

70 FLRA No. 184

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

U.S. DEPARTMENT
OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

0-NG-3376

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

November 5, 2018

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

Recognizing that these parties have already negotiated over how employees address individual workload concerns, we find that the Agency has no obligation to bargain over a proposal that addresses that same topic after a change in assignment procedures.

This matter is before the Authority on a negotiability appeal filed under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute).¹ The Union filed a petition for review (petition) concerning one proposal (the proposal) that requires the Agency to limit the number of cases that it assigns to employees with higher-than-average caseloads, or, alternatively, to modify case-processing deadlines. In addition, the Agency filed a statement of position (statement), the Union filed a response to the statement (response), and the Agency filed a reply to the response (reply).

The main question before us is whether the proposal is outside the Agency's duty to bargain because the proposal is covered by Article 25 of the parties' collective-bargaining agreement. Because the subject matter of the proposal is expressly contained in

Article 25, the answer is yes. Therefore, we will dismiss the petition.

II. Background

The Agency operates the Taxpayer Advocate Service (TAS), which employs case advocates to ensure that taxpayers understand their rights and receive fair treatment in resolving federal tax matters. When TAS receives a taxpayer's request for assistance, TAS assigns that "case" to one of its offices. Then the receiving TAS office assigns the case to one of its case advocates for review, research, development, and direct contact with the taxpayer. In performing these tasks, case advocates must adhere to case-processing deadlines that vary depending on the type or urgency of the tax matter.

Previously, TAS primarily assigned cases to its offices based on where the taxpayer first contacted TAS. But, in an effort to more evenly distribute cases among offices, TAS notified the Union that it would begin primarily assigning cases to offices based on the ZIP code of the taxpayer involved. The parties refer to this change in assignment procedures as the Initiative. They engaged in mid-term bargaining over the impact and implementation (I&I) of the Initiative, and – except for the one proposal disputed here – they reached an I&I agreement. The parties signed the I&I agreement without the disputed proposal, based on the understanding that, if the Authority found the proposal negotiable, then the parties would return to the bargaining table to negotiate the proposal.

The Union filed the petition on June 30, 2017. On July 27, 2017, the Authority conducted a post-petition conference (conference) with the parties.² The Agency filed its statement on August 11, 2017; the Union filed its response on August 28, 2017; and the Agency filed its reply on September 18, 2017.³

² See 5 C.F.R. § 2424.23.

³ The Agency requests a hearing to address "the nature of the change being negotiated" and whether the parties' bargaining history shows that their existing agreement covers the same subject as the disputed proposal. Statement at 19. Under § 2424.31 of the Authority's Regulations, the Authority may order a hearing "[w]hen *necessary* to resolve disputed issues of material fact in a negotiability or bargaining obligation dispute." 5 C.F.R. § 2424.31 (emphasis added). As discussed in Part III below, the record contains sufficient information to resolve this case without a hearing, so we deny the Agency's hearing request. See *AFGE, Local 32*, 59 FLRA 926, 926 n.2 (2004) (denying hearing request that did not identify issues "that need[ed] to be resolved to determine the negotiability of the proposals").

¹ 5 U.S.C. § 7105(a)(2)(E).

III. Proposal

A. Wording

In implementing this Initiative which, among other things, seeks to address “disparities in the level of inventories of Case Advocates,” and in applying the N-WLB [(National Work-Load Balancing)] policy to active Case Advocates (CAs) and Bilingual Case Advocates (BCAs) in offices that are eligible to send cases to other offices under English or Spanish N-WLB, TAS will take the following steps to address the impact to individual CAs/BCAs who have an inventory level that is ten percent (10%) or more higher than the national inventory average: TAS will assign no more than two (2) cases per workday to such CAs/BCAs or, where TAS determines to assign more than two (2) cases per workday to such CAs/BCAs, it will extend for a reasonable period of time the case processing requirements that are applicable to the new cases that are assigned. This process will continue during all time periods in which that specific CA/BCA has an inventory level that is ten percent (10%) or more higher than the national inventory average.⁴

B. Meaning

At the conference, the Union stated that the “proposal seeks to balance the case inventories across case advocates,” and that “this would be accomplished by either limiting daily assigned cases or – where more than two cases are assigned [in one workday] – extending the case-processing deadlines for a reasonable period of time.”⁵ The Union further explained that this limitation would be triggered “where a case advocate has a case inventory that is ten percent or higher than the national average” for all case advocates.⁶ The Union also stated that the Agency would determine what a “reasonable period of time” is, but that the Union could challenge that determination as “arbitrary or unreasonable.”⁷ The Agency agreed with the Union’s

explanation of the meaning and operation of the proposal.⁸

C. Analysis and Conclusion: The proposal is covered by Article 25 of the parties’ agreement.

The Agency claims that the proposal is outside the duty to bargain because the proposal: (1) is “covered by” Article 25 of the parties’ agreement;⁹ (2) is not related to the change in how TAS assigns cases to its offices;¹⁰ and (3) impermissibly interferes with management’s rights to direct employees and assign work.¹¹ For the reasons below, resolving the Agency’s covered-by objection fully disposes of the petition, so we need not address the Agency’s remaining arguments.¹²

The covered-by doctrine has two prongs,¹³ but here we discuss only the first. Under the first prong, the Authority examines whether the subject matter of the change to conditions of employment is expressly contained in the agreement.¹⁴ The Authority does not require an exact congruence of language.¹⁵ Instead, the Authority finds the requisite similarity if a reasonable reader would conclude that the contract provision settles the matter in dispute.¹⁶

Here, the “subject matter”¹⁷ of Article 25 is “[w]orkload [m]anagement.”¹⁸ And, as relevant to this dispute, the following provisions of Article 25 reveal how the parties agreed to address that subject:

[Section 1.A.] Employer retains the right to assign work to employees under the provisions of 5 U.S.C.

⁴ Post-Pet. Conference Record (Record) at 1-2.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* The Agency disagrees with conference record to the extent that it “suggests that the parties were negotiating over the disparities in the inventories of *individual case advocates* within TAS.” Statement at 18 (emphasis added). Because the conference record does not include the suggestion to which the Agency objects, we do not amend the record.

⁹ Statement at 1, 11-17.

¹⁰ *Id.* at 1, 8-11.

¹¹ *Id.* at 1, 4-8.

¹² See, e.g., *NATCA*, 66 FLRA 213, 217-18 & n.6 (2011) (where agency alleged that proposal was unlawful and covered by parties’ agreement, Authority found proposal covered by agreement and dismissed petition as to that proposal without evaluating the proposal’s legality).

¹³ *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000) (*Customs*).

¹⁴ *Id.*

¹⁵ *Fed. BOP v. FLRA*, 654 F.3d 91, 94-95 (D.C. Cir. 2011).

¹⁶ *U.S. Dep’t of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1018 (1993).

¹⁷ *Customs*, 56 FLRA at 814.

¹⁸ Statement, Attach. 8, 2016 Nat’l Agreement at 93 (article title).

§ 7106(a). However, if the exercise of that right by the Employer results in more than a *de minimis* change in working conditions, the Employer will notify the Union and bargain to the extent required by law.

....
[Section 1.D.1.] If negotiations are not required by a change in workload as described in [Section 1.A.], above, employees are encouraged to discuss unmanageable inventory problems with their supervisors at any time. During such discussions, employees are also encouraged to suggest ways that their inventory could be adjusted that would increase efficiency. If the matter remains unresolved, employees or the Union may submit their concerns in writing to the appropriate management official.¹⁹

Relying on the wording of Section 1.D.1. above, the Agency argues that the proposal concerns a subject that the agreement expressly covers: how to address employees' individual inventory concerns.²⁰ Thus, the Agency argues that the covered-by doctrine relieves it of any bargaining obligation over the proposal.²¹ In its response, the Union notes that, even if the agreement addresses a particular subject, the parties may nevertheless expressly authorize additional bargaining over that subject – notwithstanding the covered-by doctrine.²² And the Union asserts²³ that Section 1.A. authorizes further bargaining here.²⁴

We agree with the Agency's contention that the subject of the proposal and the subject of Section 1.D.1. are the same: how to address employees' individual

¹⁹ *Id.* at 93 (Art. 25, § 1.A.), 94 (Art. 25, § 1.D.1.).

²⁰ Statement at 11-17.

²¹ *Id.*

²² Resp. at 8-9 (citing *U.S. Dep't of the Treasury, IRS*, 68 FLRA 1027, 1032 (2015)).

²³ *Id.* at 9.

²⁴ In its reply, the Agency does not offer additional arguments on the covered-by dispute. Instead, the Agency states that it "sees no need to reply further . . . [.] as the Union raised no issues not already addressed by the Agency" in its statement. Reply at 1. By saying that it would not reply *further*, the Agency implicitly reaffirms its earlier argument that Article 25 covers the subject of the proposal. The reply does not add to the Agency's earlier argument, but also does not abandon it. Thus, we find that the Agency's explanation, albeit brief, sufficiently "respond[s] to" the Union's argument that the covered-by doctrine does not apply here. 5 C.F.R. § 2424.32(c)(2) ("Failure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion." (emphasis added)).

inventory concerns. The conference record confirms that the "proposal seeks to balance the case inventories across case advocates."²⁵ And both the title of Article 25 – "Workload Management" – and the text of Section 1.D.1. concern that same subject.²⁶ For example, Section 1.D.1. addresses "change[s] in workload," "unmanageable inventory problems," and "ways that . . . inventory could be adjusted."²⁷ Thus, we find that Section 1.D.1. covers the matter and relieves the Agency of any further bargaining obligation,²⁸ *unless* Section 1.A. expressly authorizes further bargaining.

The Union's argument about express bargaining authorization relies on Section 1.A.'s statement that, if the exercise of management's right to assign work changes working conditions in a more than *de minimis* manner, then the Agency "will notify the Union and bargain to the extent required by law."²⁹ But the Union's argument ignores the important limiting phrase "*to the extent required by law*."³⁰ The covered-by doctrine is, itself, part of the "law" that governs the Agency's bargaining obligations.³¹ And because Section 1.D.1. covers the same subject as the proposal, the Agency has already bargained over how to address employees' individual inventory concerns "to the extent required by law."³² Moreover, inasmuch as the *law* does not require additional bargaining on that subject, Section 1.A. does not authorize further bargaining. Thus, we reject the Union's contrary argument about Section 1.A.

In sum, we find that the Union's proposal is covered by Section 1.D.1., and that Section 1.A. does not expressly authorize further bargaining. Therefore, the Agency has no obligation to bargain over the proposal.

IV. Order

The petition for review is dismissed.

²⁵ Record at 2.

²⁶ Statement, Attach. 8, 2016 Nat'l Agreement at 93.

²⁷ *Id.* at 94 (Art. 25, § 1.D.1.).

²⁸ Despite the dissent's insistence to the contrary, Dissent at 7-8, the application of the covered-by doctrine here does not turn on *when* Section 1.D.1. applies. Rather, the doctrine requires us to ask *what* Section 1.D.1. addresses. And because Section 1.D.1. addresses the same subject as the proposal, the covered-by doctrine relieves the Agency of any further bargaining obligation here.

²⁹ Resp. at 9 (emphasis altered) (quoting Art. 25, § 1.A.).

³⁰ *Id.* (quoting Art. 25, § 1.A.).

³¹ *E.g., U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 875 F.3d 667, 669 (D.C. Cir. 2017) ("[T]he 'covered-by' doctrine . . . embraces a well-established principle in labor law . . .").

³² Resp. at 9 (emphasis removed).

Member DuBester, dissenting:

I disagree with the majority's determination that "the Union's proposal is covered by [Article 25,] Section 1.D.1.,"¹ and consequently is outside the Agency's duty to bargain. The majority finds that "the subject of the proposal and the subject of Section 1.D.1 are the same: how to address employees' individual inventory concerns."² Relying on this interpretation, the majority concludes that "the Agency has already bargained over how to address [those] concerns."³

The majority's reliance on Section 1.D.1. is based on a misunderstanding of the relationship between that section and Article 25's Section 1.A. Article 25's language clearly describes that relationship.⁴ Beginning with Section 1.A., that section defines the extent of the Agency's bargaining obligation regarding changes to work assignment matters. As the majority acknowledges, under Section 1.A., "if the exercise of management's right to assign work changes working conditions in a more than *de minimis* manner, then the Agency 'will notify the Union and bargain to the extent required by law.'"⁵ Accordingly, under Section 1.A.'s plain language, negotiations over a change are required unless, for example, the change is *de minimis*, or is the result of

the Agency's nonnegotiable exercise of a management right.

Article 25's language also clearly describes Section 1.D.1.'s relationship to Section 1.A. Under Section 1.D.1.'s plain language, that section *only* becomes operative, and applies in a particular situation, "[i]f negotiations are not required by a change in workload as described in [Section 1.A.], above."⁶ And further under Section 1.D.1., if, but only if negotiations are not required under Section 1.A., then "employees are encouraged to discuss unmanageable inventory problems with their supervisors at any time."⁷

Thus, Section 1.D.1.'s "encouragement" to employees "to discuss . . . inventory problems"⁸ or "concerns,"⁹ on which the majority relies, *only* becomes operative, and applicable to a particular situation, "if negotiations are not required" under Section 1.A.

Ignoring the language and structure of Article 25, the majority's decision is a classic example of circular reasoning.¹⁰ The majority *assumes* that Section 1.D.1. is operative, and applicable in this case, in order to conclude that the section "covers" the Union's proposal. On this basis, the majority then concludes that "negotiations are not required" under Section 1.A. This is precisely the condition that makes Section 1.D.1. operative, and applicable to a particular situation. But this is also the assumption the majority makes when it begins its analysis – that Section 1.D.1. is applicable in the first place. The majority's circular analysis thus returns to the assumption with which it began.

Contrary to the majority, and applying Article 25's plain language to the proposal, I would find that Section 1.A. requires bargaining. The Agency's change was more than *de minimis*, and the proposal qualifies as an appropriate arrangement under § 7106(b)(3) of the Statute. And, for the reasons discussed above, I would not find that Section 1.D.1. applies, or that the proposal is covered by the parties' agreement.

¹ Majority at 6.

² *Id.* at 5.

³ *Id.*

⁴ Article 25 states, as relevant here:

[Section 1.A.] Employer retains the right to assign work to employees under the provisions of 5 U.S.C. § 7106(a). However, if the exercise of that right by the Employer results in more than a *de minimis* change in working conditions, the Employer will notify the Union and bargain to the extent required by law.

....

[Section 1.D.1.] If negotiations are not required by a change in workload as described in [Section 1.A.], above, employees are encouraged to discuss unmanageable inventory problems with their supervisors at any time. During such discussions, employees are also encouraged to suggest ways that their inventory could be adjusted that would increase efficiency. If the matter remains the matter remains unresolved, employees or the Union may submit their concerns in writing to the appropriate management official.

⁵ Majority at 5 (quoting Section 1.A.).

⁶ Statement, Attach. 8, 2016 Nat'l Agreement at 94.

⁷ *Id.*

⁸ *Id.*

⁹ *E.g.*, Majority at 4.

¹⁰ See https://en.wikipedia.org/wiki/Circular_reasoning (Circular reasoning, also known as circular logic, "is a logical fallacy in which the reasoner begins with what they are trying to end with."); see also *King v. St. Vincent's Hosp.*, 502 U.S. 215, 215 (1991) (Argument is "unconvincing because its conclusion rests on circular reasoning, requiring the assumption of the point at issue.").

In sum, the majority's covered-by analysis is circular and logically incorrect. And the Agency's other claims are unpersuasive. Accordingly, I would find the proposal negotiable.