[ORAL ARGUMENT SCHEDULED MAY 6, 2011]
No. 10-1282

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS AND BORDER PROTECTION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

and

NATIONAL TREASURY EMPLOYEES UNION,
Intervenor.

ON PETITION FOR REVIEW OF A FINAL DECISION OF
THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT
FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The United States Department of Homeland Security, Customs and Border Protection ("CBP" or "agency") and the National Treasury Employees Union ("NTEU" or "union") appeared below in the administrative proceeding before the Federal Labor Relations Authority ("FLRA" or "Authority"). In this court proceeding, CBP is the petitioner, the Authority is the respondent, and NTEU is an intervenor.

B. Ruling Under Review

The ruling under review is *United States Dep't of Homeland Security Customs and Border Prot. and Nat'l Treasury Employees Union*, Case No. 0-AR-4363, issued on July 14, 2010, reported at 64 F.L.R.A. (No. 190) 989.

C. Related Cases

This case has not previously been before this Court. Counsel for the Authority is unaware of any cases pending before this Court which are related to this case. However, the Revised National Inspection Assignment Policy, which is at issue here, was also at issue in *NTEU v. FLRA*, 414 F.3d 50 (D.C. Cir. 2005);

and *NTEU v. FLRA*, 453 F.3d 506 (D.C. Cir. 2006).

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Glossary

Agency	Customs and Border Protection
Authority	Federal Labor Relations Authority
CBP	Customs and Border Protection
DHS	Department of Homeland Security
FLRA	Federal Labor Relations Authority
FSLRMRS	Federal Service Labor-Management Relations Statute
Labor Statute	Federal Service Labor-Management Relations Statute
LIAP	Local Inspection Assignment Policy
Merits Award	Arbitrator's Opinion and Interim Award dated November 15, 2006
MOU	Memorandum of Understanding
NIAP	National Inspection Assignment Policy
NTEU	National Treasury Employees Union
Panel	Federal Service Impasses Panel
Remedy Award	Arbitrator's Remedial and Final Award dated March 13, 2008
RNIAP	Revised National Inspection Assignment Policy
Statute	Federal Service Labor-Management Relations Statute
ULP	Unfair Labor Practice
Union	National Treasury Employees Union

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STATEMENT OF JURISDICTION

The decision under review in this case was issued by the Federal Labor Relations Authority ("FLRA" or "Authority") on July 14, 2010. The Authority's

decision is published at 64 F.L.R.A. (No. 190) 989. A copy of the decision is included in the Joint Appendix ("JA") at 281. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(H) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 ("Statute").[1] This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUE

Whether the Authority reasonably upheld an arbitrator's award determining that the agency committed an unfair labor practice (ULP) when it failed to give the union notice and opportunity to bargain over the impact and implementation of changes to work assignment policies.

STATEMENT OF THE CASE

This case arose as an arbitration proceeding conducted pursuant to § 7121 of the Statute and the collective bargaining agreement between the National Treasury Employees Union ("NTEU" or "union") and the United States Department of Homeland Security, Customs and Border Protection ("CBP" or "agency"). The union filed a grievance alleging that the agency committed a ULP by violating

[1] Pertinent statutory and regulatory provisions are set forth as an Addendum to this brief.

§ 7116(a)(1) and (5) of the Statute and the parties' collective bargaining agreement. Specifically, the union alleged that the agency unilaterally implemented changes to work assignment policies at various CBP ports without providing the union an opportunity to bargain at the national level over the impact and implementation of these changes. The arbitrator granted the grievance holding that the agency violated the Statute.[2] Seeking to overturn the award, the agency filed exceptions with the Authority pursuant to § 7122 of the Statute. The Authority upheld the arbitrator and denied the agency's exceptions.

CBP now seeks review of the Authority's decision pursuant to § 7123(a) of the Statute.

STATEMENT OF THE FACTS

Background

CBP and NTEU were parties to a series of national level collective bargaining agreements (NLA), the last of which expired in 1999, but continued to be applied pending re-negotiation.[3] JA 186. (Opinion and Interim Award, dated

[2] The arbitrator found that the agency had not violated the parties' agreement. JA 200. No exceptions to that finding were filed.

[3] Under well-established law, contract provisions concerning mandatory subjects of bargaining continue in effect after an agreement expires until those provisions are renegotiated. *United States Border Patrol, Livermore Sector, Dublin, Cal.*, 58 F.L.R.A. 231, 233 (2002). However, provisions concerning permissive subjects

November 15, 2006) (hereinafter, "Merits Award " at 5); *see also NTEU, Chapter 137*, 60 F.L.R.A. 483, 483 and n.5 (2004), *recons. den.*, 61 F.L.R.A. 60 (2005) ("*NTEU Chapter 137 (I)"*). In 1995, in addition to, and independently of, the NLA, CBP and NTEU negotiated at the national level -- the level of exclusive recognition -- the National Inspection Assignment Policy (NIAP). The NIAP provided for, *inter alia*, local bargaining -- bargaining below the level of recognition -- over Local Inspection Assignment Policies (LIAPs). JA 186; *NTEU Chapter 137 (I)*, 60 F.L.R.A. at 483.

On August 2, 2001, CBP sent NTEU a letter informing it that the agency would no longer be bound by provisions in the NLA, the NIAP, or the existing LIAPs involving permissive subjects of bargaining. Along with the letter, CBP sent NTEU a proposed revised NIAP (RNIAP). *Id.*

The agency proposed in the RNIAP to extinguish a number of the union's collective bargaining rights. For example, the agency proposed in the RNIAP that the union agree to nullify agreements between the union and the agency concerning matters covered in the RNIAP. Similarly, the agency proposed in the RNIAP that the union relinquish its prospective bargaining rights concerning any

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of bargaining may be unilaterally terminated by either party upon expiration of the agreement. *Id.* at n.5.

future changes the agency might make to conditions of employment that were addressed in the RNIAP. Specifically, section 3 of the RNIAP, entitled "Precedence and Function" provides:

> The policies and procedures contained in this [RNIAP] 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 [RNIAP].
>
> The policies and procedures [in the RNIAP] reflect the parties' 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 [RNIAP].

JA 184-185.

The agency proposed that the union agree to extinguish its prospective bargaining rights concerning numerous matters affecting conditions of employment. For example, the agency proposed that the union relinquish its prospective bargaining rights over changes regarding matters such as "Length of Workweek," "Work Hours," "Days Off," "Scheduling," "Staffing Levels," "Staffing Flexibility," and "Shift Swaps." RNIAP, section 5 (JA 173-175). CBP's letter stated that the RNIAP would take effect on September 30, 2001. *NTEU v. FLRA*, 453 F.3d 506, 509 (D.C. Cir. 2006). CBP and NTEU agree that the RNIAP did not itself "establish or mandate any

specific tours of duty, schedules, work hours, or rotational assignment policies or procedures in any port of entry or other work location." JA 44.

On August 6, 2001, NTEU invoked its right to negotiate over the impact and implementation of the RNIAP and served notice of its intent to renegotiate the expired NLA. CBP did not agree to NTEU's proposal to combine negotiations over the RNIAP with negotiations over the expired NLA. On September 6, 2001, CBP notified NTEU that it would not put off implementation of the RNIAP until the parties completed renegotiation of the NLA. *NTEU v. FLRA*, 414 F.3d 50, 54 (D.C. Cir. 2005).

Believing that the parties had reached an impasse, NTEU sought assistance from the Federal Mediation and Conciliation Service but the parties were unable to reach agreement. On September 21, 2001, NTEU sought assistance from the Federal Service Impasses Panel (Panel), which, ultimately, declined jurisdiction over the dispute.

CBP implemented the RNIAP on October 1, 2001. *Id*. Subsequently, in response, NTEU filed a grievance alleging that CBP's unilateral implementation of the RNIAP violated, *inter alia*, § 7116(a)(1) and (5) of the Statute. *United States Dep't of the Treasury, Customs Serv., Wash., D.C.*, 59 F.L.R.A. 703, 704 (2004), *aff'd sub nom. NTEU v. FLRA*, 414 F.3d 50 (D.C. Cir. 2005) ("*Customs Serv*.").

The Authority and this Court held that the agency's implementation of the RNIAP was lawful insofar as it terminated the agency's obligation to bargain at the *local level* over changes to matters set forth in the RNIAP. In several subsequent decisions, the Authority held that the agency did not violate the Statute when it refused to bargain, at the *local level*, over the impact and implementation of various management changes to the assignment of regular and overtime work.[4] In several of these decisions, the Court and/or the Authority emphasized that the RNIAP did not extinguish the agency's bargaining obligation at the *national level*. *See NTEU v. FLRA*, 453 F.3d at 508, 512; *NTEU, Chapter 137 (II)*, 61 F.L.R.A. at 416 n.3; *CBP Seattle*, 61 F.L.R.A. at 276; *NTEU, Chapter 137 (I)*, 60 F.L.R.A. at 488.

The union filed the instant grievance with the agency on May 5, 2005, alleging that the agency committed a ULP when it made unilateral changes throughout CBP to policies concerning assignment of regular and overtime work to CBP inspectors. The grievance alleged that, prior to making these changes, CBP

[4] *See NTEU, Chapter 137 (I), supra*; *United States Dep't of Homeland Security, United States Customs and Border Prot., Port of Seattle, Seattle, Wash.*, 60 F.L.R.A. 490 (2004) ("*CBP Port of Seattle*"); *NTEU, Chapter 143*, 60 F.L.R.A. 922 (2005), *aff'd sub nom. NTEU v. FLRA*, 453 F.3d 506 (D.C. Cir. 2006); *Dep't of Homeland Security, Border and Transp. Security Directorate, Bureau of Customs and Border Prot., Seattle, Wash.*, 61 F.L.R.A. 272 (2005) ("*CBP Seattle*"), *aff'd sub nom. NTEU v. FLRA*, 511 F.3d 893 (D.C. Cir. 2007)); *NTEU, Chapter 137*, 61 F.L.R.A. 413 (2005) ("*NTEU, Chapter 137 (II*)").

improperly failed to provide NTEU, at the *national level*, notice or the opportunity to bargain. The grievance listed 14 examples of such changes in various ports. The agency denied the grievance and the union invoked arbitration. JA 188.

The Arbitrator's Award

The arbitrator found that the agency committed a ULP, and that the basic facts in the case were not in dispute. JA 185, 198. He found that when local managers changed work assignment policies, they implemented "new policies and procedures" that changed conditions of employment. JA 198. This exercise of reserved management rights, according to the arbitrator, created an obligation to notify the union of the proposed changes and to bargain over their impact and implementation at the national level. *Id*. The arbitrator rejected the agency's argument that such changes were merely changes in "working conditions" that were made in accordance with "conditions of employment" that had been established by the RNIAP, and that, therefore, the agency had no bargaining obligation at either the local or the national level. JA 195.

The arbitrator found that the "RNIAP, with some exceptions that are not relevant here[5], does not actually prescribe conditions of employment." JA 197. Instead, the arbitrator found that the RNIAP provisions pertaining to length of workweek, work hours, days off, overtime assignments, overtime pools, and reassignment of inspectors to different teams merely delegated these determinations to local managers. JA 195- 198.

The arbitrator also rejected the agency's defense that the new policies and procedures were "covered by" the RNIAP. Relying on Authority precedent, the arbitrator found that the "covered by" doctrine is not applicable to the RNIAP because it is not a collective bargaining agreement. JA 198. The arbitrator reasoned that:

> Allowing the [a]gency to draft and unilaterally implement a contract provision which would delegate to managers below the level of recognition the right to make determinations and implement policies with respect to which bargaining would otherwise be required (at least at the level of recognition) and then use that unilateral delegation to avoid any bargaining would effectively gut the impact and implementation bargaining obligation created by law.

Id.

[5] An exception to which the arbitrator was referring was paragraph 5.A.1.d of the RNIAP, which he stated "represents a determination by the Agency that it will not bargain over the permissive subjects in § 7106(b)(1)." JA 197.

Accordingly, the arbitrator concluded that the agency violated § 7116(a)(1) and (5) of the Statute by failing to provide notice and an opportunity to negotiate local assignment policy changes at the national level. *Id*. The arbitrator directed the parties to attempt to agree on an appropriate remedy, and retained jurisdiction in the event the parties were unable to agree. JA 201. When the parties were unable to reach an agreement on the appropriate remedy, the arbitrator issued his Remedy Award in which he directed the agency to provide the union with notice and an opportunity to bargain at the national level. JA 202-222.

The Authority's Decision

The Authority upheld the arbitrator's finding of a ULP. As pertinent here, the Authority denied both of the agency's contrary-to-law exceptions. JA 288 – 290. Relying on its prior decisions, the Authority held that although Section 3 of the RNIAP terminated the agency's obligation to bargain over inspectional assignment matters at the *local level*, it did not extinguish the agency's statutory bargaining obligations at the *national level*. JA 289. Also, the Authority rejected the agency's argument that the changes in local assignment policies changed employees' "working conditions," but not their "conditions of employment," finding no substantive difference between the two terms. JA 290. Regarding the agency's contention that the RNIAP is a collective bargaining agreement to which

the "covered by" doctrine applies, the Authority adhered to Authority precedent holding to the contrary. *Id.* [6]

Accordingly, the Authority denied the agency's exceptions and upheld the arbitrator's award. An appeal to this Court followed.

STANDARD OF REVIEW

The standard of review of Authority decisions is "narrow." *AFGE, Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998). Authority action shall be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 7123(c), incorporating 5 U.S.C. § 706(2)(A); *Overseas Educ. Ass'n, Inc. v. FLRA*, 858 F.2d 769, 771-72 (D.C. Cir. 1988). Under this standard, unless it appears from the Statute or its legislative history that the Authority's construction of its enabling act is not one that Congress would have sanctioned, the Authority's construction should be upheld. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). A court should defer to the Authority's construction as long as it is reasonable. *See id.* at 845.

[6] In other exceptions, the agency contended that: (1) the award was contrary to law because it imposed a bargaining order and remedy for a bargaining unit that no longer existed; (2) the award's finding that the RNIAP is not a collective bargaining agreement, and its failure to apply the "covered by" doctrine, were contrary to public policy; and (3) the arbitrator's award of status quo ante relief was contrary to law. JA 285-287. In its brief, the agency appears to have abandoned these arguments and, thus, the FLRA does not address them further here.

As the Supreme Court has stated, the Authority is entitled to "considerable deference" when it exercises its "'special function of applying the general provisions of the [Statute] to the complexities' of federal labor relations." *NFFE, Local 1309* v. *Dep't of the Interior*, 526 U.S. 86, 99 (1999) (internal citations omitted).

This Court has noted that "[w]e accord considerable deference to the Authority when reviewing an unfair labor practice determination, recognizing that such determinations are best left to the expert judgment of the FLRA." *Fed. Deposit Ins. Corp. v. FLRA*, 977 F.2d 1493, 1496 (D.C. Cir. 1992) (*FDIC*) (internal quotations omitted). As a result, "[o]ur scope of review is limited." *Pension Benefit Guaranty Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992).

Factual findings of the Authority that are supported by substantial evidence on the record as a whole are conclusive. 5 U.S.C. § 7123(c); *NTEU v. FLRA*, 721 F.2d 1402, 1405 (D.C. Cir. 1983). The Authority is entitled to have reasonable inferences it draws from its findings of fact not be displaced, even if the court might have reached a different view had the matter been before it *de novo*. *See AFGE, Local 2441 v. FLRA*, 864 F.2d 178, 184 (D.C. Cir. 1988); *see also LCF, Inc. v. NLRB*, 129 F.3d 1276, 1281 (D.C. Cir. 1997).

SUMMARY OF ARGUMENT

It is undisputed that the agency made changes to local work and overtime assignment policies without giving the union notice and an opportunity to bargain. These changes, which had a significant impact on bargaining unit employees throughout the agency, were changes to conditions of employment.

As both this Court and the Authority have recognized, although the RNIAP extinguished the agency's obligation to bargain over the impact and implementation of changes to conditions of employment at the *local level*, the agency's obligation to bargain at the *national level* remained intact. Therefore, the agency has an obligation to bargain, at the national level, over the impact and implementation of the changes to work and overtime assignment policies, an obligation that it breached.

In defense of its breach, the agency argues that it has no bargaining obligation because the changes to work and overtime assignment policies are "covered by" the RNIAP. But, this defense fails because the "covered by" doctrine applies only to collective bargaining agreements. The Authority properly held that the RNIAP is not a "collective bargaining agreement" because it is not an agreement or the result of any collective bargaining. Also lacking merit is the agency's argument that the policy changes constitute changes in "working

conditions" instead of changes in "conditions of employment" and that, therefore, it has no obligation whatsoever to bargain over them. That argument is inconsistent with the Court's ruling in *NTEU v. FLRA*, 453 F.3d at 509, that the Authority "reasonably found" that the RNIAP did not extinguish the union's right to bargain prospectively, at the national level, over the impact and implementation of changes to conditions of employment.

ARGUMENT

I. THE AGENCY REASONABLY UPHELD THE ARBITRATOR'S DETERMINATION THAT THE AGENCY COMMITTED A ULP

A. General Legal Principles

It is a cardinal principle of labor law, in both the private and federal sectors, that an employer commits a ULP by unilaterally implementing changes in conditions of employment of represented employees without completing bargaining to the extent required by law. *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962); *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125, 131 (D.C. Cir. 2001); *FDIC*, 977 F.2d at 1497-98.

Consistent with this principle, an agency is required to negotiate in good faith with employees' chosen representatives, upon request, with respect to changes in conditions of employment if the changes will have more than a *de*

minimis impact on conditions of employment. *AFGE, Nat'l Border Patrol Council, AFL-CIO v. FLRA*, 446 F.3d 162, 165 (D.C. Cir. 2006). Even where changes to conditions of employment occur as a result of the exercise of management rights under § 7106(a) of the Statute, the agency remains obligated to bargain with respect to the impact and implementation of the changes in conditions of employment pursuant to 5 U.S.C. §§7106(b)(2) (procedures governing the exercise of the right) and (b)(3) (appropriate arrangements for employees adversely affected by the exercise of the right). *Dep't of the Navy, Marine Corps. Logistics Base, Albany, Ga. v. FLRA*, 962 F.2d 48, 50 (D.C. Cir. 1992) ("*Marine Corps*.").

The Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. § 7103(a)(14).[7] In determining whether a proposal or matter concerns a condition of employment of bargaining unit employees, the Authority applies a two-pronged test. Under this test, the Authority determines whether: (1) the matter proposed to be bargained pertains to bargaining unit employees; and (2) the nature and extent of the effect of the matter proposed

[7] Section 7103(a)(14) contains exceptions for matters relating to certain partisan political activities, position classification, and matters specifically provided for by Federal statute, none of which apply here.

to be bargained on working conditions of those employees. *Antilles Consol. Educ. Ass'n*, 22 F.L.R.A. 235, 236-237 (1986) (*Antilles*).

B. The Authority Reasonably Upheld the Arbitrator's Determination That The Agency Committed a ULP by Changing Work Assignment Policies Without Bargaining

The Authority reasonably applied the principles set forth above when it determined to uphold the arbitrator's findings. The Authority's determination to uphold the arbitrator's ULP finding is based on three propositions, two of which are undisputed: (1) the agency changed local work assignment policies; (2) local work assignment policies constitute conditions of employment; and (3) the agency did not give the union notice and an opportunity to bargain when it changed local work assignment policies. Because all three propositions are supported by the record, the Court should uphold the Authority's reasonable determination that the arbitrator did not err when he concluded that the agency committed a ULP when it made these changes.

As to the first consideration, it is undisputed that the agency made changes to policies governing such matters as length of workweek, work hours, days off, scheduling, staffing levels, staffing flexibility, and shift swaps.

As to the second consideration, the agency's changes in local work assignment policies were significant, and the agency does not argue to the

contrary. Examples of the "numerous changes to local assignment policies" (PB at 10), as enumerated in the arbitrator's award, include changes in the policies on excusal from mandatory overtime, participation in overtime pools, and airport reassignments. JA 195 - 197. Because the effect of the policy changes on the working conditions of bargaining unit employees was significant and the extent was agency-wide, the policy changes were changes to conditions of employment. See *Antilles*, 22 F.L.R.A. at 236-237.

As to the third consideration, it is undisputed that the agency, when making these changes to local assignment policies, did not provide the union with notice or an opportunity to bargain at the national level. PB at 10.

Based on the forgoing, the Authority reasonably upheld the arbitrator's determination that the agency committed a ULP when it breached its statutory obligation to bargain, at the national level, over the impact and implementation of changes to conditions of employment.

II. THE AGENCY'S ARGUMENTS THAT IS HAS NO BARGAINING OBLIGATIONS LACK MERIT

A. The "Covered By" Doctrine Does Not Excuse the Agency From its Bargaining Obligation

Contrary to the agency's contention, the "covered by" doctrine does not excuse it from its obligation to bargain, at the national level, over the impact and

implementation of the changes to conditions of employment. Because the RNIAP is not a collective bargaining agreement, the "covered by" doctrine does not apply.

Under the "covered by" doctrine, an agency has no duty to enter into negotiations if the proposed personnel policies and practices have already been negotiated and are covered in a collective bargaining agreement. *United States Dep't of Health & Human Serv. Admin., Soc. Sec. Admin., Balt., Md.*, 47 F.L.R.A. 1004, 1013, 1015-1018 (1993) (*SSA, Balt.*). This doctrine operates as a defense to an agency's alleged unlawful refusal to bargain under §7116(a)(5) of the Statute. *See U.S. Dep't of Health & Human Serv., Admin., Soc. Sec. Admin. Headquarters, Balt., Md.*, 57 F.L.R.A. 459, 460 (2001).

A prerequisite to the "covered by" doctrine is a collective bargaining agreement. *See NTEU v. FLRA*, 452 F.3d 793, 797 (D.C. Cir. 2006); *Marine Corps*., 962 F.2d at 53; see *also* PB at 19, 22-23. In this regard, the Court emphasized in *Marine Corps.* that "the structural heart of labor law" is reflected in the fact that the "covered by" doctrine applies when "parties bargain about a subject and memorialize the results of their negotiation in a collective bargaining agreement." 962 F.2d at 57.

More particularly, the doctrine recognizes that, pursuant to "the fundamental policy of freedom of contract," the parties are free to "create a set of enforceable

rules" by agreement and that further bargaining is not required over matters that are covered by or contained in that agreement. *Id*. The Court noted that a primary purpose of the Statute is to "promote collective bargaining and the negotiation of collective bargaining agreements [,]" and that implicit in these purposes is the need to provide parties "with stability and repose with respect to matters reduced to writing in [an] agreement." *Id*. at 59. According to the Court, the Authority properly recognized that requiring parties "to adhere to the specific conditions of employment *mutually* established in their agreement" promotes such stability. *Id*.

On the other hand, according to the Court, a completely separate standard applies when there is a claim that a union has "surrender[ed]" its right to bargain and "cede[d] full discretion" to an agency on a matter. *Id*. at 57. In the latter situation, "courts require 'clear and unmistakable' evidence of waiver and have tended to construe waivers narrowly." *Id*.

Consistent with the foregoing principles, the Authority, which has consistently held that the RNIAP is not a collective bargaining agreement, also has held that it is not subject to the "covered by" doctrine. JA 290. As explained below, the Authority properly found that the agency provided no basis for reversing its precedents in which it made that holding.

A "collective bargaining agreement" is defined under the Statute as "an *agreement* entered into as a result of collective bargaining." 5 U.S.C. § 7103(a)(8) (emphasis added). The RNIAP does not fit within this definition because it is not an agreement. An "agreement" is defined as "a manifestation of mutual assent by two or more persons." *Black's Law Dictionary* 782 (9th ed. 2009). There was no manifestation of mutual assent to the implementation of the RNIAP. Quite the contrary, the agency unilaterally implemented the RNIAP after the parties could not agree on whether to combine bargaining over the RNIAP and the NLA. The union, rather than agreeing to the terms of the RNIAP, filed a grievance alleging that the agency committed a ULP, submitted the grievance to arbitration, opposed the agency's exceptions to the arbitrator's award before the Authority, and then filed a petition for review with this Court. *NTEU v. FLRA*, 414 F.3d at 54-56. Clearly, the union would not have taken these actions if there had been mutual assent. That the agency offered the union an opportunity to bargain before implementing the RNIAP (*see* PB at 26-27) does not transform the RNIAP into an agreement.

Further, the policy goals underlying the "covered by" doctrine make it plain that it does not apply here. As the Authority explained, determining whether a matter is "covered by" a collective bargaining agreement requires a "delicate

balance" of two policy goals of the Statute. *SSA Balt.*, 47 F.L.R.A. at 1018. First, "upon execution of an agreement, an agency should be free from a requirement to continue negotiations over terms and conditions of employment already resolved by the previous bargaining." *Id*. at 1017-1018. Second, "a union should be secure in the knowledge that the agency may not rely on that agreement to unilaterally change terms and conditions that were in no manner the subject of bargaining." *Id*.

Applying the "covered by" doctrine to the RNIAP, which was implemented without any bargaining whatsoever, does not implicate or serve either of these goals. Because the Authority found that the RNIAP was lawfully implemented and that the union missed its opportunity to bargain over it (because it insisted upon bargaining over the RNIAP and the NLA at the same time), the union cannot compel negotiations over any changes to conditions of employment actually prescribed in the RNIAP. At the same time, the agency may not rely on the RNIAP as a prospective waiver of the union's right to bargain at the national level over the impact and implementation of changes to conditions of employment other than those prescribed in the RNIAP, itself.

Nonetheless, the agency claims that no deference is owed to the Authority's determination that the RNIAP is not a "collective bargaining agreement" because the Authority has never given a "rational or coherent" explanation for its

determination. PB at 22. What the agency means by this is that the Authority did not explain why then-FLRA Chairman Cabaniss erred in the concurring opinions in which she stated that she would have found the RNIAP to be a collective bargaining agreement. PB at 22-27.

However, there is no need for the Authority to explain its rejection of a single Member's concurring opinion that the Authority has never adopted as Authority law. In any event, the fundamental error in the concurrences' analysis is obvious; it conflates two separate concepts - - the process of collective bargaining and the collective bargaining agreement that may (or may not) result from that process. *See* 5 U.S.C. § 7103 (a)(12) ("collective bargaining" defined as "the performance of a mutual obligation" that *could*, "if requested by either party," result in "a written document incorporating any collective bargaining agreement reached.") (emphasis added).

Equally unhelpful to the agency are the Authority precedents it cites in support of its view that the RNIAP is a collective bargaining agreement. Two of these precedents have nothing to do with the "covered by" doctrine or whether a collective bargaining agreement exists but, instead, concern circumstances in which the union may have waived its right to impact and implementation bargaining. *See* PB at 25, citing *United States Immigration and Naturalization*

Service, Washington, D.C., 55 F.L.R.A. 69, 73 (1999); and *United States Immigration and Naturalization Service,* 24 F.L.R.A. 786, 790 (1986). Such is not the case here where, as the Authority and this Court found, the union did not relinquish its right to impact and implementation bargaining at the national level.

In fact, there is no Authority precedent that applies the "covered by" doctrine to agency policies that have been unilaterally implemented when the union was unable to, or did not effectively, avail itself of the opportunity to bargain. In this regard, the agency's reliance upon the Authority's decision in *United States Dep't of Labor, Washington, D.C.*, 60 F.L.R.A. 68 (2004) ("*DOL*"), is misplaced. *DOL* involved unique circumstances that are completely different from the facts of the instant case.

In *DOL*, the Authority applied the "covered by" doctrine to a Memorandum of Understanding (MOU) over which the parties had bargained to impasse. The agency implemented the MOU when the union failed to seek the assistance of the Panel.

The Authority treated the proposed MOU as a collective bargaining agreement to avoid frustrating the unique federal sector scheme for resolving bargaining impasses. *DOL*, 60 F.L.R.A. at 71. The purpose of that scheme is "to facilitate and, if necessary, impose a resolution of impasses." *Id*. As the

Authority further observed, "it is well established that the procedures of the Panel are part of the collective bargaining process and that any agreement, mandated or otherwise, resulting therefrom is a part of the collective bargaining agreement." *Id*. (citations omitted). The Authority concluded that the proposed MOU that was at impasse should be treated as an agreement so that unions would not have "an incentive to not seek the Panel's assistance and, instead, attempt to require additional bargaining on issues over which impasse had previously been reached." *Id*. at 71-72.

The circumstances of the instant case are completely different. Here, by contrast, the union evidenced no intent to abandon its rights. Instead, the union vigorously, albeit ineffectively, pursued its rights. When the agency first proposed the RNIAP, the union invoked its right to negotiate over the impact and implementation of the RNIAP. When it appeared to the union that the parties had reached an impasse, the union sought assistance from the Federal Mediation and Conciliation Service and then from the Panel. When the agency unilaterally implemented the RNIAP, the union filed a grievance in which it sought to regain its right to impact and implementation bargaining over the RNIAP. As the Authority and this Court found, that right, insofar as it was exercised at the local level, was irretrievably lost.

However, there is no basis to extend the union's loss to its right to bargain in the future over changes to conditions of employment not already within the RNIAP. *DOL*, therefore, provides no support for the agency's claim that the RNIAP incorporates the union's agreement to extinguish its prospective bargaining rights regarding the agency's changes in work assignment policies.

For the forgoing reasons, the Court should reject the agency's argument that the local changes to work assignment policies are "covered by" the RNIAP.

B. The Agency's Argument That its Changes to Work Assignment Policies Were Not Changes in Conditions of Employment Lacks Merit

The agency's contention that it did not commit a ULP is built on the faulty proposition that the union's unsuccessful attempt to bargain over the agency's proposal in the RNIAP to extinguish the union's prospective bargaining rights resulted in an agreement that actually extinguished those rights at the level of recognition. In support of that proposition, the agency argues that the work assignment policy changes are "working conditions" instead of "conditions of employment." The Court should reject this argument.

The agency asserts that, in section 5, the RNIAP established new conditions of employment that permitted local managers to establish new assignment policies consistent with "workload," "operational needs," and/or "budgetary limitations"

without the need for bargaining. PB at 7-8, 35. It contends that when local managers changed assignment of work policies applying these general criteria, they were not changing conditions of employment but were, instead, changing "working conditions." *Id*. at 31-32. This argument lacks merit.

It is true that the RNIAP changed "conditions of employment" by, among other things, terminating previous agreements on permissive subjects covered by 5 U.S.C. § 7106(b)(1) and providing local managers authority to make certain determinations regarding the assignment of work. *See* RNIAP, section 3 and section 5.A.1.d. (delegating to local managers authority over "scheduling the numbers, types and grades of employees" they determine are needed for a tour, shift, location, special team or task). It is true also that the union sought, unsuccessfully, to bargain with the agency over the impact and implementation of the RNIAP. *See Customs Serv.*, *supra*. As a result, the union is foreclosed, for the term of the NLA, from bargaining over that subject. In practical terms, the union is bound by the agency's determination to terminate bargaining over permissive subjects as well as its decision to vest local managers with the authority to implement changes to work and overtime assignment policies.

However, it does not follow from this that all work assignment policy changes subsequent to the implementation of the RNIAP are off the table. As established

previously, the specific changes to work assignment policies that local managers made were changes to "conditions of employment" subject to a bargaining obligation at the national level. This finding is consistent with the Court's rulings. *See NTEU v. FLRA*, 453 F.3d at 509 (The Authority "reasonably found" that under the RNIAP, the agency "could not lawfully refuse to bargain at the national level . . . over the impact and implementation of [decisions concerning the assignments of inspectors]."). Indeed, in *NTEU, Chapter 137 (I)*, the Authority made the uncontested finding that "*the [a]gency acknowledges* that it continues to have an obligation to bargain at the national level over assignment-related matters and that section 3 [of the RNIAP] does not constitute a waiver of the [u]nion's statutory rights to bargain over future changes in inspectional assignment policies." 60 F.L.R.A. at 488 (emphasis added). The agency should not now be permitted to evade that continuing obligation.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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D.C. Circuit Rule 32(a) Certification

Pursuant to Fed. R. App. P. 32(a)(7) and D.C. Circuit Rule 32(a), I hereby certify that this brief is double spaced (except for extended quotations, headings, and footnotes) and is proportionately spaced, using Times New Roman font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 14,000 words. It contains 5,745 words excluding exempt material.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1282

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS AND BORDER PROTECTION,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

and

NATIONAL TREASURY EMPLOYEES UNION,
Intervenor.

CERTIFICATE OF SERVICE

I certify that copies of the Brief for the Federal Labor Relations Authority have been filed with this court and served this day by way of the ECF filing system, and by mail, upon the following:

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February 14, 2011

Relevant Portions of the Federal Service Labor-Management Relations Statute

5 U.S.C. §§ 7101-7135

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§ 7102. Employees' rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

§ 7103. Definitions; application

(a) For the purpose of this chapter—

. . . . .

(8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

. . . . .

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

. . . . .

(14) conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute. . . . .

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

§ 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which

such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(e) The expression of any personal view, argument, opinion or the making of any statement which—

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat or reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor

practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.