

United States of America  
BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of )

DEPARTMENT OF THE TREASURY )  
U.S. CUSTOMS SERVICE )  
BOSTON DISTRICT )  
BOSTON, MASSACHUSETTS )

and )

CHAPTER 133, NATIONAL TREASURY )  
EMPLOYEES UNION )

Case No. 90 FSIP 162

DECISION AND ORDER

Chapter 133, National Treasury Employees Union (Union), filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under section 7119 of the Federal Service Labor-Management Relations Statute (Statute) between it and the Department of the Treasury, U.S. Customs Service, Boston District, Boston, Massachusetts (Employer).

After investigation of the request for assistance, the Panel directed the parties to meet with Chief Legal Advisor Donna M. Di Tullio for the purpose of resolving the issues at impasse. The parties were advised that if no settlement were reached, Ms. Di Tullio would report to the Panel on the status of the dispute and her recommendations for resolving the issues. After considering this information, the Panel would take whatever action it deemed appropriate to resolve the impasse including the issuance of a binding decision.

Ms. Di Tullio met with the parties on September 19 and 20, 1990, in Boston, Massachusetts, during which 8 issues were resolved. The parties then were instructed to submit their final offers on the remaining issues to the Panel on October 5, 1990. Prior to receiving them, the Employer's Chief of Labor Relations in Washington, D.C., for the first time advised the

-2-

Union and the Panel in a conference call that the Employer was withdrawing its proposals on all but three of the remaining issues because they are beyond the scope of negotiations over the impact and implementation of the "Airport 1990 Plan," which is described below. Furthermore, he alleged, without specification, that there is a contract bar to negotiations over those issues as they already were addressed in the master collective-bargaining agreement between the National Treasury Employees Union (NTEU) and the U.S. Customs Service, negotiated in 1987, as well as in a recently negotiated successor agreement.<sup>1/</sup> Following the conference call, the parties filed written submissions and rebuttal statements with the Panel which now has considered the entire record in this case.

#### BACKGROUND

The Employer's mission is to enforce the U.S. Customs laws through the clearance of overseas passengers and cargo, and monitor points of entry into the U.S. to deter and apprehend smugglers and those entering without proper authorization. In the Boston District, the Employer monitors Logan International Airport and the Boston seaport area. The Union represents approximately 265 employees who are part of a nationwide consolidated bargaining unit consisting of approximately 11,000 employees.

The dispute potentially affects approximately 65 customs inspectors stationed in the Boston District. It arose during negotiations following the agency's decision to implement a so-called "Airport 1990 Plan" at facilities nationwide. Part of this new approach by the agency to "air passenger processing" included the establishment of a Passenger Analysis Team (PAT Team) at certain airports. At the national level, Customs and NTEU entered into an agreement in May 1990, to delegate authority over the impact and implementation of the Plan to the local parties who undertook such negotiations, including the PAT Team at Logan Airport. It is undisputed that on August 28, 1989, the parties agreed to include in those negotiations other matters concerning the Automated Commercial System, a rotational scheme for Grade 11 customs inspectors, and other matters affecting certain inspection and control positions.

The PAT Team's primary mission is to increase seizures while facilitating passenger traffic flow. It consists of three "elements:" (1) an Analytical Unit which uses analytical tools and databases, including the airline reservation systems,

<sup>1/</sup> The successor term agreement became effective in May 1991, and expires on November 1, 1993.

-3-

to identify persons on incoming flights posing potential risks to determine the level of examination needed; (2) the Rover Coordination Center which uses two-way radios for surveillance, direct observation, and closed circuit television to surveil the primary passenger lines; and (3) Rovers who are stationed throughout the facility to conduct passenger surveillance to determine candidates for intensive examinations; they use analytical skills, behavioral analysis, and observational and interviewing techniques to select passengers for intensive inspections. Customs Directive 3300-09 (June 15, 1990), concerning the establishment of PAT Teams, provides that Customs Inspectors assigned to a PAT Team will rotate through the three elements.

### ISSUES

The parties disagree over (1) whether the Union's proposals concerning Saturday assignments on Castle Island, the scheduling of days off at the airport passenger terminal, equalization of overtime assignments, rotation of employees, and qualifications and training necessary to take part in the rotation are outside the Employer's obligation to bargain, and (2) procedures for assignment of Customs Inspectors to the PAT Team.

#### I. The Jurisdictional Question

##### a. The Union's Position

The Union proposes the following:

The assignment of the 'Saturday man' at Castle Island will be rotated in a fair and equitable manner among all Customs Inspectors assigned to the Seaport. Seaport assignments include Seaport DAU and ACS units.<sup>2/</sup>

Employees assigned to the Airport passenger terminal will have their days off on either Saturday/Sunday or Sunday/Monday. In the alternative, days off will be determined utilizing the bid process based on Customs inspectional seniority (occupational seniority) in descending order.

<sup>2/</sup> DAU and ACS refer to the Document Analysis Unit and the Automated Commercial System, respectively.

-4-

In order to achieve equalization of overtime earnings, one overtime list will be established for Customs Inspectors in the Port of Boston. This list will begin on October 1 of each year. All other previously agreed upon overtime procedures will remain in effect.

All employees assigned to the Airport passenger terminal in any capacity will rotate daily based on occupational seniority.

All GS-9 Inspectors are qualified for all aspects of the GS-9 rotation. All GS-11 Inspectors are qualified for all aspects of the GS-11 rotation. Any additional training required will be provided by the Employer.

The Union argues that the Panel should retain jurisdiction and resolve the above five Union proposals on the merits. It contends that it is undisputed that the parties orally agreed on August 28, 1989, to include in negotiations over the Airport 1990 Plan and the PAT Team other related issues concerning the Automated Commercial System, Grade 11 rotations, and Inspection and Control positions. Evidence of this agreement to consolidate negotiations is the Employer's submission of counterproposals during negotiations, and its pursuit of the merits of its proposals during mediation before FMCS and the meeting with the Panel's representative. During the Panel's investigation of the Union's request for Panel assistance, the Employer never contended that the proposals were beyond the scope of negotiations. The Employer's 11th-hour attempt to withdraw from negotiations on certain issues makes a mockery of Panel processes. The Union asserts that the Employer's claim that the proposals are outside the scope of negotiations came from the Employer's headquarters after Customs realized that it potentially could lose before the Panel on the merits of those proposals which were developed by local labor relations specialists in Boston. The Employer now seeks to eliminate that risk by claiming the Panel lacks jurisdiction.

The Union has a right to negotiate midterm all five proposals under the 1987 agreement, which is precisely what the parties had been doing until the Employer created a roadblock. These proposals constitute mandatory subjects of bargaining, and are not permissive in nature. Rather, the Union's proposals deal with Saturday assignments at Castle Island, the scheduling of days off, equalizing overtime, and the rotation, qualifications, and training of employees within the Port of Boston. Since no provision of the parties' 1987 term agreement deals with these particular matters proposed, it cannot be said

-5-

that NTEU waived the right to negotiate such matters at the local level. The Union, therefore, may pursue negotiations over those subjects. Moreover, the Panel has authority under Commander, Carswell Air Force Base, Texas and Local 1364, American Federation of Government Employees, 31 FLRA 620 (1988) to render a decision on the Employer's argument that the Union waived its right to bargain because allegedly the proposals already are covered by the 1987 term agreement. There is ample FLRA case precedent which holds that a waiver of a bargaining right must be "clear and unmistakable." Since the plain reading of the contract shows no waiver, the Panel has authority to apply FLRA case law and determine that there is no evidence that NTEU clearly and unmistakably waived any bargaining rights concerning the issues.

b. The Employer's Position

The Employer maintains that the Panel should decline jurisdiction over five of the Union's proposals because they are outside the scope of bargaining. It contends that during the course of negotiations over the impact and implementation of the Airport 1990 Plan which included the establishment of the PAT Team, the Union indicated it had concerns which were outside the scope of those negotiations, but which it wanted to discuss. Article 37, section 4, of the 1987 National Agreement states in pertinent part that "(t)he Union agrees that any proposals submitted in the context of impact bargaining will be related to the proposed change(s) and will not deal with extraneous matters."<sup>3/</sup> (Emphasis added.) This provision notwithstanding, the Employer made a good faith effort to discuss and address those issues since it appeared, initially, that the parties could mutually benefit from combined discussion of issues which encompassed varied operational components. The Employer, however, now elects to withdraw from further discussion of any proposals which are not related to the topic of the implementation of the Airport 1990 Plan, and the PAT Team. Restoring negotiations to their original scope narrows the number of issues which must be dealt with at this impasse. Under FLRA case law, "where a matter falls outside the required scope of bargaining or is negotiable only at the election of an agency, there is no mutual obligation to bargain at all. If parties do bargain over such matters either may withdraw at any time prior to reaching agreement." Federal

<sup>3/</sup> The successor master labor agreement between Customs and NTEU which went into effect in May 1991, contains identical wording found in Article 37, entitled "Bargaining," section 4, "Regional or Local Negotiations."

-6-

Deposit Insurance Corporation, Headquarters and National Treasury Employees Union, 18 FLRA 768, 772 (1985). The Union, however, would have an opportunity to raise these issues at some future date when midterm negotiations are appropriate.

#### CONCLUSIONS

We have before us the Employer's belated argument that five Union proposals are outside the scope of negotiations over the Airport 1990 Plan. It is with considerable regret that the Panel finds itself considering this argument at such a late stage in the proceeding since it was first raised by the Employer after the parties and the Panel spent considerable resources convening their representatives at a conference in Boston to resolve the issues. Nevertheless, the Employer disputes its obligation to negotiate further over matters which it contends are extraneous to the subject of impact-and-implementation bargaining over the Airport 1990 Plan. In our view, the answer to the question raised by the Employer would require the Panel to interpret the provision in the parties' 1987 master collective-bargaining agreement, now carried forward in the 1991 successor, which provides that "(t)he Union agrees that any proposals submitted in the context of impact bargaining will be related to the proposed change and will not deal with extraneous matters." It has been the Panel's longstanding policy to defer to grievance arbitration matters which involve the interpretation and application of a negotiated agreement. Therefore, we shall defer to an arbitrator to determine the relationship between the Union's proposals and the change herein, and whether the proposals fall beyond the required scope of bargaining. Thus, we relinquish jurisdiction over the Union's proposals described supra.

#### II. Procedures for Assignment of Customs Inspectors

##### a. The Employer's Position

The Employer's proposals address assignments to the PAT Team only.

Proposals 2 and 4:

All inspectors who are equally qualified, as determined by management, i.e., meet any published criteria for assignment to the PAT Team will be allowed to volunteer. Inspectors will be assigned to the PAT team based on seniority in their occupation. If an insufficient number of employees apply for the

-7-

team, the Employer will assign those employees who meet the criteria and who will provide the appropriate mix for the team. From the pool of employees who meet the criteria, management will generally select the least senior. However, the Employer may exercise its right to make team assignments other than those based on employee preferences/seniority to insure that the team has the appropriate levels of knowledge, skills, and abilities necessary to perform the duties of the team.

Inspectors already assigned to a team may request an extension of this assignment. Management will consider requests for additional tours. Factors such as the employee's performance in the past year, the pool of qualified volunteers, as determined by management, and the team composition will all be taken into consideration.

Notwithstanding the above procedures, the Employer retains the right to transfer, detail, and reassign employees in accordance with the National Agreement and any applicable established policies and procedures.

Proposal 27:

Eligibility and selection for the PAT team will be determined by management in accordance with the procedures defined in Proposal 2/4 (above).

In support of its proposals, the Employer maintains that it has the right to determine the qualifications necessary to perform an assignment. Although all Customs Inspectors may be "minimally qualified to perform the diverse tasks required of an inspector," those assigned to PAT, a specialized team requiring members who have "demonstrated a high enforcement profile," must possess other personal qualification skills which the Employer also has the right to determine. Since the Employer would publish the criteria necessary for assignment to the PAT Team, employees would be on notice of the selection factors, thereby dispelling any notion that the Employer has a secret agenda in making its selections for the team. Precedent exists for this approach; in regard to staffing other specialized teams (Contraband Enforcement and Exodus) the parties entered into an agreement which allows management to consider personal characteristics in assigning inspectors to those teams. Contrary to the Union's contention, service on a specialized team is unnecessary to gain a promotion, nor is it a guarantee of one. In this regard, a survey of those promoted

-8-

to Grade 11, the highest grade for a Customs Inspector in the bargaining unit, shows that since 1984, only 13 of 23 inspectors served on a specialized team prior to their promotion. Thus, the evidence reveals that such service is only one factor in gaining a promotion.

b. The Union's Position

Proposals 2, 4, 13, and 14 are consolidated as follows:

A. The Employer retains the right to assign Inspectors. All qualified employees will be afforded the opportunity to bid on all work locations and/or teams with the exception of C.E.T. ('Contraband Enforcement Team') and Exodus.

B. To the extent the Employer intends to utilize special criteria beyond the requirements provided in the position description for the Customs Inspector, the Union will be provided the proposed criteria for comment and bargaining as allowable under law, before the proposed criteria are forwarded to Customs Headquarters for review and approval.

C. Sixty days prior to the effective date of such assignments, criteria approved by Customs Headquarters shall be distributed to all Inspectors on an annual basis. All Inspectors will be permitted to bid for such assignments. All qualified employees will be given their selections.

D. Should more qualified employees bid for an assignment than there are available positions, those employees with the greatest occupational seniority will be selected. Conversely, if an insufficient number of employees apply for a certain assignment, the Employer agrees to assign those employees with least occupational seniority.

E. If the Employer determines that an assignment requires a 1 year extension, but in no event longer than 2 consecutive years unless no qualified employee has volunteered, the Employer shall notify the Chapter President in writing of the reason(s) for the extended assignment and the identity of the affected employee(s). The Employer agrees to retain the incumbent Inspector in the assignment for the extension period, unless there is evidence of



-9-

performance below the acceptable level of competence.

F. Notwithstanding the above procedures, the Employer retains the right to transfer, detail and reassign employees in accordance with the National Agreement.

Proposal 27 provides:

The Employer agrees that all full-time inspectional employees assigned to the passenger terminal will be, for all intents and purposes, assigned to PAT (the Passenger Analysis Team).

The Union contends that since all Customs Inspectors are equally qualified to perform inspectional duties, which the Employer acknowledges, and an Administrative Law Judge (ALJ) has affirmed in an unfair labor practice decision,<sup>4/</sup> the fairest way to determine all inspectional assignments is through the bidding process which it proposes. Should more inspectors "put in" for an assignment than are needed, seniority as an inspector should be used as the determining factor. Under this procedure, the most senior inspectors would be given a better chance for assignment to specialized teams which could lead to a promotion to the Grade 11 level. Assignment to such a team would be career enhancing since over 90 percent of the promotions to Grade 11 since 1984 have gone to inspectors who have served on a team or who have been assigned special details.

The parties previously have recognized the benefits of using seniority as a selection factor; in this regard, Article 20, section 5, of the 1987 contract provides that when the Employer must reassign or temporarily reassign employees from one post of duty to another, seniority shall be the basis of selection when there are too many or too few volunteers. Furthermore, the Panel has often used seniority as a factor in resolving issues at impasse.

<sup>4/</sup> U.S. Customs Service Washington, D.C. and U.S. Customs Service, Northeast Region, Boston, Massachusetts and National Treasury Employees Union and National Treasury Employees Union, Chapter 133, (U.S. Customs Service) Case Nos. 1-CA-70210 and 1-CA-80068 (August 4, 1989), OALJ Report 84.

-10-

The current methods for assignment to teams and work locations do not provide inspectors with equal opportunity for selection, since management can make "arbitrary decisions (using) subjective criteria having little or no relevance to the duties of the position." Personal qualification criteria, which the Employer proposes to use in making selections to the PAT Team, are so subjective that their use would allow management to select virtually anyone for an assignment, with the real basis for selection unknown. These vague criteria would only increase the likelihood for grievances and perpetuate the "old-boy network" which has developed in the Boston district.

The provision which would require Customs Headquarters to review and approve qualifications criteria developed by the Boston District for selection to assignments should have the effect of limiting or eliminating any subjective factors in the criteria. The Philadelphia District has used a comparable bid system for several years without adverse consequences, and there is no reason why a similar scheme cannot work in the Boston District as well.

With respect to Proposal 27, which would require that all inspectors assigned to the airport passenger terminal be deemed assigned to the PAT Team, it would aid the Customs Service in achieving its objective of avoiding specialization within the PAT Team. Furthermore, it would increase the pool of available qualified inspectors to perform the work.

#### CONCLUSIONS

Having considered the evidence and arguments on these issues, we conclude that the dispute should be resolved on the basis of the Employer's proposals. In this regard, we find that the Union's proposals to use strict seniority as the selection factor may interfere with management's discretion to determine the individual skills and qualifications necessary to perform a particular assignment. We note the Employer's statement in its brief that the "PAT Team is an independent, highly-tuned professional entity within the U.S. Customs Service" whose "main purpose . . . is to interdict drugs and other contraband entering the United States, by identifying the one to five percent of the passengers who pose the greatest threat to the mission of the U.S. Customs." The assignment includes gathering information from a variety of data bases and Federal agencies, analyzing the data for accuracy, and then relaying it to Rovers and Inspectors through a Rover Command Center. According to the Employer, "it is essential that personnel who have demonstrated a high enforcement profile through detecting violations and seizures in narcotics,

-11-

currency and other contraband be identified and assigned to this task by management." In our view, the Employer argues convincingly that given the mission of the PAT Team and the nature of the assignments to be performed by team members, it is appropriate for the Employer to consider past performance and personal qualifications of inspectors in making assignments to the PAT Team, rather than rely solely on seniority.

In our view, the Union's reliance on the ALJ's determination in U.S. Customs Service that Customs Inspectors are all equally qualified to perform inspectional duties is misplaced. That case is distinguishable because it did not involve assignments requiring specialized enforcement skills as do PAT Team assignments. Despite the Union's objections to using personal qualification criteria in selection for assignments, we note that there is some precedence for doing so as the parties previously have agreed to use such criteria for selecting inspectors to work on two other specialized teams.

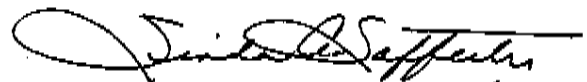
Finally, with respect to Union Proposal 27, we find that it is merely a circuitous way for the Union to accomplish its objective of providing all inspectors the opportunity for an assignment to a specialized team without taking into consideration the Employer's need to fill certain types of assignments with uniquely qualified inspectors.

#### ORDER

Pursuant to the authority vested in it by section 7119 of the Federal Service Labor-Management Relations Statute and because of the failure of the parties to resolve their dispute during the course of proceedings instituted pursuant to section 2471.6(a)(2) of the Panel's regulations, the Federal Service Impasses Panel under section 2471.11(a) of its regulations hereby orders the following:

The parties shall adopt the Employer's proposals concerning procedures for assignment of Customs Inspectors to the Passenger Analysis Team.

By direction of the Panel.



Linda A. Lafferty  
Executive Director

August 22, 1991  
Washington, D.C.