OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

ARMY AND AIR FORCE EXCHANGE SERVICE, WACO
DISTRIBUTION CENTER, WACO, TEXAS
Respondent

and

Case No. DA-CA-50356

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 4042, AFL-CIO

Charging Party

Carlos E. Vergara, Esq.

For the Respondent

Joseph T. Merli, Esq.

For the General Counsel

Mrs. Alice Long

For the Charging Party

Before: ELI NASH, JR.

Administrative Law Judge

DECISION

Statement of the Case

A Complaint and Notice of Hearing was issued by the Dallas Regional Director on October 27, 1995. The complaint alleges that the Army and Air Force Exchange Service, Waco Distribution Center, Waco, Texas (herein called the Respondent) violated Section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (herein called the Statute) by implementing a change in the rotation schedules for Motor Vehicle Operators without giving the Union prior notice or the opportunity to bargain over the substance and/or the impact and implementation of the change. The complaint further alleges that Respondent violated the Statute in bypassing the American Federation of Government Employees, Local 4042, AFL-CIO (herein called the Union) and dealing directly with employees.

A hearing in this matter was held in Waco, Texas. All parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel filed a post hearing brief which has been carefully considered. Respondent did not file a brief.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

Respondent's mission is to supply goods to the various Army and Air Force post exchanges within its geographic area of responsibility. To accomplish this mission, Respondent maintains a Transportation Department. To deliver goods to the exchanges, the Transportation Department employs approximately 60 Motor Vehicle Operators (herein called MVOs) whose job it is to haul the goods in semi-tractor trailers. These 60 MVOs are divided into two approximately equal groups, single and paired. Consequently, there are about 20 single MVOs and 20 two-man teams.

Each single MVO or MVO team is responsible for delivering a trailer load of goods to a certain destination or destinations and then returning to Respondent. These delivery trips are known as routes. Examples of some of these routes include Minot, North Dakota; Fort Polk, Louisiana; Oakland, California; and Newport News, Virginia. For a variety of reasons, some routes are more desirable than others. First, the longer routes, such as Oakland, California and Minot, North Dakota, require more hours to complete and therefore offer an opportunity for the driver or drivers to make more money.

In addition, certain routes are to geographic areas with larger per diem rates. In other words, an MVO assigned to drive a route to a high cost area such as Oakland, California, would receive more per diem than an MVO driving to an area with a lower rate of per diem such as Leonard Wood, Missouri.

Further, certain routes require only that the MVO drive the rig and switch trailers but not unload any goods. These routes are known as a "drop and hook." Some of the other routes require the MVO to do more than just drive the rig. A delivery route requires the MVO to drive the rig and unload the goods in the trailer. When driving this type of route the MVO must physically move the goods from the trailer to the loading dock with a dolly. Some routes even require that the MVO move the goods past the loading dock and into the building. Also, during winter months, some northern routes require driving in bad weather conditions such as heavy rain, ice or snow; southern routes are less likely to present such conditions.

Finally, some routes require the MVO to drive on weekends while other routes do not. Drivers earn more money for weekend driving.

All MVOs are grade level HPP8. All MVOs are equally qualified to drive all rigs. And all MVOs are equally qualified to drive all routes. Moreover, at all times, management determines which routes need to be driven and when, that is, what dates they needed to be driven.

For many years prior to January 8, 1995, MVOs rotated every two weeks to a different route. Consequently, every MVO had an opportunity to drive all routes over a given period of time. In this way, the differences between the various routes described above, such as income, weather, hook and drop vs. delivery, and weekend driving, all balanced out among all of the MVOs.

Sometime in January 1995, prior to January 8, 1995, Gary Shelton, Respondent's Assistant Transportation Manager, dealt directly with unit employees by approaching individual employees and soliciting their views concerning a possible change to the above described MVO route rotation practice. When asking the employees for input and assistance in establishing a new system, Shelton told the drivers, "It was up to [them]."

On January 8, 1995, management posted a new schedule for all MVOs which indicated that the route assigned to each MVO would not rotate until April 8, 1995. In other words, each MVO would drive the route which was assigned to him for the next three months instead of the usual two weeks. However, in April, after the three months had passed, management failed to rotate the routes. Rather, the route assigned to an MVO in January now became that driver's permanently assigned route. This change was implemented without giving the Union notice and the opportunity to bargain prior to the change.

Analysis and Conclusions

(A) Unilateral Change

Section 7103(a)(14) of the Statute defines conditions of employment as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions[.]" A determination as to whether a change concerns a condition of employment is based on the subject matter of the change and whether (1) that subject matter pertains to bargaining unit employees or; (2) there is a direct connection between the subject matter and the work situation or employment relationship of unit employees. *See generally Antilles Consolidated Education Association and Antilles Consolidated School System*, 22 FLRA 235, 237 (1986).

A change in the practice of regularly rotating delivery routes among MVOs pertains to unit employees clearly occurred herein. There is also no doubt that there is a direct connection between the routes driven by the MVOs and the work situation of these bargaining unit employees. The MVOs herein spend most of their working hours driving a tractor trailer rig over the road, the route assigned to each MVO is a prerequisite, and consequently, a condition of employment. *See Fort Stewart Schools v. FLRA*, 110 S. Ct. 2043, 2047 (1990)(definition of "conditions of employment" suggests that the phrase refers to "qualifications demanded of, or obligations imposed upon, employees"). Accordingly, it is found and concluded that the change in the practice of regularly rotating delivery routes among the various MVOs constituted a change in their conditions of employment.

The evidence further demonstrated that all the MVOs, involved in this case, are equally qualified to drive all tractor trailer rigs over all routes. In other words, Respondent previously determined that all MVOs were

equally qualified to perform all of the MVO duties necessary to accomplish its mission. Respondent already had determined to whom or what position the duties would be assigned. Furthermore, Respondent always decided when and which routes needed to be driven. Under these circumstances, it is clear that Respondent determined (1) the particular duties to be assigned, (2) when the work assignments will occur, and (3) to whom or what position the duties would be assigned. Therefore, the change did not concern management's right to assign work under Section 7106(a)(2)(B) and was, thus, negotiable as to substance. *See U.S. Department of Health and Human Services,* 41 FLRA 1309 (1991), *U.S. Department of the Treasury, Customs Service*, 38 FLRA 770, 785-88 (1990), and *U.S. Department of Commerce, National Weather Service*, 37 FLRA 392, 399 (1990).

Furthermore, under the standard set forth in *Department of Health and Human Services, Social Security Administration,* 24 FLRA 403 (1986), the record disclosed that the change had more than a *de minimis* adverse impact on the bargaining unit employees. In this regard, the evidence disclosed adverse impact resulting from the change ranging from a decrease in overtime and income,[(1)] loss of "hook and drop" routes, to an increase in stress and potential danger from driving routes in areas prone to inclement weather, and weekend driving. Accordingly, it is found that the Union also had the right to negotiate the impact and implementation of the instant change.

(B) Bypass of the Union

Section 7114(a)(1) of the Statute provides that a labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for all employees in the unit. The Authority has long held that on matters which are properly bargainable with the exclusive representative, the exclusive representative is the sole spokesman of the employees, and any attempt by an agency to deal directly with employees concerning proposed changes in their conditions of employment, constitutes an unlawful bypass in violation of Section 7116(a)(1) and (5) of the Statute.

In *United States Department of Transportation, Federal Aviation Administration, 19 FLRA 893 (1985)*, the Authority found that the Respondent had violated Section 7116(a)(1) and (5) of the Statute by posting a memorandum which directly solicited the opinions of radar unit employees concerning a proposed change in conditions of employment by eliminating the evening shift on weekends; and by soliciting the opinions of unit employees concerning a proposed change in conditions of employment by eliminating the evening shift on weekends; and by soliciting the opinions of unit employees at a meeting and in a posted follow-up memorandum thereafter, concerning proposed changes in shift hours contingent upon the availability of someone to work until midnight. Furthermore, the Authority stated that, management was "not merely attempting to gather information or opinions" concerning its operations but directly sought the opinions of these bargaining unit employees as to proposed changes in their conditions of employment. In the Authority's view, such conduct constituted an unlawful bypass of the exclusive representative since it concerned immediate contemplated changes in conditions of employment affecting bargaining unit employees. Shelton did not testify. Thus, the uncontroverted evidence established that Shelton dealt directly with bargaining unit employees. Accordingly, it is found that the record supports the allegation that Respondent, by the conduct of Shelton, committed an unlawful bypass of the Union.

In light of the foregoing, it is found and concluded that a preponderance of the evidence establishes that Respondent violated Section 7116(a)(1) and (5) of the Statute by unilaterally changing the route rotation schedule for MVOs and by unlawfully bypassing the Union when Manager Gary Shelton directly solicited

views from unit employees over conditions of employment.

(C) *Status Quo Ante* Remedy is Appropriate

In addition to the normal Notice posting and cease and desist order, the General Counsel seeks a *status quo ante* remedy, as well as a make whole remedy for any employees who suffered loss of pay or benefits as a result of Respondent's unlawful unilateral change. Both additional remedies appear appropriate to the undersigned.

Since the change herein is negotiable as to substance, a *status quo ante* remedy is appropriate. See *Veterans Administration, West Los Angeles Medical Center, Los Angeles, California*, 23 FLRA 278 (1986); *Long Beach Naval Shipyard, Long Beach, California*, 17 FLRA 511 (1985). Such a remedy is appropriate in this case even if it were concluded that the obligation is only as to impact and implementation since the measurable impact here is more than *de minimis. Federal Correctional Institution*, 8 FLRA 604 (1982).

Applying the five factors in *Federal Correctional Institution, supra,* to this case is not difficult since the instant record disclosed the following: (1) Respondent never gave the Union any notice of the change; (2) the Union requested to bargain; (3) there was an attempt by management to negotiate or deal directly with unit employees; (4) there was more than a *de minimis* impact; and, finally (5) there is no evidence of any disruption to the agency's operations. *See also: Air Force Accounting and Finance Center, Lowry Air Force Base, Denver, Colorado*, 42 FLRA 1226, 1239, 1260 (1991); *Department of Health and Human Services, Social Security Administration*, 28 FLRA 409, 431 (1987) and *Federal Aviation Administration*, 15 FLRA 100 (1984).

Based on the foregoing, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Army and Air Force Exchange Service, Waco Distribution Center, Waco, Texas, shall:

1. Cease and desist from:

(a) Unilaterally implementing changes in working conditions for bargaining unit employees without first providing the American Federation of Government Employees, Local 4042, AFL-CIO, the exclusive representative of its employees, prior notice and an opportunity to bargain, by eliminating the two-week route rotation policy which was in effect for Motor Vehicle Operators prior to January 8, 1995.

(b) Unlawfully bypassing American Federation of Government Employees, Local 4042, AFL-CIO by dealing directly with Motor Vehicle Operators, or any other bargaining unit employees, regarding changes in the Motor Vehicle Operators' two-week route rotation policy.

(c) In any like or related manner interfere with, restrain, or coerce its employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

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

(a) Rescind the change implemented on January 8, 1995 whereby permanent routes replaced the two-week route rotation policy for Motor Vehicle Operators and reinstate the prior policy of rotating routes every two weeks.

(b) Make whole any Motor Vehicle Operator who suffered a loss of pay or benefits as a result of our unlawful unilateral implementation of the change.

(c) Post at its facility in Waco, Texas, 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 Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

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

Issued, Washington, DC, September 30, 1996

_____ ELI NASH, JR.

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Army and Air Force Exchange Service, Waco Distribution Center, Waco, Texas, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT unilaterally implement changes in working conditions for bargaining unit employees without first providing the American Federation of Government Employees, Local 4042, AFL-CIO (Union), the exclusive representative of our employees, prior notice and an opportunity to bargain, by eliminating the two-week route rotation policy which was in effect for Motor Vehicle Operators prior to January 8, 1995.

WE WILL NOT unlawfully bypass the Union by dealing directly with Motor Vehicle Operators, or any other bargaining unit employees, regarding changes in the Motor Vehicle Operators' two-week route rotation policy.

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

WE WILL rescind the change implemented on January 8, 1995 whereby permanent routes replaced the two-week route rotation policy for Motor Vehicle Operators and reinstate the prior policy of rotating routes every two weeks.

WE WILL make whole any Motor Vehicle Operator who suffered a loss of pay or benefits as a result of our unlawful unilateral implementation of the change.

_____

(Activity)

Date: _____ 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 the Regional Director of the Federal Labor Relations Authority, Dallas Regional Office, 525 Griffin Street, Suite 926, LB-107, Dallas, TX 75202-1906, and whose telephone number is: (214) 767-4996.

1. I disagree with the General Counsel that loss of high cost area per diem is a condition of employment having an impact on the MVOs herein.