UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION SEATTLE, WASHINGTON and DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION LYNDEN, WASHINGTON Respondents	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party AND DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION WASHINGTON, D.C. Respondent	Case Nos. SF-CA-02-0003 SF-CA-02-0060
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. SF-CA-03-0183

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been considered by an 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. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **APRIL 18, 2005**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

ELI NASH
Chief Administrative Law Judge

Dated: March 16, 2004
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: March 16, 2004

TO: The Federal Labor Relations Authority

FROM: ELI NASH
Chief Administrative Law Judge

SUBJECT: DEPARTMENT OF HOMELAND SECURITY
BORDER AND TRANSPORTATION SECURITY
DIRECTORATE, BUREAU OF CUSTOMS AND
BORDER PROTECTION
SEATTLE, WASHINGTON

and

DEPARTMENT OF HOMELAND SECURITY
BORDER AND TRANSPORTATION SECURITY
DIRECTORATE, BUREAU OF CUSTOMS AND
BORDER PROTECTION
LYNDEN, WASHINGTON

Respondents

and Case Nos. SF-CA-02-0003
SF-CA-02-0060

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

AND

DEPARTMENT OF HOMELAND SECURITY
BORDER AND TRANSPORTATION SECURITY
DIRECTORATE, BUREAU OF CUSTOMS AND
BORDER PROTECTION
WASHINGTON, D.C.

Respondent

and Case No. SF-CA-03-0183

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(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

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1 The charges in Case Nos. SF-CA-02-0003 and SF-CA-02-0060 were filed against the U.S. Customs Service. Effective March 1, 2003, pursuant to the Department of Homeland Security Act of 2002 and the Department of Homeland Security Reorganization Act (November 25, 2002), the Department of the Treasury, U.S. Customs Service transferred to the U.S. Department of Homeland Security. (G.C. Exh. 1 (gg) and Jt. Exh. 5.)

OALJ 05-21

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION SEATTLE, WASHINGTON[1] and DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION LYNDEN, WASHINGTON Respondents and NATIONAL TREASURY EMPLOYEES UNION Charging Party AND DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION WASHINGTON, D.C. Respondent and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case Nos. SF-CA-02-0003 SF-CA-02-0060 Case No. SF-CA-03-0183

Caroline M. Blessey, Esquire
David Goldfarb, Esquire
For the Respondents

J. Kenneth Donnelly, Esquire
For the Charging Party

Stephanie Arthur, Esquire
Vanessa G. Lim, Esquire
For the General Counsel

Before: ELI NASH
Chief Administrative Law Judge

DECISION[2]

Statement of the Case

On July 15, 2002, the Regional Director for the San Francisco Region of the Federal Labor Relations Authority (the Authority), issued separate Complaints and Notices of Hearing in Case Nos. SF-CA-02-0003 and SF-CA-02-0060. By order dated March 7, 2003, the undersigned granted a motion by the General Counsel to consolidate the two cases for hearing. The proceedings in Case No. SF-CA-02-0003 were initiated by a charge filed by the National Treasury Employees Union (Union or NTEU) on October 1, 2001. An amended charge in that case was filed on November 5, 2001. The proceedings in Case No. SF-CA-02-0060 were initiated by a charge filed on October 19, 2001. An amended charge in that case was filed on April 29, 2002.

On April 1, 2003, the Regional Director for the San Francisco Region issued a Complaint and Notice of Hearing in Case No. SF-CA-03-0183. The proceedings in Case No. SF-CA-03-0183 were initiated by a charge filed by the Union on December 2, 2002. An amended charge was filed on

[2] Upon motion by the General Counsel made during the hearing in this case, formal documents identified as General Counsel's Exhibits 1(a) through (ii) were admitted into evidence. The formal documents introduced were accompanied by an "Index and Description of Formal Docu-ments." Review of the record of the hearing showed that a number of the documents listed in the index and description were missing. Most of the missing documents pertain to motions for summary judgment that Respondent Seattle and Respondent Lynden submitted prior to the hearing and that were ruled on prior to the hearing. All of those documents had been submitted to the Administrative Law Judge hearing the case prior to the hearing. The only other documents missing are the original charges filed in Case Nos. SF-CA-02-0003 and SF-CA-02-0060. Both of those charges were amended prior to the hearing and copies of the amended charges were present in the formal documents. The absence of these documents from the hearing record does not affect my ability to render a decision in this consolidated case.

December 11, 2002, and a second amended charge was filed on March 27, 2003. At the pre-hearing conference, General Counsel's Motion To Consolidate Case No. SF-CA-03-0183 with Case Nos. SF-CA-02-0003 and SF-CA-02-0060 for the purpose of hearing and decision was granted.

The complaint in Case No. SF-CA-02-0003 alleged that the U.S. Customs Service, now Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Seattle, Washington, (G.C. Exh. 1 (gg)) (Customs Seattle or Respondent Seattle) violated section 7116(a)(1) and (5) of the Statute when it repudiated an agreement with NTEU concerning overtime staffing procedures for security checkpoints at Seattle-Tacoma Airport (Sea-Tac). The complaint in Case No. SF-CA-02-0060 alleged that U.S. Customs Service, now Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Lynden, Washington (Customs Lynden or Respondent Lynden) violated section 7116(a)(1) and (5) of the Statute by refusing to negotiate regarding the implementation of a midnight to 8 a.m. shift at the Port of Lynden, Washington. The complaint in Case No. SF-CA-03-0183 alleges that Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Washington, D.C. (Customs or Respondent) violated section 7116(a)(1) and (5) when the Seattle Port Director implemented numerous shift changes without affording the Union notice and an opportunity to bargain.

The Respondent Seattle and Respondent Lynden filed Motions for Summary Judgment in each case that were denied by Orders dated February 24, 2003 (G.C. Exhs. 1(x) and 1 (y)). On March 5, 2003, an Order was entered in each case denying Respondent Seattle and Respondent Lynden's Motions For Certification To File An Interlocutory Appeal (G.C. Exhs. 1(bb) and 1(cc)).

A hearing was held on June 11 and 12, 2003, in Seattle, Washington. The Administrative Law Judge who conducted the hearing subsequently became unavailable to issue a decision. The parties were advised of this fact and were offered the opportunity to request a new hearing. Each party has waived the right to a new hearing, and I have made my decision herein based on the record as a whole and the post-hearing briefs submitted by each party. The General Counsel filed a reply brief in Case No. SF-CA-03-0183 pursuant to a motion for permission to file a reply brief in that case, which was granted by Order dated August 1, 2003. The briefs and reply brief have been fully considered. On the basis of the

entire record, I make the following findings and conclusions.3

Findings of Fact

During the litigation of this consolidated case, the parties stipulated some of the facts. Some of those facts have been overtaken by events. Rather than set forth the stipulations in the body of this decision, they are set forth in an appendix to this decision. To facilitate readability of this decision, the following account is a synthesis drawn from facts contained in the parties' stipulations, subsequent related decisions issued by the Authority, and other facts established in the record of the hearing.

Background

NTEU holds exclusive recognition for a nationwide unit of employees of Customs; that unit includes employees in both Seattle and Lynden, Washington. Customs and NTEU are parties to a National Labor Agreement (NLA). Although that agreement expired in 1999, the parties continued to apply its terms in accordance with statutory requirements pending its renegotiation. In 1995, a National Inspectional Assignment Policy (NIAP) was implemented following negotiations with NTEU. The NIAP provided for the negotiation at the local level, i.e., below the level of recognition, of matters that came within the ambit of section 7106(b)(1) of the Statute including staffing levels and tours of duty. By letter dated August 2, 2001, the Assistant Commissioner, Human Resources Management at Customs notified the National President of NTEU that, "effective immediately," it would no longer be bound by provisions in the NLA in which the agency agreed to bargain over matters covered by section 7106(b)(1). Resp. Exh. 4. Customs noted that past implementation of its agreement to negotiate over (b)(1) matters had resulted in provisions on such matters being included in numerous agreements with NTEU. The letter advised that Customs did not intend to be bound in the future by any of those "(b)(1) provisions" in the NLA, NIAP, Local Inspectional Assignment Policies (LIAPs), and other agreements or memoranda of understanding currently in existence and transmitted a proposed revised NIAP to replace

3 Credibility determinations may be based on a variety of considerations including the consistency of the witness's testimony with other record evidence. Since the undersigned did not have the opportunity to view witnesses' demeanor, the credibility determinations herein are based on my review of the entire record.

the original NIAP negotiated in 1995. *Id.* The letter informed NTEU that Customs intended to implement the revised NIAP on September 30, 2001.

In response, NTEU proposed that the revisions to the NIAP be negotiated in conjunction with renegotiation of the NLA. Customs rejected NTEU's proposal to combine the negotiations. The parties were unable to resolve their disagreement concerning negotiations over the revised NIAP and Customs unilaterally implemented the revised NIAP on October 1, 2001. NTEU grieved that implementation and the grievance went to arbitration. The arbitrator found that Customs improperly failed to negotiate with NTEU prior to implementing the revised NIAP and ordered the parties to engage in prospective bargaining.

Both parties filed exceptions to the arbitrator's award with the Authority. In its ruling on the exceptions, the Authority found that Customs had not violated the Statute by its actions in implementing the revised NIAP and set aside the Arbitrator's award. *United States Department of the Treasury, Customs Service, Washington, D.C. and National Treasury Employees Union*, 59 FLRA 703 (2004) (*Customs Service*), *appeal filed*, No. 04-1137 (D.C. Cir., Apr. 22, 2004). In essence, the Authority found that the unilateral implementation of the revised NIAP was lawful.

The revised NIAP, which contained numerous provisions pertaining to scheduling, staffing, and overtime assignments, provided in relevant part as follows:

> 3. PRECEDENCE AND FUNCTION
>
> The policies and procedures contained in this Handbook take precedence over any and all other agreements, policies, or other documents or practices executed or applied by the parties previously, at either the national or local levels, concerning the matters covered within this Handbook.
>
> . . . No further obligation to consult, confer, or negotiate, either upon the substance or impact and implementation of any decision or action, shall arise upon the exercise of any provision, procedure, right or responsibility addressed or contained within this Handbook.
>
> 4. SUPERSEDED MATERIAL

> This Handbook supersedes and replaces NIAP Handbook Number HB 51200-02 dated June 1995, as well as all local agreements that address matters contained within this Handbook.

Resp. Exh. 3.

Case No. SF-CA-02-0003

In the immediate aftermath of the events of September 11, 2001, Customs was tasked with staffing security checkpoints at, among others, Sea-Tac with armed, uniformed inspectors. On September 18, 2001, Kathleen Sarten, the Area Port Director of the Area Port of Seattle, met with NTEU representatives and informed them that Customs had been directed to provide staffing at the airport security checkpoints and, based on the urgency involved, immediate implementation was required. On or about September 20, 2001, Customs began staffing security checkpoints at Sea-Tac. Some, but not all, of the security checkpoint assignments were staffed on an overtime basis.

At the hearing in this case, Thomas Geary, who in September 2001 was a Senior Customs Inspector in Seattle and Chapter President for NTEU, testified that he reached an oral agreement on matters relating to the security checkpoint assignment with Alberto Farias, who in September 2001 was the supervisor for the Contraband Enforcement Team and anti-smuggling unit. According to Geary, this agreement came about after he expressed "concerns as to the bargaining unit" to Farias and Farias "came back" and informed him that Farias' supervisor, Dan McClincy, had authorized Farias "to work out an agreement with the union." Tr. 43. The account of the contents of his discussions with Farias that Geary provided at the hearing was sketchy.[4] Piecing together information from Geary's testimony on direct and redirect, Joint Exhibit 5, and G.C. Exhibit 4, what emerges is that Geary was of the belief that he and Farias reached an agreement to staff a daily midnight to 8:00 a.m. work assignment at one of the checkpoints, which was located at the "south satellite," on an overtime basis by rotating employees drawn from the entire inspectional workforce on a

[4] During cross-examination, Geary acknowledged that his memory of events during the relevant time frame might be imperfect. Geary explained that during the last half of September 2001, he was working extended hours as a consequence of the events of September 11, 2001; spending time on union business; and completing the relocation of his household to Arizona in conjunction with his uncoming retirement, which took place at the end of September 2001.

daily basis using inverse seniority.[5] According to Geary, he and Farias agreed that the other checkpoints would be staffed using normal overtime assignment principles. Geary testified that the agreement he reached with Farias was not put in writing but was memorialized verbally and in an e-mail put out by Farias. The particular e-mail cited by Geary was dated September 21, 2001, contained a subject line "Staffing checkpoint from 0001-0800 weekdays," and stated in relevant part:

> Supervisors. Please pass this on to employees:
>
> We have been tasked with providing an armed presence at all security checkpoints at Sea-Tac Airport. The South Satellite will take care of staffing the checkpoint at the exit to the FIS during core hours with the rest being assigned on overtime. CET, Anti-Smuggling, Canine and OI will take care of staffing the four other checkpoints from 0800 to 2400. One checkpoint is open 24 hours and three others open at 0400. The three 0400-0800 jobs will be assigned on overtime daily by the boarding desk. The one remaining graveyard overtime shift will be rotated among all inspectors and CEO's in the port on the basis of inverse seniority beginning this Monday, 9/24. This should result in each person working it once ever[y] 2 1/2 months. By scheduling it in advance, officers should be able to adequately prepare for it or arrange swaps. This applies to the Monday thru Saturday ot jobs. We won't apply this to the Sunday overtime because the person assigned won't have to follow the job with his regular assignment. . . .

G.C. Exh. 4.

Farias denied that he had entered into an agreement with Geary and insisted that he was not empowered to do so. Farias also asserted that the decision to staff the midnight to 8:00 a.m. assignment on an overtime basis was made by someone above him in the management hierarchy but he didn't know who. Farias testified that initial plans were to use

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[5] From my reading of Geary's testimony about his discussion with Farias, it appears that Geary's primary focus was on expanding the pool of employees who would be tapped for the overtime assignment at the south satellite and determining which procedures would be used for select-ing particular individuals for the overtime assignments involved with staffing the security checkpoints.

12-hour shifts to staff the checkpoints, but he felt that would not work and changed the schedule back to two 8-hour shifts on regular time at all of the checkpoints plus an 8-hour overtime assignment to cover the hours between midnight and 8:00 a.m. at the "south terminal checkpoint."[6] Farias acknowledged that he had some discussions with Geary about how the checkpoints would be staffed but stated that he did not remember specifics. Farias conceded that he discussed deviating from previously negotiated overtime assignment procedures to staff the midnight to 8 a.m. assignment at the south satellite with the union, but denied entering into any agreement on that matter.

On or about September 24, 2001, Farias forwarded to Geary a copy of his e-mail that is quoted above accompanied by an e-mail from McClincy to Farias that commented on the latter's e-mail to supervisors. G.C. Exh. 4; Tr. 169-71. McClincy's e-mail to Farias stated as follows:

> Al,
>
> This is a new o.t. assignment procedure agreed to by NTEU and management during this extraordinary time: it is not based on hi-low or availability.

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6 Farias never explained the seeming inconsistency in his testimony on cross-examination that he made the change from 12-hour shifts to 8-hour shifts, i.e., two 8-hour shifts on regular time supplemented by overtime, with his testimony on direct examination that the decision to staff the period of midnight to 8 a.m. at the south satellite using overtime was made by someone in management other than and unknown to him. Sarten testified that she determined which work unit would be assigned to cover the security checkpoints but left the job of developing the schedules to the chief inspectors. Sarten also testified that she told the chief inspectors that if she hadn't given them enough staff to do the job, they were authorized to use overtime to meet additional staffing needs. If the testimony of both Sarten and Farias is accepted, it seems likely that it was Chief Inspector McClincy, who did not testify, who made the particular determination that midnight to 8 a.m. at the south satellite would be staffed by using overtime. Such a role for McClincy would be consistent with the fact that McClincy was the supervisor of Farias who was serving as "kind of the lead on the assignments for the checkpoints." Tr. 172. That is, if McClincy was one of the chief inspectors authorized by Sarten to use overtime if necessary and McClincy's subordinate was doing the hands on work in developing schedules, it seems likely that McClincy would have been the decision-maker on the matter.

> Please inform NTEU that this procedure applies only to this unique situation and does not establish a precedent for other mid to 8 assignments in the future. In addition the long standing policy NOT to approve trades that will create an increased cost to the government still applies, i.e. officers WILL NOT BE ALLOWED to trade a scheduled mid to 8 assignment for one that will coincide with their day off and therefore create a commute.
>
> Dan

G.C. Exh. 4 [Emphasis in original.]

When questioned about the reference in McClincy's e-mail to an agreement between NTEU and management, Farias stated that he assumed that McClincy had some discussion with Geary and insisted that he (Farias) hadn't entered into any agreement with Geary.

Sarten testified that only she could make agreements with the Union in the area port. Sarten stated that although she had on occasion delegated authority to negotiate with the Union, the delegatee could only negotiate but was not allowed to enter into an agreement. Sarten also testified that she did not authorize either Farias or McClincy to make any agreements with the union regarding staffing the checkpoints on overtime. According to Sarten, agreements generally were in the form of written documents that were signed by the members of the bargaining teams and the Port Director and Union chapter president.

Further muddying the water on the question of whether Respondent's representatives entered into an agreement with NTEU concerning the staffing of the security checkpoints is a letter dated September 25, 2001, to Sarten that is signed by Geary. In that letter, Geary informed Sarten that pursuant to Article 31 of the NLA, NTEU was raising a dispute concerning the assignment of employees to the checkpoints at Sea-Tac and complained that on September 20, 2001, "the agency changed tours of duty for all employees that it selected for this assignment."[7] Resp. Exh. 1. In the letter, Geary asserted that the agency's action constituted a violation of "Article 21, Section 3.A and Section 5.A." *Id.* During his testimony, Geary acknowledged that the signature on the letter was his but stated that he had no recollection of the letter. In explaining his

[7] Article 31 of the NLA is entitled Dispute Resolution Procedure.

inability to remember the letter, Geary cited the hectic nature of the time involved that resulted from the events of September 11 and his impending retirement. Thus, no explanation of the letter was afforded by the Union during the hearing in this consolidated case.[8]

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[8] It appears that the sections cited in the letter refer to portions of the NLA between the parties. Those sections provide as follows:

ARTICLE 21
HOURS AND LOCATIONS OF WORK

. . . .

Section 3.A. Except when the Employer determines that the Agency would be seriously handicapped in carrying out its functions or that costs would be substantially increased, it shall provide that:

(1) assignments to tours of duty are scheduled in advance of the administrative workweek over periods of not less than one (1) week;
(2) the basic forty (40) hour workweek is scheduled on five (5) days, Monday through Friday, when possible and the two (2) days outside the basic workweek are consecutive;
(3) the working hours in each day in the basic workweek are the same;
(4) the basic non-overtime workday may not exceed eight (8) hours;
(5) the occurrence of holidays may not affect the designation of the basic workweek; and
(6) breaks in working hours of more than one (1) hour may not be scheduled in a basic workday.

. . . .

Section 5.A. For employees who are required to work more than one shift, tour of duty, or varied working hours, assignments to shifts, tours of duty of varied working hours shall be scheduled at least two (2) weeks in advance and shall cover periods of not less than two (2) weeks.

Jt. Exh. 1(a).

On or about September 21, 2001, Customs issued a schedule for staffing of the midnight to 0800 overtime assignment at the south terminal Mondays through Saturdays that spanned the period September 24, 2001, through October 31, 2001, and designated a different inspector assigned each day. Customs adhered to that schedule through September 29. On October 1, 2001, Customs changed the midnight to 0800 assignment to a weekly rotated shift on regular time and, thus, eliminated overtime for that assignment. Under the new schedule, one inspector would be required to work the shift for an entire week. On October 10, 2001, the National Guard took over staffing the security checkpoints at Sea-Tac.

It is concluded that the record supports a finding that some sort of agreement was reached with Geary by lower-level managers Farias and McClincy. Although there may have been a difference in the view that the two sides had regarding the nature of the agreement, I find that there was certainly an agreement in the sense that they reached an accord on aspects of how the assignment to the security checkpoints should be implemented.[9] Specifically, the evidence supports a finding that there was agreement that assignment to the south satellite security checkpoint would be rotated through the entire inspectional workforce based on inverse seniority. Obviously, the agreement was premised on the assignment being overtime but it is not clear from the evidence presented whether this premise was a unilateral given from which a bilateral agreement as to implementation procedures followed or was itself the product of a bilateral agreement. That is, it is not clear whether McClincy shared the decision-making on this point with Geary. Moreover, although it is more than likely the Union would have desired that the assignment be compensated on an overtime basis, it does not appear that overtime as contrasted with regular time was an issue at the point Geary and Farias were engaged in discussions. Based on the evidence in the record, it is

[9] In my view, the evidence supports a finding that Farias was not authorized to enter into a collective bargaining agreement regarding the assignments to the security check-points. Nevertheless, it is concluded that the evidence supports a finding that Farias conveyed to Geary that he was authorized to work with Geary to address the latter's concerns. Thus it appears more likely than not that Farias did not inform Geary about the limits of his authority. This may have been because Farias did not realize that Geary might interpret their dealings as collective bargaining or hoped to develop a mutually agreeable solution for making assignments to the security checkpoints without any issue of collective bargaining arising.

found that although the designation of midnight to 8:00 a.m. at the south satellite security checkpoint as an overtime assignment was the premise on which the agreement with NTEU was based, the evidence does not establish that the overtime nature of the assignment was an actual feature of the bilateral agreement reached.

Case No. SF-CA-02-0060

This case involves the Port of Lynden, Washington. Prior to September 11, 2001, the Port of Lynden was open from 8:00 a.m. to midnight and closed from midnight to 8:00 a.m. Reflective of those hours of operation, employees assigned to that port worked two shifts-8:00 a.m. to 4:00 p.m. and 4:00 p.m. to midnight. On September 11, 2001, however, the port instituted a midnight to 8:00 a.m. shift in order to ensure that the port would be staffed on a 24-hour basis.

When the events underlying this particular allegation took place, Bonnie Tyler was serving as the Union's Steward at the Port of Lynden. Tyler testified that in her experience prior to September 11, there was one 3-month period when there was a midnight shift in effect at the Port of Lynden and that occurred in the year 2000. According to Tyler, assignment to the midnight shift during that period was accomplished by using volunteers.

Tyler testified that when she arrived at work on September 11, Port director Jeff Buhr informed her that a midnight shift was needed. The purpose of this shift was to have Customs personnel present for security purposes; the port would continue to remain closed during the hours of midnight to 8:00 a.m. Buhr advised Tyler that he would use volunteers to staff the midnight shift. Tyler testified that she recognized the need for the action and was in agreement with Buhr's decision. After a short period, however, the number of employees willing to volunteer for the shift dwindled and the system broke down. Buhr then switched to a system of rotating the employees assigned to the port through the midnight shift. According to Tyler, she was not entirely happy with the situation but acquiesced in the change as a temporary measure until she and Buhr could "talk about it, how we were going to cover this." Tr. 66. Buhr, on the other hand, perceived that Tyler agreed that the rotation was the only option and didn't "really" indicate any concerns with it. Tr. 184. By e-mail dated September 19, 2001, Buhr advised the inspectors at Lynden that he and Tyler had discussed the difficulty in staffing the midnight shift on a voluntary basis and agreed that it would be best to schedule the shift on a rotating

basis. G.C. Exh. 6. Buhr's e-mail further stated that the rotation would start September 30 and that the measure was a temporary one while "we are in heightened awareness." *Id.*

Tyler testified that she asked Buhr three or four times about bargaining over the change and when he was unresponsive, submitted a written request dated September 25, 2001. In that request, Tyler sought immediate post-implementation bargaining concerning the addition of the midnight shift and the "number of Inspectors assigned to Primary."[10] G.C. Exh. 5. According to Tyler, she "handed" the written request to Buhr on September 25 and under the advice of another NTEU official e-mailed or cc-mailed an additional copy to Buhr.[11] Tyler testified that she never received any written response from Buhr and that when she queried Buhr about a response he told her that he was instructed to "not even respond in writing." Tr. 70.

Buhr had no recollection or record of receiving a written request for bargaining from Tyler. On cross-examination, however, Buhr acknowledged that during the period between September 11 and October 1, 2001, he "probably" told Tyler that he was not authorized to negotiate regarding the midnight shift. Tr. 193. Moreover, Buhr characterized Tyler's input as "predecisional." Tr. 190. Once implemented, an employee's rotation to the midnight shift lasted for a 7-day stretch. According to Buhr, the midnight shift lasted about 4 or 5 months.

It is concluded that the record supports a finding that Tyler did indeed request post-implementation bargaining regarding the midnight to 8:00 a.m. shift. In this regard, there is written documentation supporting her claim. Although Buhr contends that he didn't receive the request, I conclude that what more likely happened was that with all

[10] The complaint in this case includes no allegation with respect to the number of inspectors assigned to "primary" but is limited to the issue of the midnight shift. Also, there was no other claim during the litigation of this case that Respondent Lynden violated the Statute by any actions it may have taken with regard to the number of inspectors assigned to "primary." Thus, the dispute before me encompasses only the implementation of the midnight to 8 a.m. shift.

[11] The only document submitted into evidence was a copy of the September 25 letter that Tyler testified she handed to Buhr. A copy of the e-mail or cc-mail was not placed into evidence.

that was going on after September 11, he simply forgot rather than Tyler's not giving it to him. It is also found that Buhr's acknowledgment that he probably told Tyler that he wasn't authorized to negotiate regarding the midnight shift is consistent with a factual scenario in which she asked for negotiations.

Case No. SF-CA-03-0183

This case involves the Port of Seattle. Within that port, Customs Inspectors work at a number of different locations. Prior to December 2002, the Customs Inspectors assigned to the passenger-processing unit at Sea-Tac, one of the locations within the port, worked a regular 6-day workweek, Monday-Saturday. Sunday assignments were routinely staffed on overtime. During fiscal years 2000, 2001, and 2002, alternative work schedules (AWS) were available to employees at the Sea-Tac passenger-processing unit during the months of November through March. Under AWS, inspectors could work a 4-10 schedule, which consisted of four, 10-hour days per week; or a 5-4-9 schedule, which consisted of 80 hours per pay period distributed over nine days. The inspectors also had the option of remaining on a traditional workweek consisting of five 8-hour days.

Prior to December 2002, employees assigned to the Automated Targeting System (ATS) unit and Vehicle and Cargo Inspection System (VACIS) unit in the Port of Seattle worked a 5-day workweek schedule, Monday through Friday. Work required on the weekends was performed on overtime.

On November 26, 2002, the Port of Seattle briefed Union Chapter Vice President, John Torre, regarding some impending changes. In conjunction with the briefing, the Port of Seattle provided a written document that identified a number of personnel changes described as necessary to meet its need to (1) send inspectors to the northern border in support of anti-terrorism efforts and (2) make significant reductions in overtime spending. Among the changes identified was the institution of a 7-day workweek for inspectors at the Sea-Tac passenger-processing unit.

By a letter dated November 27, 2002, that was addressed to Sarten as Port Director, Steven D. Bailey, the Acting President of NTEU Chapter 139, requested to negotiate the impact and implementation of the personnel changes proposed in the memorandum that had been given to Torre on November 26, 2002. Bailey also requested that the *status quo* be maintained pending negotiations. By letter dated December 5, 2002, Sarten declined to bargain. In that letter, Sarten stated that the planned personnel changes

were covered by the [revised] NIAP, and that pursuant to the [revised] NIAP there was no obligation to bargain the substance or impact and implementation of the changes. Sarten's letter stated that any local inspectional assignment policy "has been superceded by the NIAP." Jt. Exh. 6(i).

In December 2002, a 7-day workweek was implemented for inspectors at Sea-Tac as well as in the ATS and VACIS units and a 12:00 noon to 8 p.m. shift was added at Sea-Tac. At the hearing in this case, James Foley, the President of NTEU Chapter 139, testified that these changes deprived employees of the opportunity to work overtime and, thus, had a potential monetary impact on the employees.[12] Additionally, according to Foley, there were "social" impacts from employees working 12 noon to 8 p.m. and of having less discretion about working on Sundays in that it affected the ability of employees to engage in various activities such as athletic, cultural, and family events.

Analysis and Conclusions

The Positions of the Parties

The General Counsel

Case No. SF-CA-02-0003

The Complaint in this case alleges that Respondent Seattle violated section 7116(a)(1) and (5) by repudiating an agreement made with NTEU concerning procedures for staffing the security checkpoints at Sea-Tac. The General Counsel contends that the evidence establishes that Respondent Seattle entered into an agreement with NTEU that provided the midnight to 8:00 a.m. assignment at the South

[12] Foley also acknowledged that employees received a 50 percent premium for working on Sunday. The monetary difference between this premium and the overtime rate is not clear from Foley's testimony, however. Although in discussing the reasons that Sunday overtime was desirable Foley made a statement that implied that the overtime rate was double time, the record is not clear what rate applies to overtime for customs inspectors. In his testimony, Foley asserted that including Sunday in the workweek rather than treating it as an overtime day complicated matters for employees who were concerned about managing their overtime earnings in order to maximize their "high three" for retirement purposes. Foley's testimony in this regard identified the problem for employees as one of accounting rather than a loss of earnings.

Satellite checkpoint would be staffed on overtime and rotated daily based on inverse seniority.[13] The General Counsel argues that Respondent Seattle's action in establishing a regular shift to staff the midnight to 8:00 a.m. assignment and using weekly rather than daily rotation meets the Authority's test for repudiation. Specifically, the General Counsel urges that Respondent Seattle's action directly contradicted an unambiguous agreement reached with NTEU and, hence, constituted a clear and patent breach of that agreement. The General Counsel further asserts that the sole purpose of the agreement was to address the method for staffing the security checkpoints and, consequently, the action in converting the midnight to 8:00 a.m. assignment from overtime with daily rotation to a regular shift with weekly rotation went to the heart of the agreement.

The General Counsel believes that any claim by Respondent Seattle that the instant complaint is barred by section 7116(d) of the Statute based on a grievance that NTEU filed over the implementation of the revised NIAP should be rejected. In this regard, the General Counsel contends that because the NIAP grievance was filed subsequent to the charge underlying the complaint in this case it does not serve to bar the complaint.

The General Counsel maintains that any claim by Respondent Seattle that the Authority's "covered by" doctrine warrants dismissal of the complaint in this case should be rejected. The General Counsel argues that the covered by doctrine, which affords a defense to allegations of unilateral change, is inapplicable herein because the theory on which the complaint in this case is based is repudiation of an agreement as contrasted with unilateral change.

The General Counsel insists that Respondent Seattle cannot validly claim that its action in repudiating a local agreement reached on September 11, 2001, was permitted by section 7106(a)(2)(D) of the Statute. Although acknowledging that it was necessary for Respondent Seattle to assist in staffing airport security checkpoints in the aftermath of September 11, the General Counsel, nonetheless, argues it is spurious and nonsensical for Respondent Seattle to claim that an agreement reached after September 11, that was

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[13] The General Counsel asserts that if Respondent Seattle attempts to contradict McClincy's e-mail and claim that there was no agreement, an adverse inference should be drawn from the failure to call McClincy as a witness. In view of the above findings, it is unnecessary to make a determination on whether an adverse inference is warranted.

designed to deal with resulting national security issues, can be repudiated because of the events of September 11.

In this case, the General Counsel seeks an order requiring Respondent Seattle to cease and desist, make employees whole for lost pay with interest, and post a Notice to All Employees signed by the Director of the Port of Seattle.

Case No. SF-CA-02-0060

In this matter the essential allegation is that Respondent Lynden violated section 7116(a)(1) and (5) by implementing a midnight shift at the port and without bargaining over procedures and appropriate arrangements following implementation in response to NTEU's request that it do so. The General Counsel states that the implementation of the shift constituted a change in conditions of employment that had more than a *de minimis* impact on bargaining unit employees. The General Counsel does not dispute that Respondent Lynden had an immediate need to implement the shift in response to the events of September 11 and that normal advance notice and bargaining obligations could not be met. The General Counsel asserts that Respondent Lynden was still required to bargain following implementation.

The General Counsel also urges that Respondent's argument that the complaint in this case is barred under section 7116(d) based on the grievance over the implementation of the revised NIAP lacks merit. The General Counsel maintains that the NIAP grievance and the complaint arise from different factual circumstances and are based on different legal theories. The General Counsel also argues that because the change that is the subject of this case occurred prior to the implementation of the revised NIAP, the latter cannot be used as a defense to the allegations in this case. Insofar as Respondent Lynden's claim that its actions were taken in response to an emergency within the meaning of section 7106(a)(2)(D), the General Counsel points out that Respondent Lynden still had a duty to bargain over procedures and appropriate arrangements after implementation.

In this case, the General Counsel seeks an order requiring Respondent Lynden to cease and desist from implementing changes in working conditions without bargaining to the extent required by the Statute and post a notice to employees.

Case No. SF-CA-03-0183

This matter involves the alleged unilateral implementation of several changes in workweeks and tours of duty in the Port of Seattle. It is contended that the changes had a significant impact on bargaining unit employees.

The General Counsel maintains that the complaint in this case is not barred by section 7116(d) of the Statute because it did not involve the same issue and did not arise from the same factual circumstances as the revised NIAP grievance. Also, it is argued that Respondent's claim that the revised NIAP covers the changes that it made and that Article 3 of the revised NIAP permitted it to make the changes without any bargaining, should be rejected. In support of this argument, the General Counsel contends that the revised NIAP was not legally implemented and, consequently, is not lawfully in effect and cannot be relied on by Respondent to relieve it of its statutory duty to bargain over the changes that are the subject of the complaint in this case. Unfortunately, the arguments in this regard were based on an arbitrator's award that was subsequently set aside by the Authority. See *Customs* Service, 59 FLRA 703 (2004).

The General Counsel seeks a remedy including an order requiring Respondent to reinstate the *status quo ante*, make employees whole for pay and benefits lost, and post a notice to employees. The General Counsel contends that a *status quo ante* remedy is warranted under the criteria set forth in *Federal Correctional Institution*, 8 FLRA 604 (1980) (*FCI*). Addressing the FCI criteria, the General Counsel asserts that the evidence establishes that Respondent's actions with respect to its failure to bargain were willful and in bad faith and that the changes instituted by the Respondent had a significant effect on employees. The General Counsel argues that the Respondent has not presented any evidence that establishes that reinstatement of the *status quo ante* would be disruptive of agency operations. In this regard, the General Counsel maintains that in the event of a *status quo ante* remedy, the Respondent would retain the option of meeting any staffing needs outside regular shifts by using overtime assignments.

In its reply brief, the General Counsel argues that in accordance with the NLA, bargaining over procedures and appropriate arrangements relative to local changes occurs at the local level. In this regard, the General Counsel disputes a contention made by Respondent that with the implementation of the revised NIAP there was no longer any duty to bargain at the local level. The General Counsel asserts that this case does not involve any contention that

Respondent was obligated to bargain over substance but, is focused on the issue of bargaining obligations with respect to procedures and appropriate arrangements. The General Counsel contends there is no evidence in the record that Respondent withdrew from its agreement to bargain impact and implementation issues at the local level. In support of this contention, the General Counsel points to testimony by one of Respondent's witnesses at the hearing to the effect that Respondent had not rescinded local bargaining as to impact and implementation.[14]

The General Counsel also moved to strike assertions contained in the Respondent's brief as to facts that were not introduced in the record in the form of a stipulation or testimonial or documentary evidence. The General Counsel's motion to strike encompasses the portion of the background section of Respondent's reply brief that provide an overview of the Port of Seattle as well as "all references in Respondent's brief to purported facts . . . which are not presented on the record as evidence during the hearing." G.C. Rely Brief at 4. Other than its reference to the portion of the background section that provides an overview of the Port of Seattle, the General Counsel does not identify which specific statements in the Respondent's brief come within the ambit of its motion to strike. Accordingly, the General Counsel's motion to strike is hereby granted only to the extent of the portions of the background section of Respondent's brief providing an overview of the Port of Seattle that rely on facts not contained in evidence, to include the stipulations, presented at the hearing.

The Respondents

Case Nos. SF-CA-02-0003 and SF-CA-0060

The Respondents in these two cases largely make the same arguments with respect to both cases. To avoid the

[14] Specifically, the General Counsel cites the testimony of Dennis Reischl, a labor relations specialist with Respondent, who stated that although Respondent rescinded its election to negotiate on "(b)(1) topics," it "did not rescind local bargaining as to impact and implementation or, for that matter, any other thing that I'm aware of." Tr. 131. It should be noted, however, that Reischl also testified that in proposing the revised NIAP the Respondent sought to negotiate "up front" over procedures and appropriate arrangements that would be applied when the occasion arose and eliminate the need to bargain procedures and appropriate arrangements at the local level in the future. Tr. 132

repetition that would result if I set forth the arguments separately in each case, I shall combine them.

Both Respondents deny that they violated the Statute as alleged. In both cases, the Respondents maintain that there was a failure to prove the facts alleged in the complaints. In Case No. SF-CA-02-0003, Respondent Seattle asserts that the General Counsel failed to establish that there was an agreement reached between it and NTEU concerning the security checkpoint assignments at Sea-Tac. Respondent Lynden maintains that the evidence shows that Lynden Port Director Buhr, in fact, engaged in post-implementation bargaining with NTEU representative Tyler.

Further, Respondents argue that even if the General Counsel proved the facts, there are legal defenses that provide a basis for dismissing the complaints.

The Respondents contend that the NIAP grievance serves to bar the complaint in this case under section 7116(d).[15] In support of this argument, Respondents claim that the complaints involve the same factual circumstances as the NIAP grievance, rest on a substantially similar legal theory as the NIAP grievance, and post-date the NIAP grievance. The Respondents characterize the factual basis of both the complaints and NIAP grievance as implementation of inspectional assignments on or about October 1, 2001. The Respondent asserts that this commonality is further demonstrated by the fact that at the NIAP arbitration hearing, NTEU presented testimony as to the events that underlie the complaints in these cases. As to legal theory, Respondents argue that both the grievance and the complaints involve allegations that Customs' implementation of inspectional assignment policy violates the Statute.

As to filing date, although Respondent Seattle acknowledges that the initial charge filed in Case No. SF-CA-02-0003 predated the NIAP grievance, it maintains that the charge was so vague it failed to raise an issue within the meaning of section 7116(d). Respondent Seattle argues that although the amended charge did clearly identify an issue, this clarification did not occur until after the filing of the NIAP grievance and, consequently, the NIAP grievance was the earlier filed of the two procedures for purposes of section 7116(d). In addition, Respondents argue

[15] The Respondents made substantially identical arguments in two Motions for Summary Judgment filed prior to the hearing in this case. The arguments were rejected in orders denying the Motions for Summary dated February 24, 2003. G.C. Exhs. 1(x) and 1(y).

that even if section 7116(d) is not applicable, the principles of collateral estoppel should bar the Union from bringing the same matter at the local level in these cases that was brought at the national level in the NIAP grievance.

The Respondents contend that the "covered by" defense applies with respect to the allegations in these complaints. More specifically, the Respondents contend that any changes to inspectional assignments were "covered by" the revised NIAP, which it claims expressly covers "virtually all aspects of the inspectional assignment process and places the authority for such assignments squarely within the discretion of the manager." Resp. Brief at 32. The Respondents characterize the revised NIAP as a lawfully implemented, national, bilateral agreement that, by virtue of its Sections 3 and 4, retracted existing local agreements and practices and eliminated local bargaining over inspectional assignments, effective October 1, 2001.

Lastly, Respondents argue that they were authorized under section 7106(a)(2)(D) to take the actions that they did with respect to inspectional assignments. In this regard, the Respondents contend that the events of September 11 created an emergency that came within the ambit of that section and that its actions were a necessary response to that event. The Respondents also assert that their actions with respect to inspectional assignments were essential to the necessary functioning of the agency.

Case No. SF-CA-03-0183

In denying the allegations of this complaint, Respondent asserts that the changes herein related to matters addressed by the revised NIAP. Thus Respondent contends that the Authority does not have jurisdiction in the case and supports its argument on essentially the same 7116(d) and collateral estoppel arguments that were made in the Seattle and Lynden cases. Respondent also reasserts the "covered by" claim made in the Seattle and Lynden cases.

Finally, Respondent argues that even if impact and implementation bargaining over NIAP-related issues were required, NTEU in Seattle had no right to insist on bargaining at the local level because recognition lies at the national level. Respondent contends, furthermore, that it had withdrawn from bargaining permissive subjects at all organizational subdivisions.

The Charging Party

In response to defenses Respondents raised that are bottomed on the revised NIAP, NTEU makes several arguments that apply to all three complaints.[16] NTEU argues that Section 3 of the revised NIAP, if accepted as valid, would waive its statutory rights to bargain. NTEU also contends that because waivers of statutory rights are a permissive subject of bargaining, it was not required to bargain over Section 3 and did not do so. Further, NTEU claims that Section 3 is unenforceable because it was implemented without NTEU'S agreement or acquiescence. NTEU asserts that Respondents' reliance on the "covered by" doctrine as a defense in these cases is misplaced. Finally, NTEU disagrees with the Respondents' contention that the revised NIAP is a bilateral agreement and argues that in the absence of such an agreement the "covered by" doctrine does not apply.

With respect to Case No. SF-CA-02-0003, NTEU contends that the evidence shows that Respondent Seattle entered into an agreement with NTEU to staff the midnight to 8:00 a.m. assignment at Sea-Tac on an overtime basis with daily rotation by inverse seniority. NTEU alleges that the evidence demonstrates that Respondent Seattle repudiated this agreement.

In response to Respondent Seattle's reliance on the NIAP grievance to support a claim that section 7116(d) bars the complaint in this case, NTEU insists that the issue of the revised NIAP was raised, in this case, by the Respondents as a defense and not by it or the General Counsel as a theory underlying the charge or complaint. NTEU argues that it should be the theories advanced in support of the charge, not those asserted as a defense, that determine whether a complaint is barred by section 7116(d). NTEU points out that Respondent Seattle's contention that section 7116(d) bars the complaint was previously rejected in the order denying that Respondent's motion for summary judgment. Assuming, however, the issue of section 7116(d) is revisited, NTEU claims under criteria articulated by the Authority, that section does not bar the complaint. Applying those criteria, NTEU asserts that the initial charge underlying the complaint in this case was sufficient to trigger the unfair labor practice process and predated the NIAP grievance. Further, NTEU contends that the complaint as well as the underlying initial and amended charge arose from different factual situations and are based on different legal theories than the NIAP grievance. Although NTEU acknowledges that the complaint was based on a

[16] These particular arguments predate the issuance of several Authority decisions that involve the revised NIAP.

legal theory that differed from that of the initial charge, it maintains that the complaint was nevertheless valid. NTEU thus asserts that even assuming that the initial charge was the same as the NIAP grievance in terms of facts and legal theories on which they were based, the difference in legal theories between the complaint and grievance render section 7116(d) inapplicable.

With respect to Case No. SF-CA-02-0060, NTEU claims that although it requested to negotiate the impact of the establishment of the midnight to 8:00 a.m. shift at Lynden, Respondent Lynden refused to do so. NTEU concedes Respondent Lynden's right to take immediate action to staff the shift, but contends Respondent Lynden was obligated to bargain post-implementation regarding the impact of the new shift. NTEU asserts that in view of the absence of any evidence that post-implementation bargaining would have impeded management from meeting any threat that existed after September 11, 2001, Respondent Lynden's defense based on section 7106(a)(2)(D) is baseless. Turning to Respondent Lynden's claim that section 7116(d) barred the complaint in this case, NTEU asserts that the complaint is based on a different set of factual circumstances and legal theory than the grievance.

NTEU concedes that the substance of the changes that are the subject of Case No. SF-CA-03-0183 was non-negotiable, but contends that it had the right to bargain over impact and implementation. Furthermore, NTEU disagrees with the Respondent's argument that it rescinded the prior agreement to engage in local-level bargaining over local changes. NTEU asserts that through Article 37 of the NLA the Respondent agreed to bargain local changes at the local level. NTEU argues that Respondent's notification dated August 2, 2001, that it was rescinding its election to bargain over section 7106(b)(1) matters does not relieve it of the obligation under Article 37 to engage in bargaining over local changes at the local level. NTEU acknowledges that bargaining below the level of recognition is a permissive matter but nonetheless maintains that Respondent did not provide it with adequate notice that Respondent intended to terminate its agreement in Article 37 to engage in such bargaining and, consequently, remains bound by the terms of that article. Lastly, NTEU contends that section 7116(d) does not bar the complaint in this case because it arose from different facts and is based on a different legal theory than the NIAP grievance.

As remedy, NTEU seeks an order requiring Respondent to provide back pay, restore the *status quo ante* and post a notice to employees.

Analysis

Section 7116(d) and collateral estoppel

In conjunction with all of these cases, Respondents insist that the complaints are barred by section 7116(d) and that collateral estoppel applies. Insofar as Case Nos. SF-CA-02-0003 and SF-CA-02-0060, the same arguments were made in pre-hearing motions for summary judgment and rejected in orders denying those motions. The orders denying the motions both state that the determination to reject those claims was:

> without prejudice to the right of the Respondent to take appropriate action if the General Counsel attempts to advance theories at the hearing which are, in effect, identical to those which the Union presented to the Arbitrator.

G.C. Exhs. 1(x) and (y). In reasserting its section 7116(d) and collateral estoppel claims in the post-hearing brief in these two cases, the two Respondents make no claim that the General Counsel attempted to advance theories at the hearing that were identical to those advanced before the arbitrator in the NIAP grievance. In the absence of such claim, I will not address Respondent Seattle and Respondent Lynden's contention that section 7116(d) and collateral estoppel bar consideration of the complaints in these cases further.

Respondent presents substantively identical section 7116(d) and collateral estoppel arguments in Case No. SF-CA-02-0183. In that case, however, the arguments were neither previously presented nor ruled on. Consequently, I will address them in this decision.

Pursuant to section 7116(d), an aggrieved party has the option of raising certain issues under a grievance procedure or as an unfair labor practice but not under both. In this particular case, the Respondent relies on the NIAP grievance as the basis of its section 7116(d) claim. There is no dispute that the NIAP grievance predated the unfair labor practice charge that initiated this case.

In order for an unfair labor practice charge to be barred under section 7116(d) by an earlier-filed grievance, the issue that is the subject matter of the charge must be the same issue that was the subject matter of the grievance. *See, e.g., United States Department of the Navy, Naval Surface Warfare Center, Carderock Division, Acoustic Research Detachment, Bayview, Idaho and International*

Association of Machinists and Aerospace Workers, District 160, Lodge 282, 59 FLRA 763, 764 (2004). The determination of whether an unfair labor practice charge and grievance involve the same issue focuses on whether the charge arose from the same set of factual circumstances and the theory advanced in support of the charge and the grievance is substantially the same. *See, e.g., OLAM Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California*, 51 FLRA 797, 801-02 (1996) (*Point Arena*). Only if both requirements are satisfied is the subsequent ULP barred by an earlier filed grievance. *See, e.g., id.*

The factual circumstances from which the NIAP grievance arose was the Respondent's implementation in October 2001 of a revised national policy, the revised NIAP, governing the assignment of, among others, inspectional personnel. The factual circumstances from which the charge in this ULP case arose was Respondent's implementation in December 2002 of several changes relating to work schedules in the Port of Seattle. Respondent argues that the subjects of the grievance and the unfair labor practice charge are tied together because the litigation relating to the revised NIAP grievance encompassed inspectional assignments made pursuant to the revised NIAP. It is found, however, that that the set of factual circumstances from which the grievance arose is not the same as that from which the ULP charge arose. In this regard, the record shows that the implementation of the various work scheduling measures in Seattle in December 2002 involved different actions and individuals than the implementation of the revised NIAP in 2001 involved. The NIAP grievance concerned the implementation of a policy governing inspectional assignments generally that was nationwide in scope. The individuals involved in the events relating to that implementation were national level officials from both the Union and Customs. The unfair labor practice charge in this case concerns the implementation of some specific changes in work schedules that were limited in scope to the Port of Seattle. The individuals involved in the events relating to the implementation of the Port of Seattle work schedule changes were officials from the Union and Customs at the Port of Seattle level. Additionally, it is noted that the actions that are the subject of the unfair labor practice charge occurred in December 2002, a point in time subsequent to the November 5, 2002, issuance of the arbitrator's award in the NIAP grievance.

Accordingly, it is concluded that the theories advanced to support both the NIAP grievance and the unfair labor practice charge are substantially the same. That is, in both the grievance and unfair labor practice charge, NTEU and/or the General Counsel, as relevant, allege that

Respondent violated section 7116(a)(1) and (5) by failing to fulfill its bargaining obligations prior to implementation. In view of the difference in factual circumstances, however, the requirements necessary for the NIAP grievance to bar the unfair labor practice charge under section 7116(d) are not met.[17]

Respondent argues that even if section 7116(d) does not apply, the doctrine of collateral estoppel does. As discussed in previous Authority decisions, "collateral estoppel, or issue preclusion, is part of the broader doctrine of *res judicata* that prevents a second litigation of the same issues of fact or law even in connection with a different claim or cause of action." *E.g., U.S. Department of Energy, Western Area Power Administration, Golden, Colorado*, 56 FLRA 9, 11 (2000) (*WAPA*). Five elements must be met for the doctrine of collateral estoppel to be applied. It must be demonstrated that:

> (1) the same issue was involved in both cases; (2) that issue was litigated in the first case; (3) resolving it was necessary to the decision in the first case; (4) the decision in the first case, on the issue to be precluded, was final; and (5) the party attempting to raise the issue in the second case was fully represented in the first case.

Id.

Even assuming that the doctrine of collateral estoppel has any application at all in the circumstances of this case,[18] I find that the issue raised in the unfair labor practice charge in this case is not the same as that raised in the NIAP grievance and was not litigated in the NIAP grievance. As discussed above, the issue in the unfair

[17] The other elements of section 7116(d) are: whether the issue was earlier raised under the grievance procedure; and whether the selection of procedures was in the discretion of the aggrieved party. *See, e.g., Equal Employment Opportunity Commission and American Federation of Government Employees, National Council of EEOC Locals No. 216*, 53 FLRA 465, 472 n.9 (1997). Neither of those two elements is in dispute in this case.

[18] In *WAPA*, the Authority noted that it was unclear whether collateral estoppel has any application in circumstances where one of the cases involved is an arbitrator's award in view of the fact that such awards are not precedential. *See* 56 FLRA at 11 n.4.

labor practice charge is whether there was a failure by Respondent to meet bargaining obligations in conjunction with the implementation of specific work schedule changes that occurred in December 2002 in the Port of Seattle. The issue in the NIAP grievance was whether there was a failure by Respondent to meet bargaining obligations in conjunction with the implementation of a national policy governing inspectional assignments that occurred in October 2001. Although there is a connection between the two issues in that the Respondent relied on the revised NIAP as its authority for making the work schedule changes in Seattle without bargaining, they are not the same issue. Additionally, the issue of the 2002 changes was not litigated in the NIAP grievance as those changes occurred after the issuance of the arbitrator's decision in the NIAP grievance. I reject the Respondent's claim that collateral estoppel applies to this unfair labor practice case.

Relevant Authority decisions

Subsequent to the hearing and filing of briefs in these cases, the Authority issued a series of decisions that bear on the complaints in these three cases. The first was *Customs Service,* 59 FLRA 703, in which the Authority ruled on exceptions to the arbitrator's award in the NIAP grievance. In reaching its decision to set the arbitrator's award aside, the Authority found that the implementation of the revised NIAP constituted a change in conditions of employment and an exercise of management rights under section 7106(a) and (b)(1) of the Statute. In view of this, Customs' obligation to bargain was limited to the impact and implementation of the proposed changes in the revised NIAP. The Authority noted that the negotiations over the new NLA would extend bargaining beyond the scope of impact and implementation issues relating to the revised NIAP. The Authority found that because the Union's proposal to condition negotiations regarding the NIAP on first bargaining over the expired NLA exceeded Customs' obligation to bargain, it was a permissive subject of bargaining and Customs could not be required to bargain. In the face of the Union's insistence on such a proposal, the Authority determined that Customs' had the right to refuse to bargain over the proposal and to implement the revised NIAP.

Somewhat later a trio of decisions issued that further elucidate the status and effect of the revised NIAP. *United States Department of Homeland Security, United States National Treasury Employees Union, Chapter 137 and United States Department of Homeland Security, Bureau of Customs and Border Protection*, 60 FLRA No. 96 (2004) (*Customs I*); *United States Department of Homeland Security, United States*

Customs and Border Protection, Port of Seattle, 60 FLRA No. 97 (2004) (*Customs II*); and *United States Department of Homeland Security, United States Customs and Border Protection and National Treasury Employees Union*, 60 FLRA No. 98 (2004) (*Customs III*). Two points in particular that emerge from those decisions are dispositive of some of the issues raised in the instant cases. First, the Authority found Section 3 of the revised NIAP terminated locally negotiated agreements concerning inspectional assignment matters, as well as Customs' obligation to bargain at the local level regarding such matters. *See, e.g.*, *Customs I*, 60 FLRA No. 96, slip op. at 12. Second, the Authority held the revised NIAP does not constitute a negotiated agreement and, consequently, does not afford a basis for a "covered by" defense.[19] *See, e.g., id.* slip op. at 13-14.

With respect to the first point, the Authority noted that the level of exclusive recognition exists at the national level and that it was well established that there is no statutory obligation to bargain below the level of recognition. *Id.*, slip op. at 9. The Authority reasoned that although parties are not obligated to negotiate matters below the level of bargaining, they may agree to do so but such an agreement is a permissive area of bargaining. *Id.*, slip op. at 10. The Authority determined that consistent with their ability to negotiate over permissive subjects of bargaining, Customs and NTEU agreed in the 1995 NIAP to negotiate over inspectional assignment matters at the local level. *Id.* The Authority found that when the NLA expired in 1999, either party could lawfully terminate permissively negotiated matters and Customs did just that when it implemented Section 3 of the revised NIAP. *Id.* That is, in the Authority's view, Section 3 of the revised NIAP terminated both locally negotiated agreements concerning inspectional assignment matters and Customs' permissively negotiated obligation to bargain at the local level regarding inspectional assignment matters.[20] *Id.*, slip op. at 10-12.

With respect to the second point, the Authority agreed with the arbitrator that the revised NIAP did not constitute

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[19] On this point, Chairman Cabaniss disagreed with the majority. *See, e.g., Customs II*, 60 FLRA No. 96, slip op. at 17-19.

[20] The Authority emphasized that Section 3 did not, however, extinguish Customs' statutory bargaining obligations at the national level, which is the level of recognition, to bargain over all mandatory subjects of bargaining concerning inspectional assignments. 60 FLRA No. 96, slip op. at 15.

a collective bargaining agreement. *Id.* slip op. at 13. In this regard, the Authority noted that the revised NIAP "is not a part of any national agreement entered into by the parties; it is not subject to the parties' national agreement; and it has no term provision." *Id.*

Case No. SF-CA-02-0003

The Authority's determination that Section 3 of the revised NIAP, which was lawfully implemented, extinguished all locally negotiated agreements concerning inspectional assignments renders it unnecessary to apply the analytical framework that is normally applied in addressing repudiation allegations. Even assuming that Respondent Seattle entered into an agreement with NTEU to use overtime to staff the midnight to 8:00 a.m. shift at the south satellite at Sea-Tac, such agreement terminated on October 1, 2001, by operation of Section 3 of the revised NIAP and, hence, as of that date there was no agreement left that could be repudiated. I find that Respondent Seattle did not violate the Statute as alleged by its actions on October 1, 2001, in establishing a shift on regular time to cover the midnight to 8:00 a.m. assignment at the south satellite security checkpoint.[21]

Case No. SF-CA-02-0060

Based on my findings above, Tyler made a request on September 25, 2001, to engage in post-implementation bargaining regarding the midnight shift.[22] At that time, Section 3 of the revised NIAP had not yet gone into effect. Any obligation Respondent Lynden had to negotiate regarding the establishment of a midnight shift at that border crossing evaporated on October 1, 2001, when local level bargaining was extinguished by operation of Section 3 of the revised NIAP. The parties are in dispute as to whether Respondent Lynden had any obligation to bargain prior to October 1, 2001. Respondent Lynden contends that its action was immune from bargaining based on section 7106(a)(2)(D). Charging Party and the General Counsel concede that under the circumstances, immediate action was necessary with respect to establishing and staffing a midnight shift at

[21] In view of this finding, it is unnecessary to and I do not address the defenses raised by Respondent Seattle.

[22] Although Tyler asserted that she made oral requests prior to that point, she did not provide any dates of those requests or identify how far in advance of September 25, 2001, they were made. Consequently, the only date established in the record on which a request was made was September 25.

Lynden but, assert that there was an obligation to bargain over the matter on a post-implementation basis.

Under section 7106(a)(2)(D), management has the right to (1) independently assess whether an emergency exists and (2) decide what actions are needed to address the emergency. *See, e.g., United States Department of Veterans Affairs, VA Regional Office, St. Petersburg, Florida and American Federation of Government Employees, Local 1594*, 58 FLRA 549, 551 (2003). The record as a whole, clearly shows that Respondent Lynden's action establishing and staffing the midnight shift was taken in response to the events of September 11, 2001, and was for the purpose of securing the borders of the United States. It is also worthy of note, that the record clearly shows that with September 11, the mission of Customs became increasingly focused on anti-terrorism. In view of the demonstrated relationship of the action to an emergency and to carrying out Customs' mission, it is concluded that the establishment and staffing of the midnight shift at Lynden involved an exercise of section 7106(a)(2)(D) rights.

What remains is the question of whether Respondent Lynden had any obligation to bargain with respect to its action. It is well established that as a general matter obligations to bargain must be fulfilled prior to implementation of a change in conditions of employment. *See, e.g., United States Immigration and Naturalization Service, Washington, D.C.*, 55 FLRA 69, 72-73 (1999) (*INS*). It seems reasonable, however, to interpret section 7106(a)(2)(D) as operating to allow immediate implementation of the actions coming within its ambit when necessary to respond to an emergency and, thus, to provide an exception to the normal obligation to bargain prior to implementation. Requiring pre-implementation bargaining would effectively nullify section 7106(a)(2)(D) with respect to emergencies that could not be anticipated in advance. What is not clear from Authority precedent is whether the Statute requires post-implementation bargaining concerning section 7106(a)(2)(D) matters. Although there has been suggestion that it does, there is no decision that definitively answers the question.[23]

As written, the Statute does not remove the subject matter identified in section 7106(a)(2)(D) entirely from the obligation to bargain. That is, by the terms of section 7106, that subsection remains "subject to subsection (b)" of that section. Subsection (b) operates to preserve,

[23] *See U.S. Customs Service, Washington, D.C.*, 29 FLRA 307, 325 (1987).

among other things, negotiation of procedures and appropriate arrangements related to the items identified in subsection (a). Thus, the terms of section 7106 indicate that an obligation to bargain over procedures and appropriate arrangements applies to section 7106(a)(2)(D) as well as the other portions of subsection (a). As a practical matter, the only way that such bargaining may be accomplished in many instances is on a post-implementation basis.

In the absence of any definitive ruling on the question of bargaining obligations with respect to actions taken during emergencies, a useful analog exists with respect to bargaining obligations in circumstances involving the implementation of changes necessary to correct an unlawful practice. In those situations, the agency may lawfully implement the changes without prior bargaining and is only obligated to bargain after implementation over impact and implementation of the change. *See, e.g., INS*, 55 FLRA at 73 n.8. As with the correction of unlawful practices, situations requiring a response to an emergency involve immediate action where the pre-implementation bargaining is precluded due to circumstances not in the union's control. As with the correction of unlawful practices, post-implementation bargaining is warranted where immediate action is necessary to respond to an emergency. Requiring such bargaining reconciles the rights of exclusive representatives to bargain over changes in conditions of employment and of management to take necessary actions during emergencies.

Even assuming that Respondent Lynden normally would have been obligated to bargain on a post-implementation basis, the timing of the bargaining request relative to the point at which the revised NIAP effectively extinguished bargaining obligations at the local level complicates matters. As already noted, the first date on which the evidence establishes that NTEU requested bargaining was September 25, 2001. Within a week of that date, any bargaining obligation on the part of Respondent Lynden evaporated. Moreover, any locally negotiated agreements concerning inspectional assignment issues would have terminated as of October 1. Under these circumstances, even if Respondent Lynden had immediately agreed to the Union's request, bargaining would have been an exercise in futility. Assuming that the parties could have completed bargaining in the 5 calendar days that remained before October 1, the fruit of that bargaining would have terminated on that date. Under these circumstances, I do not find that Respondent Lynden's failure to engage in bargaining during the 5 calendar days between September 25 and October 1 constitutes

a failure to bargain in violation of the Statute. In this regard, Respondent neither agreed to nor denied the request during the 5-day period but apparently simply let time run out. Given the short period involved, Respondent Lynden's failure to respond to the bargaining request did not amount to a failure to bargain that would constitute a violation of the Statute.

Case No. SF-CA-03-0183

This case concerns a number of changes to work schedules made during December 2002, in the Port of Seattle. In this case, the Respondent named is Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Washington, D.C., the national level organization. The allegation contained in the complaint is that by the actions of Sarten, the Seattle Port Director, the Respondent failed to bargain. Although the complaint is broadly framed and could be read as an allegation that Respondent at the national level failed to bargain over the changes in Seattle, the facts and arguments submitted by the parties focus on a bargaining request regarding a local level change made by the local Union to and denied by Sarten in her capacity of Port Director. Furthermore, in the arguments submitted post-hearing by the Respondent, Charging Party, and General Counsel all focus on whether the obligation to bargain over local changes remained at the local level despite Respondent's implementation of the revised NIAP.[24] In view of these circumstances, it is found that the issue presented and litigated by the parties in this case is whether Respondent violated the Statute by failing to bargain at the local level concerning a local level change.

As discussed above, any obligation by Respondent to bargain at the local level regarding local changes terminated with the implementation of the revised NIAP on October 1, 2001. Consequently, it is found that Respondent did not violate the Statute by Sarten's failure to engage in bargaining at the local level over the work schedule changes that she implemented in Seattle during December 2000. *See Customs II* and *Customs III*.

24
In a footnote in its post-hearing brief, the Charging Party makes a bare assertion that Respondent did not give notice of the changes in Seattle at either the national or local level. In conjunction with the hearing, however, no evidence was adduced on the question of whether or not notice was given at the national level. Rather, the evidence was limited to what transpired at the local level.

Based on all of the above, it is recommended that the Authority adopt the following:

ORDER

It is hereby ordered that the complaints in Case Nos. SF-CA-02-0003, SF-CA-02-0060 and SF-CA-03-0183 be and, hereby, are dismissed in their entirety.

Issued, March 16, 2005, Washington, DC

_____
ELI NASH
Chief Administrative Law Judge

APPENDIX

The parties have entered into three Stipulations of Fact. The first covers all three cases; the second covers Case Nos. SF-CA-02-0003 and SF-CA-02-0060; the third covers Case No. SF-CA-03-0183.[25]

The first Stipulation is as follows:

STIPULATION OF FACT

In each of the above referenced cases [Case Nos. SF-CA-02-0003, 0060 and 03-0183], the Respondent raises the National Inspectional Assignment Policy (NIAP) which was implemented by U.S. Customs Service*/ nationwide on October 1, 2001, as a defense to the alleged unfair labor practices. In each case, Customs asserts that NIAP permitted it to take the actions which are alleged to be unfair labor practices. General Counsel and Charging Party assert that NIAP was unilaterally implemented and therefore is not in effect. An arbitration was held over Customs' alleged unilateral implementation of NIAP and an arbitrator's award by Arbitrator Hockenberry issued on November 5, 2002. The Arbitrator's award is currently before the Authority on exceptions filed by Customs (to the decision) and NTEU (to the remedy).

_____

*/ Throughout this Stipulation, the agency is referred to as U.S. Customs Service inasmuch as all of the events included in the Stipulation predated March 1, 2003 when U.S. Customs Service became the Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, pursuant to the Department of Homeland Security Act of 2002 and the Department of Homeland Security Reorganization Act, November 25, 2002.

Inasmuch as matters relative to the validity of Customs' implementation of NIAP were fully

[25] The stipulations contained footnotes. In setting forth the stipulations below, the footnotes contained therein are identified by asterisks and set forth immediately after the paragraph to which they attach within the stipulations.

litigated before the arbitrator and in order to expedite these hearings, the parties agree to the following stipulations relative to implementation of NIAP on October 1, 2001. This Stipulation of Fact will be entered into the record as **Jt Ex 1.** The parties further agree to make the complete record from the arbitration a part of the record for these ULP cases. The Arbitration record, including the transcript, exhibits and the parties' post hearing briefs, will be **Jt Ex 2.** Arbitrator Hockenberry's award will be **Jt. Ex 3.** The Exceptions filed by U.S. Customs and NTEU, will be **Jt Ex. 4.** By entering into these stipulations, no party waives its right to raise objections on brief to the relevance, materiality or necessity of any stipulated fact.

1. U.S. Customs Service and NTEU are parties to a National Labor Agreement (NLA) that expired in 1999, but which continues to be applied in accordance with statutory requirements pending its re-negotiation. Article 37 of the NLA is entitled "Bargaining." The NLA is **Arbitration Jt Ex DDD.**

2. In 1995, a National Inspectional Assignment Policy (NIAP) was implemented following negotiations with NTEU. The 1995 NIAP contained provisions permitting the negotiation of 5 U.S.C. 7106(b)(1) topics, including staffing levels and tours of duty, at the "local" level; i.e., below the level of recognition. The 1995 NIAP is **Arbitration Jt Ex GGG.**

3. By letter dated August 2, 2001, U.S. Customs notified NTEU that it elected to no longer be bound by provisions in the NLA in which the agency agreement [sic] to bargain over "matters covered by 5 USC 7106(b)(1)." In addition, the letter stated that the agency would no longer be bound by the (b)(1) provisions contained in the NLA or in other agreements, including the NIAP and Local Inspectional Assignment Policies (LIAPs) "which contain provisions that involve (b)(1) matters, including several that require local level bargaining on such things as minimum staffing levels and tours of duty." A copy of the August 2, 2001 letter is **Arbitration Jt Ex D.**

4. Attached to the August 2, 2001 letter was a proposed revised NIAP. **Arbitration Jt Ex D.**

5. The proposed new NIAP was presented to NTEU Headquarters as U.S. Customs Service National Headquarters' proposal for revision of the 1995 NIAP.

6. The revised NIAP document includes a "Precedence" provision (Section 3) which provides:

> The policies and procedures contained in this Handbook take precedence over any and all other agreements, policies, or other documents or practices executed or applied by the parties previously, at either the national or local, concerning the matters covered within this Handbook.
>
> The policies and procedures addressed contained [sic] in this Handbook reflect the parties [sic] full and complete agreement on the matters contained and addressed herein. No further obligation to consult, confer, or negotiate, either upon the substance or impact and implementation of any decision or action, shall arise upon the exercise of any provision, procedure, right or responsibility addressed or contained within this Handbook.

7. The revised NIAP proposal included provisions reiterating the agency's Statutory management rights regarding the establishment of tours of duty, scheduling and work hours.

8. Following receipt of the proposed NIAP, NTEU notified Customs of its intent to renegotiate provisions of the NLA and to negotiate NIAP in conjunction with the revisions to the NLA. **Arbitration Jt Exs E, H.** NTEU asserted that its proposal to negotiate NIAP in conjunction with the NLA was a groundrules proposal and it subsequently filed with FMCS and FSIP asserting a ground rules impasse. **Arbitration Jt Ex[s] S, AA.**

9. Customs disagreed with the Union's position that its proposal to renegotiate the NLA was a groundrules proposal relative to management's proposed revised NIAP, **Arbitration Jt Ex J** and subsequently maintained before FSIP that the

parties were not at impasse over groundrules. **Arbitration Jt Ex FF.**

10. Other correspondence between the parties during this period (August 2, 2001 to October 1, 2001) is summarized in the Arbitrator's decision and included in **Arbitration Jt Exs F through DD.**

11. U.S. Customs implemented the revised NIAP, as proposed, nationwide on October 1, 2001. By letter dated October 1, 2001, NTEU National Headquarters was notified that the revised NIAP had been implemented. A copy of this letter is **Arbitration Jt Ex EE.**

12. All Directors of Field Operations in the Customs Management Centers (CMCs), as well as Port Directors and subordinate supervisors were subsequently advised of the implementation of the revised NIAP and were directed to implement its provisions immediately. The Agency instructed its managers and supervisors to make determinations regarding shifts, tours of duty and work hours and to implement them without further bargaining with NTEU.

13. On October 15, 2001, NTEU filed a national level grievance protesting implementation of the revised NIAP, and subsequently invoked arbitration at the national level on November 9, 2001.

14. An arbitration award regarding the dispute was rendered by Arbitrator William Hockenberry on November 5, 2002. Both NTEU and the agency subsequently filed exceptions to the award with the Federal Labor Relations Authority, which are currently pending. (Joint Exh. 1).

2. The Second Stipulation of Fact, which applies only to Case Nos. SF-CA-02-0003 and SF-CA-0060, provides as follows:

STIPULATION OF FACT

The following stipulation is entered into in order to narrow the issues presented at the hearing. By entering into these stipulations, no party waives its right to raise objections on brief to the relevance, materiality or necessity of any stipulated fact.

1. Prior to July 18, 2001, local Customs*/ officials were authorized to bargain with local NTEU officials regarding local issues, including matters involving section 7106(b)(1) and procedures and arrangements under section 7106(b)(2) and (3).

_____

*/ Throughout this Stipulation, the agency is referred to as U.S. Customs Service inasmuch as all of the events included in the Stipulation predated March 1, 2003 when U.S. Customs Service became the Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, pursuant to the Department of Homeland Security Act of 2002 and the Department of Homeland Security Reorganization Act, November 25, 2002.

2. After July 18, 2001, Customs officials, including those at the local level, were no longer authorized to bargain over section 7106(b)(1) matters. However, between July 18, 2001 and October 1, 2001, local Customs officials were still authorized to negotiate procedures and arrangements for local changes, including those related to inspectional assignments.

3. On October 1, 2001, Customs implemented a revised National Inspectional Assignment Policy.

With regards to Case No. SF-CA-02-0003:

4. Due to the events of September 11, 2001, Customs was tasked with staffing certain airport security checkpoints, including those at Sea-Tac Airport, with armed uniformed inspectors.

5. On or about September 20, 2001, Customs began staffing the Sea-Tac Airport security checkpoints.

6. On or about September 21, 2001, Customs issued an advance schedule which covered the staffing for the Sea-Tac Airport South Terminal. The schedule was entitled "Heightened Awareness 0001-0800 Overtime Assignments for October

2001." (Jt. Exhibit 5(a)). The schedule covered assign-ments for September 24 to October 31, 2001 (The dates for the first week of the schedule are one day off since September 24, 2001 was actually a Monday). The schedule was adhered to from September 24-29, 2001.

[7]. Effective October 1, 2001, Customs changed the midnight to 8:00 am shift into a weekly rotated regular shift, thus eliminating overtime for the shift and requiring one inspector to work the shift for an entire week as opposed to one day.

[8]. On October 10 or 11, 2001 the National Guard took over the staffing for all security checkpoints at the Sea-Tac Airport.

With regards to Case No. SF-CA-02-0060:

[9]. Prior to September 11, 2001, Customs inspectors at the Port of Lynden worked two different shifts seven days a week. The shifts were from 8:00 am to 4:00 pm and 4:00 pm to midnight. The Port of Lynden was closed from midnight to 8:00 am and Customs inspectors were not scheduled to work during that time.

[10]. On September 11, 2001, a new midnight to 8:00 am shift was implemented at the Port of Lynden in order to ensure that the Port would be staffed on a 24 hour basis. (Joint Exhibit 5).

The Third Stipulation of Fact, which applies only to Case No. SF-CA-03-0183, provides as follows:

STIPULATION OF FACT

1. Customs Inspectors work at many different locations within the Port of Seattle including the Seattle-Tacoma Airport South Satellite (Sea-Tac), the Transiplex Air Cargo Office, the Nevada Street Office (which includes the Trade Branch and the Seaport Border Security Branch), and several additional office sites. The Automated Targeting System (ATS) and Vehicle and Cargo Inspection System (VACIS) units are located at the Nevada Street Office.

2. Prior to December 2002, Inspectors in the Sea-Tac passenger-processing unit worked a regular

six-day workweek, Monday-Saturday. There were no regular Sunday shifts; Sunday assignments, if needed, were routinely staffed on overtime. The regular shifts in the Sea-Tac passenger processing unit from the beginning of April to the end of October are usually 8:00 a.m.-4:00 p.m. During fiscal years 2000, 2001 and 2002, alternate work schedules (AWS) were employed from the beginning of November to the end of March during the approximately six-month period each year when Northwest Airline's daily Tokyo to Seattle flight regularly arrived earlier than its scheduled time, and Alaska Airlines operated its winter schedule of daily flights from Mexico to Seattle, which arrived in the early evening. Under AWS schedule, inspectors worked either a four day a week, 10 hours a day schedule (4-10), a 5-4-9 schedule (during a two-week period, inspector works 9 days for a total of 80 hours) or a regular five day a week, 8 hour a day schedule (5-8). The 4-10 scheduled shift normally started at either 5:00 a.m. or 6:00 a.m. The 5-4-9 and regular 5-8 shift usually started at 8:00 a.m. or 9:00 a.m. Attached hereto as **Jt Ex 6(a)** is the Sea-Tac schedule in effect October 20-November 2, 2002, which represents the regular April to October schedule; **Jt Ex 6(b) and (c)** which show the winter schedule effective November 4, 2002.

3. Prior to December 2002, inspectors working in the VACIS and ATS units worked a regular five day a week schedule, Monday through Friday. There were no regular Saturday or Sunday shifts. Work required on Saturday or Sunday was normally worked on overtime. **Jt Ex 6(d)**, the schedule for pp #22 (November 4-16, 2002) is an example of the regular ATS and VACIS work schedule prior to December 2002. The ATS and VACIS units are collectively referred to as SBSB on the schedule.

4. Beginning December 2002, a seven-day workweek was implemented for inspectors at Sea-Tac and in the VACIS and ATX units. A 12:00 noon to 8:00 p.m. (1200-2000) shift was added at Sea-Tac. **Jt Ex 6(e)** is the Sea-Tac 7-Day Workweek Schedule effective Sunday December 1, 2002. **Jt Ex 6(f)** is the 7-day workweek schedule implemented for VACIS and ATS effective Sunday December 15, 2002. The ATS and VACIS units are referred to as SBSB on this schedule as well.

5. On November 26, 2002, the Port of Seattle briefed NTEU Chapter Vice President John Torre and provided him with a document summarizing temporary duty assignments and changes in works assignments for inspectors within the Port of Seattle. This document is attached as **Jt Ex 6(g).**

6. Management states that the adjustment of work assignments and shifts was initiated in response to the need to align the workforce with the workload and that these actions were taken in conformance with the current National Inspectional Assignment Policy (NIAP). Management states that several factors influenced these adjustments including the increase of TDY assignments for Port of Seattle inspectors to the Northern Border, the management need to ensure adherence to the quarterly overtime budget, and the ongoing responsibility to ensure compliance with the principles of the NIAP.

7. On November 27, 2002, Steven D. Bailey, Acting President of NTEU Chapter 139, requested to negotiate the impact and implementation of the personnel changes proposed by the Port of Seattle. This document is attached as **Jt Ex 6(h).**

8. By letter dated December 5, 2002, Respondent, by Sarten, declined to bargain over the personnel changes at the Port of Seattle on the ground stated therein. This letter is attached as **Jt Ex 6(i).**

9. The seven-day work week implemented at Sea-Tac, VACIS and ATS and the establishment of the shifts, described above, resulted in changes in the shift assignments of inspectors in the bargaining unit represented by NTEU.

10. There is an established procedure for assignment of overtime to inspectors at the Port of Seattle. In the event lost overtime is ordered as part of the remedy in this case, the parties agree that data are available to the parties to calculate an equitable distribution of overtime backpay. (Joint Exh. 6).

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by ELI NASH, Chief Administrative Law Judge, in Case Nos. SF-CA-02-0003, SF-CA-02-0060 and SF-CA-03-0183, were sent to the following parties:

_____

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DATED: March 16, 2004
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