Base simply by notifying the Union in advance. She further testified that if AWS were cancelled only for certain divisions but not Base-wide, the Union would not be entitled to any notice. In either event, she testified, the Union was not entitled to negotiate over management's decision to cancel AWS. As noted above, the arbitrator rejected this interpretation of the LSA.

the issue is whether to terminate AWS for employees after the Division Director's discretion to implement AWS for them has been exercised. Finally, the arbitrator concluded that Article 41, Section 4 of the LSA--which allows employees to grieve their Division Director's decision to exclude them from AWS--is not inconsistent with requiring the employer to negotiate when it determines that AWS adversely affects finances or impairs mission accomplishments and therefore should be discontinued.[4]

When the Union brought the arbitrator's award to the attention of Ronald Pinson, the Respondent's Deputy Director, and demanded a return to the AWS program, Pinson refused to do so. According to Pinson, he telephoned DDRW Headquarters for guidance and was told that the agency was negotiating with all of the AFGE locals and would reach a

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The General Counsel contends that the arbitrator's award interpreting the LSA has become part of the agreement itself and is binding on the parties in this case. Conversely, the Respondent asserts that it was not a party to the arbitration between the Union and MCLBB, that the facts and circumstances in this case are far different from those before the arbitrator, and that the award in that case is irrelevant here. In my judgment, the arbitrator's award is neither binding nor irrelevant in this case. It is not binding because the Respondent was not a party to that earlier proceeding and cannot be precluded from litigating issues which may have been decided between those parties. Moreover, inasmuch as another arbitrator would not be bound by this arbitrator's award even if the parties and the issues were the same, see U.S. Department of Transportation, Federal Aviation Administration, Southern Region, Atlanta, Georgia and National Air Traffic Controllers Association, 47 FLRA 658, 663 (1993), and cases cited, such award cannot be considered binding in this unfair labor practice proceeding. Indeed, as the Authority has stated, Administrative Law Judges are empowered and required to interpret provisions in collective bargaining agreements where necessary to resolve alleged unfair labor practices. Internal Revenue Service, Washington, D.C., 47 FLRA 1091, 1103 (1993). On the other hand, the arbitra-tor's award involves an interpretation of the same contract provisions that are at issue here and thus cannot be considered irrelevant. Accordingly, while there is no need to defer to the arbitrator's interpretations, there is no need to disregard such interpretations to the extent they are persuasive.

separate supplemental agreement rather than be covered by the LSA between the Union and MCLBB.[5]

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[5] The record indicates that DDRW and the DLA Council of AFGE Locals negotiated concerning a number of subjects, including AWS, and that management declared an impasse concerning AWS on February 9, 1994. I take official notice that a request for assistance thereafter was filed with the Federal Service Impasses Panel (Case No. 94 FSIP 156) on several issues, including AWS, and that the parties thereafter were able to resolve their differences over AWS without the need for a formal Panel decision and order on that issue. See Department of Defense, Defense Logistics Agency, Defense Distribution Region West, Stockton, California and AFGE Locals of Defense Distribution Region West, AFL-CIO, Case No. 94 FSIP 156 (Feb. 23, 1995).

Discussion and Legal Conclusions

A. Threshold Issues

As stated above, the complaint alleges that the Respondent violated section 7116(a)(1) and (5) of the Statute by cancelling the alternate work schedule (AWS) Plan for unit employees in the Inventory Division, the Systems and Procedures Section, the Warehouse Division, the Packing and Shipping Division, and the Product and Evaluation Division, without negotiating with the Union concerning the decision to do so. In its answer, the Respondent denied violating the duty to bargain in good faith, specifically relying on Article 41, Sections 1 and 8 of the Local Supplemental Agreement (LSA) between the Union and MCLBB as justification for its unilateral action. More specifically, the Respondent asserted that the LSA clearly authorized management to discontinue AWS for unit employees simply by notifying the Union of its intentions in advance, and that it had no obligation to negotiate mid-term concerning matters clearly covered by the LSA.

At the hearing in this case, the General Counsel and the Respondent agreed that the unfair labor practice allegation should be resolved on the basis of how the LSA is properly interpreted: if the LSA permitted the Respondent to cancel AWS after notifying the Union that it deemed AWS to adversely affect finances or impair mission accomplishments, then the complaint should be dismissed; however, if the LSA's reference in Article 41, Section 8 to Article 4, Section 1 of the MLA required the Respondent not only to notify the Union of the foregoing but also to negotiate concerning the intended change in conditions of employment, then the Respondent's unilateral termination of AWS for unit employees constituted an unfair labor practice as alleged in the complaint.

In its post-hearing brief, the Respondent contended for the first time that the LSA's provisions should not govern the disposition of this case because, under Article 20,

Section 5 of DLA's Master Agreement with AFGE[6] and Memorandum of Understanding 90-2 (dated June 20, 1990) between the same parties,[7] the LSA "ceased to exist" before the Respondent cancelled AWS for unit employees. More

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[6] Article 20, Section 5 of the Master Agreement provides:

> HOURS OF DUTY
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> * * * * * * * *
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> SECTION 5 - ALTERNATIVE WORK SCHEDULES
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> Alternative Work Schedules (AWS) may be negotiated between PLFAs [Primary Level Field Activities] and DLA Council Locals in accordance with the following provisions:
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> A. The parties stipulate in writing that they will institute a AWS Program for an initial 6 month trial period.
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> B. At the end of the trial period, the parties may agree to extend the provisions of the program for a period of time agreed to locally.

[7] Memorandum of Understanding 90-2 provides, in pertinent part, as follows:

> a. Effective 24 June 1990, all AFGE . . . bargaining unit employees formerly of the Departments of the Army, Navy and Air Force . . . and of the Defense Depot Tracy California will move into the newly created Defense Distribution Region West (DDRW), and will be subject to the terms and conditions of the Master Agreement between DLA and the DLA Council of AFGE Locals (otherwise referred to as the Master Agreement).
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> b. . . . All other agreements applicable to these employees prior to the move to DLA will become supplements to the Master Agreement after the realignment. As supplements, they remain applicable only to the extent that they do not conflict with the Master Agreement. These agreements . . . remain in effect until the new supplement is agreed to by the parties, or 18 months, whichever comes first. So long as it is understood that if an agreement has not been reached at the end of the 18 months from the signing of this Memorandum of Understanding (MOU), the parties will be considered at impasse.

specifically, the Respondent asserted that when it notified the Union in mid-May 1992 that AWS would be discontinued for unit employees as of June 1, 1992, MOU 90-2 had been in effect for almost two years; that under MOU 90-2, local supplements such as the LSA which were applicable to employees prior to their transfer into DDRW would remain in effect for a maximum of 18 months; and that the parties would be considered at impasse if no supplemental agreement were negotiated between them within 18 months after the signing of MOU 90-2. Accordingly, the Respondent contends that it had the right to unilaterally change conditions of employment contained in the LSA on which the parties were at impasse where--as here--the Union has not sought the assistance of the Federal Service Impasses Panel after receiving notice of the impending change.

I reject this ingenious argument for several reasons. First, at all times material to this case, the Respondent acted--and sought to justify its actions--under the specific terms of the LSA. It neither bargained with the Union concerning the termination of AWS for unit employees nor notified the Union that the parties were at impasse over the issue. Indeed, the Respondent asserted that it could act unilaterally because the LSA negotiated between the Union and MCLBB in January 1991 gave it the right to do so if it determined that AWS was adversely affecting finances or impairing mission accomplishments. Under these circumstances, it is understandable that the Union would have no basis for believing that an impasse existed and that it should seek the Panel's assistance. Second, if the Respondent wished to rely upon additional contractual provisions--after the hearing closed--to justify its unilateral action, the appropriate method for doing so would have been a motion to reopen the record in order to introduce evidence concerning the proper meaning and application of those provisions.[8] This approach would have afforded the General Counsel an opportunity to challenge the meaning or applicability of those additional contractual

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[8] Cf. U.S. Department of Treasury, Internal Revenue Service, Washington, D.C., 40 FLRA 303, 308-09 (1991)(Authority rejected evidentiary exhibits attached to agency's exceptions which came into existence after close of hearing and therefore were not part of record, stating that proper procedure required motion to Judge under 5 C.F.R. § 2423.19 (k) to reopen hearing and introduce exhibits as evidence); see also Department of Housing and Urban Development, Region X, Seattle, Washington, 41 FLRA 363 (1991).

provisions at the hearing.[9] Finally, in the absence of evidence that the parties intended MOU 90-2 to apply in the circumstances of this case in the manner that the Respondent urges, I reject the Respondent's reading which would produce anomalous results. Thus, while the parties contemplated in 1990 that additional employees subsequently would be transferred into the newly-created DDRW beyond those identified as having been transferred in June 1990, there is no basis to conclude that the parties contemplated transfers occurring more than 18 months later. That is, when the parties agreed that supplemental agreements covering transferred employees would remain in effect for 18 months unless earlier superseded by a supplemental agreement between them, it is more likely that they intended such provision to apply to those employees already transferred into DDRW in 1990. To read that provision more broadly as applicable to the employees involved in this case--who were not even transferred from the Marine Corps to the newly-created Respondent Defense Distribution Depot Barstow (organiza-tionally part of DDRW) until March 1992--would produce the absurd result that the LSA became inoperative as to those employees in December 1991, i.e., four months before their transfer to the Respondent. In the absence of compelling evidence to support such a reading, I reject

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[9] This is exactly what occurred with respect to the testimony of Esther Gonzales which the Respondent offered concerning the purported meaning of certain provisions of the LSA which both parties agreed were pivotal to the disposition of this case.

it.[10] Accordingly, I conclude that the LSA was in effect and governed the rights and obligations of the parties when the Respondent unilaterally changed unit employees' conditions of employment by removing them from the 5/4/9 Plan effective June 1, 1992.

B. Article 41, Section 8 of the LSA Required the Respondent to Negotiate over the Decision to Terminate Alternative Work Schedules for Unit Employees

I now turn to the issue which the parties have agreed will resolve the underlying dispute in this case: whether the LSA, as properly interpreted and applied, authorized the Respondent to terminate the 5/4/9 Plan for unit employees unilaterally. The LSA is of critical importance because it is well settled that an agency's right to establish or terminate an alternate work schedule is subject to the duty to bargain both as to the substance and the impact and implementation of the decision. Defense Logistics Agency, Defense Industrial Plant Equipment Center, Memphis, Tennessee, 44 FLRA 599, 600 and n.1 (1992); U.S. Environmental Protection Agency, Research Triangle Park, North Carolina and American Federation of Government Employees, Local 3347, 43 FLRA 87, 92 (1991); American Federation of Government Employees Local 1934 and Department of the Air Force, 3415 ABG, Lowery AFB, Colorado, 23 FLRA 872, 873-74 (1986). Accordingly, unless the LSA authorized

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[10] Similarly, I reject the Respondent's contention that the complaint should be dismissed because the Union was not the proper party to request negotiations over the Respondent's decision to terminate AWS for the unit employees in question. Thus, the Respondent never rejected the Union's demand to negotiate on the basis that the Union lacked authority to bargain. Rather, the Respondent refused to negotiate purportedly because the LSA empowered it to act unilaterally. Moreover, when the Respondent decided to terminate AWS for its unit employees, notice was sent to the Union as the authorized agent of AFGE for the purpose of representing the Respondent's employees--the Union's status in this regard having been admitted in the Respondent's answer to the complaint herein. Finally, Article 20, Section 1 of the Master Agreement between DLA and AFGE states that "the establishment of work schedules and the administration of this Article [which specifically includes alternative work schedules] are matters for negotiation at the PLFA [primary level field activity] level." Inasmuch as the Respondent is a PLFA, and the Union is the agent of AFGE for representing the Respondent's employees, there is no basis for concluding that the Union lacked authority to request bargaining over the decision to discontinue AWS for the Respondent's unit employees.

the Respondent to terminate AWS for all of the unit employees, its admitted unilateral action in this regard constituted a clear violation of section 7116(a)(1) and (5) of the Statute.

In Internal Revenue Service, Washington, D.C., 47 FLRA 1091 (1993), the Authority concluded:

> [W]hen a respondent claims as a defense to an alleged unfair labor practice that a specific provision of the parties' collective bargaining agreement permitted its actions alleged to constitute an unfair labor practice, the Authority, including its administrative law judges, will determine the meaning of the parties' collective bargaining agreement and will resolve the unfair labor practice complaint accordingly.

Id. at 1103.[11] Since the Respondent raises the provisions of the LSA as a defense to the General Counsel's allegation that the unilateral termination of AWS for unit employees constituted an unlawful refusal to bargain under the Statute, I am required to interpret the LSA in order to decide whether the Respondent's defense is well founded.

The record indicates that the LSA between the Union and MCLBB which became effective in January 1991 was the result of two months of hard bargaining in which the Union initially proposed a work week of four 10-hour days with every Friday off. Respondent counter-proposed a 5/4/9 Plan "at the Division Director's discretion." The parties eventually agreed upon the 5/4/9 Plan, with each Division Director having the discretion to decide which employees in that Division would be covered and which ones would be excluded (Article 41, Section 1). For those employees or shops that were excluded from the AWS Plan, the parties agreed that a request for reconsideration could be submitted to the appropriate Division Director through the grievance procedures in the MLA (Article 41, Section 4). Finally, with respect to the termination of the AWS Plan after

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[11] In adopting this approach, the Authority noted that it not only had the power under section 7105(a)(2)(G) and (I) of the Statute to resolve unfair labor practice complaints and to take such other actions as are necessary and appropriate to effectively administer the Statute, but that its right to interpret collective bargaining agreements when necessary to resolve an unfair labor practice claim is consistent with the NLRB's recognized authority to do so in the private sector, citing NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967) and Local Union 1395, IBEW v. NLRB, 797 F.2d 1027, 1030 (D.C. Cir. 1986). Id. at 1104-05.

implementation, management proposed that "if during the life of this LSA, the alternate work schedule is determined to adversely affect finances or impair mission accomplishment, the base will effect a change."[12] The Union proposed a separate Section which provided that the MCLBB would notify the Union "in accordance with Article 4, Section 1 of the MLA" of any intent to effect a change if the alternate work schedule was "determined to adversely affect finances or impair mission accomplishments." The Union's proposal eventually was adopted by the parties as Article 41, Section 8 of the LSA. As previously quoted, the precise language agreed upon was as follows:

> Section 8. If during the life of this LSA, the alternate compressed work schedule is determined to adversely affect finances or impair mission accomplishments, the base will notify the union in advance of their intent to effect a change in accordance with Article 41, Section 1 of the MLA.

Thus, it is clear--and undisputed by the parties--that Article 41, Section 8 of the LSA would apply to situations where a Division Director had exercised his or her discretion to include all or certain employees in that Division under the AWS Plan, and where management subsequently determined that a change was necessary for one of the reasons stated in Section 8. Under these circumstances, the parties further agree, the base (i.e., MCLBB) was required to notify the Union, in advance, of its intention to effect a change in the AWS Plan. The disagreement arises with respect to whether the Union was merely entitled to advance notice (as claimed by the Respondent) or whether it also had the right to negotiate over the proposed change in the existing AWS Plan (as claimed by the General Counsel and the Union). For the reasons stated below, I conclude that the Respondent was obligated by the terms of Article 41, Section 8 of the LSA to bargain as to the decision to terminate the AWS Plan for its unit employees.

The starting point in my analysis is the language of Article 41, Section 8 of the LSA. The key phrase in that provision is "in accordance with Article 4, Section 1 of the MLA." Thus, if the Respondent's only obligation under Article 41, Section 8 of the LSA were to notify the Union in advance concerning an intended change in the AWS Plan, there would have been no need to refer to Article 4, Section 1 of the MLA at all. The latter phrase would have been

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[12] Under this proposal, the Union would not have had the right to notice of, or the opportunity to negotiate over, management's decision to change or discontinue the AWS Plan.

superfluous. In my view, the only reason why the parties to the LSA would have referred to Article 4, Section 1 of the MLA is because that provision specifically requires notice to the Union when management has decided to change policies "that give rise to a bargaining obligation under the Statute." The removal of unit employees from the AWS Plan after they had been included through the exercise of management's discretion would constitute a change in policy giving rise to a statutory bargaining obligation. The incorporation of Article 4, Section 1 of the MLA into the language of Article 41, Section 8 of the LSA therefore compels the conclusion that notice to the Union and an opportunity to bargain were required when the Respondent decided to change the unit employees' conditions of employment by removing them from coverage under the AWS Plan.

The other provisions of the LSA support the foregoing interpretation. Thus, the parties to the LSA separately provided that the Division Directors had the discretion to choose which employees would be included in the AWS Plan and that those employees who were excluded had the right to challenge the exercise of the Division Director's discretion through the negotiated grievance procedures of the MLA. This suggests that the parties intended to treat in a different manner those employees who were included under the AWS Plan through their Division Directors' exercise of discretion but subsequently were chosen by management for exclusion. The fact that the parties did not provide for any means of challenging the removal of employees from the AWS Plan[13]--a far more disruptive decision than excluding them from the AWS Plan at the start[14]--suggests that the parties contemplated bargaining before such a decision could be implemented.

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As I interpret Article 41, Section 4 of the LSA, it applies only where an employee or a shop has been excluded from the AWS Plan by virtue of a Division Director's discretion, and wishes to seek reconsideration of that discretionary determination. It does not apply where a Division Director exercises discretion to include employees in the AWS Plan but management later decides that such employees should be removed from the Plan.

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Obviously, employees who are chosen to participate in the AWS Plan thereafter form carpool, day care and other arrange-ments based upon their revised work schedules which may be far more difficult to undo and therefore would be far more disruptive to them than if they had never been included at the outset and thus never had the need to make such new arrangements.

Finally, in agreement with the arbitrator who previously interpreted and applied these provisions of the LSA in similar circumstances, I find it "simply not reasonable [to conclude] that the Union--which bargained hard for the alternate work schedule plan and proposed the language in Section 8 requiring bargaining--would have agreed to such a proposal." Stated differently, I conclude that the Union would not have proposed and fought for the language in Section 8 if it simply required management to notify the Union before unilaterally removing employees from the AWS Plan. Indeed, there is nothing in the record to suggest that the Union intended its proposal to have such a limited effect.15

Accordingly, I conclude that the Respondent violated section 7116(a)(1) and (5) of the Statute by unilaterally removing unit employees from the AWS Plan, thereby changing

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While Esther Gonzales, management's chief negotiator of the LSA, testified as to what MCLBB intended Article 41, Section 8 of the LSA to mean (see n.3), she never disputed that the Union intended its proposal to require substantive bargaining over any management decision to remove unit employees from the AWS Plan. Moreover, I discount Gonzales' testimony concerning the LSA's meaning because her testimony has been contradictory and inconsistent. Thus, before the arbitrator, she testified that the Union would have been entitled to notice and an opportunity to bargain if management had decided to eliminate the AWS Plan Base-wide rather than in one branch of a division. In this case, however, which did involve a determination to eliminate the AWS Plan altogether, Gonzales testified that the Respondent was merely obligated to notify the Union of its decision but had no duty to bargain. These inconsistent interpretations appear to be result-oriented, and therefore are entitled to little weight. In any event, as previously stated, and in agreement with the arbitrator, I find that the Union's interpretation of Article 41, Section 8 of the LSA is more reasonable and I adopt it.

their conditions of employment,[16] because Article 41, Section 8 of the LSA which was applicable to those employees did not authorize the Respondent to take such action unilaterally.[17]

C. The Appropriate Remedy

The General Counsel has requested a status quo ante remedy in the circumstances of this case, inasmuch as the Respondent's unlawful unilateral change in conditions of employment involved a matter which was substantively negotiable and the Respondent has not established the existence of special circumstances which would make such a remedy inappropriate. Respondent has not taken a position with respect to the question of an appropriate remedy.

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[16] I reject the Respondent's assertion that the unfair labor practice forum is inappropriate in this case because the parties provided in Article 41, Section 4 of the LSA that Division Directors' decisions concerning the exclusion of employees from the AWS Plan would be subject to challenge through the negotiated grievance procedure. In the first place, I have concluded that Article 41, Section 4 of the LSA was intended to provide a forum to challenge a Division Director's exercise of discretion to exclude unit employees from the AWS Plan, not to cover subsequent decisions to reverse the original discretionary determination to include them. In any event, even if Article 41, Section 4 of the LSA extends to the latter situation, the Authority has previously held that an aggrieved person is not limited to the negotiated grievance procedure but may choose to pursue the matter in an unfair labor practice proceeding by virtue of the discretion afforded under section 7116(d) of the Statute. See, e.g., Internal Revenue Service, Washington, D.C., 47 FLRA at 1106.

[17] I want to emphasize that, in reaching this conclusion, I am not rejecting the Respondent's reasons for deciding to eliminate AWS for all of its employees. Indeed, the Respondent's declining work force may have made it far more difficult to accomplish mission requirements while the employees remained on a 5/4/9 Plan. However, this is not the question before me. The only issue here is whether the Respondent improperly refused to bargain over the decision to eliminate AWS before implementing that decision. I note that the parties subsequently did bargain over this issue in 1993 and reached an impasse which was referred to the Federal Service Impasses Panel. If that process had occurred in 1992, this entire proceeding would have been unnecessary.

I conclude, in agreement with the General Counsel, that a status quo ante remedy is appropriate in this case. Thus, as previously found, the Respondent admittedly terminated the established AWS Plan for all unit employees without bargaining over its decision to do so. Although the Respondent testified at the hearing that it took such action essentially because the decreasing employee complement was making it more difficult to meet established time frames for completing various work assignments while unit employees remained on the AWS Plan, there was no contention that special circumstances existed which would render a status quo ante remedy inappropriate--such as an inability to accomplish the Respondent's mission. Accordingly, I shall recommend that the Authority adopt the following remedial order, which has been imposed under similar circumstances in other cases. See Defense Logistics Agency, Defense Industrial Plant Equipment Center, Memphis, Tennessee, 44 FLRA at 600-01, 618-20; U.S. Department of the Air Force, 416 CSG, Griffiss Air Force Base, Rome, New York, 38 FLRA 1136, 1150-51 (1990).[18]

ORDER

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[18] I deny the General Counsel's request for an extraordinary remedy which would require the Respondent not only to reinstate the AWS Plan for all unit employees but to maintain that Plan for the same length of time that the employees had been unlawfully deprived of the Plan--i.e., from June 1, 1992 until the date of the Authority's order herein. The General Counsel cites a case, Marine Corps Logistics Base, Barstow, California, 44 FLRA 782, 800-01 (1992), in which a similar "time credit" was granted. In that case, however, the agency simply raised the price of a soft drink in its vending machines by five cents per can, so the Authority ordered a rescission of the price increase and a further decrease of five cents per can for the same number of days that the unilateral increase in price had been in effect. The circumstances in this case are far different. Ordering a similar "time credit" here would require the Respondent to maintain the AWS Plan even if further staffing decreases made it impossible for the Respondent to accomplish its mission. There was no similar risk in requiring the Marine Corps to reduce the price of its soft drinks by an additional five cents, even for a substantial period of time. Moreover, I note that the parties belatedly negotiated over the AWS Plan from mid-1993 until the Respondent declared a bargaining impasse in February 1994, thereafter referred the dispute to the Federal Service Impasses Panel, and apparently resolved the matter voluntarily during the pendency of this proceeding. Under these circumstances, I find that the extraordinary remedy requested by the General Counsel is inappropriate.

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 the Defense Distribution Region West, Defense Distribution Depot Barstow, Barstow, California, shall:

1. Cease and desist from:

(a) Unilaterally terminating the alternate work schedule (AWS) Plan for unit employees located at Barstow, California, without affording the American Federation of Government Employees, Local 1482, AFL-CIO, the authorized agent of the employees' exclusive representative, the opportunity to negotiate with respect to any proposed changes.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured them 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, reestablish the AWS Plan that was in effect for unit employees located at Barstow, California, prior to its unilateral termination on or about June 1, 1992, and afford the authorized agent of the employees' exclusive representative the opportunity to negotiate with respect to any proposed changes.

(b) Post at its facilities in Barstow, California, 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 Director of the Defense Distribution Depot Barstow 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, San Francisco Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., April 28, 1995.

ELI NASH, Jr.
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 unilaterally terminate the alternate work schedule (AWS) Plan for unit employees located at Barstow, California, without affording the American Federation of Government Employees, Local 1482, AFL-CIO, the authorized agent of our employees' exclusive representative, the opportunity to negotiate with respect to any proposed changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, reestablish the AWS Plan that was in effect for unit employees located at Barstow, California, prior to our unilateral termination of the Plan on or about June 1, 1992, and afford the authorized agent of our employees' exclusive representative the opportunity to negotiate with respect to any proposed changes.

(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 its provisions, they may communicate directly with the Regional Director, San Francisco Region, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, California 94103-1791, and whose telephone number is: (415) 744-4000.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, JR., Administrative Law Judge, in Case Nos. SA-CA-20491 and SA-CA-20522, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Dated: April 28, 1995

Washington, DC