UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE KANSAS CITY SERVICE CENTER KANSAS CITY, MISSOURI Respondent	Case Nos. DE-CA-90628 DE-CA-90850
and NATIONAL TREASURY EMPLOYEES UNION NATIONAL TREASURY EMPLOYEES UNION CHAPTER 66 Charging Parties	

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JUNE 19, 2000**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424

JESSE ETELSON
Administrative Law Judge

Dated: May 16, 2000
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: May 16, 2000

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
KANSAS CITY SERVICE CENTER
KANSAS CITY, MISSOURI
Respondent

and Case Nos. DE-CA-90628
DE-CA-90850

NATIONAL TREASURY EMPLOYEES UNION
NATIONAL TREASURY EMPLOYEES UNION
CHAPTER 66
Charging Parties

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcripts, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges OALJ 00-34

WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE KANSAS CITY SERVICE CENTER KANSAS CITY, MISSOURI Respondent and	Case Nos. DE-CA-90628 DE-CA-90850
NATIONAL TREASURY EMPLOYEES UNION NATIONAL TREASURY EMPLOYEES UNION CHAPTER 66 Charging Parties	

William P. Lehman, Esq.
For the Respondent

Hazel E. Hanley, Esq.
For the General Counsel

Jean E. Fisher, Esq.
Aimee Batson, Steward
James D. Bailey, Esq. (on the brief)
For the Charging Parties

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Statement of the Case

These cases, consolidated pursuant to the joint request of the parties, involve several alleged violations of sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute). The amended complaint in Case No. DE-CA-90628 alleges that the Respondent violated the Statute by holding meetings with employees who are employed in a bargaining unit represented by Charging Party National Treasury Employees Union, Chapter 66 (Chapter 66), at which meetings Respondent dealt directly with these employees by instructing them to devise seating

arrangements for new tours of duty schedules, without affording Chapter 66 the opportunity to be represented. The complaint alleges that Respondent further violated the Statute by refusing to bargain with Chapter 66 over changes in shifts for bargaining unit employees and by eliminating night shifts, thereby implementing new tours of duty schedules, without providing Chapter 66 with an opportunity to negotiate to the extent required by law.

Respondent's Answer to the allegations of the amended complaint in Case No. DE-CA-90628 denies that the meetings it held with employees were held without affording Chapter 66 the opportunity to be represented. Respondent asserts that employees were solicited to participate in those meetings as volunteers pursuant to an agreement with Chapter 66. The answer also denies that Respondent dealt directly with the employees by instructing them to devise new seating arrangements. The answer admits that Respondent refused to bargain over changes in working conditions concerning changes in shifts and that it changed the working conditions of bargaining unit employees when it implemented new tours of duty schedules by eliminating night shifts for certain employees. It asserts that the parties' collective bargaining agreement covers the relevant changes and that Respondent neither deprived Chapter 66 of the opportunity to negotiate to the extent required by law nor bypassed Chapter 66 in violation of sections 7116(a)(1) and (5).

The complaint in Case No. DE-CA-90850 alleges that the Respondent violated the Statute by notifying Charging Party National Treasury Employees Union (NTEU) that it intended to change the primary night shift tour of duty for certain unit employees, by notifying the affected employees of the change, and by refusing NTEU's request to negotiate to the extent required by the law over the change. Respondent's answer in Case No. DE-CA-90850 admits all of the factual allegations of the complaint but denies that it committed the alleged unfair labor practice, asserting that the collective bargaining agreement covers the changes relevant to the case.

A hearing on the complaints was held in Overland Park, Kansas, on December 16 and 17, 1999. All parties waived closing oral arguments but filed post-hearing briefs.

Findings of Fact[1]

A. Status and Relationship of the Parties

Respondent is a component of the Department of the Treasury, Internal Revenue Service (IRS), an agency within the meaning of section 7103(a)(3) of the Statute. The Charging Parties are both labor organizations within the meaning of section 7103(a)(4). NTEU is the exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining with IRS. Chapter 66 is NTEU's agent for representing employees at Respondent. IRS and NTEU have an extensive bargaining history. Their current collective bargaining agreement, which the parties have entitled "NC V," became effective on July 1, 1998.

B. Relevant Contractual Provisions

Article 15 of NC V, following the pattern of the parties' previous national agreement, is entitled "Reassignments and Voluntary Relocations." While Article 15 of NC V contains some new or modified provisions, the following definitions in Section 1B were left unchanged:

> For the purpose of this article:
>
> 1. "Position" means a set of duties requiring the full or part-time employment of one (1) person, as described in the position description.
>
> 2. "Reassignment" means a permanent change in an employee's position or a permanent change in the Post-of-Duty (POD) to which the employee is assigned, without promotion or demotion.

Other provisions of Article 15 that the Respondent has cited as being relevant to these cases are:

> Section 1A, setting forth the purpose of Article 15--to "[establish] procedures for making certain changes

[1] With the exception of some of the details surrounding: (1) the alleged bypass of Chapter 66 when the Respondent held meetings with employees concerning seating arrangements, and (2) the bargaining history noted below, none of the facts are in dispute. For this purpose, I regard as not in dispute all evidence that was neither controverted by other evidence nor argued against in the briefs. For the reasons set forth later in this decision, I do not regard as material any disputed evidence concerning the bargaining history of Article 15 of NC V.

in employees' work assignments . . . .;"

Sections 1B.3, 4, and 5, defining "Commuting Area," "Satellite" office, and "Enter on Duty" date;

Section 2A, establishing procedures for reassignments within a POD;

Section 2B, establishing procedures for reassignments outside of a POD, but within the commuting area;

Section 2C, establishing procedures for reassignments outside the commuting area;

Section 4A, Reassignments-General Provisions "The parties jointly commit to work together in minimizing the adverse impact on employees involuntarily reassigned under this article. The parties further commit to fully exploring a variety of options which minimize adverse impact such as Flexiplace, Alternative Work Schedules, and Telecommuting."

C. Discontinuance of Night Shift in Notice Review Section

Respondent's Notice Review Section is located in its Review and Assistance Branch. The employees in the Notice Review Section perform sample reviews of taxpayer notices generated by Respondent to determine the accuracy of these notices. Prior to 1999, the Notice Review Section had maintained year-round day and night shifts. On February 12, 1999, Judith A. Maude, Chief, Review and Assistance Branch, notified Chapter 66 that the Notice and Review night shift would not operate during non-peak months. Ms. Maude met with Chapter 66 officials in late February 1999 to brief them on this change. In early March 1999 Ms. Maude met with the night shift employees to announce and explain the decision to maintain the shift only during peak season. The Notice Review night shift was discontinued at the end of the 1999 peak season on August 1. It was scheduled to resume in the next peak season, beginning in January 2000.

Following notification of the anticipated night shift change, Chapter 66 requested to "negotiate all legally negotiable matters, i.e., numbers, types, and grades of jobs associated with" the shift schedule modification (G.C. Exh. 10). Respondent took the position that the relevant change was covered by "Article 15, Section 2A of NC V," and that

there was no obligation to bargain over it (G.C. Exh. 11).[2] Thus no negotiations occurred.

D. Meetings with Employees Concerning Seating Arrangements

On May 10, 1999, Carla Smith, manager of the Notice Review day shift, and Debbie Henderson, manager of the permanent employees on the Notice Review night shift ("Unit II"), were assigned the responsibility of handling the seating arrangements when the Unit II employees joined the day shift. Smith and Henderson agreed to canvass the affected Notice Review employees for volunteers to work as a team to develop a seating plan and to present it to the managers for their consideration. NTEU was to be made aware of all meetings and invited to attend. The resulting plan was to be presented to the other employees, who, it was hoped, would be more amenable to the result than they would have been if the managers had devised the plan. (G.C. Exh. 20, Tr. 388.)[3]

Carla Smith testified that she informed Chapter 66 day shift steward Sandra Mondaine of the volunteer plan just before a "unit meeting" on May 12 (Tr. 364, 373). Mondaine was a subordinate steward to Nichelle (Niki) Smith, the assistant chief steward. Niki Smith was considered the "main" steward for a group of day shift employees including those in Notice Review (Tr. 182, 184, 365). Mondaine shared with Niki Smith the duty, as a steward, to attend unit meetings that Carla Smith conducted with her day shift employees (Tr. 365, 595). According to Carla Smith, Mondaine agreed that the volunteer plan sounded like a good idea (Tr. 364). According to Mondaine, they had no discussion. Rather, Carla Smith merely mentioned the idea during a meeting, and did not suggest any role for her as a union representative. (Tr. 595-97.)

Carla Smith telephoned Niki Smith, apparently around the same time, and told her about the need to come up with a seating arrangement in connection with the shift change. Niki Smith responded that "we" were not in favor of what management was doing. Carla Smith told her that they had to proceed and that they were going to use volunteers. Niki asked how they were going to select volunteers. Carla replied that they would go by "SED dates." Niki told her

[2] As set forth above, Section 2A applies to "reassignments within a POD."

[3] Henderson observed in an e-mail message to Smith that the shift change would be "a difficult transition for many of the permanent night employees" (G.C. Exh. 20).

that "we" were not in agreement with that, but then made her own suggestion as to whom to solicit first as volunteers. (Tr. 187-89.) Carla, who remembered fewer of the details of the conversation, came away nevertheless with the impression that Niki did not approve of the plan and wanted no part in it (Tr. 366, 380-81). Carla sent Niki a copy of a memorandum Carla sent to her employees on May 13 explaining the process and soliciting volunteers for the team (Tr. 366, G.C. Exh. 22).[4]

Night shift Manager Henderson had a conversation with Tom Comeau, then Chapter 66's Acting Chief Steward for the night shift, apparently during the same general period. Henderson informed Comeau of the volunteer plan. While Comeau did not seem happy about the shift change, Henderson believed that he "seemed okay with" the volunteer method "at first" (Tr. 389-90). Comeau testified that he did not agree that Henderson could arrange seating committee meetings and that he told her that only Chapter 66 officials Tim Allegri (Chapter President), De'Andre' Jones (Chief Steward), and Chris Cobb (Chief Negotiator) could bind Chapter 66 (Tr. 167-68). On May 13, Henderson sent Comeau a memorandum "to confirm the conversation that we had regarding the proposed plan for handling the change to seating arrangements . . ." Henderson detailed the plan and included the statement that "NTEU will be invited to attend all meetings." (G.C. Exh. 23.) Comeau discussed Henderson's memorandum with Allegri, who dictated a response which Comeau sent to Henderson and Carla Smith (G.C. Exh. 24):

> Re: Shift Change Negotiations for Notice Review Employees
>
> We understand that Notice Review management has started negotiations with NTEU representatives concerning the proposed shift change for night shift employees.
>
> Up to the time of this new development, the Service Center Director has not been receptive to these negotiations. We are pleased that the Agency has taken the initiative to begin the negotiation process.
>
> It is imperative that negotiations are completed prior to management making selections for any implementation teams that may be organized. I'm sure you don't need to be reminded that when such

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[4] It is not clear, however, whether Carla's telephone conversation with Niki occurred before or after she sent the memorandum.

> teams are developed, NTEU will be afforded the opportunity to select team members.
>
> Please direct all future communications to the Chapter office so that we may continue these negotiations expeditiously.
>
> Tom Comeau for Tim Allegri
> Chapter 66

On May 26, Respondent's Director, Barbara Olberding, responded to Comeau's memorandum, to which she attributed the date of May 13, and to another memorandum from Allegri on the subject of whether the announced shift changes were covered by Article 15 of NC V. With respect to the Comeau memorandum, Director Olberding wrote (G.C. Exh. 27):

> The memorandum from Mr. Comeau indicates that negotiations have begun on the shift change for Notice Review evening shift employees. This is not, in fact, the case. A meeting was held with NTEU to advise of management's intent to solicit participation from the Notice Review groups regarding the design of the seating arrangement. This identified group task is not a negotiation, but was intended as a courtesy to obtain employee input.

The initial solicitation by managers (Carla) Smith and Henderson did not produce any volunteers from the night shift. Henderson recirculated the solicitation memo and met with employees, recruiting participants, until, eventually, they assembled a team of volunteers and scheduled a series of three meetings between June 29 and July 1, 1999.

On June 21, Henderson sent a memorandum to Chapter 66 President Allegri, inviting NTEU to be present at each of the three scheduled meetings. The memorandum also stated that Niki Smith and Tom Comeau were the two stewards "originally involved with setting up the [volunteer] team [s]." (G.C. Exh. 28.) This memorandum came to Comeau's attention. He, apparently on the same day it was issued, called Henderson, disavowed his involvement, and asked her to remove his name. Henderson complied by sending a substituted memorandum mentioning only Niki Smith. There is no evidence that Niki Smith received a copy of these memoranda. However, Allegri asked Chief Steward Jones to inquire about her involvement. When contacted by Jones, Niki Smith told him that she had not participated in any type of negotiations regarding seating arrangements (Tr. 179). Allegri decided that he would not send any

representatives to the meetings of the volunteer teams selected by the managers (Tr. 160, 163).

After the three scheduled meetings, the volunteer teams were unable to reach a consensus on seating arrangements. The employees were instructed to reconvene on July 1. At this final meeting the team members agreed to disagree and to submit two different plans to management without recommending either. At some point, a meeting was held with other affected employees.[5] Although no consensus was reached, a majority of the employees appeared to favor one of the plans and, without a formal polling, management accepted that plan. (Tr. 206-14, 229, G.C. Exh. 39.)

E. Discontinuance of Night Shift in Data Conversion Branch

The Data Conversion Branch is located in Respondent's Processing Division. The employees in the Data Conversion Branch are responsible for transcribing, to the IRS computer data base, all the tax data submitted by taxpayers on their returns to the IRS computer data base. Prior to 1999, the Data Conversion Branch had maintained year-round day and night shifts. The tour of duty of some or all of the employees on the night shift was from Sunday through Thursday, the Sunday workday enabling them to earn premium pay. In 1999, Processing Division Chief Penny Slaughter decided to discontinue the non-peak season Data Conversion Branch night shift. In a memorandum dated April 12, 1999, Branch Chief Adalyn Holdshoe notified Chapter 66 of the planned change for the non-peak Data Conversion night shift.

Chapter 66 responded to this memorandum on April 19 with a request to "negotiate all legally negotiable matters, i.e., numbers, types and grades of jobs associated with" the elimination of the night shift, and for a briefing "[i]n order to draft proposals" (G.C. Exh. 16). Holdshoe met with and briefed Chapter 66 officials. However, the Respondent responded to the bargaining request by maintaining that "the language in Article 15, section 2 of NC V applies equally to both reassignments and realignments," and, on that basis, denying any further obligation to bargain (G.C. Exh. 21). The Data Conversion night shift was discontinued effective October 1, 1999, and scheduled for reinstatement during peak season.

F. Change of Night Shift in Code and Edit Section

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This may have been a meeting held on July 13 about which Carla Smith informed Chapter 66 by memorandum dated July 7 (G.C. Exh. 30).

The Code and Edit Section is located in the Document Perfection Branch of Respondent's Processing Division. The Code and Edit employees "edit" tax returns for further processing. This involves, among other things, contacting taxpayers whose returns are incomplete in some way, and obtaining the information necessary to "perfect" their returns. Prior to 1999, Code and Edit maintained a peak season night shift from Sunday through Thursday with core hours of 8:30 p.m. to 5:00 a.m. Apparently this shift employed only seasonal employees, who would be reemployed, if at all, at the next peak season beginning each January. In 1999, Processing Division Chief Slaughter decided that the core hours of the Code and Edit night shift would be changed to 6:00 p.m. to 2:30 a.m., Monday through Friday, beginning in the 2000 peak season. In July 8, 1999, Linda D. Potter, Chief of the Document Perfection Branch, notified Chapter 66 of this change. Chapter 66 requested to bargain over it. As it did with regard to the previous changes discussed above, Chapter 66 also requested a briefing. Chief Potter responded with a schedule for a briefing, but there is no record evidence of any response to the request to bargain. No bargaining occurred over this change.

G. Effect of the Changes on Conditions of Employment

The General Counsel presented voluminous testimony from a large number of employee witnesses as to the effect of the shift changes, in the sections and branches where they worked, on their working conditions and on their lives. These essentially uncontested effects included loss of income to some of the employees. Respondent has not contested its obligation to negotiate over these changes except for its assertion that it had fulfilled its obligation by virtue of negotiating Article 15 of NC V. The extent of that obligation, with respect to either the substance of the changes or their impact and implementation will be discussed later in this decision. Similarly, since analysis of the appropriate remedy depends in part on the extent of the bargaining obligation, further discussion of the effect of the changes will await resolution of the extent of the obligation.

Analysis and Conclusions

A. Framework for Analysis of "Covered By" Defense

Respondent concedes every element of the General Counsel's *prima facie* case with respect to the alleged refusals to negotiate over the shift changes. It asserts that its failure to afford the Union the opportunity to negotiate concerning these changes in conditions of

employment, and its bypassing of the Union in discussing some of these changes with employees, were permitted because the subject of these changes was "covered by" the parties' national collective bargaining agreement (NC V).

An unacceptable level of confusion has crept into the analysis to be used in determining whether an agency has established the so-called "covered by" defense. This, I believe, has resulted in unnecessary litigation and the unnecessary complication of necessary litigation. Being reminded again of Francis Bacon's dictum that truth emerges more readily from error than from confusion, I risk committing the former in the interest of helping to minimize the latter.

In *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993)(*SSA*), the Authority, in order to resolve a long-standing problem regarding parties' satisfaction of their statutory bargaining obligation, undertook to "establish a **definitive test**" (emphasis added) *Id.* at 1016, designed to provide the parties to a collective bargaining agreement, to the extent appropriate, "with stability and repose with respect to matters **reduced to writing in the agreement.**" (Emphasis added.) *Id.* at 1017, quoting *Department of the Navy, Marine Corps Logistics Base, Albany, Georgia*, 962 F.2d 48, 59 (D.C. Cir. 1992).

The test so established is set forth at considerable length in *SSA.* The Authority restated relevant parts of the test in *Navy Resale Activity, Naval Station, Charleston, South Carolina*, 49 FLRA 994, 1002 (1994)(*Navy Resale*). As that restatement appears to me to be faithful to the lengthier original, and as it became a link in the evolution of the test, I quote it here:

> In *SSA* we stated . . . that in determining whether an agreement provision covers a matter in dispute, we will initially examine whether the matter is expressly contained in the collective bargaining agreement. If the language of the agreement provision does not expressly encompass the subject matter of the proposals, we will next determine whether the subject matter is so commonly considered an aspect of the matter set forth in the agreement that the subject is "'inseparably bound up with and . . . plainly an aspect of . . . a subject expressly covered by the contract.'" 47 FLRA at 1018 (quoting *C & S Industries, Inc.*, 158 NLRB 454, 459 (1966)) (citation omitted). We stated that "[i]n this regard, we will determine

> whether the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the provision that the negotiations are presumed to have foreclosed further bargaining over the matter, regardless of whether it is expressly articulated in the provision." *Id.* If so, we will conclude that the subject matter is covered by the agreement provision. In making these determinations, we will, "where possible or pertinent, examine all record evidence." *Id.* at 1019 (citation omitted). **When it is difficult to determine whether the matter is plainly an aspect of a subject covered by the agreement, we give controlling weight to the parties' intent.** If we conclude that the subject matter was not one that should have been contemplated as within the intended scope of the provision, we will find that it is not covered by that provision, and there will be a continued obligation to bargain. (emphasis added.)

The Authority reiterated the test in *Department of Veterans Affairs Medical Center, Denver, Colorado*, 52 FLRA 16, 23 (1996)(*VAMC Denver*). This time it characterized the test as a "three prong approach." The "third prong" refers to that part of the test placed in bold type above:

> The Authority [in *SSA*] stated that the third prong applies in cases where it is difficult to determine whether the subject matter sought to be bargained is an aspect of matters already negotiated. In such cases, the Authority will give controlling weight to the parties' intent. *Id.; Navy Resale Activity, Naval Station, Charleston, South Carolina*, 49 FLRA 994, 1002 (1994).

So says the Authority in its 1996 *VAMC Denver* decision. Thus it was clear, up to that time, that what came to be called the third prong inquiry into the unwritten intent of the parties was to be used only in those cases where, to use the original *SSA* language, it is "difficult to determine whether the matter sought to be bargained is, in fact, an aspect of matters already negotiated." SSA, 47 FLRA at 1018. In such cases, "we will examine whether, based on the circumstances of the case, the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances." *Id.* at 1019.

However, in *Department of the Treasury, United States Customs Service, El Paso,*

Texas, 55 FLRA 43, 46 (1998) (*Customs Service*), the Authority, purporting to follow *VAMC Denver*, reframed what it had recently called the "third prong":

> If neither of [the first two] steps leads to the conclusion that further negotiations on the subject are foreclosed, the Authority proceeds to the third step of the analysis, which is to examine the parties' intent. *Navy Resale Activity, Naval Station, Charleston, South Carolina*, 49 FLRA 994, 1002 (1994).

This, in what I view as a serious mischaracterization of *VAMC Denver*, of *Navy Resale*, and of *SSA*, suggests that the Authority will proceed to the third step, or prong, of the test even when it is clear, after completing the analysis required by the first two steps, that the disputed subject matter is **not** an aspect of matters already negotiated.[6] I believe this dictum to be the source of much of the confusion currently surrounding the "covered by" doctrine and that it should be put to rest.[7]

It is possible, of course, that the Authority actually intended to modify the *SSA* test so as to permit one or more parties to a written agreement (other than by mutual consent) to show that they intended something different from what they say, either expressly or by implication, in their agreement. Such a doctrine sits uncomfortably with any principle of contract interpretation with which I am familiar. Moreover, the Authority must be presumed to be well aware of the response that courts, historically, have given to an agency's unexplained change of policy. Thus, I have great difficulty in presuming that the Authority made such a significant change without explaining its reasons or, at least, announcing that it was making a change.

I will, therefore, apply the test originally set forth in *SSA*, and restated in *Navy Resale* and *VAMC Denver* with respect to the appropriateness of making a "third prong" inquiry. In doing so I will adhere to the principle that, at least absent extraordinary circumstances, the mutual intentions of the parties to an unambiguous agreement are

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[6] The Authority reaffirmed this mischaracterization in *Social Security Administration, Region VII, Kansas City, Missouri*, 55 FLRA 536, 538 n.1 (1999).

[7] It is reversible error to defer to the Authority's characterization of its own previous decisions when such characterizations are inaccurate. *See Department of the Navy, Naval Weapons Station, Yorktown, Virginia*, 55 FLRA 1112, 1115, 1120 and n.10 (1999).

most accurately reflected in the agreement itself.[8] Thus, I will examine the relevant provisions in the parties' agreement to ascertain whether the matters at issue here are expressly contained in the agreement and, if not, whether they are so commonly considered as aspects of the matter set forth in the agreement that the subjects are inseparably bound up with and **plainly aspects of**, a subject expressly covered. Unless it is difficult to make such a determination without the aid of extrinsic evidence (of circumstances indicating whether "the parties reasonably should have contemplated that the agreement would foreclose further bargaining," *SSA*, 47 FLRA at 1019), the inquiry ends there.

By ending the inquiry at that point, as I do in this case, I may be doing a disservice to the parties who brought witnesses across the country to testify at the hearing about bargaining history and post-agreement events, and may cause further inconvenience and delay by increasing the possibility of a remand to resolve any differences in their testimony. I have proceeded differently in the past, opining that the inquiry should have ended at the second step but examining the bargaining history as a precautionary measure. *U.S. Customs Service, Customs Management Center, Miami, Florida*, Case No. AT-CA-80566, OALJ 99-25 (April 28, 1999), *pending before the Authority*. I believe now, however, that failing to use every legitimate means available to me to encourage a resolution of the troublesome broader issue is the greater disservice. Nor has there been any preliminary indication that this case represents one of those rare situations, if there be any, that warrant departing from the "definitive test" that, as I have found, continues to embody the controlling precedent.

B. Respondent Has Not Established that the Shift Changes Were "Covered By" Article 15

"Covered by" is an affirmative defense. The party raising it bears the burden of persuasion that it has been established. Here, Respondent contends that Article 15,

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[8] In *Social Security Administration*, 55 FLRA 374, 377 (1999), a decision issued after *Customs Service*, the Authority, reframing a statement (quoted above) from its landmark *SSA* decision, cited *SSA* for the proposition that "the Statute provides stability and repose to matters reduced to writing in a collective bargaining agreement. 47 FLRA at 1017." The Authority went on to state that "basic principles of contract interpretation presume that the parties understood the import of their agreement and that they had the intention which its terms manifest." *Id.* at 377.

Section 2A, of NC V covers the shift changes at issue and the related meetings with employees about seating arrangements.

Section 2A refers to "reassignments within a POD," and nothing more. Respondent is correct in looking to Section 2A insofar as the affected employees remained within their posts of duty. However, to determine what a "reassignment" means, we must look to Section 1B, which states unequivocally that its definition of certain terms control "[f]or the purpose of this article," that is, for the purpose of all of Article 15. Section 1B defines "reassignment" as "a permanent change in an employee's position or a permanent change in the [POD] to which the employee is assigned, without promotion or demotion."

The only term in this definition that might need further elucidation is "position." Section 1B answers this need by defining "position" as "a set of duties requiring the full or part-time employment of one (1) person, as described in the position description."

It is undisputed that the shift changes in dispute here resulted in no change in the positions or the POD's of the affected employees. It is also undisputed that neither Section 1B nor Section 2A expressly encompasses such shift changes. Can it, nevertheless, be said that shift changes of this kind are so commonly considered an aspect of reassignments, as defined by Section 1B, that they are inseparably bound up with and plainly an aspect of such reassignments? This part of the test, like the first part, is objective. That is, it asks whether negotiators in general, rather than the parties to the agreement in question, should be expected to consider one an essential aspect of the other. For example, would negotiators generally regard an agreement about permanent changes in positions or posts of duty to be incomplete if it did not also cover shift changes within a post of duty?

I can see no reason why negotiators would necessarily refrain from agreeing on procedures for reassignments, as defined in Sections 1B, in the absence of any agreement about shift changes. Such an agreement on reassignments might result because, for example, the negotiators on neither side raised the issue of shift changes, or because the issue was raised but could not be resolved. In the latter instance, the negotiators might simply agree to disagree, might defer the issue for future negotiations, or, disagreeing as to whether or to what extent the issue was negotiable, might use other means to resolve its negotiability. While there might be circumstances in which

negotiators would decide that an agreement on reassignments without an agreement on shift changes was worthless, meaningless, or otherwise contrary to their interests, I am not persuaded that such circumstances are so prevalent as to satisfy the *SSA-Navy Resale* "commonly considered" standard.

Nor does the Respondent offer anything to the contrary. Rather, its argument (although I have considered its auxiliary points) boils down to the following (Resp. Br. at 14):

> The parties' bargaining history clearly demonstrates that Article 15, Section 2A was intended to have a broader application than indicated in Section 1. Likewise, the IRS' objective of eliminating local negotiations in regard to reassignments/realignments was set forth throughout the negotiation process.

In other words, Respondent relies on bargaining history to show that, notwithstanding the statement in Section 1B that the definitions it contains apply "[f]or the purpose of this article," the parties, in effect, agreed orally to two things: first, that the Section 1B definition of "reassignment" does not apply to Section 2A; second, that the "reassignments within a POD" governed by Section 2A include shift changes that do not involve "a permanent change in an employee's position." This is precisely the kind of contention that the *SSA-Navy Resale* test precludes unless a claim that "the matter is plainly an aspect of a subject covered by the agreement," 49 FLRA at 1002, is sufficiently persuasive that it would be difficult to reject it without resorting to extrinsic evidence of the parties' intent.[9] Absent such a colorable claim in this case, I find that the bargaining history argument, although based on evidence admitted into the record without objection, is not properly to be considered on the merits of the "covered by" defense.

C. Respondent Unlawfully Bypassed Chapter 66

While Respondent's principal defense to the allegation that it violated the Statute by dealing directly with employees about seating arrangements is that the changes in question were among those covered by Article 15, it also contends that it satisfied any obligation it may have had by

[9] Such a contention could, of course, be accepted if all the interested parties acquiesced, presumably based on mutual agreement as to its accuracy. That is not the case here, nor would one expect the parties to be in litigation if it were.

inviting Chapter 66 to the employee meetings, which Chapter 66 chose to boycott. Although Respondent has not pressed its earlier contention that it held the employee meetings pursuant to an agreement with Chapter 66, I note here that the evidence does not support such a contention.[10]

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, and negotiate collective bargaining agreements covering, all employees in the unit." This is the nature of *collective* bargaining. The exclusive representative, then, not the employees themselves, must be afforded the opportunity to negotiate with management over all matters within the agency's statutory bargaining obligation. This opportunity is not afforded if the exclusive representative is merely invited to participate in meetings at which employees designated by management are also present, representing their own individual interests or those of their co-workers. Thus, the Authority has recognized that a union has the right to designate its own representatives and that an agency's interference with this right violates section 7116 (a)(1) of the Statute. *Bureau of Indian Affairs, Isleta Elementary School, Pueblo of Isleta, New Mexico*, 54 FLRA 1428, 1438 (1998). A union might agree to employees' participation in discussions concerning negotiable conditions of employment, but is not required to. *See Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 28 FLRA 409, 431 (1987) (*DHHS*).

Respondent here unilaterally selected a method for assembling a team of bargaining unit employees to discuss and to make proposals with respect to a condition of their employment. The seating arrangements were not only a condition of employment; they were an aspect of the impact and implementation of the discontinuation of the night shift. Respondent met with these employees and treated them as the representatives of that part of the bargaining unit that would be affected by the matter under discussion. It invited the agent of the exclusive representative to attend, but only as an additional participant in the exercise.

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[10] I have found it unnecessary to resolve the factual dispute regarding the conversation between Manager Carla Smith and Steward Sandra Mondaine about the prospective employee volunteer plan, as it is clear that Mondaine was not authorized to agree to such plan on behalf of either Chapter 66 or NTEU. Moreover, Carla Smith acknowledged that she did not know what authority Mondaine had (Tr. 369).

The agent, Chapter 66, declined to participate. However, in so doing it was merely asserting its right to designate the individuals who would negotiate for it as the employees' exclusive representative. It was, at the same time, resisting management's dictation of how one aspect of the impact and implementation of the merging of the shifts was to be resolved. Chapter 66 did not, by this declination, waive any of its bargaining rights.

Similarly, Respondent assembled employees, not limited to the original volunteer teams, to discuss and help decide between the competing plans submitted by the volunteer teams. While no formal polling of employees occurred, it was manifestly the sense of the meeting that the employees' response to the competing plans would receive considerable weight. Chapter 66, while it was invited to attend, was not given the opportunity to act as the employees' exclusive representative. Had it been, it might have taken a position that afforded either more weight, or less, to the opinions expressed at the meeting by the employees present, or might have argued against isolating the seating arrangements issue from all other issues arising from the shift change.

By, in effect, bypassing the exclusive representative when it dealt directly with employees about seating arrangements, Respondent violated sections 7116(a)(1) and (5) of the Statute, as alleged in paragraphs 18 and 20 of the amended complaint in Case No. DE-CA-90628. *DHHS,* 28 FLRA at 431*; Air Force Accounting and Finance Center, Lowry Air Force Base, Denver, Colorado*, 42 FLRA 1226, 1239, 1260 (1991). *See also Social Security Administration*, 55 FLRA 978, 982-83 (1999). The General Counsel does not press, and I do not find, that Respondent further violated the Statute by failing to afford Chapter 66 the opportunity to be represented at the employee meetings, as alleged in paragraph 19 of the amended complaint.

D. Bargaining Obligation to be Enforced

1. Overview and preliminary conclusions

Having rejected Respondent's defenses, I have concluded that it violated sections 7116(a)(1) and (5) by implementing shift changes in the Notice Review Section and the Data Conversion Branch, and by announcing a prospective change in the night shift in the Code and Edit Section, without giving Chapter 66 or NTEU an opportunity to bargain about any aspect of those changes. Since the exclusive representative was given no opportunity to bargain, it was not necessary to decide, up to now, whether the bargaining obligation

included the obligation to bargain over the decision to make those changes or was limited to bargaining over their impact and implementation (I&I). However, I must now address this issue in order to fashion an appropriate bargaining order. *See U.S. Department of Justice, Immigration and Naturalization Service*, 55 FLRA 892, 894, 916 (1999)(*INS*).

The General Counsel contends that Respondent was obligated to bargain at least as to the I&I of the changes at issue. While placing principal emphasis on the I&I obligation, the General Counsel also argues that the elimination of the existing negotiated tour of duty in the Code and Edit Section was "fully negotiable" because it affected alternate work schedules (AWS)[11]. The General Counsel notes but takes no position on the contention by Chapter 66 and NTEU, discussed below, that a provision in a partnership agreement between IRS and NTEU constitutes an election by IRS, under section 7106(b)(1) of the Statute, to negotiate over the decision to make the changes it made here. I do not have the benefit of the Respondent's position with respect to the extent of the bargaining obligation, except for its denial that there is any.

A change in the shifts employees are required to work constitutes an exercise of section 7106(b)(1) of the Statute, *American Federation of Government Employees, Local 2145 and U.S. Department of Veterans Affairs, Hunter Holmes McQuire Medical Center, Richmond, Virginia*, 48 FLRA 53, 59 (1993), which encompasses the management right to determine the number of employees management considers necessary to have on duty. *Id.* Although the Authority will examine the facts and circumstances of each case, changes in employees' tours of duty, with respect either to the hours of the day or the days of the week are typically considered to be more than *de minimis* and to give rise to an obligation to bargain over their I&I. *See Veterans Administration Medical Center, Phoenix, Arizona*, 47 FLRA 419, 422-24 (1993).

In the instant case, in the absence of anything to the contrary from Respondent, and especially in light of Manager Henderson's acknowledgment that the shift change in Notice Review would be "a difficult transition for many of the permanent night employees" (G.C. Exh. 20), suffice it to say that the record more than adequately establishes that the actual and reasonably foreseeable effects of each of the shift changes was more than *de minimis* and that they required I&I bargaining. Starting here as a base point, I consider first the General Counsel's contention that the

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[11] I will use "AWS" as the abbreviated form of both "alternate work schedule" and "alternate work schedules."

fact that the shift change in Code and Edit eliminated a negotiated AWS made it "fully negotiable."

2. Respondent's AWS bargaining obligation does not result in a duty to bargain over the decision to change tours of duty

The General Counsel appears to rely on the existence of a local Alternate and Compressed Work Schedule Agreement to which the new Code and Edit tour of duty purportedly does not conform, and cites cases holding that AWS are fully negotiable. The argument is not persuasive.

Respondent did not change a negotiated AWS. It changed some employees' tours of duty. The decision to make such a change is something about which an agency may, generally, decline to bargain. *U.S. Department of the Air Force, 416 CSG, Griffis Air Force Base, Rome, New York*, 38 FLRA 1136, 1147 (1990)(*Griffis*). On the other hand, matters which pertain to the institution, implementation, administration, and termination of AWS are negotiable, and, within the limits set by the Federal Employees Flexible and Compressed Work Schedule Act, "fully negotiable." *Id.* at 1147-48.

I do not read this to mean that any change in tours of duty that affects an employee's opportunity to make use of a currently available AWS requires bargaining over the decision to make that change. The *Griffis* line of cases appears, rather, to refer to changes made in the AWS itself. Even allowing that the "implementation" and "administration" of the schedules are considered to be "fully negotiable," this adds nothing to the agency's obligation to negotiate over the I&I of the change in a tour of duty. Thus, a union's right to negotiate over changes in the available AWS to accommodate employees whose opportunity to use the AWS has been affected by a new tour of duty is not necessarily accompanied by a right to negotiate about the underlying decision to change the tour of duty.

3. There was no "election" to negotiate section 7106(b)(1) subjects

In 1994, IRS and NTEU entered into a "Second Edition" of a "Total Quality Partnership" agreement. Many aspects of the partnership-like arrangements contemplated by the agreement were placed under the leadership of a National Partnership Council (NPC) comprised of IRS executives and NTEU representatives. The agreement assigns to the NPC the responsibility to "[c]reate and implement policies which" are aimed at certain objectives. Among these objectives are to "[e]ncourage a labor management relationship which . . .

holds the organization at all levels responsible for negotiating over the subjects set forth in [section 7106(b)(1) of the Statute]." (G.C. Exh. 7, Section I.C.)

A dispute, resulting in an NTEU grievance, arose as to whether this agreement constituted an election by IRS to negotiate permissive subjects of bargaining under section 7106(b)(1) and thus obligated it to proceed to impasse procedures involving stalemated negotiations over section 7106(b)(1) subjects. The parties submitted the grievance to an arbitrator on this issue. The arbitrator issued an award on March 22, 1999, sustaining the grievance and holding that IRS had elected to negotiate section 7106(b)(1) subjects. IRS filed exceptions to the award, and, on May 10, 2000, the Authority issued its decision denying those exceptions. *U.S. Department of the Treasury, Internal Revenue Service, Washington, D.C. and National Treasury Employees Union*, 56 FLRA No. 54 (2000). The Authority rejected the contentions that the award failed to draw its essence from the parties' agreement, that it is contrary to law, and that it is contrary to certain OPM guidance on which the arbitrator relied. It was not within the Authority's scope of review, however, to decide whether in its view the arbitrator's interpretation of the agreement was correct.

Article 43 of NC V deals with the arbitration of grievances arising under the contract. Section 4A.8 of Article 43 provides that the arbitrator's decision "shall be final, binding and, except for expedited awards, precedential . . . ." Chapter 66 and NTEU takes the following position concerning the weight to be accorded here to the March 22, 1999, arbitration award:

> Once it becomes final and binding, Arbitrator Kaplan's decision will be precedential for the parties. Since the arbitrator's decision is not directly under review in the instant case, the deferential standard applied by the Authority in cases involving appeals of arbitral decisions does not apply. Nonetheless, Arbitrator Kaplan's well-reasoned analysis and findings, which are based on testimony and documentary evidence as well as application of standard principles of contract construction, should be instructive in determining the parties' meaning.

Thus, although IRS and NTEU have taken the unusual step of providing that arbitrators' decisions are precedential, it is not claimed here that this award is entitled to any greater weight than its power to persuade. Nevertheless, since the Authority has upheld the award and thus rendered

it precedential, the parties may be left in an odd posture if the same provisions of the partnership agreement were to receive a different construction in this proceeding. Thus, IRS presumably will be required to bargain about the substance of all section 7106(b)(1) subjects except for these shift changes. Notwithstanding that, however, I take the Charging Parties at their word and take a fresh look at the issue of contract interpretation presented to the arbitrator. Having done that, I respectfully disagree with the arbitrator's analysis and conclusion.

The Authority has typically equated an "election" to negotiate section 7106(b)(1) subjects with the very act of negotiating over such matters. *See, for example, National Treasury Employees Union, Chapter 97 and U.S. Department of the Treasury, Internal Revenue Service, Fresno Service Center,* 45 FLRA 1242, 1250, 1254 (1992); *Department of Transportation, Federal Aviation Administration, Los Angeles, California*, 15 FLRA 100, 102 (1984). Moreover, even the act of negotiating over such matters is not considered an irrevocable election, as "it is well established that an agency may withdraw from bargaining on a matter within the coverage of section 7106(b)(1) of the Statute at any time prior to reaching final agreement on such matter." *American Federation of Government Employees, Local 644 and U.S. Department of Labor, Mine Safety and Health Administration*, 21 FLRA 1046, 1047 (1986). *See also American Federation of Government Employees, Local 644 and U.S. Department of Labor, Occupational Safety and Health Administration, Norfolk, Virginia*, 40 FLRA 831, 833, 836 (1991)(Neither the agency's offer of counterproposals to union proposals relating to a policy mandating the use of beepers nor its negotiations as to other proposals concerning the use of beepers warrants a finding that the agency elected to bargain over the particular matters in dispute).

Moving to a situation where the "election" is based not on conduct, but on what is contended to be an agreement or commitment to negotiate in the future about certain subjects, one enters a murky area. Preliminarily, the Authority does not consider all agreements addressing 7106 (b)(1) matters to have the same legally binding effect as a collective bargaining agreement. *American Federation of Government Employees, Local 3529 and U.S. Department of Defense, Defense Contract Audit Agency, Central Region, Dallas Texas*, 52 FLRA 1313, 1317 (1997). Rather, it will examine the circumstances of each case to determine whether an issue resolved in the context of partnership discussions was the result of "collective bargaining" within the meaning of section 7103(a)(12) of the Statute. *U.S. Department of*

Transportation, Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky, 53 FLRA 312, 318-20 (1997). I do not believe the record in this case is adequate to provide the basis for such a determination. Nor is it clear to me whether or not an agreement must have the same legally binding effect as a collective bargaining agreement in order to constitute an "election" pursuant to section 7106(b)(1). Nevertheless, the "election" issue may be resolved on other grounds.

Contrary to the arbitrator, I find nothing in section I.C. of the 1994 partnership agreement that evidences an actual election. To the extent that the agreement commits the NPC (not the IRS) to see that "the organization at all levels" is held "responsible for negotiating over" section 7106(b)(1) subjects, this commitment is introduced by language much more suggestive of an exhortation than of a firm requirement. Thus, the NPC's responsibilities are limited to "[c]reat[ing] and implement[ing] policies which" promote certain listed objectives. One of these objectives is to "[e]ncourage a labor management relationship which," among other things, holds the organization at all levels responsible to engage in such negotiating.

There are, then, at least two steps that must precede holding "the organization at all levels" responsible to negotiate on section 7106(b)(1) subjects. First, the NPC must create and implement policies which "[e]ncourage" a certain kind of labor management relationship. Second that relationship, once created, must be implemented toward certain ends. For example, the labor management relationship that NPC is charged to encourage "assures an environment throughout the organization which supports empowerment, innovation, pride in work products, mutual trust, and the achievement of full potential." The relationship also "identifies and addresses quality of worklife issues[.]"

These and other desired effects of the NPC-encouraged labor management relationship cannot be deemed to have been accomplished upon the signing of the agreement. They represent the culmination of the continuing work of the NPC, and those with whom it interacts, toward these accomplishments. It seems more reasonable than not to regard the desired effect in question here, holding the organization responsible to negotiate 7106(b)(1) subjects, in this light, rather than as an action that the NPC implemented immediately and automatically upon adoption of the 1994 partnership agreement.

The partnership agreement provisions under examination here may profitably be compared with another provision with which the Authority has dealt recently, albeit inconclusively. This provision, also in a partnership agreement, but one that was undisputedly within the parties' national collective bargaining agreement, provided, in pertinent part, that:

> Administration and Union representatives will bargain in good faith, including bargaining on issues which may fall under 7106(b)(1), using interest-based bargaining (IBB) with the objective of reaching agreement.

An arbitrator directed the agency to bargain over section 7106(b)(1) matters, concluding that it had "elected" to do so. *Social Security Administration, Baltimore, Maryland and American Federation of Government Employees*, 55 FLRA 1063, 1065 (1999)(*SSA-AFGE)*.[12] The Authority, dismissing the agency's exception to the arbitrator's "election" finding, determined that "[t]he Agency fails to demonstrate that such an interpretation of the parties' agreement disregards the agreement or is implausible, irrational, or unfounded." *Id.* at 1069. The same provision was before the Authority in a different posture, this time in connection with an unfair labor practice allegation that the agency had repudiated it, in *Social Security Administration, Baltimore, Maryland*, 55 FLRA 1122 (1999). The agency had interpreted the provision as expressing only a commitment to good faith bargaining once an election has been made. The Authority (Member, now Chairman, Wasserman dissenting) adopted the judge's conclusion that the agency's interpretation was reasonable and, therefore, that its actions in accordance with its interpretation did not constitute a clear and patent breach, and thus was not a repudiation of the agreement. *Id.* at 1126.

If that provision was not an unequivocal election to negotiate over section 7106(b)(1) subjects, how much less so is section I.C. of the IRS-NTEU 1994 partnership agreement.[13] First, the commitment it contains is by the NPC and not, at least not directly, by IRS. Second, a commitment to encourage a labor management relationship that encompasses certain elements is less than a binding agreement, on behalf of those who are to be encouraged to

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[12] The partnership agreement language quoted above is found in *SSA-AFGE*, 55 FLRA at 1068.

[13] As noted above, this provision may or may not have resulted from "collective bargaining," which may or may not matter.

enter into such a relationship, that each of those elements will be fully implemented.

Although the partnership agreement implies that certain things should be done (for example, that a labor relations relationship under which the organization will be held responsible for negotiating over section 7106(b)(1) subjects be created and implemented), agreeing that such a relationship should be created and implemented is not the same as creating and implementing it. Such equivalence between what is expected to be done and what has been done exists, as I previously had occasion to observe, only in the topsy-turvy world of Gilbert and Sullivan. *See INS*, 55 FLRA at 916-17. Moreover, even directing another to undertake an act is not necessarily the same as undertaking the act oneself. *U.S. Department of Commerce, Patent and Trademark Office*, 54 FLRA 360, 378 (1998)(Member, now Chairman, Wasserman concurring in part and dissenting in part)(*PTO*), *petition for review denied, National Association of Government Employees, Inc. v. FLRA*, 179 F.3d 946 (D.C. Cir. 1999)(*NAGE*). Nor, as the court noted in *NAGE*, at 950, is this distinction merely an "immaterial semantic" one.

In *PTO*, the Authority cast some doubt on whether even an unequivocal agreement to negotiate section 7106(b)(1) subjects would qualify as an "election." Thus, responding to a suggestion by Member Wasserman, in dissent, that Executive Order 12871 encompassed a quid pro quo that showed the existence of a contract or quasi-contract with Federal employee unions, the majority stated that "even if our dissenting colleague's view of what transpired were correct, it would not provide any basis for construing the President's clear direction to agency heads to bargain over section (b)(1) subjects as an enforceable election under the Statute." *PTO*, 54 FLRA at 383 n.23. In a later footnote, the majority stated that its decision that Section 2(d) of the Executive Order does not constitute an election under the Statute "does not address, and should not be read to call into question the enforceability of, agreements to bargain over section 7106(b)(1) subjects." *Id.* at 387 n.27. The last statement, in its context, suggests that such agreements may be enforceable as contracts but not necessarily as statutory "elections." Such a contract enforcement occurred, for example, in *SSA-NAGE. See SSA-AFGE,* 55 FLRA at 1069. Thus, a breach of such an agreement would not necessarily constitute an unfair labor practice unless it were alleged and proved to constitute a repudiation of the agreement.

The Appropriate Remedies

The main remedial issue presented here is whether the bargaining order traditionally provided in refusal to bargain cases should include a *status quo ante* provision, and if so, how such a provision should be formulated. The General Counsel and the Charging Parties contend that, assuming that only I&I bargaining is required, a *status quo ante* bargaining order should be imposed pursuant to the criteria set forth in *Federal Correctional Institution*, 8 FLRA 604, 606 (1982) (*FCI*). Those criteria, as restated and reaffirmed recently in *U.S. Department of Energy, Western Area Power Administration, Golden, Colorado*, 56 FLRA 9, 13 (2000)(*WAPA*), are, among other things[14]:

> (1) whether, and when, an agency notified the union concerning the change; (2) whether, and when, the union requested bargaining over procedures for implementing the change and/or appropriate arrangements for employees adversely affected by the change; (3) the willfulness of the respondent's conduct in failing to bargain; (4) the nature and extent of the impact upon adversely affected employees; and (5) whether, and to what extent, a *status quo ante* remedy would disrupt the respondent's operations.

Here, Respondent notified the union concerning the change but did not provide it with the opportunity to negotiate. The Authority has interpreted such a finding as having the effect of a finding that the first *FCI* factor "favors" the granting of a *status quo ante* bargaining order. *See INS,* 55 FLRA at 906, 917. With respect to the second factor, Chapter 66 promptly and repeatedly requested bargaining over "all legally negotiable matters" in connection with the proposed changes. The third factor also supports the *status quo ante* remedy in that Respondent's intentional refusal to bargain must be considered "willful" notwithstanding that it was based on the erroneous belief that the subject matter was "covered by" the parties' agreement. *WAPA*, 56 FLRA at 13.

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[14] Although the Authority, in *WAPA*, omitted the phrase, "among other things," in listing the *FCI* criteria, the phrase is part of the original *FCI* formulation and I have no reason to believe that the Authority intended to preclude the consideration of other factors shown in a particular case to be relevant. *See Federal Deposit Insurance Corporation, Washington, DC*, 48 FLRA 313, 329 (1993), *petition for review denied on other grounds sub. nom. FDIC v. FLRA*, No. 93-1694 (D.C. Cir. Dec. 12, 1994)(unpublished opinion). However, no such showing has been made here.

The impact on employees of all of the shift changes was not fully measurable at the time of the hearing. However, the impact was, even prospectively, substantial, as acknowledged by Notice Review Manager Henderson in commenting to Carla Smith that it would be "a difficult transition for many of the permanent night employees." Further, the impact has been or predictably will be even more severe for at least some of the affected employees. Thus, beyond the fact that a number of the employees suffered direct pecuniary loss, the night shifts that were eliminated appear to have had in their ranks more than a scattering of employees who had selected night shifts because of special needs involving individual and family health, transportation, or other problems. The changes in the regular hours of work, and the resulting changes in the hours for which AWS were available, have created actual difficulties for many Notice Review and Data Conversion night shift employees. Similarly, potential difficulties for the Code and Edit employees whose night shifts were scheduled to be changed in January 2000 were presented at the hearing by employees whose special needs made their preexisting shifts relatively accommodating.

Affected employees were eligible to apply for "hardship" transfers to positions in which their work schedules would be more suitable than those imposed by the shift changes, and some employees availed themselves of this opportunity. However, not all of the employees were in a position to make such transfers, and even those who did were not necessarily placed in situations that were comparable in all significant respects to what they had reasonably come to expect in their former positions.

Although Respondent did not present any evidence addressing specifically the potential of a *status quo ante* remedy for disrupting its operations, there was some testimony about the reasons for making the shift changes and the efficiencies to be gained by doing so. Some of the anticipated improvements were disputed by employee witnesses. More important, the night shifts in Notice Review and Data Conversion were not eliminated permanently but were to resume every peak season, which lasts for substantial parts of the year in each of the affected sections. This makes it difficult to infer that an additional temporary resumption of these shifts pending the parties' I&I negotiations (which might even occur during a peak season) would be unusually disruptive.

FCI appears to recognize that restoration of the *status quo ante* will often have some disruptive effect. Thus it places in the balance the degree of disruption, not merely

whether there will be any. Moreover, in balancing such adverse effects against the competing factors, the Authority looks for specific evidence in the record concerning how, and to what degree, such disruption would occur. *Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas*, 55 FLRA 848, 856 (1999)(*Bastrop*).

The Authority has articulated two distinct purposes for a *status quo ante* remedy. One is to place parties, including employees, in the positions they would have been in had there been no unlawful conduct. The other purpose, applicable in part (perhaps) only to cases where the violation is a unilateral change, is "to deter the Respondent and future parties from failing to satisfy their duty to bargain and reduce any incentive that may exist to unilaterally implement changes in conditions of employment and then refuse to negotiate over all pertinent aspects of the impact and implementation of the changes." *Id.* at 855, 857.

Applying the *FCI* factors in light of these purposes, the Authority requires, in order to find that this remedy is not appropriate, a substantial showing that disruption would occur. It has cited with apparent approval the position of the Court of Appeals for the District of Columbia Circuit, in *National Treasury Employees Union v. FLRA*, 910 F.2d 964, 969 (D.C. Cir. 1990), that in cases where "an agency has taken unilateral action that disturbs the *status quo* and has illegally refused to give a union an opportunity to bargain . . .," the Authority "bear[s] the burden" of explaining why it did not make employees whole. *INS*, 55 FLRA at 906. Further, citing its own earlier decisions, the Authority noted in *Bastrop* that a *status quo ante* remedy can be appropriate notwithstanding that the unilateral change may have improved the quality or efficiency of the agency's operation, and, further, that the remedy was warranted where the agency had not "established a sufficient degree of disruption to its operations to outweigh the benefits of a *status quo ante* remedy," *Id.* at 856. All of the above carries the strong suggestion that, in the Authority's view, the agency "bears the burden" of showing that the remedy is inappropriate.

Regardless of where the burden lies, the factors working in favor of a *status quo ante* bargaining order here far outweigh, in my view, any that would render it inappropriate. Moreover, since, as noted above, one of the purposes of the Authority's remedies is to restore the positions in which the parties would have been in the absence of the unfair labor practices, it is appropriate that the *status quo ante* remedy here be accompanied by a

make-whole remedy for the employees who, in various ways, have been affected adversely by the changes that were imposed unilaterally. *See WAPA*, 56 FLRA at 14, 30; *Department of Defense Dependents Schools*, 54 FLRA 259, 269-70 (1998). In this case, it is appropriate that such relief include an offer to reinstate employees who resigned or otherwise chose to cease employment in the organizational components in which their shifts had been changed, and to compensate them for any compensable losses due to those choices.

The General Counsel also requests that the traditional notice to be posted be signed by the Commissioner of Internal Revenue and be posted nationwide. There are plausible arguments to be made for such a posting, based on the Respondent's acting pursuant to advice from the IRS national office that the subject matter was covered by Article 15 of NC V. However, there was neither an allegation nor evidence that the national office at the agency level instructed its "activity," Respondent, to refuse to bargain. Moreover, unlike the situation in *U.S. Department of Treasury, Internal Revenue Service*, Case No. CH-CA-80709, OALJ 00-01 (Oct. 8, 1999), where, in a case involving a comparable "covered by" issue, Judge Devaney recommended such a posting and signature, the Respondent "activity" is the sole Respondent here and the agency is not a party.[15] In these circumstances I harbor a serious doubt that the Authority can order the agency, or its Commissioner, to do anything, unless, in a separate proceeding, the agency were found to have obstructed compliance with the order directed at Respondent.

As for the nationwide posting, I have the impression that employees would find it strange, or even confusing, to see a notice signed by an official of the Respondent, referring to an order directed only at the local "activity," posted at locations manifestly outside his or her jurisdiction. Although it nevertheless might be considered to have some desirable effect, such effect would be superfluous if the notice already recommended by Judge Devaney is adopted and enforced. Given the unlikelihood that the order in these cases would be adopted and the Devaney order not, I see little purpose in stretching to innovate for this uncertain objective.

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I have never been persuaded that such distinctions between different levels of the same agency make any sense. However, they are too well established to argue with any further.

The General Counsel has also inserted in a proposed recommended order a provision that the places at which the notices are to be posted specifically include the IRS electronic mail system. While such a provision might or might not be considered an additional element of "relief sought," as that term is used in section 2423.23 of the Authority's regulations, governing prehearing disclosure, consideration must be given to the fact that the General Counsel did not mention it in the prehearing disclosure statement exchanged with Respondent pursuant to that section. This deprived Respondent of the opportunity to oppose such a provision. Further, whatever the merits of this novel addition to the Authority's standard posting language, it represents a change that, if appropriate, would probably be applicable to many agencies. The addition, therefore, should be based on a general policy discussion that is most properly addressed to the Authority in the first instance. *Cf. United States Department of Justice, Immigration and Naturalization Service*, 51 FLRA 914, 916, 931 (1996) (issue of whether Notice should include language stating that the Authority has found that the respondent violated Statute is referred to the Authority).16

I recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Department of the Treasury, Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri, shall:

· Cease and desist from:

(a) Changing tours of duty (TODs) and shifts of unit employees in the Notice Review, Data Conversion, and Code & Edit sections, without first bargaining with the National Treasury Employees Union, Chapter 66, concerning the impact and implementation of those changes.

(b) Bypassing the National Treasury Employees Union, Chapter 66, and dealing directly with bargaining unit employees concerning their conditions of employment.

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I find another innovative suggestion by the General Counsel, that the posted copies of the Notice shall be on forms "reproduced from those furnished by the Denver Regional Director . . .," to be nonsubstantive and acceptable.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

· Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Rescind the changes in TODs and shifts in the Notice Review, Data Conversion, and Code & Edit sections, effected on August 1, 1999, October 1, 1999, and January 1, 2000, respectively.

(b) Offer to reinstate employees who resigned, retired, or were reassigned from the Notice Review, Data Conversion, or Code & Edit sections rather than continue employment in the changed TODs and shifts in those units.

(c) Make all employees whole to the extent they have suffered any reduction of pay and/or benefits as a result of the implementation of changes in TODs and shifts.

(d) Notify the National Treasury Employees Union, Chapter 66 of any intent to change the TODs and shifts of affected employees in the Notice Review, Data Conversion, and Code & Edit sections, and, upon request, negotiate to the extent required by law over those changes.

(e) Post at its facilities where bargaining unit employees represented by the National Treasury Employees Union and Chapter 66 are located, copies of the attached Notice on forms reproduced from those furnished by the Denver Regional Director of the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Kansas City Service Center, and they shall be posted and maintained for 60 consecutive days thereafter, in conspicuous place, including all bulletin boards and other places where notices to employees are customarily placed. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(f) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, within 30 days from the date of this Order, notify the Regional Director, Denver Regional Office, Federal Labor Relations Authority, in writing, as to what steps have been taken to comply.

Issued, Washington, DC, May 16, 2000.

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JESSE ETELSON
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 Department of the Treasury, Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri, 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 implement changes in tours of duty (TODs) or shifts of bargaining unit employees in our Notice Review, Data Conversion, and Code & Edit sections without first bargaining with the National Treasury Employees Union, Chapter 66, concerning the impact and implementation of those changes.

WE WILL NOT bypass the National Treasury Employees Union, Chapter 66 by dealing directly with bargaining unit employees in the Notice Review Section regarding solicitation of volunteers to devise seating arrangements.

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 rescind the changes in the TODs and shifts of employees in the Notice Review, Data Conversion, and Code & Edit sections, effected on August 1, 1999, October 1, 1999, and January 1, 2000, respectively.

WE WILL offer to reinstate employees who resigned, retired, or were reassigned from the Notice Review, Data Conversion, and Code & Edit sections because of the changes implemented in their TODs and shifts.

WE WILL make all employees whole to the extent they have suffered any reduction of pay and/or benefits as a result of the implementation of the changes in TODs and shifts in the Notice Review, Data Conversion, and Code & Edit sections.

WE WILL notify the National Treasury Employees Union, Chapter 66 of any intent to change the TODs and shifts of affected employees in the Notice Review, Data Conversion, and Code & Edit sections, and, upon request, negotiate to the extent required by law over those changes.

_____
(Respondent/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 its provisions, they may communicate directly with the Regional Director, Denver Regional Office, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204, and whose telephone number is: (303)844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by JESSE ETELSON, Administrative Law Judge, in Case Nos. DE-CA-90628 & 90850, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT	**CERTIFIED NOS:**
Hazel Hanley, Esquire	P168-060-186

Federal Labor Relations Authority
1244 Speer Blvd, Suite 100
Denver, CO 80204

Aimee Batson, Steward P168-060-187
NTEU, Chapter 66
P.O. Box 920220
Kansas City, MO 64192

William Lehman, Esquire P168-060-188
IRS, Suite 2400
200 W. Adams Street
Chicago, Il 60606

Jean Fisher, Nat'l Field Representative P168-060-189
National Treasury Employee Union
475 17th Street, Suite 500
Denver, CO 80202

REGULAR:

James Bailey, National Counsel
National Treasury Employee Union
475 17th Street, Suite 500
Denver, CO 80202

_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: MAY 16, 2000
WASHINGTON, DC