OFFICE OF ADMINISTRATIVE LAW JUDGESWASHINGTON, D.C. 20424

. . . . . .UNITED STATES CUSTOMS SERVICE .SAN FRANCISCO, CALIFORNIA
. Respondent .. and Case No. 9-CA-10622
NATIONAL TREASURY EMPLOYEES .UNION .
Charging Party/ Union... . . . . .Martha T. Wong Counsel for the Respondent
John Villasenor Representative of the Charging Party

R. Timothy Sheils Counsel for the General Counsel, FLRA
Before: GARVIN LEE OLIVER Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1), (5), and (6) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1), (5), and (6), by implementing a new shift from 2 p.m. to 10 p.m., while the Union's request for assistance with the negotiations was pending before the Federal Service Impasses Panel. The complaint also alleges that Respondent violated section 7116(a)(1) and (5) of the Statute by changing the policy of assigning off days for Saturday work prior to the completion of negotiations with the Union concerning the change.

Respondent's answer denied any violation of the Statute and asserted, in part, that the issues remaining in dispute after bargaining were not subject to further bargaining as they were addressed by existing agreements. Respondent also maintained that the Union had waived its right to bargain concerning the policy of assigning off days for Saturday work by waiting until the "eleventh hour" to request bargaining.

A hearing was held in San Francisco, California. The Respondent, Union, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Union (NTEU) is the certified exclusive representative of a nationwide unit of employees appropriate for collective bargaining at United States Customs Service, Washington, D.C., including the Respondent's San Francisco District, San Francisco, California employees.

From approximately 1983 until September 1991 there was only one regular shift at the San Francisco International Airport (SFO), from 8 a.m. to 5 p.m., and there was no regular shift at Oakland. As a result, all of the work assignments of the inspectors at Oakland and at SFO after 5 p.m. were overtime assignments. The

overtime assignments allowed inspectors to earn at a rate that exceeded double time. Between 10-14 inspectors would work the overtime assignment at SFO each night. At Oakland, four inspectors would work three overtime assignments during the weekday evenings until December 1991 when two additional weekday evenings of overtime assignments were added. While only 35-40 of the region's inspectors were assigned to the regular shift at the baggage terminal, all 130 inspectors in the region participated in the baggage overtime at both SFO and Oakland. The selection for the baggage overtime involved a number of factors that had evolved from various sources, including both past practices and provisions found in various negotiated agreements.

On March 11, 1991, Respondent formally advised NTEU of its intention to implement a new shift at SFO Baggage from 2 p.m. to 10 p.m. One of the main impacts of such a shift would be the elimination of the previous overtime earned from 5 p.m. to 10 p.m. The Respondent enclosed its proposed procedures for the new shift and any additional overtime which would be required and invited the Union to offer impact and implementation proposals.

The Respondent and the Union commenced negotiations on March 22, 1991. On March 25, 1991, Respondent sent the Union a modification of its original procedures. The Union replied with its own proposals on March 30, 1991. A bargaining session in April 1991 ended without the parties reaching agreement.

FSIP Request

On May 13, 1991, Respondent distributed a modification of its plan to all employees to be effective May 28, 1991, which did not reflect the Union's position on all issues. The Union filed a request for assistance with the Federal Service Impasses Panel (FSIP or Panel) on May 15, 1991. Respondent rescinded its

May 13, 1991 plan on May 24, 1991. The Panel notified the parties that it had docketed the Union's request for assistance as 91 FSIP 210.

Implementation

While the parties were awaiting the Panel's action, Respondent implemented a modified plan on September 9, 1991. The plan contained the Union's proposed limit of a one-week involuntary assignment to the new shift, but none of the other disputed issues had been modified to reflect the Union's positions.

Unresolved Issues

When the Union requested the assistance of the Panel in May 1991, there were a number of unresolved issues. The four main issues concerned (1) the length of the shift rotation;

(2) procedures for mandatory overtime, including the staffing for work pending at 10 p.m. with personnel on the 2-10 p.m. shift; (3) procedures for the replacement and trade of such overtime assignments; and (4) procedures for an employee to request relief from such overtime assignments.

The first issue, the length of the shift rotation, was subsequently resolved when Respondent implemented the Union's proposal. With respect to the second issue, concerning mandatory overtime for personnel on the preceding shift, Respondent claimed that its right to draft employees from the 2 p.m. to the 10 p.m. shift to work pending overtime was covered by section (c) of Manual Supplement VIII-2132-01 of February 24, 1981 ("Manual Supplement", G.C. Ex. 7). Respondent claimed that section (c) of the 1981 Manual Supplement continued in existence after INS 2, Customs Directive of December 20, 1988 ("INS 2", G.C. Ex. 12) by virtue of a 1989 agreement or waiver on the part of the Union (Respondent's Ex. 2). Section (c) of the 1981 Manual Supplement had never been implemented. A previous 2-10 p.m. shift in 1983 did not have any need for overtime between 10-12 p.m. as no flights were scheduled to arrive between 10-12 p.m. (Tr. 269-70; 277). The Union took the position that this section of the Manual Supplement did not apply and was not effective pursuant to the agreement as it was in conflict with INS 2 of 1988. There is no dispute that if the provisions were in conflict with INS 2 it would be superseded by INS 2. The 1981 Manual Supplement and management's proposal required the initial assignment of overtime to personnel assigned to the previous shifts while INS 2 of 1988 was more permissive and provided that such personnel "will be considered first (in accordance with excusal procedures) if this will result in less cost to the government." The Union also took the position that the mandatory assignment of overtime conflicted with agreements and past practices under which the assignment to overtime depended upon gender and the amount of overtime earned by an inspector up to that time; that is, the inspector who had earned the lowest amount of overtime could request the assignment and the inspector with the most overtime earnings could request to be relieved of the assignment.

With respect to the issue regarding trade and replacement of overtime assignments, the Union proposed to continue the practice of an assigned inspector being able to trade job assignments with another assigned inspector. For example, an inspector assigned a cargo assignment could trade for a baggage assignment. The Union also wanted to make sure that the practice of an inspector finding a replacement could be applied to the new shift, even if the replacement inspector was not assigned to the shift and would earn increased overtime by virtue of being called back after completing a shift that ended at 5 p.m. Respondent, relying on INS 2 and the Manual Supplement, insisted that there be no additional expense to the Government in trades and, similarly, that replacements be limited to someone on the same shift to avoid as much as triple the cost.

Article 22, Section 4 of the national agreement allows inspectors to exchange overtime assignments. The provision lists only three reasons for normally disapproving the replacement: impairment of workflow, adverse impact upon number, types, and grades of employees, and adverse impact upon the administration of limits placed upon the permissible amount of overtime for employees. The provision does not refer to disapproval of an exchange because it would result in callback costs. This language was disapproved by the Department of the Treasury during the agency head review process. NTEU filed an appeal of that determination. On November 27, 1992, the Authority reviewed the provision (Provision 28) and ordered the Agency to rescind its disapproval. National Treasury Employees Union and U.S. Department of the Treasury, Customs Service, Washington, D.C., 46 FLRA 696, 752-54 (1992). Although the provision was not in effect uniformly until the pending negotiability appeal was issued, inspectors in the San Francisco Region were able to exercise the exchange replacement procedure based on an established past practice.

With respect to the issue of employees' requesting relief from overtime assignments, Section II.C.3 of INS 2 provided that, "A night assignment shall not be split where there is reasonable assurance that the assignment will terminate before 2 a.m." (Emphasis added). John Villasenor, Union Chapter President, testified that this determination was difficult for supervisors, so a practice developed whereby an inspector could request to be replaced on overtime if a flight came in after 1 a.m., since it generally took one hour to clear a flight. The Union had proposed to continue this practice. Respondent took the position that the proposal was covered by the national agreement, the mandatory overtime provision of the Regional Supplement, and section II.C.3 of

INS 2.

Also in dispute at the time of implementation was another Union proposal relating to health and safety. It provided that inspectors would not be drafted for overtime if they had worked overtime the night before.

Witnesses for both parties conceded that there are a myriad of agreements within the San Francisco district between NTEU and the Respondent that may have a bearing on overtime assignments. Respondent's Assistant District Director Tom O'Brien and NTEU's National Counsel Andrew Krakoff acknowledged that the parties have commonly negotiated agreements over a matter that may or may not be covered by various outstanding agreements because they found it too complicated to determine whether the matter is in fact covered by an agreement. (Tr. 251-52; 314-15).

Effect of Implementation

Establishing the new shift on September 9, 1991, saved Respondent about $150,000 in overtime costs in SFO Baggage. Approximately $130,000 of this savings was spent by Respondent on overtime in other areas. As a result, there was an overall decrease of approximately $20,000 in the overtime earnings of inspectors. The record reflects that some inspectors lost overtime pay as a result of the implementation of the new shift. (Tr. 140; 157; 232-34; 244; 258).

There is now less overtime available, and there are still the same number of inspectors competing for overtime. Among the other areas where the overtime funds were shifted, a small portion was used on the Enforcement Team, an overtime assignment which is not available to all inspectors. (Tr. 233, 244-45,

248-49; 253; 337-38).

FSIP Proceedings

Representatives of Respondent and the Union met with FSIP personnel in Washington, D.C., on March 27, 1992. After the parties' opening statements, FSIP Assistant Director H. Joseph Schimansky indicated that the matters in dispute appeared to involve the interpretation of previously negotiated agreements best decided by an arbitrator in the grievance process. He stated that since the problem involved certain language in management's proposals, the parties should spend the day resolving the matter by developing language that would be agreeable to both sides. Schimansky did not state what ultimate decision the Panel would render if agreement were not reached, and he did not say that, in that event, the Panel would dismiss the case for lack of jurisdiction.

The parties worked all day on compromise language and reached a memorandum of agreement in the Panel's offices. By the March 27, 1992 memorandum the parties agreed to the implementation of the 2 to 10 p.m. shift at SFO Baggage on September 9, 1991. It stated that the "following procedures represent recent agreed-upon language between management and the Union and other previously existing agreements." With respect to the assignment of 2 to 10 p.m. shift inspectors to overtime, the agreement eliminated specific reference to the 1981 Manual Supplement. Instead, it included the more permissive language from INS 2 of

1988, including reference to the excusal procedures, and generally referenced other agreements and practices by stating that assignment to overtime would be "pursuant to INS-2, existing agreements, policies, and practices as applicable." The agreement also provided that inspectors would indicate their avail-ability for overtime "per existing agreements, policies, and past practices." The agreement allowed inspectors to exchange over-time assignments "per the language contained in Article 22, Section 4 of the National Agreement and existing agreements and past practices between NTEU and the San Francisco District until such time as the FLRA rules on the pending negotiability appeal. . . . Should the Authority determine the language is non-negotiable . . . either party may reopen this section. . . ."

The parties acknowledged that some of the issues were "left up in the air" by the compromise language and that any dispute as to the new agreement's application would have to be processed under the grievance procedure.

Day's Off For Saturday Work

Prior to September 9, 1991 an inspector assigned to work on a Saturday could request to take another particular day off during the week. Generally, the requested day off was granted.

On August 22, 1991, Supervisory Customs Inspector Barbin notified Union President Villasenor that, due to the implementation of the 2 to 10 p.m. shift on September 9, 1991, it was necessary for Respondent to adopt the policy of assigning a particular day off for Saturday work in advance, but that employee requests for a change in the assigned day off would be given serious consideration. Union President Villasenor did not specifically request to bargain, but requested that the notice be given to him in writing. He stated that he would pick it up.

On the morning of August 23, 1991, Barbin called Villasenor and advised him that the letter was ready for pick-up. He also advised Villasenor that an employee meeting would be held that afternoon. Villasenor stated he would pick the letter up at the meeting.

Union President Villasenor did not show up for the August 23, 1991 meeting despite a 15 minute delay imposed to await his arrival. Therefore, Inspector Barbin sent the notice of the proposed change to Villasenor by the internal mail service that same day.

On Friday, September 6, 1991, at 2:26 p.m., District Director Paul Andrew received a letter by fax from Mr. Villasenor requesting that the policy not be implemented until bargaining had been completed.

The policy of assigning day's off for Saturday work was implemented on September 9, 1991. No bargaining took place.

Discussion and Conclusions

Alleged Failure to Maintain Status Quo While Before FSIP

The complaint alleges that Respondent violated section 7116(a)(1), (5), and (6) of the Statute by implementing the new shift from 2 p.m. to 10 p.m. while the Union's request for assistance was pending before the FSIP. The General Counsel argues that the shift could not be implemented while the matter was before the Panel, regardless of the ultimate action taken by the Panel, and regardless of what effect any existing agreements may have on the bargaining obligation. The General Counsel also claims that the negotiations in question were not covered by the existing agreements as (1) the parties ultimately reached an agreement that included provisions which the Union had sought and which were other than those implemented, (2) the parties reached an agreement on a dispute involving the cargo shift while this matter was pending, (3) the September 9, 1991 procedures were inconsistent with past practices and with certain provisions of existing agreements, and (4) the parties have made it a practice to negotiate specific agreements that may cover the same subject as those covered by existing agreements.

Respondent defends on the basis that the Agency fully bargained all negotiable proposals; that the remaining proposals in dispute were covered by existing agreements; and that NTEU also expressly waived further bargaining on the excusal issue. Respondent claims that NTEU's request for FSIP assistance was "actually a camouflage for seeking a favorable interpretation of the language in existing agreements" and for Respondent "to have waited for the ultimate outcome of the Panel . . . would permit the NTEU to have delayed implementation under false pretenses of an impasse situation, where its proposals are obviously non-negotiable."

The record does not demonstrate that the Union was seeking to delay implementation by falsely invoking the services of the Panel. Rather, I find that the impasse was genuine. Some of the proposals in dispute presented complicated impasse issues relating to what language of which agreements applied to the change (that is, whether certain provisions were in force, or were superseded by, or in conflict with others) as well as proposals relating to past practices where such practices differed from the parties' agreements. Furthermore, the parties had a practice of negotiating agreements over a matter that may be covered by various outstanding agreements because they considered it too complicated, in view of their many agreements, to determine whether the matter was, in fact, covered by an agreement. Despite this practice, the negotiations came to an impasse in this case because some of the parties' various proposals did impact on the language in previous agreements and on past practices.

The Agency's position that the parties' agreements covered the matter or expressly waived the Union's right to bargain was a threshold issue properly resolved by the Panel in deciding what action to take or whether to retain jurisdiction over the dispute.[(1)] See, e.g., Department of the Treasury, IRS, Nat'l Computer Ctr., Martinsburg, W. Va. and Chapter 82, Nat'l Treasury Employees Union, Case No. 87 F.S.I.P. 168 (June 29, 1988) (FSIP, in part, ordered the union to withdrawone proposal relating to the assignment of overtime and holiday work as it appeared to be inconsistent with the parties' master collective bargaining agreement and, therefore, involved a question of contract interpretation more appropriately addressed in another forum. The Panel resolved other issues.)

The impasse case involved here was closed with the assistance of the Panel as the result of a voluntary settlement. According to Panel Release No. 337 of November 6, 1992, the Panel resolves approximately 69 percent of its cases in this manner. Chairman Edwin D. Brobeck stated in the Release, "In our view, the best way to resolve disputes continues to be through voluntary settlements, and we are committed, with the resources at our disposal, to helping the parties make that happen." (Emphasis added).

As the Authority recently stated in VA, Decatur, Georgia, 46 FLRA at 345-46:

> Once a party timely invokes the services of the Panel, the statusquo must be maintained to the extent consistent with the necessary functioning of the agency, in order to allow the Panel to take whatever action it deems appropriate. A failure to maintain the status quo while a negotiation dispute is pending before the Panel constitutes a violation of section 7116(a)(1), (5), and (6) of the Statute. For example, Department of Health and Human Services, Health Care Financing Administration, 39 FLRA 120, 131-32 (1991) enforced sub nom. Department of Health and Human Services, Health Care Financing Administration v. FLRA, No. 91-1068 (4th Cir. Dec. 26, 1991).
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> The purpose of the requirement that the parties maintain the statusquo "is to facilitate the Panel's consideration of negotiations impasses and allow the Panel to take whatever action it deems appropriate to resolve the dispute." SSA, 35 FLRA at 950. An agency's obligation to maintain the status quo while matters are before the Panel is not affected by the nature of the action the Panel eventually takes. In particular, an agency is obligated to maintain the status quo even if the Panel ultimately declines jurisdiction over the union's request for assistance. See U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., 44 FLRA 1065, 1072-73 (1992), petition for review filed sub nom. U.S. Department of Justice, Immigration and

Naturalization Service v. FLRA, No. 92-4652 (5th Cir. June 24, 1992).

Respondent has not demonstrated that its action was consistent with the necessary functioning of the agency. Although costs are a legitimate factor to be considered in deciding what is necessary for the efficient functioning of an agency, the Authority has rejected an agency's argument that costs alone required implementation while an impasse was pending before the Panel. U.S. Department of Housing and Urban Development, Kansas City Region, 23 FLRA 435, 437-38 (1986); Department of the Air Force, Scott Air Force Base, Illinois, 42 FLRA 266, 273 (1991). Similarly, Respondent has not demonstrated that its action in unilaterally implementing the shift so that overtime costs could be shifted from baggage and applied elsewhere was consistent with the necessary functioning of the agency. Respondent had met its responsibilities for servicing incoming flights for approximately eight years by means of an 8 a.m. to 5 p.m. shift and overtime assignments. There is no evidence that a sudden change in flight patterns occurred in September 1991 to justify the unilateral implementation of a new shift before the Panel could take appropriate action.

It is concluded that Respondent violated section 7116(a)(1), (5), and (6) of the Statute by implementing the new shift while the parties' negotiation dispute over the matter was pending before the Panel.

The Union and the General Counsel do not seek a statusquoante remedy with respect to the new shift because of the subsequent March 27, 1992 agreement between the parties. They do seek backpay for overtime lost during the period from September 9, 1991 to March 27, 1992, the date that the matter was resolved before the Panel. The record establishes that some employees lost overtime pay which they were not able to make up elsewhere as a result of Respondent's unlawful unilateral implementation of the new shift while the impasse in negotiations concerning the impact and implementation of the matter was pending before the Panel. Backpay is appropriate where, as here, the Agency's unlawful implementation resulted in a reduction of pay. The amount of backpay owed will be a matter for compliance. United States Customs Service, Southwest Region, El Paso, Texas, 44 FLRA 1128, 1129-30 (1992); United States Immigration and Naturalization Service, Honolulu District Office, Honolulu, Hawaii, 43 FLRA 608(1991); Department of the Air Force, Scott Air Force Base, 42 FLRA 266, 274-75 (1991).

Day's Off For Saturday Work

The complaint alleges that Respondent violated section 7116(a)(1) and (5) of the Statute by unilaterally implementing changes in conditions of employment by changing the policy on assigning "Saturday off days" prior to the completion of negotiations with the Union over the substance, impact and implementation of the change.

The record reflects that the Union received oral notice of the proposed change on August 22, 1991, and written notice on or about August 23, 1991. It did not respond, or submit a request to bargain, until late in the day September 6, 1991, some two weeks later, which was the Friday before the policy was to go in effect on Monday, September 9, 1991.

When a union has adequate notice of when a proposed change is to be implemented, it must make a timely request to bargain. See United States Department of Defense, Department of the Army, Headquarters, Fort Sam Houston, Texas, 8 FLRA 623 (1982). Where the union's request is submitted prior to the change, but at the 11th hour, it has been held to be untimely. Department of the Treasury, U.S. Customs Service, Region I (Boston, Massachusetts), 16 FLRA 654, 671 (1984); Internal Revenue Service (District Region, National Office Unit), 14 FLRA 698, 700 (1984).

The Union, under the circumstances of this case, was given adequate notice of Respondent's proposed change and the opportunity to bargain, but did not make a timely request to bargain. Accordingly, Respondent did not unlawfully refuse to bargain in good faith and did not violate section 7116(a)(1) and (5) of the Statute, as alleged, with respect to the change in day's off for Saturday work.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

Order

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, it is hereby ordered that the United States Customs Service, San Francisco, California, shall:

1. Cease and desist from:

(a) Failing and refusing to cooperate in impasse proceedings by implementing a new work shift while a request of the National Treasury Employees Union, the exclusive representative of its employees, for assistance with a negotiation impasse over the matter is pending before the Federal Service Impasses Panel.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Consistent with law and regulation, make whole all bargaining unit employees for any loss of pay or benefits suffered as a result of the implementation of the new work shift on September 9, 1991, including backpay with interest for any withdrawal or reduction in pay, allowances, or differentials.

(b) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the District Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the San Francisco Region, Federal Labor Relations Authority, San Francisco, California, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

3. The allegation that Respondent violated the Statute by changing the policy of assigning off days for Saturday work prior to the completion of negotiations with the Union is dismissed.

Issued, Washington, DC, February 12, 1993

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GARVIN LEE OLIVER

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to cooperate in impasse proceedings by implementing a new work shift while a request of the National Treasury Employees Union, the exclusive representative of our employees, for assistance with a negotiation impasse over the matter is pending before the Federal Service Impasses Panel.

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

WE WILL, consistent with law and regulation, make whole all bargaining unit employees for any loss of pay or benefits suffered as a result of the implementation of the new work shift on September 9, 1991, including backpay with interest for any withdrawal or reduction in pay, allowances, or differentials.

_____
(Activity)

Dated: _____ By: _____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with Regional Director of the Federal Labor Relations Authority, Region 9, whose address is: San Francisco Regional Office, 901 Market Street, Suite 220, San Francisco, CA 90071, and whose telephone number is: (415) 744-4000.

1. It is not necessary to resolve these issues in this case since the unfair labor practice case only alleges a refusal to cooperate in impasse proceedings by making a unilateral change (a failure to maintain the statusquo) while the Union's request for assistance with the negotiations was pending before the Panel. Compare Department of Veterans Affairs, Veterans Administration Medical Center, Decatur, Georgia, 46 FLRA 339 (1992) petition for review filed sub nom. Department of Veterans Affairs, Veterans Administration Medical Center, Decatur, Georgia v. FLRA,

No. 92-1654 (D.C. Cir., Dec. 18, 1992) (VA, Decatur, Georgia).