Office of Administrative Law Judges

WASHINGTON, D.C.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
Respondent

and Case No. WA-CA-90683
PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS
Charging Party

Mr. Ronald L. Frampton For the Respondent

Thomas F. Bianco, Esquire For the General Counsel

Before: WILLIAM B. DEVANEY Administrative Law Judge

DECISION

Statement of the Case

Arbitrator Leon B. Applewhaite on June 14, 1999, issued a Decision and Award in Grievance PF-ALR-98-1-NAT-1, in which he held that FAA violated Article 69 of the parties' Agreement when it unilaterally implemented the transfer of the United Air (UA) training program for other major air carriers (UA Part 142 Program [14 C.F.R. Part 142]) from the Denver Flight Standards District Office (FSDO) to the Denver Certificate Management Office (CMO), which, although located in Denver, is an adjunct of the San Francisco Office of CMU/CMO (Certificate Management Unit/Certificate Management Office)[1].

The Union, Professional Airways Systems Specialists, was given no notice of the transfer and, on July 28, 1998, filed a national level grievance alleging that Respondent, FAA, breached Article 69 by failing to provide advance notice of the transfer of the UA Part 142 Program. The Arbitrator held, in relevant part, that FAA exercised a retained management right when it implemented the transfer; but, "[t]he issue of impact on bargaining unit employees should be negotiated." (General Counsel's Brief, p.9). The Award provided, in relevant part,:

> "That the Union submit negotiation proposals on the impact of the May 29, 1998, memorandum to the working conditions of the bargaining unit employees no later than July 7, 1999.

> "That the parties negotiate on the impact of working conditions on bargaining unit employees caused by the May 29, 1998, memorandum.
>
> "That the first meeting should take place no later than July 14, 1999." (Complaint, Par. 11; General Counsel's Brief, p. 9).

The Union, on July 7, 1999, submitted seven bargaining proposals (Complaint, Par. 12). On July 13, 1999, FAA replied that it would not bargain over the proposals (Complaint, Par. 13), a position it reiterated, in writing, on July 21, 1999 (Complaint, p. 14).

The Union, on August 30, 1999, filed the charge herein in which it asserted that Respondent FAA's refusal to bargain over its seven proposals was contrary to the Award of the Arbitrator was not in compliance with § 22(b) of the Statute, 5 U.S.C. § 7122(b);[2] and violated §§ 16(a)(1) and (8) of the Statute. The Regional Director of the Authority by letter dated March 31, 2000, dismissed the charge with respect to six of the Union's proposals[3]; but he issued the Complaint, on May 31, 2000, on the seventh, or remaining, Union bargaining proposal which stated,

> "Individuals previously assigned to the United Air Services part 142 certificate in the Den[ver] FSDO will, at a consistent grade level, be given priority consideration for reassignment to the Den[ver] CMFO in order to be a member of the FAR-142 certificate management team." (General Counsel's Brief, pp. 10-11; Respondent's Brief, p. 1).

The Complaint alleged that Respondent FAA's failure to comply with § 22(b) violated §§ 16(a)(1) and (8) of the Statute. In its Answer, Respondent admitted all allegations of Paragraphs 1 through 14 of the Complaint, i.e., specifically Respondent admitted, inter alia, that the Arbitrator ordered the parties to negotiate the, ". . . impact of the working conditions on the bargaining unit employees caused by the May 29, 1998, memorandum" (Complaint and Answer, Par. 11); admitted that the Union timely submitted bargaining proposals (Complaint and Answer, Par. 12); and that Respondent FAA, on July 31, 1999, and again on July 21, 1999, refused to bargain over the Union's proposals (Complaint and Answer, Pars. 13 and 14).

The Complaint set the hearing for August 15, 2000. On May 12, 1999, Respondent FAA and the Union, prior to the issuance of the Decision and Award by the Arbitrator, had entered into an agreement that provided, in part, as follows:

> "The Parties agree that with respect to the Federal Labor Relations Authority (FLRA) three (3) prong test[4] for determining whether a matter is 'covered by' or 'contained in' the Collective Bargaining Agreement that the second and third prong of the FLRA's test will not be used as a claim by either Party in implementing changes." (General Counsel's Brief, p. 9).

That is, as Respondent stated,

> ". . . a prong 1 test is applicable to the instant proposal in that the subject matter is expressly

contained in the parties' collective bargaining agreement." (Respondent's Brief, p. 2).

On July 25, 2000, Respondent FAA, inter alia, moved for, ". . . Decision on Written Arguments of the Parties", because there are, ". . . no facts . . . in dispute . . ." (Respondent's Motion, p. 2). On July 31, 2000, General Counsel filed an, "Opposition To Respondent's Motion For Decision On Written Argument Of The Parties", asserting: ". . . The negotiability of the PASS bargaining proposal is in dispute . . . General Counsel also intends to offer evidence . . . to rebut the FAA's defense that the subject over which PASS sought to bargain is covered by a collective bargaining agreement. Finally, . . . General Counsel believes that the scope of the posting of the Notice . . . is in dispute." (General Counsel's Response, p. 2).

A pre-hearing conference call was held on August 7, 2000, at which each party was represented. At the outset, Respondent stipulated that the decision to move the work was a national issue and agreed that, if it is found to have violated the Statute, any notice will be signed by the Administrator of the Federal Aviation Administration. Respondent stated that it has not, and does not, challenge the negotiability of the Union's proposal; and, further, Respondent stated that its sole defense to its refusal to bargain on the Union's proposal was, it asserted, that the proposal was expressly covered by the Agreement of the parties. Respondent asserted that because there were no factual issues in dispute, this case should be decided on its Motion for Summary Judgment. General Counsel asserted there should be a hearing to resolve negotiability and was told that negotiability was not an issue and that I would not decide an issue that had not been raised. General Counsel suggested no material factual issues in dispute and, orally, the parties were informed that the hearing scheduled for August 15, 2000, was cancelled; that this case would be decided on Respondent's Motion for Summary Judgment; that a briefing schedule would be fixed; that Respondent was directed to file copies of the Union's proposal, copies of the Agreement, and to notify all parties in writing on, or before, August 14, 2000, the specific provisions of the Agreement it asserts covers the Union's proposal. The following day, August 8, 2000, a formal "Order Cancelling Hearing And Submission On Motion For Summary Judgment" was issued by the undersigned and served on counsel for all parties, which confirmed the oral disposition set forth above and provided that the parties shall submit briefs in support and in opposition on, or before, September 11, 2000.

General Counsel, on August 15, 2000, filed a "Motion To Reconsider Order Cancelling Hearing And Submission On Motion For Summary Judgement Or, In The Alternative, Motion To Conform The Proceedings To 5 U.S.C. § 2423.27".[5] General Counsel's Motion was denied by Order dated August 16, 2000. On August 23, 2000, General Counsel filed a "Motion For Interlocutory Appeal" which was denied by Order dated August 24, 2000. Respondent and General Counsel each timely filed a brief, received on, or before, September 13, 2000, which have been carefully considered.

Conclusions

1. There are no material facts in dispute.

The matters set forth in the "Statement of the Case", supra, are adopted as the findings in this case.

This case concerns, solely, an alleged failure to comply with an arbitrator's final and binding award. The Arbitrator held that Respondent FAA exercised a retained management right when, on May 29, 1998, it unilaterally implemented the transfer of the UA Part 142 Program from the Denver Flight Standards District

Office to the Denver Certificate Management Office, which is an adjunct of the San Francisco Office of the Certificate Management Unit/Certificate Management Office; however, the arbitrator ordered the parties to negotiate on the impact of the change on bargaining unit employees caused by the transfer. Thus, his Award ordered:

> "That the Union submit negotiation proposals on the impact of the May 29, 1998, memorandum to the working conditions of the bargaining unit employees no later than July, 7, 1999.
>
> "That the parties negotiate on the impact of working conditions on bargaining unit employees caused by the May 29, 1998, memorandum."
>
> "That the first meeting should take place no later than July 14, 1999." (Complaint, Par. 11; General Counsel's Brief, p. 9).

Respondent admitted that the Union timely submitted bargaining proposals, one of which the Regional Director of the Authority found concerned the impact of the transfer on working conditions of bargaining unit employees and, on the basis of which, he issued the Complaint. Respondent FAA admitted that it refused to bargain on the Union's proposal. Respondent FAA stipulated that the decision to transfer the work was a national issue and agreed that if it is found to have violated the Statute, any notice will be signed by the Administrator of FAA. Respondent FAA stated that it does not, and has not, challenged the negotiability[(6)] of the Union's proposal; and, finally, Respondent stipulated that its sole defense to its refusal to bargain was, it asserted, that the Union's proposal was expressly covered by the Agreement of the parties.

General Counsel's burden of establishing that Respondent FAA violated §§ 16(a)(1) and (8) of the Statute was established by Respondent FAA's admission that it had refused to bargain on the Union's proposal, as the arbitrator had ordered, and its sole defense was that the Union's proposal was expressly covered by the parties' Agreement. Negotiability of the Union's proposal is not an issue and under Respondent FAA's defense neither the meaning nor the intent of the Agreement is in issue. As to scope of posting, documents show that Respondent FAA stipulated that the decision to transfer the work was a national issue; that the grievance was filed by the Union at the national level and alleged a breach of Article 69, entitled, "National Relation-ship" (Respondent FAA's Brief, Attachment, Article 69, p. 54); and that the Arbitrator found that Respondent FAA violated Article 69, Section 1 of which provides, "In the event the Employer proposes to change a national personnel policy, practice, or other matter affecting working conditions. . . ." (id.), by failing to negotiate, ". . . the issue of impact on bargaining unit employees. . . ." (General Counsel's Brief, p. 9) of the transfer. The transfer involved only employees of the Denver Flight Standards Office (Respondent FAA says, ". . . only one employee of the Denver Flight Standards District Office (DEN FSDO). . . ." (Respondent FAA's Brief, p. 4), and the employees of the Denver Certificate Management Office, which is part of the San Francisco Office of the CMU/CMO (Certificate Management Unit/Certificate Management Office), to which the work was transferred; nevertheless, as noted above, the decision to transfer was a national issue and the grievance was filed by the Union at the national level.

Because there are no issues of fact, disposition of this matter on Respondent's Motion For Decision On Written Arguments Of The Parties, which the undersigned and all parties understood and accepted as a Motion For Summary Judgment, is wholly appropriate.

2. "Expressly covered by agreement" is not a defense to an order to bargain.

If an agency, in exercising a reserved management right, changes conditions of employment of bargaining unit employees it, nevertheless has a duty to bargain on impact and implementation, i.e., procedures or appropriate arrangements pursuant to § 6(b)(2) and (3) of the Statute. However, before an order to bargain issues, the agency properly can show, inter alia, that the matter over which the Union seeks to bargain is covered by a collective bargaining agreement and, if it is, no bargaining order will issue. U.S. Department of Transportation, Federal Aviation Administration, Washington, D.C. and Michigan Airways Facilities Sector, Belleville, Michigan, 44 FLRA 482, 495 (1992).

But where, as here, an arbitrator has ordered the agency to ". . . negotiate on the impact of working conditions on bargaining unit employees caused by May 29, 1998, memorandum" (i.e., the transfer of work), the agency can not evade the order by asserting that the Union's proposal is covered by agreement because, even if it were expressly covered by agreement, and, for reasons set forth hereinafter, I conclude that it is not, the agency was ordered to, ". . . negotiate on the impact of working conditions . . ." caused by the transfer, and, pursuant to § 3(a)(12) of the Statute, the obligation to negotiate [bargain] requires, inter alia, that,

> ". . . the representative of an agency and the exclusive representative of employees . . . meet . . . to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees . . . ." (5 U.S.C. § 7103(a)(12)) (Emphasis supplied).

Accordingly, the Order of the Arbitrator required the parties to meet and bargain in good-faith and this obligation to meet and bargain is not satisfied by an agency's refusal to bargain because of its assertion of covered by agreement. Even if expressly covered by agreement there still is the obligation to meet and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees notwithstanding that § 3(a)(12) concludes, ". . . but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession." (id.).

Moreover, to permit the assertion of a defense of "covered by agreement" to a refusal to comply with an arbitrator's award ordering the agency to negotiate would permit a collateral attack on the merits of an award which has become final and binding under § 22(b) of the Statute (5 U.S.C. § 7122(b)). The Arbitrator ordered the parties to, ". . . negotiate on the impact . . ." of the transfer. Whether Respondent FAA asserted "covered by" as a defense to the Arbitrator, in which event, rejection by the Arbitrator has become final and binding, or whether Respondent FAA did not raise the "covered by" defense to the Arbitrator, in which event, Respondent FAA, by failing to challenge the order to ". . . negotiate on the impact . . .", nevertheless, has permitted the order to negotiate impact to become final and binding and may not now assert that it is not obligated to bargain.

3. The Union's proposal is not expressly covered by the Agreement of the parties.

It is true that the Agreement covers matters related to the Union's proposal (See: Article 8, 9, 10, 19 and 20; Attachment, Respondent FAA's Brief). Nevertheless, Respondent FAA concedes that the Union's proposal is not covered by the Agreement. Thus, Respondent FAA stated, for example,

> ". . . the union did not negotiate a fourth reason to give rights to employees whose details are discontinued . . ." (Respondent FAA's Brief, p. 3).

The Arbitrator ordered Respondent FAA to bargain on the impact on working conditions of bargaining unit employees caused by the May 29, 1998, transfer of work and because reassignment rights and priority consideration for employees whose details are discontinued are not covered by the Agreement, there is no contractual preclusion of bargaining on the Union's proposal.

4. Scope of Posting.

General Counsel asserted at one point,

> ". . . The entire bargaining unit represented by the Charging Party was . . . injured by the . . . failure to comply with the Award . . ." (General Counsel's Brief, p. 25).

But later stated,

> ". . . It is entirely reasonable to assume that few unit members are aware of the Award, or the Respondent's failure to comply with it, since the subject of the Award was quite limited. . . ."
>
> (id.).

Respondent FAA states,

> ". . . any order to post a notice should be restricted to the FAA's Denver Flight Standards District Office (DEN FSDO) and the adjunct of the San Francisco office called the Certificate Manage-ment Office located in Denver (DEN CMFO). . . . Accordingly, and since there is no reference to the issue being national in scope, and notice should be posted locally." (Respondent FAA's Brief, p. 4).

Contrary to Respondent FAA's statement that, ". . . there is no reference to the issue being national in scope. . . .", Respondent FAA stipulated that the decision to transfer the work was a national issue; the grievance was

filed by the Union at the national level; the grievance alleged a breach of Article 69, entitled, "National Relationship"; and the Arbitrator found that Respondent FAA violated Article 69. Nevertheless, the transfer of work affected only the employees of the Denver Flight Standards District Office (DEN FSDO) and the employees of the Certificate Management Office wherever located. As General Counsel recognizes, ". . . few unit members are aware of the Award, or Respondent's failure to comply with it, since the subject of the Award was quite limited. . . .". Accordingly, posting nationwide in all facilities where bargaining unit employees work is not warranted and I shall order posting only at the facilities of the Denver Flight Standards Office and at all facilities of the Certificate Management Office, including, but not limited to, those at Denver (DEN CMFO) and at San Francisco.

Having found that Respondent FAA violated §§ 16(a)(1) and (8) of the Statute by its failure to comply with a final and binding arbitration award, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.41 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41, and § 18 of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the Department of Transportation, Federal Aviation Administration, Washington, D.C., shall:

1. Cease and desist from:

(a) Failing to comply with the final and binding Arbitration Award issued by Arbitrator Leon Applewhaite on June 14, 1999, in Grievance PF-ALR-98-NAT-1.

(b) Failing to bargain with the Professional Airways Systems Specialists over the bargaining proposal stating:

> "Individuals previously assigned to the United Air Services part 142 certificate in the DEN FSDO will, at a consistent grade, be given priority consideration for reassignment to the DEN CMFO in order to be a member of the FAR-142 certificate management team."

(c) In any like or related manner, interfering with, restraining, or coercing its 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) At the request of the Professional Airways Systems Specialists, the exclusive representative, bargain over its proposal that:

> "Individuals previously assigned to the United Air Services part 142 certificate in the DEN FSDO will, at a consistent grade, be given priority consideration for reassignment to the DEN CMFO in order to be a member of the FAR-142 certificate management team."

(b) Post at the facilities of the FAA Denver Flight Standards Office (DEN FSCO) and at all facilities of FAA's Certificate Management Office including, but not limited to, those facilities at Denver (DEN CMFO) and at San Francisco, 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 Administrator of the Federal Aviation Administration, 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 ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e), notify the Regional Director, Washington Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

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WILLIAM B. DEVANEY

Administrative Law Judge

Dated: February 15, 2001

Washington, DC

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Transportation, Federal Aviation Administration 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 fail or refuse to comply with final and binding awards resolving grievance filed by the Professional Airways Systems Specialists.

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

WE WILL bargain with the Professional Airways Systems Specialists, upon request, over its proposal that:

> "Individuals previously assigned to the United Air Services part 142 certificate in the DEN FSDO will, at a consistent grade, be given priority consideration for reassignment to the DEN CMFO in order to be a member of the FAR-142 certificate management team."

_____

Administrator Federal Aviation Administration

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 the Regional Director, Washington Region, Federal Labor Relations Authority, whose address is: 800 K Street, NW, Suite 910N, Washington, DC 20001, and whose telephone number is: (202)482-6700.

1. As training programs for Part 121 Programs [14 C.F.R. Part 121] were already under CMO, the May 29, 1998, memorandum of the Southwest Regional Manager of the Flight Standards Division consolidated the UA Part 142 Program with the UA Part 121 Program in CMO/CMU (General Counsel's Brief p. 6).

2. Herein, sections of the Statute are, for convenience of reference, referred to without inclusion of the initial, "71" of the statutory reference, i.e., Section 7122(b) will be referred to, simply, as, "§ 22(b)".

3. These six proposals are not before me and no opinion whatever is expressed concerning them.

4. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004, 1018-1019 (1993); Navy Resale Activity, Naval Station, Charleston, South Carolina, 49 FLRA 994, 1002 (1994); Department of the Treasury, United States Customs Service, El Paso, Texas, 55 FLRA 43, 46-47 (1998); U.S. Customs Service, Customs Management Center, Miami, Florida, 56 FLRA 809, 813-814 (2000).

5. General Counsel's reference to the United States Code plainly is in error. The reference, obviously, was intended to be to the Authority's Rules and Regulations, 5 C.F.R. § 2423.27.

6. Semantics aside, it is clear that Respondent conceded that the Union's proposal concerned the impact of the transfer on the working conditions of bargaining unit employees and proposed matters negotiable under the Statute.